

DRAFT

FOR DISCUSSION ONLY

**PROPOSED REVISIONS OF
UNIFORM SECURITIES ACTS**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

JANUARY, 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 several different versions of the 1956 Act adopted by the states and the Drafting Committee's determination to seek adoption of the new Uniform Securities Act in all state jurisdictions.

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

TABLE OF CONTENTS

Page(s)

[PART A: DEFINITIONS]

SECTION 101 Definitions	1
(a) Administrator	1
(b) Agent	1
(c) Broker-Dealer	2
(d) Depository Institution	3
(e) Federal Covered Investment Adviser	4
(f) Federal Covered Security	5
(g) File, Filed, or Filing	6
(h) Fraud	7
(i) Guaranteed	7
(j) Institutional Investor	7
(k) Insurance Company	9
(l) Insured	9
(m) International Bank	9
(n) Investment Adviser	10
(o) Investment Adviser Representative	12
(p) Issuer	14
(q) Nonissuer Transaction	15
(r) Person	15
(s) Price Amendment	15

(t) Promoter	16
(u) Sale or Sell	16
(v) Securities Act of 1933, etc.	18
(w) Security	19
(x) Self-Regulatory Organization	20
(y) State	21
(z) Underwriter	21

[PART B: EXEMPTIONS]

SECTION 201 Exempt Securities	22
(a) United States Governments and Municipals	22
(b) Foreign Governments	22
(c) Depository Institutions and International Banks	23
(d) Insurance Companies	24
(e) Public Utilities	24
(f) Regulated Securities Markets	25
(g) Not-for-Profit Institutions	26
(h) Employee Benefit Plans	28
(i) Equipment Trust Certificates	29
SECTION 202 Exempt Transactions	29
(a) De Minimis Transactions	30
(b) Manual Exemption	30

(c) Nonissuer Transactions in Securities Subject to Securities Exchange Act Reporting	33
(d) Specified Fixed Maturity, Interest or Dividend	33
(e) Unsolicited Brokerage Transactions	34
(f) Underwriter Transactions	34
(g) Unit Real Estate Transactions	35
(h) Bankruptcy and Insolvency Transactions	35
(i) Pledges	36
(j) Institutional Investors	36
(k) Limited Offering Transactions	37
(l) Transactions with Existing Security Holders	38
(m) Offerings When Registered Under this Act and the Securities Act of 1933	39
(n) Offerings When Registered Under this Act and Exempt from the Securities Act of 1933	40
(o) Control Transactions	41
SECTION 203 Additional Exemptions	42
SECTION 204 Denial, Condition, Limitation or Revocation of Exemptions	42
 [PART C: REGISTRATION OF SECURITIES] 	
SECTION 301 Securities Registration Requirement	44
SECTION 302 Notice Filings and Fees Applicable to Federal Covered Securities	44

SECTION 303 Securities Registration by Coordination	46
SECTION 304 Securities Registration by Qualification	48
SECTION 305 General Securities Registration Provisions	54
SECTION 306 Denial, Suspension, and Revocation of Securities Registration	57

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

SECTION 401 Registration Requirements for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives	62
SECTION 402 Exempt Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives	65
SECTION 403 Registration Procedure for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives	67
SECTION 404 Postregistration Procedures	72
SECTION 405 Denial, Revocation, Suspension, Cancellation, and Withdrawal of Registration	74

[PART E: FRAUD AND LIABILITIES]

SECTION 501 General Fraud Provision	81
SECTION 502 Fraud by Investment Advisers	81
SECTION 503 Burden of Proof	82

SECTION 504 Filing of Sales and Advertising Literature	83
SECTION 505 Misleading Filings	83
SECTION 506 Misrepresentations Concerning Registration or Exemption	83
SECTION 507 Qualified Immunity	84
SECTION 508 Criminal Penalties	85
SECTION 509 Civil Liabilities	86
SECTION 510 Jurisdiction and Service of Process	89
[PART F: ADMINISTRATION AND JUDICIAL REVIEW]	
SECTION 601 Administration of Act	94
SECTION 602 Investigations and Subpoenas	94
SECTION 603 Administrative Enforcement	96
SECTION 604 Rules, Forms, Orders, and Hearings	99
SECTION 605 Administrative Files and Opinions	101
SECTION 606 Public Information; Confidentiality	102
SECTION 607 Cooperation With Other Agencies	103

SECTION 608 Judicial Review of Orders	105
---	-----

SECTION 609 Uniformity of Application and Construction	105
--	-----

[PART G: MISCELLANEOUS]

SECTION 701 Short Title	107
-------------------------------	-----

SECTION 702 Severability	107
--------------------------------	-----

SECTION 703 Repeal and Savings Provisions	107
---	-----

SECTION 704 Effective Date	108
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1 **UNIFORM SECURITIES ACT (2001)**

2 **[PART A: DEFINITIONS]**

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

4 **REPORTER’S COMMENT**

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

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

8 **REPORTER’S COMMENT**

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

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

1 or director of a broker-dealer or issuer, or an individual occupying a similar status or
2 performing similar functions, is an agent only if the individual otherwise comes within the
3 definition. No individual shall be deemed to be an agent solely by reason of effecting
4 transactions in a covered security to qualified purchasers as described in §18(b)(3) of the
5 Securities Act of 1933 or effecting transactions in a covered security as described in
6 §18(b)(4)(D) of the Securities Act of 1933.

7 REPORTER'S COMMENT

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

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

12 2. The second sentence of this definition is added in Colorado Securities Act §201(14) and
13 Illinois Securities Act §2.9 to clarify when an individual acting for an issuer will be an agent.

14 3. The substance of the final sentence both appears in NASAA 1997 amendments and in
15 Illinois Securities Act §2.9. Section 18(b)(3) will become operational only when the Securities and
16 Exchange Commission (SEC) by rule adopts a definition of “qualified purchaser.”

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

- 20 1. an agent;
- 21 2. an issuer;
- 22 3. a depository institution that solely engages in activities specified in
23 §3(a)(4)(B) or §3(a)(5)(B) of the Securities Exchange Act of 1934;
- 24 4. an international bank;

5. a person who has no place of business in this state if (A) he or she effects transactions in this state exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other broker-dealers, or (iii) depository institutions or institutional investors, when acting for themselves or as trustees, or (B) the person is licensed under the securities act of a state in which the person maintains a place of business and the person offers and sells in this state to a person who is an existing customer of the person and whose residence is not in this state; or

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

REPORTER'S COMMENT

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

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

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

3. The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the exemption of banks from the definition of broker and dealer in §§3(a)(4) and (5) of the Securities Exchange Act. This Act provides for comparable state "functional" regulation by subjecting banks to state broker-dealer regulation. Nonetheless, there are several exceptions to these repeals which are preserved for state law purposes in §101(c)(3).

(d) **“Depository institution” means a bank, savings institution, or trust company that is organized or chartered under the laws of a state or of the United States, is authorized to and receives deposits, and which is supervised and examined by an official or**

agency of a state or the United States. The term does not include an insurance company or other organization primarily engaged in the insurance business or a Morris Plan bank, industrial loan company, or a similar bank or company unless its deposits are insured by a federal agency.

REPORTER'S COMMENT

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

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

2. RUSA §101(3) also excepted from this definition “[a] trust company or other institution that is authorized by federal or state law to exercise fiduciary powers of the type a national bank is permitted to exercise under the authority of the Comptroller of the Currency and is supervised and 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, or is excepted from the definition of an investment adviser under §202(a)(11) 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. The National Securities Markets Improvement Act of 1996, as subsequently amended, was most significant for its partial preemption of state law in the securities offering and shareholder report areas. Under amended §18(a) of the federal Securities Act of 1933, no state statute, rule, order, or other administrative action may apply to

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

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

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

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

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

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

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

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

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

1 Act:

2 (A) Sections 4(1) [transactions by persons other than an
3 issuer, underwriter or dealer], and 4(3) [dealers after specified periods
4 of time], but only if the issuer files reports with the Commission under
5 §13 or 15(d) of the Securities Exchange Act;

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

7 (C) Securities Act exemptions in §3(a) with the exception of
8 the charitable exemption in §3(a)(4), the exchange exemption in
9 §3(a)(10), the intrastate exemption in §3(a)(11), and the municipal
10 securities exemption in §3(a)(2), but only with “respect to the offer or
11 sale of such [municipal] security in the state in which the issuer of
12 such security is located”; and

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

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

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

27 **(g) “File, Filed, or Filing” means the delivery of a document or application to the**
28 **[Administrator or designated depository] or designee of the [Administrator] or to the principal**
29 **office of the [Administrator].**

30 REPORTER’S COMMENT

31 Source of Law: RUSA §101(4).

32 1. The RUSA definition was revised to recognize that documents or applications may be filed
33 in paper form or electronically with the [Administrator], or when designated, depository institutions
34 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 delivery 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.

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

REPORTER'S COMMENT

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

(i) "Guaranteed" means guaranteed as to payment of all principal and all interest.

REPORTER'S COMMENT

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

1. This definition follows the 1956 Act.

2. RUSA uses an alternative and broader definition: "Guaranteed means guaranteed as to payment of all or substantially all of principal and interest or dividends."

