UNOFFICAL TEXT
OF THE
MAINE UNIFORM SECURITIES ACT

With Official and Maine Comments

Maine Revised Statutes Annotated
Title 32, Chapter 135

As of March 20, 2007

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UNIFORM SECURITIES ACT (2002)

Prefatory Note of the National Conference of Commissioners on Uniform State Laws

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 and the Securities Litigation Uniform Standards Act of 1998.

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

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

The Act has been reorganized to follow in large part the National Conference of Commissioners on Uniform State Laws ("NCCUSL") Procedural and Drafting Manual 15-41 (1997).

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

Nonetheless several sections of this Act are identical or substantively identical to sections of the 1956 Act or RUSA. It is not intended that adoption of a new Uniform Securities Act will reject earlier case decisions interpreting identical or substantively identical sections of the 1956 Act or RUSA unless specifically so stated in the Official Comments.

The Act is solely a new Uniform Securities Act. It does not codify or append related regulations or guidelines. The Act also authorizes state administrators in Section 203 to adopt further exemptions without statutory amendment. The Drafting Committee did not address state tender offer or control share provisions in its preparation of this Act.

The Act includes subheadings within sections as an aid to readers. Unlike section captions, subheadings are not a part of the official text. Each jurisdiction in which this Act is introduced may consider whether to adopt the subheadings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings.

The Drafting Committee reviewed several drafts in meetings between 1998 and 2002. The drafts were made available on NCCUSL's public website before the meetings. The meetings were publicly noticed and open to all who wished to attend. The Committee had the assistance of advisors, consultants, and observers from several interested groups, including, among others, the American Bankers Association, the American Bar Association, the American Council of Life Insurers, the Certified Financial Planner Board of Standards, the Financial Planning Association, the Investment Company Institute, the Investment Counsel Association of America, the National Association of Securities Dealers, Inc., the New York Stock Exchange, the North American Securities Administrators Association, the Securities and Exchange Commission, and the Securities Industry Association. In addition, the Reporter and the Chair met on several occasions with committees or representatives of these and other groups.

In drafting the new Act, the Reporter and the Drafting Committee recognized two fundamental challenges. First, there was a general recognition among all involved of the desirability of drafting an Act that would receive broad support. The success of RUSA had been limited because of fundamental differences among relevant constituencies on several issues. After the National Securities Markets Improvement Act of 1996 preempted specified aspects of state securities law with respect to federal covered securities, the opportunity to draft an Act in a less contentious atmosphere was available. Given the number of industry, investor, and regulatory interests affected by the Act and the complexity of the Act itself, building consensus was the Act's most significant drafting challenge.

Second, there was the technical challenge of drafting a new Act that could achieve the basic goal of uniformity among states and with applicable federal

law against the backdrop of 46 years of experience with the 1956 Act. Over time both Uniform and non-Uniform Act states have, to varying degrees, evolved local solutions to a number of securities law issues. In an increasingly global securities market, the need for uniformity has become more important. Drafting language to achieve the greatest practicable uniformity, given differences in state practice, was a key aspiration of this Act. In a few instances, such as dollar amounts for fees, the Act defers to local practice. On a few other issues, bracketed language or the Official Comments articulate an alternative some states may choose to adopt rather than the language of the Act itself.

The Act is in seven Articles:

1. General Provisions
2. Exemptions from Registration of Securities
3. Registration of Securities and Notice Filing of Federal Covered Securities
4. Broker-Dealers, Agents, Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers
5. Fraud and Liabilities
6. Administration and Judicial Review
7. Transition

There are has three overarching themes of the Act.

First, Section 608 articulates in greater detail than the 1956 Act's Section 415 the objectives of uniformity, cooperation among relevant state and federal governments and self-regulatory organizations, investor protection and, to the extent practicable, capital formation. Section 608 is the reciprocal of the instruction on these subjects given by Congress in 1996 to the Securities and Exchange Commission in Section 19(c) of the Securities Act of 1933. The theme of uniformity and the aspiration of coordination of federal and state securities law is particularly stressed in the Act and Official Comments. Section 602(f), consistent with the Federal Securities Litigation Uniform Standard Act of 1998, is a new provision encouraging reciprocal state enforcement assistance.

A second overarching theme of the Act is achieving consistency with the National Securities Markets Improvement Act of 1996 ("NSMIA"). New definitions were added to define in Section 102(6), federal covered investment adviser, and in Section 102(7), federal covered security. NSMIA also had

implications for several securities registration exemptions (see Sections 201(3), 201(4), 201(6), 202(4), 202(6), 202(13), 202(14), 202(15) and 202(16)); securities registration (Sections 301(1) and 302); and the broker-dealer, agent, investment adviser, and investment adviser representative provisions (see especially Sections 402(b)(1) and (5), 403(b)(1)(A) and (2), 405 and 411).

A third theme of the Act involves facilitating electronic records, signatures, and filing. New definitions were added to address filing (Section 102(8)), record (Section 102(25)), and sign (Section 102(30)). Section 105 expressly permits the filing of electronic signatures and records. Collectively these provisions are intended to permit electronic filing in central information depositories such as the Web-CRD (Central Registration Depository), the Investment Adviser Registration Depository (IARD), the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or successor institutions. Electronic communication also has led to an amplification of the jurisdiction Section 610.

The new Act makes several other significant changes compared to the 1956 Act or RUSA.

(1) The definition of "security" in Section 102(28) has been modernized to take into account amendments to the counterpart federal provisions; add new language to expressly include uncertificated securities; exclude contributory or noncontributory ERISA plans; and amplify the definition of investment contract so that it can expressly reach interests in limited partnerships, limited liability companies, or viatical settlement agreements, among other contracts, when they satisfy the definition of investment contract.

The new Act does not expressly exclude from the definition of security variable insurance products, but does exempt variable insurance products from securities registration in Section 201(4). The states are divided on the question of whether variable insurance products should be excluded (and not subject to fraud enforcement) or exempted (and subject to fraud enforcement). For those states that wish to continue to provide or adopt an exclusion for variable insurance products from the definition of security, the brackets should be removed from the phrase "or variable." For those states that wish variable insurance products to be included in the definition of security, the bracketed phrase should be removed.

(2) Nineteen new definitions were added to define "bank" (Section 102(3)), "depository institution" (Section 102(5)), "federal covered investment

adviser" (Section 102(6)), "federal covered security" (Section 102(7)), "filing" (Section 102(8)), "institutional investor" (Section 102(11)), "insurance company" (Section 102(12)), "insured" (Section 102(13)), "international banking institution" (Section 102(14)), "investment adviser representative" (Section 102(16)), "offer to purchase" (Section 102(19)), "place of business" (Section 102(21)), "predecessor act" (Section 102(22)), "price amendment" (Section 102(23)), "principal place of business" (Section 102(24)), "record" (Section 102(25)), "Securities and Exchange Commission" (Section 102(27)), "self-regulatory organization" (Section 102(29)), and "sign" (Section 102(30)). The growth in definitions is suggestive of the increased complexity and detail of several revised provisions in the new Act.

(3) Specific exemptions from securities registration are broadened. Most significant is Section 202(13) which builds on a new definition of institutional investors that parallels Rule 501(a) of the Securities Act of 1933, but with $10 million rather than $5 million thresholds in Sections 102(11)(F) through (K), and (O), and addresses specified employee plans, trusts, Internal Revenue Code Section 501(c)(3) organizations, small business investment companies licensed by the United States Small Business Administration, private business development companies under Section 202(a)(22) of the Investment Advisers Act, and other institutional purchasers. The definition of institutional investor also reaches qualified institutional buyers under Rule 144A(a)(i) of the Securities Act of 1933, major U.S. institutional investors as defined in Rule 15a-6(b)(4)(i) of the Securities Exchange Act of 1934, and federal covered investment advisers acting for their own accounts. The new institutional investor transaction exemption in Section 202(13) will also reach other persons specified by rule or order of the administrator.

The limited offering transaction exemption in Section 202(14) was broadened to reach 25 persons, in addition to those exempted by the institutional investor exemption, on condition that the transaction is part of a single issue, and other specified conditions are satisfied.

If the SEC adopts a new definition of qualified purchaser, as it has proposed under Rule 146(c) of the Securities Act of 1933, there may ultimately be four preemptive or exemptive types of provision applicable to the new Act: (1) the SEC qualified purchaser provision; (2) Section 18(b)(4)(D) which provides preemptive treatment for Rule 506 offerings under the Securities Act of 1933; (3) specified investors in Section 202(13); and (4) limited offerings in Section 202(14).

The options exemption in Section 201(6) was broadened; the "manual" exemption in Section 202(2) has been modernized for an electronic age; a broadened exemption has been provided for specified foreign securities in Section 202(3); a new exemption has been added for nonissuer transactions in securities subject to Securities Exchange Act reporting in Section 202(4); a new exemption has been added for nonissuer transactions rated at the time of a transaction by a nationally recognized statistical rating organization in one of the four highest rating categories in Section 202(5)(A); and new exemptions were added for specified exchange transactions in Section 202(9), control transactions in Section 202(18), specified out-of-state offers or sales in Section 202(20), specified sales transactions in Section 202(22), and specified foreign issuers whose securities are traded on designated securities markets in Section 202(23).

The administrator may expressly authorize one of three regulatory plans for the offering of notes, bonds, debentures, or other evidences of indebtedness for nonprofit organizations under Section 201(7). New conditions have been added to the unit secured transaction exemption in Section 202(11) to address two substantial areas of state regulatory concern.

The emphasis in the securities registration exemptive area is on flexibility. Securities administrators are given broad powers both to exempt other securities, transactions, or offers in Section 203 and to deny, suspend, condition or limit specified exemptions in Section 204.

(4) Relatively modest changes were made to Article 3, which concerns registration of securities. A new notice filing provision was added in Section 302 for federal covered securities. A generic waiver and modification provision was added in Section 307. New procedural provisions for stop orders were added in Section 306(d) through (f).

Merit regulation was among the most divisive issues that confronted the RUSA Drafting Committee. After the National Securities Markets Improvement Act of 1996 preempted states from applying merit regulation provisions to federal covered securities, this became a less controversial issue. The approach in this Act retains two widely adopted merit regulation provisions in Section 306(a)(7)(A) and (B):

a. the offering will work or tend to work a fraud upon purchasers or would so operate; or

b. the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations or unreasonable amounts or kinds of options.

In addition, bracketed Section 306(a)(7)(C) includes the less widely adopted formulation, "the offering is being made on terms that are unfair, unjust, or inequitable." A new Section 306(b) provides: "To the extent practicable the administrator, by rule adopted or order issued under this [Act] shall publish standards that provide notice of conduct that violates subsection (a)(7)." NASAA Guidelines provide this type of published standard. This hortatory Section is intended to address one type of criticism of merit regulation.

(5) Article 4, which concerns broker-dealers, agents, investment advisers, investment adviser representatives, and federal covered investment advisers was substantially revised to take into account NSMIA and significant changes in administrative practice such as those occasioned by the electronic WEB-CRD and the IARD. New developments had an impact on the definitions of "agent" (Section 102(2)), "broker-dealer" (Section 102(4)), "investment adviser" (Section 102(15)), and "investment adviser representative" (Section 102(16)). NSMIA led also to the new federal covered investment adviser notice filing procedure in Section 405.

"[A] bank, savings institution or trust company" was excluded from the 1956 Act Section 401(c) definition of broker-dealer. After the Gramm-Leach-Bliley Act was adopted in 1999, the generic exclusion of banks from the definition of broker and dealer in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934 was rescinded in favor of functional regulation. At the federal level this means that banks, unless limiting their securities activities to a specific list of excluded activities, are required to register as broker-dealers. This Act generally follows the federal approach with exceptions for private securities offerings addressed by Section 3(a)(4)(B)(vii) of the Securities Exchange Act of 1934 and de minimis transactions in Section 3(a)(4)(B)(xi) which in the new Act are limited to unsolicited transactions. The administrator is given a residual power in Section 102(4)(E) to adopt further exclusions for banks, by rule or order. Securities issued by banks, other depository institutions, and international banking institutions are exempt from securities registration in Section 201(3). Banks, savings institutions, and other depository institutions, when not excluded from the definition of broker-dealer, will be required to register by Section 401 and generally, like all other broker-dealers,

be subject to the regulatory and liability provisions of the Act in Article 4 and 5.

(6) Article 5 on fraud and liabilities and the definition of fraud in Section 102(9) are substantively little changed. This includes the general fraud provision in Section 501, the filing of sales and advertising literature in Section 504, misleading filings in Section 505, and misrepresentations concerning registration or exemption in Section 506. Technical changes were made to the evidentiary burden Section 503 and the criminal penalties Section 508.

Section 502(a), fraud in providing investment advice, is unchanged. New rulemaking authority was added in Sections 502(b) and (c) to succeed earlier statutory provisions in Section 102 of the 1956 Act. This will give the administrator broad flexibility and recognizes that most state provisions regulating investment advisers in recent years have been adopted through rules.

Section 507 is a new qualified immunity provision to protect a broker-dealer or investment adviser from defamation claims based on information filed with the SEC, a state administrator, or self-regulatory organization "unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity." This Section, which is consistent with most litigated cases to date and is a response to concerns that defamation lawsuits have deterred broker-dealers and investment advisers from full and complete disclosure of problems with departing employees. The Drafting Committee was also sensitive to the concern that such immunity could allow broker-dealers and investment advisers to unfairly characterize employees to protect their "book" of clients. Because of this concern the Drafting Committee rejected proposals for an absolute immunity.

Section 510 is a new rescission offer provision that should be read with the definition of offer to purchase in Section 102(19) and the exemption for rescission offers in Section 202(19). Section 510 is consistent with administrative practice in many states today, although some states also have a filing requirement.

More thought was devoted to the civil liability Section 509 than any other provision. As ultimately drafted much in this Section is little changed from the 1956 Act. New subsections were added to recognize the preemptive Securities Litigation Act of 1998 (Section 509(a)) and civil liability for investment advice (Sections 509(e) and (f)).

Significant changes were made in the statute of limitations Section 509(j). Current state law provides a wide range of statutes of limitations. The 1956 Act contained a "two years after the contract of sale" statute of limitations. The new Act has two statute of limitations provisions. Section 509(j)(1) limits violations of registration provisions to "one year after the violation occurred." Section 509(j)(2) follows the pattern of federal securities law statutes of limitations, as amended in July 2002 by the Sarbanes-Oxley Act, and limits fraud violations to the earlier of "two years after the discovery of the facts constituting the violation or five years after such violation."

The derivative liability provision in Section 509(g) is not intended to change the predicates for liability for one who "materially aids" violative conduct.

(7) Several changes are made in Article 6, which concerns Administration and Judicial Review. Most are technical in nature. A new authorization for the administrator to develop and implement investor education initiatives has been added in Sections 601(d) and (e).

Considerable attention was devoted to enforcement of the Act. The 1956 Act Section 408 was a slender provision providing for injunctions. Sections 603 and 604, in contrast, provide a broad array of civil and administrative techniques including asset freezes, rescission orders, and civil penalties. Under Section 604 the administrator may issue a cease and desist order. Two other enforcement provisions in the Act are (1) stop orders in Sections 306(d) through (f), and (2) broker-dealer, agent, investment adviser, and investment adviser representative denials, revocations, suspensions, withdrawal, restrictions, conditions, or limitations of registration in Section 412. Each of the enforcement provisions in the Act includes both summary process and due process requirements either through judicial process or guarantees of appropriate notice, opportunity for hearing, and findings of facts and conclusions of law in a written record.

Section 607 is a new provision that clarifies the scope of nonpublic records and the administrator's discretion to disclose in light of the extensive development of freedom of information and open records laws since the 1956 Act was adopted.

The jurisdiction and service of process provisions, Sections 610 and 611, generally follow Section 414 of the 1956 Act, but have been modernized to take into account electronic communications.

(8) Section 103 preserves the ability of the Act to reflect later amendments of specified federal statutes and rules to the extent they are preemptive or this is otherwise permitted by state law.

All involved in the drafting of this new Act owe a particular debt of gratitude to Richard B. Smith who served as our chair. His efforts were pivotal to the initiation of this project. His indefatigable leadership and high standards immeasurably improved the final Act.

UNIFORM SECURITIES ACT

Legislative Note

Each state, the District of Columbia, Guam, and Puerto Rico have enacted an administrative procedure act. The procedural provisions of the Act in some instances are intended to augment the state administrative procedure act. In so doing, this Act differs from other uniform acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in that it contains procedural provisions on topics such as administrative rulemaking and adjudication, service of process, judicial review of administrative adjudications, public records, public hearings, and use immunity. Normally a uniform act promulgated by NCCUSL defers to existing state procedural provisions on such matters. This Act reflects a policy decision that these matters should be addressed in this Act to promote uniformity in securities regulation. When a conflict exists between this Act and a state administrative procedure act, this Act is intended to supersede the state administrative procedure act. When, however, a reference is made in this Act to the state administrative procedure act, this Act is intended to follow the state's existing administrative procedure act.

In general in this Act a rule will apply generally and an order will apply to a specific individual, transaction, or matter, although the term order may also apply generally in those states that permit orders of general applicability.

UNOFFICIAL TEXT

MAINE UNIFORM SECURITIES ACT
TITLE 32, CHAPTER 135
As of March 20, 2007

SUBCHAPTER 1

GENERAL PROVISIONS

§16101. Short title

This chapter may be known and cited as "the Maine Uniform Securities Act."

§16102. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Administrator. "Administrator" means the Securities Administrator under section 16601.

2. Agent. "Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer or director of a broker-dealer or issuer or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the meaning of the term "agent." "Agent" does not include an individual excluded by rule adopted or order issued under this chapter. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

3. Bank. "Bank" means:

A. A banking institution organized under the laws of the United States;

B. A member bank of the Federal Reserve System;

C. A banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of United States Public Law 87-722, 12 United States Code, Section 92a, and that is supervised and examined by a state or federal agency having supervision over banks and that is not operated for the purpose of evading this chapter; and

D. A receiver, conservator or other liquidating agent of any institution or firm described in paragraph A, B or C.

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

A. An agent;

B. An issuer;

C. A bank, credit union or savings institution if its activities as a broker-dealer are limited to those specified in Section 3(a)(4)(B)(i) to (vi) and (viii) to (x); Section 3(a)(5)(B); and Section 3(a)(5)(C) of the federal Securities Exchange Act of 1934, 15 United States Code, Sections 78c(a)(4) and (5);

D. An international banking institution; or

E. Any other person the administrator excludes, by rule or order, consistent with the public interest and protection of investors. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

5. Depository institution. "Depository institution" means:

A. A bank; or

B. A savings institution, trust company, credit union or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits and supervised and examined by an official or agency of a state or the United States if its

deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or a successor authorized by federal law.

"Depository institution" does not include an insurance company or other organization primarily engaged in the business of insurance; a Morris Plan bank; or an industrial loan company.

6. Federal covered investment adviser. "Federal covered investment adviser" means a person registered under the federal Investment Advisers Act of 1940.

7. Federal covered security. "Federal covered security" means a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b) or rules or regulations adopted pursuant to that provision.

8. Filing. "Filing" means the receipt under this chapter of a record by the administrator or a designee of the administrator.

9. Fraud; deceit; defraud. "Fraud," "deceit" and "defraud" are not limited to common law deceit.

10. Guaranteed. "Guaranteed" means guaranteed as to payment of all or substantially all of principal and interest or dividends.

11. Institutional investor. "Institutional investor" means any of the following, whether acting for itself or for others in a fiduciary capacity:

A. A depository institution or international banking institution;

B. An insurance company;

C. A separate account of an insurance company;

D. An investment company as defined in the federal Investment Company Act of 1940;

E. A broker-dealer registered under the federal Securities Exchange Act of 1934;

F. An employee pension, profit-sharing or benefit plan if the plan has total assets in excess of $10,000,000 or its investment decisions are made by a named fiduciary, as defined in the federal Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the federal Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the federal Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution or an insurance company;

G. A plan established and maintained by a state, a political subdivision of a state or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of $10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the federal Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the federal Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the federal Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution or an insurance company;

H. A trust, if it has total assets in excess of $10,000,000, its trustee is a depository institution and its participants are exclusively plans of the types identified in paragraph F or G, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

I. An organization described in Section 501(c)(3) of the Internal Revenue Code, 26 United States Code, Section 501(c)(3), a corporation, a Massachusetts trust or similar business trust, a limited liability company or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $10,000,000;

J. A small business investment company licensed by the United States Small Business Administration under Section 301(c) of the federal Small Business Investment Act of 1958, 15 United States Code, Section 681(c) with total assets in excess of $5,000,000;

K. A private business development company as defined in Section 202(a)(22) of the federal Investment Advisers Act of 1940, 15 United

States Code, Section 80b-2(a)(22) with total assets in excess of $5,000,000;

L. A federal covered investment adviser acting for its own account;

M. A qualified institutional buyer as defined in 17 Code of Federal Regulations, 230.144A(a)(1), except as defined in 17 Code of Federal Regulations 230.144A(a)(1)(i)(H);

N. A major U.S. institutional investor as defined in 17 Code of Federal Regulations, 240.15a-6(b)(4)(i);

O. Any other person, other than an individual, of institutional character with total assets in excess of $10,000,000 not organized for the specific purpose of evading this chapter; or

P. Any other person specified by rule adopted or order issued under this chapter. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

12. Insurance company. "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and that is subject to supervision by the Superintendent of Insurance or a similar official or agency of a state.

13. Insured. "Insured" means insured as to payment of all or substantially all principal and interest or dividends.

14. International banking institution. "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the federal Securities Act of 1933.

15. Investment adviser. "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a

business or that holds itself out as providing investment advice to others for compensation. "Investment adviser" does not include:

A. An investment adviser representative;

B. A lawyer, accountant, engineer or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

C. A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

D. A publisher of a bona fide newspaper, news magazine or business or financial publication of general and regular circulation;

E. A federal covered investment adviser;

F. A bank or savings institution;

G. Any other person that is excluded by the federal Investment Advisers Act of 1940 from the definition of investment adviser; or

H. Any other person excluded by rule adopted or order issued under this chapter. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

16. Investment adviser representatives. "Investment adviser representatives" means individuals employed by or associated with an investment adviser or federal covered investment adviser and who make any recommendations or otherwise give investment advice regarding securities, manage accounts or portfolios of clients, determine which recommendation or advice regarding securities should be given, provide investment advice or hold themselves out as providing investment advice, receive compensation to solicit, offer or negotiate for the sale of or for selling investment advice or supervise employees who perform any of the foregoing. "Investment adviser representatives" does not include individuals who:

A. Perform only clerical or ministerial acts;

B. Are agents whose performance of investment advice is solely incidental to the individuals acting as agents and who do not receive special compensation for investment advisory services;

C. Are employed by or associated with a federal covered investment adviser, unless the individuals have a "place of business" in this State as that term is defined by rule adopted under Section 203A of the federal Investment Advisers Act of 1940, 15 United States Code, Section 80b-3a, and are:

(1) "Investment adviser representatives" as that term is defined by rule adopted under Section 203A of the federal Investment Advisers Act of 1940, 15 United States Code, Section 80b-3a; or

(2) Not "supervised persons" as that term is defined in Section 202(a)(25) of the federal Investment Advisers Act of 1940, 15 United States Code, Section 80b-2(a)(25); or

D. Are excluded by rule adopted or order issued under this chapter. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

17. Issuer. "Issuer" means a person that issues or proposes to issue a security, subject to the following:

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

B. The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for ensuring payment of the certificate;

C. The issuer of a fractional undivided interest in an oil, gas or other mineral lease or in payments out of production under a lease, right or royalty is the owner of an interest in the lease or in payments out of

production under a lease, right or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale; or

D. The issuer of a fractional or pooled interest in a viatical or life settlement contract is the person who creates, for the purpose of sale, the fractional or pooled interest. The issuer of a viatical or life settlement contract that is not fractionalized or pooled is the person effecting the transaction with the investor in such a contract but does not include a broker-dealer or sales representative.

18. Nonissuer transaction; nonissuer distribution. "Nonissuer transaction" or "nonissuer distribution" means a transaction or distribution not directly or indirectly for the benefit of the issuer.

19. Offer to purchase. "Offer to purchase" includes an attempt or offer to obtain, or solicitation of an offer to sell, a security or interest in a security for value. "Offer to purchase" does not include a tender offer that is subject to Section 14(d) of the federal Securities Exchange Act of 1934, 15 United States Code, Section 78n(d).

20. Person. "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.

21. Place of business. "Place of business" of a broker-dealer, an investment adviser or a federal covered investment adviser means:

A. An office at which the broker-dealer, investment adviser or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with or otherwise communicates with customers or clients; or

B. Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser or federal covered investment adviser provides brokerage or investment advice or solicits, meets with or otherwise communicates with customers or clients.

22. Predecessor act. "Predecessor act" means the former Revised Maine Securities Act.

23. Price amendment. "Price amendment" means the amendment to a registration statement filed under the federal Securities Act of 1933 or, if an amendment is not filed, the prospectus or prospectus supplement filed under the federal Securities Act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices and other matters dependent upon the offering price.

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

25. Record. "Record," except in the phrases "of record," "official record" and "public record," means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

26. Sale; offer to sell. "Sale" includes every contract of sale of, contract to sell or disposition of a security or interest in a security for value. "Offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. "Sale" and "offer to sell" include:

A. A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

B. A gift of assessable stock involving an offer and sale; and

C. A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security.

27. Securities and Exchange Commission. "Securities and Exchange Commission" means the United States Securities and Exchange Commission.

28. Security. "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or

participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; investment in a viatical or life settlement contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas or other mineral rights; documents of title to or certificates of interest or participation in an oil, gas or other mineral title or lease or in payments out of production under any title, lease, right or royalty; put, call, straddle, option or privilege on a security, certificate of deposit or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of or warrant or right to subscribe to or purchase any of the foregoing. "Security":

A. Includes both a certificated and an uncertificated security;

B. Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period;

C. Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the federal Employee Retirement Income Security Act of 1974;

D. Includes as an investment contract an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. For purposes of this paragraph, "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a 3rd party or other investors; and

E. Includes as an investment contract, among other contracts, an interest in a limited partnership and a limited liability company.

29. Self-regulatory organization. "Self-regulatory organization" means a national securities exchange registered under the federal Securities Exchange Act of 1934, a national securities association of broker-dealers registered under the federal Securities Exchange Act of 1934, a clearing agency registered under the federal Securities Exchange Act of 1934 or the Municipal Securities

Rulemaking Board established under the federal Securities Exchange Act of 1934.

30. Sign. "Sign" means, with present intent to authenticate or adopt a record:

A. To execute or adopt a tangible symbol; or

B. To attach or logically associate with the record an electronic symbol, sound or process.

31. State. "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.

32. Viatical or life settlement contract. "Viatical or life settlement contract" means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of an insurance policy or certificate of insurance. "Viatical or life settlement contract":

A. Includes a contract for a loan or other financing transaction secured primarily by an individual or group life insurance policy other than a loan by a life insurance company pursuant to the terms of the life insurance contract or a loan secured by the cash value of a policy;

B. Includes an agreement to transfer ownership or change the beneficiary designation of an insurance policy at a later date regardless of the date that compensation for the transfer or change is paid; and

C. Does not include:

(1) The assignment, transfer, sale, devise or bequest of a death benefit, life insurance policy or certificate of insurance by the viator to the viatical settlement provider pursuant to the Viatical and Life Settlements Act;

(2) The assignment, transfer, sale, devise or bequest of a life insurance policy, for any value less than the expected death

benefit, by the viator to a friend or family member who enters into no more than one such agreement in a calendar year;

(3) An assignment of a life insurance policy to a supervised lender, as defined in Title 9-A, section 1-301, subsection 39, as collateral for a loan; or

(4) The exercise of accelerated benefits pursuant to the terms of the Maine Insurance Code and of a life insurance policy.

For purposes of this chapter, the individual insured who is the subject of the insurance policy or certificate of insurance does not have to be diagnosed as terminally ill or chronically ill at the time a settlement contract is executed.

Official Comments

Prior Provisions: 1956 Act Section 401; RUSA 101.

1. Under Section 605(a) the administrator has the power to define by rule any term, whether or not used in this Act, as long as the definitions are not inconsistent with the Act.

2. All definitions include corresponding meanings. For example, "filing" would include "file" or "filed"; "sale" would include "sell."

3. Prefatory Phrase: "In this [Act], unless the context otherwise requires": Prior Provisions: 1956 Act Section 401 Preface; RUSA Section 101 Preface. This prefatory phrase which is in the counterpart provisions of the federal securities statutes, see, e.g., Securities Act of 1933 Section 2(a), provides the basis for the courts to take into account the statutory and factual context of each definition, see, e.g., Reves v. Ernst & Young, 494 U.S. 56 (1990); 2 Louis Loss & Joel Seligman, Securities Regulation 927-929 (3d ed. rev. 1999), and will allow the courts to harmonize this Act's definitions with the counterpart federal securities definitions to the extent appropriate. Cf. Akin v. Q-L Inv., Inc., 959 F.2d 521, 532 (5th Cir. 1992) ("Texas courts generally look to decisions of the federal courts to interpret the Texas Securities Act because of obvious similarities between the state and federal laws"); Koch v Koch Indus., Inc. 203 F.3d 1202, 1235 (10th Cir. 2000) (following federal definition of materiality); Biales v. Young, 432 S.E.2d 482, 484 (S.C. 1993) ("Section 35-1-1490(2) is substantially similar to Section 12(1) of the Federal Securities Act").

