

# UNIFORM SECURITIES ACT

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS ON  
UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

*at its*

ANNUAL CONFERENCE  
MEETING IN ITS SIXTY-FIFTH YEAR  
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WITH  
COMMENTS

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## PREFATORY NOTE

The Uniform Securities Act was drafted at the request of the Conference by Professor Louis Loss of the Harvard Law School together with Mr. Edward M. Cowett as Research Associate. The Act followed a two-year Study of State Securities Regulation made in consultation with an Advisory Committee containing representatives of the Conference, the American Bar Association, the National Association of Securities Administrators, the Securities and Exchange Commission, the Investment Bankers Association of America, and the National Association of Securities Dealers, Inc., as well as several practicing lawyers with experience in "blue sky law."

The comments included here are the official comments of the Conference. The Act together with the unofficial section-by-section comments of the draftsmen appear as an appendix in Loss and Cowett on "Blue Sky Law," published by Little, Brown & Co. in early 1957. The draftsmen's comments are considerably more detailed than the official comments and also describe generally the existing law. No inference of disagreement with the draftsmen's comments is to be drawn from the non-inclusion of all those comments here. The emphasis here is on brevity.

## UNIFORM SECURITIES ACT

### AN ACT

[Relating to securities; prohibiting fraudulent practices in relation thereto; requiring the registration of broker-dealers, agents, investment advisers, and securities; and making uniform the law with reference thereto:]

[*Be it enacted . . .*]

#### COMMENT

The Uniform Securities Act, as approved by the National Conference of Commissioners on Uniform State Laws on August 25, 1956, is in four parts. The first three parts represent the three basic "blue sky" philosophies: (I) the "fraud" approach, (II) registration of broker-dealers, agents, and investment advisers, and (III) registration of securities. Part IV contains those general provisions (definitions, exemptions, judicial review, investigatory, injunctive and criminal provisions, etc.) which are essential in varying degrees under any of the three basic philosophies.

The first three parts are designed to stand alone or in any combination. Appendix A specifies the changes required to be made in the Act if Part III is deleted. Appendix B specifies those portions of Part IV which are required for only a "fraud" type of statute (Part I).

The Act lends itself to four alternate treatments of investment advisers. These are specified in Appendix C.

A state which enacts only Part I and the relevant portions of Part IV should delete from the title the words: "requiring the registration of broker-dealers, agents, investment advisers, and securities." A state which enacts only Parts I and II and the relevant portions of Part IV should substitute for those words: "requiring the registration of broker-dealers, agents, and investment advisers."

### PART I

#### FRAUDULENT AND OTHER PROHIBITED PRACTICES

1 SECTION 101. [*Sales and Purchases.*] It is unlawful for any per-  
2 son, in connection with the offer, sale, or purchase of any security,  
3 directly or indirectly  
4 (1) to employ any device, scheme, or artifice to defraud,  
5 (2) to make any untrue statement of a material fact or to omit  
6 to state a material fact necessary in order to make the statements  
7 made, in the light of the circumstances under which they are  
8 made, not misleading, or  
9 (3) to engage in any act, practice, or course of business which op-  
10 erates or would operate as a fraud or deceit upon any person.

#### COMMENT TO § 101

Section 101 is substantially the Securities and Exchange Commission's Rule X-10B-5, 17 Code Fed. Regs. § 240.10b-5, which in turn was modeled upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), except that the rule was expanded to cover the purchase as well as the sale of any security. There are no exemptions from § 101.

The sanctions for the conduct which is made "unlawful" by § 101 (or any other section which makes conduct "unlawful") are found in Parts II, III and IV of the statute. Those sanctions include administrative proceedings of various sorts under §§ 204 and 306 when a registration of a broker-dealer, agent, investment adviser or security is pending or effective under Part II or III; judicial injunction under § 408; and criminal prosecution under § 409. Section 410(h) provides that "unlawful" conduct does not result in civil liability except as provided in § 410.

#### 1 SECTION 102. [*Advisory Activities.*]

2 (a) It is unlawful for any person who receives any considera-  
3 tion from another person primarily for advising the other person  
4 as to the value of securities or their purchase or sale, whether  
5 through the issuance of analyses or reports or otherwise,

6 (1) to employ any device, scheme, or artifice to defraud the  
7 other person, or

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

#### COMMENT TO § 102(a)

This provision is modeled on §§ 206(1) and 206(2) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1) and (2), except that it avoids the use of the term "investment adviser." The definition of "investment adviser" in § 401(f) contains a number of exceptions which look to the registration requirement in Part II. But, as in § 101, there are no exemptions from fraud.

11 (b) It is unlawful for any investment adviser to enter into,  
12 extend, or renew any investment advisory contract unless it pro-  
13 vides in writing

14 (1) that the investment adviser shall not be compensated  
15 on the basis of a share of capital gains upon or capital apprecia-  
16 tion of the funds or any portion of the funds of the client;

17 (2) that no assignment of the contract may be made by the  
18 investment adviser without the consent of the other party to the  
19 contract; and

20 (3) that the investment adviser, if a partnership, shall notify  
21 the other party to the contract of any change in the membership  
22 of the partnership within a reasonable time after the change.

23 Clause (1) does not prohibit an investment advisory contract  
24 which provides for compensation based upon the total value of a  
25 fund averaged over a definite period, or as of definite dates or  
26 taken as of a definite date. "Assignment," as used in clause (2),  
27 includes any direct or indirect transfer or hypothecation of an

28 investment advisory contract by the assignor or of a controlling  
29 block of the assignor's outstanding voting securities by a security  
30 holder of the assignor; but, if the investment adviser is a part-  
31 nership, no assignment of an investment advisory contract is  
32 considered to result from the death or withdrawal of a minority  
33 of the members of the investment adviser having only a minority  
34 interest in the business of the investment adviser, or from the  
35 admission to the investment adviser of one or more members who,  
36 after admission, will be only a minority of the members and will  
37 have only a minority interest in the business.

COMMENT TO § 102(b)

Clauses (1)-(3), together with the first sentence thereafter, are modeled on § 205 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-5. The definition of "assignment" in the last sentence is taken from the definition in § 202(a)(1) of the federal statute, 15 U.S.C. § 80b-2(a)(1). Section 102(b) does not require that the entire contract be in writing. An informal exchange of letters containing the three specified provisions would be sufficient.

38 (c) It is unlawful for any investment adviser to take or have  
39 custody of any securities or funds of any client if  
40 (1) the [Administrator] by rule prohibits custody; or  
41 (2) in the absence of rule, the investment adviser fails to  
42 notify the [Administrator] that he has or may have custody.

COMMENT TO § 102(c)

The Act does not prohibit the same person from being both a broker-dealer and an investment adviser. See the comment under § 201(c). Section 102(c)(1) is sufficiently flexible so that any rules adopted thereunder might be made inapplicable to persons acting in both capacities, or applicable only with respect to those clients who are charged specially for investment advice. Concerning the distinction between broker-dealers and investment advisers, see the comment under § 401(f).

PART II

REGISTRATION OF BROKER-DEALERS,  
AGENTS, AND INVESTMENT ADVISERS.

1 SECTION 201. [*Registration Requirement.*]

2 (a) It is unlawful for any person to transact business in this  
3 state as a broker-dealer or agent unless he is registered under  
4 this act.

COMMENT TO § 201(a)

"Agent" and "broker-dealer" are defined in §§ 401(b) and 401(c). The scope of § 201(a) with reference to the phrase "to transact business in this state" is specified in §§ 414(a) and 414(b).

5 (b) It is unlawful for any broker-dealer or issuer to employ an  
6 agent unless the agent is registered. The registration of an agent

7 is not effective during any period when he is not associated with  
8 a particular broker-dealer registered under this act or a particular  
9 issuer. When an agent begins or terminates a connection with a  
10 broker-dealer or issuer, or begins or terminates those activities  
11 which make him an agent, the agent as well as the broker-dealer or  
12 issuer shall promptly notify the [Administrator].

COMMENT TO § 201(b)

When an agent shifts from one broker-dealer or issuer to another, the last sentence requires all three persons—the agent, the old employer and the new employer—to notify the Administrator.

13 (c) It is unlawful for any person to transact business in this  
14 state as an investment adviser unless (1) he is so registered under  
15 this act, (2) he is registered as a broker-dealer without the im-  
16 position of a condition under section 204(b)(5), or (3) his only  
17 clients in this state are investment companies as defined in the  
18 Investment Company Act of 1940 or insurance companies.

COMMENT TO § 201(c)

*Clause (2)*: The Act permits the same person to exercise both broker-dealer and advisory functions and to do so without dual registration. Clause (2) ties in with § 204(b)(5), which authorizes the Administrator to condition a particular applicant's registration as a broker-dealer upon his not transacting business as an investment adviser if the Administrator finds that he is not qualified as an investment adviser.

*Clause (3)*: This clause is based on § 203(b)(2) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(b)(2), which exempts an investment adviser from registration if his only clients are investment companies and insurance companies. But even such an investment adviser is subject to § 102. Clause (3) also ties into § 401(f)(6); see paragraph 12 of the comment under § 414(a)-(f).

The scope of § 201(c) with reference to the phrase "to transact business in this state" is specified in § 414(f).

19 (d) Every registration expires one year from its effective date  
20 unless renewed. [The [Administrator] by rule or order may  
21 prepare an initial schedule for registration renewals so that sub-  
22 sequent renewals of registrations effective on the effective date  
23 of this Act may be staggered by calendar months. For this pur-  
24 pose the [Administrator] by rule may reduce the registration  
25 fee proportionately.]

COMMENT

The bracketed language is intended for those states where every registration today expires on December 31 or some other fixed date of each year. When any such state goes over to the scheme of § 201(d), the bracketed language will prevent its continuing to be deluged with a mass of renewal applications on the first of every year. Section 418(c) will automatically take care of the situation, without the bracketed language, in those states which already provide that every registration expires one year from its effective date unless renewed.

1 SECTION 202. [Registration Procedure.]

2 (a) A broker-dealer, agent, or investment adviser may obtain  
3 an initial or renewal registration by filing with the [Adminis-  
4 trator] an application together with a consent to service of proc-  
5 ess pursuant to section 414(g). The application shall contain  
6 whatever information the [Administrator] by rule requires con-  
7 cerning such matters as (1) the applicant's form and place of  
8 organization; (2) the applicant's proposed method of doing busi-  
9 ness; (3) the qualifications and business history of the applicant;  
10 in the case of a broker-dealer or investment adviser, the qualifica-  
11 tions and business history of any partner, officer, or director, any  
12 person occupying a similar status or performing similar functions,  
13 or any person directly or indirectly controlling the broker-dealer  
14 or investment adviser; and, in the case of an investment adviser,  
15 the qualifications and business history of any employee; (4) any  
16 injunction or administrative order or conviction of a misdemeanor  
17 involving a security or any aspect of the securities business and  
18 any conviction of a felony; and (5) the applicant's financial con-  
19 dition and history. The [Administrator] may by rule or order  
20 require an applicant for initial registration to publish an an-  
21 nouncement of the application in one or more specified newspapers  
22 published in this state. If no denial order is in effect and no  
23 proceeding is pending under section 204, registration becomes  
24 effective at noon of the thirtieth day after an application is filed.  
25 The [Administrator] may by rule or order specify an earlier effec-  
26 tive date, and [he] may by order defer the effective date until  
27 noon of the thirtieth day after the filing of any amendment.  
28 Registration of a broker-dealer automatically constitutes regis-  
29 tration of any agent who is a partner, officer, or director, or a  
30 person occupying a similar status or performing similar functions.

COMMENT TO § 202(a)

*Second sentence:* This sentence is a conglomerate of a number of the present statutes, as well as the comparable provisions of the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 together with the SEC's Forms BD and ADV for broker-dealers and investment advisers respectively. The language is sufficiently broad to cover everything required by those statutes and forms, and at the same time is sufficiently specific to facilitate the adoption of a uniform form for each of the three types of registration.