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

(i) a depository institution or international bank;

(ii) an insurance company;

(iii) a separate account of an insurance company;

(iv) an investment company or business development company as defined

in the Investment Company Act of 1940;

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

8 (vi) a plan established and maintained by a state, its political
9 subdivisions, or any agency or instrumentality of a state or its political
10 subdivisions [with total assets in excess of [\$5,000,000]], for the benefit of its
11 employees;

12 (vii) a trust fund [with total assets in excess of [\$5,000,000]] whose
13 trustee is a depository institution or trust company and whose participants are
14 exclusively plans of the types identified in paragraph (v) or (vi) of this Section
15 [regardless of size of assets], except trust funds that include as participants
16 individual retirement accounts or H.R. 10 plans;

17 (viii) an organization described in §501(c)(3) of the Internal Revenue
18 Code, or a corporation, Massachusetts or similar business trust, or partnership,
19 not formed for the specific purpose of acquiring the securities offered, [with
20 total assets in excess of [\$5,000,000]];

21 (ix) a small business investment company licensed by the Small Business
22 Administration under §301(c) or (d) of the Small Business Investment Act of 1958 [with

1 **total assets in excess of [\$5,000,000]];**

2 **(x) a private business development company as defined in §202(a)(22) of the**
3 **Investment Advisers Act of 1940 [with total assets in excess of [\$5,000,000]];** or

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

5 REPORTER’S COMMENT

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

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

11 REPORTER’S COMMENT

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

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

14 REPORTER’S COMMENT

15 Source of Law: RUSA §401(a)(2).

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

18 **(m) “International Bank” means any international banking institution of which the**

United States is a member and whose securities are exempt from the Securities Act of 1933.

REPORTER'S COMMENT

Source of Law: New.

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

(n) **“Investment adviser” means a person who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or who, for compensation and as a part of a business, issues or promulgates analyses or reports concerning securities. Investment adviser also includes a person who, as an integral component of other financially related services, provides investment advisory services to others for compensation and as part of a business or who holds itself out as providing investment advisory services to others for compensation. The term does not include:**

(1) an investment adviser representative;

(2) a depository institution or international bank;

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

(4) a broker-dealer or its agents whose performance of investment advisory services is

solely incidental to the conduct of business as a broker-dealer and who receives no special compensation for the investment advisory services;

(5) a publisher, employee, or columnist of a newspaper, news magazine, or business or financial publication, or an owner, operator, producer, or employee of a cable, radio, or television network, station, or production facility if, in either case, the financial or business news published or disseminated is made available to the general public and the content does not consist of rendering advice on the basis of the specific investment situation 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)(1) & (7) to incorporate the new concepts of an investment adviser representative and a federal covered investment adviser; (b) substitutes in §101(n)(2) the term “depository institution 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. Proposed Rule 202(a)(11)-1(a) instead would provide:

10
11 A broker-dealer registered with the Commission under Section 15 of the
12 Securities Exchange Act of 1934 (15 U.S.C. 78o):

13 (a) Will not be deemed to be an investment adviser based solely on its receipt
14 of special compensation, provided that:

15 (1) The broker or dealer does not exercise investment discretion, as that term
16 is defined in Section 3(a)(35) of the Exchange Act (15 U.S.C. 78c(a)(35)), over the
17 accounts from which it receives special compensation;

18 (2) Any investment advice provided by the broker or dealer with respect to
19 accounts from which it receives special compensation is solely incidental to the
20 brokerage services provided to those accounts; and

21 (3) Advertisements for, and contracts or agreements governing, accounts for
22 which the broker or dealer receives special compensation include a prominent
23 statement that the accounts are brokerage accounts.

24 If Rule 202(a)(11)-1 is adopted, parallel language will be added to §101(n)(4).

25 5. The SIA has also proposed adding an exclusion to this definition that would provide:

26 Registered investment advisers may pay a cash fee to a solicitor who refers
27 business to the investment adviser (but does not render any investment advice) as long
28 as the solicitor is not subject to a disqualification as set out in this Act and the cash
29 fee is paid pursuant to written agreement retained by both the investment adviser and
30 the solicitor and provided to the client prior to or at the time of entering into any
31 investment advisory contract.

32 **(o)(1) “Investment adviser representative” of an investment adviser other than a federal**
33 **covered investment adviser means any partner, officer, director of (or an individual occupying**
34 **a similar status or performing similar functions) or any other individual employed by or**
35 **associated with an investment adviser, except clerical or ministerial personnel, who does any**

1 of the following: (A) makes any recommendations or otherwise renders advice regarding
2 securities, (B) manages securities accounts or portfolios of clients, (C) determines which
3 recommendation or advice regarding securities should be given, (D) solicits, offers or
4 negotiates for the sale of or sells investment advisory services, or (E) supervises employees who
5 perform any of the foregoing.

6 (2) “Investment adviser representative” of a federal covered investment adviser means
7 an individual with a place of business in this State as that term is defined by the United States
8 Securities and Exchange Commission under §203A of the Investment Advisers Act of 1940 and
9 who is –

10 (A) (i) not a supervised person of the federal covered investment adviser, as defined in
11 §202(a)(25) of the Investment Advisers Act of 1940, but solicits, offers, or negotiates for the sale
12 of or sells investment advisory services on behalf of a federal covered investment adviser; or
13 (ii) an investment adviser representative as defined in Rule 203A-3(a) under the Investment
14 Advisers Act of 1940; and

15 (B) is a partner, officer, director of (or an individual occupying a similar status or
16 performing similar functions) or other individual employed by or associated with the
17 investment adviser, except clerical or ministerial personnel who does any of the following: (i)
18 makes any recommendations or otherwise renders advice regarding securities, (ii) manages
19 securities accounts or portfolios of clients, (iii) determines which recommendation or advice
20 regarding securities should be given, (iv) solicits, offers or negotiates for the sale of or sells
21 investment advisory services, or (v) supervises employees who perform any of the foregoing.

1 REPORTER'S COMMENT

2 Source of Law: NASAA 1997 Amendment.

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

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

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

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

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

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

21 REPORTER'S COMMENT

22 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 *Technological Labs, Inc. v. Utah Sec. Div.*, 744 F.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 the Securities Act of 1933 or, if no amendment is filed, the prospectus or prospectus

1 supplement filed under the Securities Act of 1933, which includes a statement of the offering
2 price, underwriting and selling discounts or commissions, amount of proceeds, conversion
3 rates, call prices, and other matters dependent upon the offering price.

4 REPORTER'S COMMENT

5 Source of Law: RUSA §101(11).

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

17 REPORTER'S COMMENT

18 Source of Law: RUSA §101(12).

19 (u)(1) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition

1 of, a security or interest in a security for value.

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

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

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

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

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

21 REPORTER’S COMMENT

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

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

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

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

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

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

5. The RUSA version of what is now §101(u)(6)(A) has been adopted rather than the 1956 Act phrase “any bona fide pledge or loan.”

(v) “Securities Act of 1933,” “Securities Exchange Act of 1934,” “Public Utility Holding Company Act of 1935,” “Investment Company Act of 1940,” “Investment Advisers Act of 1940,” “Employee Retirement Income Security Act of 1974,” “National Housing Act,” and “Commodity Exchange Act” mean the federal statutes of those names, as amended.

REPORTER’S COMMENT

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

1. This Subsection is intended to be construed consistently with the National Conference of Commissioners on Uniform State Laws, Uniform Statute and Rule Construction Act §12 (1995), which provides:

(a) A statute or rule that incorporated by reference another statute of this [State] incorporates a later enactment or amendment of the other statute.

(b) A statute that incorporates by reference a rule of this [State] does not incorporate a later adoption or amendment of the rule.

(c) A rule that incorporates by reference another rule of this [State] incorporates a later adoption or amendment of the other rule.

(d) 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

1 other statute or rule.

2 Cf. Rochvarg, State Adoption of Federal Law – Legislative Abdication or Reasoned Policymaking?,
3 36 Admin. L. Rev. 277 (1984) (analyzing constitutional questions that arise when states attempt to
4 adopt future federal laws or regulations); Oklahoma City v. State et rel. Oklahoma Dep’t of Labor,
5 918 P. 2d 26 (Okla. 1995) (distinguishing retrospective incorporation by reference by state of federal
6 regulation from impermissible future incorporation by reference).

7 (w) **“Security” means: a note; stock; treasury stock; bond; debenture; evidence of**
8 **indebtedness; certificate of interest or participation in a profit-sharing agreement; a limited**
9 **partnership interest; [an interest in a limited liability company or limited liability**
10 **partnership]; collateral-trust certificate; preorganization certificate or subscription;**
11 **transferable share; investment contract; voting-trust certificate; certificate of deposit for a**
12 **security; fractional undivided interest in an oil, gas, or other mineral lease or in payments out**
13 **of production under a lease, right, or royalty; a put, call, straddle, or option entered into on**
14 **a national securities exchange relating to foreign currency; a put, call, straddle, or option on**
15 **a security, certificate of deposit, or group or index of securities, including an interest in or**
16 **based on the value of any of the foregoing; or, in general, an interest or instrument commonly**
17 **known as a “security,” or a certificate of interest or participation in, temporary or interim**
18 **certificate for, receipt for, whole or partial guarantee of, or warrant or right to subscribe to**
19 **or purchase, any of the foregoing. The term does not include:**

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

23 (ii) **an interest in a contributory or noncontributory pension or welfare plan subject to**

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

2. Section 101(w) also uses RUSA’s “fractional undivided interest in oil, gas or other mineral rights” formulation, which originated in §2(a)(1) of the Securities Act rather than the 1956 Act’s formulation, “certificate of interest or participation in an oil, gas or mining title.” In recent years, the courts interpreting §2(a)(1) of the federal Securities Act have often interpreted oil, gas or mineral interests as investment contracts when they were not fractional undivided interests. 2 L. Loss & J. Seligman, *Securities Regulation* 979-982 (3d ed. rev. 1999).