4. Section 102(2): Agent: Prior Provisions: 1956 Act Section 401(b); RUSA Section 101(14). Section (102)(2), in part, follows the 1956 Act definition. The 1956 Act used the term "agent" while the RUSA Section 101(14) used the term "sales representative." Given the broader enactment of the 1956 Act, this Act also uses the term "agent." Certain exclusions from the 1956 Act are exemptions in this Act. See Section 402(b).

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

An individual can be an agent for a broker-dealer or issuer for a purpose other than effecting or attempting to effect purchases or sales of securities and not be a statutory agent under this Act. See, e.g., Baker, Watts & Co. v. Miles & Stockridge, 620 A.2d 356, 367 (Md. Ct. App. 1993) (attorney-client relationship is generally one of agency, but that alone does not bring an attorney within securities act definition of agent). An individual will not be an agent under Section 102(2) because of the person's status as a partner, officer, or director of a broker-dealer or issuer if such an individual does not effect or attempt to effect purchases or sales of securities. See, e.g., Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988).

Section 102(2) is intended to include any individual who acts as an agent, whether or not the individual is an employee or independent contractor. Cf. Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. en banc 1990), cert. denied, 499 U.S. 976 (1991).

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

An individual whose acts are solely clerical or ministerial would not be an agent under Section 102(2). Cf. Section 402(b)(8).Ministerial or clerical acts might include preparing written communications or responding to inquiries.

5. Section 102(3): Bank: Prior Provision: Subsection 3(a)(6) of the Securities Exchange Act of 1934. A United States branch of a foreign bank that otherwise satisfies this definition would be a bank.

6. Section 102(4): Broker-Dealer: Prior Provisions: 1956 Act Section 401(c); RUSA Section 101(2). This definition generally follows the definition of broker-dealer in the 1956 Act and RUSA. The use of the compound term is meant to include either a broker or a dealer. The recognized distinction is that a broker acts for the benefit of another while a dealer acts for itself in buying for or selling securities from its own inventory.

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

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

The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the blanket exemption of banks from the definition of broker and dealer in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934. The Gramm-Leach-Bliley Act permits a bank to avoid registration as a broker or dealer at the federal level if the bank limits its activities to those specified in the Securities Exchange Act. This Act generally adopts the activity focused exceptions for banks included in the Gramm-Leach-Bliley Act, with minor modifications relating to the private placement and de minimis brokerage activities of banks (15 U.S.C. 78c(a)(4)(B)(vii) and (xi)). This Act also reaches savings institutions.

A state may decide to adopt an exclusion in Section 102(4)(C) that fully conforms with the bank exceptions contained in the Gramm-Leach-Bliley Act. For states that choose this approach, the language of Section 102(4)(C) should read:

(C) a bank or savings institution if its activities as broker-dealer are limited to those specified in Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

Section 102(4)(E) of this Act also permits a securities administrator to adopt additional exclusions that exclude banks and other depository institutions, in whole or in part, from the definition of "broker-dealer."

States that promptly adopt this Act should consider whether it is appropriate to provide banks a transition period to comply with the Act's new activity focused exceptions. The activity focused exceptions for banks in the Gramm-Leach-Bliley Act were originally to become effective at the federal level on May 12, 2001. However, the Securities and Exchange Commission has delayed the effective date of these activity focused exceptions and thus continued the blanket exemption for banks beyond May 12, 2001, and commenced a rulemaking designed to clarify and define the scope of the bank exceptions in the Gramm-Leach-Bliley Act. See Sec. Ex. Act Rels. 44,291, 74 SEC Dock. 2155 (2001) (proposal); 45,897, 77 SEC Dock. 1555 (2002) (proposal). To avoid disrupting the activities of banks, states should consider delaying implementation of the activity focused exceptions in this Act until these exceptions are implemented at the federal level.

Section 15(h)(1) of the Securities Exchange Act of 1934, as amended by 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 in Article 4.

7. Section 102(5): Depository institution: No Prior Provision. A depository institution's securities are addressed by the exemption in Section 201(3). A depository institution is an institutional investor in Section 102(11)(A).

8. Section 102(6): Federal covered investment adviser: No Prior Provision. This provision is necessitated by Section 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 of 1940 Rule 203A-1. Most advisers with assets under management of $25 million or more register solely under Section 203 of the Investment Advisers Act of 1940 and not state law. This division of labor is intended to eliminate duplicative regulation of investment advisers.

9. Section 102(7): Federal covered security: No Prior Provision. The National Securities Markets Improvement Act of 1996, as subsequently amended, partially preempted state law in the securities offering and reporting areas. Under Section 18(a) of the 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 Section 15A of the Securities Exchange Act such as the National Association of Securities Dealers (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) of the Securities Act of 1933 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 Securities and Exchange Commission (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 SEC has 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, or Nasdaq National Market System;

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

(3) securities offered or sold to "qualified purchasers." This category of covered securities will become operational when the SEC defines the term "qualified purchaser" as used in Section 18(b)(3) of the Securities Act of 1933, by rule. To date the SEC has proposed, but not adopted, Rule 146(c) of the Securities Act of 1933; and

(4) securities issued under the following specified exemptions of the Securities Act of 1933:

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

(B) Section 4(4) (unsolicited brokerage transactions);

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

(D) securities issued in compliance with SEC rules under Section 4(2) (private placements).

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

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

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

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

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

"Receipt" refers to the actual delivery of a record to the administrator or a designee and does not refer to a subsequent examination of the record by the administrator. See, e.g., Fehrman v. Blunt, 825 S.W.2d 658 (Mo. Ct. App. 1992). If a deficient form was provided to a designee, but not provided to the administrator because of the deficiency, it would not be filed under this definition.

11. Section 102(9): Fraud, deceit and defraud: Prior Provisions: 1956 Act Section 401(d); RUSA Section 101(6). This definition, which is identical to the 1956 Act and RUSA, codifies the holdings that "fraud" as used in the federal and state securities statutes is not limited to common law deceit. See

generally 7 Louis Loss & Joel Seligman, Securities Regulation 3421-3448 (3d ed. 1991).

12. Section 102(10): Guaranteed: Prior Provisions: 1956 Act Section 401(e); RUSA Section 401(a)(1). The 1956 Act definition of "guaranteed" applies generally to payment of "principal, interest, or dividends." The RUSA definition of "guaranteed," which was solely applicable to exempt securities, applied to the guarantee of "all or substantially all of principal and interest or dividends."

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

This definition does not address whether or not a guarantee, whether whole or partial, is itself a security. That issue is addressed by the definition of "security" in Section 102(28).

13. Section 102(11): Institutional investor: Prior Provisions: RUSA Section 101(5); Securities Act of 1933 Rules 144A and 501(a).

Sections 102(11)(A) through (K) are based on Rule 501(a) of the Securities Act of 1933, but do not include the paragraphs of Rule 501(a) that address individuals. Given the significant period of time since Rule 501(a) was adopted, this Act has used a $10 million minimum for several categories of institutional investor rather than $5 million minimum used in Rule 501(a).

Section 102(11)(H) concludes with an except clause meant to exclude self-directed plans for individuals from this definition.

With respect to the exclusion of Rule 144A(a)(1)(H) from Section 102(11)(M), the substance of Rule 144A(a)(1)(H) appears in Section 102(11)(I), but with a requirement of total assets in excess of $10,000,000.

Section 102(11)(O) is meant to reach persons similar to those listed in Sections 102(11)(A) through (N), but not otherwise listed. Under Section 503, if challenged in a proceeding, the burden of proving the availability of an exemption is on the person claiming it. An interpretive opinion may be sought from the administrator under Section 605(d).

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

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

16. Section 102(14): International banking institution: No Prior Provision. Securities issued or guaranteed by the International Bank for Reconstruction and Development, 22 U.S.C. Section 286k-1(a); the Inter-American Development Bank, 22 U.S.C. Section 283h(a); the Asian Development Bank, 22 U.S.C. Section 285h(a); the African Development Bank, 22 U.S.C. Section 290i-9; and the International Finance Corporation, see 22 U.S.C. Section 282k; are treated as exempt securities under Section 3(a)(2) of the Securities Act of 1933, see generally 3 Louis Loss & Joel Seligman, Securities Regulation 1191-1194 (3d ed. rev. 1999), and are within this term.

17. Section 102(15): Investment adviser: Prior Provisions: 1956 Act Section 401(f); RUSA Section 101(7). This term generally follows the definition in Section 202(a)(11) of the Investment Advisers Act of 1940, but has been updated to take into account new media such as the Internet.

The first sentence in Section 102(15) is identical to the first sentence in the 1956 Act Section 401(f) and the counterpart language in Section 202(a)(11). The RUSA definition deleted the phrases "either directly or through publications or writings" and "regular" before business. These terms have been returned to Section 102(15) because of the intention that this definition be construed uniformly with the definition in Section 202(a)(11) of the Investment Advisers Act of 1940. This first sentence would not reach the author of a book who did not receive compensation as part of a regular business for providing investment advice.

The second sentence in the term addressing financial planners is new. The purpose of this sentence is to achieve functional regulation of financial planners who satisfy the definition of investment adviser. Cf. Investment Advisers Act Release 1092, 39 SEC Dock. 494 (1987) (similar approach in Securities and Exchange Commission interpretative Release). This reference is not intended to preclude persons who hold a formally recognized financial planning or consulting designation or certification from using this designation.

The use by a person of a title, designation or certification as a financial planner or

other similar title, designation, or certification alone does not require registration as an investment adviser.

Sections 102(15)(A) through (H) are exclusions from the term "investment adviser." An excluded person can be held liable for fraud in providing investment advice, see Section 502, but would not be subject to the registration and regulatory provisions in Article 4.

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

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

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

Similarly, other broker-dealer employees such as research analysts who receive no special compensation from third parties for investment advice would not be required to register as investment advisers.

The 1956 Act definition added the word "paid" in Section 401(f)(4) to the counterpart exclusion in Section 202(a)(11) of the Investment Advisers Act "to emphasize," as the Official Comment explained, "that a person who periodically distributes a 'tipster sheet' free as a way to get paying clients is not excluded from the definition as a 'publisher.'"

After the 1956 Act was published, the United States Supreme Court construed the definition of investment adviser in Lowe v. SEC, 472 U.S. 181 (1985), and concluded:

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

Id. at 185.

Responsive to this language RUSA rewrote this exclusion to provide:

> a publisher, employee, or columnist of a newspaper, news magazine, or business or financial publication, or an owner, operator, 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.

Recent experience at the federal and state levels suggest that the 1956 Act and RUSA approaches may be too broad. The retention of the Investment Advisers Act approach provides a better balance between First Amendment concerns and protection of investors from non-"bona fide" publicizing of investment advice. The exclusion in Section 102(15)(D) is intended to exclude publishers of Internet or electronic media, but only if the Internet or electronic media publication or website satisfies the "bona fide" and "publication of general and regular circulation" requirements. Cf. SEC v. Park, 99 F. Supp. 2d 889, 895-896 (N.D. Ill. 2000) (court declined to dismiss complaint against an

Internet website when there were allegations that the website was not "bona fide" or of "general and regular circulation").

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

18. Section 102(16): Investment adviser representative: No Prior Provision. Investment adviser representatives have not been required to register under the Investment Advisers Act, before or after the National Securities Markets Improvement Act.

The term investment adviser representative is not intended to preclude persons who hold a formally recognized financial planning or consulting title, designation, or certification from using such a designation. The use by a person of a title, designation or certification as a financial planner, or other similar title, designation, or certification alone does not require registration as an investment adviser representative.

19. Section 102(17): Issuer: Prior Provisions: 1956 Act Section 401(g); RUSA Section 101(8). This Section generally follows the 1956 Act and RUSA.

In paragraph (B), the phrase "or that is otherwise contractually responsible for assuring payment of the certificate" is intended to address forms of payment other than leases or conditional sales contracts. It would also reach guarantors.

20. Section 102(18): Nonissuer transaction or nonissuer distribution: Prior Provisions: 1956 Act Section 401(h); RUSA Section 101(9). This definition is relevant to several exempt transactions in Section 202.

In TechnoMedical Labs, Inc. v. Utah Sec. Div., 744 P.2d 320 (Utah Ct. App. 1987), the court declined to limit the term benefit to monetary benefits and instead held a spinoff transaction could provide direct or indirect benefits to an issuer. Id. at 323-324, following SEC v. Datronics Eng'r, 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). In a similar fashion, transactions by officers, directors, promoters, and other insiders of the issuer may benefit the issuer and may not qualify as nonissuer transactions.

21. Section 102(19): Offer to purchase: No Prior Provision: A rescission offer under Section 510 would be an offer to purchase with respect to a security that earlier had been sold.

22. Section 102(20): Person: Prior Provisions: 1956 Act Section 401(i); RUSA Section 101(10). This is the standard definition used by the National Conference of Commissioners for Uniform State Laws with the addition of "limited liability company" to reflect current usage. 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.

23. Section 102(21): Place of business: Prior Provision: Rules 203A-3(b) and 222-1 of the Investment Advisers Act of 1940.

24. Section 102(23): Price amendment: Prior Provision: RUSA Section 101(11). A price amendment may be used in a registration coordinated with the Securities and Exchange Commission procedure in Section 303(d). In the case of noncash offerings, required information concerning such matters as the offering price and underwriting arrangements is normally filed in a "price" amendment after the rest of the registration statement has been reviewed by the Securities and Exchange Commission staff. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 542-550 (3d ed. rev. 1998).

25. Section 102(24): Principal place of business: Prior Provision: Rule 222-1(b) of the Investment Advisers Act of 1940.

26. Section 102(25): Record: Prior Provision: Uniform Electronic Transactions Act Section 2(13). Cf. Section 3(a)(37) of the Securities Exchange Act of 1934. The Uniform Electronic Transactions Act §2(13) defines record in nearly identical terms. The Official Comment explains:

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

This term is intended to embrace new forms of records that are created or popularized in the future. A record would include, but not be limited to, a

registration statement, report, application, book, publication, account, paper, correspondence, memorandum, agreement, document, computer file, or disk, microfilm, photograph, or audio or visual tape.

27. Section 102(26): Sale: Prior Provisions: 1956 Act Section 401(j); RUSA Section 101(13). Both the 1956 Act and RUSA definition of "sale" are modeled on Section 2(a)(3) of the Securities Act of 1933.

Language in Section 401(j) of the 1956 Act addressed the now rescinded SEC "no sale" doctrine and has been eliminated. Merger transactions are usually sales under Section 102(26), but may be exempted from the securities registration requirements by Section 202(18).

28. Section 102(28): Security: Prior Provisions: 1956 Act Section 401(1); RUSA Section 101(16). Much of the definition in Section 102(28), like the definitions in the 1956 Act Section 401(l) and RUSA Section 101(16), is identical to the definition in Section 2(a)(1) of the Securities Act. State courts interpreting the Uniform Securities Act definition of security have often looked to interpretations of the federal definition of security. See generally 2 Louis Loss & Joel Seligman, Security Regulation 923-1138.19 (3d ed. rev. 1999).

The most recent amendments to Section 2(a)(1) of the Securities Act of 1933 were added by the Commodities Futures Modernization Act of 2000 which added or revised language in the Securities Act addressing security futures and securities puts, calls, straddles, options, or privileges. Identical language has been included in Section 102(28) of this Act to harmonize interpretation of the federal and state definition of a "security." With respect to a security futures product, Section 28(a) of the Securities Exchange Act of 1934, as amended by the Commodity Futures Modernization Act of 2000, further provides: "No provision of any State law regarding the offer, sale or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability."

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

Section 102(28) uses RUSA's "fractional undivided interest in oil, gas or other mineral rights" formulation, which originated in Section 2(a)(1) of the Securities Act of 1933, rather than the 1956 Act formulation, "certificate of

interest or participation in an oil, gas or mining title." In recent years, courts interpreting Section 2(a)(1) of the Securities Act of 1933 have found certain oil, gas or mineral rights to be investment contracts (that is, securities). 2 Louis Loss & Joel Seligman, Securities Regulation 979-982 (3d ed. rev. 1999).

A new sentence was added in Section 102(28)(A) referring to certificated or uncertificated securities to indicate that the term is intended to apply whether or not a security is evidenced by a writing. Section 102(28)(A) is intended to reject Thomas v. State of Tex., 65 S.W.3d 38 (Tex. Crim. App. 2001) (Under Texas law evidence of indebtedness requires a writing).

Insurance or endowment policies or endowment or annuity contracts, other than those on which an insurance company promises to make variable payments, are excluded from this term. Variable insurance products are also excluded in many states and are exempted from securities registration in others under provisions such as Section 201(4). When variable products are included in the definition of security and exempted from registration state securities administrators can bring enforcement actions concerning variable insurance sales practices.

The Drafting Committee recognized that the decision whether to exclude variable annuities from the definition of security will be made on a state-by-state basis. Those states which intend to exclude variable products from the definition of security should add the words "or variable" to Section 102(28)(B) so that it will read:

> (B) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

In the view of the American Council of Life Insurers:

> The brackets around the words "or variable" should be removed to follow the majority of jurisdictions. Thirty-seven jurisdictions [including Guam] currently exclude all insurance, endowment and annuity contracts from the definition of security. Removal of the brackets around the words "or variable," therefore, would incorporate the approach taken in the majority of jurisdictions. The removal of these brackets also prevents a statutory conflict with [up to] 48 jurisdictions that grant the insurance commissioner exclusive jurisdiction to regulate the issuance and sale of variable contracts. Moreover, this approach recognizes that the issuance and sale of variable contracts is

> comprehensively regulated by the Securities and Exchange Commission, the National Association of Securities Dealers, 50 state insurance departments, and in the case of group life and annuities, the Department of Labor. Like all other financial products, this approach imposes only one, rather than two, levels of regulation in each state and reflects the philosophy of financial services modernization.

In the view of the North American Securities Administrators Association variable products should be exempted from registration, not excluded from the definition of securities:

> One of the goals of this Act is to align state and federal law. The United States Supreme Court ruled that a variable annuity is a security in SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959). More recently, it has been confirmed that variable insurance products are "covered securities" as defined in the National Securities Markets Improvement Act of 1996 (NSMIA) and in the Securities Litigation Uniform Standards Act of 1998 (SLUSA), see Lander v. Hartford Life Annuity Ins., 251 F.3d 101 (2d Cir. 2001).
>
> When variable products are included in the definition of security and exempted from registration, state securities administrators can bring enforcement actions concerning variable insurance sales practices. This approach toward functional regulation is supported by the National Association of Securities Dealers as evidenced by a February 2001 letter from Mary Schapiro, President of Regulatory Policy & Oversight: "Based on our experience, we have found that variable products' sales-related problems parallel those of mutual funds and other securities . . . Because of the substantial similarities between variable contracts and other securities products, we believe it is incongruous for agents and sales practices involved in variable annuities not to be covered by state securities laws."
>
> State securities regulators support the functional regulation of agents because: 1) insurance companies are not affected since state securities regulators are preempted from requiring the registration of variable products; 2) the vast majority of broker-dealer subsidiaries of insurance companies are already registered to sell securities in most states; and 3) the vast majority of agents are already dually licensed to sell insurance and securities in most states.

Section 102(28)(C) includes the exclusion in RUSA from the 1956 definition of security for "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974."

The first clause in Section 102(28)(D) is derived from the leading case of SEC v. W.J. Howey Co., 328 U.S. 293 (1946), which has been widely followed by federal and state courts. The second clause in Section 102(28)(D) is based, in part, on the leading case of SEC v. Glenn W. Turner Enter., Inc., 474 F.2d 476, 482 n.7 (9th Cir. 1973), cert. denied, 419 U.S. 900 (1974).

The courts have divided over the interpretation of the "common enterprise" element of an investment contract. The courts generally recognize that "horizontal" commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a "vertical" relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(28)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter. See generally 2 Louis Loss & Joel Seligman, Securities Regulation 989-997 (3d ed. Rev. 1999).

In interpreting all elements of the investment contract, the courts have emphasized substance, not form. A conventional partnership involving two individuals who actively participate in its management and who each own 50 percent interest of its profits has consistently not been viewed as an investment contract because profits do not come from the efforts of others. On the other hand, investments in limited partnership interests which are traded on stock exchanges consistently have been held to be investment securities because profits do come substantially from the efforts of others. Indeed, interests in an entity called a general partnership may be a security when the general partnership functions like a limited partnership. See, e.g., Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981); see generally 2 Loss & Seligman, supra, at 1019-1033.

Section 102(28)(E) is consistent with state and federal securities laws which have recognized interests in limited liability companies and limited partnerships in some circumstances as "securities," see 2 Louis Loss & Joel Seligman, Securities Regulation 1028-1031 (3d ed. rev. 1999), when

consistent with the court decisions interpreting the investment contract concept. This Act also refers to an investment in a viatical settlement or a similar agreement to make unequivocally clear that viatical settlement and similar agreements, which otherwise satisfy the definition of an investment contract, are securities. This is intended to reject the holding of one court that a viatical contract could not be a security. See SEC v. Life Partners Inc., 87 F.3d 536 (D.C. Cir. 1996), reh'g denied, 102 F.3d 587 (D.C. Cir. 1996). A number of states have done so by statute.

Judicial construction of the term "investment contract" has been the most frequently litigated issue concerning the term "security." See Gabaldon, A Sense of Security: An Empirical Study, 25 J. Corp. L. 307 (2000), explaining that there had been 792 cases decided to that date in which the definition of a security played a prominent role. Id. at 308. Some 461 of the 792 cases (58 percent) concerned investment contracts. Id. at 322. A number of states, by statute, rule, or case law have also adopted the "risk capital" test to find a security when an investment is subject to the risks of an enterprise with the expectation of profit or other valuable benefit and the investor has no direct control over the management of the enterprise. See, e.g., 2 Loss & Seligman, supra, at 939-940 n.50.

29. Section 102(29): Self-regulatory organization: Prior Provision: RUSA Section 101(17). This definition was added by RUSA and is based on a counterpart provision in the American Law Institute Federal Securities Code. At the current time national securities exchanges are registered under Section 6 of the Securities Exchange Act of 1934; national securities associations under Section 15A; clearing agencies under Section 17A; and the Municipal Securities Rulemaking Board under Section 15B.

30. Section 102(30): Sign: No Prior Provision. This definition is intended to facilitate electronic signatures, to the extent permitted by Section 105.

31. Section 102(31): State: Prior Provisions: 1956 Act Section 401(m); RUSA Section 101(18). This is the standard definition used by the National Conference of Commissioners on Uniform State Laws. It does include territories and possessions of the United States, as well as the District of Columbia and Puerto Rico, but does not include foreign governments, their territories, or their possessions. In this Act "foreign" always refers to activity, a government, or person outside of the United States, not a different state within the United States.

Maine Comments

1. Section 16102(4)(B): The definition of "broker-dealer" in the Revised Maine Securities Act ("predecessor act") similarly excluded issuers, but explicitly stated that the exclusion does not apply to issuers "effecting transactions other than with respect to its own securities." Maine has not retained this explicit statement because it is clear that the issuer exclusion is not intended to apply to issuers that are effecting transactions other than with respect to their own securities.

2. Section 16102(11)(J-K): For these selected paragraphs, Maine has adopted a threshold of $5,000,000 (similar to the Revised Maine Securities Act) rather than the model Uniform Securities Act threshold of $10,000,000.

3. Section 16102(15)(B): This paragraph excludes from the definition of "investment adviser" certain professionals whose performance of investment advice is "solely incidental" to the practice of their profession. Consistent with the predecessor act, receiving additional compensation solely for investment advice negates this definitional exclusion, because specific compensation indicates that the advice was not incidental in nature.

4. Section 16102(17)(D): Maine has modified the model Uniform Securities Act by adding paragraph (D), "[t]he issuer of a fractional or pooled interest in a viatical or life settlement contract," within the definition of issuer, similar to the predecessor act.

5. Section 16102(28): Maine has modified the model Uniform Securities Act definition of security so as to place investments in a viatical and life settlement contract within the main body of the definition (as they appeared in the Revised Maine Securities Act) and not as examples of investment contracts. This modification is intended to ensure that the same standards will be applied in Maine when determining whether such investments fall within the definition. Further, Maine has added into the body of the definition certain oil and gas interests that were also included in the Revised Maine Securities Act as a type of security.

6. Section 16102(28)(B): Maine has elected to exclude variable annuities in the definition of a security, an option included in the model Uniform Securities Act. In evaluating this option, Maine determined that it would be appropriate to update the Maine Insurance Code to include rule-making

authority for the Superintendent of Insurance to adopt rules regarding the suitability of sales of variable annuities.

7. Section 16102(28)(D): The term "profits" should be interpreted in light of the United States Supreme Court's decision in SEC v. Edwards, 124 S. Ct. 892 (2004), which clarified the meaning of the investment contract definition first set forth in SEC v. Howey, 66 S. Ct. 1100 (1946). Referring to Howey, the Court stated: "[W]e were speaking of the profits that investors seek on their investment, not the profits of the scheme in which they invest. We used 'profits' in the sense of income or return, to include for example, dividends, other periodic payments, or the increased value of the investment. There is no reason to distinguish between promises of fixed returns and promises of variable returns for purposes of the test, so understood." Edwards, 124 S. Ct. at 897.

8. Section 16102(32): Maine reinstates a definition of "viatical or life settlement contract." Viatical settlement contracts were defined in the predecessor act; this new definition conforms to the nomenclature used in the Viatical and Life Settlements Act (the Maine Revised Statutes, Title 24-A, chapter 85).

§16103. References to federal statutes

Securities Act of 1933, 15 United States Code, Section 77a et seq., Securities Exchange Act of 1934, 15 United States Code, Section 78a et seq., Public Utility Holding Company Act of 1935, 15 United States Code, Section 79 et seq., Investment Company Act of 1940, 15 United States Code, Section 80a-1 et seq., Investment Advisers Act of 1940, 15 United States Code, Section 80b-1 et seq., Employee Retirement Income Security Act of 1974, 29 United States Code, Section 1001 et seq., National Housing Act, 12 United States Code, Section 1701 et seq., Commodity Exchange Act, 7 United States Code, Section 1 et seq., Internal Revenue Code, 26 United States Code, Section 1 et seq., Securities Investor Protection Act of 1970, 15 United States Code, Section 78aaa et seq., Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, Small Business Investment Act of 1958, 15 United States Code, Section 661 et seq. and Electronic Signatures in Global and National Commerce Act, 15 United States Code, Section 7001 et seq. mean those federal laws of those names, those statutes and the rules and regulations adopted under those laws and statutes, as amended, as of December 31, 2006.

Official Comments

Prior Provisions: 1956 Act Section 401(k); RUSA Section 101(15).

1. There are a large number of references to other laws in this Act, particularly to the federal securities laws identified in Section 103, and to rules adopted by the Securities and Exchange Commission under those laws. One of the main objectives of this Act is to take account of those provisions in the federal laws that are preemptive, and to coordinate with other, nonpreemptive provisions of the federal laws where coordination between federal and state securities law is in the public interest.

2. Section 12(d) of the Uniform Statute and Rule Construction Act, adopted by NCCUSL in 1995, provides: "A statute or rule that incorporates by reference a statute or rule of another jurisdiction does not incorporate a later enactment or adoption or amendment of the other statute or rule." Nevertheless, it is not uncommon for States to permit later amendments to statutes and rules referenced in enacted legislation to become automatically effective. In those states the final bracketed language in this Section should be included in the Act.

3. In those states which do not permit automatic effectiveness of later amendments and that follow Section 12(d) of the Uniform Statute and Rule Construction Act, this problem has been addressed by either giving the administrator the power to update by rule or the duty to notify the legislature when amendment is necessary. When the legislature notification approach is adopted, to prevent a gap period, the administrator might be given the power to act by rule until the legislature has acted.

4. After enactment, amendments to a preemptive federal statute, to rules adopted by a federal agency under a preemptive provision of a federal statute, or to amendments to such rules should be enforced in all states under the Supremacy Clause of the United States Constitution. A number of such references are in this Act.

Maine Comments

1. Maine courts have held that it is unconstitutional for the Legislature, when incorporating federal laws and standards into state legislation, to incorporate any future Congressional revisions or amendments to those federal

laws and standards. By citing the federal acts, and rules and regulations adopted under them, "as amended," the intent is to include the version of the act and those amendments existing at the time this Act is enacted. It is also the intent of the administrator to notify the Legislature when amendments are necessary to conform provisions of this Act to revised or amended provisions of relevant federal laws.

§16104. References to federal agencies

A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department.

Official Comment

No Prior Provision.

§16105. Electronic records and signatures

This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit or supersede Section 101(c) of that Act, 15 United States Code, Section 7001(c) or authorize electronic delivery of any of the notices described in Section 103(b) of that Act, 15 United States Code, Section 7003(b). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or order issued under this chapter, in a manner consistent with Section 104(a) of that Act, 15 United States Code, Section 7004(a). Rules adopted under this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comment

No Prior Provision. The purpose of this Section is to permit the filing of electronic signatures and electronic records.

SUBCHAPTER 2

EXEMPTIONS FROM REGISTRATION OF SECURITIES

Official Comments

Section 201 includes exempt securities and Section 202 includes exempt transactions. Both exempt securities and exempt transactions are exempt from the securities registration, notice filing requirement of Section 302, and the filing of sales literature Section 504 of this Act. Neither Section 201 nor Section 202 provides an exemption from the Act's antifraud provisions in Article 5, nor the broker-dealer, agent, investment adviser, or investment adviser registration requirements in Article 4.