*Clause (3):* The phrase "any person occupying a similar status or performing similar functions," which modifies "partner, officer, or director" here and elsewhere in the Act, contemplates unincorporated, non-partnership organizations like Massachusetts trusts.

*Last sentence:* Section 401(b), which defines "agent," provides in its last sentence: "A director, officer, or partner of a broker-dealer or issuer, to a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition." The reasons for that provision are stated

in the comment to that section. But, since § 202(a)(3) contemplates that the qualifications and business history of partners, officers and directors will be disclosed in the application for registration of the partnership or corporation, there is no need to have the same information filed twice. Consequently, under the last sentence of § 202(a) the firm's registration automatically constitutes registration of any agent who is a partner, officer, or director; and, by virtue of this sentence in conjunction with the last sentence of § 401(b), the Administrator, if he deems it appropriate, may institute a proceeding to deny or revoke the registration of a particular partner, officer or director without disturbing the status of the firm. At the same time, the disqualification of a director, officer or partner, as distinct from an ordinary agent, is also a basis for proceeding against the firm's registration if the Administrator finds it in the public interest to do so.

31 [(b) Every applicant for initial or renewal registration shall  
32 pay a filing fee of \$. . . . in the case of a broker-dealer, \$. . . .  
33 in the case of an agent, and \$. . . . in the case of an investment  
34 adviser. When application is denied or withdrawn, the [Adminis-  
35 trator] shall retain \$. . . . of the fee.]

COMMENT TO § 202(b)

The last sentence does not apply when a registration is suspended, revoked or canceled under § 204.

36 (c) A registered broker-dealer or investment adviser may file  
37 an application for registration of a successor, whether or not the  
38 successor is then in existence, for the unexpired portion of the  
39 year. There shall be no filing fee.

COMMENT TO § 202(c)

Section 202(c) is designed to avoid unnecessary interruptions of business by removing any doubt as to the propriety of a predecessor's filing an application for the registration of the successor—for example, when a contemplated change in the membership of a partnership may be considered to result in a new partnership under the local partnership law, or when a partnership or an individual contemplates incorporation. Particularly if the states which adopt this act adopt uniform registration forms which are coordinated with those of the SEC, they may also wish to coordinate their procedure on successions. See SEC Rule X-15B-4, 17 Code Fed. Regs. § 240.15b-4. The regular procedure in § 202(a) concerning the time when an application for registration becomes effective applies also under § 202(c).

40 (d) The [Administrator] may by rule require a minimum  
41 capital for registered broker-dealers and investment advisers.

COMMENT TO § 202(d)

A few states have rules which, instead of prescribing a fixed minimum capital, follow the formula of the SEC and some of the stock exchanges in prescribing a ratio of 15-1 or 20-1 between aggregate indebtedness and net capital. Ill. Rule D-1B; Minn. Reg. VI(a); Wis. Adm. Code s. § 1.01(2). Any state which wants to give its Administrator authority to adopt debt-capital ratio rules should add

the following language at the end of Section 202(d): "or prescribe a ratio between net capital and aggregate indebtedness."

42 (e) The [Administrator] may by rule require registered broker-  
43 dealers, agents, and investment advisers to post surety bonds in  
44 amounts up to \$10,000, and may determine their conditions. Any  
45 appropriate deposit of cash or securities shall be accepted in lieu  
46 of any bond so required. No bond may be required of any regis-  
47 trant whose net capital, which may be defined by rule, exceeds  
48 \$25,000. Every bond shall provide for suit thereon by any per-  
49 son who has a cause of action under section 410 and, if the [Ad-  
50 ministrator] by rule or order requires, by any person who has a  
51 cause of action not arising under this act. Every bond shall pro-  
52 vide that no suit may be maintained to enforce any liability on  
53 the bond unless brought within two years after the sale or other  
54 act upon which it is based.

COMMENT TO § 202(e)

*Second sentence:* The Administrator has no discretion whether to accept a deposit of cash or securities in lieu of a bond, but he does have reasonable discretion to determine whether the amount of the deposit and the type of securities deposited are appropriate.

*Third sentence:* This sentence applies whether or not the Administrator adopts minimum capital rules under § 202(d) or defines "net capital" under § 412(a) for purposes of the third sentence of § 202(e). If he remains silent, the question whether a broker-dealer has a net capital of \$25,000 should be determined in accordance with sound accounting principles.

*Conditions of the bond:* The first and fourth sentences leave the conditions of the bond to the rule-making authority of the Administrator. But the fourth sentence is designed to avoid the frequently ambiguous provisions concerning who may sue on the bond by making those conditions of any required bond coterminous with the liability provisions of § 410 *so far as causes of action under the Act are concerned*. It is left to the Administrator to determine by rule or order whether suits should be allowed also for *defalcations not involving sales of securities*—for example embezzlement of customers' funds or securities. Thus, except for non-statutory causes of action, § 202(e) merely uses the bonding provision to reinforce any recovery which might be obtained under § 410; it creates no new civil liabilities. Since § 410 imposes civil liabilities only upon sellers of securities, any bond required of a person who is solely an investment adviser could apply only to such non-statutory defalcations as the Administrator might prescribe.

*Statute of limitations:* Since § 410(d) provides that every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant, any bond required under § 202(e) must provide that suit may be brought for the specified two-year period even though the person who is bonded dies before the expiration of that period.

1 SECTION 203. [Post-Registration Provisions.]

2 (a) Every registered broker-dealer and investment adviser  
3 shall make and keep such accounts, correspondence, memoranda,  
4 papers, books, and other records as the [Administrator] by rule

5 prescribes. All records so required shall be preserved for three  
6 years unless the [Administrator] by rule prescribes otherwise for  
7 particular types of records.

COMMENT TO § 203(a)

This section is modeled on § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a). It is broad enough to permit a continuation of the practice which exists in several states of requiring registered broker-dealers to keep lists of the securities they are handling.

8 (b) Every registered broker-dealer and investment adviser  
9 shall file such financial reports as the [Administrator] by rule  
10 prescribes.

11 (c) If the information contained in any document filed with  
12 the [Administrator] is or becomes inaccurate or incomplete in  
13 any material respect, the registrant shall promptly file a correct-  
14 ing amendment unless notification of the correction has been  
15 given under section 201(b).

16 (d) All the records referred to in subsection (a) are subject  
17 at any time or from time to time to such reasonable periodic,  
18 special, or other examinations by representatives of the [Ad-  
19 ministrator], within or without this state, as the [Administrator]  
20 deems necessary or appropriate in the public interest or for the  
21 protection of investors. For the purpose of avoiding unnecessary  
22 duplication of examinations, the [Administrator], insofar as [he]  
23 deems it practicable in administering this subsection, may co-  
24 operate with the securities administrators of other states, the  
25 Securities and Exchange Commission, and any national securities  
26 exchange or national securities association registered under the  
27 Securities Exchange Act of 1934.

COMMENT TO § 203(d)

Section 203(d) is modeled on § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a). This is a visitatorial power which is to be distinguished from the power to investigate and issue subpoenas under § 407. No subpoena is necessary under § 203(d). Failure to submit to a reasonable inspection is a violation of the Act, which may result in an action by the Administrator for a mandatory injunction under § 408 or, if willful, a revocation of the broker-dealer's or investment adviser's registration under § 204(a)(2)(B) or a criminal prosecution under § 409.

In some states special fees are charged to defray the cost of examinations. The Act specifically provides for fees only in connection with registration under Parts II and III. Any additional fee provision which may be desired should be inserted in § 406(c).

1 SECTION 204. [Denial, Revocation, Suspension, Cancellation,  
2 and Withdrawal of Registration.]

3 (a) The [Administrator] may by order deny, suspend, or



4 revoke any registration if [he] finds (1) that the order is in  
5 the public interest and (2) that the applicant or registrant or,  
6 in the case of a broker-dealer or investment adviser, any partner,  
7 officer, or director, any person occupying a similar status or  
8 performing similar functions, or any person directly or indirectly  
9 controlling the broker-dealer or investment adviser

10 (A) has filed an application for registration which as of its  
11 effective date, or as of any date after filing in the case of an  
12 order denying effectiveness, was incomplete in any material re-  
13 spect or contained any statement which was, in light of the  
14 circumstances under which it was made, false or misleading  
15 with respect to any material fact;

16 (B) has willfully violated or willfully failed to comply with  
17 any provision of this act or a predecessor act or any rule or  
18 order under this act or a predecessor act;

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

22 (D) is permanently or temporarily enjoined by any court  
23 of competent jurisdiction from engaging in or continuing any con-  
24 duct or practice involving any aspect of the securities business;

25 (E) is the subject of an order of the [Administrator] deny-  
26 ing, suspending, or revoking registration as a broker-dealer,  
27 agent, or investment adviser;

28 (F) is the subject of an order entered within the past five  
29 years by the securities administrator of any other state or by  
30 the Securities and Exchange Commission denying or revoking  
31 registration as a broker-dealer, agent, or investment adviser, or  
32 the substantial equivalent of those terms as defined in this act,  
33 or is the subject of an order of the Securities and Exchange Com-  
34 mission suspending or expelling him from a national securities  
35 exchange or national securities association registered under the  
36 Securities Exchange Act of 1934, or is the subject of a United  
37 States Post Office fraud order; but (i) the [Administrator] may  
38 not institute a revocation or suspension proceeding under clause  
39 (F) more than one year from the date of the order relied on, and  
40 (ii) [he] may not enter an order under clause (F) on the basis  
41 of an order under another state act unless that order was based  
42 on facts which would currently constitute a ground for an order  
43 under this section;

44 (G) has engaged in dishonest or unethical practices in the  
45 securities business;

46 (H) is insolvent, either in the sense that his liabilities ex-  
47 ceed his assets or in the sense that he cannot meet his obliga-  
48 tions as they mature; but the [Administrator] may not enter

49 an order against a broker-dealer or investment adviser under  
50 this clause without a finding of insolvency as to the broker-  
51 dealer or investment adviser; or

52 (I) is not qualified on the basis of such factors as training,  
53 experience, and knowledge of the securities business, except as  
54 otherwise provided in subsection (b).

55 The [Administrator] may by order deny, suspend, or revoke  
56 any registration if [he] finds (1) that the order is in the public  
57 interest and (2) that the applicant or registrant

58 (J) has failed reasonably to supervise his agents if he  
59 is a broker-dealer or his employees if he is an investment  
60 adviser; or

61 (K) has failed to pay the proper filing fee; but the [Ad-  
62 ministrator] may enter only a denial order under this clause,  
63 and [he] shall vacate any such order when the deficiency has  
64 been corrected.

65 The [Administrator] may not institute a suspension or revoca-  
66 tion proceeding on the basis of a fact or transaction known to  
67 [him] when registration became effective unless the proceeding is  
68 instituted within the next thirty days.

COMMENT TO § 204(a)

*First Clause (I):* This clause authorizes the Administrator to proceed against an entire firm merely because an individual partner, officer, director or controlling person is disqualified under one of the specific clauses, but it requires a finding that such action is in the public interest. The disqualification of any other agent, or of an employee of an investment adviser, may not automatically be used against the broker-dealer or the investment adviser. But, when the agent's or employee's disqualification is due to lack of reasonable supervision, the Administrator may proceed against the broker-dealer or the investment adviser under Clause (J). The Administrator's finding on "public interest" will presumably not be judicially reviewable except upon a showing of abuse of discretion. But the requirement that such a finding be made in all cases emphasizes that not every minor or technical infraction is meant to result in a denial, suspension or revocation order.

