

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

FIRST REGULAR SESSION-2005

Legislative Document

No. 509

H.P. 384

House of Representatives, February 1, 2005

An Act To Adopt the Maine Uniform Securities Act

Submitted by the Department of Professional and Financial Regulation pursuant to Joint Rule 204.

Reference to the Committee on Insurance and Financial Services suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative PERRY of Calais.
Cosponsored by Senator MILLS of Somerset and
Representatives: GLYNN of South Portland, HARLOW of Portland, McKANE of Newcastle,
RICHARDSON of Warren, Senators: PLOWMAN of Penobscot, SULLIVAN of York.

2 **Be it enacted by the People of the State of Maine as follows:**

4 **PART A**

6 **Sec. A-1. 32 MRSA c. 105**, as amended, is repealed.

8 **Sec. A-2. 32 MRSA c. 135** is enacted to read:

10 **UNIFORM SECURITIES ACT (2002)**

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

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

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

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

26 Both Acts have been preempted in part by the National
28 Securities Markets Improvement Act of 1996 and the Securities
Litigation Uniform Standards Act of 1998.

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

36 The approach of this Act is to use the substance and
38 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.

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

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

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

8
9 The Act is solely a new Uniform Securities Act. It does not
10 codify or append related regulations or guidelines. The Act also
11 authorizes state administrators in Section 203 to adopt further
12 exemptions without statutory amendment. The Drafting Committee
13 did not address state tender offer or control share provisions in
14 its preparation of this Act.

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

21
22 The Drafting Committee reviewed several drafts in meetings
23 between 1998 and 2002. The drafts were made available on NCCUSL's
24 public website before the meetings. The meetings were publicly
25 noticed and open to all who wished to attend. The Committee had
26 the assistance of advisors, consultants, and observers from
27 several interested groups, including, among others, the American
28 Bankers Association, the American Bar Association, the American
29 Council of Life Insurers, the Certified Financial Planner Board
30 of Standards, the Financial Planning Association, the Investment
31 Company Institute, the Investment Counsel Association of America,
32 the National Association of Securities Dealers, Inc., the New
33 York Stock Exchange, the North American Securities Administrators
34 Association, the Securities and Exchange Commission, and the
35 Securities Industry Association. In addition, the Reporter and
36 the Chair met on several occasions with committees or
37 representatives of these and other groups.

38
39 In drafting the new Act, the Reporter and the Drafting
40 Committee recognized two fundamental challenges. First, there was
41 a general recognition among all involved of the desirability of
42 drafting an Act that would receive broad support. The success of
43 RUSA had been limited because of fundamental differences among
44 relevant constituencies on several issues. After the National
45 Securities Markets Improvement Act of 1996 preempted specified
46 aspects of state securities law with respect to federal covered
47 securities, the opportunity to draft an Act in a less contentious
48 atmosphere was available. Given the number of industry, investor,
49 and regulatory interests affected by the Act and the complexity
50

2 of the Act itself, building consensus was the Act's most significant drafting challenge.

4 Second, there was the technical challenge of drafting a new
6 Act that could achieve the basic goal of uniformity among states
8 and with applicable federal law against the backdrop of 46 years
10 of experience with the 1956 Act. Over time both Uniform and
12 non-Uniform Act states have, to varying degrees, evolved local
14 solutions to a number of securities law issues. In an
16 increasingly global securities market, the need for uniformity
18 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.

20 The Act is in seven Articles:

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

36 There are has three overarching themes of the Act.

38 First, Section 608 articulates in greater detail than the
40 1956 Act's Section 415 the objectives of uniformity, cooperation
42 among relevant state and federal governments and self-regulatory
44 organizations, investor protection and, to the extent
46 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.

48 A second overarching theme of the Act is achieving
50 consistency with the National Securities Markets Improvement Act
of 1996 ("NSMIA"). New definitions were added to define in

2 Section 102(6), federal covered investment adviser, and in
3 Section 102(7), federal covered security. NSMIA also had
4 implications for several securities registration exemptions (see
5 Sections 201(3), 201(4), 201(6), 202(4), 202(6), 202(13),
6 202(14), 202(15) and 202(16)); securities registration (Sections
7 301(1) and 302); and the broker-dealer, agent, investment
8 adviser, and investment adviser representative provisions (see
9 especially Sections 402(b)(1) and (5), 403(b)(1)(A) and (2), 405
10 and 411).

11
12 A third theme of the Act involves facilitating electronic
13 records, signatures, and filing. New definitions were added to
14 address filing (Section 102(8)), record (Section 102(25)), and
15 sign (Section 102(30)). Section 105 expressly permits the filing
16 of electronic signatures and records. Collectively these
17 provisions are intended to permit electronic filing in central
18 information depositories such as the Web-CRD (Central
19 Registration Depository), the Investment Adviser Registration
20 Depository (IARD), the Securities and Exchange Commission's
21 Electronic Data Gathering, Analysis and Retrieval System (EDGAR)
22 or successor institutions. Electronic communication also has led
23 to an amplification of the jurisdiction Section 610.

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

26
27 (1) The definition of "security" in Section 102(28) has been
28 modernized to take into account amendments to the counterpart
29 federal provisions; add new language to expressly include
30 uncertificated securities; exclude contributory or
31 noncontributory ERISA plans; and amplify the definition of
32 investment contract so that it can expressly reach interests in
33 limited partnerships, limited liability companies, or viatical
34 settlement agreements, among other contracts, when they satisfy
35 the definition of investment contract.

36
37 The new Act does not expressly exclude from the definition
38 of security variable insurance products, but does exempt variable
39 insurance products from securities registration in Section
40 201(4). The states are divided on the question of whether
41 variable insurance products should be excluded (and not subject
42 to fraud enforcement) or exempted (and subject to fraud
43 enforcement). For those states that wish to continue to provide
44 or adopt an exclusion for variable insurance products from the
45 definition of security, the brackets should be removed from the
46 phrase "or variable." For those states that wish variable
47 insurance products to be included in the definition of security,
48 the bracketed phrase should be removed.

2 (2) Nineteen new definitions were added to define "bank"
3 (Section 102(3)), "depository institution" (Section 102(5)),
4 "federal covered investment adviser" (Section 102(6)), "federal
5 covered security" (Section 102(7)), "filing" (Section 102(8)),
6 "institutional investor" (Section 102(11)), "insurance company"
7 (Section 102(12)), "insured" (Section 102(13)), "international
8 banking institution" (Section 102(14)), "investment adviser
9 representative" (Section 102(16)), "offer to purchase" (Section
10 102(19)), "place of business" (Section 102(21)), "predecessor
11 act" (Section 102(22)), "price amendment" (Section 102(23)),
12 "principal place of business" (Section 102(24)), "record"
13 (Section 102(25)), "Securities and Exchange Commission" (Section
14 102(27)), "self-regulatory organization" (Section 102(29)), and
15 "sign" (Section 102(30)). The growth in definitions is suggestive
16 of the increased complexity and detail of several revised
provisions in the new Act.

18 (3) Specific exemptions from securities registration are
19 broadened. Most significant is Section 202(13) which builds on a
20 new definition of institutional investors that parallels Rule
21 501(a) of the Securities Act of 1933, but with \$10 million rather
22 than \$5 million thresholds in Sections 102(11)(F) through (K),
23 and (O), and addresses specified employee plans, trusts, Internal
24 Revenue Code Section 501(c)(3) organizations, small business
25 investment companies licensed by the United States Small Business
26 Administration, private business development companies under
27 Section 202(a)(22) of the Investment Advisers Act, and other
28 institutional purchasers. The definition of institutional
29 investor also reaches qualified institutional buyers under Rule
30 144A(a)(i) of the Securities Act of 1933, major U.S.
31 institutional investors as defined in Rule 15a-6(b)(4)(i) of the
32 Securities Exchange Act of 1934, and federal covered investment
33 advisers acting for their own accounts. The new institutional
34 investor transaction exemption in Section 202(13) will also reach
35 other persons specified by rule or order of the administrator.

36
37 The limited offering transaction exemption in Section
38 202(14) was broadened to reach 25 persons, in addition to those
39 exempted by the institutional investor exemption, on condition
40 that the transaction is part of a single issue, and other
41 specified conditions are satisfied.

42
43 If the SEC adopts a new definition of qualified purchaser,
44 as it has proposed under Rule 146(c) of the Securities Act of
45 1933, there may ultimately be four preemptive or exemptive types
46 of provision applicable to the new Act: (1) the SEC qualified
47 purchaser provision; (2) Section 18(b)(4)(D) which provides
48 preemptive treatment for Rule 506 offerings under the Securities
49 Act of 1933; (3) specified investors in Section 202(13); and (4)
50 limited offerings in Section 202(14).

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

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

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

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

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

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

48 b. the offering has been or would be made with
50 unreasonable amounts of underwriters' and sellers' discounts,

2 commissions, or other compensation, or promoters' profits or participations or unreasonable amounts or kinds of options.

4 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 6 306(b) provides: "To the extent practicable the administrator, by 8 rule adopted or order issued under this [Act] shall publish standards that provide notice of conduct that violates subsection 10 (a)(7)." NASAA Guidelines provide this type of published standard. This hortatory Section is intended to address one type 12 of criticism of merit regulation.

14 (5) Article 4, which concerns broker-dealers, agents, investment advisers, investment adviser representatives, and 16 federal covered investment advisers was substantially revised to take into account NSMIA and significant changes in administrative 18 practice such as those occasioned by the electronic WEB-CRD and the IARD. New developments had an impact on the definitions of 20 "agent" (Section 102(2)), "broker-dealer" (Section 102(4)), "investment adviser" (Section 102(15)), and "investment adviser 22 representative" (Section 102(16)). NSMIA led also to the new federal covered investment adviser notice filing procedure in 24 Section 405.

26 "[A] bank, savings institution or trust company" was excluded from the 1956 Act Section 401(c) definition of 28 broker-dealer. After the Gramm-Leach-Bliley Act was adopted in 1999, the generic exclusion of banks from the definition of 30 broker and dealer in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934 was rescinded in favor of functional 32 regulation. At the federal level this means that banks, unless limiting their securities activities to a specific list of 34 excluded activities, are required to register as broker-dealers. This Act generally follows the federal approach with exceptions 36 for private securities offerings addressed by Section 3(a)(4)(B)(vii) of the Securities Exchange Act of 1934 and de 38 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 40 exclusions for banks, by rule or order. Securities issued by banks, other depository institutions, and international banking 42 institutions are exempt from securities registration in Section 201(3). Banks, savings institutions, and other depository 44 institutions, when not excluded from the definition of broker-dealer, will be required to register by Section 401 and 46 generally, like all other broker-dealers, be subject to the regulatory and liability provisions of the Act in Article 4 and 5. 48

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

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

16 Section 507 is a new qualified immunity provision to protect
17 a broker-dealer or investment adviser from defamation claims
18 based on information filed with the SEC, a state administrator,
19 or self-regulatory organization "unless the person knew, or
20 should have known at the time that the statement was made, that
21 it was false in a material respect or the person acted in
22 reckless disregard of the statement's truth or falsity." This
23 Section, which is consistent with most litigated cases to date
24 and is a response to concerns that defamation lawsuits have
25 deterred broker-dealers and investment advisers from full and
26 complete disclosure of problems with departing employees. The
27 Drafting Committee was also sensitive to the concern that such
28 immunity could allow broker-dealers and investment advisers to
29 unfairly characterize employees to protect their "book" of
30 clients. Because of this concern the Drafting Committee rejected
31 proposals for an absolute immunity.
32

34 Section 510 is a new rescission offer provision that should
35 be read with the definition of offer to purchase in Section
36 102(19) and the exemption for rescission offers in Section
37 202(19). Section 510 is consistent with administrative practice
38 in many states today, although some states also have a filing
requirement.
40

42 More thought was devoted to the civil liability Section 509
43 than any other provision. As ultimately drafted much in this
44 Section is little changed from the 1956 Act. New subsections were
45 added to recognize the preemptive Securities Litigation Act of
46 1998 (Section 509(a)) and civil liability for investment advice
(Sections 509(e) and (f)).

48 Significant changes were made in the statute of limitations
49 Section 509(j). Current state law provides a wide range of
50 statutes of limitations. The 1956 Act contained a "two years

2 after the contract of sale" statute of limitations. The new Act
3 has two statute of limitations provisions. Section 509(j)(1)
4 limits violations of registration provisions to "one year after
5 the violation occurred." Section 509(j)(2) follows the pattern of
6 federal securities law statutes of limitations, as amended in
7 July 2002 by the Sarbanes-Oxley Act, and limits fraud violations
8 to the earlier of "two years after the discovery of the facts
constituting the violation or five years after such violation."

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

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

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

36
37 Section 607 is a new provision that clarifies the scope of
38 nonpublic records and the administrator's discretion to disclose
39 in light of the extensive development of freedom of information
40 and open records laws since the 1956 Act was adopted.

42 The jurisdiction and service of process provisions, Sections
43 610 and 611, generally follow Section 414 of the 1956 Act, but
44 have been modernized to take into account electronic
45 communications.

46
47 (8) Section 103 preserves the ability of the Act to reflect
48 later amendments of specified federal statutes and rules to the
49 extent they are preemptive or this is otherwise permitted by
50 state law.

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

8 **UNIFORM SECURITIES ACT**

10 **Legislative Note**

12 Each state, the District of Columbia, Guam, and Puerto Rico
14 have enacted an administrative procedure act. The procedural
provisions of the Act in some instances are intended to augment
16 the state administrative procedure act. In so doing, this Act
differs from other uniform acts promulgated by the National
18 Conference of Commissioners on Uniform State Laws (NCCUSL) in
that it contains procedural provisions on topics such as
20 administrative rulemaking and adjudication, service of process,
judicial review of administrative adjudications, public records,
22 public hearings, and use immunity. Normally a uniform act
promulgated by NCCUSL defers to existing state procedural
24 provisions on such matters. This Act reflects a policy decision
that these matters should be addressed in this Act to promote
26 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
28 act. When, however, a reference is made in this Act to the state
administrative procedure act, this Act is intended to follow the
30 state's existing administrative procedure act.

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

36 **CHAPTER 135**

38 **MAINE UNIFORM SECURITIES ACT**

40 **SUBCHAPTER 1**

42 **GENERAL PROVISIONS**

44 **§16101. Short title**

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

50 **§16102. Definitions**

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

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

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

32 3. Bank. "Bank" means:

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

38 B. A member bank of the Federal Reserve System;

40 C. A banking institution, whether incorporated or not,
42 doing business under the laws of a state or of the United
44 States, a substantial portion of the business of which
46 consists of receiving deposits or exercising fiduciary
48 powers similar to those permitted to be exercised by
50 national banks under the authority of the Comptroller of the
52 Currency pursuant to Section 1 of United States Public Law
54 87-722, 12 United States Code, Section 92a, and that is
56 supervised and examined by a state or federal agency having
58 supervision over banks and that is not operated for the
60 purpose of evading this chapter; and

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

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

74 A. An agent;

76 B. An issuer;

2 C. A bank or savings institution if its activities as a
3 broker-dealer are limited to those specified in Section
4 3(a)(4)(B)(i) to (vi) and (viii) to (x); Section 3(a)(5)(B);
5 and Section 3(a)(5)(C) of the federal Securities Exchange
6 Act of 1934, 15 United States Code, Sections 78c(a)(4) and
7 (5);

8

9 D. An international banking institution; or

10

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

16

17 5. Depository institution. "Depository institution" means:

18

19 A. A bank; or

20

21 B. A savings institution, trust company, credit union or
22 similar institution that is organized or chartered under the
23 laws of a state or of the United States, authorized to
24 receive deposits and supervised and examined by an official
25 or agency of a state or the United States if its deposits or
26 share accounts are insured to the maximum amount authorized
27 by statute by the Federal Deposit Insurance Corporation, the
28 National Credit Union Share Insurance Fund or a successor
29 authorized by federal law.

30

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

34

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

38

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

44

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

47

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

50

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

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

10 A. A depository institution or international banking
11 institution;

12 B. An insurance company;

14 C. A separate account of an insurance company;

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

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

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

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

48 H. A trust, if it has total assets in excess of
49 \$10,000,000, its trustee is a depository institution and its
50 participants are exclusively plans of the types identified

2 in paragraph F or G, regardless of the size of their assets,
3 except a trust that includes as participants self-directed
4 individual retirement accounts or similar self-directed
5 plans;

6 I. An organization described in Section 501(c)(3) of the
7 Internal Revenue Code, 26 United States Code, Section
8 501(c)(3), a corporation, a Massachusetts trust or similar
9 business trust, a limited liability company or partnership,
10 not formed for the specific purpose of acquiring the
11 securities offered, with total assets in excess of
12 \$10,000,000;

13 J. A small business investment company licensed by the
14 United States Small Business Administration under Section
15 301(c) of the federal Small Business Investment Act of 1958,
16 15 United States Code, Section 681(c) with total assets in
17 excess of \$5,000,000;

18 K. A private business development company as defined in
19 Section 202(a)(22) of the federal Investment Advisers Act of
20 1940, 15 United States Code, Section 80b-2(a)(22) with total
21 assets in excess of \$5,000,000;

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

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

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

29 O. Any other person, other than an individual, of
30 institutional character with total assets in excess of
31 \$10,000,000 not organized for the specific purpose of
32 evading this chapter; or

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

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

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

6 14. International banking institution. "International
8 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.

10 15. Investment adviser. "Investment adviser" means a person
12 that, for compensation, engages in the business of advising
14 others, either directly or through publications or writings, as
16 to the value of securities or the advisability of investing in,
18 purchasing or selling securities or that, for compensation and as
20 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:

22 A. An investment adviser representative;

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

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

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

38 E. A federal covered investment adviser;

40 F. A bank or savings institution;

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

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

50

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

14 A. Perform only clerical or ministerial acts;

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

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

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

32 (2) Not "supervised persons" as that term is defined
33 in Section 202(a)(25) of the federal Investment
34 Advisers Act of 1940, 15 United States Code, Section
35 80b-2(a)(25); or

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

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

46 A. The issuer of a voting trust certificate, collateral
47 trust certificate, certificate of deposit for a security or
48 share in an investment company without a board of directors
49 or individuals performing similar functions is the person
50 performing the acts and assuming the duties of depositor or

2 manager pursuant to the trust or other agreement or
3 instrument under which the security is issued;

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

10 C. The issuer of a fractional undivided interest in an oil,
11 gas or other mineral lease or in payments out of production
12 under a lease, right or royalty is the owner of an interest
13 in the lease or in payments out of production under a lease,
14 right or royalty, whether whole or fractional, that creates
15 fractional interests for the purpose of sale; or

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

24 **18. Nonissuer transaction; nonissuer distribution.**
25 **"Nonissuer transaction" or "nonissuer distribution" means a**
26 **transaction or distribution not directly or indirectly for the**
27 **benefit of the issuer.**

28 **19. Offer to purchase.** "Offer to purchase" includes an
29 attempt or offer to obtain, or solicitation of an offer to sell,
30 a security or interest in a security for value. "Offer to
31 purchase" does not include a tender offer that is subject to
32 Section 14(d) of the federal Securities Exchange Act of 1934, 15
33 United States Code, Section 78n(d).
34

35 **20. Person.** "Person" means an individual; corporation;
36 business trust; estate; trust; partnership; limited liability
37 company; association; joint venture; government; governmental
38 subdivision, agency or instrumentality; public corporation; or
39 any other legal or commercial entity.
40

41 **21. Place of business.** "Place of business" of a
42 broker-dealer, an investment adviser or a federal covered
43 investment adviser means:
44

45 A. An office at which the broker-dealer, investment adviser
46 or federal covered investment adviser regularly provides
47

2 brokerage or investment advice or solicits, meets with or
3 otherwise communicates with customers or clients; or

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

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

12 23. Price amendment. "Price amendment" means the amendment
13 to a registration statement filed under the federal Securities
14 Act of 1933 or, if an amendment is not filed, the prospectus or
15 prospectus supplement filed under the federal Securities Act of
16 1933 that includes a statement of the offering price,
17 underwriting and selling discounts or commissions, amount of
18 proceeds, conversion rates, call prices and other matters
19 dependent upon the offering price.

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

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

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

42 A. The gift of or delivery of a security with, or as a
43 bonus on account of, a purchase of securities or any other
44 thing constituting part of the subject of the purchase and
45 having been offered and sold for value;

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

2 C. A sale or offer of a warrant or right to purchase or
4 subscribe to another security of the same or another issuer
6 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.

8 **27. Securities and Exchange Commission.** "Securities and
10 Exchange Commission" means the United States Securities and
 Exchange Commission.

12 **28. Security.** "Security" means a note; stock; treasury
14 stock; security future; bond; debenture; evidence of
16 indebtedness; certificate of interest or participation in a
18 profit-sharing agreement; collateral trust certificate;
20 preorganization certificate or subscription; transferable share;
22 investment contract; investment in a viatical or life settlement
24 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":

32 A. Includes both a certificated and an uncertificated
34 security;

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

42 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;

44 D. Includes as an investment contract an investment in a
46 common enterprise with the expectation of profits to be
 derived primarily from the efforts of a person other than
48 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:

2 Cir. 1992) ("Texas courts generally look to decisions of the
3 federal courts to interpret the Texas Securities Act because of
4 obvious similarities between the state and federal laws"); Koch v
5 Koch Indus., Inc. 203 F.3d 1202, 1235 (10th Cir. 2000) (following
6 federal definition of materiality); Biales v. Young, 432 S.E.2d
7 482, 484 (S.C. 1993) ("Section 35-1-1490(2) is substantially
8 similar to Section 12(1) of the Federal Securities Act").

9
10 4. Section 102(2): Agent: Prior Provisions: 1956 Act
11 Section 401(b); RUSA Section 101(14). Section (102)(2), in part,
12 follows the 1956 Act definition. The 1956 Act used the term
13 "agent" while the RUSA Section 101(14) used the term "sales
14 representative." Given the broader enactment of the 1956 Act,
15 this Act also uses the term "agent." Certain exclusions from the
16 1956 Act are exemptions in this Act. See Section 402(b).

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

28
29 An individual can be an agent for a broker-dealer or issuer
30 for a purpose other than effecting or attempting to effect
31 purchases or sales of securities and not be a statutory agent
32 under this Act. See, e.g., Baker, Watts & Co. v. Miles &
33 Stockridge, 620 A.2d 356, 367 (Md. Ct. App. 1993)
34 (attorney-client relationship is generally one of agency, but
35 that alone does not bring an attorney within securities act
36 definition of agent). An individual will not be an agent under
37 Section 102(2) because of the person's status as a partner,
38 officer, or director of a broker-dealer or issuer if such an
39 individual does not effect or attempt to effect purchases or
40 sales of securities. See, e.g., Abell v. Potomac Ins. Co., 858
41 F.2d 1104 (5th Cir. 1988).

42
43 Section 102(2) is intended to include any individual who
44 acts as an agent, whether or not the individual is an employee or
45 independent contractor. Cf. Hollinger v. Titan Capital Corp., 914
46 F.2d 1564 (9th Cir. en banc 1990), cert. denied, 499 U.S. 976
47 (1991).

48
49 The word "individual" in the definition of the term "agent"
50 is limited to human beings and does not include a juridical

2 "person" such as a corporation. Cf. definition of "person" in
3 Section 102(20). The 1956 Act Section 401(b) similarly was
4 limited to individuals and did not include juridical persons.
5 See, e.g., Connecticut Nat'l Bank v. Giacomi, 699 A.2d 101,
6 111-112 (Conn. 1997) ("agent" only includes natural persons when
7 it used the term individual); Schpok v. Fodale, 236 N.W.2d 97, 99
8 (Mich. Ct. App. 1975) (agent defined to be individual and did not
include a corporation).

10 An individual whose acts are solely clerical or ministerial
11 would not be an agent under Section 102(2). Cf. Section
12 402(b)(8). Ministerial or clerical acts might include preparing
written communications or responding to inquiries.

14 5. Section 102(3): Bank: Prior Provision: Subsection
15 3(a)(6) of the Securities Exchange Act of 1934. A United States
16 branch of a foreign bank that otherwise satisfies this definition
17 would be a bank.

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

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

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

35 The Gramm-Leach-Bliley Act, signed into law in November
36 1999, rescinded the blanket exemption of banks from the
37 definition of broker and dealer in Sections 3(a)(4) and (5) of
38 the Securities Exchange Act of 1934. The Gramm-Leach-Bliley Act
39 permits a bank to avoid registration as a broker or dealer at the
40 federal level if the bank limits its activities to those
41 specified in the Securities Exchange Act. This Act generally
42 adopts the activity focused exceptions for banks included in the
43 Gramm-Leach-Bliley Act, with minor modifications relating to the
44 private placement and de minimis brokerage activities of banks

2 (15 U.S.C. 78c(a)(4)(B)(vii) and (xi)). This Act also reaches
savings institutions.

4 A state may decide to adopt an exclusion in Section
6 102(4)(C) that fully conforms with the bank exceptions contained
in the Gramm-Leach-Bliley Act. For states that choose this
8 approach, the language of Section 102(4)(C) should read:

10 (C) a bank or savings institution if its activities as
12 broker-dealer are limited to those specified in Section
14 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)).

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

22 States that promptly adopt this Act should consider whether
it is appropriate to provide banks a transition period to comply
24 with the Act's new activity focused exceptions. The activity
focused exceptions for banks in the Gramm-Leach-Bliley Act were
26 originally to become effective at the federal level on May 12,
2001. However, the Securities and Exchange Commission has delayed
28 the effective date of these activity focused exceptions and thus
continued the blanket exemption for banks beyond May 12, 2001,
30 and commenced a rulemaking designed to clarify and define the
scope of the bank exceptions in the Gramm-Leach-Bliley Act. See
32 Sec. Ex. Act Rels. 44,291, 74 SEC Dock. 2155 (2001) (proposal);
45,897, 77 SEC Dock. 1555 (2002) (proposal). To avoid disrupting
34 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.

36 Section 15(h)(1) of the Securities Exchange Act of 1934, as
38 amended by the National Securities Markets Improvement Act of
1996, preempts state law from "[establishing] capital, custody,
40 margin, financial responsibility, making and keeping records,
bonding, or financial or operational reporting requirements for
42 brokers, dealers, municipal securities dealers, government
securities brokers, or government securities dealers that differ
44 from, or are in addition to the requirements in those areas
established under [the Securities Exchange Act]." These
46 preemptions are recognized in the substantive broker-dealer
provisions in Article 4.

48
50 7. Section 102(5): Depository institution: No Prior
Provision. A depository institution's securities are addressed by

2 the exemption in Section 201(3). A depository institution is an
3 institutional investor in Section 102(11)(A).