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

A Section 202 transaction exemption must be established for each transaction.

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

Article 2 is not available to any security, transaction, or offer that, although in technical compliance with a specific section in Article 2, is part of an unlawful plan or scheme to evade the registration provisions of Article 3. In such cases registration is required. Cf. Prelim. Note 6 to Regulation D adopted under the Securities Act of 1933.

§16201. Exempt securities

The following securities are exempt from the requirements of sections 16301 to 16306 and section 16504:

1. United States Government, state and municipal securities. A security, including a revenue obligation or a separate security as defined in 17 Code of Federal Regulations, 230.131 adopted under the federal Securities Act of 1933, issued, insured or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency or instrumentality

of one or more states; by a political subdivision of one or more states; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by the Congress; or a certificate of deposit for any of the foregoing;

2. Foreign government securities. A security issued, insured or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer or guarantor;

3. Depository institution and international banking institution securities. A security issued by and representing or that will represent an interest in or a direct obligation of or be guaranteed by:

A. An international banking institution;

B. A banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution, a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or a successor authorized by federal law or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of Currency pursuant to Section 1 of United States Public Law 87-722, 12 United States Code, Section 92a or a holding company of such a depository institution; or

C. Any other depository institution, unless by rule or order the administrator proceeds under section 16204;

4. Insurance company securities. A security issued by and representing an interest in, or a debt of, or insured or guaranteed by an insurance company authorized to do business in this State;

5. Common carriers and public utility securities. A security issued or guaranteed by a railroad, other common carrier, public utility or public utility holding company that is:

A. Regulated in respect to its rates and charges by the United States or a state;

B. Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada or a Canadian province or territory; or

C. A public utility holding company registered under the federal Public Utility Holding Company Act of 1935 or a subsidiary of such a registered holding company within the meaning of that Act;

6. Federal covered securities. A federal covered security specified in Section 18(b)(1) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(1) or by rule adopted under that provision or a security listed or approved for listing on another securities market specified by rule under this chapter; a put or a call option contract, a warrant or a subscription right on or with respect to such a federal covered security; or an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the federal Securities Exchange Act of 1934 and listed or designated for trading on a national securities exchange, a facility of a national securities exchange or a facility of a national securities association registered under the federal Securities Exchange Act of 1934 or an offer or sale of the underlying security in connection with the offer, sale or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the Securities and Exchange Commission under Section 9(b) of the federal Securities Exchange Act of 1934, 15 United States Code, Section 78i(b);

7. Nonprofit organization securities. A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic or reformatory purposes, or as a chamber of commerce, and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person, or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the federal Investment Company Act of 1940, 15 United States Code, Section 80a-3(c)(10)(B); except that with respect to the offer or sale of a note, bond, debenture or other evidence of indebtedness issued by such a person a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons and transactions and imposing different requirements for different classes;

8. Cooperatives. A member's or owner's interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest,

retention certificate or like security sold to persons other than bona fide members of the cooperative; and

9. Equipment trust certificates. An equipment trust certificate with respect to equipment leased or conditionally sold to a person, if any security issued by the person would be exempt under this section or would be a federal covered security under Section 18(b)(1) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(1).

Rules adopted under this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 402(a); RUSA Section 401(b).

1. Section 201(1): United States government and municipal securities: Prior Provisions: 1956 Act Section 402(a)(1); RUSA Section 401(b)(1). This exemption generally follows the 1956 Act except that it adds securities "insured" by a specified government to those "issued" or "guaranteed." RUSA, in contrast, also addressed foreign governments, which in this Act are treated separately in Section 201(2). Rule 131 issued under the Securities Act of 1933 defines separate securities issued under governmental obligations.

A significant minority of states have excluded from the Section 201(1) exemption industrial revenue bonds. Interest on these securities is solely repayable from revenues received from a nongovernmental industrial or commercial enterprise. Typically this exclusion will not operate if (A) the payments are made or unconditionally guaranteed by a person whose securities are exempt from registration under Section 18(b)(1) of the Securities Act of 1933, or (B) in accordance with a rule under this [Act], the issuer first files a notice in a record specifying the terms of the proposed offer or sale and a copy of the offering statement and the administrator does not disallow the exemption within the time period established by the rule.

2. Section 201(2): Foreign government securities: Prior Provisions: 1956 Act Section 402(a)(2); RUSA Section 401(b)(2). The 1956 Act, as amended, and RUSA both reached foreign governments as specified in Section 201(2) and separately treated "a security issued, insured, or guaranteed by Canada, a Canadian province or territory, a political subdivision of Canada or a Canadian province or territory, an agency or corporate or other instrumentality of one or

more of the foregoing." The separate treatment of Canadian securities is largely redundant and has been eliminated from this Section.

3. Section 201(3): Depository institution and international banking institution securities: Prior Provision: RUSA 401(b)(3). Section 402(a)(3) of the 1956 Act exempts specified bank and similar depository institutions; Section 402(a)(4) exempts specified savings and loan and similar thrift institution securities; and Section 402(a)(6) exempts specified credit union securities. RUSA Section 401(b)(3) combines the three types of depository institutions into a common definition (see RUSA Section 101(13)) which are adopted in this Act as Sections 102(3) and 102(5)) and a common exemption (see RUSA Section 401(b)(3)) which is adopted in this subsection.

Banks specified in Section 3(a)(2) of the Securities Act of 1933 issue federal covered securities under Section 18(b)(4)(C) of the Securities Act of 1933. Section 201(3)(C) applies to securities issued by depository institutions without depository insurance. Under Section 204, the administrator will have the ability to revoke or limit this exemption.

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

Under this Act insurance, endowment policies, or annuity contracts under which an insurance company promises to pay fixed sums are excluded from the definition of a security in Section 102(28)(B).

Unless brackets are removed from the words "or variable" in Section 102(28)(B), a variable annuity or other variable insurance product would be considered a security under this Act and under federal securities law. See SEC v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967).

A variable annuity or other variable insurance product issued by an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 would be a "federal covered security," see Section 102(7). See Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101 (2d Cir. 2001).

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

5. Section 201(5): Common carrier and public utility securities: Prior Provisions: 1956 Act Section 401(a)(7); RUSA Section 401(b)(5). Both the 1956 Act and RUSA include references, omitted here, to the Interstate Commerce Commission, whose enabling legislation subsequently was repealed. Public utility holding companies covered by this exemption are subject both to the Public Utility Holding Company Act and to state or Canadian utility regulation.

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

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

In 1996 Congress enacted the National Securities Markets Improvement Act and provided in Section 18(b)(1) that securities listed on the New York, American or Nasdaq Stock Exchange, or designated by rule of the Securities and Exchange Commission, as well as any security of the same issuer that is equal in seniority or senior to any of these securities will be a federal covered security. Under Rule 146 the SEC has designated as federal covered securities under Section 18(b)(1) Tier I of the Pacific Exchange; Tier I of the Philadelphia Stock Exchange; and The Chicago Board Options Exchange on condition that the relevant listing standards continue to be substantially similar to those of the New York, American, or Nasdaq stock markets. See Reporter's Note to Section 102(7). A federal covered security subject to Section 18(b)(1) of the Securities Act of 1933 will not be subject to the securities registration requirements of Sections 301 and 303 through 306.

The exemption in Section 201(6) addresses specified options, warrants, and rights that are not federal covered securities under Section 18(b)(1) of the

Securities Act of 1933, but generally would have been exempted under RUSA. The 1956 Act, which was narrower, was drafted before the computerized Nasdaq stock market began trading the National Market List and the development of standardized options markets.

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

The Securities and Exchange Commission has adopted Rule 9b-1 under Section 9(b).

7. Section 201(7): Nonprofit organization securities: Prior Provision: Section 3(a)(4) of the Securities Act of 1933. Section 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA exempt specified nonprofit securities. Both are modeled on Section 3(a)(4) of the Securities Act, which was subsequently amended.

Securities issued under Section 3(a)(4) of the Securities Act of 1933 are not treated as federal covered securities in Section 18(b)(4)(C), although a separate Section 3(a)(13) exemption which addresses certain church plan securities are federal covered securities under Section 18(b)(4)(C).

RUSA included an optional notice and review requirement for nonprofit securities in Section 401(b)(10) "if at least ten days before a sale of the security the person has filed with the administrator a notice setting forth the material terms of the proposed sale and copies of any sales and advertising

literature to be used and the administrator by order does not disallow the exemption within the next five full business days."

The nonprofit exemption is of particular concern to state securities administrators. See, e.g., State Regulators Announce Dramatic Rise in Religious Scams; Tens of Thousands Lured, 33 Sec. Reg. & L. Rep. (BNA) 1189 (2001).

Under Section 6 of the Philanthropy Protection Act, Congress preempted application of the registration provisions of state securities laws to issuance of securities covered by Section 3(c)(10) of the Investment Company Act of 1940 unless states acted within three years of enactment (December 1998) to pass special state legislation cancelling federal preemption. Ten states enacted such legislation. Those states may preserve this treatment of Section 3(c)(10) securities by deleting from Section 201(7) the phrase "or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940."

Section 201(7) provides statutory authority for the states to adopt rules with respect to notes, bonds, debentures and other evidences of indebtedness issued by nonprofit organizations. Each state may adopt different rules tailored for various types of nonprofit debt offerings, (e.g., local church bond offerings, national church bond offerings, church extension funds, charitable gift annuities). For states that do not wish to provide an automatic exemption from registration for a particular type of nonprofit debt instrument or offering, Section 201(7) creates three categories of regulatory review that may be required by rule: (a) exemption by notice filing, (b) exemption by state authorization, and (c) registration by qualification. These categories are consistent with the manner in which many states currently review different types of nonprofit debt securities. See Horner & Makens, Securities Regulation of Religious and Other Nonprofit Organizations, 27 Stetson L. Rev. 473 (1997).

8. Section 201(8): Cooperatives: Prior Provision: RUSA Section 401(b)(13). Section 201(8) is derived from RUSA Section 401(b)(13) which was included in that act after a number of states had adopted exemptions for securities issued by cooperatives. Section 201(8) is not intended to be available if securities are offered or sold to the public generally.

The 1956 Act Section 402(a)(12) had instead provided: "insert any desired exemption for cooperatives." The Reporter for the 1956 Act had found such sharp variation among the 18 states that then had adopted a cooperative

exemption that "no common pattern can be found." Louis Loss, Commentary on the Uniform Securities Act 118 (1976).

9. Section 201(9): Equipment trust certificates: Prior Provision: RUSA Section 401(b)(6). The Securities Act of 1933 Section 3(a)(6) includes a narrower exemption for railroad equipment trusts. Section 201(9) follows RUSA. The Official Comment to RUSA Section 401(b)(6) explained:

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

Maine Comments

1. Section 16201(3)(B): Bank holding company language was added to this paragraph, consistent with the predecessor act.

2. Section 16201(7): As noted in Official Comment 7, this subsection is modeled on a similar federal provision that exempts nonprofit securities. Like the federal provision, this subsection refers to persons organized and operated "not for pecuniary profit." Although the corresponding provision in the Revised Maine Securities Act instead used the term "private" profit, it is not intended that this difference will alter which persons are covered under this subsection.

§16202. Exempt transactions

The following transactions are exempt from the requirements of sections 16301 to 16306 and 16504:

1. Isolated nonissuer transaction. An isolated nonissuer transaction, whether effected by or through a broker-dealer or not;

2. Manual exemption. A nonissuer transaction by or through a broker-dealer licensed under or exempt from licensing under this chapter and a resale transaction by a sponsor of a unit investment trust registered under the federal 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, if, on the date of the transaction:

A. The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership and the issuer is not a blank check, blind pool or shell company that has no specific business plan or purpose or that has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

B. The security is sold at a price reasonably related to its current market price;

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

D. A nationally recognized securities manual or its electronic equivalent designated by routine technical rule as defined in Title 5, chapter 375, subchapter 2-A adopted under this chapter or order issued under this chapter or a publicly available record filed with the Securities and Exchange Commission contains:

(1) A description of the business and operations of the issuer;

(2) The names of the issuer's executive officers and the names of the issuer's directors, if any;

(3) An audited balance sheet of the issuer as of a date within 18 months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and

(4) An audited income statement for each of the issuer's 2 immediately previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had audited income statements, a pro forma income statement; and

E. Any one of the following requirements is met:

(1) The issuer of the security has a class of equity securities listed on a national securities exchange registered under Section 6 of the federal Securities Exchange Act of 1934 or designated for trading on the National Association of Securities Dealers Automated Quotation System;

(2) The issuer of the security is a unit investment trust registered under the federal Investment Company Act of 1940;

(3) The issuer of the security, including its predecessors, has been engaged in continuous business for at least 3 years; or

(4) 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 before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had such an audited balance sheet, a pro forma balance sheet for the combined organization;

3. Nonissuer transactions in specified foreign transactions. A nonissuer transaction by or through a broker-dealer licensed under or exempt from licensing under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the Board of Governors of the Federal Reserve System;

4. Nonissuer transactions in securities where guarantor is subject to Securities Exchange Act reporting. A nonissuer transaction by or through a broker-dealer licensed under or exempt from licensing under this chapter in an outstanding security if the guarantor of the security files reports with the Securities and Exchange Commission under the reporting requirements of Section 13 or 15(d) of the federal Securities Exchange Act of 1934, 15 United States Code, Section 78m or 78o(d);

5. Nonissuer transactions in specified fixed income securities. A nonissuer transaction by or through a broker-dealer licensed under or exempt from licensing under this chapter in a security that:

A. Is rated at the time of the transaction by a nationally recognized statistical rating organization in one of its 4 highest rating categories; or

B. Has a fixed maturity or a fixed interest or dividend if:

(1) A default has not occurred during the current fiscal year or within the 3 previous fiscal years or during the existence of the issuer and any predecessor if less than 3 fiscal years in the payment of principal, interest or dividends on the security; and

(2) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership and is not and has not been within the previous 12 months a blank check, blind pool or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

6. Unsolicited brokerage transactions. A nonissuer transaction by or through a broker-dealer licensed under or exempt from licensing under this chapter effecting an unsolicited order or offer to purchase;

7. Nonissuer transactions by pledgees. A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;

8. Nonissuer transactions with federal covered investment advisers. A nonissuer transaction by a federal covered investment adviser with investments under management in excess of $100,000,000 acting in the exercise of discretionary authority in a signed record for the account of others;

9. Specified exchange transactions. A transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one or more bona fide outstanding securities, claims or property interests or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the administrator after a hearing. The administrator may impose actual costs and a reasonable fee for conducting a hearing under this subsection;

10. Underwriter transactions. A transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

11. Mortgage secured unit transactions. A transaction in a note, bond, debenture or other evidence of indebtedness secured by a mortgage or other security agreement if:

A. The note, bond, debenture or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;

B. A general solicitation or general advertisement of the transaction is not made;

C. A commission or other remuneration is not paid or given, directly or indirectly, to a person not licensed under this chapter as a broker-dealer or as an agent; and

D. The outstanding principal amount of all notes or other evidence of indebtedness that is secured by the mortgage or other security agreement does not exceed the fair market value of the property at the time of the transaction, or the issuer otherwise proves that it relied on reasonable evidence that the fair market value was not so exceeded at the time of the transaction;

12. Personal representative, guardian transactions. A transaction by a personal representative, as defined in Title 18-A, section 1-201, subsection 30, executor, administrator of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator acting in their official capacities;

13. Transactions with specified investors. A sale or offer to sell to:

A. An institutional investor;

B. A federal covered investment adviser; or

C. Any other person exempted by routine technical rule, as defined in Title 5, chapter 375, subchapter 2-A, adopted or order issued under this chapter;

14. Limited private offering transactions, any issuer. A sale or an offer to sell securities by or on behalf of an issuer, if the transaction is part of a single issue in which:

A. Not more than 10 purchasers are present in this State during any 12 consecutive months, other than those designated in subsection 13;

B. A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

C. A commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer licensed under this chapter or an agent licensed under this chapter for soliciting a prospective purchaser in this State; and

D. The issuer reasonably believes that all the purchasers in this State, other than those designated in subsection 13, are purchasing for investment;

15. Limited private offering transactions, Maine issuer. A sale or an offer to sell securities of a corporation, limited partnership or limited liability company organized under the laws of this State or any issuer determined by the administrator by order to have its principal place of business in this State, if the sale or offer is by or on behalf of the issuer and if the transaction is part of a single issue in which:

A. Not more than 25 purchasers are present in this State during any 12 consecutive months, other than those designated in subsection 13;

B. A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

C. A commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer licensed under this chapter or an agent licensed under this chapter for soliciting a prospective purchaser in this State;

D. The issuer reasonably believes that all the purchasers in this State, other than those designated in subsection 13, are purchasing for investment;

E. The issuer files with the administrator a notification for exemption that must be in such form as may be prescribed by the administrator by order or by routine technical rule, as defined in Title 5, chapter 375, subchapter 2-A; and

F. The issuer provides a copy of the notification of exemption to each offeree of securities sold in reliance on this exemption, which must contain such legends as the administrator prescribes, notifying the

offeree that the securities have not been registered with the administrator, that they may be considered restricted securities and that the issuer is under an obligation to make a reasonable finding that the securities are a suitable investment for the offeree;

16. Transactions with existing securities holders. A transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this State;

17. Offerings filed but not effective, nonexempt securities. An offer to sell, but not a sale, of a security not exempt from registration under the federal Securities Act of 1933 if:

A. A registration or offering statement or similar record as required under the federal Securities Act of 1933 has been filed, but is not effective, or the offer is made in compliance with 17 Code of Federal Regulations, 230.165; and

B. A stop order of which the offeror is aware has not been issued against the offeror by the administrator or the Securities and Exchange Commission and an audit, inspection or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

18. Offerings filed but not effective, exempt securities. An offer to sell, but not a sale, of a security exempt from registration under the federal Securities Act of 1933 if:

A. A registration statement has been filed under this chapter, but is not effective;

B. A solicitation of interest is provided in a record to offerees in compliance with a routine technical rule, as defined in Title 5, chapter 375, subchapter 2-A, adopted by the administrator under this chapter; and

C. A stop order of which the offeror is aware has not been issued against the offeror by the administrator or the Securities and Exchange

Commission and an audit, inspection or proceeding that may culminate in a stop order is not known by the offeror to be pending;

19. Control transactions. A transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets or other reorganization to which the issuer, or its parent or subsidiary, and the other person, or its parent or subsidiary, are parties;

20. Rescission offers. A rescission offer, sale or purchase under section 16510;

21. Not violative of laws of foreign state or jurisdiction. An offer or sale of a security to a person not a resident of this State and not present in this State if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter.

22. Employee benefit plans. An employees' stock purchase, savings, option, profit-sharing, pension or similar employees' benefit plan, including any securities, plan interests and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

A. Directors; general partners; trustees, if the issuer is a business trust; officers; and consultants and advisors, as permitted by 17 Code of Federal Regulations, 230.701(c)(1) (2003);

B. Family members who acquire such securities from those persons through gifts or domestic relations orders;

C. Former employees, directors, general partners, trustees, officers and consultants and advisors, as permitted by 17 Code of Federal Regulations, 230.701(c)(1) (2003), if those individuals were employed by or providing services to the issuer when the securities were offered; and

D. Insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than 50% of their annual income from those organizations;

23. Specified dividends, tender offers, judicially recognized reorganizations. A transaction involving:

A. A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property or stock;

B. An act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash; or

C. The solicitation of tenders of securities by an offeror in a tender offer in compliance with 17 Code of Federal Regulations, 230.162;

24. Nonissuer transactions in specified foreign issuers securities. A nonissuer transaction in an outstanding security by or through a broker-dealer licensed under or exempt from licensing under this chapter, if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this chapter; the issuer has been subject to continuous reporting requirements in the foreign jurisdiction for not less than 180 days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by routine technical rule, as defined in Title 5, chapter 375, subchapter 2-A, adopted or order issued under this chapter, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and the Toronto Stock Exchange, Inc. is a designated securities exchange. After an administrative hearing in compliance with the Maine Administrative Procedure Act, the administrator, by order issued under this chapter, may revoke the designation of a securities exchange under this paragraph if the administrator finds that revocation is necessary or appropriate in the public interest and for the protection of investors;

25. Investments in viatical or life settlement contracts. Any offer or sale of an investment in a viatical or life settlement contract, if:

A. The underlying viatical or life settlement transaction with the viator was not in violation of the Viatical and Life Settlements Act;

B. Such disclosure documents as the administrator, by rule or order, requires are delivered to each offeree or purchaser; and

C. Prior to any offer in this State, a notice specifying the terms of the offer is filed with the administrator together with a consent to service of process complying with section 16611, signed by the issuer, and a nonrefundable filing fee of $300 for each type or class of security being offered in this State and the administrator does not by order disallow the exemption within the next 5 full business days; or

26. Nonpublic offerings under 4(2). A security offered in a nonpublic offering under Section 4(2) of the federal Securities Act of 1933, 15 United States Code, Section 77d(2) if, no later than 15 days after the first sale in this State, a notice on "Form D," including the Appendix, as promulgated by the Securities and Exchange Commission, is filed with the administrator together with a consent to service of process complying with section 16611, signed by the issuer, and a nonrefundable filing fee of $300 for each type or class of security sold. An additional nonrefundable late filing fee of $500 must be paid for a filing made between 16 and 30 days after the first sale in this State.

Official Comments

Prior Provisions: 1956 Act Section 402(b); RUSA Section 402.

1. Sections 202(1) through (8) are available only for nonissuer transactions. An issuer selling securities in an initial public offering or other offering may not rely on Sections 202(1) through (8). A nonissuer, however, can rely on any issuer transaction exemption such as Section 202(13), when the exemption would be applicable to a nonissuer. The term "nonissuer transaction or nonissuer distribution" is defined in Section 102(18); the term "issuer" is defined in Section 102(17).

2. Section 202(1): Isolated nonissuer transactions: Prior Provisions: 1956 Act Section 402(b)(1); RUSA Section 402(1). The term "isolated transaction" is not defined in this Act, but left to the states to develop. Historically under state law there has been somewhat varied case law development of the term

"isolated transactions." See, e.g., Blinder, Robinson & Co., Inc. v. Goettsch, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer transaction exemption is not unconstitutionally vague); Allen v. Schauf, 449 P.2d 1010 (Kan. 1969) (regulation defined isolated transactions to not exceed four persons solicited in a 12 month period); Nelson v. State, 355 P.2d 413, 420 (Okla. Ct. Crim. App. 1960) ("[a]n isolated sale means one standing alone, disconnected from any other"); see generally 1 Louis Loss & Joel Seligman, Securities Regulation 125-130 (3d ed. rev. 1998).

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

Limited issuer offering transactions are separately addressed in Section 202(14).

3. Section 202(2): Nonissuer transactions in specified outstanding securities: Prior Provisions: 1956 Act Section 402(b)(2); RUSA Sections 402(3) and (4). This Section represents a modernization of the securities manual exemption which was included in both the 1956 Act and RUSA. NASAA recommended an amendment to the 1956 Act Section 402(b) after discussion with the Securities Industry Association and others in the securities industry. This Section generally follows the NASAA amendment.

Rule 419 issued under the Securities Act of 1933 defines a "blank check company" to be a company that "is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person." A "blind pool" is similar and would involve an investment in a blank check or other entity with no identified business plan or purpose. A "shell company" is also similar and would involve an entity which, to date, has no significant business assets, plan, or purpose.

4. Section 202(3): Nonissuer transactions in specified foreign transactions: No Prior Provision. The NASAA recommendation that was the basis of Section 202(2) also included specified foreign nonissuer transactions subject to a manual exemption when there was disclosure of the issuer's officers and directors in the issuer's country of domicile. This subsection uses margin securities as an alternative approach to identify sufficiently seasoned foreign

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

5. Section 202(4): Nonissuer transactions in securities subject to Securities Exchange Act reporting: Prior Provision: RUSA Section 402(2). RUSA added this exemption to authorize nonissuer secondary trading in the securities of issuers that were subject to the periodic reporting requirements of the Securities Exchange Act of 1934. To bar immediate secondary trading in nonregistered initial public offerings, there was a further requirement that these securities be subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 for not less than 90 days. Section 202(4) only covers the guarantor because if the issuer of the security is a reporting company under Sections 13 or 15(d) of the Securities Exchange Act of 1934, the transaction is preempted by Section 18(b)(4)(A) of the Securities Act of 1933.

Section 18(b)(4)(A) of the National Securities Markets Improvement Act of 1996 defines nonissuer transactions under Section 4(1) of the Securities Act of 1933 ("transactions by persons other than an issuer, underwriter, or dealer") as "federal covered securities," see Section 102(7), if the issuer files reports with the Securities and Exchange Commission under Sections 13 or 15(d) of the Securities Exchange Act of 1934. Under Section 18(a) of the Securities Act of 1933 no state statute, rule, order, or other administrative action with respect to registration of securities or reporting requirements may apply to a federal covered security. To harmonize Section 202(4) with Sections 18(a) and 18(b)(4)(A) of the Securities Act of 1933, the 90 day reporting period in RUSA Section 402(2) is not adopted in this Act.

6. Section 202(5): Nonissuer transactions in specified fixed income securities: Prior Provisions: 1956 Act Section 402(b)(2)(B); RUSA Section 402(4). The concept of a fixed income security rated by a nationally recognized statistical rating organization in one of its four highest rating categories described in Section 202(5)(A) is well established in federal securities law in Form S-3 adopted under the Securities Act of 1933 and the net capital Rule 15c3-1(c)(2)(vi)(F) adopted under the Securities Exchange Act of 1934. See 2 Louis Loss & Joel Seligman, Securities Regulation 649-653 (3d ed. rev. 1999). Nationally recognized statistical rating organizations have been identified by the Securities and Exchange Commission and include such organizations as Moody's and Standard and Poor's. Rating categories typically begin with AAA and under this Act would include BBB as the fourth highest rating category.

Section 202(5)(B) follows the 1956 Act and RUSA, but also addresses blank check and similar offerings, which became major concerns at the state and federal levels during the past two decades. Cf. Securities Act of 1933 Rule 419. See Official Comment (3).

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

7. Section 202(6): Unsolicited brokerage transactions: Prior Provisions: 1956 Act Section 402(b)(3); RUSA Section 402(5). Section 18(b)(4)(B) of the Securities Act of 1933 defines as federal covered securities those subject to Section 4(4) of the Securities Act of 1933: "brokerage transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." Section 202(6) is intended to provide exemption for nonagency transactions by dealers not within the scope of Section 4(4).

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

8. Section 202(7): Nonissuer transactions by pledgees: Prior Provisions: 1956 Act Section 402(b)(7); RUSA Section 402(9). This subsection is identical to the 1956 Act and substantively identical to RUSA.

9. Section 202(8): Nonissuer transactions with federal covered investment advisers: No Prior Provision. This exemption was added because of a recognition that federal covered investment advisers are sophisticated financial professionals capable of determining the merits of a security and do not require the protections provided by requiring registration in a particular state.

10. Section 202(9): Specified exchange transactions: No Prior Provision. Section 202(9) provides a state counterpart to the exemption in Section 3(a)(10) of the Securities Act of 1933.

11. Section 202(10): Underwriter transactions: Prior Provisions: 1956 Act Section 402(b)(4); RUSA Section 402(6). This subsection is substantively identical to the 1956 Act and RUSA.

12. Section 202(11): Unit secured transactions: Prior Provisions: 1956 Act Section 402(b)(5); RUSA Section 402(7). In recent years the application of this exemption has been one of concern to state securities administrators. The conditions that conclude this exemption are new and are intended to address these concerns.

13. Section 202(12): Bankruptcy, guardian, or conservator transactions: Prior Provisions: 1956 Act Section 402(b)(6); RUSA Section 402(8). This subsection is identical to that in the 1956 Act and RUSA.

14. Section 202(13): Transactions with specified investors: Prior Provision: 1956 Act Section 402(b)(8). The 1956 Act contains similar but less inclusive language in Section 402(b)(8). If the Securities and Exchange Commission adopts a rule defining "qualified purchaser" as used in Section 18(b)(3) of the Securities Act to specify certain purchasers of federal covered securities, part or all of this exemption will be redundant. As of September 2002, the Commission has proposed, but not adopted, Rule 146(c).

Section 202(13)(B) is limited to transactions for the account of a federal covered investment adviser and is not intended to reach transactions on behalf of others by such adviser.

15. Section 202(14): Limited offering transactions: Prior Provisions: 1956 Act Section 402(b)(9); RUSA Section 402(11). The reference in the prefatory language to "a single issue" signifies that two or more issues can be "integrated" and potentially destroy the exemption. There are two general tests for integration under the federal securities laws. The states similarly have followed generally these types of integration principles with respect to securities transaction exemptions. First, there is a six month "buffer" before and after an offer, offer to sell, or sale of a transaction exempt under Section 202(14) during which no other issue can be distributed if integration automatically is to be avoided. See Rule 147(b)(2) and Rule 502(a) of the Securities Act of 1933. Second, if two issues occur within six months, integration may occur depending upon the following factors:

(i) are the offerings part of a single plan of financing;
(ii) do the offerings involve issuance of the same class of securities;
(iii) are the offerings made at or about the same time;

(iv) is the same type of consideration to be received; and
(v) are the offerings made for the same general purpose.

See generally 3 Louis Loss & Joel Seligman, Securities Regulation 1231-1248 (3d ed. rev. 1999).