*Clause (A):* The completeness and accuracy of the application for registration are to be tested as of its *effective date* in a *suspension* or *revocation* proceeding. That is to say, the fact that an application for registration has become misleading by virtue of developments occurring *after* its effective date is not a ground for action under Clause (A). Action in such a case would have to be predicated under Clause (B) upon violation of § 203(c). On the other hand, in a proceeding to *deny* effectiveness to a pending application for registration, the completeness and accuracy of the application cannot be tested as of the effective date. This explains the first "or" clause in Clause (A).

*Clause (B):* As the federal courts and the SEC have construed the term "willfully" in § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required. The princi-

pal function of the word "willfully" is thus to serve as a legislative hint of self-restraint to the Administrator.

*Clause (D)*: The present tense of the word "is" means that an injunction which has expired or been vacated is no longer a ground for action under Clause (D).

*Clause (E)*: This clause is designed to make it clear that, when a person who has had his registration revoked applies for a new registration after an interval, the Administrator does not have to establish again the ground which led to the earlier denial or revocation order.

*Clause (F)*: As in Clause (E), the opening word "is" means that a suspension order which has expired by its terms or an order of any kind which has been vacated is not a ground for action under Clause (F).

*Clause (H)*: The "but" clause makes it clear that a broker-dealer's or investment adviser's insolvency may be used against the broker-dealer or investment adviser, and that an agent's insolvency may be used against the agent, but that an order may not be entered against a broker-dealer or investment adviser on the basis of the insolvency of a partner, officer, director or controlling person under Clause (2).

*Clause (J)*: This clause represents a codification of the view held by a number of Administrators, as well as the SEC, to the effect that a registrant must be held responsible for violations resulting from inadequate supervision of subordinates. This Act, unlike § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), does not authorize the Administrator to proceed against the registration of a *broker-dealer* merely because one of his *agents* has violated the statute (unless the agent happens to be a director, officer or partner). But, when an agent's violation is found to be due to a violation of the broker-dealer's duty of reasonable supervision, and when the Administrator finds that it is in the public interest to proceed against the broker-dealer's registration, he may do so under Clause (J). This is not to say that proof of a violation by the agent is essential to an order under Clause (J).

69 (b) The following provisions govern the application of section  
70 204(a) (2) (I):

71 (1) The [Administrator] may not enter an order against a  
72 broker-dealer on the basis of the lack of qualification of any  
73 person other than (A) the broker-dealer himself if he is an  
74 individual or (B) an agent of the broker-dealer.

75 (2) The [Administrator] may not enter an order against  
76 an investment adviser on the basis of the lack of qualification  
77 of any person other than (A) the investment adviser himself if  
78 he is an individual or (B) any other person who represents the  
79 investment adviser in doing any of the acts which make him an  
80 investment adviser.

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

84 (4) The [Administrator] shall consider that an agent who  
85 will work under the supervision of a registered broker-dealer  
86 need not have the same qualifications as a broker-dealer.

87 (5) The [Administrator] shall consider that an investment  
88 adviser is not necessarily qualified solely on the basis of ex-

89 perience as a broker-dealer or agent. When [he] finds that an  
90 applicant for initial or renewal registration as a broker-dealer  
91 is not qualified as an investment adviser, [he] may by order  
92 condition the applicant's registration as a broker-dealer upon  
93 his not transacting business in this state as an investment  
94 adviser.

95 (6) The [Administrator] may by rule provide for an ex-  
96 amination, which may be written or oral or both, to be taken  
97 by any class of or all applicants, as well as persons who repre-  
98 sent or will represent an investment adviser in doing any of the  
99 acts which make him an investment adviser.

#### COMMENT TO § 204(b)

*Clause (1)-(2)*: These clauses are a limitation upon Clause (2) of § 204(a). Some firms have limited partners or directors who simply supply capital without taking an active role in the firm's business. There is no need for such persons to be qualified.

*Clause (5)*: This is essential in order to avoid double registration by people who act both as broker-dealers and as investment advisers. See the comment under § 201(c)(2).

*Clause (6)*: Examinations may be required of any reasonably defined class of applicants. For example, the Administrator may want to examine only applicants for registration as investment advisers, in which event he will wish to examine also those applicants for broker-dealer registration who intend to perform advisory services for special compensation, so that he may properly administer § 204(b)(5).

100 (c) The [Administrator] may by order summarily postpone  
101 or suspend registration pending final determination of any pro-  
102 ceeding under this section. Upon the entry of the order, the  
103 [Administrator] shall promptly notify the applicant or regis-  
104 trant, as well as the employer or prospective employer if the  
105 applicant or registrant is an agent, that it has been entered and  
106 of the reasons therefor and that within fifteen days after the  
107 receipt of a written request the matter will be set down for  
108 hearing. If no hearing is requested and none is ordered by the  
109 [Administrator], the order will remain in effect until it is modi-  
110 fied or vacated by the [Administrator]. If a hearing is requested  
111 or ordered, the [Administrator], after notice of and opportunity  
112 for hearing, may modify or vacate the order or extend it until  
113 final determination.

114 (d) If the [Administrator] finds that any registrant or appli-  
115 cant for registration is no longer in existence or has ceased to  
116 do business as a broker-dealer, agent, or investment adviser, or  
117 is subject to an adjudication of mental incompetence or to the  
118 control of a committee, conservator, or guardian, or cannot be  
119 located after reasonable search, the [Administrator] may by  
120 order cancel the registration or application.

COMMENT TO § 204(d)

This provision is modeled on § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b). It is designed to regularize the procedure for getting rid of "dead-wood" in the files.

121 (e) Withdrawal from registration as a broker-dealer, agent,  
122 or investment adviser becomes effective thirty days after receipt  
123 of an application to withdraw or within such shorter period of  
124 time as the [Administrator] may determine, unless a revocation  
125 or suspension proceeding is pending when the application is filed  
126 or a proceeding to revoke or suspend or to impose conditions  
127 upon the withdrawal is instituted within thirty days after the  
128 application is filed. If a proceeding is pending or instituted,  
129 withdrawal becomes effective at such time and upon such condi-  
130 tions as the [Administrator] by order determines. If no proceed-  
131 ing is pending or instituted and withdrawal automatically be-  
132 comes effective, the [Administrator] may nevertheless institute  
133 a revocation or suspension proceeding under section 204(a)  
134 (2)(B) within one year after withdrawal became effective and  
135 enter a revocation or suspension order as of the last date on  
136 which registration was effective.

COMMENT TO § 204(e)

This provision is modeled on § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), and SEC Rule X-15B-6, 17 Code Fed. Regs. § 240.15b-6, although the last sentence goes somewhat further. This provision does not affect an applicant's privilege of withdrawing his application for registration *before it becomes effective*. It is simply designed to make it possible to prevent withdrawal of an effective registration under fire. The last sentence is designed to take care of the case where the Administrator does not know of any reason to object to the withdrawal application until after it has become effective; but it is limited to situations where the Administrator can prove a willful violation under § 204(a)(2)(B).

137 (f) No order may be entered under any part of this section  
138 except the first sentence of subsection (c) without (1) appro-  
139 priate prior notice to the applicant or registrant (as well as the  
140 employer or prospective employer if the applicant or registrant  
141 is an agent), (2) opportunity for hearing, and (3) written  
142 findings of fact and conclusions of law.

COMMENT TO § 204(f)

Here, as in other procedural provisions of the statute, the Administrator will also have to consider the requirements of any local Administrative Procedure Act, and these provisions may have to be varied depending upon the language of any such legislation.

PART III

REGISTRATION OF SECURITIES

1 SECTION 301. [*Registration Requirement.*] It is unlawful for  
2 any person to offer or sell any security in this state unless (1) it is  
3 registered under this act or (2) the security or transaction is  
4 exempted under section 402.

COMMENT TO § 301

Section 301 forbids offers as well as sales prior to the effectiveness of a registration statement. "Offer" and "sale" are defined in § 401(j). The 1954 amendment of the Securities Act of 1933 to permit certain types of offers during the waiting period between the filing and the effectiveness of the registration statement is recognized in a special exemption for securities which are in process of registration under both the federal and state statutes. See the comment under § 402(b)(12). "Security" is defined in § 401(1). The scope of § 301 with respect to the phrase "in this state" is specified in § 414(a), (c), (d) and (e).

1 SECTION 302. [*Registration by Notification.*]

2 (a) The following securities may be registered by notification,  
3 whether or not they are also eligible for registration by coordina-  
4 tion under section 303:

5 (1) any security whose issuer and any predecessors have been  
6 in continuous operation for at least five years if (A) there has  
7 been no default during the current fiscal year or within the three  
8 preceding fiscal years in the payment of principal, interest, or  
9 dividends on any security of the issuer (or any predecessor) with  
10 a fixed maturity or a fixed interest or dividend provision, and (B)  
11 the issuer and any predecessors during the past three fiscal years  
12 have had average net earnings, determined in accordance with  
13 generally accepted accounting practices, (i) which are applicable  
14 to all securities without a fixed maturity or a fixed interest or  
15 dividend provision outstanding at the date the registration state-  
16 ment is filed and equal at least five percent of the amount of  
17 such outstanding securities (as measured by the maximum offer-  
18 ing price or the market price on a day, selected by the registrant,  
19 within thirty days before the date of filing the registration state-  
20 ment, whichever is higher, or book value on a day, selected by the  
21 registrant, within ninety days of the date of filing the registra-  
22 tion statement to the extent that there is neither a readily de-  
23 terminable market price nor a cash offering price), or (ii) which,  
24 if the issuer and any predecessors have not had any security of the  
25 type specified in clause (i) outstanding for three full fiscal years,  
26 equal at least five percent of the amount (as measured in clause  
27 (i)) of all securities which will be outstanding if all the securities  
28 being offered or proposed to be offered (whether or not they are  
29 proposed to be registered or offered in this state) are issued;

30 (2) any security (other than a certificate of interest or par-  
31 ticipation in an oil, gas or mining title or lease or in payments  
32 out of production under such a title or lease) registered for non-  
33 issuer distribution if (A) any security of the same class has ever  
34 been registered under this act or a predecessor act, or (B) the  
35 security being registered was originally issued pursuant to an  
36 exemption under this act or a predecessor act.

COMMENT TO § 302(a)

*In general:* The introductory language of § 302(a) makes it clear that, when a particular security is eligible for registration by notification under § 302 as well as registration by coordination under § 303, it is discretionary with the person filing the registration statement to decide which procedure to use.

*Clause (1):* Section 302(a)(1) contains essentially a single earnings test, regardless of the type of security being registered. It applies in substance to any security whose issuer has been in continuous operation for five years if (A) there has been no default during the past three full fiscal years on any senior security and (B) the issuer during the past three fiscal years has had average earnings of five percent on its common stock. If the issuer has no outstanding securities of the types specified in Clause(A), it is necessary to satisfy only Clause (B). Under Clause (i) the five-percent test is applied to all outstanding securities at the date the registration statement is *filed*, and those securities are measured by the *offering price* (when additional securities are being offered) or by the *market price*, whichever is higher. In order to permit the calculation to be made so as to determine whether the notification procedure is available, the parenthetical clause within Clause (i) permits the person filing the registration statement to use the market price on any day within thirty days before the date of filing. The phrase "maximum offering price" means the highest price at which any of the securities are offered when they are offered to different people at different prices, as when they are offered to existing stockholders at a lower price than to the public generally. The phrase does not mean the maximum *proposed* offering price referred to in § 303(c)(3). See the comment under that section. But as a practical matter, since the market price and hence the offering price may go up while the registration statement is pending, it will not be safe to rely on the notification procedure unless the five-percent test is satisfied on the basis of the *maximum proposed offering price*. The five-percent test is applied to *book value* only when there is no readily determinable market price for the security being offered and there is no cash offering price either, as when the offering is made in exchange with security holders of another issuer, or with existing security holders of the same issuer under such circumstances that the exemption in § 402(b)(11) is not available.