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

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

Exchange Act of 1934.

REPORTER'S COMMENT

Source of Law: RUSA §101(17).

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

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

REPORTER'S COMMENT

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

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

REPORTER'S COMMENT

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 of the United States,**
7 **or by any political subdivision of a State or by any public authority, agency or instrumentality**
8 **of one or more States or political subdivisions of States, or by any person controlled or**
9 **supervised by and acting as an instrumentality of the Government of the United States**
10 **pursuant to authority granted by the Congress of the United States; or any certificate of**
11 **deposit for any of the 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 or transaction exemptions are meant to be mutually exclusive.
21 A security or transaction may qualify for two or more of these exemptions.

22 **(b) [Foreign Governments].** Any security issued, insured, or guaranteed by any foreign
23 **government with which the United States currently maintains diplomatic relations, or any**

political subdivision thereof, if the security is recognized as a valid obligation by the issuer, insurer, or guarantor.

REPORTER'S COMMENT

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

1. The language of §201(b) is virtually identical to RUSA except it deletes reference to securities issued or guaranteed by Canada or its political subdivisions, agencies, or corporate or other instrumentalities as redundant given the exemption for securities issued, insured, or guaranteed by foreign governments.

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

REPORTER'S COMMENT

Source of Law: RUSA §401(b)(3).

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

2. Depository institutions specified in §3(a)(2) of the Securities Act of 1933 are also federal covered securities under §18(b)(4)(C) of the Securities Act of 1933, 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 by or guaranteed by, any insurance company [and 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 adopted 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. Ordinary insurance policies or annuities, without variable returns, are not treated as securities.

In contrast, variable annuities and insurance products as well as other securities issued by insurance companies are securities under §101(w), but are exempted from securities registration under this Section. These securities are subject to the Act's antifraud provision, §501.

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

(e) [Public Utilities]. Any security issued or guaranteed by any public utility, or by a holding company which is a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that Act, or by any railroad or other common carrier which is regulated in respect to its rates and charges by a governmental authority of a State.

REPORTER'S COMMENT

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

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

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

5 **(f) [Regulated Securities Markets]. A put or call option contract, warrant or**
6 **subscription right on any federal covered security specified in §18(b)(1) of the Securities Act**
7 **of 1933 or by Rule issued under that Subsection or any security listed or approved for listing**
8 **on the (insert names of other appropriate securities markets designated by [the Administrator]**
9 **consistent with §604(b)); or any option on a security or an index of securities or foreign**
10 **currencies issued by a clearing agency registered under the Securities Exchange Act of 1934**
11 **and listed or traded on a national securities exchange, a facility of a national securities**
12 **exchange, or a facility of a national securities association registered under the Securities**
13 **Exchange Act of 1934.**

14 REPORTER'S COMMENT

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

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

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

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

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

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

27 2. Under Rule 146 the SEC has designated (i) Tier I of the Pacific Exchange; (ii) Tier I of
28 the Philadelphia Stock Exchange; and (iii) The Chicago Board Options Exchange on condition that

1 the relevant listing standards continue to be substantially similar to those of the NYSE, AMEX, or
2 NASDAQ/NMS.

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

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

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

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

19 **(g) [Not-for-Profit Institutions]. Any security [other than a debt security] issued by a**
20 **person organized and operated exclusively for religious, educational, benevolent, fraternal,**
21 **charitable, or reformatory purposes and not for pecuniary profit, and no part of the net**
22 **earnings of which inures to the benefit of any person, a private stockholder, or any security**
23 **[other than a debt security] of a fund that is excluded from the definition of an investment**
24 **company under Section 3(c)(10) of the Investment Company Act of 1940; or a membership or**
25 **equity interest in, or a retention certificate or like security given in lieu of a cash patronage**
26 **dividend issued by, a cooperative organized and operated as a nonprofit membership**
27 **cooperative under the cooperative laws of any state if not traded to the public.**

28 REPORTER'S COMMENT

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

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

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

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

13 4. The final clause of this Section is derived from RUSA §401(b)(13) which was included in
14 that Act after a number of states had adopted exemptions for securities issued by cooperatives. The
15 1956 Act §402(a)(12) had instead merely provided: “insert any desired exemption for cooperatives.”
16 The drafter of the 1956 Act had found such sharp variation among the 18 states that then adopted
17 this exemption that “no common pattern can be found.” L. Loss, Commentary on the Uniform
18 Security Act 118 (1976).

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

21 Of all the changes that have occurred at the state level, the rise of the market
22 of debt securities of non-profit organizations has been the most significant and
23 troublesome. In a study conducted by the Commission during the debate on NSMIA,
24 it was determined that over \$250 million of debt securities offered by non-profit
25 organizations were registered with the Commission and offered to Pennsylvania
26 residents on an annual basis. These investments are sold almost exclusively to
27 individual investors. Because the issuer is promising to repay the debt, the
28 Commission insists on audited financial statements and appropriate disclosure. In the
29 3 years since NSMIA, the amount of debt securities of non-profit organizations
30 registered annually with the Commission has more than doubled to \$575 million!

31 Frauds related to sales of securities by non-profit organizations have become
32 a major enforcement problem for state securities regulators. Affinity frauds continue
33 to be a popular vehicle for investment swindlers. Within the short space of several
34 years, Pennsylvanians have been the victims of two major frauds involving the offer
35 and sale of debt securities by non-profit organizations (e.g., the Foundation for New
36 Era Philanthropy and Greater Ministries of Tampa, FL). Individual investors in these
37 now defunct non-profit organizations have lost hundreds of millions of dollars. The
38 current scandal surrounding the Baptist Foundation of Arizona only accentuates the
39 ongoing problem.

40 The Commission asserts that it is time to recognize that, since the ‘56 Act was
41 adopted, the market for debt securities offered by various non-profit organizations
42 and the number of non-profit organizations issuing them has soared. It is no longer

1 a local congregation selling bonds to raise money for a new house of worship. Now,
2 all manner of non-profit organizations – religious, social, ethnic, civic – collectively
3 are offering hundreds of millions of dollars annually in debt securities to the public and
4 should be subject to the same regulation as a for-profit company issuing debt
5 securities.

6 Simply, non-profit debt offerings have become big business and should be
7 regulated as such. Therefore, the Commission strongly urges that the exemption not
8 be available for “evidences of indebtedness, whether interest bearing or not.”

9 **(h) [Employee Benefit Plans]. A security issued in connection with an employees’ stock**
10 **purchase, savings, option, profit-sharing, pension or similar employees’ benefit plan. This**
11 **includes offers and sales of securities established by the issuer, its parents, its majority-owned**
12 **subsidiaries or majority-owned subsidiaries of the issuer’s parent, for the participation of their**
13 **employees, directors, general partners, trustees (where the issuer is a business trust), officers,**
14 **or consultants and advisors, and their family members who acquire such securities from such**
15 **persons through gifts or domestic relations orders. The Subsection also includes offers and**
16 **sales to former employees, directors, general partners, trustees, officers, consultants and**
17 **advisors only if such persons were employed by or providing services to the issuer at the time**
18 **the securities were offered.**

19 REPORTER’S COMMENT

20 Source of Law: RUSA §401(b)(12).

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

24 2. The final two sentences of this Subsection are derived from Securities Act Rule 701(e).

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

27 any investment contract issued in connection with an employees’ stock

1 purchase, savings, pension, profit-sharing, or similar benefit plan if the
2 [Administrator] is notified in writing thirty days before the inception
3 of the plan or, with respect to plans which are in effect on the effective
4 date of this Act, within sixty days thereafter (or within thirty days
5 before they are reopened if they are closed on the effective date of this
6 Act).

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

12 4. The concluding phrase "or similar employees' benefit plans" is intended to be broad
13 enough to include bonus, stock appreciation, thrift, incentive and other similar plans as they are
14 popularized or introduced.

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

18 REPORTER'S COMMENT

19 Source of Law: RUSA §401(b)(6).

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

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

30 **SECTION 202 [EXEMPT TRANSACTIONS]. The following transactions are exempt from**
31 **§§301, 302, and 504:**

(a) **[De Minimis Nonissuer Transactions].** A nonissuer transaction with up to 5 purchases in a 12 month period, whether effected through a broker-dealer or not.

REPORTER'S COMMENT

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

1. This Subsection substitutes a numerical test for the less precise phrase “isolated” nonissuer transactions. Cf. 1 L. Loss & J. Seligman, *Securities Regulation* 125-129 (3d ed. rev. 1998).

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

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

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

(3) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the

1 broker-dealer as an underwriter of the security;

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

7 (a) A description of the business and operations of the
8 issuer,

9 (b) The names of the issuer's officers and the names of the
10 issuer's directors, if any, or, in the case of a non-United States
11 issuer, the corporate equivalents of such persons in the issuer's
12 country of domicile,

13 (c) An audited balance sheet of the issuer as of a date
14 within 18 months or, in the case of a reorganization or merger
15 where parties to the reorganization or merger had such audited
16 balance sheet, a pro forma balance sheet, and

17 (d) An audited income statement for each of the issuer's
18 immediately preceding two fiscal years, or for the period of
19 existence of the issuer, if in existence for less than two years, or,
20 in the case of a reorganization or merger where the parties to the
21 reorganization or merger had such audited income statement, a
22 pro forma income statement, and

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

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

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

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

REPORTER'S COMMENT

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

1. The 1956 Act §402(b)(2) provides:

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

1 or within the three preceding years, or during the existence of the
2 issuer and any predecessors if less than three years, in the payment of
3 principal, interest, or dividends on the security.