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

20 9. Section 102(7): Federal covered security: No Prior
21 Provision. The National Securities Markets Improvement Act of
22 1996, as subsequently amended, partially preempted state law in
23 the securities offering and reporting areas. Under Section 18(a)
24 of the Securities Act of 1933, no state statute, rule, order, or
25 other administrative action may apply to:

26 (1) The registration of a "covered" security or a security
27 that will be a covered security upon completion of the
28 transaction;

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

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

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

39 Section 18(b) of the Securities Act of 1933 applies to four
40 types of "covered securities":

41 (1) Securities listed or authorized for listing on the New
42 York Stock Exchange (NYSE), the American Stock Exchange (Amex);
43 the National Market System of the Nasdaq stock market; or
44 securities exchanges registered with the Securities and Exchange
45 Commission.

2 Commission (SEC) (or any tier or segment of their trading) if the
3 SEC determines by rule that their listing standards are
4 substantially similar to those of the NYSE, Amex, or Nasdaq
5 National Market System, which the SEC has done through Rule 146;
6 and any security of the same issuer that is equal in seniority or
7 senior to any security listed on the NYSE, Amex, or Nasdaq
8 National Market System;

9
10 (2) securities issued by an investment company registered
11 with the SEC (or one that has filed a registration statement
12 under the Investment Company Act of 1940);

13
14 (3) securities offered or sold to "qualified purchasers."
15 This category of covered securities will become operational when
16 the SEC defines the term "qualified purchaser" as used in Section
17 18(b)(3) of the Securities Act of 1933, by rule. To date the SEC
18 has proposed, but not adopted, Rule 146(c) of the Securities Act
19 of 1933; and

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

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

28
29 (B) Section 4(4) (unsolicited brokerage transactions);

30
31 (C) Securities Act exemptions in Section 3(a) with the
32 exception of the charitable exemption in Section 3(a)(4),
33 the exchange exemption in Section 3(a)(10), the intrastate
34 exemption in Section 3(a)(11), and the municipal securities
35 exemption in Section 3(a)(2) but only with "respect to the
36 offer or sale of such [municipal] security in the State in
37 which the issuer of such security is located"; and

38
39 (D) securities issued in compliance with SEC rules under
40 Section 4(2) (private placements).

41
42 Section 18(c)(1) preserves state authority "to investigate
43 and bring enforcement actions with respect to fraud or deceit, or
44 unlawful conduct by a broker or dealer, in connection with
45 securities or securities transactions."

46
47 The National Securities Markets Improvement Act, in essence,
48 preempts aspects of the securities registration and reporting
49 processes for specified federal covered securities. The Act does

2 not diminish state authority to investigate and bring enforcement
actions generally with respect to securities transactions.

4 The States are authorized to require filings of any document
6 filed with the SEC for notice purposes "together with annual or
periodic reports of the value of securities sold or offered to be
8 sold to persons located in the State (if such sales data is not
included in documents filed with the Commission), solely for
10 notice purposes and the assessment of any fee, together with a
consent to service of process and any required fee." Section
12 18(c)(2). However, no filing or fee may be required with respect
to any listed security that is a covered security under Section
14 18(b)(1) (traded on specified stock markets). Section 302 of this
Act addresses notice filings and fees applicable to federal
covered securities.

16
18 10. Section 102(8): Filing: Prior Provision: RUSA Section
101(4). The RUSA definition was revised to recognize that records
20 may be filed in paper form or electronically with the
administrator, or designees such as the Web-CRD (Central
22 Registration Depository) or Investment Adviser Registration
Depository (IARD) or the Securities and Exchange Commission's
24 Electronic Data Gathering, Analysis and Retrieval System (EDGAR)
or successor systems.

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

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

48 11. Section 102(9): Fraud, deceit and defraud: Prior
50 Provisions: 1956 Act Section 401(d); RUSA Section 101(6). This
definition, which is identical to the 1956 Act and RUSA, codifies

2 the holdings that "fraud" as used in the federal and state
3 securities statutes is not limited to common law deceit. See
4 generally 7 Louis Loss & Joel Seligman, Securities Regulation
5 3421-3448 (3d ed. 1991).

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

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

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

21 13. Section 102(11): Institutional investor: Prior
22 Provisions: RUSA Section 101(5); Securities Act of 1933 Rules
23 144A and 501(a).

24 Sections 102(11)(A) through (K) are based on Rule 501(a) of
25 the Securities Act of 1933, but do not include the paragraphs of
26 Rule 501(a) that address individuals. Given the significant
27 period of time since Rule 501(a) was adopted, this Act has used a
28 \$10 million minimum for several categories of institutional
29 investor rather than \$5 million minimum used in Rule 501(a).

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

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

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

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

15. Section 102(13): Insured: Prior Provision: RUSA Section
6 401(a)(2). The RUSA definition of "insured," which was solely
8 applicable to exempt securities, applied to the insurance of "all
10 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
12 Prior Provision. Securities issued or guaranteed by the
14 International Bank for Reconstruction and Development, 22 U.S.C.
16 Section 286k-1(a); the Inter-American Development Bank, 22 U.S.C.
18 Section 283h(a); the Asian Development Bank, 22 U.S.C. Section
20 285h(a); the African Development Bank, 22 U.S.C. Section 290i-9;
22 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:
24 1956 Act Section 401(f); RUSA Section 101(7). This term generally
26 follows the definition in Section 202(a)(11) of the Investment
28 Advisers Act of 1940, but has been updated to take into account
new media such as the Internet.

30 The first sentence in Section 102(15) is identical to the
32 first sentence in the 1956 Act Section 401(f) and the counterpart
34 language in Section 202(a)(11). The RUSA definition deleted the
36 phrases "either directly or through publications or writings" and
38 "regular" before business. These terms have been returned to
40 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.

42 The second sentence in the term addressing financial
44 planners is new. The purpose of this sentence is to achieve
46 functional regulation of financial planners who satisfy the
48 definition of investment adviser. Cf. Investment Advisers Act
50 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

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

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

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

16 Sections 102(15)(B), (C), and (G) are substantively
identical to the 1956 Act, RUSA, and the Investment Advisers Act
18 of 1940. The Official Comment to the 1956 Act Section 401(f)
quoted an opinion of the Securities and Exchange Commission
20 General Counsel in Investment Advisers Act Release 2 on the
meaning of "special compensation" included in Section 102(15)(C):
22

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

40 Similarly, other broker-dealer employees such as research
analysts who receive no special compensation from third parties
42 for investment advice would not be required to register as
investment advisers.
44

The 1956 Act definition added the word "paid" in Section
46 401(f)(4) to the counterpart exclusion in Section 202(a)(11) of
the Investment Advisers Act "to emphasize," as the Official
48 Comment explained, "that a person who periodically distributes a
'tipster sheet' free as a way to get paying clients is not
50 excluded from the definition as a 'publisher.'"

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

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

18 *Id.* at 185.

20 Responsive to this language RUSA rewrote this exclusion to
provide:

22 a publisher, employee, or columnist of a newspaper, news
24 magazine, or business or financial publication, or an owner,
operator, or employee of a cable, radio, or television
26 network, station, or production facility, if, in either
case, the financial or business news published or
28 disseminated is made available to the general public and the
content does not consist of rendering advice on the basis of
30 the specific investment situation of each client.

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

46 The exclusion in Section 102(15)(G) is required by the
National Securities Markets Improvement Act of 1996. This
48 exclusion will reach banks and bank holding companies as
described in Investment Advisers Act Section 202(a)(11)(A) and

2 persons whose advice solely concerns United States government
securities as described in Section 202(a)(11)(E).

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

8
10 The term investment adviser representative is not intended
to preclude persons who hold a formally recognized financial
12 planning or consulting title, designation, or certification from
using such a designation. The use by a person of a title,
14 designation or certification as a financial planner, or other
similar title, designation, or certification alone does not
require registration as an investment adviser representative.

16
18 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.

20
22 In paragraph (B), the phrase "or that is otherwise
contractually responsible for assuring payment of the
24 certificate" is intended to address forms of payment other than
leases or conditional sales contracts. It would also reach
guarantors.

26
28 20. Section 102(18): Nonissuer transaction or nonissuer
distribution: Prior Provisions: 1956 Act Section 401(h); RUSA
30 Section 101(9). This definition is relevant to several exempt
transactions in Section 202.

32 In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320
(Utah Ct. App. 1987), the court declined to limit the term
34 benefit to monetary benefits and instead held a spinoff
transaction could provide direct or indirect benefits to an
36 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.*
38 *Harwin Indus. Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971). In a
similar fashion, transactions by officers, directors, promoters,
40 and other insiders of the issuer may benefit the issuer and may
not qualify as nonissuer transactions.

42
44 21. Section 102(19): Offer to purchase: No Prior Provision:
A rescission offer under Section 510 would be an offer to
46 purchase with respect to a security that earlier had been sold.

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

2 company" to reflect current usage. The use of the concluding
3 phrase "or any other legal or commercial entity" is intended to
4 be broad enough to include other forms of business entities that
5 may be created or popularized in the future.

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

8
9 24. Section 102(23): Price amendment: Prior Provision: RUSA
10 Section 101(11). A price amendment may be used in a registration
11 coordinated with the Securities and Exchange Commission procedure
12 in Section 303(d). In the case of noncash offerings, required
13 information concerning such matters as the offering price and
14 underwriting arrangements is normally filed in a "price"
15 amendment after the rest of the registration statement has been
16 reviewed by the Securities and Exchange Commission staff. See
17 generally 1 Louis Loss & Joel Seligman, Securities Regulation
18 542-550 (3d ed. rev. 1998).

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

21
22 26. Section 102(25): Record: Prior Provision: Uniform
23 Electronic Transactions Act Section 2(13). Cf. Section 3(a)(37)
24 of the Securities Exchange Act of 1934. The Uniform Electronic
25 Transactions Act §2(13) defines record in nearly identical terms.
26 The Official Comment explains:

27
28 This is a standard definition designed to embrace all means
29 of communicating or storing information except human memory.
30 It includes any method for storing or communicating
31 information, including "writings." A record need not be
32 indestructible or permanent, but the term does not include
33 oral or other communications which are not stored or
34 preserved by some means.

35
36 This term is intended to embrace new forms of records that
37 are created or popularized in the future. A record would include,
38 but not be limited to, a registration statement, report,
39 application, book, publication, account, paper, correspondence,
40 memorandum, agreement, document, computer file, or disk,
41 microfilm, photograph, or audio or visual tape.

42
43 27. Section 102(26): Sale: Prior Provisions: 1956 Act
44 Section 401(j); RUSA Section 101(13). Both the 1956 Act and RUSA
45 definition of "sale" are modeled on Section 2(a)(3) of the
46 Securities Act of 1933.

47
48 Language in Section 401(j) of the 1956 Act addressed the now
49 rescinded SEC "no sale" doctrine and has been eliminated. Merger
50

2 transactions are usually sales under Section 102(26), but may be
exempted from the securities registration requirements by Section
202(18).

4
6 28. Section 102(28): Security: Prior Provisions: 1956 Act
Section 401(1); RUSA Section 101(16). Much of the definition in
8 Section 102(28), like the definitions in the 1956 Act Section
401(1) and RUSA Section 101(16), is identical to the definition
10 in Section 2(a)(1) of the Securities Act. State courts
interpreting the Uniform Securities Act definition of security
12 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).

14
16 The most recent amendments to Section 2(a)(1) of the
Securities Act of 1933 were added by the Commodities Futures
18 Modernization Act of 2000 which added or revised language in the
Securities Act addressing security futures and securities puts,
20 calls, straddles, options, or privileges. Identical language has
been included in Section 102(28) of this Act to harmonize
22 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
24 Commodity Futures Modernization Act of 2000, further provides:
"No provision of any State law regarding the offer, sale or
26 distribution of securities shall apply to any transaction in a
security futures product, except that this sentence shall not be
28 construed as limiting any State antifraud law of general
applicability."

30
32 Preorganization certificates or subscriptions are included
in this term, obviating the need for a separate definition as was
included in RUSA Section 402(13).

34
36 Section 102(28) uses RUSA's "fractional undivided interest
in oil, gas or other mineral rights" formulation, which
38 originated in Section 2(a)(1) of the Securities Act of 1933,
rather than the 1956 Act formulation, "certificate of interest or
40 participation in an oil, gas or mining title." In recent years,
courts interpreting Section 2(a)(1) of the Securities Act of 1933
42 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).

44
46 A new sentence was added in Section 102(28)(A) referring to
certificated or uncertificated securities to indicate that the
48 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
50 law evidence of indebtedness requires a writing).

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

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

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

24 In the view of the American Council of Life Insurers:

26 The brackets around the words "or variable" should be
removed to follow the majority of jurisdictions.
28 Thirty-seven jurisdictions [including Guam] currently
exclude all insurance, endowment and annuity contracts from
30 the definition of security. Removal of the brackets around
the words "or variable," therefore, would incorporate the
32 approach taken in the majority of jurisdictions. The removal
of these brackets also prevents a statutory conflict with
34 [up to] 48 jurisdictions that grant the insurance
commissioner exclusive jurisdiction to regulate the issuance
36 and sale of variable contracts. Moreover, this approach
recognizes that the issuance and sale of variable contracts
38 is comprehensively regulated by the Securities and Exchange
Commission, the National Association of Securities Dealers,
40 50 state insurance departments, and in the case of group
life and annuities, the Department of Labor. Like all other
42 financial products, this approach imposes only one, rather
than two, levels of regulation in each state and reflects
44 the philosophy of financial services modernization.

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

2 One of the goals of this Act is to align state and federal
law. The United States Supreme Court ruled that a variable
4 annuity is a security in SEC v. Variable Annuity Life
Insurance Company of America, 359 U.S. 65 (1959). More
6 recently, it has been confirmed that variable insurance
products are "covered securities" as defined in the National
8 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
10 101 (2d Cir. 2001).

12 When variable products are included in the definition of
security and exempted from registration, state securities
14 administrators can bring enforcement actions concerning
variable insurance sales practices. This approach toward
16 functional regulation is supported by the National
Association of Securities Dealers as evidenced by a February
18 2001 letter from Mary Schapiro, President of Regulatory
Policy & Oversight: "Based on our experience, we have found
20 that variable products' sales-related problems parallel
those of mutual funds and other securities . . . Because of
22 the substantial similarities between variable contracts and
other securities products, we believe it is incongruous for
24 agents and sales practices involved in variable annuities
not to be covered by state securities laws."

26 State securities regulators support the functional
28 regulation of agents because: 1) insurance companies are not
affected since state securities regulators are preempted
30 from requiring the registration of variable products; 2) the
vast majority of broker-dealer subsidiaries of insurance
32 companies are already registered to sell securities in most
states; and 3) the vast majority of agents are already
34 dually licensed to sell insurance and securities in most
states.

36 Section 102(28)(C) includes the exclusion in RUSA from the
38 1956 definition of security for "an interest in a contributory or
noncontributory pension or welfare plan subject to the Employee
40 Retirement Income Security Act of 1974."

42 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
44 has been widely followed by federal and state courts. The second
clause in Section 102(28)(D) is based, in part, on the leading
46 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).

48 The courts have divided over the interpretation of the
50 "common enterprise" element of an investment contract. The courts

2 generally recognize that "horizontal" commonality (for example,
3 the pooling of an investment by two or more investors) is a
4 common enterprise. A small minority of the federal circuits will
5 also find a common enterprise in a "vertical" relationship when a
6 single investor is dependent upon the expertise of a single
7 commodities broker. Since two or more persons do not share in the
8 profitability of an undertaking, it is difficult to argue that
9 there is a common enterprise. Section 102(28)(D) follows a
10 significantly larger number of federal circuits and adopts a more
11 restrictive form of vertical commonality that occurs only when
12 there is profit sharing between two persons even if, for example,
13 one is a conventional investor and one is a promoter. See
14 generally 2 Louis Loss & Joel Seligman, Securities Regulation
15 989-997 (3d ed. Rev. 1999).

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

32 Section 102(28)(E) is consistent with state and federal
33 securities laws which have recognized interests in limited
34 liability companies and limited partnerships in some
35 circumstances as "securities," see 2 Louis Loss & Joel Seligman,
36 Securities Regulation 1028-1031 (3d ed. rev. 1999), when
37 consistent with the court decisions interpreting the investment
38 contract concept. This Act also refers to an investment in a
39 viatical settlement or a similar agreement to make unequivocally
40 clear that viatical settlement and similar agreements, which
41 otherwise satisfy the definition of an investment contract, are
42 securities. This is intended to reject the holding of one court
43 that a viatical contract could not be a security. See SEC v. Life
44 Partners Inc., 87 F.3d 536 (D.C. Cir. 1996), reh'g denied, 102
45 F.3d 587 (D.C. Cir. 1996). A number of states have done so by
46 statute.

48 Judicial construction of the term "investment contract" has
49 been the most frequently litigated issue concerning the term
50 "security." See Gabaldon, A Sense of Security: An Empirical

2 Study, 25 J. Corp. L. 307 (2000), explaining that there had been
3 792 cases decided to that date in which the definition of a
4 security played a prominent role. Id. at 308. Some 461 of the 792
5 cases (58 percent) concerned investment contracts. Id. at 322. A
6 number of states, by statute, rule, or case law have also adopted
7 the "risk capital" test to find a security when an investment is
8 subject to the risks of an enterprise with the expectation of
9 profit or other valuable benefit and the investor has no direct
10 control over the management of the enterprise. See, e.g., 2 Loss
& Seligman, supra, at 939-940 n.50.

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

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

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

34
36 **Maine Comments**

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

46 2. Section 16102(11)(J-K): For these selected paragraphs,
47 Maine has adopted a threshold of \$5,000,000 (similar to the
48 Revised Maine Securities Act) rather than the model Uniform
49 Securities Act threshold of \$10,000,000.
50

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

10
11 4. Section 16102(17)(D): Maine has modified the model
12 Uniform Securities Act by adding paragraph (D), "[t]he issuer of
13 a fractional or pooled interest in a viatical or life settlement
14 contract," within the definition of issuer, similar to the
15 predecessor act.

16
17 5. Section 16102(28): Maine has modified the model Uniform
18 Securities Act definition of security so as to place investments
19 in a viatical and life settlement contract within the main body
20 of the definition (as they appeared in the Revised Maine
21 Securities Act) and not as examples of investment contracts.
22 This modification is intended to ensure that the same standards
23 will be applied in Maine when determining whether such
24 investments fall within the definition. Further, Maine has added
25 into the body of the definition certain oil and gas interests
26 that were also included in the Revised Maine Securities Act as a
27 type of security.

28
29 6. Section 16102(28)(B): Maine has elected to exclude
30 variable annuities in the definition of a security, an option
31 included in the model Uniform Securities Act. In evaluating this
32 option, Maine determined that it would be appropriate to update
33 the Maine Insurance Code to include rule-making authority for the
34 Superintendent of Insurance to adopt rules regarding the
35 suitability of sales of variable annuities.

36
37 7. Section 16102(28)(D): The term "profits" should be
38 interpreted in light of the United States Supreme Court's
39 decision in SEC v. Edwards, 124 S. Ct. 892 (2004), which
40 clarified the meaning of the investment contract definition first
41 set forth in SEC v. Howey, 66 S. Ct. 1100 (1946). Referring to
42 Howey, the Court stated: "[W]e were speaking of the profits that
43 investors seek on their investment, not the profits of the scheme
44 in which they invest. We used 'profits' in the sense of income
45 or return, to include for example, dividends, other periodic
46 payments, or the increased value of the investment. There is no
47 reason to distinguish between promises of fixed returns and
48 promises of variable returns for purposes of the test, so
49 understood." Edwards, 124 S. Ct. at 897.

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

8 **§16103. References to federal statutes**

10 Securities Act of 1933, 15 United States Code, Section 77a
11 et seq., Securities Exchange Act of 1934, 15 United States Code,
12 Section 78a et seq., Public Utility Holding Company Act of 1935,
13 15 United States Code, Section 79 et seq., Investment Company Act
14 of 1940, 15 United States Code, Section 80a-1 et seq., Investment
15 Advisers Act of 1940, 15 United States Code, Section 80b-1 et
16 seq., Employee Retirement Income Security Act of 1974, 29 United
17 States Code, Section 1001 et seq., National Housing Act, 12
18 United States Code, Section 1701 et seq., Commodity Exchange Act,
19 7 United States Code, Section 1 et seq., Internal Revenue Code,
20 26 United States Code, Section 1 et seq., Securities Investor
21 Protection Act of 1970, 15 United States Code, Section 78aaa et
22 seq., Securities Litigation Uniform Standards Act of 1998, 112
23 Stat. 3227, Small Business Investment Act of 1958, 15 United
24 States Code, Section 661 et seq. and Electronic Signatures in
25 Global and National Commerce Act, 15 United States Code, Section
26 7001 et seq. mean those federal laws of those names, those
27 statutes and the rules and regulations adopted under those laws
28 and statutes, as amended.

30 **Official Comments**

31 **Prior Provisions:** 1956 Act Section 401(k); RUSA Section
32 101(15).

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

42 2. Section 12(d) of the Uniform Statute and Rule
43 Construction Act, adopted by NCCUSL in 1995, provides: "A statute
44 or rule that incorporates by reference a statute or rule of
45 another jurisdiction does not incorporate a later enactment or
46 adoption or amendment of the other statute or rule."
47 Nevertheless, it is not uncommon for States to permit later

2 amendments to statutes and rules referenced in enacted
3 legislation to become automatically effective. In those states
4 the final bracketed language in this Section should be included
5 in the Act.

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

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

22

24

Maine Comments

26 1. Maine courts have held that it is unconstitutional for
27 the Legislature, when incorporating federal laws and standards
28 into state legislation, to incorporate any future Congressional
29 revisions or amendments to those federal laws and standards. By
30 citing the federal acts, and rules and regulations adopted under
31 them, "as amended," the intent is to include the version of the
32 act and those amendments existing at the time this Act is
33 enacted. It is also the intent of the administrator to notify
34 the Legislature when amendments are necessary to conform
35 provisions of this Act to revised or amended provisions of
36 relevant federal laws.

38

§16104. References to federal agencies

40

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

42

44

Official Comment

46

No Prior Provision.

48

§16105. Electronic records and signatures

50

2 This chapter modifies, limits and supersedes the federal
3 Electronic Signatures in Global and National Commerce Act, but
4 does not modify, limit or supersede Section 101(c) of that Act,
5 15 United States Code, Section 7001(c) or authorize electronic
6 delivery of any of the notices described in Section 103(b) of
7 that Act, 15 United States Code, Section 7003(b). This chapter
8 authorizes the filing of records and signatures, when specified
9 by provisions of this chapter or by a rule adopted or order
10 issued under this chapter, in a manner consistent with Section
11 104(a) of that Act, 15 United States Code, Section 7004(a).
12 Rules adopted under this section are routine technical rules as
13 defined in Title 5, chapter 375, subchapter 2-A.

14

Official Comment

16

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

20

SUBCHAPTER 2

22

EXEMPTIONS FROM REGISTRATION OF SECURITIES

24

Official Comments

26

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

36

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

40

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

42

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

46

44 Article 2 is not available to any security, transaction, or
45 offer that, although in technical compliance with a specific
46 section in Article 2, is part of an unlawful plan or scheme to
47 evade the registration provisions of Article 3. In such cases
48 50

2 registration is required. Cf. Prelim. Note 6 to Regulation D
3 adopted under the Securities Act of 1933.

4 **§16201. Exempt securities**

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

8
9 **1. United States Government, state and municipal**
10 **securities.** A security, including a revenue obligation or a
11 separate security as defined in 17 Code of Federal Regulations,
12 230.131 adopted under the federal Securities Act of 1933, issued,
13 insured or guaranteed by the United States; by a state; by a
14 political subdivision of a state; by a public authority, agency
15 or instrumentality of one or more states; by a political
16 subdivision of one or more states; or by a person controlled or
17 supervised by and acting as an instrumentality of the United
18 States under authority granted by the Congress; or a certificate
19 of deposit for any of the foregoing;

20
21 **2. Foreign government securities.** A security issued,
22 insured or guaranteed by a foreign government with which the
23 United States maintains diplomatic relations, or any of its
24 political subdivisions, if the security is recognized as a valid
25 obligation by the issuer, insurer or guarantor;

26
27 **3. Depository institution and international banking**
28 **institution securities.** A security issued by and representing or
29 that will represent an interest in or a direct obligation of or
30 be guaranteed by:

31 **A. An international banking institution;**

32
33 **B. A banking institution organized under the laws of the**
34 **United States; a member bank of the Federal Reserve System;**
35 **or a depository institution, a substantial portion of the**
36 **business of which consists or will consist of receiving**
37 **deposits or share accounts that are insured to the maximum**
38 **amount authorized by statute by the Federal Deposit**
39 **Insurance Corporation, the National Credit Union Share**
40 **Insurance Fund or a successor authorized by federal law or**
41 **exercising fiduciary powers that are similar to those**
42 **permitted for national banks under the authority of the**
43 **Comptroller of Currency pursuant to Section 1 of United**
44 **States Public Law 87-722, 12 United States Code, Section 92a**
45 **or a holding company of such a depository institution; or**

46
47 **C. Any other depository institution, unless by rule or**
48 **order the administrator proceeds under section 16204;**

50

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

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

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

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

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

22 6. Federal covered securities. A federal covered security
24 specified in Section 18(b)(1) of the federal Securities Act of
26 1933, 15 United States Code, Section 77r(b)(1) or by rule adopted
28 under that provision or a security listed or approved for listing
30 on another securities market specified by rule under this
32 chapter; a put or a call option contract, a warrant or a
34 subscription right on or with respect to such a federal covered
36 security; or an option or similar derivative security on a
38 security or an index of securities or foreign currencies issued
40 by a clearing agency registered under the federal Securities
42 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);

44 7. Nonprofit organization securities. A security issued by
46 a person organized and operated exclusively for religious,
48 educational, benevolent, fraternal, charitable, social, athletic
 or reformatory purposes, or as a chamber of commerce, and not for
50 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

2 investment company under Section 3(c)(10)(B) of the federal
4 Investment Company Act of 1940, 15 United States Code, Section
6 80a-3(c)(10)(B); except that with respect to the offer or sale of
8 a note, bond, debenture or other evidence of indebtedness issued
10 by such a person a rule may be adopted under this chapter
12 limiting the availability of this exemption by classifying
14 securities, persons and transactions and imposing different
16 requirements for different classes;

18 **8. Cooperatives.** A member's or owner's interest in, or a
20 retention certificate or like security given in lieu of a cash
22 patronage dividend issued by, a cooperative organized and
24 operated as a nonprofit membership cooperative under the
26 cooperative laws of a state, but not a member's or owner's
28 interest, retention certificate or like security sold to persons
30 other than bona fide members of the cooperative; and

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

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

Official Comments

48 **Prior Provisions:** 1956 Act Section 402(a); RUSA Section
50 401(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],

2 the issuer first files a notice in a record specifying the terms
of the proposed offer or sale and a copy of the offering
4 statement and the administrator does not disallow the exemption
within the time period established by the rule.