*Clause (1)(B)(ii):* Clause (ii) is designed to take care of the case where a corporate registrant (or perhaps a business trust or a limited partnership) has succeeded within the past three years to a business previously conducted by a sole proprietor or a general partnership, so that the five-year requirement at the beginning of § 302(a)(1) would be satisfied but it would be impossible to satisfy the three-year earnings test for want of any outstanding securities during all of that period. Under Clause (ii) the five-percent earnings test is applied in such a case to all securities to be outstanding *after the conclusion of the offering*.

*Clause (1) as applied to senior securities:* Under Clause (B) the five-percent earnings test on common stock must be satisfied even though the security being

offered is a preferred stock or a bond. This affords some margin of safety beyond the requirement in Clause (A) that there shall have been no default.

*Clause (2):* Oil, gas and mineral interests are excluded because they have no "issuer" as that term is defined in § 401(g)(2) and hence all distributions of such securities would be eligible for notification if they were not excluded.

37 (b) A registration statement under this section shall contain the  
38 following information and be accompanied by the following docu-  
39 ments in addition to the information specified in section 305(c)  
40 and the consent to service of process required by section 414(g):

41 (1) a statement demonstrating eligibility for registration by  
42 notification;

43 (2) with respect to the issuer and any significant subsidiary:  
44 its name, address, and form of organization; the state (or foreign  
45 jurisdiction) and the date of its organization; and the general  
46 character and location of its business;

47 (3) with respect to any person on whose behalf any part of  
48 the offering is to be made in a non-issuer distribution: his name  
49 and address; the amount of securities of the issuer held by him  
50 as of the date of the filing of the registration statement; and a  
51 statement of his reasons for making the offering;

52 (4) a description of the security being registered;

53 (5) the information and documents specified in clauses (8),  
54 (10), and (12) of section 304(b); and

55 (6) in the case of any registration under section 302(a)(2)  
56 which does not also satisfy the conditions of section 302(a)(1), a  
57 balance sheet of the issuer as of a date within four months prior to  
58 the filing of the registration statement, and a summary of earnings  
59 for each of the two fiscal years preceding the date of the balance  
60 sheet and for any period between the close of the last fiscal year  
61 and the date of the balance sheet, or for the period of the issuer's  
62 and any predecessors' existence if less than two years.

COMMENT TO § 302(b)

This section is designed to supply enough information to enable the Administrator to apply the stop-order standards which uniformly govern all registration statements whether by notification, qualification or coordination. In the case of a primary offering being registered under § 302(a)(1), clause (1) requires basic financial information by way of demonstrating eligibility for the notification procedure. Clause (6) assures a modicum of financial information in the case of a non-issuer distribution which is eligible for the notification procedure solely because of § 302(a)(2). With respect to non-issuer distributions, see the comment under § 305(i).

63 (c) If no stop order is in effect and no proceeding is pending  
64 under section 306, a registration statement under this section auto-  
65 matically becomes effective at [three o'clock Eastern Standard  
66 Time] in the afternoon of the second full business day after the

67 filing of the registration statement or the last amendment, or at  
68 such earlier time as the [Administrator] determines.

COMMENT TO § 302(c)

States in other time zones should substitute "two o'clock Central Standard Time" or "one o'clock Mountain Standard Time" or "noon Pacific Standard Time." Flexibility to take care of emergencies or unusual situations is afforded by authorizing the Administrator to accelerate the effective date. He may do this almost routinely as the SEC does, so as not to require a waiting period of two days after the filing of the price amendment.

1 SECTION 303. [Registration by Coordination.]

2 (a) Any security for which a registration statement has been  
3 filed under the Securities Act of 1933 in connection with the same  
4 offering may be registered by coordination.

COMMENT TO § 303(a)

Section 303 streamlines the *content* of the registration statement and the *procedure* by which it becomes effective, but not the *substantive standards* governing its effectiveness. The same stop-order standards specified in § 306 govern all three types of registration—notification, coordination and qualification.

The phrase "in connection with the same offering" does not require that the federal and state registration statements either be filed simultaneously or become effective simultaneously. Thus a registration statement by coordination might be filed in a particular state shortly after the effectiveness of the federal registration statement, although the Administrator would be free to decide that it was not "the same offering" if the interval was too great.

In the case of those investment companies which offer their securities continually by filing periodic amendments to their federal registration statements under the special procedure afforded by § 24(e) of the Investment Company Act of 1940 [see the comment under § 305(k)], conceptually each such amendment represents a new "offering." That is to say, every amendment filed with the SEC under § 24(e) is in substance a new registration statement. Hence it is contemplated that securities so registered with the SEC may be registered under this Act by coordination so long as the interval between the filing of the SEC amendment and the filing under this Act is not too great. Any question as to the propriety of this construction may be readily resolved by the adoption of a definitional rule under § 412(a) providing, in substance, that the term "registration statement" as used in § 303(a) includes an amendment filed under § 24(e) of the Investment Company Act of 1940.

5 (b) A registration statement under this section shall contain  
6 the following information and be accompanied by the following  
7 documents in addition to the information specified in section  
8 305(c) and the consent to service of process required by section  
9 414(g):

10 (1) three copies of the latest form of prospectus filed  
11 under the Securities Act of 1933;

12 (2) if the [Administrator] by rule or otherwise requires, a  
13 copy of the articles of incorporation and by-laws (or their sub-

14 stantial equivalents) currently in effect, a copy of any agreements  
15 with or among underwriters, a copy of any indenture or other  
16 instrument governing the issuance of the security to be registered,  
17 and a specimen or copy of the security;

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

21 (4) an undertaking to forward all future amendments to  
22 the federal prospectus, other than an amendment which merely  
23 delays the effective date of the registration statement, promptly  
24 and in any event not later than the first business day after the  
25 day they are forwarded to or filed with the Securities and Ex-  
26 change Commission, whichever first occurs.

COMMENT TO § 303(b)

Section 303(b) limits the Administrator to requiring only such information as is filed with the SEC. Concerning § 303(b)(4), see the comment under § 303(c).

27 (c) A registration statement under this section automatically  
28 becomes effective at the moment the federal registration statement  
29 becomes effective if all the following conditions are satisfied: (1)  
30 no stop order is in effect and no proceeding is pending under  
31 section 306; (2) the registration statement has been on file with  
32 the [Administrator] for at least ten days; and (3) a statement  
33 of the maximum and minimum proposed offering prices and the  
34 maximum underwriting discounts and commissions has been on  
35 file for two full business days or such shorter period as the [Ad-  
36 ministrator] permits by rule or otherwise and the offering is made  
37 within those limitations. The registrant shall promptly notify the  
38 [Administrator] by telephone or telegram of the date and time  
39 when the federal registration statement became effective and the  
40 content of the price amendment, if any, and shall promptly file  
41 a post-effective amendment containing the information and docu-  
42 ments in the price amendment. "Price amendment" means the  
43 final federal amendment which includes a statement of the offering  
44 price, underwriting and selling discounts or commissions, amount  
45 of proceeds, conversion rates, call prices, and other matters de-  
46 pendent upon the offering price. Upon failure to receive the  
47 required notification and post-effective amendment with respect  
48 to the price amendment, the [Administrator] may enter a stop  
49 order, without notice or hearing, retroactively denying effective-  
50 ness to the registration statement or suspending its effectiveness  
51 until compliance with this subsection, if [he] promptly notifies  
52 the registrant by telephone or telegram (and promptly confirms  
53 by letter or telegram when [he] notifies by telephone) of the

54 issuance of the order. If the registrant proves compliance with  
55 the requirements of this subsection as to notice and post-effective  
56 amendment, the stop order is void as of the time of its entry.  
57 The [Administrator] may by rule or otherwise waive either or  
58 both of the conditions specified in clauses (2) and (3). If the  
59 federal registration statement becomes effective before all the  
60 conditions in this subsection are satisfied and they are not  
61 waived, the registration statement automatically becomes effec-  
62 tive as soon as all the conditions are satisfied. If the registrant  
63 advises the [Administrator] of the date when the federal regis-  
64 tration statement is expected to become effective, the [Adminis-  
65 trator] shall promptly advise the registrant by telephone or  
66 telegram, at the registrant's expense, whether all the conditions  
67 are satisfied and whether [he] then contemplates the institu-  
68 tion of a proceeding under section 306; but this advice by the  
69 [Administrator] does not preclude the institution of such a  
70 proceeding at any time.

#### COMMENT TO § 303(c)

Section 303(c) is designed to achieve simultaneous effectiveness at the federal and state levels without impinging upon the Administrator's duty to test the registration statement under the substantive standards imposed by § 306.

In order for the registration statement to become effective automatically when it becomes effective at the SEC, all the conditions specified in Clauses (1)-(3) must be satisfied unless the Administrator waives one or more of them.

Under § 303(b)(4) the registration statement when it is filed must be accompanied by an undertaking to forward all amendments to the federal registration statement. There is an exception for an amendment which merely delays the federal effective date. This refers to the practice whereby, if twenty days have expired since the filing of the last federal amendment and the registration statement has not yet been corrected to the satisfaction of the SEC, the registrant files an amendment merely changing the filing date, thus starting another twenty-day period running and avoiding the necessity of the Commission's instituting a proceeding to prevent automatic effectiveness. Sometimes amendments are mailed to the SEC and sometimes they are filed manually. When they are mailed they are not "filed" under § 413(a) until they are received, and in that event they will have to be forwarded to the Administrator not later than the first business day after they are sent to the SEC. Under § 306(a)(2)(H) failure to comply with the required undertaking is *per se* a basis for a stop order.

Clause (3) and the next three sentences are addressed to the problem of getting to the Administrator the content of the federal *price amendment* in the short interval (seldom more than twenty-four hours) which usually elapses between its filing and the effectiveness of the federal registrant statement. Clause (3) enables the Administrator to apply the stop-order test in § 306(a)(2)(F) by comparing the *maximum* underwriting commissions with the *minimum* offering price, and to apply the test in § 306(a)(2)(E) by reference to the maximum proposed offering price. Section 410(a)(1) imposes an absolute civil liability upon any person who "offers or sells a security in violation of section \* \* \* 301," and § 410(f) makes the contract unenforceable. But under the fourth and fifth sentences the

validity of offers and sales in the state is not affected unless the registrant was at fault.

The last sentence makes it possible for counsel for the registrant or the underwriter to give a firm opinion to his client that all the conditions of § 303(c) have been satisfied, although it *requires* nothing further of the registrant.

#### 1 SECTION 304. [*Registration by Qualification.*]

2 (a) Any security may be registered by qualification.