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

9 3. In 1997 the Report of the Task Force on the Future of Shared State and Federal Securities
10 Regulation (1997) proposed at 13 that state authorities adopt uniform exemptions to facilitate
11 secondary trading of foreign issuer securities that meet minimum asset or market capitalization tests
12 or that are traded on a recognized foreign stock exchange. This is a different approach to achieve
13 the same result. The SIA has also proposed simplifying market transactions for securities or foreign
14 issuers which are not reporting companies through the adoption of an exemption for foreign issuers
15 which the Board of Governors of the Federal Reserve System considers eligible for margin.

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

19 **(c) [Nonissuer Transactions in Securities Subject to Securities Exchange Act**
20 **Reporting]. A nonissuer transaction in an outstanding security if the issuer of the security is**
21 **subject to the reporting requirements of §§13 or 15(d) of the Securities Exchange Act of 1934.**

22 REPORTER’S COMMENT

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

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

25 2. To harmonize this Subsection with Securities Act §18(b)(4)(A)-(B) which provides that:
26 (1) transactions by any person other than an issuer, underwriter or dealer (when the issuer files
27 reports with the Commission under §§13 or 15(d) of the Securities Act of 1933), (2) specified
28 transactions by a dealer (when the issuer files reports), and (3) specified broker transactions are
29 federal covered securities, the 90 day reporting period in RUSA §402(2) has been removed.

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

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

REPORTER'S COMMENT

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

1. RUSA divided the substance of the 1956 Act §402(b)(2) into separate manual and fixed maturity exemptions. This Act also uses that division.
2. The substance of this exemption is identical to the 1956 Act §402(b)(2)(B) and RUSA §402(4).

(e) [Unsolicited Brokerage Transactions]. A nonissuer transaction by or through a broker-dealer registered or exempt 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 brokerage transactions 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).

(f) [Underwriter Transactions]. Any transaction between the issuer or other person on

whose behalf the offering is made and an underwriter, or among underwriters.

REPORTER'S COMMENT

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

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

REPORTER'S COMMENT

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

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

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

REPORTER'S COMMENT

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

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

possession under Chapter 11 with the approval of the court.

(i) [Pledges]. Any transaction executed by a pledgee without any purpose of evading this Act.

REPORTER'S COMMENT

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

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

(1) any institutional investor;

(2) any broker or dealer registered under §15 of the Securities Exchange Act of 1934;

(3) any investment adviser registered under the Investment Advisers Act of 1940;

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

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

REPORTER'S COMMENT

Source of Law: New

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

any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity.
2. When the SEC adopts a rule defining “qualified purchaser” as used in §18(b) of the

1 Securities Act as purchasers of federal covered securities, part or all of this exemption may prove
2 redundant.

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

5 **(i) there are no more than 35 purchasers in this State, other than those designated in**
6 **§202(j), during any 12 consecutive months;**

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

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

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

18 **REPORTER'S COMMENT**

19 Source of Law: RUSA §402(11).

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

21 any transaction pursuant to an offer directed by the offeror to not
22 more than ten persons (other than those designated in paragraph (8))

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

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

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

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

34 5. A NASAA representative has also recommended inclusion of an optional notice filing
35 under this exemption.

36 **(l) [Transactions with Existing Security Holders]. Any transaction under an offer to**
37 **existing security holders of the issuer, including persons who at the time of the transaction are**
38 **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. A NASAA representative recommended removal of a notice requirement, but limiting this exemption to existing equity security holders.

2. Under §18(b)(4)(C), §3(a)(9) transactions are federal covered securities. Much 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.

(m) [Offerings When Registered Under this Act and the Securities Act of 1933]. A transaction involving an offer to sell, but not a sale, or 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 rules, but the listing and federal covered security status had not eventuated. This deletion will not exempt the sale, but only the offer.

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

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

(ii) no stop order of which the offeror is aware has been entered by the [Administrator]

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(16).

1. There is no counterpart in the 1956 Act.

2. A NASAA representative recommends deletion of this exemption. He wrote in part:

The Commission is extremely disturbed by inclusion of this new subsection. First, it is unnecessary because NSMIA already addressed state registration jurisdiction over offerings exempt from registration under the 1933 Act. Second, it deviates from the '56 Act by deregulating pre-effective offers. Under this proposal, offers to the **general public** of securities subject ONLY to state review now would be exempt. There is no requirement to file a copy of the offer with the administrator.

These include intrastate offerings exempt under Section 3(a)(11) of the 1933 Act,

1 SEC Rule 504 and SEC Regulation A offerings exempt under Section 3(b) of the 1933 Act
2 and offerings of debt securities of non-profit organizations under Section 3(a)(4) of the 1933
3 Act.

4 This subsection would allow for all manner of offers to be disseminated to the general
5 public without any regulatory oversight. The offerings affected by this subsection also tend
6 to be made by entrepreneurs undertaking a securities offering for the first time who are
7 unfamiliar with the legal requirements and liabilities and/or by counsel who are inexperienced
8 in advising on securities offerings. State securities regulators provide an extremely important
9 educational role in the context of reviewing such registration applications.

10 Retaining the prohibition on pre-effective offers gives the only regulator looking at
11 these offerings the means to prevent conditioning of the market for generally illiquid securities
12 by prohibiting exaggerated claims, fantastic financial projections and dissemination of biased,
13 puffing materials such as magazine articles, self-serving testimonials and general industry or
14 trade articles.

15 In the Commission's opinion, removing current regulatory authority over pre-
16 effective offers will result in a significant increase in enforcement actions based on materially
17 misleading offers. This will hurt, not help, the capital formation process for small businesses
18 because, where there is an enforcement action for materially misleading pre-effective offers,
19 effectiveness of the registration statement will be delayed until the enforcement case is
20 resolved. Retaining the authority to stop pre-effective offers actually saves time in that the
21 regulator can focus on reviewing the offering and improving disclosure rather than worrying
22 about what the issuer is saying to the public in an effort to pre-condition the market which,
23 for most of these offerings, is a very local one.

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

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

30 **(ii) the securities to be distributed are not required to be registered under the Securities**
31 **Act of 1933, written notice of the transaction and a copy of the materials, if any, by which**
32 **approval of the transaction will be solicited is given to the [Administrator] at least ten days**

before the consummation of the transaction.

REPORTER'S COMMENT

Source of Law: RUSA §402(17).

1. This exemption will include Tier I cross-border transactions exempt from the new Securities Act Rule 802.

SECTION 203 [ADDITIONAL EXEMPTIONS]. (a) The [Administrator] consistent with §515, by rule or order, may exempt any other security or transaction or class of securities or transactions from §§301, 302 and 504.

(b) The [Administrator] consistent with §515, by rule or order, may adopt or modify the limited offering transaction exemptions in §202(k) if the [Administrator] makes the further finding that this adoption or modification will further the objectives of compatibility with the exemptions from securities registration authorized by the Securities Act of 1933 and uniformity among the states.

REPORTER'S COMMENT

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

1. There is no counterpart in the 1956 Act.

2. Under this type of authority, at least 49 (of 53) jurisdictions through 1999 had adopted the ULOE or a Regulation D exemption, and 30 jurisdictions had adopted a Rule 144A exemption. This adoption would also provide the basis for State Small Corporate Offering Registration (SCOR) forms.

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

SECTION 204 [DENIAL, CONDITION, LIMITATION OR REVOCATION OF EXEMPTIONS]. (a) Except to the extent that a security or transaction involves a federal covered security, the [Administrator] by order may deny, condition, limit or revoke an exemption specified in §§201(f), (g), or (h) or 202, with respect to a specific security or transaction. Each such order must be entered in accordance with the requirements of §§603(b) and (c). Upon the entry of a summary order, the [Administrator] shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the [Administrator], the order will remain in effect until it is modified or vacated by the [Administrator]. If a hearing is requested or ordered, the [Administrator], after notice of and opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. An order issued under this Section is not retroactive. A person does not violate §§301, 302, or 504 by reason of an offer to sell or sale effected after the entry of an order under this Section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

REPORTER'S COMMENT

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

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

2 **SECTION 301 [SECURITIES REGISTRATION REQUIREMENT]. It is unlawful for any**
3 **person to offer or sell any security in this state unless (a) it is a federal covered security; (b) the**
4 **security or transaction is exempted under §§201-202; or (c) it is registered under this Act.**

5 **REPORTER'S COMMENT**

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

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

9 **SECTION 302 [NOTICE FILINGS AND FEES APPLICABLE TO FEDERAL COVERED**
10 **SECURITIES]. (a) The [Administrator], by rule, may require the filing of any or all of the**
11 **following documents with respect to a federal covered security under §18(b)(2) [investment**
12 **companies] of the Securities Act of 1933:**

13 **(1) Before the initial offer of such federal covered security in this state, all documents**
14 **that are part of a federal registration statement filed with the Securities and Exchange**
15 **Commission under the Securities Act of 1933, together with a consent to service of process**
16 **signed by the issuer [together with a fee of \$_____].**

17 **(2) After the initial offer of such federal covered security in this state, all documents**
18 **that are part of an amendment to a federal registration statement filed with the Securities and**
19 **Exchange Commission under the Securities Act of 1933.**

20 **(3) A report of the number of units and the total value of such federal covered securities**

1 sold to persons in this state, [together with a fee of \$_____].