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

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

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

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

16. Section 202(15): Transactions with existing security holders: Prior Provisions: 1956 Act Section 402(b)(11); RUSA Section 402(14). Section 3(a)(9) of the Securities Act of 1933 exempts exchange offerings with existing security holders. Under Section 18(b)(4)(C) transactions subject to Section 3(a)(9) are federal covered securities. See Section 102(7). Notice requirements in the earlier 1956 Act and RUSA accordingly would be preempted by the

Securities Act of 1933. See Section 18(a) of the Securities Act of 1933. Otherwise this exemption is substantively identical to the 1956 Act and RUSA.

17. Section 202(16): Offerings registered under this [Act] and the Securities Act of 1933: Prior Provisions: 1956 Act Section 402(b)(12); RUSA Section 402(15). This exemption generally follows the 1956 Act and RUSA. Rule 165 of the Securities Act of 1933, which was adopted in 1999, 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.

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

18. Section 202(17): Offerings when registration has been filed, but is not effective under this [Act] and exempt from the Securities Act of 1933: Prior Provisions: RUSA Section 402(16). If a rule is adopted by the administrator a solicitation of interest document must accompany a registration by qualification as specified in Section 304(b)(13).

Oral offers may be made after a registration statement has been filed, both before and after a registration statement is effective.

This exemption does not operate unless the administrator adopts a rule under 202(17)(B).

19. Section 202(18): Control transactions: Prior Provision: RUSA Section 402(17). Until 1972 mergers and similar transactions were not considered to involve sales and did not have to register under the Securities Act of 1933. In 1972 the Securities and Exchange Commission adopted Rule 145 defining many mergers and similar transactions to be sales and abandoned its earlier "no sale" doctrine. See 3 Louis Loss & Joel Seligman, Securities Regulation 1262-1280 (3d ed. rev. 1999).

Because most merger and similar transactions require shareholder approval and shareholders often have appraisal rights if they choose to dissent, the potential for abuse is less than in an offering of securities for cash. When

appropriate the administrator can deny, condition, limit or revoke this exemption under Section 204. Section 202(18) does not follow the requirement in RUSA Section 402(17) that written notice of the transactions and a copy of the solicitation materials be given to the administrator 10 days before the consummation of the transaction and, that the administrator is empowered to disallow the exemption within the next 10 days.

20. Section 202(19): Rescission offers: No Prior Provision. See Section 510 for discussion of rescission offers.

21. Section 202(20): Out-of-state offers or sales: Source of law: Colo. Section 11-51-102(7). Compare A.S. Goldmen & Co., Inc. v. New Jersey Bur. of Sec., 163 F.3d 780 (3d Cir. 1999), which held that under the United States Constitution's Commerce Clause a State could authorize a securities administrator to prevent a broker-dealer from selling securities from a State to purchasers in other States where purchase of the securities was authorized. The concluding phrase "and is not part of an unlawful plan or scheme to evade this [Act]" is intended to preclude reliance on this exemption by boiler rooms and others engaged in illegal activities.

Section 202(20) provides an exemption from securities registration and does not address an administrator's power to investigate and bring enforcement actions under Articles 5 and 6.

22. Section 202(21): Employee benefit plans: Prior Provision: RUSA Section 401(b)(12). The 1956 Act Section 402(a)(11) was limited to investment contracts issued in connection with specified employee benefit plans if the administrator was given 30 days written notice.

In 1979, the United States Supreme Court in International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979), held that a noncontributory, mandatory pension plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) was not a security within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934. The Securities and Exchange Commission staff subsequently took the position that the interests of employees in involuntary, contributory plans are not securities. Sec. Act Rel. 6188, 19 SEC Dock. 465, 473 (1980). Both contributory and noncontributory pension or welfare plans subject to ERISA are excluded from the definition of security in Section 102(28).

In this definition, the term "advisors" does not mean "investment advisers," as defined in Section 102(15).

With respect to employee benefit plans that are securities, Section 202(21) provides an exemption, but follows RUSA in not limiting the exemption to investment contracts and not requiring 30 days notice to the administrator.

Section 202(21) is modeled, in part, on Rule 701(c) adopted under the Securities Act of 1933. Compliance with Rule 701 will provide compliance with this exemption.

Both the 1956 Act and RUSA, for unstated reasons, treated employee benefit plans as exempt securities, rather than exempt securities transactions. There appears to be no appropriate reason to do so.

Resale of employee benefit plan securities can occur under appropriate section 202 transaction exemptions. Section 202(21) is not intended to provide a new method of publicly issuing securities.

The administrator, when appropriate, can deny, condition, limit, or revoke an exemption under Section 202(21). See Section 204.

23. Section 202(22): Specified dividends and tender offers and judicially recognized reorganizations: Prior Provision: 1956 Act Section 401(j)(6)(B) and (D); RUSA Section 101(13)(vi). Section 202(22)(A) and (B) generally follow exclusions from the definition of sale in the 1956 Act and RUSA. Section 202(22)(C) is new and corresponds to Rule 162, recently adopted under the Securities Act of 1933, which 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.

24. Section 202(23): Nonissuer transactions involving specified foreign issuer securities traded on designated securities exchanges. This exemption expressly covers Toronto Stock Exchange issuers that are public reporting companies under Canadian securities law and meet the 180 day continuous reporting requirement. In conformance with the North American Free Trade Agreement (NAFTA) and General Agreement on Trade in Services (GATS), the exemption separately provides authority for the administrator to designate by rule or order other specific foreign jurisdictions and their trading exchanges upon an adequate showing. The exemption also provides authority for an administrator to revoke any designation if necessary or appropriate in the public interest and for the protection of investors.

Maine Comments

1. Section 16202(11)(D): Maine has added this paragraph based on a similar provision in Pennsylvania law. In determining a property's fair market value at the time of the transaction, it is intended that issuers will rely on reasonable evidence of fair market value, such as generally accepted appraisal standards set forth in the Uniform Standards of Professional Appraisal Practice (USPAP), promulgated by the Appraisal Standards Board of the Appraisal Foundation.

2. Section 16202(14): The model Uniform Security Act's version of this provision used a higher "de minimis" number of purchasers (25). Maine has instead used a lower number of purchasers (10) to provide more protection for investors and because the lower number is more consistent with the relatively small size of this State.

3. Section 16202(15): Maine has added this limited private offering exemption for Maine issuers, up to 25 purchasers, which is based on section 10502(2)(Q) of the Revised Maine Securities Act.

4. Section 16202(21)(A) and (C): Maine has limited the availability of this exemption to offers or sales of securities in an employees' stock purchase or similar plan to only those consultants and advisors who are permitted to participate in such a plan under SEC Rule 701(c)(1).

5. Section 16202(24): Maine has reinstated the exemption for viatical settlement contracts similar to that which appeared in the Revised Maine Securities Act.

6. Section 16202(26): Maine has added this exemption for nonpublic offerings made under Section 4(2) of the federal Securities Act of 1933 to maintain the exemption contained in section 10502(2)(R) of the predecessor act.

§16203. Additional exemptions and waivers

If the administrator finds that it is consistent with the public interest and the protection of investors, a rule adopted or order issued under this chapter may: exempt a security, transaction or offer; exempt a class of securities, transactions or offers from any or all of the requirements of sections 16301 to

16306 and 16504; and waive, in whole or in part, any or all of the conditions for an exemption or offer under sections 16201 and 16202. In any rule or order establishing an exemption for which a filing is required, the administrator may provide for a nonrefundable filing fee not to exceed $500. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provision: RUSA Section 403.

1. Under this type of authority, 50 of 53 jurisdictions through September 2002 had adopted the Uniform Limited Offering Exemption (ULOE) or a Regulation D exemption, and 32 jurisdictions had adopted a Rule 144A exemption. This Act does not incorporate ULOE or a Rule 144A exemption because of their complexity and the likelihood of periodic updating of their provisions. Rule 144A, and similar exemptions in ULOE, can be most effectively implemented by rule rather than statute.

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

3. It is the intent of this Section that ULOE, Rule 144A, and additional exemptions or waivers be adopted uniformly by states, to the extent this is practicable.

§16204. Denial, suspension, revocation, condition or limitation of exemptions

1. Enforcement related powers. Notwithstanding the Maine Administrative Procedure Act, an order under this chapter may deny, suspend application of, condition, limit or revoke an exemption created under section 16201, subsection 3, paragraph C, section 16201, subsection 7 or 8 or section 16202 or an exemption or waiver created under section 16203 with respect to a specific security, transaction or offer if the administrator finds that the order is consistent with the public interest and the protection of the public. An order under this section may be issued only pursuant to the procedures in section 16306, subsection 4 or section 16604 and only prospectively.

2. Knowledge of order required. A person does not violate section 16301, sections 16303 to 16306, section 16504 or section 16510 by an offer to sell, offer to purchase, sale or purchase effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

Official Comments

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

1. Section 204 is potentially far reaching. The ability to deny, condition, limit, or revoke the exemptions specified in Sections 201(3)(C), 201(7), 201(8), 202, or 203 is adopted concomitant with the breadth of these exemptions. One or more than one security, transaction, or offer can be covered by a Section 204 order.

2. The courts have given a securities administrator's decision to deny or revoke an exemption substantial deference when there was compliance with applicable due process and statutory requirements. See, e.g., Johnson-Bowles Co., Inc. v. Div. of Sec., 829 P.2d 101 (Utah Ct. App. 1992).

Maine Comments

1. Section 16204(1): The model Uniform Securities Act explicitly excluded federal covered securities and transactions involving such securities from the scope of this section. Maine has removed this language as unnecessary because the Securities Administrator's authority to issue orders under this subsection is necessarily limited by preemption provisions in federal law.

SUBCHAPTER 3

REGISTRATION OF SECURITIES AND NOTICE FILING OF FEDERAL COVERED SECURITIES

§16301. Securities registration requirement

It is unlawful for a person to offer or sell a security in this State unless:

1. Federal covered security. The security is a federal covered security;

2. Exempt from registration. The security, transaction or offer is exempted from registration under sections 16201 to 16203; or

3. Registered. The security is registered under this chapter.

Official Comments

Prior Provisions: 1956 Act Section 301; RUSA Section 301.

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

2. Except for federal covered securities, exempt securities, or securities offered or sold in exempt transactions, no sale of a security may be made in this State before the security is registered. "Sale" is defined in Section 102(26); "in this State" is addressed in Section 610; and securities registration is addressed in Sections 303 through 306.

3. The Securities Act of 1933 permits certain types of offers during the "waiting period" between the filing and effectiveness of a registration statement. The exemptive provisions of Sections 202(16) and (17) operate to permit similar offers for securities that are not federal covered securities and are in the process of registration under federal or state statutes or both.

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

§16302. Notice filing

1. Notice filings for federal covered securities under Section 18(b)(2) of the federal Securities Act of 1933. A federal covered security, as defined in Section 18(b)(2) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(2), that is not otherwise exempt under sections 16201 to 16203 may not be offered or sold in this State unless before the initial offer in this State the following are filed with the administrator:

A. The uniform investment company notice filing form;

B. A consent to service of process complying with section 16611 signed by the issuer; and

C. The payment of a nonrefundable fee of $1,000 for each type or class of security offered.

2. Notice filing effectiveness and renewal. A notice filing under subsection 1 is effective for one year commencing on the date of the notice filing, the date of effectiveness of the offering filed with the Securities and Exchange Commission or a date selected by the filer, whichever date is latest. On or before expiration, a notice filing may be renewed by filing the uniform investment company notice filing form and by paying a nonrefundable renewal fee of $1,000 for each type or class of security offered. A previously filed consent to service of process complying with section 16611 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

3. Notice filings for federal covered securities under Section 18(b)(4)(D). A security that is a federal covered security under Section 18(b)(4)(D) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(4)(D) that is not otherwise exempt under sections 16201 to 16203 may not be sold in this State unless the following records are filed with the administrator no later than 15 days after the first sale in this State:

A. A notice on "Form D," including the Appendix, as promulgated by the Securities and Exchange Commission;

B. A consent to service of process complying with Section 16611, signed by the issuer; and

C. The payment of a nonrefundable fee of $300 per type or class of security sold.

A notice filer making a filing between 16 and 30 days after the first sale in this State shall pay an additional nonrefundable late filing fee of $500.

4. Stop orders. Except with respect to a federal covered security under Section 18(b)(1) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(1), if the administrator finds that there is a failure to comply with a notice or fee requirement of this section or any rule adopted under this section, the administrator may issue a stop order suspending the offer and sale of a federal covered security in this State. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the administrator.

5. Other federal covered securities. Unless the administrator provides otherwise by rule, any other federal covered security may be offered and sold in this State in reliance on its being a federal covered security without the filing of a notice or the payment of a fee.

6. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

No Prior Provision.

1. The little used "registration by notification" in the 1956 Act Section 302 or "registration by filing" in RUSA Section 302 are omitted from this Act because of the notice filing approach required by Section 18(b)(2) of the Securities Act of 1933 for federal covered securities, which, in essence, replaces the need for registration by notification.

2. For Rule 506 offerings which are addressed by Section 18(d)(4)(D) of the Securities Act of 1933, the Securities and Exchange Commission requires the filing of Form D. See Rule 503. When an issuer meets the conditions of Rule 506, Section 302(c) is intended to limit required state filings to no more than a requirement of filing a copy of Form D, including the Appendix, a consent to service of process, and a fee.

3. The definition of "filing" in Section 102(8) will permit states to receive electronic filing of records under this Section. An administrator may also accept under this Section a signed consent filed electronically with a designee of the administrator. See Section 105.

4. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[___]" in subsections (a), (b), and (c) with the phrase "a fee established by the administrator by rule". See Comment 3 to Section 410.

Maine Comments

1. The "registration by notification" provision (§10402 of the Revised Maine Securities Act) is omitted because issuers rarely used it to register their securities. The issuers who are able to utilize the notice filing provisions for federal covered securities in Section 18(b)(2) of the federal Securities Act of 1933 are not the same issuers who qualified to use the "registration by notification" provision of the Revised Maine Securities Act.

2. Section 16302(3): A notice filing under this subsection made between 16 and 30 days after the first sale in this State is effective so long as the notice filer pays the late filing fee. A notice filing made after 30 days is not effective. The first sale in this State occurs when the investor delivers to the offeror either the funds to purchase the investment or a signed subscription agreement evidencing an intention to invest such funds.

§16303. Securities registration by coordination

1. Registration permitted. A security for which a registration statement has been filed under the federal Securities Act of 1933 in connection with the same offering may be registered by coordination under this section.

2. Required records. A registration statement and accompanying records under this section must contain or be accompanied by the following records in addition to the information specified in section 16305 and a consent to service of process complying with section 16611:

A. A copy of the latest form of prospectus filed under the federal Securities Act of 1933;

B. If requested by the administrator, a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy or description of the security;

C. Copies of any other information or any other records filed by the issuer under the federal Securities Act of 1933 requested by the administrator; and

D. An undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the Securities and Exchange Commission.

3. Conditions for effectiveness of registration statement. A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

A. A stop order under subsection 4 or section 16306 or issued by the Securities and Exchange Commission is not in effect and a proceeding is not pending against the issuer under section 16306; and

B. The registration statement has been on file for at least 20 days or a shorter period provided by order issued under this chapter.

4. Notice of federal registration statement effectiveness. The registrant shall promptly notify the administrator in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by telegram, telephone or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section within 15 days of the issuance of the stop order, the stop order is void as of the date of its issuance.

5. Effectiveness of registration statement. If the federal registration statement becomes effective before each of the conditions in this section is

satisfied or is waived by the administrator, the registration statement is automatically effective under this chapter when all the conditions are satisfied or waived. If the registrant notifies the administrator of the date when the federal registration statement is expected to become effective, the administrator shall promptly notify the registrant by telegram, telephone or electronic means and promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the administrator intends the institution of a proceeding under section 16306. The notice by the administrator does not preclude the institution of such a proceeding.

6. Prospectus delivery. When a security is registered under this section, the prospectus filed under the federal Securities Act of 1933 must be delivered at the time mandated by the prospectus delivery requirements of that Act to each purchaser in this State.

Official Comments

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

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

2. The phrase "in connection with the same offering" in Section 303 does not require that the federal and state registration statements be filed simultaneously or become effective simultaneously. A registration by coordination can be filed in a State after the effectiveness of the federal registration statement as long as the administrator does not conclude that the interval was too long to consider the State registration statement "the same offering."

3. Section 303 is similar to the 1956 Act except that these provisions have been modernized to include electronic filing and electronic notification. Cf. Sections 102(8), 102(25), 105. It is anticipated that this will facilitate simultaneous filing with the Securities and Exchange Commission and the States which is consistent with the uniformity intended by this Act. Simultaneous or sequential filing could be administered through a designee similar to the current Web-CRD or in conjunction with the Securities and

Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system or otherwise.

4. Section 303(b) is not intended to limit the administrator to requiring only the information and records filed with the Securities and Exchange Commission.

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

Maine Comments

1. Section 16303(6) reinstates the prospectus delivery requirement of the Revised Maine Securities Act.

§16304. Securities registration by qualification

1. Registration permitted. A security may be registered by qualification under this section.

2. Required records. A registration statement under this section must contain the information or records specified in section 16305, a consent to service of process complying with section 16611 and the following information or records:

A. With respect to the issuer and any significant subsidiary, its name, address and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

B. With respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address and principal occupation for the previous 5 years; the amount of securities of the issuer held by the person as of the 30th day before the filing of the registration statement; the amount of

the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous 3 years or proposed to be effected;

C. With respect to persons covered by paragraph B, the aggregate sum of the remuneration paid to those persons during the previous 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer and all predecessors, parents, subsidiaries and affiliates of the issuer;

D. With respect to a person owning of record or owning beneficially, if known, 10% or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph B other than the person's occupation;

E. With respect to a promoter, if the issuer was organized within the previous 3 years, the information or records specified in paragraph B, any amount paid to the promoter within that period or intended to be paid to the promoter and the consideration for the payment;

F. With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous 3 years or proposed to be effected; and a statement of the reasons for making the offering;

G. The capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous 2 years or is obligated to issue its securities;

H. The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person

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

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

J. A description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in paragraph B, D, E, F or H and by any person that holds or will hold 10% or more in the aggregate of those options;

K. The dates of, parties to and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous 2 years and a copy of the contract;

L. A description of any pending litigation, action or proceeding to which the issuer is a party and that materially affects its business or assets and any litigation, action or proceeding known to be contemplated by governmental authorities;

M. A copy of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with section 16202, subsection 18, paragraph B;

N. A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

O. A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, that states whether the security when sold will be validly issued, fully paid and nonassessable and, if a debt security, a binding obligation of the issuer;

P. A signed or conformed copy of a consent of any accountant, engineer, appraiser or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public and that is used in connection with the registration statement;

Q. A balance sheet of the issuer as of a date within 4 months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the 3 fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet or for the period of the issuer's and any predecessor's existence if less than 3 years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

R. Any additional information or records required by rule adopted or order issued under this chapter.

3. Conditions for effectiveness of registration statement. A registration statement under this section becomes effective 30 days, or any shorter period provided by rule adopted or order issued under this chapter, after the date the registration statement or the last amendment other than a price amendment is filed if:

A. A stop order is not in effect and a proceeding is not pending under section 16306;

B. The administrator has not issued an order under section 16306 delaying effectiveness; or

C. The applicant or registrant has not requested that effectiveness be delayed.

4. Delay of effectiveness of registration statement. The administrator may delay effectiveness once for not more than 90 days if the administrator determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The administrator may also delay effectiveness for a further period of not more than 30 days if the administrator determines that the delay is necessary or appropriate.

5. Prospectus or offering document distribution may be required. An order issued under this chapter may require as a condition of registration under this section that a prospectus or offering document containing a specified part of the information or record specified in subsection 2 be sent or given to each person to whom an offer is made, before or concurrently, with the earliest of:

A. The first offer made in a record to the person otherwise than by means of a public advertisement by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

B. The confirmation of a sale made by or for the account of the person;

C. Payment pursuant to such a sale; or

D. Delivery of the security pursuant to such a sale.

6. Simplified statement. For purposes of simplifying the registration statement for smaller offerings and promoting uniformity with other states, the administrator may adopt, by rule, a form to be used as the registration statement for securities being registered under this section and sold in offerings in which the aggregate offering price does not exceed the maximum amount specified in the rule. The form need not require all the information included in this section and may require information not included in this section.

7. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 304; RUSA Section 304.

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

2. Section 304(b) originally was modeled on Schedule A of the Securities Act of 1933.

3. In Section 304(b)(12) pending litigation can include litigation that has not yet been filed.

4. Section 304(b)(17) uses the same terminology as is used currently in Regulation S-X of the Securities and Exchange Commission. Under Sections 605(a) and (c) the administrator is authorized to specify the form and content of rules and forms governing registration statements and the form and content of financial statements required under this Act.

5. Under Sections 304(b)(18) and 307 the administrator may require additional information or may waive in whole or in part or condition any of the requirements of Section 304(b). Section 304(b)(18), for example, would authorize the administrator to require that a report by an accountant, engineer, appraiser or other professional person be filed. Section 304(b)(18) would also authorize that securities of designated classes under a trust indenture contain additional specified information.

Maine Comments

1. Section 16304(6) reinstates the authority for the administrator to adopt a simplified statement for securities registration, as was allowed under the Revised Maine Securities Act.

§16305. Securities registration filings

1. Who may file. A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made or a broker-dealer licensed under this chapter.

2. Filing fee. A person filing a registration statement shall pay a nonrefundable filing fee of $1,000 for each type or class of security offered, except that for a registration statement filed under section 16304 for an offering for which the total amount raised in state and out of state does not exceed $1,000,000 the nonrefundable filing fee is $300 for each type or class of security offered.

3. Status of offering. A registration statement filed under section 16303 or 16304 must specify:

A. The amount of securities to be offered in this State;

B. The states in which a registration statement or similar record in connection with the offering has been or is to be filed;

C. Any adverse order, judgment or decree issued in connection with the offering by a state securities regulator, the Securities and Exchange Commission or a court; and

D. The states in which a registration statement was filed and withdrawn.

4. Incorporation by reference. A record filed under this chapter or the predecessor act within 5 years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

5. Nonissuer distribution. In the case of a nonissuer distribution, information or a record may not be required under subsection 9 or section 16304 unless it is known to the person filing the registration statement or to the

person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

6. Escrow and impoundment. A rule adopted or order issued under this chapter may require as a condition of registration that a security issued within the previous 5 years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the security either in this State or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this chapter, but the administrator may not reject a depository institution solely because of its location in another state.

7. Form of subscription. A rule adopted or order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than 5 years.

8. Effective period. Except while a stop order is in effect under section 16306, a registration statement is effective for one year after its effective date or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

9. Periodic reports. While a registration statement is effective, a rule adopted or order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

10. Posteffective amendments. A registration statement may be amended after its effective date. The posteffective amendment becomes effective when the administrator so orders. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a nonrefundable registration fee of $300. A posteffective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.

11. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 305; RUSA Section 305.

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

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

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

4. This Act is intended, to the extent practicable, to be revenue neutral in its impact on existing state law, see Comment 3 to Section 608. Accordingly, Section 305(b) does not specify what fees states should provide. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[___]" in subsections (b) and (j) with the phrase "a fee established by the administrator by rule pursuant to the [state administrative procedure act]" and replace the phrase "$[___] of the fee" in subsection (b) with the phrase "an amount of the fee established by the administrator by rule". See Comment 3 to Section 410.

5. Section 305(c), which generally follows the 1956 Act and RUSA, does not require in Section 305(c)(3) disclosure of an order permitting the

withdrawal of a registration statement. The administrator may, however, require disclosure of this information in a registration by qualification under Section 304(b)(18).

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

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

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

9. Section 305(f), follows the 1956 Act and RUSA, and authorizes the administrator to require the impoundment of funds until the issuer receives a specified amount from the sale of the security in this State or elsewhere and to require the escrow of promotional stock until specific conditions are met. This Section is limited to a security issued within the past five years or to be issued to a promoter for a consideration substantially different from the public offering price or to a person for a consideration other than cash. The typical distribution subject to Section 305(f) will be a relatively new promotional or speculative offering. Section 305(f) follows the 1956 Act and RUSA and provides that the administrator may not reject a depository solely because of its location in another state. Unlike the statute in Schwaemmle Const. Co. v.

Michigan Dep't of Commerce, 360 N.W.2d 141 (Mich. 1984), Section 305(f) broadly provides that the administrator "may determine the conditions of any escrow or impoundment under this subsection." As in Schwaemmle, this power will operate only until the impounded funds or escrowed shares are released.

10. Section 305(g) follows the 1956 Act in authorizing the administrator to specify the form of a subscription or sale contract.

11. Section 305(h) generally follows the 1956 Act and RUSA. The term "nonissuer transaction" or "nonissuer distribution" is defined in Section 102(18). A sale by a nonissuer would have to be registered under Section 301 unless it is exempted or involves a federal covered security. Section 202(1) exempts "isolated nonissuer transactions." When a nonissuer transaction is not exempt under Section 202(1), it may still be exempted under other transaction exemptions.

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

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

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

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

§16306. Denial, suspension and revocation of securities registration

1. Stop orders. 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:

A. The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under section 16305, subsection 10 as of its effective date or a report under section 16305, subsection 9 is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

B. This chapter or a rule adopted or order issued under this chapter or a condition imposed under this chapter has been willfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer or director of the issuer or a person having a similar status or performing a similar function or a promoter of the issuer or a person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

C. The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign or state law other than this chapter applicable to the offering, but the administrator may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the administrator may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;

D. The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

E. With respect to a security sought to be registered under section 16303, there has been a failure to comply with the undertaking required by section 16303, subsection 2, paragraph D;

F. The applicant or registrant has not paid the filing fee, but the administrator shall void the order if the deficiency is corrected; or

G. The offering:

(1) Will work or tend to work a fraud upon purchasers or would so operate;

(2) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options; or

(3) Is being made on terms that are unfair, unjust or inequitable.

2. Standards under subsection 1, paragraph G. For purposes of promoting uniformity in the application of subsection 1, paragraph G, the administrator may take into consideration, among other factors, any relevant rules promulgated by the Securities and Exchange Commission and by the administrators in other jurisdictions.

3. Institution of stop order. The administrator may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

4. Summary process. The administrator may summarily revoke, deny, postpone or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection 5 that the order has been issued, the reasons for the revocation, denial, postponement or suspension and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within

30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

5. Procedural requirements for stop order. A stop order may not be issued under this section without:

A. Appropriate notice to the applicant or registrant, the issuer and the person on whose behalf the securities are to be or have been offered;

B. An opportunity for hearing; and

C. Findings of fact and conclusions of law in a record in accordance with the Maine Administrative Procedure Act.

6. Modification or vacation of stop order. The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

7. Appointment of presiding officer. For purposes of any hearing conducted pursuant to this section, the administrator may appoint a qualified person to preside at the hearing and to make proposed findings of fact and conclusions of law. The responsibility for the entry of the final findings of fact and conclusions of law and for the issuance of any final order remains with the administrator.

Official Comments

Prior Provisions: 1956 Act Section 306; RUSA Section 306.

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

2. Section 306(a)(1) follows the 1956 Act and RUSA in testing in a suspension or revocation proceeding the completeness and accuracy of a registration statement as of the registration statement's effective date. A registration statement that becomes misleading because of a development that occurs after its effective date is not a ground for the issuance of a stop order under Section 306(a)(1). An administrator, however, may require periodic

reports under Section 305(i) or a posteffective amendment under Section 305(j). With respect to periodic reports under Section 305(i), a misleading report would be the basis of a stop order under Section 306(a)(1) if it is materially inaccurate as of the date it was filed.

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

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

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

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

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

8. Sections 306(a)(7) and (b) address merit regulation. Sections 306(E) and (F) of the 1956 Act authorized a stop order when an "offering has worked or tended to work a fraud upon purchasers or would so operate" or "the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options." By 1985 a majority of states which had adopted the 1956 Act had adopted this approach to merit regulation rather than the earlier and broader "unfair, unjust or inequitable" standard that then applied in a minority of States.

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

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

Sections 306(a)(7) and (b) take a different approach. Subject to the National Securities Markets Improvement Act of 1996, merit standards are retained but hortatory paragraph 306(b) encourages the administrator, to the extent practicable, to adopt, by rule or order, standards that provide notice to issuers of a state's merit standards. Notice will address one criticism of merit regulation. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 111-124 (3d ed. rev. 1998). Statements of Policy of the North American Securities Administrator Association that have been adopted by a state would provide notice in compliance with Section 306(b). Similarly other state rules or orders could be adopted in the future to address new types of securities as they occur.

An order under Section 306(b) can be adopted after a securities registration statement has been filed. Under Section 306(b) an administrator, by rule or order, for example, could adopt a standard that would provide the basis for a stop order denying effectiveness to a development stage company that has no specific business purpose or plan or has indicated that its primary business plan is to engage in a merger or acquisition with an unidentified company, entity, or person. "Blank check offerings" are subject to Rule 419 adopted under the Securities Act of 1933. See Comment 3 to Section 202.

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

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

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

12. As of September 2002 46 jurisdictions had adopted a form of Section 306(a)(7)(A) ("will tend to work a fraud or would so operate"); 34 jurisdictions

had adopted a form of Section 306(a)(7)(B) ("unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoter profits or participations, or unreasonable amounts or kinds of options"); and 16 jurisdictions had adopted a form of bracketed Section 306(a)(7)(C) ("terms that are unfair, unjust, or inequitable").