3 (b) A registration statement under this section shall contain  
4 the following information and be accompanied by the following  
5 documents in addition to the information specified in section  
6 305(c) and the consent to service of process required by section  
7 414(g):

8 (1) with respect to the issuer and any significant sub-  
9 sidiary: its name, address, and form of organization; the state  
10 or foreign jurisdiction and date of its organization; the general  
11 character and location of its business; a description of its  
12 physical properties and equipment; and a statement of the  
13 general competitive conditions in the industry or business in  
14 which it is or will be engaged;

15 (2) with respect to every director and officer of the issuer,  
16 or person occupying a similar status or performing similar  
17 functions: his name, address, and principal occupation for the  
18 past five years; the amount of securities of the issuer held by  
19 him as of a specified date within thirty days of the filing of  
20 the registration statement; the amount of the securities covered  
21 by the registration statement to which he has indicated his  
22 intention to subscribe; and a description of any material in-  
23 terest in any material transaction with the issuer or any sig-  
24 nificant subsidiary effected within the past three years or  
25 proposed to be effected;

26 (3) with respect to persons covered by clause (2): the  
27 remuneration paid during the past twelve months and estimated  
28 to be paid during the next twelve months, directly or in-  
29 directly, by the issuer (together with all predecessors, parents,  
30 subsidiaries, and affiliates) to all those persons in the aggre-  
31 gate;

32 (4) with respect to any person owning of record, or bene-  
33 ficially if known, ten percent or more of the outstanding shares  
34 of any class of equity security of the issuer: the information  
35 specified in clause (2) other than his occupation;

36 (5) with respect to every promoter if the issuer was or-  
37 ganized within the past three years: the information specified  
38 in clause (2), any amount paid to him within that period or  
39 intended to be paid to him, and the consideration for any such  
40 payment;

41 (6) with respect to any person on whose behalf any part  
42 of the offering is to be made in a non-issuer distribution: his  
43 name and address; the amount of securities of the issuer held  
44 by him as of the date of the filing of the registration statement;  
45 a description of any material interest in any material transac-  
46 tion with the issuer or any significant subsidiary effected within  
47 the past three years or proposed to be effected; and a statement  
48 of his reasons for making the offering;

49 (7) the capitalization and long-term debt (on both a cur-  
50 rent and a pro forma basis) of the issuer and any significant  
51 subsidiary, including a description of each security outstanding  
52 or being registered or otherwise offered, and a statement of  
53 the amount and kind of consideration (whether in the form of  
54 cash, physical assets, services, patents, goodwill, or anything  
55 else) for which the issuer or any subsidiary has issued any of  
56 its securities within the past two years or is obligated to issue  
57 any of its securities;

58 (8) the kind and amount of securities to be offered; the  
59 proposed offering price or the method by which it is to be  
60 computed; any variation therefrom at which any proportion of  
61 the offering is to be made to any person or class of persons  
62 other than the underwriters, with a specification of any such  
63 person or class; the basis upon which the offering is to be made  
64 if otherwise than for cash; the estimated aggregate underwriting  
65 and selling discounts or commissions and finders' fees (including  
66 separately cash, securities, contracts, or anything else of value to  
67 accrue to the underwriters or finders in connection with the offer-  
68 ing) or, if the selling discounts or commissions are variable, the  
69 basis of determining them and their maximum and minimum  
70 amounts; the estimated amounts of other selling expenses, includ-  
71 ing legal, engineering, and accounting charges; the name and ad-  
72 dress of every underwriter and every recipient of a finder's fee; a  
73 copy of any underwriting or selling-group agreement pursuant to  
74 which the distribution is to be made, or the proposed form of any  
75 such agreement whose terms have not yet been determined; and  
76 a description of the plan of distribution of any securities which  
77 are to be offered otherwise than through an underwriter;

78 (9) the estimated cash proceeds to be received by the  
79 issuer from the offering; the purposes for which the proceeds  
80 are to be used by the issuer; the amount to be used for each  
81 purpose; the order or priority in which the proceeds will be  
82 used for the purposes stated; the amounts of any funds to be  
83 raised from other sources to achieve the purposes stated; the  
84 sources of any such funds; and, if any part of the proceeds  
85 is to be used to acquire any property (including goodwill)

86 otherwise than in the ordinary course of business, the names  
87 and addresses of the vendors, the purchase price, the names of  
88 any persons who have received commissions in connection with  
89 the acquisition, and the amounts of any such commissions and  
90 any other expense in connection with the acquisition (including  
91 the cost of borrowing money to finance the acquisition);

92 (10) a description of any stock options or other security  
93 options outstanding, or to be created in connection with the  
94 offering, together with the amount of any such options held  
95 or to be held by every person required to be named in clause  
96 (2), (4), (5), (6), or (8) and by any person who holds or will  
97 hold ten percent or more in the aggregate of any such options;

98 (11) the dates of, parties to, and general effect concisely  
99 stated of, every management or other material contract made  
100 or to be made otherwise than in the ordinary course of busi-  
101 ness if it is to be performed in whole or in part at or after  
102 the filing of the registration statement or was made within the  
103 past two years, together with a copy of every such contract; and  
104 a description of any pending litigation or proceeding to which  
105 the issuer is a party and which materially affects its business  
106 or assets (including any such litigation or proceeding known  
107 to be contemplated by governmental authorities);

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

111 (13) a specimen or copy of the security being registered;  
112 a copy of the issuer's articles of incorporation and by-laws,  
113 or their substantial equivalents, as currently in effect; and a  
114 copy of any indenture or other instrument covering the security  
115 to be registered;

116 (14) a signed or conformed copy of an opinion of counsel  
117 as to the legality of the security being registered (with an  
118 English translation if it is in a foreign language), which shall  
119 state whether the security when sold will be legally issued,  
120 fully paid, and non-assessable, and, if a debt security, a bind-  
121 ing obligation of the issuer;

122 (15) the written consent of any accountant, engineer, ap-  
123 praiser, or other person whose profession gives authority to a  
124 statement made by him, if any such person is named as having  
125 prepared or certified a report or valuation (other than a public  
126 and official document or statement) which is used in connection  
127 with the registration statement;

128 (16) a balance sheet of the issuer as of a date within four  
129 months prior to the filing of the registration statement; a  
130 profit and loss statement and analysis of surplus for each of

131 the three fiscal years preceding the date of the balance sheet  
132 and for any period between the close of the last fiscal year and  
133 the date of the balance sheet, or for the period of the issuer's  
134 and any predecessors' existence if less than three years; and,  
135 if any part of the proceeds of the offering is to be applied to  
136 the purchase of any business, the same financial statements  
137 which would be required if that business were the registrant;  
138 and  
139 (17) such additional information as the [Administrator]  
140 requires by rule or order.

COMMENT TO § 304(b)

Section 304(b) is modeled on Schedule A of the Securities Act of 1933, 15 U.S.C. § 77aa, SEC Form S-1, which is the basic registration form under that act, and a number of the state statutes. Section 305 contains a number of provisions applicable to registration generally, including authority in § 305(e) to reduce the content of the registration statement by rule or otherwise. And § 412(a) gives authority to classify, and adopt different forms for different types of, issues and issuers.

141 (c) A registration statement under this section becomes effective  
142 when the [Administrator] so orders.

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

COMMENT TO § 304(d)

Section 304(d) simply authorizes the Administrator to require the use of a prospectus in those unusual cases where he deems it in the public interest. This Act, unlike the federal statute, is not primarily a disclosure act.

1 SECTION 305. [Provisions Applicable to Registration Generally.]  
2

3 (a) A registration statement may be filed by the issuer, any  
4 other person on whose behalf the offering is to be made, or a  
5 registered broker-dealer.

COMMENT TO § 305(a)

Section 305 contains a number of provisions which are equally applicable to all three types of registration, or in a few cases to two of the three types.

The reference here to "any other person on whose behalf the offering is to be made" is designed for non-issuer distributions. See the comment under § 305(i). This section makes it possible for a local broker-dealer to file a registration statement independently of the issuer or underwriters, especially in coordination cases, so that the issuer and underwriters will not be able to veto the making of an offering and the establishment of a market in any state in which they do not choose to register.

6 [(b) Every person filing a registration statement shall pay  
7 a filing fee of . . . . percent of the maximum aggregate offering  
8 price at which the registered securities are to be offered in this  
9 state, but the fee shall in no case be less than \$. . . . . or  
10 more than \$. . . . . When a registration statement is withdrawn  
11 before the effective date or a pre-effective stop order is  
12 entered under section 306, the [Administrator] shall retain  
13 \$. . . . . of the fee.]

COMMENT TO § 305(b)

On the fee problem with respect to convertible securities and offerings by way of warrants or rights, see the comment under § 401(j)(5).

14 (c) Every registration statement shall specify (1) the amount  
15 of securities to be offered in this state; (2) the states in which  
16 a registration statement or similar document in connection with  
17 the offering has been or is to be filed; and (3) any adverse order,  
18 judgment, or decree entered in connection with the offering by  
19 the regulatory authorities in each state or by any court or the  
20 Securities and Exchange Commission.

COMMENT TO § 305(c)

This section, like every other provision having to do with the content of the registration statement, must be read in the light of the fact that the accuracy and completeness of the registration statement are judged under § 306(a)(2)(A) as of its effective date unless a proceeding to deny effectiveness is instituted before the effective date. That is to say, the registration statement must be kept current with changing developments until the effective date, but it need not be amended thereafter except to correct inaccuracies or deficiencies which existed as of the effective date. If the Administrator wants some or all registration statements to be brought up to date periodically, he may do so by requiring reports under § 305(j).

Clause (3) does not require that notice be given with respect to any order permitting withdrawal of a registration statement. The Administrator may nevertheless require such information in qualification cases under § 304(b)(17).

21 (d) Any document filed under this act or a predecessor act  
22 [within five years preceding the filing of a registration state-



23 ment] may be incorporated by reference in the registration  
24 statement to the extent that the document is currently accurate.

## COMMENT TO § 305(d)

The language in brackets is included only because some states do not keep files indefinitely. If a particular state does not keep files for as long as five years, or if it keeps them longer, some other appropriate figure should be substituted for "five." But if files are kept indefinitely, the bracketed language should be omitted.

25 (e) The [Administrator] may by rule or otherwise permit the  
26 omission of any item of information or document from any regis-  
27 tration statement.

28 (f) In the case of a non-issuer distribution, information may  
29 not be required under section 304 or 305(j) unless it is known  
30 to the person filing the registration statement or to the persons  
31 on whose behalf the distribution is to be made, or can be fur-  
32 nished by them without unreasonable effort or expense.

## COMMENT TO § 305(f)

See paragraph 10 of the comment under § 305(i).

33 (g) The [Administrator] may by rule or order require as a  
34 condition of registration by qualification or coordination (1)  
35 that any security issued within the past three years or to be  
36 issued to a promoter for a consideration substantially different  
37 from the public offering price, or to any person for a considera-  
38 tion other than cash, be deposited in escrow; and (2) that the  
39 proceeds from the sale of the registered security in this state  
40 be impounded until the issuer receives a specified amount from  
41 the sale of the security either in this state or elsewhere. The  
42 [Administrator] may by rule or order determine the conditions  
43 of any escrow or impounding required hereunder, but [he] may  
44 not reject a depository solely because of location in another state.

## COMMENT TO § 305(g)

The "but" clause at the end of the section is designed to break the impasse which arises when each of several Administrators imposes an escrow or impounding requirement and insists that the depository be in his state.

45 (h) The [Administrator] may by rule or order require as a  
46 condition of registration that any security registered by qualifica-  
47 tion or coordination be sold only on a specified form of sub-  
48 scription or sale contract, and that a signed or conformed copy  
49 of each contract be filed with the [Administrator] or preserved  
50 for any period up to three years specified in the rule or order.

This provision is included to take care of the few states in which this regulatory device is used. No implication is intended that this authority should be used by the Administrator in states in which it is not traditional.

51 (i) Every registration statement is effective for one year from  
52 its effective date, or any longer period during which the security  
53 is being offered or distributed in a non-exempted transaction by  
54 or for the account of the issuer or other person on whose behalf  
55 the offering is being made or by any underwriter or broker-dealer  
56 who is still offering part of an unsold allotment or subscription  
57 taken by him as a participant in the distribution, except during  
58 the time a stop order is in effect under section 306. All out-  
59 standing securities of the same class as a registered security are  
60 considered to be registered for the purpose of any non-issuer  
61 transaction (1) so long as the registration statement is effective  
62 and (2) between the thirtieth day after the entry of any stop  
63 order suspending or revoking the effectiveness of the registration  
64 statement under section 306 (if the registration statement did  
65 not relate in whole or in part to a non-issuer distribution) and  
66 one year from the effective date of the registration statement. A  
67 registration statement may not be withdrawn for one year from  
68 its effective date if any securities of the same class are out-  
69 standing. A registration statement may be withdrawn otherwise  
70 only in the discretion of the [Administrator].

71 (j) So long as a registration statement is effective, the [Ad-  
72 ministrator] may by rule or order require the person who filed  
73 the registration statement to file reports, not more often than  
74 quarterly, to keep reasonably current the information contained  
75 in the registration statement and to disclose the progress of the  
76 offering.