2 (4) A notice filing shall be effective for a period of one year commencing upon the later
3 of the [Administrator's] receipt of the notice filing or the effectiveness of the offering with the
4 SEC. A notice filing may be renewed upon expiration by the issuer filing with the
5 [Administrator] a copy of those documents filed by the issuer with the SEC that the
6 [Administrator] specifies by rule or order together with the renewal fee. A previously filed
7 consent to service of process may be incorporated by reference in a renewal. A renewed notice
8 filing shall be effective upon the expiration of the filing being renewed.

9 (b) With respect to any security that is a federal covered security under §18(b)(4)(D)
10 of the Securities Act of 1933, the [Administrator], by rule, may require the issuer to file a copy
11 of any documents required to be filed with the Securities and Exchange Commission and a
12 consent to service of process signed by the issuer no later than 15 days after the first sale of
13 such federal covered security in this state, [together with a fee of \$_____].

14 (c) The [Administrator] by rule may require the filing of any document required to be
15 filed with the Securities and Exchange Commission under the Securities Act of 1933, with
16 respect to a federal covered security under §18(b)(4) of the Securities Act of 1933, [together
17 with a fee of \$_____].

18 (d) The [Administrator] may issue a stop order suspending the offer and sale of a
19 federal covered security within the 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 filing or fee required by
21 this Act. The [Administrator] shall vacate the stop order if the deficiency is corrected.

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

Section.

REPORTER'S COMMENT

Source of Law: NASAA 1997 amendment.

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

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

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

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

(b) A registration statement and accompanying documents may 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 required by §510:

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

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

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

1 (c) A registration statement under this Section automatically becomes effective at the
2 moment the federal registration statement becomes effective if all the following conditions are
3 satisfied:

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

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

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

1 date when the federal registration statement is expected to become effective, the
2 [Administrator] shall promptly advise the registrant by electronic means, telephone, or
3 telegram, at the registrant's expense, whether all the conditions are satisfied and whether the
4 [Administrator] then contemplates the institution of a proceeding under §405; but this advice
5 by the [Administrator] does not preclude the institution of such a proceeding at any time.

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

11 REPORTER'S COMMENT

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

13 1. Sections 303(a)-(d) are similar to the 1956 Act §303 except that the definition of "filed"
14 in §101(g) includes electronic filing, whether through a central registration depository that could be
15 administered similar to the current Central Registration Depository (CRD) or in conjunction with the
16 SEC's EDGAR System, or otherwise. Section 303 also permits required notification to be made by
17 electronic means, which is intended to be coextensive with the electronic means permissible under
18 §101(g).

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

20 3. Section 303 is intended to permit simultaneous electronic filing of all relevant documents
21 with the Securities and Exchange Commission and the State when technology exists to permit such
22 filings. Such simultaneous or "one stop" filing is consistent with the uniformity of application intended
23 by this Act. See §609.

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

26 (b) A registration statement under this Section shall contain the following information

1 and be accompanied by the following documents in addition to the information specified in
2 §305, and the consent to service of process required by §510:

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

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

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

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

22 (5) with respect to every promoter if the issuer was organized within the past three

1 years: the information specified in §304(b)(2), any amount paid to her or him within that
2 period or intended to be paid to her or him, and the consideration for any such payment;

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

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

15 (8) the kind and amount of securities to be offered; the proposed offering price or the
16 method by which it is to be computed; any variation at which any proportion of the offering
17 is to be made to any person or class of persons other than the underwriters, with a
18 specification of any such person or class; the basis upon which the offering is to be made if
19 otherwise than for cash; the estimated aggregate underwriting and selling discounts or
20 commissions and finders' fees (including separately cash, securities, contracts, or anything
21 else of value to accrue to the underwriters or finders in connection with the offering) or, if
22 the selling discounts or commissions are variable; the basis of determining them and their

1 maximum and minimum amounts; the estimated amounts of other selling expenses,
2 including legal, engineering, and accounting charges; the name and address of every
3 underwriter and every recipient of a finder's fee; a copy of any underwriting or selling
4 group agreement under which the distribution is to be made, or the proposed form of any
5 such agreement whose terms have not yet been determined; and a description of the plan of
6 distribution of any securities which are to be offered otherwise than through an
7 underwriter;

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

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

22 (11) the dates of, parties to, and general effect concisely stated of, every management

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

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

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

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

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

21 (16) [an audited] balance sheet of the issuer as of a date within four months before
22 the filing of the registration statement; [an audited] profit and loss statement and analysis of

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

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

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

9 REPORTER'S COMMENT

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

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

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

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

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

30 (1) no stop order is in effect and no proceeding is pending

1 under Section 306;

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

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

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

14 The Official Comment explains:

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

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

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

28 **(c) [Status of Registration Statement] Every registration statement shall specify (1) the**
29 **amount of securities to be offered in this state; (2) the states in which a registration statement**

1 or similar document in connection with the offering has been or is to be filed; and (3) any
2 adverse order, judgment, or decree entered in connection with the offering by the regulatory
3 authorities in each state or by any court or the Securities and Exchange Commission.

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

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

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

13 (g) [Escrow and Impoundment] The [Administrator] may by rule or order require as a
14 condition of registration by qualification (1) that any security issued within the past five years
15 or to be issued to a promoter for a consideration substantially different from the public offering
16 price, or to any person for a consideration other than cash, be deposited in escrow; and (2) that
17 the proceeds from the sale of the registered security in this state be impounded until the issuer
18 receives a specified amount from the sale of the security either in this state or elsewhere. The
19 [Administrator] may by rule or order determine the conditions of any escrow or impounding
20 here required, but he or she may not reject a depository solely because of location in another
21 state.

22 (h) [Form of Subscription] The [Administrator] may by rule or order require as a

1 condition of registration that any security registered by qualification or coordination be sold
2 only on a specified form of subscription or sale contract, and that a signed or conformed copy
3 of each contract be filed with the [Administrator] or preserved for any period up to three years
4 specified in the rule or order.

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

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

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

REPORTER'S COMMENT

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

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

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

3. References to escrow and impoundment of securities registered by coordination in §305(g) have been deleted.

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

(1) The registration statement as of its effective date or as of the proposed effective date

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

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

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

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

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

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

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

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

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

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

15 (c) The [Administrator] may summarily postpone or suspend the effectiveness of a
16 registration statement pending final determination of an administrative proceeding. Upon the
17 entry of the order, the [Administrator] shall promptly notify each person specified in
18 Subsection (d) that the order has been entered, the reasons for the postponement or suspension,
19 and that within 15 days after the receipt of a written request from the person the matter will
20 be set down for hearing. If no hearing is requested and none is ordered by the [Administrator],
21 the order remains in effect until it is modified or vacated by the [Administrator]. If a hearing

1 is requested or ordered, the [Administrator], after notice of and opportunity for hearing to each
2 person specified in Subsection (d), may modify or vacate the order or extend it until final
3 determination.

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

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

11 REPORTER'S COMMENT

12 Source of Law: RUSA §306.

13 1. The 1956 Act §306 is similar.

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

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

20 4. With respect to the term “willfully” in §306(a)(2), the state courts have often looked to
21 cases defining this term under the federal securities cases. See 6 L. Loss & J. Seligman, Securities
22 Regulation 3034-3039 (3d ed. 1990).

23 The state courts are divided on the meaning of “willfully.” See, e.g., Hentzner v. State of
24 Alaska, 613 F.2d 821, 825 (Alaska 1980):

25 The issue before us is the meaning of the word “wilfully” as used in AS 45.55.210(a).
26 There are several possibilities. One is that the defendant must act intentionally in the
27 sense that he is aware of what he is doing; another is that the defendant must be aware
28 that what he is doing is illegal; and a third is that the defendant must know that what
29 he is doing is wrong. It is in this last sense that we think “wilfully” should be

1 interpreted as it is used in Section 210.

2 Cf. *State of Missouri v. Dumke*, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995), following the
3 Official Comment to §204(a)(2)(B) of the 1956 Act:

4 As the federal courts and the SEC have construed the term “willfully” in §15(b) of the
5 Securities Exchange Act of 1934, 15 U.S.C. §78o(b), all that is required is proof that
6 the person acted intentionally in the sense that he was aware of what he was doing.
7 Proof of evil motive or intent to violate the law, or knowledge that the law was being
8 violated, is not required. The principal function of the word “willfully” is thus to serve
9 as a legislative hint of self-restraint to the Administrator.

10 It is the intent of the Drafting Committee that the term “willfully” be interpreted consistently
11 with the Official Code Comment to §204(a)(2)(B) of the 1956 Act.

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

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

**(b) [AGENTS] Except as provided in §402, it is unlawful for any broker-dealer or issuer
to employ or undertake an association with an agent who transacts business in this state on
behalf of such broker-dealer or issuer unless the agent is registered under this Act. The
registration of an agent is not effective during any period when the agent is not employed by
or associated with a particular broker-dealer registered or exempt under this Act or a
particular issuer, an offering of whose securities is being made in this state. When an agent
begins or terminates employment by or association with a broker-dealer or issuer, or begins or
terminates those activities which make him or her an agent, the broker-dealer or issuer or the
agent shall promptly notify the [Administrator].**

**(c)[INVESTMENT ADVISERS] (1) Except as provided in §402, it is unlawful for any
person to transact business in this state as an investment adviser, and for any individual to
transact business in this state as an investment adviser representative, unless registered under
this Act.**

1 (2) A State may require a notice filing by a federal covered investment adviser of any
2 document required by the Securities and Exchange Commission, together with a consent to
3 service of process and a fee of [\$_____].