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

16 3. Section 201(3): Depository institution and international
banking institution securities: Prior Provision: RUSA 401(b)(3).
18 Section 402(a)(3) of the 1956 Act exempts specified bank and
similar depository institutions; Section 402(a)(4) exempts
20 specified savings and loan and similar thrift institution
securities; and Section 402(a)(6) exempts specified credit union
22 securities. RUSA Section 401(b)(3) combines the three types of
depository institutions into a common definition (see RUSA
24 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))
26 which is adopted in this subsection.

28 Banks specified in Section 3(a)(2) of the Securities Act of
30 1933 issue federal covered securities under Section 18(b)(4)(C)
of the Securities Act of 1933. Section 201(3)(C) applies to
32 securities issued by depository institutions without depository
insurance. Under Section 204, the administrator will have the
34 ability to revoke or limit this exemption.

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

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

46 Unless brackets are removed from the words "or variable" in
48 Section 102(28)(B), a variable annuity or other variable
insurance product would be considered a security under this Act
50 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

2 The Chicago Board Options Exchange on condition that the relevant
listing standards continue to be substantially similar to those
4 of the New York, American, or Nasdaq stock markets. See
Reporter's Note to Section 102(7). A federal covered security
6 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.

8
10 The exemption in Section 201(6) addresses specified options,
warrants, and rights that are not federal covered securities
12 under Section 18(b)(1) of the Securities Act of 1933, but
generally would have been exempted under RUSA. The 1956 Act,
14 which was narrower, was drafted before the computerized Nasdaq
stock market began trading the National Market List and the
development of standardized options markets.

16
18 The final clause of Section 201(6) makes clear that any
offer or sale of the underlying security that occurs as a result
20 of the offer or sale of an option or other derivative security
exempted under this provision or as the result of the exercise of
22 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
24 issued. The sale of the underlying security when an option is
exercised would be exempt even if the underlying security is not
26 at that time subject to any exemption under the Act. This is
consistent with existing precedent under federal law suggesting
28 that the legality of the sale of an underlying security when an
option is exercised should be determined by the status of the
30 security at the time the option was written rather than at the
time of exercise. See, e.g., *H. Kook & Co., Inc. v. Scheinman,*
32 *Hochstin & Trotta, Inc.*, 414 F.2d 93 (2d Cir. 1969). Any
transaction in an underlying security that results from the
34 offer, sale, or exercise of any derivative security issued by a
registered clearing agency and traded on a national securities
36 exchange or association is exempt if the derivative security when
written was exempt under Section 201(6).

38
40 The Securities and Exchange Commission has adopted Rule 9b-1
under Section 9(b).

42 7. Section 201(7): Nonprofit organization securities: Prior
Provision: Section 3(a)(4) of the Securities Act of 1933. Section
44 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA exempt
specified nonprofit securities. Both are modeled on Section
46 3(a)(4) of the Securities Act, which was subsequently amended.

48 Securities issued under Section 3(a)(4) of the Securities
Act of 1933 are not treated as federal covered securities in
50 Section 18(b)(4)(C), although a separate Section 3(a)(13)

2 exemption which addresses certain church plan securities are
3 federal covered securities under Section 18(b)(4)(C).

4 RUSA included an optional notice and review requirement for
5 nonprofit securities in Section 401(b)(10) "if at least ten days
6 before a sale of the security the person has filed with the
7 administrator a notice setting forth the material terms of the
8 proposed sale and copies of any sales and advertising literature
9 to be used and the administrator by order does not disallow the
10 exemption within the next five full business days."

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

16 Under Section 6 of the Philanthropy Protection Act, Congress
17 preempted application of the registration provisions of state
18 securities laws to issuance of securities covered by Section
19 3(c)(10) of the Investment Company Act of 1940 unless states
20 acted within three years of enactment (December 1998) to pass
21 special state legislation cancelling federal preemption. Ten
22 states enacted such legislation. Those states may preserve this
23 treatment of Section 3(c)(10) securities by deleting from Section
24 201(7) the phrase "or a security of a company that is excluded
25 from the definition of an investment company under Section
26 3(c)(10)(B) of the Investment Company Act of 1940."

28 Section 201(7) provides statutory authority for the states
29 to adopt rules with respect to notes, bonds, debentures and other
30 evidences of indebtedness issued by nonprofit organizations. Each
31 state may adopt different rules tailored for various types of
32 nonprofit debt offerings, (e.g., local church bond offerings,
33 national church bond offerings, church extension funds,
34 charitable gift annuities). For states that do not wish to
35 provide an automatic exemption from registration for a particular
36 type of nonprofit debt instrument or offering, Section 201(7)
37 creates three categories of regulatory review that may be
38 required by rule: (a) exemption by notice filing, (b) exemption
39 by state authorization, and (c) registration by qualification.
40 These categories are consistent with the manner in which many
41 states currently review different types of nonprofit debt
42 securities. See Horner & Makens, Securities Regulation of
43 Religious and Other Nonprofit Organizations, 27 Stetson L. Rev.
44 473 (1997).

46 8. Section 201(8): Cooperatives: Prior Provision: RUSA
47 Section 401(b)(13). Section 201(8) is derived from RUSA Section
48 401(b)(13) which was included in that act after a number of
49 states had adopted exemptions for securities issued by
50

2 cooperatives. Section 201(8) is not intended to be available if
3 securities are offered or sold to the public generally.

4 The 1956 Act Section 402(a)(12) had instead provided:
5 "insert any desired exemption for cooperatives." The Reporter for
6 the 1956 Act had found such sharp variation among the 18 states
7 that then had adopted a cooperative exemption that "no common
8 pattern can be found." Louis Loss, Commentary on the Uniform
9 Securities Act 118 (1976).

10
11 9. Section 201(9): Equipment trust certificates: Prior
12 Provision: RUSA Section 401(b)(6). The Securities Act of 1933
13 Section 3(a)(6) includes a narrower exemption for railroad
14 equipment trusts. Section 201(9) follows RUSA. The Official
15 Comment to RUSA Section 401(b)(6) explained:

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

24 25 26 **Maine Comments**

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

29
30 2. Section 16201(7): As noted in Official Comment 7, this
31 subsection is modeled on a similar federal provision that exempts
32 nonprofit securities. Like the federal provision, this
33 subsection refers to persons organized and operated "not for
34 pecuniary profit." Although the corresponding provision in the
35 Revised Maine Securities Act instead used the term "private"
36 profit, it is not intended that this difference will alter which
37 persons are covered under this subsection.

38 39 **§16202. Exempt transactions**

40
41 The following transactions are exempt from the requirements
42 of sections 16301 to 16306 and 16504:

43
44 1. Isolated nonissuer transaction. An isolated nonissuer
45 transaction, whether effected by or through a broker-dealer or
46 not;

47
48 2. Manual exemption. A nonissuer transaction by or through
49 a broker-dealer licensed under or exempt from licensing under
50

2 this chapter and a resale transaction by a sponsor of a unit
3 investment trust registered under the federal Investment Company
4 Act of 1940 in a security of a class that has been outstanding in
5 the hands of the public for at least 90 days, if, on the date of
6 the transaction:

7
8 A. The issuer of the security is engaged in business, the
9 issuer is not in the organizational stage or in bankruptcy
10 or receivership and the issuer is not a blank check, blind
11 pool or shell company that has no specific business plan or
12 purpose or that has indicated that its primary business plan
13 is to engage in a merger or combination of the business
14 with, or an acquisition of, an unidentified person;

15
16 B. The security is sold at a price reasonably related to
17 its current market price;

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

22
23 D. A nationally recognized securities manual or its
24 electronic equivalent designated by routine technical rule
25 as defined in Title 5, chapter 375, subchapter 2-A adopted
26 under this chapter or order issued under this chapter or a
27 publicly available record filed with the Securities and
28 Exchange Commission contains:

29
30 (1) A description of the business and operations of
31 the issuer;

32
33 (2) The names of the issuer's executive officers and
34 the names of the issuer's directors, if any;

35
36 (3) An audited balance sheet of the issuer as of a
37 date within 18 months before the date of the
38 transaction or, in the case of a reorganization or
39 merger when the parties to the reorganization or merger
40 each had an audited balance sheet, a pro forma balance
41 sheet for the combined organization; and

42
43 (4) An audited income statement for each of the
44 issuer's 2 immediately previous fiscal years or for the
45 period of existence of the issuer, whichever is
46 shorter, or, in the case of a reorganization or merger
47 when each party to the reorganization or merger had
48 audited income statements, a pro forma income
49 statement; and

50

E. Any one of the following requirements is met:

2
4
6
8
(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;

10
12
(2) The issuer of the security is a unit investment trust registered under the federal Investment Company Act of 1940;

14
16
(3) The issuer of the security, including its predecessors, has been engaged in continuous business for at least 3 years; or

18
20
22
24
(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;

26
28
30
32
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;

34
36
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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);

44
46
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:

48
50
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

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

4 (1) A default has not occurred during the current
6 fiscal year or within the 3 previous fiscal years or
8 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

10 (2) The issuer is engaged in business, is not in the
12 organizational stage or in bankruptcy or receivership
14 and is not and has not been within the previous 12
16 months a blank check, blind pool or shell company that
18 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;

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

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

28 8. Nonissuer transactions with federal covered investment
30 advisers. A nonissuer transaction by a federal covered
32 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;

34 9. Specified exchange transactions. A transaction in a
36 security, whether or not the security or transaction is otherwise
38 exempt, in exchange for one or more bona fide outstanding
40 securities, claims or property interests or partly in such
42 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;

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

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

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

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

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

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

20 12. Personal representative, guardian transactions. A
21 transaction by a personal representative, as defined in Title
22 18-A, section 1-201, subsection 30, executor, administrator of an
23 estate, sheriff, marshal, receiver, trustee in bankruptcy,
24 guardian or conservator acting in their official capacities;

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

27 A. An institutional investor;

28 B. A federal covered investment adviser; or

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

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

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

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

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

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

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

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

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

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

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

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

37 F. The issuer provides a copy of the notification of
38 exemption to each offeree of securities sold in reliance on
39 this exemption, which must contain such legends as the
40 administrator prescribes, notifying the offeree that the
41 securities have not been registered with the administrator,
42 that they may be considered restricted securities and that

2 the issuer is under an obligation to make a reasonable
3 finding that the securities are a suitable investment for
4 the offeree;

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

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

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

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

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

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

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

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

43 19. Control transactions. A transaction involving the
44 distribution of the securities of an issuer to the security
45 holders of another person in connection with a merger,
46 consolidation, exchange of securities, sale of assets or other
47 transaction;

2 reorganization to which the issuer, or its parent or subsidiary,
3 and the other person, or its parent or subsidiary, are parties;

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

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

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

22 A. Directors; general partners; trustees, if the issuer is
23 a business trust; officers; and consultants and advisors, as
24 permitted by 17 Code of Federal Regulations, 230.701(c)(1)
25 (2003);

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

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

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

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

39 A. A stock dividend or equivalent equity distribution,
40 whether the corporation or other business organization
41 distributing the dividend or equivalent equity distribution
42 is the issuer or not, if nothing of value is given by
43

2 stockholders or other equity holders for the dividend or
4 equivalent equity distribution other than the surrender of a
6 right to a cash or property dividend if each stockholder or
8 other equity holder may elect to take the dividend or
10 equivalent equity distribution in cash, property or stock;

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

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

26 **24. Nonissuer transactions in specified foreign issuers**
28 **securities.** A nonissuer transaction in an outstanding security by
30 or through a broker-dealer licensed under or exempt from
32 licensing under this chapter, if the issuer is a reporting issuer
34 in a foreign jurisdiction designated by this paragraph or by rule
36 adopted or order issued under this chapter; the issuer has been
38 subject to continuous reporting requirements in the foreign
40 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;

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

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

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

5 C. Prior to any offer in this State, a notice specifying
6 the terms of the offer is filed with the administrator
7 together with a consent to service of process complying with
8 section 16611, signed by the issuer, and a filing fee of
9 \$300 for each type or class of security being offered in
10 this State and the administrator does not by order disallow
11 the exemption within the next 5 full business days; or

12 **26. Nonpublic offerings under 4(2).** A security offered in
13 a nonpublic offering under Section 4(2) of the federal Securities
14 Act of 1933, 15 United States Code, Section 77d(2) if, no later
15 than 15 days after the first sale in this State, a notice on
16 "Form D," including the Appendix, as promulgated by the
17 Securities and Exchange Commission, is filed with the
18 administrator together with a consent to service of process
19 complying with section 16611, signed by the issuer, and a
20 nonrefundable filing fee of \$300 for each type or class of
21 security sold. An additional nonrefundable late filing fee of
22 \$500 must be paid for a filing made between 16 and 30 days after
23 the first sale in this State.

24
25
26
27 **Official Comments**

28 **Prior Provisions:** 1956 Act Section 402(b); RUSA Section 402.
29
30 1. Sections 202(1) through (8) are available only for
31 nonissuer transactions. An issuer selling securities in an
32 initial public offering or other offering may not rely on
33 Sections 202(1) through (8). A nonissuer, however, can rely on
34 any issuer transaction exemption such as Section 202(13), when
35 the exemption would be applicable to a nonissuer. The term
36 "nonissuer transaction or nonissuer distribution" is defined in
37 Section 102(18); the term "issuer" is defined in Section 102(17).

38
39 2. Section 202(1): Isolated nonissuer transactions: Prior
40 Provisions: 1956 Act Section 402(b)(1); RUSA Section 402(1). The
41 term "isolated transaction" is not defined in this Act, but left
42 to the states to develop. Historically under state law there has
43 been somewhat varied case law development of the term "isolated
44 transactions." See, e.g., Blinder, Robinson & Co., Inc. v.
45 Goettsch, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer
46 transaction exemption is not unconstitutionally vague); Allen v.
47 Schauf, 449 P.2d 1010 (Kan. 1969) (regulation defined isolated
48 transactions to not exceed four persons solicited in a 12 month
49 period); Nelson v. State, 355 P.2d 413, 420 (Okla. Ct. Crim. App.
50 1960) ("[a]n isolated sale means one standing alone, disconnected

1 from any other"); see generally 1 Louis Loss & Joel Seligman,
2 Securities Regulation 125-130 (3d ed. rev. 1998).

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

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

16 3. Section 202(2): Nonissuer transactions in specified
17 outstanding securities: Prior Provisions: 1956 Act Section
18 402(b)(2); RUSA Sections 402(3) and (4). This Section represents
19 a modernization of the securities manual exemption which was
20 included in both the 1956 Act and RUSA. NASAA recommended an
21 amendment to the 1956 Act Section 402(b) after discussion with
22 the Securities Industry Association and others in the securities
23 industry. This Section generally follows the NASAA amendment.

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

36 4. Section 202(3): Nonissuer transactions in specified
37 foreign transactions: No Prior Provision. The NASAA
38 recommendation that was the basis of Section 202(2) also included
39 specified foreign nonissuer transactions subject to a manual
40 exemption when there was disclosure of the issuer's officers and
41 directors in the issuer's country of domicile. This subsection
42 uses margin securities as an alternative approach to identify
43 sufficiently seasoned foreign securities. Margin securities are
44 required to be in compliance with Regulation T which was adopted
45 by the Board of Governors of the Federal Reserve System.

48 5. Section 202(4): Nonissuer transactions in securities
49 subject to Securities Exchange Act reporting: Prior Provision:
50 RUSA Section 402(2). RUSA added this exemption to authorize
nonissuer secondary trading in the securities of issuers that

2 were subject to the periodic reporting requirements of the
3 Securities Exchange Act of 1934. To bar immediate secondary
4 trading in nonregistered initial public offerings, there was a
5 further requirement that these securities be subject to the
6 reporting requirements of Sections 13 or 15(d) of the Securities
7 Exchange Act of 1934 for not less than 90 days. Section 202(4)
8 only covers the guarantor because if the issuer of the security
9 is a reporting company under Sections 13 or 15(d) of the
10 Securities Exchange Act of 1934, the transaction is preempted by
11 Section 18(b)(4)(A) of the Securities Act of 1933.

12 Section 18(b)(4)(A) of the National Securities Markets
13 Improvement Act of 1996 defines nonissuer transactions under
14 Section 4(1) of the Securities Act of 1933 ("transactions by
15 persons other than an issuer, underwriter, or dealer") as
16 "federal covered securities," see Section 102(7), if the issuer
17 files reports with the Securities and Exchange Commission under
18 Sections 13 or 15(d) of the Securities Exchange Act of 1934.
19 Under Section 18(a) of the Securities Act of 1933 no state
20 statute, rule, order, or other administrative action with respect
21 to registration of securities or reporting requirements may apply
22 to a federal covered security. To harmonize Section 202(4) with
23 Sections 18(a) and 18(b)(4)(A) of the Securities Act of 1933, the
24 90 day reporting period in RUSA Section 402(2) is not adopted in
25 this Act.

26
27
28 6. Section 202(5): Nonissuer transactions in specified
29 fixed income securities: Prior Provisions: 1956 Act Section
30 402(b)(2)(B); RUSA Section 402(4). The concept of a fixed income
31 security rated by a nationally recognized statistical rating
32 organization in one of its four highest rating categories
33 described in Section 202(5)(A) is well established in federal
34 securities law in Form S-3 adopted under the Securities Act of
35 1933 and the net capital Rule 15c3-1(c)(2)(vi)(F) adopted under
36 the Securities Exchange Act of 1934. See 2 Louis Loss & Joel
37 Seligman, Securities Regulation 649-653 (3d ed. rev. 1999).
38 Nationally recognized statistical rating organizations have been
39 identified by the Securities and Exchange Commission and include
40 such organizations as Moody's and Standard and Poor's. Rating
41 categories typically begin with AAA and under this Act would
42 include BBB as the fourth highest rating category.

43
44 Section 202(5)(B) follows the 1956 Act and RUSA, but also
45 addresses blank check and similar offerings, which became major
46 concerns at the state and federal levels during the past two
47 decades. Cf. Securities Act of 1933 Rule 419. See Official
48 Comment (3).

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

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

14
The 1956 Act Section 402(b)(3) had provided that the
16 administrator "may by rule require that the customer acknowledge
upon a specified form that the same was unsolicited, and that a
18 signed copy of each such form be preserved by the broker-dealer
for a specified period." This type of requirement is preempted by
20 Section 18(a) of the Securities Act of 1933 for federal covered
securities and is viewed as unnecessary for the limited class of
22 dealer nonagency transactions that will be exempted by Section
202(6).

24
8. Section 202(7): Nonissuer transactions by pledgees:
26 Prior Provisions: 1956 Act Section 402(b)(7); RUSA Section
402(9). This subsection is identical to the 1956 Act and
28 substantively identical to RUSA.

30
9. Section 202(8): Nonissuer transactions with federal
covered investment advisers: No Prior Provision. This exemption
32 was added because of a recognition that federal covered
investment advisers are sophisticated financial professionals
34 capable of determining the merits of a security and do not
require the protections provided by requiring registration in a
36 particular state.

38
10. Section 202(9): Specified exchange transactions: No
Prior Provision. Section 202(9) provides a state counterpart to
40 the exemption in Section 3(a)(10) of the Securities Act of 1933.

42
11. Section 202(10): Underwriter transactions: Prior
Provisions: 1956 Act Section 402(b)(4); RUSA Section 402(6). This
44 subsection is substantively identical to the 1956 Act and RUSA.

46
12. Section 202(11): Unit secured transactions: Prior
Provisions: 1956 Act Section 402(b)(5); RUSA Section 402(7). In
48 recent years the application of this exemption has been one of
concern to state securities administrators. The conditions that

2 conclude this exemption are new and are intended to address these
concerns.

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

8 14. Section 202(13): Transactions with specified investors:
10 Prior Provision: 1956 Act Section 402(b)(8). The 1956 Act
contains similar but less inclusive language in Section
12 402(b)(8). If the Securities and Exchange Commission adopts a
rule defining "qualified purchaser" as used in Section 18(b)(3)
14 of the Securities Act to specify certain purchasers of federal
covered securities, part or all of this exemption will be
16 redundant. As of September 2002, the Commission has proposed, but
not adopted, Rule 146(c).

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

24 15. Section 202(14): Limited offering transactions: Prior
Provisions: 1956 Act Section 402(b)(9); RUSA Section 402(11). The
26 reference in the prefatory language to "a single issue" signifies
that two or more issues can be "integrated" and potentially
28 destroy the exemption. There are two general tests for
integration under the federal securities laws. The states
30 similarly have followed generally these types of integration
principles with respect to securities transaction exemptions.
32 First, there is a six month "buffer" before and after an offer,
offer to sell, or sale of a transaction exempt under Section
34 202(14) during which no other issue can be distributed if
integration automatically is to be avoided. See Rule 147(b)(2)
36 and Rule 502(a) of the Securities Act of 1933. Second, if two
issues occur within six months, integration may occur depending
38 upon the following factors:

- 40 (i) are the offerings part of a single plan of financing;
42 (ii) do the offerings involve issuance of the same class of
securities;
44 (iii) are the offerings made at or about the same time;
(iv) is the same type of consideration to be received; and
46 (v) are the offerings made for the same general purpose.

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

2 Section 402(b)(9) of the 1956 Act and Section 402(11) of the 1985
Act provide alternative limited offering transaction exemptions.
4 The 1956 Act was limited to offers to no more than ten persons
(other than institutional investors specified in Section
6 402(b)(8)); all purchasers in the State had to purchase for
investment; and no remuneration was given for soliciting
8 prospective purchasers in the State. RUSA, in contrast, was
limited to no more than 25 purchasers (other than financial or
10 institutional investors); no general solicitation or advertising;
and no remuneration was paid to a person other than a
12 broker-dealer for soliciting a prospective purchaser.

14 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,
16 the 1956 Act Section 402(b)(10) and RUSA Section 402(12) used
similar concepts in separate Sections to apply to preorganization
18 limited offerings.

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

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

36
16. Section 202(15): Transactions with existing security
38 holders: Prior Provisions: 1956 Act Section 402(b)(11); RUSA
Section 402(14). Section 3(a)(9) of the Securities Act of 1933
40 exempts exchange offerings with existing security holders. Under
Section 18(b)(4)(C) transactions subject to Section 3(a)(9) are
42 federal covered securities. See Section 102(7). Notice
requirements in the earlier 1956 Act and RUSA accordingly would
44 be preempted by the Securities Act of 1933. See Section 18(a) of
the Securities Act of 1933. Otherwise this exemption is
46 substantively identical to the 1956 Act and RUSA.

48 17. Section 202(16): Offerings registered under this [Act]
and the Securities Act of 1933: Prior Provisions: 1956 Act
50 Section 402(b)(12); RUSA Section 402(15). This exemption

2 generally follows the 1956 Act and RUSA. Rule 165 of the
3 Securities Act of 1933, which was adopted in 1999, allows the
4 offeror of securities in a business combination to make written
5 communications that offer securities for sale before a
6 registration statement is filed as long as specified conditions
7 are satisfied.

8 RUSA Section 402(15)(ii) also required that a registration
9 statement be filed under this Act, but not yet be effective. By
10 eliminating the filing requirement this exemption will reach the
11 offer (but not the sale) of a security that is anticipated to be
12 a federal covered security by applying for listing on the New
13 York Stock Exchange or other exchange specified in Section
14 18(b)(1) of the Securities Act of 1933, but the listing and
15 federal covered security status has not yet become effective.

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

23
24 Oral offers may be made after a registration statement has
25 been filed, both before and after a registration statement is
26 effective.

27
28 This exemption does not operate unless the administrator
29 adopts a rule under 202(17)(B).

30
31 19. Section 202(18): Control transactions: Prior Provision:
32 RUSA Section 402(17). Until 1972 mergers and similar transactions
33 were not considered to involve sales and did not have to register
34 under the Securities Act of 1933. In 1972 the Securities and
35 Exchange Commission adopted Rule 145 defining many mergers and
36 similar transactions to be sales and abandoned its earlier "no
37 sale" doctrine. See 3 Louis Loss & Joel Seligman, Securities
38 Regulation 1262-1280 (3d ed. rev. 1999).

39
40 Because most merger and similar transactions require
41 shareholder approval and shareholders often have appraisal rights
42 if they choose to dissent, the potential for abuse is less than
43 in an offering of securities for cash. When appropriate the
44 administrator can deny, condition, limit or revoke this exemption
45 under Section 204. Section 202(18) does not follow the
46 requirement in RUSA Section 402(17) that written notice of the
47 transactions and a copy of the solicitation materials be given to
48 the administrator 10 days before the consummation of the
49 transaction and, that the administrator is empowered to disallow
50 the exemption within the next 10 days.

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

4
6 21. Section 202(20): Out-of-state offers or sales: Source
of law: Colo. Section 11-51-102(7). Compare A.S. Goldmen & Co.,
8 Inc. v. New Jersey Bur. of Sec., 163 F.3d 780 (3d Cir. 1999),
10 which held that under the United States Constitution's Commerce
Clause a State could authorize a securities administrator to
12 prevent a broker-dealer from selling securities from a State to
purchasers in other States where purchase of the securities was
14 authorized. The concluding phrase "and is not part of an unlawful
plan or scheme to evade this [Act]" is intended to preclude
16 reliance on this exemption by boiler rooms and others engaged in
illegal activities.

18 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.

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

26
28 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
30 Retirement Income Security Act of 1974 (ERISA) was not a security
within the meaning of the Securities Act of 1933 or the
32 Securities Exchange Act of 1934. The Securities and Exchange
Commission staff subsequently took the position that the
34 interests of employees in involuntary, contributory plans are not
securities. Sec. Act Rel. 6188, 19 SEC Dock. 465, 473 (1980).
36 Both contributory and noncontributory pension or welfare plans
subject to ERISA are excluded from the definition of security in
38 Section 102(28).

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

42
44 With respect to employee benefit plans that are securities,
Section 202(21) provides an exemption, but follows RUSA in not
46 limiting the exemption to investment contracts and not requiring
30 days notice to the administrator.

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

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

6
8 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
10 securities.

12 The administrator, when appropriate, can deny, condition,
limit, or revoke an exemption under Section 202(21). See Section
14 204.

16 23. Section 202(22): Specified dividends and tender offers
and judicially recognized reorganizations: Prior Provision: 1956
18 Act Section 401(j)(6)(B) and (D); RUSA Section 101(13)(vi).
Section 202(22)(A) and (B) generally follow exclusions from the
20 definition of sale in the 1956 Act and RUSA. Section 202(22)(C)
is new and corresponds to Rule 162, recently adopted under the
22 Securities Act of 1933, which allows the offeror in a stock
exchange offer to solicit tenders of securities before a
24 registration statement is effective as long as no securities are
purchased until the registration statement is effective and the
26 tender offer has expired.