Maine Comments

1. Section 16306(2): The model Uniform Security Act's version of this subsection gave specific authority for the Securities Administrator to issue rules or orders that would define conduct violating subsection (1)(G). Because of the inherent difficulty in trying to define all conduct that would violate subsection (1)(G), Maine has adopted alternative language. For purposes of promoting uniformity in the application of subsection (1)(G), the Securities Administrator may take into consideration any relevant rules promulgated by the United States Securities and Exchange Commission and by administrators in other jurisdictions.

§16307. Waiver and modification

By rule issued or order adopted under this chapter, the administrator may waive or modify, in whole or in part, any or all of the requirements of sections 16302, 16303, and 16304 or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to section 16305, subsection 9. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provision: RUSA Section 303(h). Section 307 follows RUSA Section 303(h) and empowers the administrator to waive or modify any of the requirements of 302, 303, 304(b), or the requirement of any information or record in a registration statement. An example would be the expedited procedure several states have adopted to coordinate with shelf registration under Rule 415 of the Securities Act of 1933. In waiving or modifying requirements the administrator must make a finding satisfying the requirements of Section 605(b).

SUBCHAPTER 4

BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES AND FEDERAL COVERED INVESTMENT ADVISERS

§16401. Broker-dealer licensing requirement and exemptions

1. Licensing requirement. It is unlawful for a person to transact business in this State as a broker-dealer unless the person is licensed under this chapter as a broker-dealer or is exempt from licensing as a broker-dealer under subsection 2 or 4.

2. Exemptions from licensing. The following persons are exempt from the licensing requirement of subsection 1:

A. A broker-dealer without a place of business in this State if its only transactions effected in this State are with:

(1) The issuer of the securities involved in the transactions;

(2) A broker-dealer licensed as a broker-dealer under this chapter or not required to be licensed as a broker-dealer under this chapter, except when the person is acting as a clearing broker-dealer;

(3) An institutional investor;

(4) A nonaffiliated federal covered investment adviser with investments under management in excess of $100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;

(5) A bona fide preexisting customer whose principal place of residence is not in this State and the person is registered as a broker-dealer under the federal Securities Exchange Act of 1934 or not required to be registered under the federal Securities Exchange Act of 1934 and is registered or licensed under the securities act of the state in which the customer maintains a principal place of residence;

(6) A bona fide preexisting customer whose principal place of residence is in this State but was not present in this State when the customer relationship was established, if:

(a) The broker-dealer is registered under the federal Securities Exchange Act of 1934 or not required to be registered under the federal Securities Exchange Act of 1934 and is registered or licensed under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(b) Within 45 days after the customer's first transaction in this State, the person files an application for licensing as a broker-dealer in this State and no further transactions are effected until the license is effective. Any broker-dealer may seek an order granting a temporary exemption under subparagraph (7) while the application is pending; and

(7) Any other person exempted by rule adopted or order issued under this chapter; and

B. A person that deals solely in United States government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation or the United States Department of the Treasury, Office of Thrift Supervision or Comptroller of the Currency.

3. Limits on employment or association. It is unlawful for a broker-dealer, or for an issuer engaged in offering, offering to purchase, purchasing or selling securities in this State, directly or indirectly, to employ or associate with an individual to engage in an activity related to securities transactions in this State if the license of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser or a federal covered investment adviser by an order of the administrator under this chapter, the Securities and Exchange Commission or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer sustains the burden of proof that the broker-dealer or issuer did not know and in the exercise of reasonable care could not have known of the suspension, revocation or bar. Upon request from a broker-dealer or issuer and for good cause, an order under

this chapter may modify or waive, in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

4. Foreign transactions. A rule adopted or order issued under this chapter may permit:

A. A broker-dealer that is registered or licensed in Canada or other foreign jurisdiction and that does not have a place of business in this State to effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by:

(1) An individual from Canada or other foreign jurisdiction who is temporarily present in this State and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(2) An individual from Canada or other foreign jurisdiction who is present in this State and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(3) An individual who is present in this State with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

B. An agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this State as permitted for a broker-dealer described in paragraph A.

5. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

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

1. "Broker-dealer" is defined in Section 102(4). The scope of the Section 401(a) reference "to transact business in this State" is specified in Section 610. "Transacts a business" has been held to mean "more than a trivial or de

minimis business." United States v. Schwartz, 464 F.2d 499, 506 (2d Cir. 1972), cert. denied, 409 U.S. 1009 (1972).

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

3. "Bona fide" is a much construed term particularly in the U.C.C. context. See, e.g., MCC Proceeds, Inc. v. Advest, Inc., 743 N.Y.S.2d 1 (N.Y. A.D. 2002) (comparing bona fide to good faith standard).

4. Section 401(b)(1)(D) was added to provide relief in situations where a broker-dealer is accepting orders from a sophisticated financial professional who is making the investment decisions for its customers.

5. Under 401(b)(1)(E) and (F) preexisting customers must be bona fide. A principal place of residence, for example, normally would be the residence where the customer spends a majority of time. These exemptions were intended to facilitate ongoing broker-customer relationships with customers who have established a second or other residence for such purposes as a winter home (i.e. "snowbirds").

6. Section 401(c) prohibits a broker-dealer or issuer from employing or associating with an individual in a capacity for which that individual has been suspended by the administrator. Violation of this provision does not result in strict liability. In order for a broker-dealer or issuer to be liable, the broker-dealer or issuer must have known or should have known of the administrator's order to the individual suspended or barred. Cf. Comment 17 to Section 412.

7. Section 401(d) recognizes the increasingly transnational nature of securities brokerage and permits, if the administrator adopts a rule or order, transactions by a Canadian or a foreign broker-dealer with a person from Canada or other foreign jurisdiction who is resident in this State. This subsection is not self-executing and is effective only if the administrator adopts a rule or order.

8. To give effect to action taken by rule or order under Section 401(d), there must be a transaction registration exemption that will enable securities transactions to take place in customer accounts involving the broker-dealers and agents contemplated in Section 401(d). See Sections 202 and 203.

Maine Comments

1. Although the model Uniform Securities Act uses the term "registration," Maine retains the term "licensing" from the Revised Maine Securities Act for the sake of continuity and to avoid confusion with the registration of securities.

2. Section 16401(1): The last sentence and citation in Official Comment 1 relate to the broker-dealer definition, not to whether a broker-dealer must be licensed in Maine.

3. Section 16401(2)(A)(2): For the purpose of investor protection, Maine retains the Revised Maine Securities Act's language that excludes clearing brokers from this exemption.

4. The model Uniform Securities Act contained an additional exemption, section 401(b)(1)(G), which would apply in certain situations in which a broker-dealer has 3 or fewer customers in Maine in the past year. Maine rejected this exemption to better protect investors in Maine, a state in which broker-dealers are more likely to have only a few clients. In this State's regulatory experience, enforcement of such "de minimus" customer exemptions is complicated because of the inherent difficulty in determining the number of Maine clients of any given broker-dealer. Further, pursuant to subsection 16401(2)(A)(H), the administrator may waive the licensing requirements on a case-by-case basis. Under the predecessor act, the administrator issued exclusion orders for some broker-dealers with a small number of Maine clients. The administrator maintains such discretion under this Act.

§16402. Agent licensing requirement and exemptions

1. Licensing requirement. It is unlawful for an individual to transact business in this State as an agent unless the individual is licensed under this chapter as an agent or is exempt from licensing as an agent under subsection 2.

2. Exemptions from licensing. The following individuals are exempt from the licensing requirement of subsection 1:

A. An individual who represents a broker-dealer in effecting transactions in this State limited to those described in Section 15(h)(2)

of the federal Securities Exchange Act of 1934, 15 United States Code, Section 78(o)(2);

B. An individual who represents a broker-dealer that is exempt under section 16401, subsection 2 or 4;

C. An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

D. An individual who is a bona fide officer, director, partner or member of the issuer, or an individual occupying a similar status or performing similar functions, or a bona fide employee of the issuer who represents an issuer and who effects transactions in the issuer's securities exempted by section 16202, other than section 16202, subsections 11, 25 and 26;

E. An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, but an individual who effects transactions in a federal covered security under Section 18(b)(3) or 18(b)(4)(D) of the federal Securities Act of 1933, 15 United States Code, Section 77r(b)(3) or 77r(b)(4)(D) is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

F. An individual who represents a broker-dealer licensed in this State under section 16401, subsection 1 or exempt from licensing under section 16401, subsection 2 in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of $100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;

G. An individual who represents an issuer in connection with the purchase of the issuer's own securities;

H. An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

I. Any other individual exempted by rule adopted or order issued under this chapter.

3. License effective only while employed or associated. The license of an agent is effective only while the agent is employed by or associated with a broker-dealer licensed under this chapter or an issuer that is offering, selling or purchasing its securities in this State and is effective only with respect to transactions effected as an employee or otherwise on behalf of said broker-dealer or issuer.

4. Limit on employment or association. It is unlawful for a broker-dealer, or an issuer engaged in offering, selling or purchasing securities in this State, to employ or associate with an agent who transacts business in this State on behalf of broker-dealers or issuers unless the agent is licensed under subsection 1 or exempt from licensing under subsection 2.

5. Limit on affiliations. An individual may not act as an agent for more than one broker-dealer or one issuer at a time, unless the broker-dealers and the issuers for which the agent acts are affiliated by direct or indirect common control or are authorized by rule or order under this chapter.

6. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: RUSA Sections 201-202.

1. "Agent" is defined in Section 102(2). The scope of the Section 402(a) reference to "transact business in this State" is specified in Section 610. An administrator may by rule or order take action under Section 401(d)(2) to address an agent.

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

3. A broker-dealer in violation of Section 402(a) may be disciplined under Section 412 and be subject to a civil or administrative enforcement action under Section 603 or 604.

4. Under Sections 402(b)(3) and (5) an agent may be exempt if acting for an issuer and receiving compensation (for example, as a corporate executive), as long as the compensation is not a commission or other remuneration based on transactions in the issuer's own securities. Such an agent could receive a salary with conventional benefits, including an annual bonus (related to his or her performance) as an executive, and still be within this exemption unless the agent is also being compensated directly or indirectly for participation in the specified securities transactions.

5. Section 402(b)(6) was added to provide relief in situations where an agent is accepting orders from a sophisticated financial professional who is making the investment decisions for its customers.

6. Ministerial or clerical acts in Section 402(b)(8) might include preparing routine written communications or responding to inquiries.

7. Section 402(e) limits agents to a single employment or affiliation unless a rule or order of the administrator authorizes multiple affiliations. In any event an agent must be registered, see Section 402(a), or exempt from registration, see Section 402(b). Registration is effective only while an agent is employed by or associated with a broker-dealer or an issuer. See Section 402(c).

Maine Comments

1. Section 16402(2)(D): Maine has modified this paragraph to reinstate the predecessor act's limitation on the type of unlicensed persons who may act as agents of an issuer in effecting transactions exempt under section 16202 to "bona fide" officers, directors, partners, members or employees of the issuer. By qualifying these persons as "bona fide," it is Maine's intent that this exemption not be available to persons employed by the issuer solely to effectuate securities transactions.

§16403. Investment adviser licensing requirement and exemptions

1. Licensing requirement. It is unlawful for a person to transact business in this State as an investment adviser unless the person is licensed under this chapter as an investment adviser or is exempt from licensing as an investment adviser under subsection 2.

2. Exemptions from licensing. The following persons are exempt from the licensing requirement of subsection 1:

A. A person without a place of business in this State that is registered or licensed under the securities act of the state in which the person has its principal place of business if its only clients in this State are:

(1) Federal covered investment advisers, investment advisers licensed under this chapter or broker-dealers licensed under this chapter;

(2) Institutional investors;

(3) Bona fide preexisting clients whose principal places of residence are not in this State if the investment adviser is registered or licensed under the securities act of the state in which the clients maintain principal places of residence; or

(4) Any other client exempted by rule adopted or order issued under this chapter;

B. A person without a place of business in this State if the person has had, during the preceding 12 months, not more than 5 clients that are resident in this State in addition to those specified under paragraph A; or

C. Any other person exempted by rule adopted or order issued under this chapter.

3. Limits on employment or association. It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this State if the license of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser or broker-dealer by an order under this chapter, the Securities and Exchange Commission or a self-regulatory organization, unless the investment adviser sustains the burden of proof that the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation or bar. Upon request from the investment adviser and for good cause, the administrator, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

4. Investment adviser representative licensing required. It is unlawful for an investment adviser to employ or associate with an individual required to be licensed under this chapter as an investment adviser representative who transacts business in this State on behalf of the investment adviser unless the individual is licensed under section 16404, subsection 1 or is exempt from licensing under section 16404, subsection 2.

5. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

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

1. "Investment adviser" is defined in Section 102(15). The scope of the Section 403(a) reference to "transact business in this State" is specified in Section 610.

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

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

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

§16404. Investment adviser representative licensing requirement and exemptions

1. Licensing requirement. It is unlawful for an individual to transact business in this State as an investment adviser representative unless the individual is licensed under this chapter as an investment adviser representative or is exempt from licensing as an investment adviser representative under subsection 2.

2. Exemptions from licensing. The following individuals are exempt from the licensing requirement of subsection 1:

A. An individual who is employed by or associated with an investment adviser that is exempt from licensing under section 16403, subsection 2 or a federal covered investment adviser that is excluded from the notice filing requirements of section 16405; and

B. Any other individual exempted by rule adopted or order issued under this chapter.

3. License effective only while employed or associated. The license of an investment adviser representative is effective only while the investment adviser representative is employed by or associated with an investment adviser licensed under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under section 16405 and is effective only with respect to conduct engaged in as an employee or otherwise on behalf of said investment adviser.

4. Limit on affiliations. An individual may transact business as an investment adviser representative for more than one investment adviser or federal covered investment adviser unless a rule adopted or order issued under this chapter prohibits or limits an individual from acting as an investment adviser representative for more than one investment adviser or federal covered investment adviser.

5. Limits on employment or association. It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to conduct business in this State on behalf of an investment adviser or a federal covered investment adviser if the license of the individual as an investment adviser representative is suspended or revoked or the individual is barred from employment or association with an investment adviser or a federal covered investment adviser by an order under this chapter, the Securities and Exchange Commission or a self-regulatory organization. Upon request from a federal covered investment adviser and for good cause, the administrator, by order

issued, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

6. Referral fees. An investment adviser licensed under this chapter, a federal covered investment adviser that has filed a notice under section 16405 or a broker-dealer licensed under this chapter is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser licensed under this chapter, a federal covered investment adviser who has filed a notice under section 16405 or a broker-dealer licensed under this chapter with which the individual is employed or associated as an investment adviser representative.

7. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

No Prior Provision.

1. "Investment adviser representative" is defined in Section 102(16). The scope of the Section 404(a) reference to "transacts business in this State" is specified in Section 610.

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

3. Under this Act a sole practitioner may register as an investment adviser. See Section 403. The Investment Adviser Registration Depository currently provides for entry of the legal name of the individual as the investment adviser and the entry of any name the individual is doing business under that is different from the individual's name. A sole practitioner is not required to register under Section 404 as an investment adviser representative, unless the administrator requires such registration.

4. Section 404(e) prohibits an investment adviser representative from association with a federal covered investment adviser when such association is prohibited by an order of the administrator. Unlike similar provisions in Sections 401 and 403, there is no culpability requirement that the investment adviser representative "knows or in the exercise of reasonable care should have known" of a suspension or bar because the order should be received by the

investment adviser representative. As with Sections 401 and 403, the administrator may waive this prohibition. Cf. Comment 17 to Section 412.

5. The administrator may adopt rules or orders under Section 404(f) in accordance with Section 605. The Securities and Exchange Commission has adopted a rule that addresses referral fees in Rule 206(4)-3 of the Investment Advisers Act of 1940.

6. For a state that intends to extend Section 404(f) to those broker-dealers and investment advisers who are not required to register and those federal covered investment advisers not required to file a notice, this subsection should read:

> (f) [**Referral Fees.**] An investment adviser registered under this [Act], a federal covered investment adviser that has filed a notice under Section 405, or a broker-dealer registered under this [Act] is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this [Act], or not required to register under this [Act], a federal covered investment who has filed a notice under Section 405 or is not required to file a notice under Section 405, or a broker-dealer registered under this [Act] or not required to register under this [Act] with which the individual is employed or associated as an investment adviser representative.

§16405. Federal covered investment adviser notice filing requirement

1. Notice filing requirement. Except with respect to a federal covered investment adviser described in subsection 2, it is unlawful for a federal covered investment adviser to transact business in this State as a federal covered investment adviser unless the federal covered investment adviser complies with subsection 3.

2. Notice filing requirement not required. The following federal covered investment advisers are not required to comply with subsection 3:

> A. A federal covered investment adviser without a place of business in this State if its only clients in this State are:

(1) Federal covered investment advisers, investment advisers licensed under this chapter and broker-dealers licensed under this chapter;

(2) Institutional investors;

(3) Bona fide preexisting clients whose principal places of residence are not in this State; or

(4) Other clients specified by rule adopted or order issued under this chapter;

B. A federal covered investment adviser without a place of business in this State if the person has had, during the preceding 12 months, not more than 5 clients that are resident in this State in addition to those specified under paragraph A; and

C. Any other person excluded by rule adopted or order issued under this chapter.

3. Notice filing procedure. A person acting as a federal covered investment adviser that is not excluded under subsection 2 shall file a notice, a consent to service of process complying with section 16611, and such records as have been filed with the Securities and Exchange Commission under the federal Investment Advisers Act of 1940 and pay the fees specified in section 16410, subsection 1, paragraph E.

4. Effectiveness of filing. The notice under subsection 3 becomes effective upon its filing.

5. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

No Prior Provision.

1. "Federal covered investment adviser" is defined in Section 102(6). The scope of the Section 405(a) reference to "transacts business in this State" is specified in Section 610.

2. Section 405(b)(2) is necessitated by the National Securities Markets Improvement Act of 1996 and is intended to coordinate this Act with the Investment Advisers Act of 1940.

3. Section 404(c) provides limits on those who can be employed by or associated with a federal covered investment adviser.

4. The succession provision of Section 407(a) is available to a federal covered investment adviser who has filed a notice under Section 405.

§16406. Licensing of broker-dealers, agents, investment advisers and investment adviser representatives

1. Application for initial license. A person becomes licensed as a broker-dealer, agent, investment adviser or investment adviser representative by filing an application and a consent to service of process complying with section 16611 and paying the fee specified in section 16410 and any fees charged by the designee of the administrator for processing the filing. The application must contain:

A. The information or record required for the filing of a uniform application; and

B. Upon request by the administrator, any other financial or other information or record that the administrator determines is appropriate.

2. Amendment. If the information or record contained in an application filed under subsection 1 is or becomes inaccurate or incomplete in a material respect, the licensee shall promptly file a correcting amendment.

3. Effectiveness of licensing. If an order is not in effect and a proceeding is not pending under section 16412, a license becomes effective no later than noon on the 45th day after a completed application is filed, provided that all examination and training requirements imposed under section 16412, subsection 5 have been satisfied and provided that the license has not been denied. The administrator may authorize an earlier effective date of licensing.

4. License renewal. A license is effective until midnight on December 31st of the year for which the application for licensing is filed. Unless an order is in effect under section 16412, a license may be automatically renewed each year by filing such records as are required by the administrator, by paying the

fee specified in section 16410 and by paying costs charged by the designee of the administrator for processing the filings.

5. Additional conditions or waivers. A rule adopted or order issued under this chapter may impose other conditions on licensing or may waive, in whole or in part, specific requirements in connection with licensing as are in the public interest and for the protection of investors. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 202; RUSA Sections 205, 208.

1. Under Section 406(a), the administrator is authorized to accept standardized forms such as Form B-D for broker-dealers; Form U-4 for agents and investment adviser representatives; and Form ADV for investment advisers, which are filed today through such designees as the Web-CRD or the Investment Adviser Registration Depository (IARD). While this Act generally encourages uniformity, Sections 406(a) and (e) are intended to give the administrator authority to augment or waive disclosure requirements in appropriate cases.

2. Section 406(a) eliminates the listing of specified information delineated in Section 202 of the 1956 Act. As with RUSA Section 205, the intent is to facilitate coordination with widely used standardized forms.

3. Under this Act a single person may act both as an agent and investment adviser representative if the person satisfies applicable registration requirements to be both an agent and investment adviser representative.

Maine Comments

1. Section 16406(1): As implied by Official Comment No. 1, the Securities Administrator may designate the Central Registration Depository and the Investment Adviser Registration Depository to receive applications submitted pursuant to this section.

§16407. Succession and change in licensing of broker-dealer or investment adviser

1. Succession. A broker-dealer or investment adviser may succeed to the current license of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current license of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for licensing pursuant to section 16401 or 16403 or a notice pursuant to section 16405 for the unexpired portion of the current license or notice filing.

2. Organizational change. A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its license by filing an amendment to its license if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the licensee in its filing. The new organization is a successor to the original licensee for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for licensing. A predecessor licensed under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser licensing within 45 days after filing its amendment to effect succession.

3. Name change. A broker-dealer or investment adviser that changes its name may continue its license by filing an amendment to its license. The amendment becomes effective when filed or on a date designated by the licensee.

4. Change of ownership or control. A change of ownership or control of a broker-dealer or investment adviser may require the filing of a new application pursuant to a rule adopted or order issued under this chapter. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 202(c); RUSA 210.

1. Section 407 is intended to avoid unnecessary interruptions of business by specifying procedures for a successor broker-dealer or investment adviser; a broker-dealer or investment adviser to maintain its registration if it changes its

form of organization or name; or, in accordance with a rule or order adopted under this Act, a change of control of a broker-dealer or investment adviser.

2. There is no filing fee under Section 407.

Maine Comments

1. Section 16407(3) and (4). A broker-dealer or investment adviser may succeed to the current license of another broker-dealer or investment adviser by filing an amendment to its Form BD or Form ADV for any name change or for any changes that do not involve a material change in financial condition or management. Any succession that involves a material change in financial condition or management, or a change in ownership or control, requires that the broker-dealer or investment adviser file a license application under Section 16406 and pay the appropriate filing fee for an initial license application under Section 16410.

2. Section 16407(4): It is intended that a rule adopted or order issued under this subsection will adopt a concept similar to the definition of "successor firm" that appeared in Section 10501(21) of the Revised Maine Securities Act.

§16408. Termination of employment or association of agent and investment adviser representative and transfer of employment or association

1. Notice of termination. If an agent licensed under this chapter terminates employment by or association with a broker-dealer or issuer, or if an investment adviser representative licensed under this chapter terminates employment by or association with an investment adviser or federal covered investment adviser, or if either licensee terminates activities that require licensing as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser or federal covered investment adviser shall promptly file a notice of termination. If the licensee learns that the broker-dealer, issuer, investment adviser or federal covered investment adviser has not filed the notice, the licensee shall promptly file it.

2. Transfer of employment or association. If an agent licensed under this chapter terminates employment by or association with a broker-dealer licensed under this chapter and begins employment by or association with another broker-dealer licensed under this chapter, or if an investment adviser representative licensed under this chapter terminates employment by or association with an investment adviser licensed under this chapter or a federal covered investment adviser that has filed a notice under section 16405 and begins employment by or association with another investment adviser licensed under this chapter or a federal covered investment adviser that has filed a notice under section 16405, upon the filing by or on behalf of the licensee, within 30 days after the termination, of an application for licensing that complies with the requirement of section 16406, subsection 1 and payment of the filing fee required under section 16410, the license of the agent or investment adviser representative is:

A. Immediately effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record does not contain a new or amended disciplinary disclosure within the previous 12 months; or

B. Temporarily effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record contains a new or amended disciplinary disclosure within the previous 12 months.

3. Withdrawal of temporary license. The administrator may withdraw a temporary license if there are or were grounds for discipline as specified in section 16412 and the administrator does so within 30 days after the filing of the application. If the administrator does not withdraw the temporary license within the 30-day period, licensing becomes automatically effective on the 31st day after filing.

4. Power to prevent licensing. The administrator may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection 2, paragraph A or B based on the public interest and the protection of investors or based upon a request for other information pursuant to section 16406, subsection 1, paragraph B.

5. Termination of license or application for licensing. If the administrator determines that a licensee or applicant for licensing is no longer

in existence or has ceased to act as a broker-dealer, agent, investment adviser or investment adviser representative, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator or guardian, or can not reasonably be located, a rule adopted or order issued under this chapter may require the license be canceled or terminated or the application denied. The administrator may reinstate a canceled or terminated license, with or without hearing, and may make the license retroactive. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provision: 1956 Act Section 204(d).

1. Under Sections 402(c) and 404(c) registration of an agent or investment adviser representative is effective only while the agent or investment adviser representative is employed by or associated with a broker-dealer, issuer, or investment adviser, as may be the case. Section 408(a) specifies a procedure to inform the administrator of a notice of termination.

2. To expedite transfer to a new broker-dealer or investment adviser, Section 408(b) provides a procedure by which agents or investment adviser representative registration will be effective immediately as of the date of new employment when there is no new or added disciplinary disclosure in the relevant Central Research Depository or Investment Adviser Registration Depository records. Both electronic systems are currently administered by the National Association of Securities Dealers. Section 408(d) is intended to ensure that the administrator has the authority to prevent immediate effectiveness in appropriate cases.

Maine Comments

1. Section 16408(4): The Securities Administrator may also delay the effectiveness of licensing pursuant to a request made under section 16406(1)(B).

§16409. Withdrawal of licensing of broker-dealer, agent, investment adviser and investment adviser representative

Withdrawal of licensing by a broker-dealer, agent, investment adviser or investment adviser representative becomes effective 60 days after the filing of the application to withdraw or within any shorter period authorized by the administrator, unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, the administrator shall make a determination with respect to the withdrawal application as part of the proceeding. The administrator may institute a revocation or suspension proceeding under section 16412 within one year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which licensing was effective.

Official Comments

Prior Provisions: 1956 Act Section 204(e); RUSA Section 214

1. This section generally follows the 1956 Act Section 204(e) and RUSA Section 214. This section does not affect any applicant's privilege of withdrawal of an application from registration before the registration becomes effective. It is simply designed to prevent withdrawal of an effective registration under fire. The last sentence preserves the ability of the administrator to initiate an action under Section 412 when the administrator does not know of a reason to object to withdrawal until after withdrawal has become effective.

2. Ordinarily today a registrant will file a standardized form such as Form U-5, BD-W or ADV-W to withdraw registration.

Official Comments

Prior Provisions: 1956 Act Section 202(b); RUSA Section 206.

1. Each state should determine the appropriate fee for each type of registration and for each type of renewal, denial, or withdrawal of a registration.

2. Similarly each state should determine whether it wishes to remove the brackets from Section 410(g) and charge a single fee for dually registered agents and investment adviser representatives.

3. If a State prefers to have the fees in this section established by rule, amend this section to read as follows, inserting the appropriate reference to the State's administrative procedure act:

§16410. Filing fees

1. Fees established by administrator. The administrator shall establish by rule fees in accordance with the following:

A. A fee not to exceed $500 for an application for licensing as a broker-dealer and renewal of licensing as a broker-dealer. If the filing results in a denial or withdrawal, the administrator shall retain the fee;

B. A fee not to exceed $200 for an application for licensing as an agent and renewal of licensing as an agent. If the filing results in a denial or withdrawal, the administrator shall retain the fee;

C. A fee not to exceed $500 for an application for licensing as an investment adviser and renewal of licensing as an investment adviser. If the filing results in a denial or withdrawal, the administrator shall retain the fee;

D. A fee not to exceed $200 for an application for licensing as an investment adviser representative and renewal of licensing as an investment adviser representative. If the filing results in a denial or withdrawal, the administrator shall retain the fee;

E. An amount not to exceed $500 for an initial fee and annual notice fee for a federal covered investment adviser required to file a notice under section 16405. If the filing results in a withdrawal, the administrator shall retain the fee; and

F. A amount not to exceed $200 for an initial fee and annual renewal fee for each branch office in this State. If the filing results in a withdrawal, the administrator shall retain the fee. For purposes of this paragraph, "branch office" means any office of a broker-dealer or investment adviser located in this State, other than the principal place of business of the broker-dealer or investment adviser. Only one branch office fee is due if an office is a branch office of both a broker-dealer and an investment adviser affiliated by direct or indirect common control.

2. Payment. A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this chapter.

3. Active duty renewal fee waiver. The administrator may waive the renewal fee under subsection 1, paragraph B or D for a licensed agent or investment adviser representative who is a member of the National Guard or the Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days.

4. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Maine Comments

1. Section 16410: This section provides fee caps within which the administrator may establish licensing and renewal fees by rule. Fees are not refundable.

2. Section 16410(1)(F): This paragraph allows the administrator to set branch office licensing and renewal fees within a fee cap. Maine has added this provision based on section 10306, subsections (1)(E), (2)(E), (3) and (4) of the Revised Maine Securities Act, which have no counterparts in the model Uniform Securities Act.

§16411. Postlicensing requirements

1. Financial requirements. A rule adopted or order issued under this chapter may establish minimum financial requirements for broker-dealers licensed or required to be licensed under this chapter and investment advisers licensed or required to be licensed under this chapter. If a licensed broker-dealer or investment adviser believes, or has reasonable cause to believe, that any requirement imposed under this subsection is not being met, the licensed broker-dealer or investment adviser shall promptly notify the administrator of its current financial condition.

2. Financial reports. A broker-dealer licensed or required to be licensed under this chapter and an investment adviser licensed or required to be licensed under this chapter shall file such financial and other reports as are required by rule adopted or order issued under this chapter. If the information

contained in a record filed under this subsection is or becomes inaccurate or incomplete in a material respect, the licensee shall promptly file a correcting amendment.