4 (d)[INVESTMENT ADVISER REPRESENTATIVES] (1) Except as provided in §402,
5 it is unlawful for any investment adviser to employ or undertake an association with an
6 investment adviser representative who has a place of business located in this state unless the
7 investment adviser representative is registered under this Act. The registration of an
8 investment adviser representative is not effective during any period when the investment
9 adviser representative is not employed by or associated with a particular investment adviser
10 registered or exempt under this Act. When an investment adviser representative begins or
11 terminates employment by or association with an investment adviser or federal covered
12 investment adviser, or begins or terminates activities which make him or her an investment
13 adviser representative, the investment adviser, federal covered investment adviser, or the
14 investment adviser representative shall promptly notify the [Administrator].

15 (2) Except as provided in §402, the [Administrator] may register any investment adviser
16 representative of a federal covered investment adviser who has a place of business within the
17 State. The registration of such an investment adviser representative is not effective during any
18 period when the investment adviser representative is not employed by or associated with the
19 federal covered investment adviser. When an investment adviser representative begins or
20 terminates employment by or association with a federal covered investment adviser, or begins
21 or terminates activities which make him or her an investment adviser representative, the
22 investment adviser representative or federal covered investment adviser shall promptly notify

1 the [Administrator].

2 (3) In this Subsection the place of business of an investment adviser representative
3 means:

4 (i) An office at which the investment adviser representative regularly provides
5 investment advisory services or solicits, meets with, or otherwise communicates with clients;
6 and

7 (ii) Any other location that is held out to the general public as a location at which the
8 investment adviser representative provides investment advisory services, solicits, meets with,
9 or otherwise communicates with clients.

10 (e) Except with respect to investment advisers whose only clients are those described in
11 §402(c) of this Act, it is unlawful for any federal covered investment adviser to transact business
12 in this state unless such person complies with the provisions of §403(d) of this Act.

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

22 [(g) Every registration or notice filing under this Section expires December 31st unless

1 renewed.]

2 REPORTER'S COMMENT

3 Source of Law: 1956 Act §201(a)-(b); 1997 NASAA Amendment (for §§401(c)-(f)); RUSA
4 §203(b) (for §401(f)).

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

7 2. In 1995 NASAA also proposed as an amendment §201-A to address limited registration
8 of Canadian broker-dealers and agents.

9 Sometime in 2000 the Commission is expected to issue an order and release addressing the
10 subject of United States resident Canadians who maintain self-directed tax advantaged retirement plans
11 in Canada. The Commission recommends that the final draft of this Act parallel its positions to
12 provide consistency to foreign United States residents.

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

16 **(1) a broker-dealer who either is registered or, except as provided in §402(a)(3), is not**
17 **required to be registered under the Securities Exchange Act of 1934 and who has no place of**
18 **business in this State if:**

19 **(i) transactions effected in this State by the broker-dealer are with the issuer of the**
20 **securities involved in the transactions or other broker-dealers registered or exempt under this**
21 **[Act];**

22 **(ii) the broker-dealer is registered under the securities act of a state in which the broker-**
23 **dealer has a place of business and the broker-dealer during any 12 consecutive months does not**
24 **effect transactions with more than six persons in this State in addition to transactions specified**
25 **in subparagraph (i);**

26 **(iii) the broker-dealer is registered under the securities act of a state and sells in this**

1 State solely to institutional investors; or

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

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

7 (b)[AGENTS] The following agents are exempt from the registration requirements of
8 §401:

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

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

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

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

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

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

17 (1) any investment adviser without a place of business in this State that is registered [in
18 each State in which the adviser is required to register] if:

19 (i) its only clients in this State are federal covered investment advisers, investment
20 advisers, broker-dealers, or institutional investors;

21 (ii) its only clients in the state have their principal place of residence outside the state;

22 or

(iii) any other investment adviser without a place of business in this State if it has during the preceding 12 month period it has no more than five clients who are residents of the State in addition to the clients specified in §§402(c)(1)(i) and (ii).

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

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

(1) an investment adviser representative acting for an investment adviser which solely provides investment advisory services with respect to securities exempted by §201;

(2) an investment adviser representative of a federal covered investment adviser who has no place of business in this state;

(3) a sole proprietor who has separately registered as a federal or state investment adviser.

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

REPORTER'S COMMENT

Source of Law: RUSA §§202, 204.

1. The 1956 Act §§401(b)-(c) and (f) were similar but did not address vacationing clients.
2. While NSMIA preempts state regulation of federal covered investment advisers, it does not similarly preempt federal regulation of investment adviser representatives which were intended to be subject to state regulation.
3. NSMIA currently establishes a national set minimum standard prohibiting a state from regulating investment advisers that do not have a place of business in a state and have had fewer than six clients who are state residents during the past 12 months.

SECTION 403 [REGISTRATION PROCEDURE FOR BROKER-DEALERS, AGENTS,

INVESTMENT ADVISERS, AND INVESTMENT ADVISER REPRESENTATIVES]. (a)

A broker-dealer, agent, investment adviser, or investment adviser representative may obtain an [initial or renewal] registration by filing with the [Administrator] or his or her designee an application together with a consent to service of process complying with §510. Each application shall contain whatever information the [Administrator] by rule requires concerning such matters as

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

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

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

(4) any injunction or administrative order or conviction of a felony of the applicant or any person specified in §403(a)(3);

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

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

(b) If no denial order is in effect and no proceeding is pending under §405, registration becomes effective at noon of the 30th day after an application is filed. The [Administrator] may by rule or order specify an earlier effective date, and may by order defer the effective date until noon of the 30th day after the filing of any amendment.

Registration of a broker-dealer automatically constitutes registration of any agent who is a

1 partner, officer, or director, or a person occupying a similar status or performing similar
2 functions. Registration of an investment adviser automatically constitutes registration of
3 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)(1) Except with respect to federal covered investment advisers whose only clients
6 in this State are those described in §402(c) of this Act, a federal covered investment adviser
7 shall notify the [Administrator], before acting as a federal covered investment adviser in this
8 State, by filing a copy of such documents as have been filed with the Securities and
9 Exchange Commission as the [Administrator], by rule, may require, together with an
10 originally executed consent to service of process, [together with a notice fee of \$___].

11 The notice filing shall be effective for one year commencing upon its receipt by the
12 [Administrator]. It may be renewed by filing with the [Administrator] a copy of any
13 additional documents that have been filed with the Securities and Exchange Commission as
14 the [Administrator] may, by rule, require together with any renewal fees.

15 (d)(1) Every applicant for [initial or renewal] broker-dealer or agent registration
16 shall pay a registration filing fee of [\$___] as required by the [Administrator] in the case of a
17 broker-dealer, [\$___] in the case of an agent. When an application is denied or withdrawn,
18 the [Administrator] shall retain [\$___] of the fee;

19 (2) Every applicant for [initial or renewal] registration as an investment adviser or
20 an investment adviser representative shall pay a registration fee as required by the
21 [Administrator], [\$___] in the case of an investment adviser, and [\$___] in the case of an
22 investment adviser representative. When an application is denied or withdrawn, the

1 [Administrator] shall retain [\$____] of the fee;

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

4 [(4) The [Administrator] may require an additional fee for the filing of any document
5 in an electronic format]

6 (e)(1) A broker-dealer, federal covered investment adviser, or investment adviser
7 may succeed to the registration or notice filing of a registrant or of a federal covered
8 investment adviser who has a current notice filing, by filing an application for registration
9 of a successor, whether or not the successor is then in existence, for the unexpired portion of
10 the year. There shall be no filing fee.

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

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

22 (g) The [Administrator] may, by rule or order, require registered broker-dealers,

agents, and investment advisers who have custody of [or discretionary authority over] client funds or securities to post surety bonds in amounts up to [\$___] as the [Administrator] may prescribe, subject to the limitations of §15 of the Securities Exchange Act of 1934 (for broker-dealers) and §222 of the Investment Advisers Act of 1940 (for investment advisers) and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, or, in the case of an investment adviser whose minimum financial requirements, which may be defined by Rule exceeds [\$___] the amounts required by the [Administrator]. Every bond shall provide for suit by any person who has a cause of action under §509. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of §509(f).

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

Licensing, general provisions. (a) Unless a proceeding under §212 is instituted or the applicant is notified that the application is incomplete, the license of a broker-

1 dealer, sales representative, or investment adviser becomes effective 30 days after the
2 later of the date an application for licensing is filed and is complete or the date an
3 amendment to an application is filed and is complete, in either case only if all
4 requirements imposed under §207 are satisfied. An application is complete when the
5 applicant has furnished information responsive to each applicable item of the
6 application. The [Administrator] by order may authorize an earlier effective date of
7 licensing.

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

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

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

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

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

25 Official Code Comment 3 to RUSA §208 explains:

26 The federal pattern of continuing registration has been adopted in lieu of the
27 1956 Act provisions requiring annual renewals. Under Subsection (b), expiration,
28 revocation, or withdrawal are the events now which generally terminate the
29 effectiveness of a license.