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

42 44 **Maine Comments**

46 1. Section 16202(11)(D): Maine has added this paragraph
based on a similar provision in Pennsylvania law. In determining
48 a property's fair market value at the time of the transaction, it
is intended that issuers will rely on reasonable evidence of fair
50 market value, such as generally accepted appraisal standards set

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

2 than one security, transaction, or offer can be covered by a
Section 204 order.

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

10
12 **Maine Comments**

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

20 **SUBCHAPTER 3**

22 **REGISTRATION OF SECURITIES AND NOTICE**
24 **FILING OF FEDERAL COVERED SECURITIES**

26 **§16301. Securities registration requirement**

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

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

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

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

40 **Official Comments**

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

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

48 2. Except for federal covered securities, exempt
50 securities, or securities offered or sold in exempt transactions,

2 no sale of a security may be made in this State before the
3 security is registered. "Sale" is defined in Section 102(26); "in
4 this State" is addressed in Section 610; and securities
5 registration is addressed in Sections 303 through 306.

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

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

16 **§16302. Notice filing**

18 **1. Notice filings for federal covered securities under**
19 **Section 18(b)(2) of the federal Securities Act of 1933. A**
20 **federal covered security, as defined in Section 18(b)(2) of the**
21 **federal Securities Act of 1933, 15 United States Code, Section**
22 **77r(b)(2), that is not otherwise exempt under sections 16201 to**
23 **16203 may not be offered or sold in this State unless before the**
24 **initial offer in this State the following are filed with the**
25 **administrator:**

26 **A. The uniform investment company notice filing form;**

27 **B. A consent to service of process complying with section**
28 **16611 signed by the issuer; and**

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

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

43 **3. Notice filings for federal covered securities under**
44 **Section 18(b)(4)(D). A security that is a federal covered**
45 **security that is a federal covered security that is a federal covered**
46 **security that is a federal covered security that is a federal covered**
47 **security that is a federal covered security that is a federal covered**
48 **security that is a federal covered security that is a federal covered**
49 **security that is a federal covered security that is a federal covered**
50 **security that is a federal covered security that is a federal covered**

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

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

10 B. A consent to service of process complying with Section
11 16611, signed by the issuer; and

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

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

17 **4. Stop orders.** Except with respect to a federal covered
18 security under Section 18(b)(1) of the federal Securities Act of
19 1933, 15 United States Code, Section 77r(b)(1), if the
20 administrator finds that there is a failure to comply with a
21 notice or fee requirement of this section or any rule adopted
22 under this section, the administrator may issue a stop order
23 suspending the offer and sale of a federal covered security in
24 this State. If the deficiency is corrected, the stop order is
25 void as of the time of its issuance and no penalty may be imposed
26 by the administrator.

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

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

42 **Official Comments**

43 **No Prior Provision.**

44 1. The little used "registration by notification" in the
45 1956 Act Section 302 or "registration by filing" in RUSA Section
46 302 are omitted from this Act because of the notice filing
47 approach required by Section 18(b)(2) of the Securities Act of
48

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

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

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

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

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

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

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

31 B. The registration statement has been on file for at least
32 20 days or a shorter period provided by order issued under
33 this chapter.

34 4. Notice of federal registration statement effectiveness.
35 The registrant shall promptly notify the administrator in a
36 record of the date when the federal registration statement
37 becomes effective and the content of any price amendment and
38 shall promptly file a record containing the price amendment. If
39 the notice is not timely received, the administrator may issue a
40 stop order, without prior notice or hearing, retroactively
41 denying effectiveness to the registration statement or suspending
42 its effectiveness until compliance with this section. The
43 administrator shall promptly notify the registrant of an order by
44

2 telegram, telephone or electronic means and promptly confirm this
4 notice by a record. If the registrant subsequently complies with
6 the notice requirements of this section within 15 days of the
8 issuance of the stop order, the stop order is void as of the date
10 of its issuance.

12 5. Effectiveness of registration statement. If the federal
14 registration statement becomes effective before each of the
16 conditions in this section is satisfied or is waived by the
18 administrator, the registration statement is automatically
20 effective under this chapter when all the conditions are
22 satisfied or waived. If the registrant notifies the administrator
24 of the date when the federal registration statement is expected
26 to become effective, the administrator shall promptly notify the
28 registrant by telegram, telephone or electronic means and
30 promptly confirm this notice by a record, indicating whether all
32 the conditions are satisfied or waived and whether the
34 administrator intends the institution of a proceeding under
36 section 16306. The notice by the administrator does not preclude
38 the institution of such a proceeding.

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

Official Comments

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

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

40 2. The phrase "in connection with the same offering" in
42 Section 303 does not require that the federal and state
44 registration statements be filed simultaneously or become
46 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."

48 3. Section 303 is similar to the 1956 Act except that these
50 provisions have been modernized to include electronic filing and
electronic notification. Cf. Sections 102(8), 102(25), 105. It is

2 anticipated that this will facilitate simultaneous filing with
the Securities and Exchange Commission and the States which is
4 consistent with the uniformity intended by this Act. Simultaneous
or sequential filing could be administered through a designee
6 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.

8
4. Section 303(b) is not intended to limit the
10 administrator to requiring only the information and records filed
with the Securities and Exchange Commission.

12
5. Sections 303(c) through (e) describe the conditions to
14 be satisfied to achieve effectiveness of a coordinated filing.
"Price amendment" is defined in Section 102(23). The
16 administrator retains the right to test the registration
statement by the substantive standards of Section 306(a) and may
18 issue a stop or denial order if the administrator believes any of
those provisions are applicable.

22 **Maine Comments**

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

26 **§16304. Securities registration by qualification**

28
30 **1. Registration permitted.** A security may be registered by
qualification under this section.

32 **2. Required records.** A registration statement under this
34 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:

36
38 **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;
40 the general character and location of its business; a
description of its physical properties and equipment; and a
42 statement of the general competitive conditions in the
industry or business in which it is or will be engaged;**

44
46 **B. With respect to each director and officer of the issuer,
and other person having a similar status or performing
48 similar functions, the person's name, address and principal
occupation for the previous 5 years; the amount of
50 securities of the issuer held by the person as of the 30th
day before the filing of the registration statement; the**

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

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

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

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

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

33 G. The capitalization and long-term debt, on both a current
34 and pro forma basis, of the issuer and any significant
35 subsidiary, including a description of each security
36 outstanding or being registered or otherwise offered, and a
37 statement of the amount and kind of consideration, whether
38 in the form of cash, physical assets, services, patents,
39 goodwill or anything else of value, for which the issuer or
40 any subsidiary has issued its securities within the previous
41 2 years or is obligated to issue its securities;

42 H. The kind and amount of securities to be offered; the
43 proposed offering price or the method by which it is to be
44 computed; any variation at which a proportion of the
45 offering is to be made to a person or class of persons other
46

2 than the underwriters, with a specification of the person or
4 class; the basis on which the offering is to be made if
6 otherwise than for cash; the estimated aggregate
8 underwriting and selling discounts or commissions and
10 finder's fees, including separately cash, securities,
12 contracts or anything else of value to accrue to the
14 underwriters or finders in connection with the offering or,
16 if the selling discounts or commissions are variable, the
18 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;

20 I. The estimated monetary proceeds to be received by the
22 issuer from the offering; the purposes for which the
24 proceeds are to be used by the issuer; the estimated amount
26 to be used for each purpose; the order or priority in which
28 the proceeds will be used for the purposes stated; the
30 amounts of any funds to be raised from other sources to
32 achieve the purposes stated; the sources of the funds; and,
34 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;

36 J. A description of any stock options or other security
38 options outstanding, or to be created in connection with the
40 offering, and the amount of those options held or to be held
42 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;

44 K. The dates of, parties to and general effect concisely
46 stated of each managerial or other material contract made or
48 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;

- 2 L. A description of any pending litigation, action or
4 proceeding to which the issuer is a party and that
6 materially affects its business or assets and any
8 litigation, action or proceeding known to be contemplated by
10 governmental authorities;
- 12 M. A copy of any prospectus, pamphlet, circular, form
14 letter, advertisement or other sales literature intended as
16 of the effective date to be used in connection with the
18 offering and any solicitation of interest used in compliance
20 with section 16202, subsection 18, paragraph B;
- 22 N. A specimen or copy of the security being registered,
24 unless the security is uncertificated; a copy of the
26 issuer's articles of incorporation and bylaws or their
28 substantial equivalents, in effect; and a copy of any
30 indenture or other instrument covering the security to be
32 registered;
- 34 O. A signed or conformed copy of an opinion of counsel
36 concerning the legality of the security being registered,
38 with an English translation if it is in a language other
40 than English, that states whether the security when sold
42 will be validly issued, fully paid and nonassessable and, if
44 a debt security, a binding obligation of the issuer;
- 46 P. A signed or conformed copy of a consent of any
48 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.

2 A registration statement under this section becomes effective 30
4 days, or any shorter period provided by rule adopted or order
6 issued under this chapter, after the date the registration
statement or the last amendment other than a price amendment is
filed if:

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

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

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

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

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

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

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

44 C. Payment pursuant to such a sale; or

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

48 **6. Simplified statement.** For purposes of simplifying the
registration statement for smaller offerings and promoting
50 uniformity with other states, the administrator may adopt, by

2 rule, a form to be used as the registration statement for
3 securities being registered under this section and sold in
4 offerings in which the aggregate offering price does not exceed
5 the maximum amount specified in the rule. The form need not
6 require all the information included in this section and may
7 require information not included in this section.

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

12 Official Comments

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

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

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

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

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

34 5. Under Sections 304(b)(18) and 307 the administrator may
35 require additional information or may waive in whole or in part
36 or condition any of the requirements of Section 304(b). Section
37 304(b)(18), for example, would authorize the administrator to
38 require that a report by an accountant, engineer, appraiser or
39 other professional person be filed. Section 304(b)(18) would also
40 authorize that securities of designated classes under a trust
41 indenture contain additional specified information.

44 Maine Comments

46 1. Section 16304(6) reinstates the authority for the
47 administrator to adopt a simplified statement for securities
48 registration, as was allowed under the Revised Maine Securities
49 Act.
50

2 **§16305. Securities registration filings**

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

8 **2. Filing fee.** A person filing a registration statement
shall pay a nonrefundable filing fee of \$1,000 for each type or
10 class of security offered, except that for a registration
statement filed under section 16304 for an offering for which the
12 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
14 class of security offered.

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

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

20

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

24

26 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
28 court; and

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

32

34 **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
36 reference in the registration statement to the extent that the
record is currently accurate.

38

40 **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
42 filing the registration statement or to the person on whose
behalf the distribution is to be made or unless it can be
44 furnished by those persons without unreasonable effort or expense.

46 **6. Escrow and impoundment.** A rule adopted or order issued
under this chapter may require as a condition of registration
48 that a security issued within the previous 5 years or to be
issued to a promoter for a consideration substantially less than
50 the public offering price or to a person for a consideration

2 other than cash be deposited in escrow; and that the proceeds
4 from the sale of the registered security in this State be
6 impounded until the issuer receives a specified amount from the
8 sale of the security either in this State or elsewhere. The
10 conditions of any escrow or impoundment required under this
12 subsection may be established by rule adopted or order issued
14 under this chapter, but the administrator may not reject a
16 depository institution solely because of its location in another
18 state.

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

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

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

44 10. Posteffective amendments. A registration statement may
46 be amended after its effective date. The posteffective amendment
48 becomes effective when the administrator so orders. If a
50 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

2 of the additional securities being registered if, within one year
3 after the date of the sale, the amendment is filed and the
4 additional registration fee is paid.

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

10 Official Comments

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

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

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

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

24 4. This Act is intended, to the extent practicable, to be
25 revenue neutral in its impact on existing state law, see Comment
26 3 to Section 608. Accordingly, Section 305(b) does not specify
27 what fees states should provide. If a State prefers to have the
28 fees in this section established by rule, replace the phrase "a
29 fee of \$[___]" in subsections (b) and (j) with the phrase "a fee
30 established by the administrator by rule pursuant to the [state
31 administrative procedure act]" and replace the phrase "\$[___] of
32 the fee" in subsection (b) with the phrase "an amount of the fee
33 established by the administrator by rule". See Comment 3 to
34 Section 410.

35 5. Section 305(c), which generally follows the 1956 Act and
36 RUSA, does not require in Section 305(c)(3) disclosure of an
37 order permitting the withdrawal of a registration statement. The
38 administrator may, however, require disclosure of this
39 information in a registration by qualification under Section
40 304(b)(18).

41 6. Section 305(c), like every other provision concerned
42 with the content of the registration statement, must be read with
43 Section 306(a)(1) which judges the accuracy and completeness of
44 the registration statement as of its effective date unless an
45 order denying effectiveness had been entered before the effective
46 date.

2 date. A registration statement must be kept current with changing
developments until the effectiveness date, but a registration
4 statement is not required to be amended after the effective date
except to correct inaccuracies or deficiencies which existed as
6 of the effective date. An administrator, however, separately may
require under Section 305(i) or (j) periodic reports or
8 amendments to keep reasonably current the information contained
in the registration statement.

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

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

28 9. Section 305(f), follows the 1956 Act and RUSA, and
authorizes the administrator to require the impoundment of funds
30 until the issuer receives a specified amount from the sale of the
security in this State or elsewhere and to require the escrow of
32 promotional stock until specific conditions are met. This Section
is limited to a security issued within the past five years or to
34 be issued to a promoter for a consideration substantially
different from the public offering price or to a person for a
36 consideration other than cash. The typical distribution subject
to Section 305(f) will be a relatively new promotional or
38 speculative offering. Section 305(f) follows the 1956 Act and
RUSA and provides that the administrator may not reject a
40 depository solely because of its location in another state.
Unlike the statute in *Schwaemmle Const. Co. v. Michigan Dep't of*
42 *Commerce*, 360 N.W.2d 141 (Mich. 1984), Section 305(f) broadly
provides that the administrator "may determine the conditions of
44 any escrow or impoundment under this subsection." As in
Schwaemmle, this power will operate only until the impounded
46 funds or escrowed shares are released.

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

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

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

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

46 Section 305(h) also provides that, unless the administrator
48 determines otherwise, a registration statement cannot be
50 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.

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

62 **§16306. Denial, suspension and revocation**
64 **of securities registration**

66 **1. Stop orders.** The administrator may issue a stop order
68 denying effectiveness to, or suspending or revoking the
70 effectiveness of, a registration statement if the administrator
finds that the order is in the public interest and that:

72 A. The registration statement as of its effective date or
74 before the effective date in the case of an order denying

2 effectiveness, an amendment under section 16305, subsection
3 10 as of its effective date or a report under section 16305,
4 subsection 9 is incomplete in a material respect or contains
5 a statement that, in the light of the circumstances under
6 which it was made, was false or misleading with respect to a
7 material fact;

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

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

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

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

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

44 G. The offering:
45
46
47
48
49
50

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

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

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

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

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

28 **4. Summary process.** The administrator may summarily
revoke, deny, postpone or suspend the effectiveness of a
30 registration statement pending final determination of an
administrative proceeding. Upon the issuance of the order, the
32 administrator shall promptly notify each person specified in
subsection 5 that the order has been issued, the reasons for the
34 revocation, denial, postponement or suspension and that within 15
days after the receipt of a request in a record from the person
36 the matter will be scheduled for a hearing. If a hearing is not
requested and none is ordered by the administrator, within 30
38 days after the date of service of the order, the order becomes
final. If a hearing is requested or ordered, the administrator,
40 after notice of and opportunity for hearing for each person
subject to the order, may modify or vacate the order or extend
42 the order until final determination.

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

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

50 B. An opportunity for hearing; and

2 conducted but would be illegal if conducted in the State where
the registration statement is filed.

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

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

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

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

26 Sections 306(a)(7) and (b) take a different approach.
Subject to the National Securities Markets Improvement Act of
28 1996, merit standards are retained but hortatory paragraph 306(b)
encourages the administrator, to the extent practicable, to
30 adopt, by rule or order, standards that provide notice to issuers
of a state's merit standards. Notice will address one criticism
32 of merit regulation. See generally 1 Louis Loss & Joel Seligman,
Securities Regulation 111-124 (3d ed. rev. 1998). Statements of
34 Policy of the North American Securities Administrator Association
that have been adopted by a state would provide notice in
36 compliance with Section 306(b). Similarly other state rules or
orders could be adopted in the future to address new types of
38 securities as they occur.

40 An order under Section 306(b) can be adopted after a
securities registration statement has been filed. Under Section
42 306(b) an administrator, by rule or order, for example, could
adopt a standard that would provide the basis for a stop order
44 denying effectiveness to a development stage company that has no
specific business purpose or plan or has indicated that its
46 primary business plan is to engage in a merger or acquisition
with an unidentified company, entity, or person. "Blank check
48 offerings" are subject to Rule 419 adopted under the Securities
Act of 1933. See Comment 3 to Section 202.

50

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

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

12 11. An administrator must consider the public interest when
issuing a stop order and may under Section 306(f) consider the
14 public interest when modifying or vacating a stop order. See,
e.g., *TechnoMedical Lab., Inc. v. Utah Sec. Div.*, 744 P.2d 320,
16 324-325 (Utah Ct. App. 1987) (a state has a valid public interest
in stopping the issuance of hundreds of thousands of public
18 shares that did not comply with the disclosure requirements of
securities registration); cf. stop orders under the Securities
20 Act of 1933, see 1 Louis Loss & Joel Seligman, *Securities
Regulation* 576-589 (3d ed. rev. 1998).

22 12. As of September 2002 46 jurisdictions had adopted a
24 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
26 306(a)(7)(B) ("unreasonable amounts of underwriters' and sellers'
discounts, commissions, or other compensation, or promoter
28 profits or participations, or unreasonable amounts or kinds of
options"); and 16 jurisdictions had adopted a form of bracketed
30 Section 306(a)(7)(C) ("terms that are unfair, unjust, or
inequitable").

34 **Maine Comments**

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

48 **§16307. Waiver and modification**

2 By rule issued or order adopted under this chapter, the
3 administrator may waive or modify, in whole or in part, any or
4 all of the requirements of sections 16302, 16303, and 16304 or
5 the requirement of any information or record in a registration
6 statement or in a periodic report filed pursuant to section
7 16305, subsection 9. Rules adopted pursuant to this section are
8 routine technical rules as defined in Title 5, chapter 375,
9 subchapter 2-A.

10
11 **Official Comments**

12
13 **Prior Provision:** RUSA Section 303(h). Section 307 follows
14 RUSA Section 303(h) and empowers the administrator to waive or
15 modify any of the requirements of 302, 303, 304(b), or the
16 requirement of any information or record in a registration
17 statement. An example would be the expedited procedure several
18 states have adopted to coordinate with shelf registration under
19 Rule 415 of the Securities Act of 1933. In waiving or modifying
20 requirements the administrator must make a finding satisfying the
21 requirements of Section 605(b).
22

23
24 **SUBCHAPTER 4**

25 **BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS,**
26 **INVESTMENT ADVISER REPRESENTATIVES AND FEDERAL**
27 **COVERED INVESTMENT ADVISERS**

28
29 **§16401. Broker-dealer licensing requirement and exemptions**

30
31 **1. Licensing requirement.** It is unlawful for a person to
32 transact business in this State as a broker-dealer unless the
33 person is licensed under this chapter as a broker-dealer or is
34 exempt from licensing as a broker-dealer under subsection 2 or 4.

35
36 **2. Exemptions from licensing.** The following persons are
37 exempt from the licensing requirement of subsection 1:

38
39 **A. A broker-dealer without a place of business in this**
40 **State if its only transactions effected in this State are**
41 **with:**

42
43 **(1) The issuer of the securities involved in the**
44 **transactions;**

45
46 **(2) A broker-dealer licensed as a broker-dealer under**
47 **this chapter or not required to be licensed as a**
48 **broker-dealer under this chapter, except when the**
49 **person is acting as a clearing broker-dealer;**
50

- 2 (3) An institutional investor;
- 4 (4) A nonaffiliated federal covered investment adviser
6 with investments under management in excess of
 \$100,000,000 acting for the account of others pursuant
 to discretionary authority in a signed record;
- 8 (5) A bona fide preexisting customer whose principal
10 place of residence is not in this State and the person
 is registered as a broker-dealer under the federal
12 Securities Exchange Act of 1934 or not required to be
 registered under the federal Securities Exchange Act of
14 1934 and is registered or licensed under the securities
 act of the state in which the customer maintains a
16 principal place of residence;
- 18 (6) A bona fide preexisting customer whose principal
 place of residence is in this State but was not present
20 in this State when the customer relationship was
 established, if:
- 22 (a) The broker-dealer is registered under the
 federal Securities Exchange Act of 1934 or not
24 required to be registered under the federal
 Securities Exchange Act of 1934 and is registered
26 or licensed under the securities laws of the state
 in which the customer relationship was established
28 and where the customer had maintained a principal
 place of residence; and
- 30 (b) Within 45 days after the customer's first
 transaction in this State, the person files an
32 application for licensing as a broker-dealer in
 this State and no further transactions are
34 effected until the license is effective. Any
 broker-dealer may seek an order granting a
36 temporary exemption under subparagraph (7) while
 the application is pending; and
- 38 (7) Any other person exempted by rule adopted or order
40 issued under this chapter; and
- 42 B. A person that deals solely in United States government
44 securities and is supervised as a dealer in government
 securities by the Board of Governors of the Federal Reserve
46 System, the Federal Deposit Insurance Corporation or the
 United States Department of the Treasury, Office of Thrift
48 Supervision or Comptroller of the Currency.
- 50

2 3. Limits on employment or association. It is unlawful for
4 a broker-dealer, or for an issuer engaged in offering, offering
6 to purchase, purchasing or selling securities in this State,
8 directly or indirectly, to employ or associate with an individual
10 to engage in an activity related to securities transactions in
12 this State if the license of the individual is suspended or
14 revoked or the individual is barred from employment or
16 association with a broker-dealer, an issuer, an investment
18 adviser or a federal covered investment adviser by an order of
20 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.

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

24 A. A broker-dealer that is registered or licensed in Canada
26 or other foreign jurisdiction and that does not have a place
28 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:

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

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

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

48 B. An agent who represents a broker-dealer that is exempt
50 under this subsection to effect transactions in securities
 or attempt to effect the purchase or sale of securities in

2 this State as permitted for a broker-dealer described in
3 paragraph A.

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

8

Official Comments

10

11 **Prior Provisions:** 1956 Act Section 201; RUSA Sections
12 201-202.

13 1. "Broker-dealer" is defined in Section 102(4). The scope
14 of the Section 401(a) reference "to transact business in this
15 State" is specified in Section 610. "Transacts a business" has
16 been held to mean "more than a trivial or de minimis business."
17 United States v. Schwartz, 464 F.2d 499, 506 (2d Cir. 1972),
18 cert. denied, 409 U.S. 1009 (1972).

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

24 3. "Bona fide" is a much construed term particularly in the
25 U.C.C. context. See, e.g., MCC Proceeds, Inc. v. Advest, Inc.,
26 743 N.Y.S.2d 1 (N.Y. A.D. 2002) (comparing bona fide to good
27 faith standard).

30

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

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

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

2 the administrator's order to the individual suspended or barred.
Cf. Comment 17 to Section 412.

4 7. Section 401(d) recognizes the increasingly transnational
6 nature of securities brokerage and permits, if the administrator
adopts a rule or order, transactions by a Canadian or a foreign
8 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
10 adopts a rule or order.

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

18 **Maine Comments**

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

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

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

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

50 **§16402. Agent licensing requirement and exemptions**

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

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

10 A. An individual who represents a broker-dealer in
effecting transactions in this State limited to those
12 described in Section 15(h)(2) of the federal Securities
Exchange Act of 1934, 15 United States Code, Section
14 78(o)(2);

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

18 C. An individual who represents an issuer with respect to
20 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
22 who is not compensated in connection with the individual's
participation by the payment of commissions or other
24 remuneration based, directly or indirectly, on transactions
in those securities;

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

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

46 F. An individual who represents a broker-dealer licensed in
48 this State under section 16401, subsection 1 or exempt from
licensing under section 16401, subsection 2 in the offer and
50 sale of securities for an account of a nonaffiliated federal
covered investment adviser with investments under management

2 in excess of \$100,000,000 acting for the account of others
pursuant to discretionary authority in a signed record;

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

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

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

14 **3. License effective only while employed or associated.**

14 The license of an agent is effective only while the agent is
16 employed by or associated with a broker-dealer licensed under
18 this chapter or an issuer that is offering, selling or purchasing
20 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.

22 **4. Limit on employment or association.** It is unlawful for
24 a broker-dealer, or an issuer engaged in offering, selling or
26 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.

28 **5. Limit on affiliations.** An individual may not act as an
30 agent for more than one broker-dealer or one issuer at a time,
32 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.

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

38 **Official Comments**

40 **Prior Provisions:** RUSA Sections 201-202.

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

48 2. An independent contractor must be either a broker-dealer
50 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.

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

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

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

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

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

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Maine Comments

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38 1. Section 16402(2)(D): Maine has modified this paragraph
to reinstate the predecessor act's limitation on the type of
40 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
42 issuer. By qualifying these persons as "bona fide," it is
Maine's intent that this exemption not be available to persons
44 employed by the issuer solely to effectuate securities
transactions.

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§16403. Investment adviser licensing requirement and exemptions

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50 1. Licensing requirement. It is unlawful for a person to
transact business in this State as an investment adviser unless

2 the person is licensed under this chapter as an investment
3 adviser or is exempt from licensing as an investment adviser
4 under subsection 2.

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

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

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

15 (2) Institutional investors;

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

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

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

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

29 3. Limits on employment or association. It is unlawful for
30 an investment adviser, directly or indirectly, to employ or
31 associate with an individual to engage in an activity related to
32 investment advice in this State if the license of the individual
33 is suspended or revoked or the individual is barred from
34 employment or association with an investment adviser, federal
35 covered investment adviser or broker-dealer by an order under
36 this chapter, the Securities and Exchange Commission or a
37 self-regulatory organization, unless the investment adviser
38 sustains the burden of proof that the investment adviser did not
39 know, and in the exercise of reasonable care could not have
40 known, of the suspension, revocation or bar. Upon request from
41 the investment adviser and for good cause, the administrator, by
42 order, may waive, in whole or in part, the application of the
43 prohibitions of this subsection to the investment adviser.
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2 representative unless the individual is licensed under this
3 chapter as an investment adviser representative or is exempt from
4 licensing as an investment adviser representative under
5 subsection 2.