COMMENT TO § 305(i), § 305(j) AND RELATED SECTIONS REFERRING TO  
NON-ISSUER DISTRIBUTIONS

The statutory scheme with respect to non-issuer distributions and the related question of how long a registration statement remains effective is as follows:

1. Section 301(a) applies broadly to any offer or sale by any person. Thus, it is literally unlawful for A to sell five shares of X Corp. to B unless there is registration or an exemption.

2. The term "non-issuer" is defined in § 401(h) to mean simply "not directly or indirectly for the benefit of the issuer."

3. Section 402(b)(1) exempts from registration "any isolated non-issuer transaction, whether effected through a broker-dealer or not."

4. When the non-issuer distribution is something more than an "isolated transaction," however that phrase is construed, it may still be exempted under one of the following sections: 402(a)(8), 402(b)(3), 402(b)(6), 402(b)(7), 402(b)(8), or 402(b)(9). See the comments under those sections.

5. Apart from these exemptions of general applicability, § 402(b)(2) affords an

exemption which is specifically designed for certain non-issuer distributions. An Administrator who chooses to do so may keep track of the securities sold under this exemption by requiring under § 203(a) that registered broker-dealers prepare and keep lists of those securities.

6. If no exemption is available for the non-issuer distribution, the security must be registered. Under the first sentence of § 305(i) every registration statement is effective for at least one year and for any longer period during which the security is being distributed, except while a stop order is in effect. Under Clause (1) of the second sentence all outstanding securities "of the same class" as the registered security are considered to be registered for the purpose of any non-issuer transaction so long as the registration statement remains effective. And § 305(j) gives the Administrator power by rule or order to require the registrant to file reports so long as the registration remains effective. With respect to the applicability of § 305(j) to convertible securities and rights offerings, see the comment under § 401(j)(5). The effect is that as long as a registration statement is effective, no matter who has filed it or how many units of the class have been registered, all securities of the same class can be legally traded by anybody as if they were registered.

7. Clause (2) of the second sentence of § 305(i) is designed to take care of the situation where the Administrator finds it necessary to enter a stop order during the year after the effective date. When the registration which thus becomes the subject of a stop order was itself filed in connection with the non-issuer distribution, it would substantially nullify the effect of the stop order to continue to permit a secondary market on the class registration theory of the first sentence of § 305(i). But, when the registration statement related entirely to a primary distribution by the issuer, and a substantial part of the offering was made in the state before the stop order was entered, Clause (2) avoids indefinitely locking the buyers in. Clause (2) stops all trading based on the class registration theory of the first sentence of § 304(i), as distinct from trading based on the "isolated transaction" exemption in § 402(b)(1) or some other exemption, for thirty days after the entry of the stop order, so that the public may become aware of the stop order and the reason for its entry. Thereafter such trading may resume until the year has expired.

8. If securities of the class being registered are outstanding when the registration statement becomes effective, or if some of the registered securities have been sold, post-effective withdrawal of the registration statement would interfere with the privilege of persons generally to engage in non-issuer trading for a minimum period of one year after the effective date. Since sellers might not always know of the withdrawal, they might thus be subjected to civil liability through no fault of their own. For this reason § 305(i) provides that a registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding.

9. If no exemption is available for a non-issuer distribution and a registration statement for securities of the same class is not effective, there arises for the first time the necessity of filing a special registration statement to permit a non-issuer distribution. As in the case of a distribution for the account of the issuer, registration may be affected here by coordination, notification or qualification. Concerning the exclusion of oil, gas and mining interests from § 302(a)(2), see the comment under that section. A registration for a non-issuer distribution, like any other registration, is considered to register all outstanding securities of the same class, and thus to permit anybody to trade for a minimum of one year or however much longer it may take to complete the registered non-issuer distribution. It is thus immaterial whether the registration statement specifically covers 100

shares or 100,000 shares, because the Administrator may not permit the registration statement to become effective unless the statutory standards are satisfied.

10. Section 305(f) is designed only to take care of the case where the seller cannot obtain certified financial statements and other data normally required. The phrase "without unreasonable effort or expense" is borrowed from § 10(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77j(a)(3). In the case of a non-issuer distribution by a person who is in a control relationship with the issuer or otherwise has access to required information, that phrase is not meant to apply to the expense which is merely incident to supplying the information required to register. Moreover, § 305(f) does not excuse the filing of the financial data required by § 302(b)(6) if a non-issuer distribution is registered by notification; for § 305(f) applies by its terms only to §§ 304 (registration by qualification) and 305(j) (reports). The person filing the registration statement can always register by qualification. Although he may not be able to obtain the financial data required by § 302(b)(6) to demonstrate eligibility for the notification procedure, he may be able to obtain other information which the Administrator might wish to require under § 304.

77 (k) A registration statement relating to a security issued by  
78 a face-amount certificate company or a redeemable security  
79 issued by an open-end management company or unit investment  
80 trust, as those terms are defined in the Investment Company  
81 Act of 1940, may be amended after its effective date so as to  
82 increase the securities specified as proposed to be offered. Such  
83 an amendment becomes effective when the [Administrator] so  
84 orders. Every person filing such an amendment shall pay a  
85 filing fee, calculated in the manner specified in subsection (b),  
86 with respect to the additional securities proposed to be offered.

#### COMMENT TO § 305(k)

Investment companies of the types here specified are distinguished by the fact that they are continually offering their securities. Therefore, they do not lend themselves readily to the concept of registering a security in connection with a proposed distribution. For that reason Congress in 1954 added a new § 24(e) to the Investment Company Act of 1940, 15 U.S.C. § 80a-24(e), providing an amendment procedure for registration statements filed under the Securities Acts of 1933 by investment companies of these types. Since these investment companies typically offer in many states, the same provision is incorporated in § 305(k). Normally the investment company will presumably wish to use the coordination procedure under § 303. See the last paragraph of the comment under § 303(a). But it will find § 305(k) useful when it runs out of locally registered securities in a particular state before it has to file an amendment to its federal registration statement.

1 SECTION 306. [Denial, Suspension, and Revocation of Regis-  
2 tration.]

3 (a) The [Administrator] may issue a stop order denying ef-  
4 fectiveness to, or suspending or revoking the effectiveness of,  
5 any registration statement if [he] finds (1) that the order is  
6 in the public interest and (2) that

7 (A) the registration statement as of its effective date or as

8 of any earlier date in the case of an order denying effectiveness,  
9 or any amendment under section 305(k) as of its effective date,  
10 or any report under section 305(j) is incomplete in any material  
11 respect or contains any statement which was, in the light of the  
12 circumstances under which it was made, false or misleading  
13 with respect to any material fact;

14 (B) any provision of this act or any rule, order, or condi-  
15 tion lawfully imposed under this act has been willfully violated,  
16 in connection with the offering, by (i) the person filing the regis-  
17 tration statement, (ii) the issuer, any partner, officer, or director  
18 of the issuer, any person occupying a similar status or perform-  
19 ing similar functions, or any person directly or indirectly con-  
20 trolling or controlled by the issuer, but only if the person filing  
21 the registration statement is directly or indirectly controlled by  
22 or acting for the issuer, or (iii) any underwriter;

23 (C) the security registered or sought to be registered is the  
24 subject of an administrative stop order or similar order or a  
25 permanent or temporary injunction of any court of competent  
26 jurisdiction entered under any other federal or state act applica-  
27 ble to the offering; but (i) the [Administrator] may not institute  
28 a proceeding against an effective registration statement under  
29 clause (C) more than one year from the date of the order or  
30 injunction relied on, and (ii) [he] may not enter an order under  
31 clause (C) on the basis of an order or injunction entered under  
32 any other state act unless that order or injunction was based on  
33 facts which would currently constitute a ground for a stop order  
34 under this section;

35 (D) the issuer's enterprise or method of business includes  
36 or would include activities which are illegal where performed;

37 (E) the offering has worked or tended to work a fraud upon  
38 purchasers or would so operate;

39 (F) the offering has been or would be made with unreason-  
40 able amounts of underwriters' and sellers' discounts, commis-  
41 sions, or other compensation, or promoters' profits or participa-  
42 tion, or unreasonable amounts or kinds of options;

43 (G) when a security is sought to be registered by notifica-  
44 tion, it is not eligible for such registration;

45 (H) when a security is sought to be registered by coordina-  
46 tion, there has been a failure to comply with the undertaking  
47 required by section 303(b)(4); or

48 (I) the applicant or registrant has failed to pay the proper  
49 filing fee; but the [Administrator] may enter only a denial order  
50 under this clause and [he] shall vacate any such order when the  
51 deficiency has been corrected.

52 The [Administrator] may not institute a stop-order proceed-

53 ing against an effective registration statement on the basis of a  
54 fact or transaction known to him when the registration state-  
55 ment became effective unless the proceeding is instituted within  
56 the next thirty days.

#### COMMENT TO § 306(a)

Section 306(a) applies equally to all three types of registration.

*Clause (A)*: The completeness and accuracy of the registration statement are to be tested as of its *effective date* in a *suspension* or *revocation* proceeding. That is to say, the fact that a registration statement has become misleading by virtue of developments occurring *after* its effective date is not a ground for the issuance of a stop order revoking its effectiveness under Clause (A). Post-effective amendments are not necessary except to reflect inaccuracies as of the effective date. If a particular Administrator wants the registration statement to be kept more or less currently accurate so long as it remains effective, he may require reports as often as quarterly by rule or order under § 305(j). In that event, filing a misleading report would be a basis for a stop order under Clause (A) and failure to file such a report would be a basis for a stop order under Clause (B). On the other hand, in a proceeding to *deny* effectiveness to a pending registration statement, its completeness and accuracy cannot be tested as of the effective date. This explains the first "or" clause in Clause (A).

*Clause (B)*: Concerning the meaning of "willfully," see the comment under § 204(a)(2)(B). Under Clause (ii) a violation by the issuer has the same consequences whether the issuer has filed the registration statement itself or has had a local broker-dealer file the registration statement for it. But, when the registration is filed by a local broker-dealer who is acting independently, a provision authorizing the issuance of a stop order for a violation by the issuer or somebody connected with the issuer would be inconsistent with the statutory purpose of permitting (particularly in cases of registration by coordination) the making of an offering and the establishment of a market in any state in which a registered broker-dealer is willing to effect registration. See the comment under § 305(a).

*Clause (C)*: The word "is" at the beginning of Clause (C) means that a stop order or injunction which has expired by its terms or been vacated is not a ground for action under this clause.

*Clause (D)*: The reference here is to something like a racetrack or gambling casino which is conducted in a state where such an enterprise is illegal. The "public interest" standard in Clause (1) must always be considered. Thus the fact that a large department store had recently violated a statute on resale price maintenance of minimum wages would not justify action under Clause (D). Moreover, Clause (D) is not meant to apply to an enterprise which is lawful where conducted, although it would be illegal if conducted in the state where the registration statement is filed.

*Clause (E)*: Section 401(d) provides that the term "fraud" is not limited to common-law deceit. But this clause is not designed to be as broad as the "sound business principles" standard or the "fair, just, and equitable" standard found in some statutes.

*Clause (F)*: This clause is broad enough to cover the statement of policy on options which was adopted in 1946 by the National Association of Securities Administrators, as well as its 1955 statement of policy on so-called "cheap stock." 29 Proceedings of NASA 84-90; 38 id. 113-15.

57 (b) The [Administrator] may by order summarily postpone  
58 or suspend the effectiveness of the registration statement pend-  
59 ing final determination of any proceeding under this section.  
60 Upon the entry of the order, the [Administrator] shall promptly  
61 notify each person specified in subsection (c) that it has been  
62 entered and of the reasons therefor and that within fifteen days  
63 after the receipt of a written request the matter will be set down  
64 for hearing. If no hearing is requested and none is ordered by  
65 the [Administrator], the order will remain in effect until it is  
66 modified or vacated by the [Administrator]. If a hearing is  
67 requested or ordered, the [Administrator], after notice of and  
68 opportunity for hearing to each person specified in subsection  
69 (c), may modify or vacate the order or extend it until final  
70 determination.