3. Record keeping. Record-keeping requirements are as follows:

A. A broker-dealer licensed or required to be licensed under this chapter and an investment adviser licensed or required to be licensed under this chapter shall make and maintain those accounts, correspondence, memoranda, papers, books and other records that are:

(1) Required by rule adopted or order issued under this chapter; or

(2) If no rule or order as set forth in subparagraph (1) has been adopted under this chapter, in compliance with the record-keeping requirements of the federal Securities Exchange Act of 1934 in the case of a broker-dealer or the federal Investment Advisers Act of 1940 in the case of an investment adviser;

B. Broker-dealer records required to be maintained under paragraph A may be maintained in computer or microform format or any other form of data storage, provided that the records are readily accessible to the administrator;

C. Investment adviser records required to be maintained under paragraph A may be maintained in any form of data storage required by rule adopted or order issued under this chapter; and

D. Records required to be maintained under this section must be preserved for 6 years unless the administrator, by rule, specifies either a longer or shorter period for a particular type or class of records.

4. Audits or inspections. The records of a broker-dealer licensed or required to be licensed under this chapter and of an investment adviser licensed or required to be licensed under this chapter are subject to such periodic, special or other audits or inspections by a representative of the administrator, within or without this State, as the administrator considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The administrator may copy, require the licensee to copy and remove for audit or inspection copies of all records the administrator reasonably

considers necessary or appropriate to conduct the audit or inspection. Broker-dealers, agents, investment advisers and investment adviser representatives shall make their records available to the administrator in a readable form. The administrator may assess a reasonable charge for conducting an audit or inspection under this subsection.

5. Custody and discretionary authority bond or insurance. A rule adopted or order issued under this chapter may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security. The administrator may determine the requirements of the insurance, bond or other satisfactory form of security. The insurance, bond or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond or other satisfactory form of security if instituted within the time limitations in section 16509, subsection 10, paragraph B.

6. Requirements for custody. Subject to Section 15(h) of the federal Securities Exchange Act of 1934, 15 United States Code, Section 78o(h) or Section 222 of the federal Investment Advisers Act of 1940, 15 United States Code, Section 80b 22, an agent may not have custody of funds or securities of a customer except under the supervision of a broker-dealer and an investment adviser representative may not have custody of funds or securities of a client except under the supervision of an investment adviser or a federal covered investment adviser. A rule adopted or order issued under this chapter may prohibit, limit or impose conditions on a broker-dealer regarding custody of funds or securities of a customer and on an investment adviser regarding custody of securities or funds of a client.

7. Investment adviser brochure rule. With respect to an investment adviser licensed or required to be licensed under this chapter, a rule adopted or order issued under this chapter may require that information or other record be furnished or disseminated to clients or prospective clients in this State as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

8. Continuing education. A rule adopted or order issued under this chapter may require an individual licensed under section 16402 or 16404 to participate in a continuing education program approved by the Securities and Exchange Commission and administered by a self-regulatory organization or another continuing education program approved by the administrator.

9. Privacy provisions. A broker-dealer licensed or required to be licensed under this chapter and an investment adviser licensed or required to be licensed under this chapter shall comply with the privacy provisions of the federal Gramm-Leach-Bliley Act, 15 United States Code, Section 6801 et seq. (1999) and the implementing Regulation S-P, federal Privacy of Consumer Financial Information, 17 Code of Federal Regulations, Part 248 (2001) adopted by the Securities and Exchange Commission. This subsection is not intended to permit the release of health care information except as permitted by Title 22, section 1711-C or Title 24-A, chapter 24.

10. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Sections 102(c), 202(d) and (e) and 203; RUSA Sections 209, 211 and 215.

1. Sections 411(a) through (c) and (e) through (f) implicitly refer to "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements." Under the National Securities Markets Improvement Act of 1996, States may not impose such requirements on covered broker-dealers and investment advisers greater than those specified in Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Advisors Act of 1940.

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

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

4. Section 411(c)(1) authorizes the administrator to require all records to be preserved for the period the administrator prescribes by rule or order.

5. Rule 17a-4 is the current rule under Section 17(a) of the Securities Exchange Act referred to in Section 411(c)(2) that addresses acceptable forms of data storage.

6. The administrator's power to copy and examine records in Section 411(d) is subject to all applicable privileges. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4921-4925 n.69 (3d ed. rev. 1996). The power in Section 411(d) to conduct audits or inspections is distinguishable from the administrator's enforcement powers under Section 602. No subpoena is necessary under Section 411(d). Failure to submit to a reasonable audit or inspection is a violation of this Act which may result in an action by the administrator under Section 412(d)(8), a criminal prosecution under Section 508, or an injunction under Section 603. An unreasonable audit, inspection or demand for information or documents would be subject to challenge in an appropriate court.

7. Section 411(f) broadens 1956 Act Section 102(c) and RUSA Section 215 to apply to agents as well as investment adviser representatives. Subject to Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Adviser Act of 1940, the administrator is given broad authority to prohibit, limit, or condition custody arrangements.

8. Section 411(g) parallels Rule 204-3, adopted under the Investment Advisers Act of 1940, popularly known as the brochure rule, which authorizes the SEC to require dissemination to investment adviser clients of specified information about the investment adviser and investment advice.

Maine Comments

1. Section 16411(3)(B): The model Uniform Securities Act version of this section cited to a provision of federal law as to acceptable forms of data storage. That federal provision is also cited in Official Comment 5. So as to avoid incorporating federal standards by reference, Maine has deleted this citation in favor of a provision from the Revised Maine Securities Act that sets forth an objective standard that is nonetheless compatible with current federal law and with the Uniform Electronic Transactions Act.

2. Section 16411(3)(D): Maine has added this provision regarding record preservation based on section 10310(6) of the Revised Maine Securities Act, which had no counterpart in the model Uniform Securities Act.

3. Section 16411(4): The records of agents and investment adviser representatives are records of the broker-dealers and investment advisers that employ them.

4. Section 16411(9): Maine has added this provision regarding privacy based on section 10313(1)(L) of the Revised Maine Securities Act, which had no counterpart in the model Uniform Securities Act.

§16412. Denial, revocation, suspension, withdrawal, restriction, condition or limitation of licensing

1. Disciplinary conditions, applicants. If the administrator finds that the order is in the public interest and subsection 4 authorizes the action, an order issued under this chapter may deny an application, or may condition or limit licensing, of an applicant to be a broker-dealer, agent, investment adviser or investment adviser representative.

2. Disciplinary conditions, licensees. If the administrator finds that the order is in the public interest and subsection 4 authorizes the action, an order issued under this chapter may revoke, suspend, condition or limit the license of a licensee. Notwithstanding this subsection, the administrator may not:

A. Institute a revocation or suspension proceeding under this subsection based on an order issued under a law of another state that is reported to the administrator or a designee of the administrator more than one year after that state's order is reported; or

B. Under subsection 4, paragraph E, subparagraph (1) or (2), issue an order on the basis of an order issued under the securities act of another state unless the other state's order was based on conduct for which subsection 4 would authorize the action had the conduct occurred in this State.

3. Disciplinary penalties, licensees. If the administrator finds that the order is in the public interest and subsection 4, paragraph A, B, C, D, E, F, H, I, J, L or M authorizes the action, an order under this chapter may censure, impose a bar on or impose a civil fine in an amount not to exceed a maximum of $5,000 per violation on a licensee.

4. Grounds for discipline. A person may be disciplined under subsections 1 to 3 if the person or, in the case of a broker-dealer or investment adviser, the broker-dealer or investment adviser, a partner, officer or director of the broker-dealer or investment adviser, a person occupying a similar status or performing similar functions or a person directly or indirectly controlling the broker-dealer or investment adviser:

A. Has filed an application for licensing in this State under this chapter or the predecessor act within the previous 10 years that, as of the effective date of licensing or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;

B. Intentionally or knowingly violated or intentionally or knowingly failed to comply with this chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act within the previous 10 years;

C. Has pleaded guilty or nolo contendere to or been convicted of murder or a Class A, B or C crime or a felony or within the previous 10 years has pleaded guilty or nolo contendere to or been convicted of a Class D or E crime or a misdemeanor involving a security, a commodity future or option contract or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance or any crime indicating a lack of fitness to engage in the securities business;

D. Is enjoined or restrained by a court of competent jurisdiction in any action from engaging in or continuing an act, practice or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance;

E. Is the subject of an order, issued after notice and opportunity for hearing by:

(1) The securities or other financial services regulator of a state or by the Securities and Exchange Commission, a self-regulatory organization or other federal agency denying, revoking, barring or suspending registration or licensing as a broker-dealer, agent,

investment adviser, investment adviser representative or federal covered investment adviser;

(2) The securities regulator of a state or the Securities and Exchange Commission against a broker-dealer, agent, investment adviser, investment adviser representative or federal covered investment adviser;

(3) The Securities and Exchange Commission or a self-regulatory organization suspending or expelling the registrant or licensee from membership in the self-regulatory organization;

(4) A court adjudicating a United States Postal Service fraud order;

(5) The insurance regulator of a state denying, suspending or revoking registration or licensing as an insurance producer or its equivalent;

(6) A depository institution or financial services regulator suspending or barring the person from the depository institution or other financial services business; or

(7) The United States Commodity Futures Trading Commission denying, suspending or revoking registration under the federal Commodity Exchange Act;

F. Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the Securities and Exchange Commission, the United States Commodity Futures Trading Commission, the Federal Trade Commission, a federal depository institution regulator or a depository institution, insurance or other financial services regulator of a state that the person intentionally or knowingly violated the federal Securities Act of 1933, the federal Securities Exchange Act of 1934, the federal Investment Advisers Act of 1940, the federal Investment Company Act of 1940, the federal Commodity Exchange Act, the securities or commodities law of a state or a federal or state law under which a business involving investments, franchises, insurance, banking or finance is regulated;

G. Is insolvent, either because the person's liabilities exceed the person's assets or because the person can not meet the person's

obligations as they mature. The administrator may not enter an order against an applicant or licensee under this paragraph without a finding of insolvency as to the applicant or licensee;

H. Refuses to allow or otherwise impedes the administrator from conducting an audit or inspection under section 16411, subsection 4 or refuses access to a licensee's office to conduct an audit or inspection under section 16411, subsection 4;

I. Has failed to reasonably supervise an agent, investment adviser representative or other individual if the agent, investment adviser representative or other individual was subject to the person's supervision and committed a violation of this chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act or engaged in conduct that would be grounds for discipline under this subsection within the previous 10 years;

J. Is subject to an order entered by a court of competent jurisdiction or entered after notice and opportunity for hearing by a federal or state licensing agency denying, suspending, revoking or restricting the person's license to sell real estate, insurance or any investment other than securities, provided that the order resulted from allegations of misconduct. This paragraph also applies when the denial, suspension, revocation or restriction of the license is pursuant to a consent agreement between the person and the licensing agency, whether or not the agency also issues an order;

K. After notice and opportunity for a hearing, has been found within the previous 10 years:

(1) By a court of competent jurisdiction to have intentionally and knowingly violated the laws of a foreign jurisdiction under which the business of securities, commodities, investment, franchises, insurance, banking or finance is regulated;

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

(3) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;

L. Is the subject of a cease and desist order issued by the Securities and Exchange Commission or issued under the securities, commodities, investment, franchise, banking, finance or insurance laws of a state;

M. Has engaged in unlawful, dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance or insurance business within the previous 10 years; or

N. Is not qualified on the basis of factors such as training, experience and knowledge of the securities business; except that, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for licensing as an investment adviser representative, a denial order may not be based on this paragraph if the individual has successfully completed all examinations required by subsection 5. The administrator may require an applicant for licensing under section 16402 or 16404 who has not been registered or licensed in a state within the 2 years preceding the filing of an application in this State to successfully complete an examination.

5. Examinations. A rule adopted or order issued under this chapter may require that training or an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all individuals. An order issued under this chapter may waive, in whole or in part, training or an examination as to an individual or training or an examination as to a class of individuals if the administrator determines that the training or examination is not necessary or appropriate in the public interest and for the protection of investors.

6. Summary process. Notwithstanding Title 5, sections 10003 and 10004, if the public interest or the protection of investors so requires, the administrator may suspend or deny an application summarily; restrict, condition, limit or suspend a license; or censure, bar or impose a civil penalty on a licensee before final determination of an administrative proceeding. Upon the issuance of an order, the administrator shall promptly notify each person subject to the order that the order has been issued, the reasons for the action and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested

and none is ordered by the administrator within 30 days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

7. Procedural requirements. An order may not be issued under this section, except under subsection 6, without:

A. Appropriate notice to the applicant or licensee;

B. Opportunity for hearing; and

C. Findings of fact and conclusions of law in a record in accordance with Title 5, chapter 375.

8. Control person liability. A person that controls, directly or indirectly, a person not in compliance with this section may be disciplined by order of the administrator under subsections 1 to 3 to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this section.

9. Limit on investigation or proceeding. The administrator may not institute a proceeding under subsection 1, 2 or 3 based solely on material facts actually known by the administrator unless an investigation or the proceeding is instituted within one year after the administrator actually acquires knowledge of the material facts.

10. Appointment of presiding officer. For purposes of a hearing conducted pursuant to this section, the administrator may appoint a qualified person to preside at the hearing and to make proposed findings of fact and conclusions of law. The responsibility for the entry of the final findings of fact and conclusions of law and for the issuance of any final order remains with the administrator.

Official Comments

Prior Provisions: 1956 Act Section 204; RUSA Sections 207, 212-213.

1. Section 412 generally follows Section 204 of the 1956 Act and Sections 207 and 212-213 of RUSA, but has been modified to reflect subsequent

developments that have broadened the scope and remedies of counterpart federal and state statutes.

2. Section 412 authorizes the administrator to seek a sanction based on the seriousness of the misconduct. Under Section 412 the administrator must prove that the denial, revocation, suspension, cancellation, withdrawal, restriction, condition, or limitation both is (1) in the public interest and (2) involves one of the enumerated grounds in Section 412(d). See, e.g., Mayflower Sec. Co., Inc. v. Bureau of Sec., 312 A.2d 497 (N.J. 1973). The "public interest" is a much litigated concept that has come to have settled meanings. See generally 6 L. Loss & J. Seligman, Securities Regulation 3103.5-3103.18 (3d ed. rev. 2002) (under federal securities laws). The public interest will not require imposition of a sanction for every minor or technical violation of subsection (d).

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

4. Section 412(a) through (c) authorizes the administrator to proceed against an entire firm, regardless of whether the administrator proceeds against any individual, when an individual partner, officer, or director or person occupying a similar status or performing similar functions, or a controlling person is disciplined under subsection (d), but only if proceeding against the entire firm is in the public interest. The discipline of such an individual may not automatically be used against a broker-dealer or investment adviser. When, however, there is a failure to reasonably supervise, see Section 412(d)(9) or control person liability, see Section 412(h), the administrator is empowered to proceed against a firm in an appropriate case. In Section 412, "any partner, officer, or director, any person occupying a similar status or performing similar function." can include a branch manager, assistant branch manager, or other supervisor.

5. In Section 412(d)(1) the completeness and accuracy of an effective application for registration is tested as of the appropriate effective date. An application that becomes incomplete or inaccurate after its effective date is not a ground for discipline under paragraph (d)(1). In an appropriate case, an action might be available under paragraph (d)(2) and Section 406(b). On the other hand, in a proceeding to deny effectiveness to a pending application for registration, the completeness and accuracy of the application is not limited to the effective date and can be judged on any date after filing.

6. The term "willfully" in Section 412(d)(2) and (11)(A) is discussed in Comment 2 to Section 508.

7. There is no time limit or statute of limitations on felony convictions in Section 412(d)(3) as a ground for disciplinary action.

8. The present tense of the verb "is" in Sections 412(d)(4) through (6) and (12) means that an injunction, order, adjudication, or determination that has expired or been vacated is no longer a ground for discipline.

9. In Sections 412(d)(5) and (6) the administrator is not required to prove the validity of the ground which led to the earlier disciplinary order.

10. Under Section 412(d)(7) the administrator may not proceed against a broker-dealer or investment adviser firm on the basis of the insolvency of a partner, officer, director, controlling person or other person specified in subsection (b), unless it is a sole proprietorship.

11. Section 412(d)(8) can be violated by a refusal to cooperate with an administrator's reasonable audit or inspection, including by withholding or concealing records, refusing to furnish required records, or refusing the administrator reasonable access to any office or location within an office to conduct an audit or inspection under this Act. However, a request by a person subject to an audit or inspection for a reasonable delay to obtain assistance of counsel does not constitute a violation of Section 412(d)(8).

12. The term "failed to supervise reasonably" in Section 412(d)(9) includes not having reasonable supervisory procedures in place as well as a proper system of supervision and internal control. Cf. Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Section 15(b)(4)(E) of the Securities Exchange Act of 1934 similarly addresses "failure to supervise reasonably." See 6 Louis Loss & Joel Seligman, Securities Regulation 3097-3101 (3d ed. rev. 2002).

13. The term "dishonest and unethical practices" in Section 412(d)(13) has been held not to be unconstitutionally vague. See, e.g., Brewster v. Maryland Sec. Comm'n, 548 A.2d 157, 160 (M.D. Ct. Spec. App. 1988) ("a broad statutory standard is not vague if it has a meaningful referent in business practice, custom or usage"); Johnson-Bowles Co. v. Division of Sec., 829 P.2d 101, 114 (Utah Ct. App. 1992) (such legislative language bespeaks a legislative intent to delegate the interpretation of what constitutes "dishonest and unethical practices" in the securities industry to the administrator). Ministerial or clerical violations of a statute or rule, if immaterial and

occurring without intent or recklessness, typically would not constitute dishonest or unethical practices.

14. Under the counterparts to Section 412(d)(14) and (e) applicants to become agents of broker-dealers typically take standardized tests administered by the National Association of Securities Dealers, Inc.

15. Sections 412(f) and (g) amplify the earlier procedures found in Section 204(f) of the 1956 Act and are intended to facilitate summary disciplinary proceedings, when these are appropriate.

16. Section 412(i) parallels the language of Section 204 of the 1956 Act and Section 212(b) of RUSA with some significant changes. The time period in which the administrator can act has been extended to one year from 30 days in the 1956 Act and 90 days in RUSA. The limitation on instituting a proceeding can also be tolled by instituting a formal investigation. The addition of the word "solely" is intended to make it clear that an administrator may consider the prior history of an applicant or registrant even if that prior history had been known to the administrator for more than one year if there are additional material facts which are actually known to the administrator within the last year.

17. "Actually known" in Section 412(i) is used to signify that the mere filing of material facts in the Central Registration Depository or Investment Advisory Registration Depository systems does not constitute actual knowledge, unless that information was received by the administrator, or, but for a decision by the administrator, would have been received by the administrator.

Maine Comments

1. The model Uniform Securities Act version of this section and other sections referred to "willful" violations of law, whereas the Revised Maine Securities Act referred instead to "intentional or knowing" violations of law. Maine retains the words "intentional or knowing" because that language is used in the Maine Criminal Code. Further, under Maine law the term "willful" is construed to mean the same thing as "intentional or knowing."

SUBCHAPTER 5

FRAUD AND LIABILITIES

§16501. General fraud

It is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly:

1. Device, scheme, artifice. To employ a device, scheme or artifice to defraud;

2. Untrue statement of or omission of material fact. To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

3. Fraud, deceit. To engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person.

Official Comments

Prior Provisions: 1956 Act Section 101; RUSA Section 501.

1. Section 501, which was Section 101 in the 1956 Act, was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a), and Section 101 of the 1956 Act. Section 501 is not identical to either Rule 10b-5 or Section 17(a).

2. There are no exemptions from Section 501.

3. Section 501 applies to any securities offer, sale or purchase, including offers, sales, or purchases involving registered, exempt, or federal covered securities. It would also apply to a rescission offer under Section 510.

4. The possible consequences of violating Section 501 are many. These include denial, suspension, or revocation of securities registration under Section 306; denial, revocation, suspension, withdrawal, restriction, condition or limitation of a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412; criminal prosecution

under Section 508; civil enforcement proceedings under Sections 603; and administrative proceedings under 604.

5. Because Section 501, like Rule 10b-5, reaches market manipulation, see 8 Louis Loss & Joel Seligman, Securities Regulation Ch.10.D (3d ed. 1991), this Act does not include the RUSA market manipulation Section 502, which had no counterpart in the 1956 Act.

6. The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context. See, e.g., Section 508, criminal penalties, where "willfulness" must be proven; Section 509, civil liabilities, which includes a reasonable care defense; or civil and administrative enforcement actions under Sections 603 and 604, where no culpability is required to be pled or proven.

7. There is no private cause of action, express or implied, under Section 501. Section 509(m) expressly provides that only Section 509 provides a private cause of action for conduct that could violate Section 501.

Maine Comments

1. Official Comment 5 states that because section 501 "reaches market manipulation" the model Uniform Securities Act did not contain a separate section on market manipulation. For this reason, Maine does not retain section 10202 of the Revised Maine Securities Act, which set forth certain prohibited practices relating to market manipulation. However, the conduct described in former section 10202, set out below, would result in liability under this section.

Without limiting the general applicability of section 10201, a person may not:

1. Fictitious quotations. Quote a fictitious price with respect to a security;

2. No change in beneficial ownership. Effect a transaction in a security that involves no change in the beneficial ownership of the security for the purpose of creating a false or misleading appearance of active trading in a security or with respect to the market for the security;

3. Orders for purchases. Enter an order for the purchase of a security with the knowledge that an order of substantially the same size and at substantially the same time and price for the sale of the security has been, or will be, entered by or for the same, or affiliated, person for the purpose of creating a false or misleading appearance of active trading in a security or with respect to the market for the security;

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

5. Deceptive practices. Employ any other deceptive or fraudulent device, scheme or artifice to manipulate the market in a security.

§16502. Prohibited conduct in providing investment advice

1. Fraud in providing investment advice. It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

A. To employ a device, scheme or artifice to defraud another person; or

B. To engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person.

2. Rules defining fraud. A rule adopted under this chapter may define an act, practice or course of business of a person described in subsection 1 as fraudulent, deceptive or manipulative and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives from engaging in acts, practices and courses of business defined as fraudulent, deceptive or manipulative.

3. Rules specifying contents of advisory contract. A rule adopted under this chapter may specify the contents of an investment advisory contract entered into, extended or renewed by an investment adviser.

4. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 102(a); RUSA Section 503.

1. Section 502(a) applies to any person that commits fraud in providing investment advice. Section 502(b) is not limited to persons registered as investment advisers or investment adviser representatives.

2. A person can violate both Section 501 and Section 502 if the person violates Section 502 in connection with the offer, purchase, or sale of a security.

3. The rulemaking authority under Sections 502(b) and (c) would provide the basis for existing NASAA rules concerning investment advisers, to the extent these rules are not preempted by the National Securities Markets Improvement Act of 1996.

4. Under Section 203A(b)(2) of the Investment Advisers Act States retain their authority to investigate and bring enforcement actions with respect to fraud or deceit against a federal covered investment adviser or a person associated with a federal covered investment adviser. Under Section 502(a), which applies to any person, a State could bring an enforcement action against a federal covered investment adviser, including a federal covered investment adviser excluded from the definition of investment adviser in Section 102(15)(E).

5. There is no private cause of action, express or implied, under Section 502. Section 509(m) expressly provides that only Section 509 provides for a private cause of action for prohibited conduct in providing investment advice that could violate Section 502.

§16503. Evidentiary burden

1. Civil. In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden to prove the applicability of the exemption, exception, preemption or exclusion.

2. Criminal. In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden to prove by a preponderance of the evidence any such affirmative defense.

Official Comment

Prior Provisions: 1956 Act Section 402(d); RUSA Section 608.

1. As specified in Section 503(a), in a civil or administrative action, the person claiming an exemption, exception, preemption, or exclusion has the burden of persuasion.

2. In contrast, in a criminal action under Section 503(b), the prosecutor is required to prove each element of a crime "beyond a reasonable doubt." The defendant only has the burden of producing evidence of an exemption, exception, preemption, or exclusion. Some court decisions have characterized this burden as an affirmative defense. See, e.g., United States ex. rel. Schott v. Tehan, 365 F.2d 191, 195 (6th Cir. 1966) (Ohio blue sky law constitutionally shifts burden of production to defendant); Commonwealth v. David, 309 N.E.2d 484, 488 (Mass. 1974) (exemption is an affirmative defense); State v. Frost, 387 N.E.2d 235, 238-239 (Ohio 1979) (it is not unconstitutional to require the burden of proof as an affirmative defense to prove a securities law exemption); State v. Andersen, 773 A.2d 328 (Conn. 2001) (an exemption from registration is an affirmative defense to the charge of selling unregistered securities).

Maine Comments

1. Section 16503(2): The model Uniform Securities Act used a "burden of going forward" standard with respect to the defenses mentioned in this subsection. In order to comport with the established standard in the Revised Maine Securities Act, Maine instead uses the "preponderance of the evidence" burden.

§16504. Filing of sales and advertising literature

1. Filing requirement. A rule adopted or order issued under this chapter may require the filing of a prospectus, a pamphlet, a circular, a form letter, an advertisement, sales literature, some other advertising record relating to a

security or investment advice or a business plan addressed or intended for distribution to prospective investors, including clients or prospective clients of a person licensed or required to be licensed as an investment adviser under this chapter. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

2. Excluded communications. This section does not apply to sales and advertising literature specified in subsection 1 that relates to a federal covered security, a federal covered investment adviser or a security or transaction exempted by section 16201, 16202 or 16203 except as required pursuant to section 16201, subsection 7 and section 16202, subsections 15 and 24.

Official Comments

Prior Provisions: 1956 Act Section 403; RUSA Section 405.

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

2. The administrator may bring a civil enforcement action in a court under Section 603 or institute administrative enforcement under Section 604 to prevent publication, circulation or use of any materials required by the administrator to be filed under Section 504 that have not been filed.

3. Section 504(b) is meant to refer to the communications described in Section 504(a).

§16505. Misleading filings

It is unlawful for a person to make or cause to be made in a record that is used in an action or proceeding or filed under this chapter a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

Official Comment

Prior Provisions: 1956 Act Section 404; RUSA Section 504.

The definition of "materiality" in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote") has generally been followed in both federal and state securities law. See 4 Louis Loss & Joel Seligman, Securities Regulation 2071-2105 (3d ed. rev. 2000).

§16506. Misrepresentations concerning licensing, registration or exemption

The filing of an application for licensing, registration, a registration statement, a notice filing under this chapter, the licensing of a person, the notice filing by a person or the registration of a security under this chapter does not constitute a finding by the administrator that a record filed under this chapter is true, complete and not misleading. The filing, licensing or registration or the availability of an exemption, exception, preemption or exclusion for a security or a transaction does not mean that the administrator has passed upon the merits or qualifications of, or recommended or given approval to, a person, security or transaction. It is unlawful to make or cause to be made to a purchaser, customer, client or prospective customer or client a representation inconsistent with this section.

Official Comment

Prior Provisions: 1956 Act Section 405; RUSA Section 505.

This Section follows the 1956 Act and RUSA, as well as state securities statutes generally, in providing that a misrepresentation concerning registration or an exemption is unlawful.

§16507. Qualified immunity

A broker-dealer, agent, investment adviser, federal covered investment adviser or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser or investment adviser representative for defamation relating to a statement that is contained in a record required by the administrator or designee of the administrator, the Securities and Exchange Commission or a self-regulatory organization, unless the person knew, or should have known at the time that

the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

Official Comments

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. In 1994 The Securities and Exchange Commission Division of Market Regulation published The Large Firm Project: A Review of Hiring, Retention, and Supervisory Practices (1994), which found that a small number of "rogue brokers" were responsible for a significant proportion of customer disciplinary complaints. These brokers in some instances moved from one broker-dealer firm to another, it was explained, without full and complete disclosure of disciplinary problems by the broker-dealer, because of broker-dealer firms' fear of state law defamation claims. See also GAO, Actions Needed to Better Protect Investors against Unscrupulous Brokers 3 (1994); Testimony of SEC Chairman Arthur Levitt Concerning the Large Firm Project, Subcomm. on Telecommunications & Fin., House Comm. on Energy & Commerce (Sept. 14, 1994), reprinted in 1994-1995 Fed. Sec. L. Rep. (CCH) ¶85,433 (1994).

2. In 1998, the National Association of Securities Dealers proposed qualified immunity for statements made in Forms U-4 and U-5 to address this problem. This proposal was reprinted in Securities Exchange Act Release 39,892, 66 SEC Dock. 2473 (1998). This proposal was limited to arbitration proceedings. It was not acted on by the Securities and Exchange Commission.

3. An alternative approach would be a standard providing for absolute immunity. See generally Anne Wright, Form U-5 Defamation, 52 Wash. & Lee L. Rev. 1299 (1995); Acciardo v. Millennium Sec. Corp., 83 F. Supp. 2d 413 (S.D.N.Y. 2000) (discussing both New York qualified and absolute immunity cases).

4. Securities administrators or self-regulatory organizations generally are subject to absolute or qualified immunity for actions of their employees within the course of their official duties. See 10 Louis Loss & Joel Seligman, Securities Regulation 4818-4821 (3d ed. rev. 1996).

5. As is generally the law "truth is a complete defense to a defamation action." Andrews v. Prudential Sec., Inc., 160 F.3d 304, 308 (6th Cir. 1998).