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

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9
10 A. An individual who is employed by or associated with an
11 investment adviser that is exempt from licensing under
12 section 16403, subsection 2 or a federal covered investment
13 adviser that is excluded from the notice filing requirements
14 of section 16405; and

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

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

25
26 **4. Limit on affiliations.** An individual may transact
27 business as an investment adviser representative for more than
28 one investment adviser or federal covered investment adviser
29 unless a rule adopted or order issued under this chapter
30 prohibits or limits an individual from acting as an investment
31 adviser representative for more than one investment adviser or
32 federal covered investment adviser.

33
34 **5. Limits on employment or association.** It is unlawful for
35 an individual acting as an investment adviser representative,
36 directly or indirectly, to conduct business in this State on
37 behalf of an investment adviser or a federal covered investment
38 adviser if the license of the individual as an investment adviser
39 representative is suspended or revoked or the individual is
40 barred from employment or association with an investment adviser
41 or a federal covered investment adviser by an order under this
42 chapter, the Securities and Exchange Commission or a
43 self-regulatory organization. Upon request from a federal covered
44 investment adviser and for good cause, the administrator, by
45 order issued, may waive, in whole or in part, the application of
46 the requirements of this subsection to the federal covered
47 investment adviser.
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2 6. Referral fees. An investment adviser licensed under
4 this chapter, a federal covered investment adviser that has filed
6 a notice under section 16405 or a broker-dealer licensed under
8 this chapter is not required to employ or associate with an
10 individual as an investment adviser representative if the only
12 compensation paid to the individual for a referral of investment
14 advisory clients is paid to an investment adviser licensed under
16 this chapter, a federal covered investment adviser who has filed
18 a notice under section 16405 or a broker-dealer licensed under
20 this chapter with which the individual is employed or associated
22 as an investment adviser representative.

24 7. Rulemaking. Rules adopted pursuant to this section are
26 routine technical rules as defined in Title 5, chapter 375,
28 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;

2 §16406. Licensing of broker-dealers, agents, investment advisers
3 and
4 investment adviser representatives

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

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

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

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

21 3. Effectiveness of licensing. If an order is not in
22 effect and a proceeding is not pending under section 16412, a
23 license becomes effective no later than noon on the 45th day
24 after a completed application is filed, provided that all
25 examination and training requirements imposed under section
26 16412, subsection 5 have been satisfied and provided that the
27 license has not been denied. The administrator may authorize an
28 earlier effective date of licensing.

29 4. License renewal. A license is effective until midnight
30 on December 31st of the year for which the application for
31 licensing is filed. Unless an order is in effect under section
32 16412, a license may be automatically renewed each year by filing
33 such records as are required by the administrator, by paying the
34 fee specified in section 16410 and by paying costs charged by the
35 designee of the administrator for processing the filings.

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

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Official Comments

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

6 1. Under Section 406(a), the administrator is authorized to
8 accept standardized forms such as Form B-D for broker-dealers;
10 Form U-4 for agents and investment adviser representatives; and
12 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.

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

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

24 26 **Maine Comments**

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

34 **§16407. Succession and change in licensing of broker-dealer or investment adviser**

36 **1. Succession.** A broker-dealer or investment adviser may
38 succeed to the current license of another broker-dealer or
investment adviser or a notice filing of a federal covered
40 investment adviser, and a federal covered investment adviser may
succeed to the current license of an investment adviser or notice
42 filing of another federal covered investment adviser, by filing
as a successor an application for licensing pursuant to section
44 16401 or 16403 or a notice pursuant to section 16405 for the
unexpired portion of the current license or notice filing.

46 **2. Organizational change.** A broker-dealer or investment
48 adviser that changes its form of organization or state of
incorporation or organization may continue its license by filing
50 an amendment to its license if the change does not involve a

2 material change in its financial condition or management. The
3 amendment becomes effective when filed or on a date designated by
4 the licensee in its filing. The new organization is a successor
5 to the original licensee for the purposes of this chapter. If
6 there is a material change in financial condition or management,
7 the broker-dealer or investment adviser shall file a new
8 application for licensing. A predecessor licensed under this
9 chapter shall stop conducting its securities business other than
10 winding down transactions and shall file for withdrawal of
11 broker-dealer or investment adviser licensing within 45 days
12 after filing its amendment to effect succession.

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

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

23 **Official Comments**

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

25 1. Section 407 is intended to avoid unnecessary
26 interruptions of business by specifying procedures for a
27 successor broker-dealer or investment adviser; a broker-dealer or
28 investment adviser to maintain its registration if it changes its
29 form of organization or name; or, in accordance with a rule or
30 order adopted under this Act, a change of control of a
31 broker-dealer or investment adviser.

32 2. There is no filing fee under Section 407.

33 **Maine Comments**

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

2 appropriate filing fee for an initial license application under
Section 16410.

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

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10 **§16408. Termination of employment or association of agent and**
12 **investment adviser representative and transfer of**
14 **employment or**
association

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

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

46 **A. Immediately effective as of the date of the completed**
48 **filing if the agent's Central Registration Depository record**
or successor record or the investment adviser
representative's Investment Adviser Registration Depository

2 record or successor record does not contain a new or amended
3 disciplinary disclosure within the previous 12 months; or

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

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

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

23 **5. Termination of license or application for licensing.** If
24 the administrator determines that a licensee or applicant for
25 licensing is no longer in existence or has ceased to act as a
26 broker-dealer, agent, investment adviser or investment adviser
27 representative, or is the subject of an adjudication of
28 incapacity or is subject to the control of a committee,
29 conservator or guardian, or can not reasonably be located, a rule
30 adopted or order issued under this chapter may require the
31 license be canceled or terminated or the application denied. The
32 administrator may reinstate a canceled or terminated license,
33 with or without hearing, and may make the license retroactive.
34 Rules adopted pursuant to this section are routine technical
35 rules as defined in Title 5, chapter 375, subchapter 2-A.

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41 **Official Comments**

42 **Prior Provision:** 1956 Act Section 204(d).

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

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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 initial filing of an application as a broker-dealer and renewal of an application by a broker-dealer for licensing. 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

2 required to file a notice under section 16405. If the
3 filing results in a withdrawal, the administrator shall
4 retain the fee; and

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

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

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

24 **Maine Comments**

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

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

38 **§16411. Postlicensing requirements**

40 1. Financial requirements. A rule adopted or order issued
41 under this chapter may establish minimum financial requirements
42 for broker-dealers licensed or required to be licensed under this
43 chapter and investment advisers licensed or required to be
44 licensed under this chapter. If a licensed broker-dealer or
45 investment adviser believes, or has reasonable cause to believe,
46 that any requirement imposed under this subsection is not being
47 met, the licensed broker-dealer or investment adviser shall
48 promptly notify the administrator of its current financial
49 condition.

2 2. Financial reports. A broker-dealer licensed or required
3 to be licensed under this chapter and an investment adviser
4 licensed or required to be licensed under this chapter shall file
5 such financial and other reports as are required by rule adopted
6 or order issued under this chapter. If the information contained
7 in a record filed under this subsection is or becomes inaccurate
8 or incomplete in a material respect, the licensee shall promptly
file a correcting amendment.

10 3. Record keeping. Record-keeping requirements are as
11 follows:

12 A. A broker-dealer licensed or required to be licensed
13 under this chapter and an investment adviser licensed or
14 required to be licensed under this chapter shall make and
15 maintain those accounts, correspondence, memoranda, papers,
16 books and other records that are:

17 (1) Required by rule adopted or order issued under
18 this chapter; or

19 (2) If no rule or order as set forth in subparagraph
20 (1) has been adopted under this chapter, in compliance
21 with the record-keeping requirements of the federal
22 Securities Exchange Act of 1934 in the case of a
23 broker-dealer or the federal Investment Advisers Act of
24 1940 in the case of an investment adviser;

25 B. Broker-dealer records required to be maintained under
26 paragraph A may be maintained in computer or microform
27 format or any other form of data storage, provided that the
28 records are readily accessible to the administrator;

29 C. Investment adviser records required to be maintained
30 under paragraph A may be maintained in any form of data
31 storage required by rule adopted or order issued under this
32 chapter; and

33 D. Records required to be maintained under this section
34 must be preserved for 6 years unless the administrator, by
35 rule, specifies either a longer or shorter period for a
36 particular type or class of records.

37 4. Audits or inspections. The records of a broker-dealer
38 licensed or required to be licensed under this chapter and of an
39 investment adviser licensed or required to be licensed under this
40 chapter are subject to such periodic, special or other audits or
41 inspections by a representative of the administrator, within or
42 without this State, as the administrator considers necessary or
43 appropriate in the public interest and for the protection of
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2 investors. An audit or inspection may be made at any time and
4 without prior notice. The administrator may copy, require the
6 licensee to copy and remove for audit or inspection copies of all
8 records the administrator reasonably considers necessary or
10 appropriate to conduct the audit or inspection. Broker-dealers,
12 agents, investment advisers and investment adviser
14 representatives shall make their records available to the
16 administrator in a readable form. The administrator may assess a
18 reasonable charge for conducting an audit or inspection under
20 this subsection.

22 **5. Custody and discretionary authority bond or insurance.**
24 A rule adopted or order issued under this chapter may require a
26 broker-dealer or investment adviser that has custody of or
28 discretionary authority over funds or securities of a customer or
30 client to obtain insurance or post a bond or other satisfactory
32 form of security. The administrator may determine the
34 requirements of the insurance, bond or other satisfactory form of
36 security. The insurance, bond or other satisfactory form of
38 security must permit an action by a person to enforce any
40 liability on the insurance, bond or other satisfactory form of
42 security if instituted within the time limitations in section
44 16509, subsection 10, paragraph B.

46 **6. Requirements for custody.** Subject to Section 15(h) of
48 the federal Securities Exchange Act of 1934, 15 United States
50 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

2 administered by a self-regulatory organization or another
3 continuing education program approved by the administrator.

4 9. Privacy provisions. A broker-dealer licensed or
5 required to be licensed under this chapter and an investment
6 adviser licensed or required to be licensed under this chapter
7 shall comply with the privacy provisions of the federal
8 Gramm-Leach-Bliley Act, 15 United States Code, Section 6801 et
9 seq. (1999) and the implementing Regulation S-P, federal Privacy
10 of Consumer Financial Information, 17 Code of Federal
11 Regulations, Part 248 (2001) adopted by the Securities and
12 Exchange Commission. This subsection is not intended to permit
13 the release of health care information except as permitted by
14 Title 22, section 1711-C or Title 24-A, chapter 24.

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

20 Official Comments

21 **Prior Provisions:** 1956 Act Sections 102(c), 202(d) and (e)
22 and 203; RUSA Sections 209, 211 and 215.

23 1. Sections 411(a) through (c) and (e) through (f)
24 implicitly refer to "capital, custody, margin, financial
25 responsibility, making and keeping records, bonding, or financial
26 or operational reporting requirements." Under the National
27 Securities Markets Improvement Act of 1996, States may not impose
28 such requirements on covered broker-dealers and investment
29 advisers greater than those specified in Section 15(h) of the
30 Securities Exchange Act of 1934 and Section 222 of the Investment
31 Advisors Act of 1940.

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

39 3. The duty in Section 411(b) to correct or update
40 information is limited to material information which a reasonable
41 investor would continue to consider important in deciding whether
42 to purchase or sell securities. Cf. TSC Indus., Inc. v. Northway,
43 Inc., 426 U.S. 438, 444-450 (1970); Securities Act Release No.
44 6084, 17 SEC Dock. 1048, 1054 (1979) ("persons are continuing to
45 rely on all or any material portion of the statements").

2 2. Section 16411(3)(D): Maine has added this provision
3 regarding record preservation based on section 10310(6) of the
4 Revised Maine Securities Act, which had no counterpart in the
5 model Uniform Securities Act.

6 3. Section 16411(4): The records of agents and investment
7 adviser representatives are records of the broker-dealers and
8 investment advisers that employ them.

10 4. Section 16411(9): Maine has added this provision
11 regarding privacy based on section 10313(1)(L) of the Revised
12 Maine Securities Act, which had no counterpart in the model
13 Uniform Securities Act.

14 §16412. Denial, revocation, suspension, withdrawal,
15 restriction, condition or limitation of licensing

18 1. Disciplinary conditions, applicants. If the
19 administrator finds that the order is in the public interest and
20 subsection 4 authorizes the action, an order issued under this
21 chapter may deny an application, or may condition or limit
22 licensing, of an applicant to be a broker-dealer, agent,
23 investment adviser or investment adviser representative and, if
24 the applicant is a broker-dealer or investment adviser, of a
25 partner, officer, director or person having a similar status or
26 performing similar functions, or a person directly or indirectly
27 in control, of the broker-dealer or investment adviser.

28 2. Disciplinary conditions, licensees. If the
29 administrator finds that the order is in the public interest and
30 subsection 4 authorizes the action, an order issued under this
31 chapter may revoke, suspend, condition or limit the license of a
32 licensee and, if the licensee is a broker-dealer or investment
33 adviser, the license of a partner, officer, director or person
34 having a similar status or performing similar functions, or a
35 person directly or indirectly in control, of the broker-dealer or
36 investment adviser. Notwithstanding this subsection, the
37 administrator may not:

40 A. Institute a revocation or suspension proceeding under
41 this subsection based on an order issued under a law of
42 another state that is reported to the administrator or a
43 designee of the administrator more than one year after that
44 state's order is reported; or

46 B. Under subsection 4, paragraph E, subparagraph (1) or
47 (2), issue an order on the basis of an order issued under
48 the securities act of another state unless the other state's
49 order was based on conduct for which subsection 4 would
50 authorize the action had the conduct occurred in this State.

2 3. Disciplinary penalties, licensees. If the administrator
4 finds that the order is in the public interest and subsection 4,
paragraphs A to F, H, I and J or paragraphs L and M authorize the
6 action, an order under this chapter may censure, impose a bar on
or impose a civil penalty in an amount not to exceed a maximum of
8 \$5,000 per violation on a licensee and, if the licensee is a
broker-dealer or investment adviser, any partner, officer,
10 director or person having a similar status or performing similar
functions, or any person directly or indirectly in control, of
the broker-dealer or investment adviser.

12 4. Grounds for discipline. A person may be disciplined
14 under subsections 1 to 3 if the person:

16 A. Has filed an application for licensing in this State
18 under this chapter or the predecessor act within the
previous 10 years that, as of the effective date of
20 licensing or as of any date after filing in the case of an
order denying effectiveness, was incomplete in any material
22 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;

24 B. Intentionally or knowingly violated or intentionally or
26 knowingly failed to comply with this chapter or the
predecessor act or a rule adopted or order issued under this
28 chapter or the predecessor act within the previous 10 years;

30 C. Has pleaded guilty or nolo contendere to or been
32 convicted of a Class A, B or C crime or a felony or within
the previous 10 years has pleaded guilty or nolo contendere
34 to or been convicted of a Class D or E crime or a
misdemeanor involving a security, a commodity future or
36 option contract or an aspect of a business involving
securities, commodities, investments, franchises, insurance,
38 banking or finance or any crime indicating a lack of fitness
to engage in the securities business;

40 D. Is enjoined or restrained by a court of competent
42 jurisdiction in any action from engaging in or continuing an
act, practice or course of business involving an aspect of a
44 business involving securities, commodities, investments,
franchises, insurance, banking or finance;

46 E. Is the subject of an order, issued after notice and
48 opportunity for hearing by:

50 (1) The securities or other financial services
regulator of a state or by the Securities and Exchange

2 Commission, a self-regulatory organization or other
3 federal agency denying, revoking, barring or suspending
4 registration or licensing as a broker-dealer, agent,
5 investment adviser, investment adviser representative
6 or federal covered investment adviser;

7 (2) The securities regulator of a state or the
8 Securities and Exchange Commission against a
9 broker-dealer, agent, investment adviser, investment
10 adviser representative or federal covered investment
11 adviser;

12 (3) The Securities and Exchange Commission or a
13 self-regulatory organization suspending or expelling
14 the registrant or licensee from membership in the
15 self-regulatory organization;

16 (4) A court adjudicating a United States Postal Service
17 fraud order;

18 (5) The insurance regulator of a state denying,
19 suspending or revoking registration or licensing as an
20 insurance producer or its equivalent;

21 (6) A depository institution or financial services
22 regulator suspending or barring the person from the
23 depository institution or other financial services
24 business; or

25 (7) The United States Commodity Futures Trading
26 Commission denying, suspending or revoking registration
27 under the federal Commodity Exchange Act;

28 F. Is the subject of an adjudication or determination,
29 after notice and opportunity for hearing, by the Securities
30 and Exchange Commission, the United States Commodity Futures
31 Trading Commission, the Federal Trade Commission, a federal
32 depository institution regulator or a depository
33 institution, insurance or other financial services regulator
34 of a state that the person intentionally or knowingly
35 violated the federal Securities Act of 1933, the federal
36 Securities Exchange Act of 1934, the federal Investment
37 Advisers Act of 1940, the federal Investment Company Act of
38 1940, the federal Commodity Exchange Act, the securities or
39 commodities law of a state or a federal or state law under
40 which a business involving investments, franchises,
41 insurance, banking or finance is regulated;

42 G. Is insolvent, either because the person's liabilities
43 exceed the person's assets or because the person can not
44 pay its debts as they become due in the ordinary course of
45 business;

2 meet the person's obligations as they mature. The
3 administrator may not enter an order against an applicant or
4 licensee under this paragraph without a finding of
5 insolvency as to the applicant or licensee;

6 H. Refuses to allow or otherwise impedes the administrator
7 from conducting an audit or inspection under section 16411,
8 subsection 4 or refuses access to a licensee's office to
9 conduct an audit or inspection under section 16411,
10 subsection 4;

11 I. Has failed to reasonably supervise an agent, investment
12 adviser representative or other individual if the agent,
13 investment adviser representative or other individual was
14 subject to the person's supervision and committed a
15 violation of this chapter or the predecessor act or a rule
16 adopted or order issued under this chapter or the
17 predecessor act or engaged in conduct that would be grounds
18 for discipline under this subsection within the previous 10
19 years;

20 J. Is subject to an order entered by a court of competent
21 jurisdiction or entered after notice and opportunity for
22 hearing by a federal or state licensing agency denying,
23 suspending, revoking or restricting the person's license to
24 sell real estate, insurance or any investment other than
25 securities, provided that the order resulted from
26 allegations of misconduct. This paragraph also applies when
27 the denial, suspension, revocation or restriction of the
28 license is pursuant to a consent agreement between the
29 person and the licensing agency, whether or not the agency
30 also issues an order;

31 K. After notice and opportunity for a hearing, has been
32 found within the previous 10 years:

33 (1) By a court of competent jurisdiction to have
34 intentionally and knowingly violated the laws of a
35 foreign jurisdiction under which the business of
36 securities, commodities, investment, franchises,
37 insurance, banking or finance is regulated;

38 (2) To have been the subject of an order of a
39 securities regulator of a foreign jurisdiction denying,
40 revoking or suspending the right to engage in the
41 business of securities as a broker-dealer, agent,
42 investment adviser, investment adviser representative
43 or similar person; or
44

2 (3) To have been suspended or expelled from membership
4 by or participation in a securities exchange or
 securities association operating under the securities
 laws of a foreign jurisdiction;

6 L. Is the subject of a cease and desist order issued by the
8 Securities and Exchange Commission or issued under the
 securities, commodities, investment, franchise, banking,
 finance or insurance laws of a state;

10 M. Has engaged in unlawful, dishonest or unethical
12 practices in the securities, commodities, investment,
14 franchise, banking, finance or insurance business within the
 previous 10 years; or

16 N. Is not qualified on the basis of factors such as
18 training, experience and knowledge of the securities
20 business; except that, in the case of an application by an
22 agent for a broker-dealer that is a member of a
24 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
26 licensing under section 16402 or 16404 who has not been
 registered or licensed in a state within the 2 years
28 preceding the filing of an application in this State to
 successfully complete an examination.

30 5. Examinations. A rule adopted or order issued under this
32 chapter may require that training or an examination, including an
34 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
36 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
38 the training or examination is not necessary or appropriate in
 the public interest and for the protection of investors.

40 6. Summary process. Notwithstanding Title 5, sections
42 10003 and 10004, if the public interest or the protection of
44 investors so requires, the administrator may suspend or deny an
 application summarily; restrict, condition, limit or suspend a
46 license; or censure, bar or impose a civil penalty on a licensee
 before final determination of an administrative proceeding. Upon
48 the issuance of an order, the administrator shall promptly notify
 each person subject to the order that the order has been issued,
50 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

2 be scheduled for a hearing. If a hearing is not requested and
4 none is ordered by the administrator within 30 days after the
6 date of service of the order, the order becomes final by
8 operation of law. If a hearing is requested or ordered, the
10 administrator, after notice of and opportunity for hearing to
12 each person subject to the order, may modify or vacate the order
14 or extend the order until final determination.

16 7. Procedural requirements. An order issued may not be
18 issued under this section, except under subsection 6, without:

20 A. Appropriate notice to the applicant or licensee;

22 B. Opportunity for hearing; and

24 C. Findings of fact and conclusions of law in a record in
26 accordance with Title 5, chapter 375.

28 8. Control person liability. A person that controls,
30 directly or indirectly, a person not in compliance with this
32 section may be disciplined by order of the administrator under
34 subsections 1 to 3 to the same extent as the noncomplying person,
36 unless the controlling person did not know, and in the exercise
38 of reasonable care could not have known, of the existence of
40 conduct that is a ground for discipline under this section.

42 9. Limit on investigation or proceeding. The administrator
44 may not institute a proceeding under subsection 1, 2 or 3 based
46 solely on material facts actually known by the administrator
48 unless an investigation or the proceeding is instituted within
50 one year after the administrator actually acquires knowledge of
the material facts.

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
2 concept that has come to have settled meanings. See generally 6
L. Loss & J. Seligman, Securities Regulation 3103.5-3103.18 (3d
4 ed. rev. 2002) (under federal securities laws). The public
interest will not require imposition of a sanction for every
6 minor or technical violation of subsection (d).

8 3. The term "foreign" means a jurisdiction outside of the
United States, not a different state within the United States.

10 4. Section 412(a) through (c) authorizes the administrator
12 to proceed against an entire firm, regardless of whether the
administrator proceeds against any individual, when an individual
14 partner, officer, or director or person occupying a similar
status or performing similar functions, or a controlling person
16 is disciplined under subsection (d), but only if proceeding
against the entire firm is in the public interest. The discipline
18 of such an individual may not automatically be used against a
broker-dealer or investment adviser. When, however, there is a
20 failure to reasonably supervise, see Section 412(d)(9) or control
person liability, see Section 412(h), the administrator is
22 empowered to proceed against a firm in an appropriate case. In
Section 412, "any partner, officer, or director, any person
24 occupying a similar status or performing similar function." can
include a branch manager, assistant branch manager, or other
26 supervisor.

28 5. In Section 412(d)(1) the completeness and accuracy of an
effective application for registration is tested as of the
30 appropriate effective date. An application that becomes
incomplete or inaccurate after its effective date is not a ground
32 for discipline under paragraph (d)(1). In an appropriate case, an
action might be available under paragraph (d)(2) and Section
34 406(b). On the other hand, in a proceeding to deny effectiveness
to a pending application for registration, the completeness and
36 accuracy of the application is not limited to the effective date
and can be judged on any date after filing.

38 6. The term "willfully" in Section 412(d)(2) and (11)(A) is
40 discussed in Comment 2 to Section 508.

42 7. There is no time limit or statute of limitations on
felony convictions in Section 412(d)(3) as a ground for
44 disciplinary action.

46 8. The present tense of the verb "is" in Sections 412(d)(4)
through (6) and (12) means that an injunction, order,
48 adjudication, or determination that has expired or been vacated
is no longer a ground for discipline.

50

2 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.

4
6 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,
8 controlling person or other person specified in subsection (b),
unless it is a sole proprietorship.

10
12 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
14 furnish required records, or refusing the administrator
reasonable access to any office or location within an office to
16 conduct an audit or inspection under this Act. However, a request
by a person subject to an audit or inspection for a reasonable
18 delay to obtain assistance of counsel does not constitute a
violation of Section 412(d)(8).

20
22 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
24 control. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th
Cir. 1990), cert. denied, 499 U.S. 976 (1991). Section
26 15(b)(4)(E) of the Securities Exchange Act of 1934 similarly
addresses "failure to supervise reasonably." See 6 Louis Loss &
28 Joel Seligman, *Securities Regulation* 3097-3101 (3d ed. rev. 2002).

30
32 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.
34 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,
36 114 (Utah Ct. App. 1992) (such legislative language bespeaks a
legislative intent to delegate the interpretation of what
38 constitutes "dishonest and unethical practices" in the securities
industry to the administrator). Ministerial or clerical
40 violations of a statute or rule, if immaterial and occurring
without intent or recklessness, typically would not constitute
42 dishonest or unethical practices.

44
46 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.

48
50 15. Sections 412(f) and (g) amplify the earlier procedures
found in Section 204(f) of the 1956 Act and are intended to

2 facilitate summary disciplinary proceedings, when these are
appropriate.

4 16. Section 412(i) parallels the language of Section 204 of
6 the 1956 Act and Section 212(b) of RUSA with some significant
8 changes. The time period in which the administrator can act has
10 been extended to one year from 30 days in the 1956 Act and 90
12 days in RUSA. The limitation on instituting a proceeding can also
14 be tolled by instituting a formal investigation. The addition of
the word "solely" is intended to make it clear that an
16 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.

18 17. "Actually known" in Section 412(i) is used to signify
that the mere filing of material facts in the Central
20 Registration Depository or Investment Advisory Registration
Depository systems does not constitute actual knowledge, unless
22 that information was received by the administrator, or, but for a
decision by the administrator, would have been received by the
24 administrator.

26 **Maine Comments**

28 1. The model Uniform Securities Act version of this section
and other sections referred to "willful" violations of law,
30 whereas the Revised Maine Securities Act referred instead to
"intentional or knowing" violations of law. Maine retains the
32 words "intentional or knowing" because that language is used in
the Maine Criminal Code. Further, under Maine law the term
34 "willful" is construed to mean the same thing as "intentional or
knowing."

36 **SUBCHAPTER 5**

38 **FRAUD AND LIABILITIES**

40 **§16501. General fraud**

42 It is unlawful for a person, in connection with the offer,
44 sale or purchase of a security, directly or indirectly:

46 1. Device, scheme, artifice. To employ a device, scheme or
48 artifice to defraud;

50 2. Untrue statement of or omission of material fact. To
make an untrue statement of a material fact or to omit to state a

2 material fact necessary in order to make the statements made, in
3 light of the circumstances under which they were made, not
4 misleading; or

5 3. **Fraud, deceit.** To engage in an act, practice or course
6 of business that operates or would operate as a fraud or deceit
7 upon another person.