71 (c) No stop order may be entered under any part of this  
72 section except the first sentence of subsection (b) without (1)  
73 appropriate prior notice to the applicant or registrant, the issuer,  
74 and the person on whose behalf the securities are to be or have  
75 been offered, (2) opportunity for hearing, and (3) written findings  
76 of fact and conclusions of law.

#### COMMENT TO § 306(c)

This section is comparable to § 204(f) and the comment there is equally applicable here.

77 (d) The [Administrator] may vacate or modify a stop order  
78 if [he] finds that the conditions which prompted entry have  
79 changed or that it is otherwise in the public interest to do so.

### PART IV

#### GENERAL PROVISIONS

1 SECTION 401. [Definitions.] When used in this act, unless the  
2 context otherwise requires:

3 (a) "[Administrator]" [substitute any other appropriate term,  
4 such as "Commission," "Commissioner," "Secretary," etc.] means  
5 the [official or agency designated in section 406(a)].

6 (b) "Agent" means any individual other than a broker-dealer  
7 who represents a broker-dealer or issuer in effecting or attempt-  
8 ing to effect purchases or sales of securities. "Agent" does not  
9 include an individual who represents an issuer in (1) effecting  
10 transactions in a security exempted by clause (1), (2), (3),  
11 (10), or (11) of section 402(a), (2) effecting transactions ex-  
12 empted by section 402(b), or (3) effecting transactions with  
13 existing employees, partners, or directors of the issuer if no

14 commission or other remuneration is paid or given directly or  
15 indirectly for soliciting any person in this state. A partner,  
16 officer, or director of a broker-dealer or issuer, or a person  
17 occupying a similar status or performing similar functions, is  
18 an agent only if he otherwise comes within this definition.

#### COMMENT TO § 401(b)

Whether a particular individual who represents a broker-dealer or issuer is an "agent" or is himself a "broker-dealer" depends upon much the same factors which create an agency relationship at common law. That is to say, the question turns essentially on whether the individual has manifested a consent to the broker-dealer or issuer to act subject to his control. See *Restatement of Agency* § 1. The last sentence does not require every partner, officer or director to file a separate application for registration, because the last sentence of § 202(a) provides that registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer or director. See the comment under § 202(a).

19 (c) "Broker-dealer" means any person engaged in the busi-  
20 ness of effecting transactions in securities for the account of  
21 others or for his own account. "Broker-dealer" does not include  
22 (1) an agent, (2) an issuer, (3) a bank, savings institution, or  
23 trust company, or (4) a person who has no place of business  
24 in this state if (A) he effects transactions in this state ex-  
25 clusively with or through (i) the issuers of the securities in-  
26 volved in the transactions, (ii) other broker-dealers, or (iii)  
27 banks, savings institutions, trust companies, insurance com-  
28 panies, investment companies as defined in the Investmen-  
29 Company Act of 1940, pension or profit-sharing trusts, or othe-  
30 financial institutions or institutional buyers, whether acting fo-  
31 themselves or as trustees, or (B) during any period of twelve  
32 consecutive months he does not direct more than fifteen offer-  
33 to sell or buy into this state in any manner to persons othe-  
34 than those specified in clause (A), whether or not the offero-  
35 or any of the offerees is then present in this state.

#### COMMENT TO § 401(c)

With respect to the distinction between a person who is "engaged in the business of effecting transactions \* \* \* for his own account" and an ordinary investor who buys and sells with some frequency, see Loss, *Securities Regulation* (195 with 1955 Supp.), pp. 720-22.

Clause (4): See paragraph 12 of the comment under § 414(a)-(f). The reference in Clause (B) to fifteen offers during any period of twelve consecutive months in the case of persons without a place of business in the state is not intended to carry any implication that a person who effects more than fifteen transactions for his own account in the course of ordinary investment during any period of twelve months is for that reason alone a "broker-dealer."

36 (d) "Fraud," "deceit," and "defraud" are not limited to com-  
37 mon-law deceit.

COMMENT TO § 401(d)

Section 401(d) codifies the holdings that "fraud" as used in federal and state securities statutes, as well as the federal mail fraud statute, is not limited to common-law deceit. See the cases cited in *Loss, Securities Regulation* (1951 with 1955 Supp.), p. 817, notes 30-31.

38 (e) "Guaranteed" means guaranteed as to payment of prin-  
39 cipal, interest, or dividends.

40 (f) "Investment adviser" means any person who, for com-  
41 pensation, engages in the business of advising others, either  
42 directly or through publications or writings, as to the value of  
43 securities or as to the advisability of investing in, purchasing,  
44 or selling securities, or who, for compensation and as a part of  
45 a regular business, issues or promulgates analyses or reports  
46 concerning securities. "Investment adviser" does not include (1)  
47 a bank, savings institution, or trust company; (2) a lawyer, ac-  
48 countant, engineer, or teacher whose performance of these  
49 services is solely incidental to the practice of his profession; (3)  
50 a broker-dealer whose performance of these services is solely  
51 incidental to the conduct of his business as a broker-dealer and  
52 who receives no special compensation for them; (4) a publisher  
53 of any bona fide newspaper, news magazine, or business or  
54 financial publication of general, regular, and paid circulation;  
55 (5) a person whose advice, analyses, or reports relate only to  
56 securities exempted by section 402(a)(1); (6) a person who  
57 has no place of business in this state if (A) his only clients in  
58 this state are other investment advisers, broker-dealers, banks,  
59 savings institutions, trust companies, insurance companies, in-  
60 vestment companies as defined in the Investment Company  
61 Act of 1940, pension or profit-sharing trusts, or other financial  
62 institutions or institutional buyers, whether acting for them-  
63 selves or as trustees, or (B) during any period of twelve con-  
64 secutive months he does not direct business communications  
65 into this state in any manner to more than five clients other  
66 than those specified in clause (A), whether or not he or any  
67 of the persons to whom the communications are directed is  
68 then present in this state; or (7) such other persons not within  
69 the intent of this paragraph as the [Administrator] may by  
70 rule or order designate.

COMMENT TO § 401(f)

*In general:* Section 401(f) has been taken almost verbatim from the definition in § 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11). On the administrative construction of the federal definition, see *Loss, Securities Regulation* (1951 with 1955 Supp.), pp. 788-92. Clause (6) has been added; see paragraph 12 of the comment under § 414(a)-(f).

Clause (3): The model of this clause in the federal act has been thus explained in an opinion of the SEC's General Counsel (Investment Advisers Act Release No. 2):

"[This clause] amounts to a recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business, and that it would be inappropriate to bring them within the scope of the Investment Advisers Act merely because of this aspect of their business. On the other hand, that portion of clause [(3)] which refers to 'special compensation' amounts to an equally clear recognition that a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the Act merely because he is also engaged in effecting market transactions in securities. It is well known that many brokers and dealers have investment advisory departments which furnish investment advice for compensation in the same manner as does an investment adviser who operates solely in an advisory capacity. The essential distinction to be borne in mind in considering borderline cases \* \* \* is the distinction between compensation for advice itself and compensation for services of another character to which advice is merely incidental."

Clause (4): The word "paid," which does not appear in the federal definition, has been added to emphasize that a person who periodically distributes a "tipster sheet" free as a way to get paying clients is not excluded from the definition as a "publisher."

71 (g) "Issuer" means any person who issues or proposes to  
72 issue any security, except that (1) with respect to certificates  
73 of deposit, voting-trust certificates, or collateral-trust certifi-  
74 cates, or with respect to certificates of interest or shares in an  
75 unincorporated investment trust not having a board of directors  
76 or persons performing similar functions or of the fixed, re-  
77 stricted management, or unit type, the term "issuer" means the  
78 person or persons performing the acts and assuming the duties  
79 of depositor or manager pursuant to the provisions of the trust  
80 or other agreement or instrument under which the security is  
81 issued; and (2) with respect to certificates of interest or par-  
82 ticipation in oil, gas, or mining titles or leases or in pay-  
83 ments out of production under such titles or leases, there is not  
84 considered to be any "issuer."

COMMENT TO § 401(g)

The phraseology is taken almost verbatim from § 2(4) of the Securities Act of 1933, 15 U.S.C. § 77b(4). The peculiar types of securities other than those dealt with in Clause (1)—for example, equipment-trust certificates—may be handled under the rule-making power in § 412(a).

85 (h) "Non-issuer" means not directly or indirectly for the  
86 benefit of the issuer.

COMMENT TO § 401(h)

See the comment under § 305(i).

87 (i) "Person" means an individual, a corporation, a partner-  
88 ship, an association, a joint-stock company, a trust where the

89 interests of the beneficiaries are evidenced by a security, an  
90 unincorporated organization, a government, or a political sub-  
91 division of a government.

92 (j) (1) "Sale" or "sell" includes every contract of sale of,  
93 contract to sell, or disposition of, a security or interest in a  
94 security for value.

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

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

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

104 (5) Every sale or offer of a warrant or right to purchase  
105 or subscribe to another security of the same or another issuer,  
106 as well as every sale or offer of a security which gives the  
107 holder a present or future right or privilege to convert into  
108 another security of the same or another issuer, is considered to  
109 include an offer of the other security.

110 (6) The terms defined in this subsection do not include  
111 (A) any bona fide pledge or loan; (B) any stock dividend,  
112 whether the corporation distributing the dividend is the issuer  
113 of the stock or not, if nothing of value is given by stockholders  
114 for the dividend other than the surrender of a right to a cash  
115 or property dividend when each stockholder may elect to take  
116 the dividend in cash or property or in stock; (C) any act inci-  
117 dent to a class vote by stockholders, pursuant to the certificate  
118 of incorporation or the applicable corporation statute, on a  
119 merger, consolidation, reclassification of securities, or sale of  
120 corporate assets in consideration of the issuance of securities of  
121 another corporation; or (D) any act incident to a judicially  
122 approved reorganization in which a security is issued in ex-  
123 change for one or more outstanding securities, claims, or prop-  
124 erty interests, or partly in such exchange and partly for cash.

#### COMMENT TO § 401(j)

*Clauses (1)-(2):* The phraseology is borrowed substantially from § 2(3) of the Securities Act of 1933, 15 U.S.C. § 77b(3), as amended in 1954 to split the definitions of "sale" and "offer." See the comment under § 402(b)(12).

*Clause (5):* This clause provides that there is always an "offer" of the security called for by a conversion privilege or the warrant. Hence that security must be registered (unless some exemption is available) before the convertible security or the warrants are offered. Even if the warrants are themselves distributed without consideration, so that the warrants are not "sold," a gift of a

warrant involves an offer to sell the stock called for by the warrant. Hence registration of the *stock* is necessary before the warrants may even be given away. Moreover, since the security called for is being continuously "offered" so long as the conversion privilege or the purchase right remains exercisable, the security called for remains registered all that time under § 305(i), and the person who files the registration statement is subject to the Administrator's power to require the filing of reports under § 305(j).

Under certain conditions, however, § 402(b)(11) exempts offers to existing security holders, specifically including "persons who at the time of the transaction are holders of convertible securities, non-transferable warrants, or transferable warrants exercisable within not more than ninety days of their issuance." That exemption does not excuse *registration* of the second security (that is, the security called for by the warrant or conversion privilege) unless the offering of the first security itself (that is, the warrants or the convertible security) comes within the exemption; for there is a present "offer" of the second security under § 401(j)(5) and the offerees are not yet existing security holders. But the exemption under § 402(b)(11) will normally be available *when the conversion privilege or warrant is exercised*. Hence, if the *first* security is not being offered or distributed more than one year from the effective date of the registration statement, the effectiveness of the registration statement terminates at the end of the one-year period under § 305(i) and the power to require reports terminates at the same time.