6. An agent who has been the subject of a Form U-5, Uniform Termination Notice for Securities Industry Registration, may respond to specified adverse disclosures and have her or his responses reprinted on the published version of Form U-5.

7. Through September 2002 no state had adopted an immunity provision in its securities statute. No state has rejected immunity in this context by judicial decision. A number of states have adopted qualified immunity by judicial decision. See, e.g., Eaton Vance Distrib., Inc. v. Ulrich, 692 So.2d 915 (Fla. Dist. Ct. App. 1997); Bavarati v. Josephal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) (Illinois); Andrews v. Prudential Sec., Inc., 160 F.3d 304 (6th Cir. 1998) (Michigan); Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996) (Oklahoma); Glennon v. Dean Witter Reynolds Inc., 83 F.3d 132 (6th Cir. 1996) (Tennessee).

§16508. Criminal penalties

1. Criminal penalties. A person that intentionally or knowingly violates this chapter, or a rule adopted or order issued under this chapter, except section 16504 or the notice filing requirements of section 16302 or 16405, or that intentionally or knowingly violates section 16505 knowing the statement made to be false or misleading in a material respect, upon conviction, commits a Class C crime. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

2. Referral to Attorney General. The administrator may refer such evidence as is available concerning violations of this chapter or any rule or order issued under this chapter to the Attorney General, who may, with or without such a reference from the administrator, institute the appropriate criminal proceedings under this chapter. The Attorney General may request assistance from the administrator or employees of the administrator.

3. No limitation on other criminal enforcement. This chapter does not limit the power of this State to punish a person for conduct that constitutes a crime under other laws of this State.

4. Venue. When a person pursuant to one scheme or course of conduct, whether upon the same person or several persons, engages in fraudulent or other prohibited practices, engages in unlawful transactions of business or

other unlawful conduct or engages in unlawful offers to sell or purchase or unlawful sales or purchases under this chapter, the State may opt for a single Class C count, and, in that circumstance, prosecution may be brought in any venue in which one or more of the unlawful acts were committed.

Official Comments

Prior Provisions: 1956 Act Section 409; RUSA Section 604; Securities Exchange Act of 1934 Section 32(a).

1. This Section follows the 1956 Act and the federal securities laws in imposing criminal penalties for any willful violation of the Act. RUSA Section 604 distinguished between felonies and misdemeanors, limiting willful violations of cease and desist orders to a misdemeanor.

2. The term "willfully" has the same meaning in Section 508 as it did in the 1956 Act. All that is required is proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.

3. The final sentence of Section 508(a) is based on Section 32(a) of the Securities Exchange Act of 1934, which provides: "[N]o person shall be subject to imprisonment under this section in violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." The "no knowledge" clause in Section 508(a) is relevant only to sentencing. The person convicted has the burden of persuasion to prove no knowledge at sentencing. Because this does not impose a burden on the defendant to disprove the elements of a crime, Section 32(a) of the Securities Exchange Act of 1934 has been held not to raise a constitutional problem. United States v. Mandel, 296 F. Supp. 1038, 1040 (S.D.N.Y. 1969).

4. The appropriate state prosecutor under Section 508(b) may decide whether to bring a criminal action under this statute, another statute, or, when applicable, common law. In certain states the administrator has full or limited criminal enforcement powers.

5. This section does not specify maximum dollar amounts for criminal fines, maximum terms for imprisonment, nor the years of limitation, but does provide for each state to specify appropriate magnitudes for criminal fines or maximum terms for imprisonment.

6. The definition of willfulness in Comment 2 to Section 508 has been followed by most courts. See, e.g., State v. Hodge, 460 P.2d 596, 604 (Kan. 1969) ("No specific intent is necessary to constitute the offense where one violates the securities act except the intent to do the act denounced by the statute"); State v. Nagel, 279 N.W.2d 911, 915 (S.D. 1979) ("[I]t is widely understood that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer"); State v. Fries, 337 N.W.2d 398, 405 (Neb. 1983) (proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state's blue sky law); People v. Riley, 708 P.2d 1359, 1362 (Colo. 1985) ("A person acts 'knowingly' or 'willfully' with respect to conduct . . . when he is aware that his conduct . . . exists"); State v. Larsen, 865 P.2d 1355, 1358 (Utah 1993) (willful implies a willingness to commit the act, not an intent to violate the law or to injure another or acquire any advantage); State v . Montgomery, 17 P.3d 292, 294 (Idaho 2001) (bad faith is not required for a violation of a state securities act; willful implies "simply a purpose or willingness to commit the act or make the omission referred to"); State v. Dumke, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995) (mens rea not required); State v. Mueller, 549 N.W.2d 455, 460 (Wis. Ct. App. 1996) (willfulness does not require proof that the defendant acted with intent to defraud or knowledge that the law was violated); United States v. Lilley, 291 F. Supp. 989, 993 (S.D. Tex. 1968) ("no knowledge" clause in federal statute not available to defendant claiming lack of knowledge of particular SEC rule).

Maine Comments

1. Section 16508(1): The model Uniform Securities Act version of this section and other sections referred to "willful" violations of law, whereas the Revised Maine Securities Act referred instead to "intentional or knowing" violations of law. Maine retains the words "intentional or knowing" because that language is used in the Maine Criminal Code. Further, under Maine law the term "willful" is construed to mean the same thing as "intentional or knowing."

§16509. Civil liability

1. Securities Litigation Uniform Standards Act. Enforcement of civil liability under this section is subject to the federal Securities Litigation Uniform Standards Act of 1998.

2. Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of section 16301; section 16303, subsection 6; section 16304, subsection 5; or section 16305, subsection 6 or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing of the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following.

A. The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and the interest at the legal rate of interest from the date of the purchase, costs and reasonable attorney's fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph C.

B. The tender referred to in paragraph A may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph C.

C. Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and the interest at the legal rate of interest from the date of the purchase, costs and reasonable attorney's fees determined by the court.

3. Liability of purchaser to seller. A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission and the purchaser not sustaining the burden of proof that the purchaser did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following.

A. The seller may maintain an action to recover the security and any income received on the security, costs and reasonable attorney's fees

determined by the court, upon the tender of the purchase price, or for actual damages as provided in paragraph C.

B. The tender referred to in paragraph A may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph C.

C. Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability and the interest at the legal rate of interest from the date of the sale of the security, costs and reasonable attorney's fees determined by the court.

4. Liability of unlicensed broker-dealer and agent. A person acting as a broker-dealer or agent that sells or buys a security in violation of section 16401, subsection 1; section 16402, subsection 1; or section 16506 is liable to the customer. The customer, if a purchaser, may maintain an action for a remedy as specified in subsection 2, paragraphs A to C or, if a seller, for a remedy as specified in subsection 3, paragraphs A to C.

5. Liability of unlicensed investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 16403, subsection 1; section 16404, subsection 1; or section 16506 is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest at the legal rate of interest from the date of payment, costs and reasonable attorney's fees determined by the court.

6. Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme or artifice to defraud the other person or engages in an act, practice or course of business that operates or would operate as a fraud or deceit on the other person is liable to the other person. An action under this subsection is governed by the following.

A. The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages

caused by the fraudulent conduct, interest at the legal rate of interest from the date of the fraudulent conduct, costs and reasonable attorney's fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

B. This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

7. Joint and several liability. The following persons are liable jointly and severally with and to the same extent as persons liable under subsections 2 to 6:

A. A person that directly or indirectly controls a person liable under subsections 2 to 6, unless the controlling person sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of conduct by reason of which the liability is alleged to exist;

B. An individual who is a managing partner, executive officer or director of a person liable under subsections 2 to 6, including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care, could not have known of the existence of conduct by reason of which the liability is alleged to exist;

C. An individual who is an employee of or associated with a person liable under subsections 2 to 6 and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care, could not have known of the existence of conduct by reason of which the liability is alleged to exist; and

D. A person that is a broker-dealer, agent, investment adviser or investment adviser representative that materially aids the conduct giving rise to the liability under subsections 2 to 6, unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of conduct by reason of which the liability is alleged to exist.

8. Right of contribution. A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

9. Survival of cause of action. A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

10. Statute of limitations. A person may not obtain relief:

A. Under subsection 2 for violation of section 16301 or under subsection 4 or 5, unless the action is instituted within 2 years after the violation occurred; or

B. Under subsection 2, other than for violation of section 16301, or under subsection 3 or 6, unless the action is instituted within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation.

11. No enforcement of violative contract. A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or order issued under this chapter, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter, may not base an action on the contract.

12. No contractual waiver. A condition, stipulation or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.

13. Survival of other rights or remedies. The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this section or section 16411, subsection 5.

Official Comments

Prior Provisions: 1956 Act Section 410; RUSA Sections 605-607, 609, 802.

1. Under Section 509 violations of two or more sections can be proven, but the remedy is limited either to rescission or actual damages. Actual damages means compensatory damages. Punitive or "double" damages are not provided by this section which also is the standard under Section 28(a) of the Securities Exchange Act of 1934. See 9 Louis Loss & Joel Seligman, Securities Regulation 4408-4427 (3d ed. rev. 1992).

2. The Securities Litigation Uniform Standards Act of 1998 cited in Section 509(a) modifies the entire Section 509.

3. As with Section 12(a)(2) of the Securities Act of 1933, Section 509(b) contains a type of privity requirement in that the purchaser is required to bring an action against the seller. Section 509(b) is broader than Section 12(a)(2) in that it will reach all sales in violation of Section 301, not just sales "by means of a prospectus" as is the law under Section 12(a)(2). See Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).

4. Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b). See Gerhard W. Gohler, IRA v. Wood, 919 P.2d 561 (Utah 1996); Ritch v. Robinson-Humprhey Co., 748 So. 2d 861 (Ala. 1999); Kaufman v. I-Stat Corp., 754 A.2d 1188 (N.J. 2000).

5. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of the Securities of 1933. See 9 Louis Loss and Joel Seligman, Securities Regulations 4242-4246 (3d ed. 1992). The measure of damages in Section 509(c)(3), however, is that contemplated by Rule 10b-5. Sec. 9 id. 4408-4427. In providing for damages as an alternative to rescission, Section 509(b)(3) follows the 1956 Act and is an improvement upon many earlier state provisions, which conditioned the plaintiff's right of recovery on his or her being in a position to make a good tender. A plaintiff is not given the right under this type of statutory formula to retain stock and also seek damages.

6. Sections 509(e) and (f) are based on a proposed NASAA amendment to the Uniform Securities Act adopted in order "to establish civil liability for individuals who willfully violate Section 102 dealing with fraudulent practices pertaining to advisory activities." Neither provision is intended to limit other state law claims for providing investment advice.

7. Broker-dealer employees, including research analysts, who receive no special compensation from third parties for investment advice would not be liable under Section 509(f).

8. The control liability provision in Section 509(g)(1) is modeled on that in the 1956 Act. On the meaning of "control," see 4 Louis Loss & Joel Seligman, Securities Regulations 1703-1727 (3d ed. rev. 2000).

9. The defense of lack of knowledge in Sections 509(g) is also modeled on the 1956 Act.

10. Under Section 509(g)(2) partners, officers, and directors are liable, subject to the defense afforded by that subsection, without proof that they aided in the sale. In Section 509(g)(2), the term "partner" is intended to be limited to partners with management responsibilities, rather than a partner with a passive investment.

11. Under 509(g)(4), the performance by a clearing broker of the clearing broker's contractual functions - even though necessary to the processing of a transaction - without more would not constitute material aid or result in liability under this subsection. See, e.g., Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990).

12. The "reasonable attorneys' fees" specified in Section 509 are permissive, not mandatory. See, e.g., Andrews v. Blue, 489 F.2d 367, 377 (10th Cir. 1973), (Colorado statute).

13. The contribution provision in Section 509(h) is a safeguard to avoid the common law principle that prohibited contribution among joint tortfeasors.

14. The statute of limitations in Section 509(j) is a hybrid of the 1956 Act and federal securities law approaches. The 1956 Act Section 410(p) provided that: "No person may sue under this section more than two years after the contract of sale." Under this provision, the state courts generally decline to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling.

Before the July 2002 enactment of the Sarbanes-Oxley Act, Rule 10b-5 of the Securities Exchange Act as construed by the United States Supreme Court in Lampf, Pleva, Lipkind, Prepis & Petigrew v. Gilbertson, 501 U.S. 350 (1991), prohibited equitable tolling under the federal securities law one year after discovery and three years after the act formula. See generally 10 Louis

Loss & Joel Seligman, Securities Regulation 4505-4525 (3d. ed. rev. 1996). The Sarbanes-Oxley Act added 28 U.S.C. §1658(b) which provides

> . . . a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of ---
>
> > (1) 2 years after the discovery of the facts constituting the violation; or
> >
> > (2) 5 years after such violation.

Section 509(j)(1), as with the 1956 Act, is a unitary statute of repose, requiring an action to be commenced within one year after a violation occurred. It is not intended that equitable tolling be permitted.

Section 509(j)(2), in contrast, generally follows the federal securities law model. An action must be brought within the earlier of two years after discovery or five years after the violation. As with federal courts construing the statute of limitations under Rule 10b-5, it is intended that the plaintiff's right to proceed is limited to two years after actual discovery "or after such discovery should have been made by the exercise of reasonable diligence" (inquiry notice), see, e.g., Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997), or five years after the violation.

The rationale for replicating the basic federal statute of limitations in this Act is to discourage forum shopping. If the statute of limitations applicable to Rule 10b-5 were to be changed in the future, identical changes should be made in Section 509(j)(2).

15. Section 509(k) is similar to Section 29(b) of the Securities Exchange Act and is intended to apply only to actions to enforce illegal contracts. See Louis Loss, Commentary on the Uniform Securities Act 150 (1976).

16. Section 509(m) follows the 1956 Act.

17. Section 509 and Section 411(e) provide the exclusive private causes of action under this Act.

Maine Comments

1. Section 16509(7): The reference to "managing partner" is not restricted to those who carry the title of managing partner. Consistent with Official Comment 10, this subsection reaches all partners who have management responsibilities, as opposed to those partners who participate only as passive investors. Whether a partner (or person having a similar status or performing similar functions) is subject to potential derivative liability should be based on the facts and circumstances in each case and not on the person's title.

2. Section 16509(10)(A): The model Uniform Securities Act allowed a one-year statute of limitation for purchaser lawsuits involving unregistered securities or unlicensed conduct. To better protect investors, Maine has retained the 2-year statute of limitations found in the Revised Maine Securities Act.

§16510. Rescission offers

1. Requirements. A purchaser, seller or recipient of investment advice may not maintain an action under section 16509 if:

A. The purchaser, seller or recipient of investment advice receives in a record, before the action is instituted:

(1) An offer stating the respect in which liability under section 16509 may have arisen and fairly advising the purchaser, seller or recipient of investment advice of that person's rights in connection with the offer and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale or investment advice;

(2) If the basis for relief under this section may have been a violation of section 16509, subsection 2, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid and interest at the legal rate of interest from the date of the purchase, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a

tender, less the value of the security when the purchaser disposed of it and interest at the legal rate of interest from the date of the purchase in cash equal to the damages computed in the manner provided in this subsection;

(3) If the basis for relief under this section may have been a violation of section 16509, subsection 3, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest at the legal rate of interest from the date of the sale, or, if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest at the legal rate of interest from the date of the sale;

(4) If the basis for relief under this section may have been a violation of section 16509, subsection 4, an offer to pay as specified in subparagraph (2) if the customer is a purchaser or an offer to tender or to pay as specified in subparagraph (3) if the customer is a seller;

(5) If the basis for relief under this section may have been a violation of section 16509, subsection 5, an offer to reimburse in cash the consideration paid for the advice and interest at the legal rate of interest from the date of payment; or

(6) If the basis for relief under this section may have been a violation of section 16509, subsection 6, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct and interest at the legal rate of interest from the date of the violation causing the loss;

B. The offer under paragraph A states that it must be accepted by the purchaser, seller or recipient of investment advice within 30 days after the date of its receipt by the purchaser, seller or recipient of investment advice or any shorter period, of not less than 3 days, that the administrator, by order, specifies;

C. The offeror has the present ability to pay the amount offered or to tender the security under paragraph A;

D. The offer under paragraph A is delivered to the purchaser, seller or recipient of investment advice or sent in a manner that ensures receipt by the purchaser, seller or recipient of investment advice; and

E. The purchaser, seller or recipient of investment advice that accepts the offer under paragraph A in a record within the period specified under paragraph B is paid in accordance with the terms of the offer.

2. Form of offer. The administrator, by rule or order, may prescribe the form in which the information specified in subsection 1 must be contained in any offer made under subsection 1. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

3. Statute of limitation tolled. If an offer is not performed in accordance with its terms, suit by the offeree under section 16509 is permitted without regard to this section, and the statute of limitations tolls from the time of receipt of the offer until 120 days after the rescission or settlement offer was to have been performed.

Official Comments

Prior Provisions: 1956 Act Section 410(e); RUSA Section 607.

1. A rescission offer must meet the specific requirements of Section 510 for civil liability under Section 509 to be extinguished. Cf. Binder v. Gordian Sec., Inc., 742 F. Supp. 663, 666 (N.D. Ga. 1990). See generally Rowe, Rescission Offers under Federal and State Securities Law, 12 J. Corp. L. 383 (1987).

2. A rescission offer that does not comply with Section 510 is subject to civil liability, administrative enforcement, or criminal penalties under this Act. A rescission offer, for example, could violate Section 501, the general fraud provision.

3. The administrator may publish a form that would comply with Section 510, but the form would not be the only one that could be used by the parties.

4. A valid rescission offer will be exempt from securities registration. See Section 202(19).

5. If a state chooses to add a notice or filing provision, it could provide this provision in Section 510(6), which would state:

> (6) The offer [or a notice] is required to be filed with the administrator 10 business days before the offering and conform in form and content with a rule prescribed by the administrator.

Maine Comments

1. Section 16510: Maine has added subsections (2) and (3) based on provisions in the Revised Maine Securities Act. The content of subsection (2) is also reflected in Official Comment 5. The content of subsection (3) prevents unfairness to investors who wait in good faith to see whether sellers will perform on their rescission offers.

§16511. Right to rescission applicable to sales of viatical or life settlement contracts

1. Right to rescind transaction. In addition to any other rights provided for under this chapter or otherwise, an investor, other than an institutional investor, who purchases a viatical or life settlement contract may rescind the investment by giving written notice of rescission to the entity designated for such notice in the disclosure documents, by ordinary mail postage prepaid, within 30 business days following the later of:

A. The day on which the investor received the final disclosure document pertaining to the transaction as required under this chapter and the rules or orders under this chapter; and

B. The day on which the investor paid the required consideration for the purchase of the viatical or life settlement contract.

2. Form of notice. The notice is sufficient if addressed to the entity designated for such notice at the address given in the disclosure statement pertaining to the transaction. Notice of rescission is effective upon deposit in the United States mail. The notice of rescission need not take a particular form and is sufficient if it expresses the intention of the purchaser to rescind the transaction.

Maine Comments

1. Section 16511: Maine has added this section based on a provision in the Revised Maine Securities Act.

SUBCHAPTER 6

ADMINISTRATION AND JUDICIAL REVIEW

§16601. Administration

1. Office of Securities; administrator. There is created within the Department of Professional and Financial Regulation the Office of Securities. The Office of Securities is directed by the Securities Administrator, referred to in this chapter as the "administrator," who is responsible for the administration and enforcement of this chapter, the Maine Commodity Code and chapter 69-B.

A. The administrator is appointed by the Commissioner of Professional and Financial Regulation. The administrator is appointed for a term that is coterminous with the term of the Governor or until a successor is appointed and qualified. Any vacancy occurring must be filled by appointment for the unexpired portion of the term. The administrator may be removed from office for cause by the commissioner, and Title 5, section 931, subsection 2 does not apply. A person appointed as administrator must have knowledge of, or experience in, the theory and practice of securities.

B. With the approval of the Commissioner of Professional and Financial Regulation, the administrator shall organize the Office of Securities in such a manner as the administrator considers necessary to carry out the administrator's responsibilities.

C. The administrator may employ personnel as the business of the Office of Securities may require, subject to the Commissioner of Professional and Financial Regulation's approval and in accordance with the Civil Service Law. The qualifications of the personnel must reflect the needs and responsibilities of the Office of Securities' regulatory functions. The administrator may authorize senior personnel of the Office of Securities to carry out the administrator's duties and authority. The administrator may employ or engage such expert, professional or other assistance as may be necessary to assist the Office of Securities in carrying out its functions. In addition to salaries or wages, all employees of the Office of Securities must receive their actual expenses incurred in the performance of their official duties.

D. At the expense of the Office of Securities, the administrator may train the Office of Securities' employees, or have them trained, in a manner the administrator determines desirable, to carry out the purposes of the Office of Securities.

2. Unlawful use of records or information. It is unlawful for the administrator or an employee or designee of the administrator to use for personal benefit or the benefit of others records or other information obtained by or filed with the administrator that is not public under section 16607, subsection 2. This chapter does not authorize the administrator or an officer, employee or designee of the administrator to disclose the record or information, except in accordance with section 16602, section 16607, subsection 3 or section 16608.

3. No privilege or exemption created or diminished. This chapter does not create or diminish a privilege or exemption that exists at common law or by statute or rule or otherwise.

4. Investor education. The administrator may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the administrator may collaborate with public and nonprofit organizations with an interest in investor education. The administrator may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives. This subsection does not authorize the administrator to require participation or monetary contributions of a registrant in an investor education program.

5. Waiver of fee. The administrator may, by order, waive the filing fee required to register a security, to perfect a notice filing for a federal covered security or to secure an exemption from registration upon a written finding that the fee would be unreasonably high in light of the maximum potential proceeds from the sale of the security in the State or that the imposition of the fee would otherwise be unreasonable.

6. Nonlapsing operating fund. There is established an operating fund to be used to carry out the purposes of this chapter and any other statutory duties of the administrator. The operating fund consists of all annual renewal license fees for agents and investment adviser representatives received pursuant to this

chapter. Any balance in the operating fund does not lapse, but must be carried forward to be used for the same purposes.

7. Securities Investor Education and Training Fund. The Securities Investor Education and Training Fund, referred to in this subsection as "the fund," is established to provide funds for the purposes specified in subsection 4. The fund consists of all grants or donations accepted by the administrator pursuant to subsection 4 and all payments received by the administrator for investor education and training that have been designated in a consent order or consent agreement resulting from a multistate investigation or a joint investigation with the federal Securities and Exchange Commission or a court order or court judgment to be credited to the fund. Any balance in the fund does not lapse but must be carried forward to be used for the same purposes.

Official Comments

Prior Provisions: 1956 Act Section 406; RUSA Sections 701-702.

1. Section 601(b) should be read with Section 607. Section 601(b) prohibits the administrator or the administrator's officers and employees from using for personal benefit records or information that Section 607(b) specifies do not constitute public records. Section 601(b) is not intended to limit the operation of Section 607(a). Neither Section 601(b) nor 607(b) is intended to impede the ability of the agencies specified in Section 608(a) from sharing records or other information in connection with an examination or an investigation.

2. Section 601(c) makes clear that nothing in this Act alters the availability of evidentiary privileges. That question is left to the general law of the particular state.

3. Sections 601(d) and (e) were adopted in recognition of the importance of investor education. An increasing number of jurisdictions are earmarking specific funds for this purpose. The lack of financial acumen among public investors, seniors, and students continues to be demonstrated in recent industry and regulatory studies. The importance of investor financial literacy is increasingly crucial given the decades long shift from defined benefit retirement plans toward defined contribution plans where employees are left to direct their own retirement accounts.

Maine Comments

1. Section 16601: Maine has added subsections (5) and (6) based on provisions in the Revised Maine Securities Act. Subsection (5) is intended for situations in which the filing fee is disproportionately high given the scope and nature of the offering. Subsection (6) describes how the Office of Securities is funded.

§16602. Investigations and subpoenas

1. Authority to investigate. The administrator may:

A. Conduct public or private investigations within or outside of this State that the administrator considers necessary or appropriate to determine whether a person has violated, is violating or is about to violate this chapter or a rule adopted or order issued under this chapter or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

B. Require or permit a person to testify, file a statement or produce a record, under oath or otherwise as the administrator determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

C. Publish a record concerning an action, proceeding or investigation under, or a violation of, this chapter or a rule adopted or order issued under this chapter if the administrator determines it is necessary or appropriate in the public interest and for the protection of investors.

2. Administrator powers to investigate. For the purpose of an investigation under this chapter, the administrator or the administrator's designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements and require the production of any records that the administrator considers relevant or material to the investigation. It is unlawful to fail to provide any statement or record if requested.

3. Procedure and remedies for noncompliance. If a person does not appear or refuses to testify, file a statement or produce records or otherwise does not obey a subpoena as required by the administrator under this chapter, the administrator may request that the Attorney General apply to either the

Superior Court located in Kennebec County or the Superior Court where service may be obtained on the person refusing to testify or produce or a court of another state to enforce compliance. The court may:

A. Hold the person in contempt;

B. Order the person to appear before the administrator;

C. Order the person to testify about the matter under investigation or in question;

D. Order the production of records;

E. Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

F. Impose a civil fine not to exceed $10,000 per violation; and

G. Grant any other necessary or appropriate relief.

4. Application for relief. This section does not preclude a person from applying to the Superior Court located in Kennebec County or a court of another state for relief from a request to appear, testify, file a statement, produce records or obey a subpoena.

5. Assistance to securities regulator of another jurisdiction. At the request of the securities regulator of another state or a foreign jurisdiction, the administrator may provide assistance if the requesting regulator states that it is conducting an investigation to determine whether a person has violated, is violating or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting regulator administers or enforces. The administrator may provide the assistance by using the authority to investigate and the powers conferred by this section as the administrator determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this State if occurring in this State. In deciding whether to provide the assistance, the administrator may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the administrator on securities matters when requested, whether compliance with the request would violate or prejudice the public policy of this State and the

availability of resources and employees of the administrator to carry out the request for assistance.

Official Comments

Prior Provisions: 1956 Act Section 407; RUSA Section 601.

1. Sections 602 (a) and (b) follow the 1956 Act, which was modeled generally on Sections 21(a) through (d) of the Securities Exchange Act of 1934 as it then read.

2. Standards for issuance of subpoenas have been generally established in federal and state securities law. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4917-4937 (3d ed. rev. 1996) (discussing Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) and other cases). The scope of subpoena enforcement in each state is a general matter for judicial determination. Under Section 602, an individual subpoenaed to testify by the administrator is not compelled to testify within the meaning of these sections simply by service of a subpoena. Under Section 602(b) the individual can be subpoenaed and compelled to attend. Once in attendance an individual can assert an evidentiary privilege or exemption, see Section 601(c), including the Fifth Amendment privilege against self-incrimination. If an individual refuses to testify or give evidence, the administrator may apply (or have the appropriate State attorney apply) to the appropriate court for the relief specified in Section 602(c). If the individual invokes the privilege against self-incrimination, Section 602(d) allows the administrator to apply to the appropriate court to compel testimony under the "use immunity" provision barring the record compelled or other evidence obtained from being used in a criminal case. See People v. District Co. of Arapahoe County, 894 P.2d 739 (Colo. 1995). The phrase "directly or indirectly" in Section 602(e) is intended to include testimony, other evidence, or other information derived from immunized testimony, statements, records, or evidence.

3. Section 602 is intended to apply generally to securities offers and sales under Article 3 and broker-dealer and investment adviser activity under Article 4, when there is noncompliance with the first sentence of Section 602(c). This subsection does not limit the powers of an administrator under other provisions of this Act.

4. A court may quash a subpoena for good cause under Section 602(d). The court may decline to enforce a subpoena that is arbitrary, capricious, or oppressive.

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

6. Section 602(f) is consistent with the Securities Litigation Uniform Standard Act of 1998 which provides in Section 102(e):

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

7. There are limitations on financial institutions being subject to visitorial powers by State officials, such as those affecting national banks contained in 12 U.S.C. 484 and 12 C.F.R. Sec. 7.4000. Law outside this Act may place similar limits on state chartered financial institutions being subjected to visitorial powers. This Act does not negate these limitations.

Maine Comments

1. The model Uniform Securities Act contained a provision (section 602(e)) that Maine wholly rejected. Maine thus moved up subsection (f) of the model act to become section 16602(5).

2. Maine does not concur with the implications in Official Comment 7 as to federal limitations on the State's visitorial powers. There is ongoing litigation and disagreement over the scope and applicability of such limitations.

§16603. Civil enforcement

1. Civil action instituted by administrator. If the administrator believes that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has engaged, is engaging or

is about to engage in an act, practice or course of business that materially aids a violation of this chapter or a rule adopted or order issued under this chapter, the administrator may request that the Attorney General bring an action in the Superior Court of the county in which the person resides or has the principal place of business or in the Superior Court of Kennebec County to enjoin the act, practice or course of business and to enforce compliance with this chapter or a rule adopted or order issued under this chapter.

2. Relief available. In an action under this section and on a proper showing, the court may:

A. Issue a permanent or temporary injunction, restraining order or declaratory judgment;

B. Order other appropriate or ancillary relief, which may include:

(1) An asset freeze, accounting, writ of attachment, writ of general or specific execution and appointment of a receiver or conservator, which may be the administrator, for the defendant or the defendant's assets;

(2) Ordering the administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents and profits, to collect debts and to acquire and dispose of property;

(3) Imposing a civil fine not to exceed $10,000 per violation or an order of rescission, restitution or disgorgement directed to a person that has engaged in an act, practice or course of business constituting a violation of this chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act; and

(4) Ordering the payment of prejudgment and postjudgment interest; or

C. Order such other relief as the court considers appropriate.

3. No bond required. The administrator is not required to post a bond in an action or proceeding under this chapter.

4. Securities agency of another state. Upon a showing by the administrator or securities agency of another state that a person has violated any provision of the securities act of that state or any rule or order of the administrator or securities agency of that state, the Superior Court may grant appropriate legal and equitable remedies.