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

33 **SECTION 404 [POSTREGISTRATION PROVISIONS]. (a) Every registered broker-dealer**
34 **and registered investment adviser shall make and keep such accounts, correspondence,**
35 **memoranda, papers, books, and other records as the [Administrator] prescribes, by rule or**
36 **order, except as limited by §15(h) of the Securities Exchange Act of 1934 (in the case of a**

1 broker-dealer), and §222 of the Investment Advisers Act of 1940 (in the case of an investment
2 adviser).

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

6 (c) Every registered broker-dealer and every registered investment adviser shall file such
7 financial reports as the [Administrator] may prescribe, by rule or order, except as limited by
8 §15(h) of the Securities Exchange Act of 1934 in the case of a broker-dealer.

9 (d) If the information contained in any document filed with the [Administrator] is or
10 becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a
11 correcting amendment with the [Administrator]. A federal covered investment adviser shall
12 file with the [Administrator] a copy of any amendment to its registration that is filed with the
13 Securities and Exchange Commission.

14 (e) Except as limited by §15(h) in the case of a registered broker-dealer, the records
15 referred to in §§404(b)-(d) are subject at any time or from time to time to such reasonable
16 periodic, special, or other examinations by representatives of the [Administrator], within or
17 without this state, as the [Administrator] deems necessary or appropriate in the public
18 interest or for the protection of investors. Such examinations may be made without prior
19 notice. For the purpose of avoiding unnecessary duplication of examinations, the
20 [Administrator] shall cooperate with the securities administrators of other states, the
21 Securities and Exchange Commission, and any national securities exchange or national
22 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, 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 §16(e), but provides:

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

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

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

SECTION 405 [DENIAL, REVOCATION, SUSPENSION, CANCELLATION, AND WITHDRAWAL OF REGISTRATION]. (a) The [Administrator] shall by order deny, suspend or revoke any registration, or bar or censure any registrant agent or investment adviser representative from employment by or association with a registered broker-dealer, investment adviser, or federal covered investment adviser, or bar or censure any officer, director, partner or person occupying a similar status or performing similar functions for a registered broker-

1 dealer or investment adviser, from employment by or association with a registered broker-
2 dealer or registered investment adviser, or restrict or limit a registrant as to any function or
3 activity of the business for which registration is required in this state, if the [Administrator]
4 finds (1) that the order is in the public interest and (2) that the applicant or registrant

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

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

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

16 (D) is permanently or temporarily enjoined by any court of competent jurisdiction from
17 engaging in or continuing any conduct or practice involving any aspect of the securities
18 business;

19 (E) is the subject of an order entered within the past five years by the securities
20 administrator of any other state or by the Securities and Exchange Commission denying,
21 revoking, or suspending registration as a broker-dealer, agent, investment adviser, or
22 investment adviser representative, or the substantial equivalent of those terms as defined in this

1 Act, or is the subject of an order entered within the past five years by the [Administrator] of
2 any State or by the Securities and Exchange Commission with a registered broker-dealer or
3 registered investment adviser, or the substantive equivalent of these terms or is the subject of
4 an order of the Securities and Exchange Commission suspending or expelling him from a
5 national securities exchange or national securities association registered under the Securities
6 Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but (i) the
7 [Administrator] may not institute a revocation or suspension proceeding under this paragraph
8 more than one year from the date of the order relied on, and (ii) [the Administrator] may not
9 enter an order under this paragraph on the basis of an order under another state act unless that
10 order was based on facts which would currently constitute a ground for an order under this
11 Subsection;

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

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

22 (H) is not qualified on the basis of such factors as training, experience, and knowledge

1 of the securities business, except as otherwise provided in §405(b);

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

7 (J) [after notice,] has failed to pay the proper filing fee;

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

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

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

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

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

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

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

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

19 (c) The [Administrator] may by order postpone or suspend registration, or in the case
20 of an agent or investment adviser representative or of an individual applying to become an
21 agent or an investment adviser representative, suspend or bar any such person from acting in
22 that capacity, pending final determination of any proceeding under this Section. Upon entry

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

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

15 (e) Withdrawal from registration as a broker-dealer, agent, investment adviser or
16 investment adviser representative becomes effective 30 days after receipt of an application to
17 withdraw or within such shorter period of time as the [Administrator] may determine, unless
18 a revocation or suspension proceeding is pending when the application is filed or a proceeding
19 to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days
20 after the application is filed. If a proceeding is pending or instituted, withdrawal becomes
21 effective at such time and upon such conditions as the [Administrator] by order determines.
22 If no proceeding is pending or instituted and withdrawal automatically becomes effective, the

1 [Administrator] may nevertheless institute a revocation or suspension proceeding under
2 §405(a)(2)(B) within one year after withdrawal became effective and enter a revocation or
3 suspension order as of the last date on which registration was effective.

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

9 REPORTER'S COMMENT

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

12 1. The term "foreign" means a jurisdiction outside of the United States, not a different State
13 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 modeled on Rule 10b-5 of the Securities Exchange Act.

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

16 3. Section 410(h) of the 1956 Act provided unlawful conduct does not result in civil liability
17 except as provided in §410. See, e.g., Held v. Product Mfg. Co., 592 F.2d 1005, 1007 (Or. 1979).
18 This prohibition of civil liability based upon this Section is continued in §509(j). Nonetheless at least
19 two Uniform Securities Act states declined to adopt §410(h) and have implied private remedies under
20 the equivalent to this Section. See, e.g., Carothers v. Rice, 633 F.2d 7, 9 (6th Cir. 1980) (Kentucky);
21 Wade v. Skipper's Inc., 915 F.2d 1324, 1329-1332 (9th Cir. 1990) (Washington).

22 An argument for allowing a private cause of action under §501 is that it is based upon Rule
23 10b-5 which does authorize an implied course of action.

24 **SECTION 502 [FRAUD BY INVESTMENT ADVISERS]. It is unlawful for any person who**
25 **receives any consideration from another person primarily for advising the other person as to**
26 **the value of securities or their purchase or sale, whether through the issuance of analyses or**

reports or otherwise

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

(b) to engage in any transaction, practice, or course of business which operates or would

operate as a fraud or deceit upon the other person.

REPORTER'S COMMENT

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

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

2. Under §203A(b)(2) of the Investment Advisers Act States retain their authority to investigate and bring enforcement actions against a federal covered investment adviser or a person associated with a federal covered investment adviser.

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 or an exception from a definition has the burden of proving the applicability of the exemption or exception.

(b) In a criminal proceeding, under this [Act], a person claiming an exemption or an exception 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

1 required to meet to obtain a conviction is establishing the requisite elements of the
2 criminal offense “beyond a reasonable doubt,” a defendant claiming an exemption or
3 exception as a defense has the burden of offering evidence to establish that defense.

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

11 **REPORTER’S COMMENT**

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

13 **SECTION 505 [MISLEADING FILINGS].** A person may not make or cause to be made, in a
14 document filed with the [Administrator] or in a proceeding under this [Act], a statement that
15 the person knows or has reasonable grounds to know is, at the time and in the light of the
16 circumstances under which it is made, false or misleading in a material respect.

17 **REPORTER’S COMMENT**

18 Source of Law: RUSA §504.

19 1. The RUSA Official Comment explains: “This Section adds the language ‘the person knows
20 or has reasonable grounds to know’ as a condition to liability. This modification thus removes the
21 strict liability standard that existed under the Section 404 in the 1956 Act.”

22 **SECTION 506 [MISREPRESENTATIONS CONCERNING REGISTRATION OR**
23 **EXEMPTION].** (a) Neither the fact that an application for registration, a registration
24 statement or a notice filing has been filed under this [Act] nor the fact that a person is

1 registered or has made a notice filing or a security is registered under this [Act] constitutes a
2 finding by the [Administrator] that a document filed under this [Act] is true, complete, and not
3 misleading. Neither of those facts nor the fact that an exemption or exception is available for
4 a security or a transaction means that the [Administrator] has passed upon the merits or
5 qualifications of, or recommended or given approval to, a person, security, or transaction.

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

8 REPORTER'S COMMENT

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

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

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

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REPORTER'S COMMENT

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

1. The NASD proposal was reprinted in Securities Exchange Release 39,892, 66 SEC Dock. 2473 (1998). To date it has not been approved by the SEC.
2. The NASD proposal is limited to arbitration proceedings.
3. An alternative approach would be a standard providing for absolute immunity.
4. This or a similar provision should only be adopted after the Securities and Exchange Commission approves a counterpart rule for securities arbitration proceedings.

SECTION 508 [CRIMINAL PENALTIES]. (a) Any person who willfully violates any provision of this Act except §302, the notice filing requirements of §403 or 505 or who willfully violates any rule or order under this Act, or who willfully violates §505 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than [\$5,000] or imprisoned not more than three years, or both; but no person may be imprisoned for the violation of any rule or order if the person proves that he or she had no knowledge of the rule or order. [No indictment or information may be returned under this Act more than five years after the alleged violation.]

(b) The [Administrator] may refer such evidence as is available concerning violations of this Act or of any rule or order issued under this Act to the [Attorney General or the proper district attorney], who may, with or without such a reference, institute the 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. The sentence in brackets in §508(a) is an optional provision for any state which does not have a general criminal statute of limitations.