10 **Official Comments**

12 **Prior Provisions:** 1956 Act Section 101; RUSA Section 501.

13 1. Section 501, which was Section 101 in the 1956 Act, was
14 modeled on Rule 10b-5 adopted under the Securities Exchange Act
15 of 1934 and on Section 17(a) of the Securities Act of 1933. There
16 has been significant later case development interpreting Rule
17 10b-5, Section 17(a), and Section 101 of the 1956 Act. Section
18 501 is not identical to either Rule 10b-5 or Section 17(a).

19 2. There are no exemptions from Section 501.

20 3. Section 501 applies to any securities offer, sale or
21 purchase, including offers, sales, or purchases involving
22 registered, exempt, or federal covered securities. It would also
23 apply to a rescission offer under Section 510.

24 4. The possible consequences of violating Section 501 are
25 many. These include denial, suspension, or revocation of
26 securities registration under Section 306; denial, revocation,
27 suspension, withdrawal, restriction, condition or limitation of a
28 broker-dealer, agent, investment adviser, or investment adviser
29 representative registration under Section 412; criminal
30 prosecution under Section 508; civil enforcement proceedings
31 under Sections 603; and administrative proceedings under 604.

32 5. Because Section 501, like Rule 10b-5, reaches market
33 manipulation, see 8 Louis Loss & Joel Seligman, Securities
34 Regulation Ch.10.D (3d ed. 1991), this Act does not include the
35 RUSA market manipulation Section 502, which had no counterpart in
36 the 1956 Act.

37 6. The culpability required to be pled or proved under
38 Section 501 is addressed in the relevant enforcement context.
39 See, e.g., Section 508, criminal penalties, where "willfulness"
40 must be proven; Section 509, civil liabilities, which includes a
41 reasonable care defense; or civil and administrative enforcement
42 actions under Sections 603 and 604, where no culpability is
43 required to be pled or proven.

2 7. There is no private cause of action, express or implied,
3 under Section 501. Section 509(m) expressly provides that only
4 Section 509 provides a private cause of action for conduct that
5 could violate Section 501.

6
7
8 **Maine Comments**

9
10 1. Official Comment 5 states that because section 501
11 "reaches market manipulation" the model Uniform Securities Act
12 did not contain a separate section on market manipulation. For
13 this reason, Maine does not retain section 10202 of the Revised
14 Maine Securities Act, which set forth certain prohibited
15 practices relating to market manipulation. However, the conduct
16 described in former section 10202, set out below, would result
17 in liability under this section.

18 Without limiting the general applicability of section 10201,
19 a person may not:

20 1. Fictitious quotations. Quote a fictitious price with
21 respect to a security;

22
23 2. No change in beneficial ownership. Effect a transaction
24 in a security that involves no change in the beneficial
25 ownership of the security for the purpose of creating a
26 false or misleading appearance of active trading in a
27 security or with respect to the market for the security;

28
29 3. Orders for purchases. Enter an order for the purchase of
30 a security with the knowledge that an order of substantially
31 the same size and at substantially the same time and price
32 for the sale of the security has been, or will be, entered
33 by or for the same, or affiliated, person for the purpose of
34 creating a false or misleading appearance of active trading
35 in a security or with respect to the market for the security;

36
37 4. Orders for sale. Enter an order for the sale of a
38 security with the knowledge that an order of substantially
39 the same size and at substantially the same time and price
40 for the purchase of the security has been, or will be,
41 entered by or for the same, or affiliated, person for the
42 purpose of creating a false or misleading appearance of
43 active trading in a security or with respect to the market
44 for the security; or

45
46 5. Deceptive practices. Employ any other deceptive or
47 fraudulent device, scheme or artifice to manipulate the
48 market in a security.
49
50

2 §16502. Prohibited conduct in providing investment advice

4 1. Fraud in providing investment advice. It is unlawful
6 for a person that advises others for compensation, either
8 directly or indirectly or through publications or writings, as to
10 the value of securities or the advisability of investing in,
12 purchasing or selling securities or that, for compensation and as
14 part of a regular business, issues or promulgates analyses or
16 reports relating to securities:

18 A. To employ a device, scheme or artifice to defraud
20 another person; or

22 B. To engage in an act, practice or course of business that
24 operates or would operate as a fraud or deceit upon another
26 person.

28 2. Rules defining fraud. A rule adopted under this chapter
30 may define an act, practice or course of business of a person
32 described in subsection 1 as fraudulent, deceptive or
34 manipulative and prescribe means reasonably designed to prevent
36 investment advisers and investment adviser representatives from
38 engaging in acts, practices and courses of business defined as
40 fraudulent, deceptive or manipulative.

42 3. Rules specifying contents of advisory contract. A rule
44 adopted under this chapter may specify the contents of an
46 investment advisory contract entered into, extended or renewed by
48 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.

36 **Official Comments**

38 **Prior Provisions:** 1956 Act Section 102(a); RUSA Section 503.

40 1. Section 502(a) applies to any person that commits fraud
42 in providing investment advice. Section 502(b) is not limited to
44 persons registered as investment advisers or investment adviser
46 representatives.

48 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.

2 This Section follows the 1956 Act and RUSA, as well as state
3 securities statutes generally, in providing that a
4 misrepresentation concerning registration or an exemption is
unlawful.

6 **§16507. Qualified immunity**

8 A broker-dealer, agent, investment adviser, federal covered
9 investment adviser or investment adviser representative is not
10 liable to another broker-dealer, agent, investment adviser,
11 federal covered investment adviser or investment adviser
12 representative for defamation relating to a statement that is
13 contained in a record required by the administrator or designee
14 of the administrator, the Securities and Exchange Commission or a
15 self-regulatory organization, unless the person knew, or should
16 have known at the time that the statement was made, that it was
17 false in a material respect or the person acted in reckless
18 disregard of the statement's truth or falsity.

20 **Official Comments**

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

26 1. In 1994 The Securities and Exchange Commission Division
27 of Market Regulation published The Large Firm Project: A Review
28 of Hiring, Retention, and Supervisory Practices (1994), which
29 found that a small number of "rogue brokers" were responsible for
30 a significant proportion of customer disciplinary complaints.
31 These brokers in some instances moved from one broker-dealer firm
32 to another, it was explained, without full and complete
33 disclosure of disciplinary problems by the broker-dealer, because
34 of broker-dealer firms' fear of state law defamation claims. See
35 also GAO, Actions Needed to Better Protect Investors against
36 Unscrupulous Brokers 3 (1994); Testimony of SEC Chairman Arthur
37 Levitt Concerning the Large Firm Project, Subcomm. on
38 Telecommunications & Fin., House Comm. on Energy & Commerce
39 (Sept. 14, 1994), reprinted in 1994-1995 Fed. Sec. L. Rep. (CCH)
40 ¶85,433 (1994).

42 2. In 1998, the National Association of Securities Dealers
43 proposed qualified immunity for statements made in Forms U-4 and
44 U-5 to address this problem. This proposal was reprinted in
45 Securities Exchange Act Release 39,892, 66 SEC Dock. 2473 (1998).
46 This proposal was limited to arbitration proceedings. It was not
47 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

2 the administrator, institute the appropriate criminal proceedings
3 under this chapter. The Attorney General may request assistance
4 from the administrator or employees of the administrator.

5 3. No limitation on other criminal enforcement. This
6 chapter does not limit the power of this State to punish a person
7 for conduct that constitutes a crime under other laws of this
8 State.

9 4. Venue. When a person pursuant to one scheme or course
10 of conduct, whether upon the same person or several persons,
11 engages in fraudulent or other prohibited practices, engages in
12 unlawful transactions of business or other unlawful conduct or
13 engages in unlawful offers to sell or purchase or unlawful sales
14 or purchases under this chapter, the State may opt for a single
15 Class C count, and, in that circumstance, prosecution may be
16 brought in any venue in which one or more of the unlawful acts
17 were committed.

20 Official Comments

21 **Prior Provisions:** 1956 Act Section 409; RUSA Section 604;
22 Securities Exchange Act of 1934 Section 32(a).

23 1. This Section follows the 1956 Act and the federal
24 securities laws in imposing criminal penalties for any willful
25 violation of the Act. RUSA Section 604 distinguished between
26 felonies and misdemeanors, limiting willful violations of cease
27 and desist orders to a misdemeanor.

28 2. The term "willfully" has the same meaning in Section 508
29 as it did in the 1956 Act. All that is required is proof that a
30 person acted intentionally in the sense that the person was aware
31 of what he or she was doing. Proof of evil motive or intent to
32 violate the law or knowledge that the law was being violated is
33 not required.

34 3. The final sentence of Section 508(a) is based on Section
35 32(a) of the Securities Exchange Act of 1934, which provides:
36 "[N]o person shall be subject to imprisonment under this section
37 in violation of any rule or regulation if he proves that he had
38 no knowledge of such rule or regulation." The "no knowledge"
39 clause in Section 508(a) is relevant only to sentencing. The
40 person convicted has the burden of persuasion to prove no
41 knowledge at sentencing. Because this does not impose a burden on
42 the defendant to disprove the elements of a crime, Section 32(a)
43 of the Securities Exchange Act of 1934 has been held not to raise
44 a constitutional problem. United States v. Mandel, 296 F. Supp.
45 1038, 1040 (S.D.N.Y. 1969).

2 4. The appropriate state prosecutor under Section 508(b)
3 may decide whether to bring a criminal action under this statute,
4 another statute, or, when applicable, common law. In certain
5 states the administrator has full or limited criminal enforcement
6 powers.

7 5. This section does not specify maximum dollar amounts for
8 criminal fines, maximum terms for imprisonment, nor the years of
9 limitation, but does provide for each state to specify
10 appropriate magnitudes for criminal fines or maximum terms for
11 imprisonment.

12 6. The definition of willfulness in Comment 2 to Section
13 508 has been followed by most courts. See, e.g., State v. Hodge,
14 460 P.2d 596, 604 (Kan. 1969) ("No specific intent is necessary
15 to constitute the offense where one violates the securities act
16 except the intent to do the act denounced by the statute"); State
17 v. Nagel, 279 N.W.2d 911, 915 (S.D. 1979) ("[I]t is widely
18 understood that the legislature may forbid the doing of an act
19 and make its commission a crime without regard to the intent or
20 knowledge of the doer"); State v. Fries, 337 N.W.2d 398, 405
21 (Neb. 1983) (proof of a specific intent, evil motive, or
22 knowledge that the law was being violated is not required to
23 sustain a criminal conviction under a state's blue sky law);
24 People v. Riley, 708 P.2d 1359, 1362 (Colo. 1985) ("A person acts
25 'knowingly' or 'willfully' with respect to conduct . . . when he
26 is aware that his conduct . . . exists"); State v. Larsen, 865
27 P.2d 1355, 1358 (Utah 1993) (willful implies a willingness to
28 commit the act, not an intent to violate the law or to injure
29 another or acquire any advantage); State v. Montgomery, 17 P.3d
30 292, 294 (Idaho 2001) (bad faith is not required for a violation
31 of a state securities act; willful implies "simply a purpose or
32 willingness to commit the act or make the omission referred to");
33 State v. Dumke, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995) (mens rea
34 not required); State v. Mueller, 549 N.W.2d 455, 460 (Wis. Ct.
35 App. 1996) (willfulness does not require proof that the defendant
36 acted with intent to defraud or knowledge that the law was
37 violated); United States v. Lilley, 291 F. Supp. 989, 993 (S.D.
38 Tex. 1968) ("no knowledge" clause in federal statute not
39 available to defendant claiming lack of knowledge of particular
40 SEC rule).

41 42 43 **Maine Comments**

44 1. Section 16508(1): The model Uniform Securities Act
45 version of this section and other sections referred to "willful"
46 violations of law, whereas the Revised Maine Securities Act
47 referred instead to "intentional or knowing" violations of law.
48 Maine retains the words "intentional or knowing" because that
49
50

2 language is used in the Maine Criminal Code. Further, under
3 Maine law the term "willful" is construed to mean the same thing
4 as "intentional or knowing."

6 **§16509. Civil liability**

8 **1. Securities Litigation Uniform Standards Act.**
9 Enforcement of civil liability under this section is subject to
10 the federal Securities Litigation Uniform Standards Act of 1998.

12 **2. Liability of seller to purchaser.** A person is liable to
13 the purchaser if the person sells a security in violation of
14 section 16301; section 16303, subsection 6; section 16304,
15 subsection 5; or section 16305, subsection 6 or by means of an
16 untrue statement of a material fact or an omission to state a
17 material fact necessary in order to make the statement made, in
18 light of the circumstances under which it is made, not
19 misleading, the purchaser not knowing of the untruth or omission
20 and the seller not sustaining the burden of proof that the seller
21 did not know and, in the exercise of reasonable care, could not
22 have known of the untruth or omission. An action under this
23 subsection is governed by the following.

24 A. The purchaser may maintain an action to recover the
25 consideration paid for the security, less the amount of any
26 income received on the security, and the interest at the
27 legal rate of interest from the date of the purchase, costs
28 and reasonable attorney's fees determined by the court, upon
29 the tender of the security, or for actual damages as
30 provided in paragraph C.

32 B. The tender referred to in paragraph A may be made any
33 time before entry of judgment. Tender requires only notice
34 in a record of ownership of the security and willingness to
35 exchange the security for the amount specified. A purchaser
36 that no longer owns the security may recover actual damages
37 as provided in paragraph C.

38 C. Actual damages in an action arising under this
39 subsection are the amount that would be recoverable upon a
40 tender less the value of the security when the purchaser
41 disposed of it and the interest at the legal rate of
42 interest from the date of the purchase, costs and reasonable
43 attorney's fees determined by the court.

46 **3. Liability of purchaser to seller.** A person is liable to
47 the seller if the person buys a security by means of an untrue
48 statement of a material fact or omission to state a material fact
49 necessary in order to make the statement made, in light of the
50 circumstances under which it is made, not misleading, the seller

2 not knowing of the untruth or omission and the purchaser not
3 sustaining the burden of proof that the purchaser did not know
4 and, in the exercise of reasonable care, could not have known of
5 the untruth or omission. An action under this subsection is
6 governed by the following.

7 A. The seller may maintain an action to recover the
8 security and any income received on the security, costs and
9 reasonable attorney's fees determined by the court, upon the
10 tender of the purchase price, or for actual damages as
11 provided in paragraph C.

12 B. The tender referred to in paragraph A may be made any
13 time before entry of judgment. Tender requires only notice
14 in a record of the present ability to pay the amount
15 tendered and willingness to take delivery of the security
16 for the amount specified. If the purchaser no longer owns
17 the security, the seller may recover actual damages as
18 provided in paragraph C.

19 C. Actual damages in an action arising under this
20 subsection are the difference between the price at which the
21 security was sold and the value the security would have had
22 at the time of the sale in the absence of the purchaser's
23 conduct causing liability and the interest at the legal rate
24 of interest from the date of the sale of the security, costs
25 and reasonable attorney's fees determined by the court.

26 4. Liability of unlicensed broker-dealer and agent. A
27 person acting as a broker-dealer or agent that sells or buys a
28 security in violation of section 16401, subsection 1; section
29 16402, subsection 1; or section 16506 is liable to the customer.
30 The customer, if a purchaser, may maintain an action for a remedy
31 as specified in subsection 2, paragraphs A to C or, if a seller,
32 for a remedy as specified in subsection 3, paragraphs A to C.

33 5. Liability of unlicensed investment adviser and
34 investment adviser representative. A person acting as an
35 investment adviser or investment adviser representative that
36 provides investment advice for compensation in violation of
37 section 16403, subsection 1; section 16404, subsection 1; or
38 section 16506 is liable to the client. The client may maintain an
39 action to recover the consideration paid for the advice, interest
40 at the legal rate of interest from the date of payment, costs and
41 reasonable attorney's fees determined by the court.

42 6. Liability for investment advice. A person that receives
43 directly or indirectly any consideration for providing investment
44 advice to another person and that employs a device, scheme or
45 artifice to defraud the other person or engages in an act,
46

2 practice or course of business that operates or would operate as
3 a fraud or deceit on the other person is liable to the other
4 person. An action under this subsection is governed by the
5 following.

6 A. The person defrauded may maintain an action to recover
7 the consideration paid for the advice and the amount of any
8 actual damages caused by the fraudulent conduct, interest at
9 the legal rate of interest from the date of the fraudulent
10 conduct, costs and reasonable attorney's fees determined by
11 the court, less the amount of any income received as a
12 result of the fraudulent conduct.

13 B. This subsection does not apply to a broker-dealer or its
14 agents if the investment advice provided is solely
15 incidental to transacting business as a broker-dealer and no
16 special compensation is received for the investment advice.

17 **7. Joint and several liability.** The following persons are
18 liable jointly and severally with and to the same extent as
19 persons liable under subsections 2 to 6:

20 A. A person that directly or indirectly controls a person
21 liable under subsections 2 to 6, unless the controlling
22 person sustains the burden of proof that the person did not
23 know and, in the exercise of reasonable care, could not have
24 known of the existence of conduct by reason of which the
25 liability is alleged to exist;

26 B. An individual who is a managing partner, executive
27 officer or director of a person liable under subsections 2
28 to 6, including an individual having a similar status or
29 performing similar functions, unless the individual sustains
30 the burden of proof that the individual did not know and, in
31 the exercise of reasonable care, could not have known of the
32 existence of conduct by reason of which the liability is
33 alleged to exist;

34 C. An individual who is an employee of or associated with a
35 person liable under subsections 2 to 6 and who materially
36 aids the conduct giving rise to the liability, unless the
37 individual sustains the burden of proof that the individual
38 did not know and, in the exercise of reasonable care, could
39 not have known of the existence of conduct by reason of
40 which the liability is alleged to exist; and

41 D. A person that is a broker-dealer, agent, investment
42 adviser or investment adviser representative that materially
43 aids the conduct giving rise to the liability under
44 subsection 2 to 6, unless the person sustains the burden of
45 the liability;

2 proof that the person did not know and, in the exercise of
3 reasonable care, could not have known of the existence of
4 conduct by reason of which the liability is alleged to exist.

6 8. Right of contribution. A person liable under this
7 section has a right of contribution as in cases of contract
8 against any other person liable under this section for the same
9 conduct.

10 9. Survival of cause of action. A cause of action under
11 this section survives the death of an individual who might have
12 been a plaintiff or defendant.

14 10. Statute of limitations. A person may not obtain relief:

16 A. Under subsection 2 for violation of section 16301 or
17 under subsection 4 or 5, unless the action is instituted
18 within 2 years after the violation occurred; or

20 B. Under subsection 2, other than for violation of section
21 16301, or under subsection 3 or 5, unless the action is
22 instituted within the earlier of 2 years after discovery of
23 the facts constituting the violation or 5 years after the
24 violation.

26 11. No enforcement of violative contract. A person that has
27 made, or has engaged in the performance of, a contract in
28 violation of this chapter or a rule adopted or order issued under
29 this chapter, or that has acquired a purported right under the
30 contract with knowledge of conduct by reason of which its making
31 or performance was in violation of this chapter, may not base an
32 action on the contract.

34 12. No contractual waiver. A condition, stipulation or
35 provision binding a person purchasing or selling a security or
36 receiving investment advice to waive compliance with this chapter
37 or a rule adopted or order issued under this chapter is void.

38 13. Survival of other rights or remedies. The rights and
39 remedies provided by this chapter are in addition to any other
40 rights or remedies that may exist, but this chapter does not
41 create a cause of action not specified in this section or section
42 16411, subsection 5.

44
45
46 **Official Comments**

47 **Prior Provisions:** 1956 Act Section 410; RUSA Sections
48 605-607, 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-Humphrey 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).

2 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).

6 9. The defense of lack of knowledge in Sections 509(g) is
also modeled on the 1956 Act.

8
10 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
12 509(g)(2), the term "partner" is intended to be limited to
partners with management responsibilities, rather than a partner
14 with a passive investment.

16 11. Under 509(g)(4), the performance by a clearing broker
of the clearing broker's contractual functions - even though
18 necessary to the processing of a transaction - without more would
not constitute material aid or result in liability under this
20 subsection. See, e.g., Ross v. Bolton, 904 F.2d 819 (2d Cir.
1990).

22
24 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).

26
28 13. The contribution provision in Section 509(h) is a
safeguard to avoid the common law principle that prohibited
contribution among joint tortfeasors.

30
32 14. The statute of limitations in Section 509(j) is a
hybrid of the 1956 Act and federal securities law approaches. The
34 1956 Act Section 410(p) provided that: "No person may sue under
this section more than two years after the contract of sale."
36 Under this provision, the state courts generally decline to
extend a statute of limitations period on grounds of fraudulent
concealment or equitable tolling.

38
40 Before the July 2002 enactment of the Sarbanes-Oxley Act,
Rule 10b-5 of the Securities Exchange Act as construed by the
42 United States Supreme Court in *Lampf, Pleva, Lipkind, Preps &*
Petigrew v. Gilbertson, 501 U.S. 350 (1991), prohibited equitable
44 tolling under the federal securities law one year after discovery
and three years after the act formula. See generally 10 Louis
46 Loss & Joel Seligman, Securities Regulation 4505-4525 (3d. ed.
rev. 1996). The Sarbanes-Oxley Act added 28 U.S.C. §1658(b) which
48 provides

2 . . . a private right of action that involves a claim of
3 fraud, deceit, manipulation, or contrivance in contravention
4 of a regulatory requirement concerning the securities laws,
5 as defined in section 3(a)(47) of the Securities Exchange
6 Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later
7 than the earlier of ---

8 (1) 2 years after the discovery of the facts
9 constituting the violation; or

10 (2) 5 years after such violation.

11
12 Section 509(j)(1), as with the 1956 Act, is a unitary
13 statute of repose, requiring an action to be commenced within one
14 year after a violation occurred. It is not intended that
15 equitable tolling be permitted.

16
17 Section 509(j)(2), in contrast, generally follows the
18 federal securities law model. An action must be brought within
19 the earlier of two years after discovery or five years after the
20 violation. As with federal courts construing the statute of
21 limitations under Rule 10b-5, it is intended that the plaintiff's
22 right to proceed is limited to two years after actual discovery
23 "or after such discovery should have been made by the exercise of
24 reasonable diligence" (inquiry notice), see, e.g., *Law v. Medco*
25 *Research, Inc.*, 113 F.3d 781 (7th Cir. 1997), or five years after
26 the violation.

27
28 The rationale for replicating the basic federal statute of
29 limitations in this Act is to discourage forum shopping. If the
30 statute of limitations applicable to Rule 10b-5 were to be
31 changed in the future, identical changes should be made in
32 Section 509(j)(2).

33
34 15. Section 509(k) is similar to Section 29(b) of the
35 Securities Exchange Act and is intended to apply only to actions
36 to enforce illegal contracts. See *Louis Loss, Commentary on the*
37 *Uniform Securities Act 150* (1976).

38
39 16. Section 509(m) follows the 1956 Act.

40
41 17. Section 509 and Section 411(e) provide the exclusive
42 private causes of action under this Act.

43

44
45 **Maine Comments**

46
47 1. Section 16509(7): The reference to "managing partner"
48 is not restricted to those who carry the title of managing
49 partner. Consistent with Official Comment 10, this subsection
50

2 reaches all partners who have management responsibilities, as
3 opposed to those partners who participate only as passive
4 investors. Whether a partner (or person having a similar status
5 or performing similar functions) is subject to potential
6 derivative liability should be based on the facts and
7 circumstances in each case and not on the person's title.

8 2. Section 16509(10)(A): The model Uniform Securities Act
9 allowed a one-year statute of limitation for purchaser lawsuits
10 involving unregistered securities or unlicensed conduct. To
11 better protect investors, Maine has retained the 2-year statute
12 of limitations found in the Revised Maine Securities Act.

14 **§16510. Rescission offers**

16 **1. Requirements.** A purchaser, seller or recipient of
17 investment advice may not maintain an action under section 16509
18 if:

20 A. The purchaser, seller or recipient of investment advice
21 receives in a record, before the action is instituted:

22 (1) An offer stating the respect in which liability
23 under section 16509 may have arisen and fairly advising
24 the purchaser, seller or recipient of investment advice
25 of that person's rights in connection with the offer
26 and any financial or other information necessary to
27 correct all material misrepresentations or omissions in
28 the information that was required by this chapter to be
29 furnished to that person at the time of the purchase,
30 sale or investment advice;

31 (2) If the basis for relief under this section may have
32 been a violation of section 16509, subsection 2, an
33 offer to repurchase the security for cash, payable on
34 delivery of the security, equal to the consideration
35 paid and interest at the legal rate of interest from
36 the date of the purchase, less the amount of any income
37 received on the security, or, if the purchaser no
38 longer owns the security, an offer to pay the purchaser
39 upon acceptance of the offer damages in an amount that
40 would be recoverable upon a tender, less the value of
41 the security when the purchaser disposed of it and
42 interest at the legal rate of interest from the date of
43 the purchase in cash equal to the damages computed in
44 the manner provided in this subsection;

45 (3) If the basis for relief under this section may have
46 been a violation of section 16509, subsection 3, an
47 offer to tender the security, on payment by the seller
48 of the amount of the purchase price, less the amount of
49 any income received on the security, or, if the purchaser
50 no longer owns the security, an offer to pay the purchaser

2 of an amount equal to the purchase price paid, less
3 income received on the security by the purchaser and
4 interest at the legal rate of interest from the date of
5 the sale, or, if the purchaser no longer owns the
6 security, an offer to pay the seller upon acceptance of
7 the offer, in cash, damages in the amount of the
8 difference between the price at which the security was
9 purchased and the value the security would have had at
10 the time of the purchase in the absence of the
11 purchaser's conduct that may have caused liability and
12 interest at the legal rate of interest from the date of
13 the sale;

14 (4) If the basis for relief under this section may have
15 been a violation of section 16509, subsection 4, an
16 offer to pay as specified in subparagraph (2) if the
17 customer is a purchaser or an offer to tender or to pay
18 as specified in subparagraph (3) if the customer is a
19 seller;

20 (5) If the basis for relief under this section may have
21 been a violation of section 16509, subsection 5, an
22 offer to reimburse in cash the consideration paid for
23 the advice and interest at the legal rate of interest
24 from the date of payment; or

25 (6) If the basis for relief under this section may have
26 been a violation of section 16509, subsection 6, an
27 offer to reimburse in cash the consideration paid for
28 the advice, the amount of any actual damages that may
29 have been caused by the conduct and interest at the
30 legal rate of interest from the date of the violation
31 causing the loss;

32 B. The offer under paragraph A states that it must be
33 accepted by the purchaser, seller or recipient of investment
34 advice within 30 days after the date of its receipt by the
35 purchaser, seller or recipient of investment advice or any
36 shorter period, of not less than 3 days, that the
37 administrator, by order, specifies;

38 C. The offeror has the present ability to pay the amount
39 offered or to tender the security under paragraph A;

40 D. The offer under paragraph A is delivered to the
41 purchaser, seller or recipient of investment advice or sent
42 in a manner that ensures receipt by the purchaser, seller or
43 recipient of investment advice; and
44

2 E. The purchaser, seller or recipient of investment advice
3 that accepts the offer under paragraph A in a record within
4 the period specified under paragraph B is paid in accordance
5 with the terms of the offer.