Official Comments

Prior Provisions: 1956 Act Section 408; RUSA Section 603

1. Section 408 of the 1956 Act was limited to injunctions. This Section follows RUSA in broadening the civil remedies available when the administrator believes that a violation has occurred. A primary purpose of a broad range of potential sanctions is to enable administrators to better tailor appropriate sanctions to particular misconduct.

2. The administrator alternatively may proceed to seek administrative enforcement under Section 604; to deny, suspend, or revoke a securities registration under Section 306; or to deny, suspend, revoke, or take other action against a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412.

3. Constitutional due process considerations can also be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions of each jurisdiction. The term "upon a proper showing" has a settled meaning in the federal securities laws. See, e.g., Securities Act of 1933 Section 20(b).

4. As with Sections 509(g)(3) and (4), materially aid in Section 603(a) does not include ministerial or clerical acts.

Maine Comments

1. Section 16603(4): Maine has added this subsection based on a provision in the Revised Maine Securities Act, though former references to specifically available remedies have been deleted as unnecessary.

§16604. Administrative enforcement

1. Issuance of order or notice. If the administrator determines that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has materially aided, is materially aiding or is about to materially aid an act, practice or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter, the administrator may:

A. Issue an order directing the person to cease and desist from engaging in the act, practice or course of business or to take other action necessary or appropriate to comply with this chapter;

B. Issue an order denying, suspending, revoking or conditioning the exemptions for a broker-dealer under section 16401, subsection 2, paragraph A, subparagraph (4) or (6) or an investment adviser under section 16403, subsection 2, paragraph A, subparagraph (3); or

C. Issue an order under section 16204.

2. Summary process. An order under subsection 1 is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement of any censure, bar, civil fine or costs of investigation the administrator will seek, a statement of the reasons for the order and notice that, within 15 days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after the date of service of the order, the order, including the imposition of a censure, bar or civil fine or requirement for payment of the costs of investigation sought in a statement in the order, becomes final as to that person by operation of law. A summary order issued against any person becomes a final order 30 days after the administrator mails notice to the interested parties of the right to request a hearing if they fail to request a hearing or on the date of the hearing if the person requesting the hearing fails to appear. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

3. Procedure for final order. If a hearing is requested or ordered pursuant to subsection 2, a hearing must be held pursuant to the Maine Administrative Procedure Act. A final order may not be issued unless the administrator makes findings of fact and conclusions of law in a record in

accordance with the Maine Administrative Procedure Act. The final order may make final, vacate or modify the order issued under subsection 1.

4. Civil fine; final orders and remedies. In a final order under subsection 3, the administrator may: order remedies described in subsection 1; censure that person; bar that person from association with any issuer, broker-dealer or investment adviser in this State; or impose a civil fine not to exceed $5,000 per violation.

5. Costs. In a final order, the administrator may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or order issued under this chapter.

6. Filing of certified final order with court; effect of filing. If a petition for judicial review of a final order is not filed in accordance with section 16609, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced or satisfied in the same manner as a judgment of the court.

7. Enforcement by court; further civil fine. If a person does not comply with an order under this section, the administrator may request that the Attorney General petition a court of competent jurisdiction to enforce the order. The court may not require the administrator to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in contempt of the order. The court may impose a further civil fine against the person for contempt in an amount not to exceed $10,000 per violation and may grant any other relief the court determines is just and proper in the circumstances.

8. Appointment of presiding officer. For purposes of any hearing conducted pursuant to this section, the administrator may appoint a qualified person to preside at the hearing and to make proposed findings of fact and conclusions of law. The responsibility for the entry of the final findings of fact and conclusions of law and for the issuance of any final order remain with the administrator.

Official Comments

Prior Provisions: RUSA Sections 602, 712.

1. Section 604, unlike Section 603, may be initiated by the administrator without prior judicial process or a prior hearing. The section, among other matters, empowers the administrator to act summarily in appropriate circumstances.

2. Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings against registered broker-dealers, agents, investment advisers, or investment adviser representatives under Section 412. All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604.

3. Service of an order or notice under this Section is not effective unless made in accordance with Section 611.

Maine Comments

1. Section 16604(4): Maine has added the administrator's power to censure and bar in order to maintain the administrative enforcement authority found in the Revised Maine Securities Act.

2. Section 16604(8): Maine has added this subsection on appointment of a presiding officer based on a provision in the Revised Maine Securities Act. It allows for greater administrative efficiency and fairness in the administrative hearing process.

§16605. Rules, forms, orders, interpretative opinions and hearings

1. Issuance and adoption of forms, orders and rules. In addition to specific authority granted elsewhere in this chapter, the administrator may:

A. Issue forms and orders and, after notice and comment, adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports and other records;

B. By rule, define terms, whether or not used in this chapter, but those definitions may not be inconsistent with this chapter; and

C. By rule, classify securities, persons and transactions and adopt different requirements for different classes.

2. Findings and cooperation. Under this chapter, a rule or form may not be adopted or amended, or an order issued or amended, unless the administrator finds that the rule, form, order or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this chapter. In adopting, amending and repealing rules and forms, section 16608 applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of registration statements, applications, reports and other records, including the adoption of uniform rules, forms and procedures.

3. Financial statements. The administrator may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or order issued under this chapter. A rule adopted or order issued under this chapter may establish:

A. The form and content of financial statements required under this chapter;

B. Whether unconsolidated financial statements must be filed; and

C. Whether required financial statements must be audited by an independent certified public accountant.

4. Interpretative opinions. The administrator may provide interpretative opinions or issue determinations that the administrator will not institute a proceeding or an action under this chapter against a specified person for engaging in a specified act, practice or course of business if the determination is consistent with this chapter. A rule adopted or order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations whether the administrator will institute an action or a proceeding under this chapter.

5. Declaratory rulings. The administrator, in the administrator's discretion, may conduct a hearing and issue a declaratory ruling under Title 5, section 9001, subsection 3 as to the applicability of this chapter, any provision of this chapter or any rule or order of the administrator to any person or transaction or as to the meaning of any term used in this chapter or any rule or order of the administrator.

6. Conformity with rule, form or order. No provision of this chapter imposing any liability applies to any act done or omitted in good faith in conformity with a rule, order or form adopted by the administrator, notwithstanding that the rule, order or form may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

7. Presumption for public hearings. A hearing in an administrative proceeding under this chapter must be conducted in public unless the administrator for good cause consistent with this chapter determines that the hearing will not be so conducted.

8. Rulemaking. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 412; RUSA Sections 705, 707.

1. It is anticipated that the administrator will propose amendments or make rules under Section 605(a) to remain coordinate with relevant federal law, as well as appropriate rules of the National Association of Securities Dealers, and to achieve uniformity among the States.

2. Uniform forms such as Form B-D, U-4, U-5, and NF are today common in the securities industry and are authorized by Section 605(b).

3. Section 605(c) refers to generally accepted accounting principles in the United States which currently are promulgated by the Financial Accounting Standards Board and the Securities and Exchange Commission.

4. It is anticipated that the states will employ websites, e-mail or other electronic means to provide notice of proposed rulemaking or adoption of new rules, rule amendments, forms or form amendments, statements of policy or interpretations adopted by the administrator, and issuance of orders to registrants and others who have provided a current e-mail or similar address and expressed an interest in receiving such notice.

5. Section 605(e) does not apply to staff no action or interpretative opinions, but does apply to rules, forms, orders, statements of policy or interpretations adopted by the administrator.

Maine Comments

1. Section 16605(5). Maine has added subsection (5) regarding declaratory rulings, the substance of which appeared in the Revised Maine Securities Act but not the model Uniform Securities Act.

2. Section 16605(6): Maine has replaced the model Uniform Security Act's provision regarding effect of compliance, originally subsection (e), with a provision regarding good faith conformity found in the Revised Maine Securities Act.

§16606. Administrative files and opinions

1. Public register of filings. Subject to state record-keeping requirements, the administrator shall maintain, or designate a person to maintain, records or a register of: applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor act; and interpretative opinions or no action determinations issued under this chapter. Records may be maintained in computer or microform format or any other form of data storage, as long as the records are readily accessible.

2. Public availability. The administrator shall make all rules, forms, interpretative opinions, advisory rulings, consent agreements and orders available to the public.

3. Copies of public records. The administrator shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted or order issued under this chapter may establish a reasonable charge for furnishing the record, not to exceed $.50 per page; for providing a licensee register in an electronically readable format, not to exceed $20 per copy; or for certification, not to exceed $10 per certified record. A copy of the record certified or a certificate by the administrator of a record's nonexistence is prima facie evidence of a record or

its nonexistence. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Official Comments

Prior Provisions: 1956 Act Section 413; RUSA Section 709.

1. "Record" is defined in Section 102(25).

2. Compliance with a state records law will typically satisfy the requirements of Section 606(a).

§16607. Public records; confidentiality

1. Presumption of public records. Except as otherwise provided in subsection 2, records obtained by the administrator or filed under this chapter, including a record contained in or filed with a registration statement, application, notice filing or report, are public records and are available for public examination in accordance with Title 1, chapter 13, subchapter 1.

2. Nonpublic records. The following records are not public records and are not available for public examination under subsection 1:

A. A record obtained by the administrator in connection with an audit or inspection under section 16411, subsection 4 or an investigation under section 16602;

B. A part of a record filed in connection with a registration statement under section 16301 and sections 16303 to 16305 or a record under section 16411, subsection 4 that contains trade secrets or confidential information if the person filing the registration statement or report has asserted a claim of confidentiality or privilege that is authorized by law;

C. A record that is not required to be provided to the administrator or filed under this chapter and is provided to the administrator only on the condition that the record will not be subject to public examination or disclosure;

D. A record received from a person specified in section 16608, subsection 1 that has been designated as confidential by the agency furnishing the record;

E. Any social security number, residential address unless used as a business address and residential telephone number unless used as a business telephone number contained in a record that is filed;

F. A record obtained by the administrator through a designee of the administrator that, pursuant to a routine technical rule, as defined in Title 5, chapter 375, subchapter 2-A, or an order under this chapter, has been:

(1) Expunged from the administrator's records by the designee; or

(2) Determined to be nonpublic or nondisclosable by that designee if the administrator finds the determination to be in the public interest and for the protection of investors;

G. Records to the extent that they relate solely to the administrator's internal personnel rules and practices, including, but not limited to, protocols, guidelines, manuals and memoranda of procedure for employees of the Office of Securities;

H. Interagency or intra-agency memoranda or letters, including generally records that reflect discussions between or consideration by the administrator and employees of the Office of Securities of any action taken or proposed to be taken by the administrator or employees of the Office of Securities, including, but not limited to, reports, summaries, analyses, conclusions or other work product of the administrator or employees of the Office of Securities, except those that by law would routinely be discoverable in litigation; and

I. Records to the extent that disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.

3. Administrator discretion to disclose. If disclosure is for the purpose of a civil, administrative or criminal investigation, action or proceeding or to a person specified in section 16608, subsection 1, the administrator may disclose a record obtained in connection with an audit or inspection under section 16411, subsection 4 or a record obtained in connection with an investigation under section 16602. Prior to disclosure to a person specified in section 16608, subsection 1, the administrator may require the requesting agency to certify that under applicable law reasonable protections exist to preserve the

integrity, confidentiality and security of the information comparable to the protections existing under the laws of this State.

4. Public disclosure for enforcement purposes. The administrator may disclose to the public any information obtained in connection with an investigation that would otherwise be nonpublic information, but only if the administrator determines that disclosure is necessary for the protection of investors or the public.

Official Comments

Prior Provisions: RUSA Section 703; SEC Rule Section 200.80(b)(4); Securities Exchange Act of 1934 Sections 24(d) and (e).

1. Section 607(a) reflects the extensive development of freedom of information and open records laws since the 1956 Act was adopted.

2. Section 607(b) may insulate from public disclosure records or other information that may be available under a state freedom of information or open records act. Unless the state freedom of information or open records act implements a constitutional provision, this Act as the later and more specific enactment should control as a matter of statutory construction. A state may amend its freedom of information act, open records act or this section to eliminate any inconsistencies.

3. Records and other information obtained by an administrator in connection with an audit or inspection under subsection 411(d) or an investigation under Section 602 may be made public in the enforcement action, even if records and other information would otherwise be subject to subsection 607(b)(1).

4. An administrator may orally disclose information under Section 607(c) to a person specified in Section 608(a) for the purposes specified in Section 607(c).

Maine Comments

1. Section 16607(2)(G-I): Maine has added these paragraphs based on SEC rules that had been referenced in the predecessor act.

§16608. Uniformity and cooperation with other agencies

1. Objective of uniformity and cooperation. The administrator may, in the administrator's discretion, cooperate, coordinate, consult and, subject to section 16607, share records and information with the securities regulator of another state, Canada, a Canadian province or territory, a foreign jurisdiction, the Securities and Exchange Commission, the United States Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection Corporation, a self-regulatory organization, a national or international organization of securities regulators, a federal or state banking or insurance regulator or a governmental regulatory or law enforcement agency to, among other objectives, effectuate greater uniformity in securities matters among the Federal Government, self-regulatory organizations, states and foreign governments.

2. Policies to consider. In cooperating, coordinating, consulting and sharing records and information under this section and in acting by rule, order or waiver under this chapter, the administrator may, in the administrator's discretion, take into consideration in carrying out the public interest the following general policies:

A. Maximizing effectiveness of regulation for the protection of investors;

B. Maximizing uniformity in federal and state regulatory standards; and

C. Minimizing burdens on the business of capital formation without adversely affecting essentials of investor protection.

3. Subjects for cooperation. The cooperation, coordination, consultation and sharing of records and information authorized by this section includes:

A. Establishing or employing one or more designees as a central depository for licensing, registration and notice filings under this chapter and for records required or allowed to be maintained under this chapter;

B. Developing and maintaining uniform forms;

C. Conducting a joint examination or investigation;

D. Holding a joint administrative hearing;

E. Instituting and prosecuting a joint civil or administrative proceeding;

F. Sharing and exchanging personnel;

G. Coordinating registrations under section 16301 and licensing under sections 16401 to 16404 and exemptions under section 16203;

H. Sharing and exchanging records, subject to section 16607;

I. Formulating rules, statements of policy, guidelines, forms and interpretative opinions and releases;

J. Formulating common systems and procedures;

K. Notifying the public of proposed rules, forms, statements of policy and guidelines;

L. Attending conferences and other meetings among securities regulators, which may include representatives of governmental and private sector organizations involved in capital formation, considered necessary or appropriate to promote or achieve uniformity; and

M. Developing and maintaining a uniform exemption from registration for small issuers and taking other steps to reduce the burden of raising investment capital by small businesses.

Official Comments

Prior Provisions: 1956 Act Section 415; RUSA Sections 704 and 803; 19(c) of the Securities Act of 1933.

1. Uniformity of regulation among the states and coordination with the Securities and Exchange Commission is a principal objective of this Act. Section 608 is intended to encourage such cooperation to the maximum extent appropriate. Operative phrases such as "shall, in its discretion" in Sections 608(a) and (b) are intended to be precisely coordinate with the directive that Congress gave to the Securities and Exchange Commission in Section 19(c) of the Securities Act of 1933.

2. The goals of uniformity among the states and coordination with related federal regulation, including self regulatory organizations, may be enhanced by greater use of information technology systems such as the Web-CRD, the Investment Adviser Registration Depository (IARD), or the Securities and Exchange Commission Electronic Data Gathering, Analysis and Retrieval System (EDGAR). These types of techniques are consistent with a potential system of "one stop filing" of all federal and state forms that is encouraged by this Act.

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

4. Section 608(c) lists some joint or coordinated efforts which might be undertaken. Other appropriate cooperative activities are also encouraged.

5. Court decisions interpreting the securities laws have construed these acts to achieve "broad protection to investors," a remedial approach that "embodies a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits." SEC v. W.J. Howey Co, 328 U.S. 293, 299, 301 (1946).

Maine Comments

1. Section 16608(1): The Revised Maine Securities Act contained a specific provision, in section 10702(1), that the administrator has the discretion to bear the costs of cooperation with other regulators. Maine does not retain that provision here because the administrator has such discretion even without a specific provision to that effect.

§16609. Judicial review

1. Judicial review of orders. Notwithstanding Title 10, section 8003, subsection 5, any person aggrieved by a final order of the administrator may obtain judicial review of the order in the Superior Court of Kennebec County by filing a petition in accordance with Title 5, section 11001 and the Maine Rules of Civil Procedure, Rule 80C.

2. Judicial review of rules. A rule adopted under this chapter is subject to judicial review in accordance with the Maine Administrative Procedure Act.

Official Comments

Prior Provisions: 1956 Act Section 411; RUSA Section 711(b).

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

2. A rule adopted under this Act may be subject to judicial review in accordance with the state administrative procedure act.

3. In those states in which judicial review of rules is permitted, a state may choose to add Section 609(b). In those states in which judicial review of rules is not permitted, Section 609(b) should be deleted.

§16610. Jurisdiction

1. Sales and offers to sell. The following sections do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this State or the offer to purchase or the purchase is made and accepted in this State:

A. Section 16301;

B. Section 16302;

C. Section 16401, subsection 1;

D. Section 16402, subsection 1;

E. Section 16403, subsection 1;

F. Section 16404, subsection 1;

G. Section 16501;

H. Section 16506;

I. Section 16509; and

J. Section 16510.

2. Purchases and offers to purchase. The following sections do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this State or the offer to sell or the sale is made and accepted in this State:

A. Section 16401, subsection 1;

B. Section 16402, subsection 1;

C. Section 16403, subsection 1;

D. Section 16404, subsection 1;

E. Section 16501;

F. Section 16506;

G. Section 16509; and

H. Section 16510.

3. Offers in this State. For the purpose of this section, an offer to sell or to purchase a security is made in this State, whether or not either party is then present in this State, if the offer:

A. Originates from within this State; or

B. Is directed by the offeror to a place in this State and received at the place to which it is directed.

4. Acceptances in this State. For the purpose of this section, an offer to purchase or to sell is accepted in this State, whether or not either party is then present in this State, if the acceptance:

A. Is communicated to the offeror in this State and the offeree reasonably believes the offeror to be present in this State and the acceptance is received at the place in this State to which it is directed; and

B. Has not previously been communicated to the offeror, orally or in a record, outside this State.

5. Publications, radio, television or other electronic communications. An offer to sell or to purchase a security is not made in this State when a publisher circulates or there is circulated on the publisher's behalf in this State a bona fide newspaper or other publication of general, regular and paid circulation that is not published in this State or that is published in this State but has had more than 2/3 of its circulation outside this State during the previous 12 months or when a radio or television program or other electronic communication, except specifically addressed electronic mail or messaging, originating outside this State is received in this State. A radio or television program or other electronic communication is considered as having originated in this State if either the broadcast studio or the originating source of transmission is located in this State, unless:

A. The program or communication is syndicated and distributed from outside this State for redistribution to the general public in this State;

B. 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;

C. The program or communication is an electronic communication 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

D. The program or communication consists of an electronic communication that originates in this State, but which is not intended for distribution to the general public in this State.

For purposes of this subsection, when a publication is published in editions, each edition is considered a separate publication except for material common to all editions. Radio or television programs, or other electronic communications, with changes, alterations or additions made prior to local redistribution, are considered as originating in this State.

6. Investment advice and misrepresentations. The following sections apply to a person if the person engages in an act, practice or course of business

instrumental in effecting prohibited or actionable conduct in this State, whether or not either party is then present in this State:

A. Section 16403, subsection 1;

B. Section 16404, subsection 1;

C. Section 16405, subsection 1;

D. Section 16502;

E. Section 16505; and

F. Section 16506.

Official Comments

Source of Law: 1956 Act Section 414; RUSA Section 801.

1. Section 610 defines the application of the Act to interstate or international transactions when only some of the elements of a violation occur in this State. This Section applies to all types of proceedings specified by the Act - administrative, civil, and criminal. The law is now settled that a person may violate the law of a particular state without ever being within the state or performing each act necessary to violate the law within that state.

2. Section 610 generally follows Section 414 of the 1956 Act, but has been modernized to reflect the development of the Internet and other electronic communications after 1956.

3. Section 610 can be illustrated in the context of a civil action under Section 509(b) by a purchaser in State A against a seller in State B:

Section 610(a) would apply when an "offer to sell is made in this State."

Section 610(c) provides that an offer which originates in State B and is directed to State A is made in both states. The securities act of State A would apply under Section 610(c)(2). The act of State B would apply also, under Section 610(c)(1). The intent is to prevent a seller in State B from using that state as a base of operations for defrauding person in other states.

Section 610(e) addresses offers made through publications, radio, television, or electronic communications. The subsection provides a series of safe harbors for advertisements in newspapers, magazines, radio, television, or electronic media that either originate outside State A or that originate in State A but are directed outside the state to the general public. With respect to bona fide newspapers or other publications of general, regular, and paid circulation, the safe harbor requires that more than two thirds of its circulation be outside State A. With respect to radio, television, or other electronic communications, safe harbors are specified in Sections 610(e)(1) through (4).

Section 610(d), however, provides that a person in State A who makes an offer to purchase as a result of communication described in Section 610(e) may cause the act to be applicable if the offeror accepts the offer "in this State." Section 610(d) defines when an offer is accepted "in this State."

If a selling broker-dealer in State B solely sends a confirmation into State A, or the purchaser in State A sends a check from within State A, the act will not apply unless, under Section 610(d), the confirmation or delivery constitutes the seller's acceptance of the purchaser's offer to buy in State A.

The applicability of the act to purchaser is addressed by Section 610(b) which is the converse of Section 610(a). Under Section 509(c) there can be liability of purchasers to sellers.

Section 610(f) is a new provision that specifies jurisdictions in cases involving investment advice and misrepresentations.

4. Under subsection 202(20) certain out-of-state offers or sales are exempt from securities registration.

5. The phrase "other electronic means" is coextensive with computer or other information technology permitted by subsections 102(8), 102(25).

6. Under Section 610 the administrator may adopt interpretative rules or orders to specify when particular uses of new electronic communications, including the Internet, involve an offer to sell or to purchase a security, acceptance of an order to purchase or sell a security, or an act or practice involving prohibited conduct, within a State, whether or not a purchaser, seller, or other party is then present in the State. The NASAA Interpretive Order Concerning Broker-Dealers, Agents, and Investment Adviser Representatives Using the Internet for General Dissemination of Information for Products and Services (Apr. 23, 1997) is an illustration of an interpretative order that would

be in compliance with the administrator's authority under Section 610. Under this Order, broker-dealers, agents, investment advisers, and investment adviser representatives who distribute information on available products and services through communications on the Internet generally to anyone having access to the Internet such as postings on a bulletin board or home page shall not be deemed to be transacting business in a State if specified conditions are satisfied including a legend clearly stating that the broker-dealer, agent, investment adviser, or investment adviser representative may transact business in that State only if first registered, excluded or exempted from applicable registration requirements.

Maine Comments

1. Section 10707(3) of the Revised Maine Securities Act provided that receipt in this State may include mail delivered to a post office in this State. Maine does not retain that provision here because such a delivery is covered under the terms of this section.

2. Section 16610(5): Maine has added the phrase "except specifically addressed electronic mail or messaging" to clarify that specifically directed electronic communications by electronic mail or messaging originating outside of Maine and received in Maine is an offer made in Maine.

§16611. Service of process

1. Signed consent to service of process. A consent to service of process must be signed and filed on a form designated by the administrator. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this chapter or a rule adopted or order issued under this chapter after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for licensing or registration or a previous exemption or notice filing need not file an additional consent.

2. Conduct constituting appointment of agent for service. If a person, including a nonresident of this State, engages in an act, practice or course of business prohibited or made actionable by this chapter or a rule adopted or order issued under this chapter and the person has not filed a consent to service

of process under subsection 1, the act, practice or course of business constitutes the appointment of the administrator as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.

3. Procedure for service of process. Service under subsection 1 or 2 may be made by providing a copy of the process to the office of the administrator, but it is not effective unless:

A. The plaintiff, which may be the administrator, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address or takes other reasonable steps to give notice; and

B. The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the administrator in a proceeding before the administrator, allows.

4. Service in administrative proceedings or civil actions by administrator. Service pursuant to subsection 3 may be used in a proceeding before the administrator or by the administrator in a civil action in which the administrator is the moving party.

5. Opportunity to defend. If process is served under subsection 3, the court, or the administrator in a proceeding before the administrator, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

Official Comments

Prior Provisions: 1956 Act Sections 414(g) and (h); RUSA Section 708.

1. Section 611 follows the 1956 Act and RUSA in providing for a signed consent to service of process in Section 611(a); a substituted service of process in Section 611(b); and process and opportunity to defend in Sections 611(c) through (e).

2. An issuer is not required to file a consent to service of process unless it proposes to offer a security in this State through someone acting on an agency

basis. Since the civil liability provisions of Section 509(b) apply only in a suit by a purchaser against a seller, the issuer in a firm commitment underwriting is civilly liable only to the underwriter, who, in turn, may be liable to the dealer, who, in turn, may be liable to the purchaser. In contrast, in a best efforts underwriting, when the security is sold on an agency basis and title passes directly to the purchaser, the issuer can be liable to the purchaser.

3. Section 611(b) generally follows Section 414(h) of the 1956 Act and Section 708(c) of RUSA. The intent is to provide for substituted service of process when a seller in one state directs an offer into a second state either in violation of the laws of the second state or fraudulently. Under Section 611(b) the purchaser may sue the seller in the purchaser's state and then bring an action on the judgment in the seller's state. The constitutionality of this type of statute has long been sustained.

4. This section was originally based on the type of nonresident motorist statute whose constitutionality was sustained in Hess v. Pawlowski, 274 U.S. 352 (1927) and subsequently in other contexts. See, e.g., International Shoe Co. v. State of Wash., 326 U.S. 310 (1945); Travelers Health Ass'n v. Commonwealth of Va., 339 U.S. 643 (1950).

§16612. Liability of control persons

In an administrative action brought by the administrator, or a civil action brought by the Attorney General for a violation of any provision of this chapter or any rule or order adopted or issued by the administrator pursuant to this chapter, every person who directly or indirectly controls another person liable for the violation, every partner, officer or director of that other person, every person occupying a similar status or performing similar functions, every employee of that other person who materially aids in the act or transaction constituting the violation and every broker-dealer, agent, investment adviser or investment adviser representative who materially aids in the act or transaction constituting the violation is liable to the same extent as that other person, unless the person otherwise secondarily liable under this chapter proves that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. Any of the remedies authorized by section 16603, subsection 2 may be granted with respect to a person secondarily liable under this section. This section is not intended to abrogate any right to contribution that may exist at common law with respect to an award of restitution.

Maine Comments

1. In the model Uniform Securities Act, Section 612 was a severability provision that was not necessary in Maine because of the general severability section in Title 1 of the Maine Revised Statutes.

2. Section 16612: Maine has added this section based on a provision in the Revised Maine Securities Act, section 10602(3), allowing for control person liability in administrative proceedings and in civil actions brought by the Attorney General.

§16613. Administrative determination of abandonment

A pending license application, registration statement, exemption filing or notice filing may be considered abandoned if the administrator has not received a response to inquiries or deficiency notices for a period of at least 120 days. The administrator shall send an abandonment notice to the last known address of the applicant or filer. The applicant or filer must respond to the abandonment notice within 30 days to avoid an abandonment determination. The abandonment of an application does not preclude the filing of a subsequent application for licensing, registration statement, exemption filing or notice filing.

Maine Comment

1. This section incorporates the abandonment provisions within sections 10313(7), 10406(5) and 10502(8) of the Revised Maine Securities Act, which had no counterparts in the model Uniform Securities Act.

SUBCHAPTER 7

TRANSITION

§16701. Effective date

This chapter takes effect December 31, 2005.

§16702. Application

The application of this chapter to existing proceedings and existing rights and duties is described in this section**.**

1. Applicability of predecessor act to pending proceedings and existing rights. The predecessor act exclusively governs all actions or proceedings that are pending on the effective date of this chapter or may be instituted on the basis of conduct occurring before the effective date of this chapter, but a civil action may not be maintained to enforce any liability under the predecessor act unless instituted within any period of limitation that applied when the cause of action accrued or within 5 years after the effective date of this chapter, whichever is earlier.

2. Continued effectiveness under predecessor act. All effective licenses and registrations under any predecessor act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations and conditions imposed on the licenses and registrations under any predecessor act remain in effect while they would have remained in effect if this chapter had not been enacted. They are considered to have been filed, issued or imposed under this chapter, but are exclusively governed by that predecessor act.

3. Applicability of predecessor act to offers or sales. The predecessor act exclusively applies to an offer or sale made within one year after the effective date of this chapter pursuant to an offering made in good faith before the effective date of this chapter on the basis of an exemption available under the predecessor act.

Official Comments

Prior Provisions: 1956 Act Section 418; RUSA Section 807.

Prior law governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of a State blue sky statute. See Hilton v. Mumaw, 522 F.2d 588, 600 (9th Cir. 1975).