3. On the meaning of “willfully”, see Comment 3 under §306.

SECTION 509 [CIVIL LIABILITIES]. Except to the extent that certain state class actions are prohibited by the Securities Litigation Uniform Standards Act of 1998, (a) any person who

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

(b) Any person who

(1) is an investment adviser and engages in conduct in violation of §401(c) or (d) (an

1 action pursuant to a violation of §401(d) may not be maintained except by those persons who
2 directly received advice from the unregistered investment adviser representative), §506(b), or
3 of any rule or order under §504, or

4 (2) receives directly or indirectly any consideration from another person for advice as
5 to the value of securities or their purchase or sale, whether through the issuance of analyses,
6 reports or otherwise and employs any device, scheme, or artifice to defraud such other person
7 or engages in any act, practice or course of business which operates or would operate as a fraud
8 or deceit on such other person, is liable to that person who may sue either at law or in equity
9 to recover the consideration paid for such advice and any loss due to such advice, together with
10 interest [at x percent per year] from the date of payment of the consideration plus costs and
11 reasonable attorneys' fees, less the amount of any income received. An action based on a
12 violation of §501(b) may not prevail where the person accused of the violation sustains the
13 burden of proof that he or she did not know, and in the exercise of reasonable care could not
14 have known, of the existence of the facts by reason of which the liability is alleged to exist.

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

1 among the several persons so liable.

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

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

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

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

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

1 making or performance was in violation, may base any suit on the contract.

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

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

8 REPORTER'S COMMENT

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

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

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

18 SECTION 510 [JURISDICTION AND SERVICE OF PROCESS].

19 [Subject Matter Jurisdiction]

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

23 (b) Sections 401(a), 501, and 506 apply to persons who buy or offer to buy a security
24 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) An applicant for licensing or registration under this [Act] or an issuer who proposes to offer a security in this State through an agent shall file 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

1 previous application for licensing or registration need not file an additional consent.

2 [B. Conduct]

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

9 [C. Service of Process]

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

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

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

20 (k) Service as provided in §510(j) may be used in a proceeding before the
21 [Administrator] or by the [Administrator] in a proceeding in which the [Administrator] is the
22 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 Cybersecurity*, 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 his officers or employees to use for**
7 **personal benefit any information which is filed with or obtained by the [Administrator] and**
8 **which is not made public. No provision of this Act authorizes the [Administrator] or any of her**
9 **or his officers or employees to disclose any such information except among themselves or when**
10 **necessary or appropriate in a proceeding or investigation under this Act. No provision of this**
11 **Act either creates or derogates from any privilege which exists at common law or otherwise**
12 **when documentary or other evidence is sought under a subpoena directed to the**
13 **[Administrator] or any of her or his officers or employees.**

14 **REPORTER’S COMMENT**

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

16 1. The 1956 Act also includes optional §406(c): “[(c) Insert a provision, if desired, covering
17 fees for examinations, filings under Section 403, and other miscellaneous filings for which no fees are
18 specified elsewhere in this Act.]”

19 **SECTION 602 [INVESTIGATIONS AND SUBPOENAS]. (a) The [Administrator] (1) may**
20 **make such public or private investigations within or outside of this state as he or she deems**
21 **necessary to determine whether any person has violated or is about to violate any provision of**
22 **this Act or any rule or order, or to aid in the enforcement of this Act or in the prescribing of**

1 rules and forms hereunder, (2) may require or permit any person to file a statement in writing,
2 under oath or otherwise as the [Administrator] determines, as to all the facts and circumstances
3 concerning the matter to be investigated, and (3) may publish information concerning any
4 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, compel their attendance, take evidence, and require the production of any books,
8 papers, correspondence, memoranda, agreements, or other documents or records which the
9 [Administrator] deems relevant or material to the inquiry.

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

17 (d) No person is excused from attending and testifying or from producing any document
18 or record before the [Administrator], or in obedience to the subpoena of the [Administrator]
19 or any designated officer, or in any proceeding instituted by the [Administrator], on the ground
20 that the required testimony or evidence (documentary or otherwise) may tend to incriminate
21 her or him or subject her or him to a penalty or forfeiture; but no individual may be prosecuted
22 or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing

1 concerning which he or she is compelled, after claiming the privilege against self-incrimination,
2 to testify or produce evidence (documentary or otherwise), except that the individual testifying
3 is not exempt from prosecution and punishment for perjury or contempt committed in
4 testifying.

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

9 REPORTER'S COMMENT

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

11 1. The Securities Litigation Uniform Standard Act of 1998 in §102(e) provides:
12 The Securities and Exchange Commission, in consultation with State securities
13 commissions (or any agencies or offices performing like functions), shall seek to
14 encourage the adoption of State laws providing for reciprocal enforcement by State
15 securities commissions of subpoenas issued by another State securities commission
16 seeking to compel persons to attend, testify in, or produce documents or records in
17 connection with an action or investigation by a State securities commission of an
18 alleged violation of State securities laws.

19 **SECTION 603 [ADMINISTRATIVE ENFORCEMENT]. (a) Whenever it appears to the**
20 **[Administrator] that any person has engaged or is about to engage in any act or practice**
21 **constituting a violation of any provision of this Act or any rule or order under this Act, the**
22 **[Administrator] may bring one or more of the following remedies:**

23 (1) issue a cease and desist order, with or without a prior hearing against the person or
24 persons engaged in the prohibited activities, directing them to cease and desist from further

1 **illegal activity; or**

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

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

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

19 **(b) Except to the extent otherwise provided in §603(c), no administrative remedy may**
20 **be sought without (1) appropriate public notice to the applicant or registrant as well as the**
21 **employer or prospective employer if the applicant or registrant is an agent or investment**
22 **adviser representative and (2) opportunity for hearing.**

(c)(1) The [Administrator] may use emergency administrative proceedings in a situation involving an immediate danger to the public welfare requiring immediate action. The [Administrator] may take only such action as is necessary to prevent or avoid the immediate danger to the public welfare 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 Section, 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.

1 1. A Note to the 1956 Act §408 provides: “Constitutional due process considerations should
2 be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions
3 of each jurisdiction.”

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

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

20 3. RUSA §710 alternatively provides:

21 The [Administrator] may commence an administrative proceeding at any time with
22 respect to a matter within the [Administrator’s] jurisdiction. The [Administrator] shall
23 commence an administrative proceeding upon the application of a person, unless:

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

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

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

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

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

33 (F) the matter is not submitted in a form substantially complying with the rules of the
34 [Administrator].
35

36 **SECTION 604 [RULES, FORMS, ORDERS, AND HEARINGS]. (a) The [Administrator] may**
37 **from time to time make, amend and rescind such rules, forms and orders as are necessary to**
38 **carry out the provisions of this Act, including rules and forms governing registration**

1 statements, applications, and reports, and defining any terms, whether or not used in this Act,
2 insofar as the definitions are not inconsistent with the provisions of this Act. For the purposes
3 of rules and forms, the [Administrator] may by rule adopt exemptions from the registration
4 requirements of §§301 and 401 where such exemptions are consistent with the public interest
5 and with the purposes fairly intended by the policy and provisions of this Act.

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

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

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

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

21 (f) Every hearing in an administrative proceeding shall be public unless the
22 [Administrator] in his or her discretion grants a request joined in by all the respondents that

1 the hearing be conducted privately.

2 REPORTER'S COMMENT

3 Source of Law: 1956 Act §412; 1987 NASAA Proposed Amendment to §412(a); RUSA
4 §§705, 707.

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

14 **(b) The information contained in or filed with any registration statement, application,**
15 **notice filing, or report may be made available to the public, under such rules consistent with**
16 **§606 as the [Administrator] prescribes, or as otherwise prescribed by law.**

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

(d) The [Administrator] in his or her discretion 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 adds a declaratory order provision:

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

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

SECTION 606 [PUBLIC INFORMATION; CONFIDENTIALITY]. (a) Except as provided in subsection (b), information and documents filed with or obtained by the [Administrator] 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; and

(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 or commercial or financial information of a person for which that person is entitled to, and has asserted, a claim of confidentiality or a claim of privilege authorized by law.

(c) The [Administrator] may disclose:

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

(2) information obtained in connection with an investigation under §602 if disclosure is for the purpose of a civil, administrative, or criminal investigation or proceeding by a securities agency, law enforcement agency, or administrator specified in §607, and the receiving agency or administrator represents in writing that under applicable law protections exist to preserve the integrity, confidentiality, and security of the information.

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

REPORTER'S COMMENT

Source of Law: RUSA §703.

SECTION 607 [COOPERATION WITH OTHER AGENCIES]. (a) To encourage uniform interpretation and administration of this Act and effective securities regulation and enforcement, the [Administrator] shall cooperate with the securities agencies or administrators

1 of one or more states, Canadian provinces or territories, or another country, the Securities and
2 Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor
3 Protection Corporation, any self regulatory organization, any national or international
4 organization of securities officials or agencies, and any governmental law enforcement or
5 regulatory agency.

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

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

10 (2) developing common forms;

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

12 (4) holding a joint administrative hearing;

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

14 (6) sharing and exchanging personnel;

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

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

20 REPORTER'S COMMENT

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

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

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

REPORTER'S COMMENT

Source of Law: RUSA §711(b).

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

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

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. 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.

2. 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.

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

1 4. This Section is intended to be for the guidance of the Administrator and any reviewing
2 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**
19 **been filed, entered, or imposed under this Act, but are governed by prior law.**

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

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

REPORTER'S COMMENT

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

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

REPORTER'S COMMENT

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