6 2. Form of offer. The administrator, by rule or order, may
7 prescribe the form in which the information specified in
8 subsection 1 must be contained in any offer made under subsection
9 1. Rules adopted pursuant to this subsection are routine
10 technical rules as defined in Title 5, chapter 375, subchapter
11 2-A.

12 3. Statute of limitation tolled. If an offer is not
13 performed in accordance with its terms, suit by the offeree under
14 section 16509 is permitted without regard to this section, and
15 the statute of limitations tolls from the time of receipt of the
16 offer until 120 days after the rescission or settlement offer was
17 to have been performed.

20 Official Comments

21 **Prior Provisions:** 1956 Act Section 410(e); RUSA Section 607.

22
23 1. A rescission offer must meet the specific requirements
24 of Section 510 for civil liability under Section 509 to be
25 extinguished. Cf. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663,
26 666 (N.D. Ga. 1990). See generally Rowe, *Rescission Offers under*
27 *Federal and State Securities Law*, 12 J. Corp. L. 383 (1987).

28
29 2. A rescission offer that does not comply with Section 510
30 is subject to civil liability, administrative enforcement, or
31 criminal penalties under this Act. A rescission offer, for
32 example, could violate Section 501, the general fraud provision.

33
34 3. The administrator may publish a form that would comply
35 with Section 510, but the form would not be the only one that
36 could be used by the parties.

37
38 4. A valid rescission offer will be exempt from securities
39 registration. See Section 202(19).

40
41 5. If a state chooses to add a notice or filing provision,
42 it could provide this provision in Section 510(6), which would
43 state:

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45 (6) The offer [or a notice] is required to be filed with the
46 administrator 10 business days before the offering and
47 conform in form and content with a rule prescribed by the
48 administrator.

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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

2 1. Office of Securities; administrator. There is created
3 within the Department of Professional and Financial Regulation
4 the Office of Securities. The Office of Securities is directed
5 by the Securities Administrator, referred to in this chapter as
6 the "administrator," who is responsible for the administration
7 and enforcement of this chapter, the Maine Commodity Code and
8 chapter 69-B.

10 A. The administrator is appointed by the Commissioner of
11 Professional and Financial Regulation. The administrator is
12 appointed for a term that is coterminous with the term of
13 the Governor or until a successor is appointed and
14 qualified. Any vacancy occurring must be filled by
15 appointment for the unexpired portion of the term. The
16 administrator may be removed from office for cause by the
17 commissioner, and Title 5, section 931, subsection 2 does
18 not apply. A person appointed as administrator must have
19 knowledge of, or experience in, the theory and practice of
20 securities.

22 B. With the approval of the Commissioner of Professional
23 and Financial Regulation, the administrator shall organize
24 the Office of Securities in such a manner as the
25 administrator considers necessary to carry out the
26 administrator's responsibilities.

28 C. The administrator may employ personnel as the business
29 of the Office of Securities may require, subject to the
30 Commissioner of Professional and Financial Regulation's
31 approval and in accordance with the Civil Service Law. The
32 qualifications of the personnel must reflect the needs and
33 responsibilities of the Office of Securities' regulatory
34 functions. The administrator may authorize senior personnel
35 of the Office of Securities to carry out the administrator's
36 duties and authority. The administrator may employ or engage
37 such expert, professional or other assistance as may be
38 necessary to assist the Office of Securities in carrying out
39 its functions. In addition to salaries or wages, all
40 employees of the Office of Securities must receive their
41 actual expenses incurred in the performance of their
42 official duties.

44 D. At the expense of the Office of Securities, the
45 administrator may train the Office of Securities' employees,
46 or have them trained, in a manner the administrator
47 determines desirable, to carry out the purposes of the
48 Office of Securities.

2 **2. Unlawful use of records or information.** It is unlawful
4 for the administrator or an employee or designee of the
6 administrator to use for personal benefit or the benefit of
8 others records or other information obtained by or filed with the
10 administrator that is not public under section 16607, subsection
12 2. This chapter does not authorize the administrator or an
14 officer, employee or designee of the administrator to disclose
16 the record or information, except in accordance with section
18 16602, section 16607, subsection 3 or section 16608.

20 **3. No privilege or exemption created or diminished.** This
22 chapter does not create or diminish a privilege or exemption that
24 exists at common law or by statute or rule or otherwise.

26 **4. Investor education.** The administrator may develop and
28 implement investor education initiatives to inform the public
30 about investing in securities, with particular emphasis on the
32 prevention and detection of securities fraud. In developing and
34 implementing these initiatives, the administrator may collaborate
36 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.

38 **5. Waiver of fee.** The administrator may, by order, waive
40 the filing fee required to register a security, to perfect a
42 notice filing for a federal covered security or to secure an
44 exemption from registration upon a written finding that the fee
46 would be unreasonably high in light of the maximum potential
48 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
sales representatives 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.

Official Comments

2 administrator determines, as to all the facts and
4 circumstances concerning a matter to be investigated or
6 about which an action or proceeding is to be instituted; and

8 C. Publish a record concerning an action, proceeding or
10 investigation under, or a violation of, this chapter or a
12 rule adopted or order issued under this chapter if the
14 administrator determines it is necessary or appropriate in
16 the public interest and for the protection of investors.

18 2. Administrator powers to investigate. For the purpose of
20 an investigation under this chapter, the administrator or the
22 administrator's designated officer may administer oaths and
24 affirmations, subpoena witnesses, seek compulsion of attendance,
26 take evidence, require the filing of statements and require the
28 production of any records that the administrator considers
30 relevant or material to the investigation. It is unlawful to
32 fail to provide any statement or record if requested.

34 3. Procedure and remedies for noncompliance. If a person
36 does not appear or refuses to testify, file a statement or
38 produce records or otherwise does not obey a subpoena as required
40 by the administrator under this chapter, the administrator may
42 request that the Attorney General apply to either the Superior
44 Court located in Kennebec County or the Superior Court where
46 service may be obtained on the person refusing to testify or
48 produce or a court of another state to enforce compliance. The
50 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

2 appear, testify, file a statement, produce records or obey a
3 subpoena.

4 5. Assistance to securities regulator of another
5 jurisdiction. At the request of the securities regulator of
6 another state or a foreign jurisdiction, the administrator may
7 provide assistance if the requesting regulator states that it is
8 conducting an investigation to determine whether a person has
9 violated, is violating or is about to violate a law or rule of
10 the other state or foreign jurisdiction relating to securities
11 matters that the requesting regulator administers or enforces.
12 The administrator may provide the assistance by using the
13 authority to investigate and the powers conferred by this section
14 as the administrator determines is necessary or appropriate. The
15 assistance may be provided without regard to whether the conduct
16 described in the request would also constitute a violation of
17 this chapter or other law of this State if occurring in this
18 State. In deciding whether to provide the assistance, the
19 administrator may consider whether the requesting regulator is
20 permitted and has agreed to provide assistance reciprocally
21 within its state or foreign jurisdiction to the administrator on
22 securities matters when requested, whether compliance with the
23 request would violate or prejudice the public policy of this
24 State and the availability of resources and employees of the
25 administrator to carry out the request for assistance.

28 Official Comments

30 **Prior Provisions:** 1956 Act Section 407; RUSA Section 601.

31 1. Sections 602 (a) and (b) follow the 1956 Act, which was
32 modeled generally on Sections 21(a) through (d) of the Securities
33 Exchange Act of 1934 as it then read.

34 2. Standards for issuance of subpoenas have been generally
35 established in federal and state securities law. See, e.g., 10
36 Louis Loss & Joel Seligman, Securities Regulation 4917-4937 (3d
37 ed. rev. 1996) (discussing Oklahoma Press Pub. Co. v. Walling,
38 327 U.S. 186 (1946) and other cases). The scope of subpoena
39 enforcement in each state is a general matter for judicial
40 determination. Under Section 602, an individual subpoenaed to
41 testify by the administrator is not compelled to testify within
42 the meaning of these sections simply by service of a subpoena.
43 Under Section 602(b) the individual can be subpoenaed and
44 compelled to attend. Once in attendance an individual can assert
45 an evidentiary privilege or exemption, see Section 601(c),
46 including the Fifth Amendment privilege against
47 self-incrimination. If an individual refuses to testify or give
48 evidence, the administrator may apply (or have the appropriate
49 State attorney apply) to the appropriate court for the relief

2 specified in Section 602(c). If the individual invokes the
3 privilege against self-incrimination, Section 602(d) allows the
4 administrator to apply to the appropriate court to compel
5 testimony under the "use immunity" provision barring the record
6 compelled or other evidence obtained from being used in a
7 criminal case. See People v. District Co. of Arapahoe County, 894
8 P.2d 739 (Colo. 1995). The phrase "directly or indirectly" in
9 Section 602(e) is intended to include testimony, other evidence,
10 or other information derived from immunized testimony,
11 statements, records, or evidence.

12 3. Section 602 is intended to apply generally to securities
13 offers and sales under Article 3 and broker-dealer and investment
14 adviser activity under Article 4, when there is noncompliance
15 with the first sentence of Section 602(c). This subsection does
16 not limit the powers of an administrator under other provisions
17 of this Act.

18 4. A court may quash a subpoena for good cause under
19 Section 602(d). The court may decline to enforce a subpoena that
20 is arbitrary, capricious, or oppressive.

21 5. Where appropriate under Section 602(f), an administrator
22 could move to authorize admission of a requesting state's
23 attorney under existing pro hac vice rules.

24 6. Section 602(f) is consistent with the Securities
25 Litigation Uniform Standard Act of 1998 which provides in Section
26 102(e):

27
28 The Securities and Exchange Commission, in consultation
29 with State securities commissions (or any agencies or
30 offices performing like functions), shall seek to encourage
31 the adoption of State laws providing for reciprocal
32 enforcement by State securities commissions of subpoenas
33 issued by another State securities commission seeking to
34 compel persons to attend, testify in, or produce documents
35 or records in connection with an action or investigation by
36 a State securities commission of an alleged violation of
37 State securities laws.
38

39 7. There are limitations on financial institutions being
40 subject to visitorial powers by State officials, such as those
41 affecting national banks contained in 12 U.S.C. 484 and 12 C.F.R.
42 Sec. 7.4000. Law outside this Act may place similar limits on
43 state chartered financial institutions being subjected to
44 visitorial powers. This Act does not negate these limitations.
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50 **Maine Comments**

2 1. The model Uniform Securities Act contained a provision
4 (section 602(e)) that Maine wholly rejected. Maine thus moved up
 subsection (f) of the model act to become section 16602(5).

6 2. Maine does not concur with the implications in Official
8 Comment 7 as to federal limitations on the State's visitorial
10 powers. There is ongoing litigation and disagreement over the
 scope and applicability of such limitations.

12 **§16603. Civil enforcement**

14 **1. Civil action instituted by administrator.** If the
16 administrator believes that a person has engaged, is engaging or
18 is about to engage in an act, practice or course of business
20 constituting a violation of this chapter or a rule adopted or
22 order issued under this chapter or that a person has, is or is
24 about to engage in an act, practice or course of business that
26 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.

28 **2. Relief available.** In an action under this section and
30 on a proper showing, the court may:

32 A. Issue a permanent or temporary injunction, restraining
 order or declaratory judgment;

34 B. Order other appropriate or ancillary relief, which may
36 include:

38 (1) An asset freeze, accounting, writ of attachment,
40 writ of general or specific execution and appointment
42 of a receiver or conservator, which may be the
 administrator, for the defendant or the defendant's
 assets;

44 (2) Ordering the administrator to take charge and
46 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;

48 (3) Imposing a civil fine not to exceed \$10,000 per
50 violation or an order of rescission, restitution or

2 disgorgement directed to a person that has engaged in
4 an act, practice or course of business constituting a
6 violation of this chapter or the predecessor act or a
8 rule adopted or order issued under this chapter or the
10 predecessor act; and

12 (4) Ordering the payment of prejudgment and
14 postjudgment interest; or

16 C. Order such other relief as the court considers
18 appropriate.

20 3. No bond required. The administrator is not required to
22 post a bond in an action or proceeding under this chapter.

24 4. Securities agency of another state. Upon a showing by
26 the administrator or securities agency of another state that a
28 person has violated any provision of the securities act of that
30 state or any rule or order of the administrator or securities
32 agency of that state, the Superior Court may grant appropriate
34 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 rulmaking 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.

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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 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 civil penalty 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

2 hearing if the person requesting the hearing fails to appear.
3 If a hearing is requested or ordered, the administrator, after
4 notice of and opportunity for hearing to each person subject to
5 the order, may modify or vacate the order or extend it until
6 final determination.

7 **3. Procedure for final order.** If a hearing is requested or
8 ordered pursuant to subsection 2, a hearing must be held pursuant
9 to the Maine Administrative Procedure Act. A final order may not
10 be issued unless the administrator makes findings of fact and
11 conclusions of law in a record in accordance with the Maine
12 Administrative Procedure Act. The final order may make final,
13 vacate or modify the order issued under subsection 1.

14 **4. Civil fine; final orders and remedies.** In a final order
15 under subsection 3, the administrator may: order remedies
16 described in subsection 1; censure that person; bar that person
17 from association with any issuer, broker-dealer or investment
18 adviser in this State; or impose a civil fine not to exceed
19 \$5,000 per violation.

20 **5. Costs.** In a final order, the administrator may charge
21 the actual cost of an investigation or proceeding for a violation
22 of this chapter or a rule adopted or order issued under this
23 chapter.

24 **6. Filing of certified final order with court; effect of**
25 **filing.** If a petition for judicial review of a final order is
26 not filed in accordance with section 16609, the administrator may
27 file a certified copy of the final order with the clerk of a
28 court of competent jurisdiction. The order so filed has the same
29 effect as a judgment of the court and may be recorded, enforced
30 or satisfied in the same manner as a judgment of the court.

31 **7. Enforcement by court; further civil fine.** If a person
32 does not comply with an order under this section, the
33 administrator may request that the Attorney General petition a
34 court of competent jurisdiction to enforce the order. The court
35 may not require the administrator to post a bond in an action or
36 proceeding under this section. If the court finds, after service
37 and opportunity for hearing, that the person was not in
38 compliance with the order, the court may adjudge the person in
39 contempt of the order. The court may impose a further civil fine
40 against the person for contempt in an amount not to exceed
41 \$10,000 per violation and may grant any other relief the court
42 determines is just and proper in the circumstances.

43 **8. Appointment of presiding officer.** For purposes of any
44 hearing conducted pursuant to this section, the administrator may
45 appoint a qualified person to preside at the hearing and to make
46 the hearing.

2 proposed findings of fact and conclusions of law. The
3 responsibility for the entry of the final findings of fact and
4 conclusions of law and for the issuance of any final order remain
5 with the administrator.

6 7 **Official Comments**

8
9 **Prior Provisions:** RUSA Sections 602, 712.

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11 1. Section 604, unlike Section 603, may be initiated by the
12 administrator without prior judicial process or a prior hearing.
13 The section, among other matters, empowers the administrator to
14 act summarily in appropriate circumstances.

15
16 2. Sections 603 and 604 are intended to be available to the
17 administrator against persons not subject to stop orders under
18 Section 306 or proceedings against registered broker-dealers,
19 agents, investment advisers, or investment adviser
20 representatives under Section 412. All persons or securities not
21 subject to Section 306 or 412 will be subject to Sections 603 and
22 604. A person must be covered by either (1) Sections 306 or 412
23 or (2) Sections 603 or 604.

24
25 3. Service of an order or notice under this Section is not
26 effective unless made in accordance with Section 611.

27 28 **Maine Comments**

29
30 1. Section 16604(4): Maine has added the administrator's
31 power to censure and bar in order to maintain the administrative
32 enforcement authority found in the Revised Maine Securities Act.

33
34 2. Section 16604(8): Maine has added this subsection on
35 appointment of a presiding officer based on a provision in the
36 Revised Maine Securities Act. It allows for greater
37 administrative efficiency and fairness in the administrative
38 hearing process.

39 40 **§16605. Rules, forms, orders, interpretative opinions and** 41 **hearings**

42
43 **1. Issuance and adoption of forms, orders and rules. In**
44 **addition to specific authority granted elsewhere in this chapter,**
45 **the administrator may:**

46
47 **A. Issue forms and orders and, after notice and comment,**
48 **adopt and amend rules necessary or appropriate to carry out**
49 **this chapter and may repeal rules, including rules and forms**
50

2 governing registration statements, applications, notice
3 filings, reports and other records;

4 B. By rule, define terms, whether or not used in this
5 chapter, but those definitions may not be inconsistent with
6 this chapter; and

7 C. By rule, classify securities, persons and transactions
8 and adopt different requirements for different classes.

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10 **2. Findings and cooperation.** Under this chapter, a rule or
11 form may not be adopted or amended, or an order issued or
12 amended, unless the administrator finds that the rule, form,
13 order or amendment is necessary or appropriate in the public
14 interest or for the protection of investors and is consistent
15 with the purposes intended by this chapter. In adopting, amending
16 and repealing rules and forms, section 16608 applies in order to
17 achieve uniformity among the states and coordination with federal
18 laws in the form and content of registration statements,
19 applications, reports and other records, including the adoption
20 of uniform rules, forms and procedures.

21
22 **3. Financial statements.** The administrator may require
23 that a financial statement filed under this chapter be prepared
24 in accordance with generally accepted accounting principles in
25 the United States and comply with other requirements specified by
26 rule adopted or order issued under this chapter. A rule adopted
27 or order issued under this chapter may establish:

28 A. The form and content of financial statements required
29 under this chapter;

30 B. Whether unconsolidated financial statements must be
31 filed; and

32 C. Whether required financial statements must be audited by
33 an independent certified public accountant.

34
35 **4. Interpretative opinions.** The administrator may provide
36 interpretative opinions or issue determinations that the
37 administrator will not institute a proceeding or an action under
38 this chapter against a specified person for engaging in a
39 specified act, practice or course of business if the
40 determination is consistent with this chapter. A rule adopted or
41 order issued under this chapter may establish a reasonable charge
42 for interpretative opinions or determinations whether the
43 administrator will institute an action or a proceeding under this
44 chapter.

2 others who have provided a current e-mail or similar address and
expressed an interest in receiving such notice.

4 5. Section 605(e) does not apply to staff no action or
interpretative opinions, but does apply to rules, forms, orders,
6 statements of policy or interpretations adopted by the
administrator.
8

10 **Maine Comments**

12 1. Section 16605(5). Maine has added subsection (5)
regarding declaratory rulings, the substance of which appeared in
14 the Revised Maine Securities Act but not the model Uniform
Securities Act.
16

18 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
20 conformity found in the Revised Maine Securities Act.

22 **§16606. Administrative files and opinions**

24 **1. Public register of filings.** Subject to state
record-keeping requirements, the administrator shall maintain, or
26 designate a person to maintain, records or a register of:
applications for registration of securities; registration
28 statements; notice filings; applications for registration of
broker-dealers, agents, investment advisers and investment
30 adviser representatives; notice filings by federal covered
investment advisers that are or have been effective under this
32 chapter or the predecessor act; notices of claims of exemption
from registration or notice filing requirements contained in a
34 record; orders issued under this chapter or the predecessor act;
and interpretative opinions or no action determinations issued
36 under this chapter. Records may be maintained in computer or
microform format or any other form of data storage, as long as
38 the records are readily accessible.

40 **2. Public availability.** The administrator shall make all
rules, forms, interpretative opinions, advisory rulings, consent
42 agreements and orders available to the public.

44 **3. Copies of public records.** The administrator shall
furnish a copy of a record that is a public record or a
46 certification that the public record does not exist to a person
that so requests. A rule adopted under this chapter may establish
48 a reasonable charge for furnishing the record, not to exceed \$.50
per page, or for certification, not to exceed \$10 per certified
50 record. A copy of the record certified or a certificate by the

2 administrator of a record's nonexistence is prima facie evidence
3 of a record or its nonexistence. Rules adopted pursuant to this
4 section are routine technical rules as defined in Title 5,
5 chapter 375, subchapter 2-A.

6
7 **Official Comments**

8 **Prior Provisions:** 1956 Act Section 413; RUSA Section 709.

10 1. "Record" is defined in Section 102(25).

12 2. Compliance with a state records law will typically
13 satisfy the requirements of Section 606(a).

14 **§16607. Public records; confidentiality**

16 **1. Presumption of public records.** Except as otherwise
18 provided in subsection 2, records obtained by the administrator
19 or filed under this chapter, including a record contained in or
20 filed with a registration statement, application, notice filing
21 or report, are public records and are available for public
22 examination in accordance with Title 1, chapter 13, subchapter 1.

24 **2. Nonpublic records.** The following records are not public
25 records and are not available for public examination under
26 subsection 1:

28 A. A record obtained by the administrator in connection
29 with an audit or inspection under section 16411, subsection
30 4 or an investigation under section 16602;

32 B. A part of a record filed in connection with a
33 registration statement under section 16301 and sections
34 16303 to 16305 or a record under section 16411, subsection 4
35 that contains trade secrets or confidential information if
36 the person filing the registration statement or report has
37 asserted a claim of confidentiality or privilege that is
38 authorized by law;

40 C. A record that is not required to be provided to the
41 administrator or filed under this chapter and is provided to
42 the administrator only on the condition that the record will
43 not be subject to public examination or disclosure;

44 D. A record received from a person specified in section
45 16608, subsection 1 that has been designated as confidential
46 by the agency furnishing the record;

48 E. Any social security number, residential address unless
49 used as a business address and residential telephone number

2 unless used as a business telephone number contained in a
3 record that is filed;

4 F. A record obtained by the administrator through a
5 designee of the administrator that, pursuant to a routine
6 technical rule, as defined in Title 5, chapter 375,
7 subchapter 2-A, or an order under this chapter, has been:

8
9 (1) Expunged from the administrator's records by the
10 designee; or

11 (2) Determined to be nonpublic or nondisclosable by
12 that designee if the administrator finds the
13 determination to be in the public interest and for the
14 protection of investors;

15
16 G. Records to the extent that they relate solely to the
17 administrator's internal personnel rules and practices,
18 including, but not limited to, protocols, guidelines,
19 manuals and memoranda of procedure for employees of the
20 Office of Securities;

21
22 H. Interagency or intra-agency memoranda or letters,
23 including generally records that reflect discussions between
24 or consideration by the administrator and employees of the
25 Office of Securities of any action taken or proposed to be
26 taken by the administrator or employees of the Office of
27 Securities, including, but not limited to, reports,
28 summaries, analyses, conclusions or other work product of
29 the administrator or employees of the Office of Securities,
30 except those that by law would routinely be discoverable in
31 litigation; and

32
33 I. Records to the extent that disclosure could reasonably
34 be expected to constitute an unwarranted invasion of
35 personal privacy.

36
37 **3. Administrator discretion to disclose.** If disclosure is
38 for the purpose of a civil, administrative or criminal
39 investigation, action or proceeding or to a person specified in
40 section 16608, subsection 1, the administrator may disclose a
41 record obtained in connection with an audit or inspection under
42 section 16411, subsection 4 or a record obtained in connection
43 with an investigation under section 16602. Prior to disclosure
44 to a person specified in section 16608, subsection 1, the
45 administrator may require the requesting agency to certify that
46 under applicable law reasonable protections exist to preserve the
47 integrity, confidentiality and security of the information
48 comparable to the protections existing under the laws of this
49 State.

2 Canada, a Canadian province or territory, a foreign jurisdiction,
3 the Securities and Exchange Commission, the United States
4 Department of Justice, the Commodity Futures Trading Commission,
5 the Federal Trade Commission, the Securities Investor Protection
6 Corporation, a self-regulatory organization, a national or
7 international organization of securities regulators, a federal or
8 state banking or insurance regulator or a governmental regulatory
9 or law enforcement agency to, among other objectives, effectuate
10 greater uniformity in securities matters among the Federal
11 Government, self-regulatory organizations, states and foreign
12 governments.

13 **2. Policies to consider.** In cooperating, coordinating,
14 consulting and sharing records and information under this section
15 and in acting by rule, order or waiver under this chapter, the
16 administrator may, in the administrator's discretion, take into
17 consideration in carrying out the public interest the following
18 general policies:

19 A. Maximizing effectiveness of regulation for the
20 protection of investors;

21 B. Maximizing uniformity in federal and state regulatory
22 standards; and

23 C. Minimizing burdens on the business of capital formation
24 without adversely affecting essentials of investor
25 protection.

26 **3. Subjects for cooperation.** The cooperation,
27 coordination, consultation and sharing of records and information
28 authorized by this section includes:

29 A. Establishing or employing one or more designees as a
30 central depository for licensing, registration and notice
31 filings under this chapter and for records required or
32 allowed to be maintained under this chapter;

33 B. Developing and maintaining uniform forms;

34 C. Conducting a joint examination or investigation;

35 D. Holding a joint administrative hearing;

36 E. Instituting and prosecuting a joint civil or
37 administrative proceeding;

38 F. Sharing and exchanging personnel;

2 G. Coordinating registrations under section 16301 and
3 licensing under sections 16401 to 16404 and exemptions under
4 section 16203;

6 H. Sharing and exchanging records, subject to section 16607;

8 I. Formulating rules, statements of policy, guidelines,
9 forms and interpretative opinions and releases;

10 J. Formulating common systems and procedures;

12 K. Notifying the public of proposed rules, forms,
13 statements of policy and guidelines;

14 L. Attending conferences and other meetings among
15 securities regulators, which may include representatives of
16 governmental and private sector organizations involved in
17 capital formation, considered necessary or appropriate to
18 promote or achieve uniformity; and

20 M. Developing and maintaining a uniform exemption from
21 registration for small issuers and taking other steps to
22 reduce the burden of raising investment capital by small
23 businesses.

26
27 **Official Comments**

28
29 **Prior Provisions:** 1956 Act Section 415; RUSA Sections 704
30 and 803; 19(c) of the Securities Act of 1933.

31 1. Uniformity of regulation among the states and
32 coordination with the Securities and Exchange Commission is a
33 principal objective of this Act. Section 608 is intended to
34 encourage such cooperation to the maximum extent appropriate.
35 Operative phrases such as "shall, in its discretion" in Sections
36 608(a) and (b) are intended to be precisely coordinate with the
37 directive that Congress gave to the Securities and Exchange
38 Commission in Section 19(c) of the Securities Act of 1933.

40 2. The goals of uniformity among the states and
41 coordination with related federal regulation, including self
42 regulatory organizations, may be enhanced by greater use of
43 information technology systems such as the Web-CRD, the
44 Investment Adviser Registration Depository (IARD), or the
45 Securities and Exchange Commission Electronic Data Gathering,
46 Analysis and Retrieval System (EDGAR). These types of techniques
47 are consistent with a potential system of "one stop filing" of
48 all federal and state forms that is encouraged by this Act.

2 3. This Act is intended, to the extent practicable, to be
revenue neutral in its impact on existing state laws.

4 4. Section 608(c) lists some joint or coordinated efforts
which might be undertaken. Other appropriate cooperative
6 activities are also encouraged.

8 5. Court decisions interpreting the securities laws have
construed these acts to achieve "broad protection to investors,"
10 a remedial approach that "embodies a flexible rather than a
static principle, one that is capable of adaption to meet the
12 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
14 Co, 328 U.S. 293, 299, 301 (1946).

16 **Maine Comments**

18 1. Section 16608(1): The Revised Maine Securities Act
20 contained a specific provision, in section 10702(1), that the
administrator has the discretion to bear the costs of cooperation
22 with other regulators. Maine does not retain that provision here
because the administrator has such discretion even without a
24 specific provision to that effect.

26 **§16609. Judicial review**

28 **1. Judicial review of orders.** Notwithstanding Title 10,
section 8003, subsection 5, any person aggrieved by a final order
30 of the administrator may obtain judicial review of the order in
the Superior Court of Kennebec County by filing a petition in
32 accordance with Title 5, section 11001 and the Maine Rules of
Civil Procedure, Rule 80C.

34 **2. Judicial review of rules.** A rule adopted under this
36 chapter is subject to judicial review in accordance with the
Maine Administrative Procedure Act.
38

40 **Official Comments**

42 **Prior Provisions:** 1956 Act Section 411; RUSA Section 711(b).

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

2 2. A rule adopted under this Act may be subject to judicial
review in accordance with the state administrative procedure act.

4 3. In those states in which judicial review of rules is
permitted, a state may choose to add Section 609(b). In those
6 states in which judicial review of rules is not permitted,
Section 609(b) should be deleted.

8

§16610. Jurisdiction

10

1. Sales and offers to sell. The following sections do not
12 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
14 to purchase or the purchase is made and accepted in this State:

16

A. Section 16301;

18

B. Section 16302;

20

C. Section 16401, subsection 1;

22

D. Section 16402, subsection 1;

24

E. Section 16403, subsection 1;

26

F. Section 16404, subsection 1;

28

G. Section 16501;

30

H. Section 16506;

32

I. Section 16509; and

34

J. Section 16510.

36

2. Purchases and offers to purchase. The following sections
do not apply to a person that purchases or offers to purchase a
38 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
40 in this State:

42

A. Section 16401, subsection 1;

44

B. Section 16402, subsection 1;

46

C. Section 16403, subsection 1;

48

D. Section 16404, subsection 1;

50

E. Section 16501;

2 F. Section 16506;

4 G. Section 16509; and

6 H. Section 16510.

8 3. Offers in this State. For the purpose of this section,
10 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
12 offer:

14 A. Originates from within this State; or

16 B. Is directed by the offeror to a place in this State and
received at the place to which it is directed.

18 4. Acceptances in this State. For the purpose of this
20 section, an offer to purchase or to sell is accepted in this
State, whether or not either party is then present in this State,
22 if the acceptance:

24 A. Is communicated to the offeror in this State and the
offeree reasonably believes the offeror to be present in
26 this State and the acceptance is received at the place in
this State to which it is directed; and

28 B. Has not previously been communicated to the offeror,
orally or in a record, outside this State.

30 5. Publications, radio, television or other electronic
32 communications. An offer to sell or to purchase a security is
34 not made in this State when a publisher circulates or there is
circulated on the publisher's behalf in this State a bona fide
36 newspaper or other publication of general, regular and paid
circulation that is not published in this State or that is
38 published in this State but has had more than 2/3 of its
circulation outside this State during the previous 12 months or
40 when a radio or television program or other electronic
communication, except specifically addressed electronic mail or
42 messaging, originating outside this State is received in this
State. A radio or television program or other electronic
44 communication is considered as having originated in this State if
either the broadcast studio or the originating source of
46 transmission is located in this State, unless:

48 A. The program or communication is syndicated and
distributed from outside this State for redistribution to
50 the general public in this State;

2 administrative, civil, and criminal. The law is now settled that
3 a person may violate the law of a particular state without ever
4 being within the state or performing each act necessary to
5 violate the law within that state.

6 2. Section 610 generally follows Section 414 of the 1956
7 Act, but has been modernized to reflect the development of the
8 Internet and other electronic communications after 1956.

10 3. Section 610 can be illustrated in the context of a civil
11 action under Section 509(b) by a purchaser in State A against a
12 seller in State B:

14 Section 610(a) would apply when an "offer to sell is made in
15 this State."

16 Section 610(c) provides that an offer which originates in
17 State B and is directed to State A is made in both states. The
18 securities act of State A would apply under Section 610(c)(2).
19 The act of State B would apply also, under Section 610(c)(1). The
20 intent is to prevent a seller in State B from using that state as
21 a base of operations for defrauding person in other states.

24 Section 610(e) addresses offers made through publications,
25 radio, television, or electronic communications. The subsection
26 provides a series of safe harbors for advertisements in
27 newspapers, magazines, radio, television, or electronic media
28 that either originate outside State A or that originate in State
29 A but are directed outside the state to the general public. With
30 respect to bona fide newspapers or other publications of general,
31 regular, and paid circulation, the safe harbor requires that more
32 than two thirds of its circulation be outside State A. With
33 respect to radio, television, or other electronic communications,
34 safe harbors are specified in Sections 610(e)(1) through (4).

36 Section 610(d), however, provides that a person in State A
37 who makes an offer to purchase as a result of communication
38 described in Section 610(e) may cause the act to be applicable if
39 the offeror accepts the offer "in this State." Section 610(d)
40 defines when an offer is accepted "in this State."

42 If a selling broker-dealer in State B solely sends a
43 confirmation into State A, or the purchaser in State A sends a
44 check from within State A, the act will not apply unless, under
45 Section 610(d), the confirmation or delivery constitutes the
46 seller's acceptance of the purchaser's offer to buy in State A.

48 The applicability of the act to purchaser is addressed by
49 Section 610(b) which is the converse of Section 610(a). Under
50 Section 509(c) there can be liability of purchasers to sellers.

2 Section 610(f) is a new provision that specifies
jurisdictions in cases involving investment advice and
4 misrepresentations.

6 4. Under subsection 202(20) certain out-of-state offers or
sales are exempt from securities registration.

8
10 5. The phrase "other electronic means" is coextensive with
computer or other information technology permitted by subsections
102(8), 102(25).

12
14 6. Under Section 610 the administrator may adopt
interpretative rules or orders to specify when particular uses of
16 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
18 prohibited conduct, within a State, whether or not a purchaser,
seller, or other party is then present in the State. The NASAA
20 Interpretive Order Concerning Broker-Dealers, Agents, and
Investment Adviser Representatives Using the Internet for General
22 Dissemination of Information for Products and Services (Apr. 23,
1997) is an illustration of an interpretative order that would be
24 in compliance with the administrator's authority under Section
610. Under this Order, broker-dealers, agents, investment
26 advisers, and investment adviser representatives who distribute
information on available products and services through
28 communications on the Internet generally to anyone having access
to the Internet such as postings on a bulletin board or home page
30 shall not be deemed to be transacting business in a State if
specified conditions are satisfied including a legend clearly
32 stating that the broker-dealer, agent, investment adviser, or
investment adviser representative may transact business in that
34 State only if first registered, excluded or exempted from
applicable registration requirements.

36 38 **Maine Comments**

40 1. Section 10707(3) of the Revised Maine Securities Act
provided that receipt in this State may include mail delivered to
42 a post office in this State. Maine does not retain that
provision here because such a delivery is covered under the terms
44 of this section.

46 2. Section 16610(5): Maine has added the phrase "except
specifically addressed electronic mail or messaging" to clarify
48 that specifically directed electronic communications by
electronic mail or messaging originating outside of Maine and
50 received in Maine is an offer made in Maine.

2 §16611. Service of process

4 1. Signed consent to service of process. A consent to
6 service of process must be signed and filed on a form designated
8 by the administrator. A consent appointing the administrator the
10 person's agent for service of process in a noncriminal action or
12 proceeding against the person, or the person's successor or
14 personal representative under this chapter or a rule adopted or
16 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.

18 2. Conduct constituting appointment of agent for service.
20 If a person, including a nonresident of this State, engages in an
22 act, practice or course of business prohibited or made actionable
24 by this chapter or a rule adopted or order issued under this
26 chapter and the person has not filed a consent to service of
28 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.

30 3. Procedure for service of process. Service under
32 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:

34 A. The plaintiff, which may be the administrator, promptly
36 sends notice of the service and a copy of the process,
38 return receipt requested, to the defendant or respondent at
40 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

42 B. The plaintiff files an affidavit of compliance with this
44 subsection in the action or proceeding on or before the
46 return day of the process, if any, or within the time that
 the court, or the administrator in a proceeding before the
 administrator, allows.

48 4. Service in administrative proceedings or civil actions
 by administrator. Service pursuant to subsection 3 may be used

2 in a proceeding before the administrator or by the administrator
3 in a civil action in which the administrator is the moving party.

4 5. Opportunity to defend. If process is served under
5 subsection 3, the court, or the administrator in a proceeding
6 before the administrator, shall order continuances as are
7 necessary or appropriate to afford the defendant or respondent
8 reasonable opportunity to defend.

10
11 **Official Comments**

12
13 **Prior Provisions:** 1956 Act Sections 414(g) and (h); RUSA
14 Section 708.

15 1. Section 611 follows the 1956 Act and RUSA in providing
16 for a signed consent to service of process in Section 611(a); a
17 substituted service of process in Section 611(b); and process and
18 opportunity to defend in Sections 611(c) through (e).

19 2. An issuer is not required to file a consent to service
20 of process unless it proposes to offer a security in this State
21 through someone acting on an agency basis. Since the civil
22 liability provisions of Section 509(b) apply only in a suit by a
23 purchaser against a seller, the issuer in a firm commitment
24 underwriting is civilly liable only to the underwriter, who, in
25 turn, may be liable to the dealer, who, in turn, may be liable to
26 the purchaser. In contrast, in a best efforts underwriting, when
27 the security is sold on an agency basis and title passes directly
28 to the purchaser, the issuer can be liable to the purchaser.

29 3. Section 611(b) generally follows Section 414(h) of the
30 1956 Act and Section 708(c) of RUSA. The intent is to provide for
31 substituted service of process when a seller in one state directs
32 an offer into a second state either in violation of the laws of
33 the second state or fraudulently. Under Section 611(b) the
34 purchaser may sue the seller in the purchaser's state and then
35 bring an action on the judgment in the seller's state. The
36 constitutionality of this type of statute has long been sustained.

37 4. This section was originally based on the type of
38 nonresident motorist statute whose constitutionality was
39 sustained in *Hess v. Pawlowski*, 274 U.S. 352 (1927) and
40 subsequently in other contexts. See, e.g., *International Shoe Co.*
41 *v. State of Wash.*, 326 U.S. 310 (1945); *Travelers Health Ass'n v.*
42 *Commonwealth of Va.*, 339 U.S. 643 (1950).

43 **§16612. Liability of control persons**

44 In an administrative action brought by the administrator, or
45 a civil action brought by the Attorney General for a violation of
46

2 any provision of this chapter or any rule or order adopted or
4 issued by the administrator pursuant to this chapter, every
6 person who directly or indirectly controls another person liable
8 for the violation, every partner, officer or director of that
10 other person, every person occupying a similar status or
12 performing similar functions, every employee of that other person
14 who materially aids in the act or transaction constituting the
16 violation and every broker-dealer, agent, investment adviser or
18 investment adviser representative who materially aids in the act
20 or transaction constituting the violation is liable to the same
22 extent as that other person, unless the person otherwise
24 secondarily liable under this chapter proves that the person did
26 not know, and in the exercise of reasonable care could not have
28 known, of the existence of the facts by reason of which the
30 liability is alleged to exist. Any of the remedies authorized by
32 section 16603, subsection 2 may be granted with respect to a
34 person secondarily liable under this section. This section is not
36 intended to abrogate any right to contribution that may exist at
38 common law with respect to an award of restitution.

22 **Maine Comments**

24 1. In the model Uniform Securities Act, Section 612 was a
26 severability provision that was not necessary in Maine because of
28 the general severability section in Title 1 of the Maine Revised
30 Statutes.

32 2. Section 16612: Maine has added this section based on a
34 provision in the Revised Maine Securities Act, section 10602(3),
36 allowing for control person liability in administrative
38 proceedings and in civil actions brought by the Attorney General.

34 **§16613. Administrative determination of abandonment**

36 A pending license application, registration statement,
38 exemption filing or notice filing may be considered abandoned if
40 the administrator has not received a response to inquiries or
42 deficiency notices for a period of at least 120 days. The
44 administrator shall send an abandonment notice to the last known
46 address of the applicant or filer. The applicant or filer must
48 respond to the abandonment notice within 30 days to avoid an
50 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.

50 **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 January 1, 2006.

§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.

2 Prior law governs all suits, actions, prosecutions, or
proceedings which are pending or may be initiated on the basis of
4 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).

6
8 **PART B**

10 **Sec. B-1. 24-A MRSA §2517, sub-§3** is enacted to read:

12 3. The superintendent shall adopt rules regarding the
14 suitability of sales of annuities for the purpose of protecting
the consumer and furthering uniformity of laws with other
16 states. Rules adopted pursuant to this section are routine
technical rules pursuant to Title 5, chapter 375, subchapter 2-A.

18
20 **PART C**

22 **Sec. C-1. 4 MRSA §152, sub-§9**, as amended by PL 2001, c. 229,
§1, is further amended to read:

24 **9. Licensing jurisdiction.** Except as provided in Title 5,
26 section 10004; Title 8, section 279-B; Title 10, section 8003,
subsection 5; Title 20-A, sections 10712 and 10713; Title 29-A;
28 Title 32, chapters 2-B, ~~105~~ and 114 and 135; and Title 35-A,
section 3132, exclusive jurisdiction upon complaint of an agency
30 or, if the licensing agency fails or refuses to act within a
reasonable time, upon complaint of the Attorney General to revoke
32 or suspend licenses issued by the agency. The District Court has
original jurisdiction upon complaint of a licensing agency to
34 determine whether renewal or reissuance of a license of that
agency may be refused. The District Court has original
36 concurrent jurisdiction to grant equitable relief in proceedings
initiated by an agency or the Department of the Attorney General
alleging any violation of a license or licensing laws or rules.

38
40 Notwithstanding any other provisions of law, a licensing agency
may not reinstate or otherwise affect a license suspended,
42 revoked or modified by the District Court pursuant to a complaint
filed by the Attorney General without the approval of the
Attorney General;

44
46 **Sec. C-2. 5 MRSA §194-B, sub-§2, ¶B**, as enacted by PL 2001, c.
550, Pt. A, §2, is amended to read:

48 B. Sales or transfers for fair market value of:

2 (1) Any interest in property owned by the public
3 charity or any wholly owned subsidiary, the net
4 proceeds of which are paid solely to the public charity
5 or any wholly owned subsidiary; or

6 (2) Money or monetary equivalents owned by a public
7 charity or any wholly owned subsidiary in exchange for
8 an interest in property, including securities as
9 defined in Title 32, section ~~10501~~ 16102, subsection ~~18~~
10 28, to be held by the public charity or any wholly
11 owned subsidiary;

12 **Sec. C-3. 5 MRSA §10051, sub-§1**, as amended by PL 2003, c.
13 505, §1, is further amended to read:

14 **1. Jurisdiction.** Except as provided in section 10004;
15 Title 8, section 279-B; Title 10, section 8003; Title 20-A,
16 sections 10712 and 10713; Title 29-A; and Title 32, chapters 2-B,
17 ~~105--and~~ 114 and 135, the District Court has exclusive
18 jurisdiction upon complaint of any agency or, if the licensing
19 agency fails or refuses to act within a reasonable time, upon
20 complaint of the Attorney General to revoke or suspend licenses
21 issued by the agency and has original jurisdiction upon complaint
22 of an agency to determine whether renewal or reissuance of a
23 license of that agency may be refused.

24 **Sec. C-4. 9-A MRSA §3-506**, as amended by PL 1987, c. 129,
25 §62, is further amended to read:

26 **§3-506. Limitation**

27 This Part ~~shall~~ does not apply to any transaction covered by
28 section 8-204, nor ~~shall~~ does it apply to any sale, by any dealer
29 or agent or salesman of a registered dealer, registered pursuant
30 to Title 32, chapter ~~105~~ 135, of stocks, bonds, debentures or
31 securities representing stocks, bonds or debentures registered
32 pursuant to Title 32, chapter ~~105~~ 135 or expressly exempt from
33 registration thereof.

34 **Sec. C-5. 9-B MRSA §1053, sub-§4, ¶B**, as enacted by PL 1993,
35 c. 257, §6, is amended to read:

36 B. Offers or sales that are exempt from registration by
37 virtue of Title 32, section ~~10502,--subsection-2,--paragraph~~
38 ~~E,--N--or--R~~ 16202, subsections 16, 19 or 26.

39 **Sec. C-6. 10 MRSA §1210-B, sub-§3**, as enacted by PL 2001, c.
40 471, Pt. E, §2, is amended to read:

2 **3. Securities.** A sale by a dealer or agent or salesman of
a dealer registered pursuant to Title 32, chapter ~~105~~ 135 of
4 stocks, bonds, debentures or securities representing stocks,
bonds or debentures registered pursuant to Title 32, chapter ~~105~~
6 135 or expressly exempt from registration pursuant to Title 32,
chapter ~~105~~ 135;

8 **Sec. C-7. 13 MRSA §1756, last ¶,** as enacted by PL 1993, c. 300,
§1, is amended to read:

10 Notwithstanding any other provision of law to the contrary,
12 the offer of membership, shares or other ownership interests in a
cooperative affordable housing corporation or any other
14 corporation or unincorporated association organized for the
primary purpose of providing housing on a cooperative basis as a
16 consumer cooperative under subchapter ~~1~~ 1 or otherwise is not the
offer of a security pursuant to Title 32, chapter ~~105~~ 135 or any
18 other provision of law.

20 **Sec. C-8. 14 MRSA §1522, sub-§1, ¶L,** as enacted by PL 1991, c.
9, Pt. G, §2, is amended to read:

22 L. Title 32, section ~~10602~~ 16603;

24 **Sec. C-9. 20-A MRSA §11482,** as enacted by PL 1997, c. 732,
26 §4, is amended to read:

28 **§11482. Exemption from registration**

30 A participation agreement offered pursuant to this chapter
is not a security as defined in Title 32, section ~~10501~~ 16102,
32 subsection ~~18~~ 28. The authority may obtain written advice of
legal counsel or written advice from the United States Securities
34 and Exchange Commission, or both, that the offering of a
participation agreement is not subject to federal securities laws
36 but is in compliance with those laws and is not in violation of
other applicable laws.

38 **Sec. C-10. 24-A MRSA §1402, sub-§4, ¶D,** as amended by PL 1999,
40 c. 225, §2, is further amended to read:

42 D. "Consultant" does not include:

44 (1) An attorney licensed to practice who is actively
practicing law in this State;

46 (2) An insurance actuary and member or associate of
48 the Society of Actuaries or American Academy of
Actuaries;

50

- 2 (3) A public accountant certified under Title 32,
chapter 113 or a certified public accountant who is
4 certified under Title 32, chapter 113 and in active
public practice;
- 6 (4) A licensed insurance producer who receives a fee
8 in lieu of a commission pursuant to section 1450 if the
insurance producer receives a fee for the insurance
transaction and not for other services provided;
- 10 (5) A financial institution or a financial institution
12 holding company if the insurance advice is given as
part of its trust department rendering insurance advice
14 in a fiduciary capacity; or
- 16 (6) A person authorized to act as or on behalf of an
investment advisor in accordance with Title 32, section
18 ~~10303 and 10304, subsection 2-A~~ 16403 and 16404 to the
extent such activities entail providing insurance
20 advice incidental to financial planning advice.

22 **Sec. C-11. 24-A MRSA §3489, sub-§1, ¶C**, as enacted by PL 1999,
c. 656, §5, is amended to read:

- 24 C. "Public offering" means an offer that includes an offer
26 to individuals that is made by means of public advertising
or general solicitation. "Public offering" does not include:
- 28 (1) Issuance of stock to the mutual holding company or
30 any related stock holding company; or
 - 32 (2) An offer or sale that is exempt from registration
34 by virtue of Title 32, section ~~10502, subsection 2,~~
paragraph ~~I, L, N, O or R~~ 16202, subsections 13, 15,
36 16, 19 or 25.

38 **Sec. C-12. 24-A MRSA §3489, sub-§6**, as enacted by PL 1999, c.
656, §5, is amended to read:

40 **6. Membership interest.** A membership interest in a mutual
42 holding company does not constitute a security under Title 32,
section ~~10501~~ 16102, subsection ~~18~~ 28 or any other law of this
44 State and is not transferable.

46 **Sec. C-13. 24-A MRSA §6208, 2nd ¶**, as amended by PL 2001, c.
182, §8, is further amended to read:

48 If a registration statement for the cooperative is filed
with the Office of Securities, pursuant to the Revised Maine
50 Uniform Securities Act, Title 32, chapter ~~105~~ 135, a copy must be

2 simultaneously filed with the superintendent and a copy must be
3 given to every purchaser of a membership interest or share in the
4 cooperative at least 10 days prior to the sale of the interest or
5 share. Any information required to be filed with the
6 superintendent pursuant to this chapter and contained in the
7 referenced registration materials may be filed in that format
8 with the superintendent and need not be submitted under separate
9 cover. If a registration statement is not filed with the Office
10 of Securities, a disclosure statement containing, to the extent
11 applicable, all the information required to register a security
12 by qualification, pursuant to Title 32, section 10404 16304, must
13 be filed with the superintendent and given to every subscriber at
14 least 10 days prior to the sale. In the alternative, a provider
15 may elect to provide each subscriber a disclosure statement
16 containing those provisions stated in section 6209 determined to
be required by the superintendent.

18 **Sec. C-14. 24-A MRSA §6815, sub-§2**, as amended by PL 2003, c.
19 636, §15, is further amended to read:

20 **2. Securities registration.** Any sale by a settlement
21 provider of settlement contracts, policies acquired pursuant to
22 settlement contracts or interests therein that constitute a
23 "security" within the meaning of the United States Securities Act
24 of 1933, as amended, or the Revised Maine Uniform Securities Act,
25 as amended, must be registered under those statutes unless there
26 is an available exemption from registration under those statutes.
27

28 **Sec. C-15. 24-A MRSA §6815-A**, as enacted by PL 2003, c. 636,
29 §16, is amended to read:

32 **§6815-A. Regulatory requirements under Maine Uniform**
33 **Securities Act**

34 This chapter does not preempt the regulatory requirements
35 set forth in the Revised Maine Uniform Securities Act, as
36 amended, including but not limited to the regulation of
37 securities transactions in settlement contracts or viatical
38 settlement contracts and the licensing of any person or entity
39 engaged in the sale of securities.
40

42 **Sec. C-16. 32 MRSA §1401, sub-§1, ¶B**, as enacted by PL 1999,
43 c. 258, §2 and affected by §3, is amended to read:

44 **B.** The payee shall deposit the money in either a federally
45 insured deposit or share account or a trust account; the
46 type of account must be disclosed to the payor or the
47 payor's representative and a deposit in a trust account may
48 be invested in or used to purchase only the following:
49
50

2 (1) Federally insured deposit or share accounts;

4 (2) Securities issued, insured or guaranteed by the
United States or by any agency or corporate or other
instrumentality of the United States;

6 (3) Municipal securities that are exempt from
8 registration under Title 32, section ~~10502~~ 16201,
subsection 1, ~~paragraph-A~~; and

10 (4) Permanent life insurance, other than variable life
12 insurance and annuities, from an insurer authorized to
transact insurance in this State, subject to the
14 provisions of Title 24-A, chapter 27. A payee or
mortuary trustee may not receive any commission, fee or
16 other consideration from an insurer in connection with
the procurement or purchase of insurance permitted by
18 this subparagraph.

20 Except for fees allowed by this section, all investments
made with trust assets remain trust assets.

22 **Sec. C-17. 32 MRSA §4668, sub-§1, ¶C**, as enacted by PL 2001,
24 c. 276, §1, is amended to read:

26 C. A sale by a dealer or agent or salesman of a dealer
registered pursuant to chapter ~~105~~ 135 of stocks, bonds,
28 debentures or securities representing stocks, bonds or
debentures registered pursuant to chapter ~~105~~ 135 or
30 expressly exempt from registration pursuant to chapter ~~105~~
135;

32 **Sec. C-18. 32 MRSA §11208**, as amended by PL 1989, c. 542,
34 §74, is further amended to read:

36 **§11208. Securities laws unaffected**

38 Nothing in this chapter impairs, derogates or otherwise
affects the authority or powers of the administrator under the
40 Revised Maine Uniform Securities Act or the application of any
provision to that Act to any person or transaction subject to
42 that Act.

44 **Sec. C-19. 32 MRSA §14701, sub-§4**, as enacted by PL 2001, c.
324, §12, is amended to read:

46 **4. Merchandise.** "Merchandise" includes any objects, wares,
48 goods, promises, commodities, intangibles, services or other
things of value but does not include food or technical or
50 vocational schools located outside of the State that are

2 registered pursuant to Title 20-A, section 9501. "Merchandise"
does not include securities that are registered or exempt from
4 registration pursuant to chapter ~~105~~ 135, the Revised Maine
Uniform Securities Act and rules adopted pursuant to that Act.

6 **Sec. C-20. 38 MRSA §2212, sub-§15**, as enacted by PL 1989, c.
585, Pt. A, §7, is amended to read:

8
10 **15. Application.** Provide financial assistance by means of
revenue obligation securities which are not subject to Title 32,
chapter ~~105~~ 135, relating to dealers in securities.

12

14

SUMMARY

16

Part A of this bill enacts the Maine Uniform Securities Act.

18

Part B authorizes the Superintendent of Insurance to adopt
certain rules.

20

Part C corrects cross references.