The registration fee in the case of warrants or rights should be based on the total offering price of the security called for by the warrants or rights, together with the offering price of the warrants or rights themselves if they are not given away. In the convertible security situation, since no consideration is given for the second security except the surrender of the first, the fee should be based solely on the offering price of the convertible security and there should be no double fee.

125 (k) "Securities Act of 1933," "Securities Exchange Act of  
126 1934," "Public Utility Holding Company Act of 1935," and  
127 "Investment Company Act of 1940" mean the federal statutes  
128 of those names as amended before or after the effective date of  
129 this act.

130 (1) "Security" means any note; stock; treasury stock; bond;  
131 debenture; evidence of indebtedness; certificate of interest or  
132 participation in any profit-sharing agreement; collateral-trust  
133 certificate; preorganization certificate or subscription; trans-  
134 ferable share; investment contract; voting-trust certificate;  
135 certificate of deposit for a security; certificate of interest or  
136 participation in an oil, gas, or mining title or lease or in pay-  
137 ments out of production under such a title or lease; or, in  
138 general, any interest or instrument commonly known as a  
139 "security," or any certificate of interest or participation in,  
140 temporary or interim certificate for, receipt for, guarantee of,  
141 or warrant or right to subscribe to or purchase, any of the  
142 foregoing. "Security" does not include any insurance or endow-  
143 ment policy or annuity contract under which an insurance com-  
144 pany promises to pay [a fixed sum of] money either in a lump  
145 sum or periodically for life or some other specified period.

COMMENT TO § 401(1)

This section is identical with § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), except for oil, gas and mineral interests and the addition of the last sentence. Section 2(1) was modeled on the definitions in some of the state statutes, and the federal definition has in turn influenced many of the new state statutes enacted since 1933. Moreover, substantially that definition—particularly the phrase “investment contract”—has been broadly construed by both state and federal courts. See, e.g., *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946); for citations to other federal and state cases, as well as a discussion of the administrative construction of the several phrases in the definition, see Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 299-329.

*Oil, gas and mineral interests:* Section 2(1) of the Securities Act of 1933 uses the phrase “fractional undivided interest in oil, gas, or other mineral rights.” The phrase in this statute is modeled on the language in § 25008(a) of the California act—“certificate of interest in an oil, gas, or mining title or lease”—which may be slightly broader than the federal phrase and in any event is by far the most commonly found phrase in the state statutes. The words which have been added to the California language are intended to make it clear that so-called “oil payments” are securities whether or not they may be regarded as interests *in a title or lease*. Very few states go so far as to include entire leasehold interests. However, it is clear that even entire leasehold interests may be offered under such circumstances that a security is involved in the nature of an “investment contract.” *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); for other cases, see Loss, *Securities Regulation* (1951 with 1955 Supp.), p. 312, n. 31.

The last sentence has been explicitly phrased so as not to exclude from the definition the so-called “variable annuities” which have recently been developed. See also the comment under § 402(a)(5). If it is desired to exclude variable annuities along with orthodox annuities on the ground that the former are sufficiently regulated by the insurance authorities in the particular state, the bracketed language should be deleted.

146 (m) “State” means any state, territory, or possession of the  
147 United States, the District of Columbia, and Puerto Rico.

1 SECTION 402. [*Exemptions.*]

2 (a) The following securities are exempted from sections 301  
3 and 403:

COMMENT TO § 402(a)

The distinction between *exemptions* and *exceptions from definitions* is important in view of the fact that the exemptions enumerated in § 402 are not exemptions from the anti-fraud provisions of §§ 101 and 410(a)(2). See the exceptions from the definition of “agent” in § 401(b), the definition of “broker-dealer” in § 401(c), the definition of “investment adviser” in § 401(f), the definitions of “sale” and “offer” in § 401(j)(6), and the definition of “security” in the last sentence of § 401(1).

4 (1) any security (including a revenue obligation) issued or  
5 guaranteed by the United States, any state, any political sub-  
6 division of a state, or any agency or corporate or other instru-  
7 mentality of one or more of the foregoing; or any certificate  
8 of deposit for any of the foregoing;

9 (2) any security issued or guaranteed by Canada, any  
10 Canadian province, any political subdivision of any such prov-  
11 ince, any agency or corporate or other instrumentality of one  
12 or more of the foregoing, or any other foreign government with  
13 which the United States currently maintains diplomatic rela-  
14 tions, if the security is recognized as a valid obligation by the  
15 issuer or guarantor;

16 (3) any security issued by and representing an interest in  
17 or a debt of, or guaranteed by, any bank organized under the  
18 laws of the United States, or any bank, savings institution, or  
19 trust company organized and supervised under the laws of any  
20 state;

COMMENT TO § 402(a)(3)

Each of the exemptions in Clauses (3)-(5) applies only if the security represents an interest in or a debt of the particular issuer, or is guaranteed by the particular issuer. The purpose is to make it clear that these exemptions do not apply when, for example, a bank acting as depository for a protective committee in a reorganization issues certificates of deposit, which in no sense represent an interest in or a claim against the bank. The exemption for bank securities in Illinois was so construed even before it was specifically limited as it now is. *Jaffe v. Goldner*, 251 Ill. App. 188 (1929); see also *Commissioner of Banks v. Chase Securities Corp.*, 298 Mass. 285, 301-05, 10 N. E. 2d 472, 485-87 (1937), appeal dismissed, 302 U.S. 660. But it required an amendment in California [§ 25100(c)] to override a contrary interpretation. *Young v. Three for One Royalties*, 31 P. 2d 789 (Cal. 1934), rehearing denied with opinion, 1 Cal. 2d 639, 36 P. 2d 1065 (1934).

21 (4) any security issued by and representing an interest in  
22 or a debt of, or guaranteed by, any federal savings and loan  
23 association, or any building and loan or similar association  
24 organized under the laws of any state and authorized to do  
25 business in this state;

COMMENT TO § 402(a)(4)

See the comment under § 402(a)(3).

26 (5) any security issued by and representing an interest in  
27 or a debt of, or guaranteed by, any insurance company or-  
28 ganized under the laws of any state and authorized to do busi-  
29 ness in this state; [but this exemption does not apply to an  
30 annuity contract, investment contract, or similar security under  
31 which the promised payments are not fixed in dollars but are  
32 substantially dependent upon the investment results of a seg-  
33 regated fund or account invested in securities;]

COMMENT TO § 402(a)(5)

See the comment under § 402(a)(3). With respect to the status of insurance policies and annuities, see the comment under the last sentence of § 401(1). By

virtue of that section, the orthodox insurance policy or annuity is not a "security" and the blue sky law has no impact on it, whereas securities issued by insurance companies are exempted from registration under the conditions of § 402(a)(5) and hence are subject to the fraud provisions. The purpose of the "but" clause in § 402(a)(5) is to make it clear that the so-called "variable annuities" which have recently been developed, and which are securities under § 401(1), are not exempted.

If the bracketed language in § 401(1) is deleted (see the comment under that section), the bracketed language in § 402(a)(5) should be deleted for the same reason.

34 (6) any security issued or guaranteed by any federal credit  
35 union or any credit union, industrial loan association, or similar  
36 association organized and supervised under the laws of this  
37 state;

COMMENT TO § 402(a)(6)

The reference to federal credit unions is to those organized under 12 U.S.C. § 1751 *et seq.*

38 (7) any security issued or guaranteed by any railroad,  
39 other common carrier, public utility, or holding company which  
40 is (A) subject to the jurisdiction of the Interstate Commerce  
41 Commission; (B) a registered holding company under the Pub-  
42 lic Utility Holding Company Act of 1935 or a subsidiary of  
43 such a company within the meaning of that act; (C) regulated  
44 in respect of its rates and charges by a governmental authority  
45 of the United States or any state; or (D) regulated in respect  
46 of the issuance or guarantee of the security by a governmental  
47 authority of the United States, any state, Canada, or any  
48 Canadian province;

COMMENT TO § 402(a)(7)

Twelve of the forty statutes with some sort of public-utility exemption refer specifically to regulation by municipal as well as state authority. The others do not necessarily exclude the possibility of municipal regulation. The reference in § 402(a)(7) to "a governmental authority of \* \* \* any state" is broad enough to include a municipal authority.

49 (8) any security listed or approved for listing upon notice  
50 of issuance on the New York Stock Exchange, the American  
51 Stock Exchange, or the Midwest Stock Exchange [, or listed  
52 on the (insert names of appropriate regional stock exchanges) ];  
53 any other security of the same issuer which is of senior or sub-  
54 stantially equal rank; any security called for by subscription  
55 rights or warrants so listed or approved; or any warrant or  
56 right to purchase or subscribe to any of the foregoing;

57 (9) any security issued by any person organized and op-  
58 erated not for private profit but exclusively for religious, edu-

59 cational, benevolent, charitable, fraternal, social, athletic, or  
60 reformatory purposes, or as a chamber of commerce or trade  
61 or professional association;

62 (10) any commercial paper which arises out of a current  
63 transaction or the proceeds of which have been or are to be  
64 used for current transactions, and which evidences an obliga-  
65 tion to pay cash within nine months of the date of issuance,  
66 exclusive of days of grace, or any renewal of such paper which  
67 is likewise limited, or any guarantee of such paper or of any  
68 such renewal;

COMMENT TO § 402(a)(10)

This exemption is modeled on § 3(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(3). On the SEC construction of the phrase "current transaction," see Loss, *Securities Regulation* (1951 with 1955 Supp.), p. 356. See also § 402(b)(8), which exempts an offer or sale of any security to banks and other institutional buyers. The two exemptions substantially overlap.

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

COMMENT TO § 402(a)(11)

This exemption is designed to solve the problem which arises in those states whose Administrators take the position, also taken by the SEC, that employees' benefit plans of various kinds involve an offer of a security in the nature of an "investment contract," at least if participation is voluntary with each employee and he must contribute under the plan in order to participate. See Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 326-29.

76 [(12) insert any desired exemption for cooperatives.]  
77 (b) The following transactions are exempted from sections 301  
78 and 403:  
79 (1) any isolated non-issuer transaction, whether effected  
80 through a broker-dealer or not;

COMMENT TO § 402(b)(1)

See the comment under § 305(i).

81 (2) any non-issuer distribution of an outstanding security  
82 if (A) a recognized securities manual contains the names of the  
83 issuer's officers and directors, a balance sheet of the issuer as  
84 of a date within eighteen months, and a profit and loss state-



85 ment for either the fiscal year preceding that date or the most  
86 recent year of operations, or (B) the security has a fixed ma-  
87 turity or a fixed interest or dividend provision and there has  
88 been no default during the current fiscal year or within the three  
89 preceding fiscal years, or during the existence of the issuer and  
90 any predecessors if less than three years, in the payment of  
91 principal, interest, or dividends on the security;

COMMENT TO § 402(b)(2)

See the comment under § 305(i).

92 (3) any non-issuer transaction effected by or through a  
93 registered broker-dealer pursuant to an unsolicited order or  
94 offer to buy; but the [Administrator] may by rule require that  
95 the customer acknowledge upon a specified form that the sale  
96 was unsolicited, and that a signed copy of each such form be  
97 preserved by the broker-dealer for a specified period;

COMMENT TO § 402(b)(3)

If necessary, the Administrator may use his rule-making authority under § 412(a) to define the term "solicitation." On the construction of the term in § 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2), see Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 405-06. In one important respect § 402(b)(3) is broader than § 4(2) of the federal statute, which the SEC has always interpreted as exempting only the *broker's* part of the transaction. In the SEC's view, the *selling customer* must find his own exemption—normally the exemption in § 4(1) of the federal act which is comparable to the exemption in § 402(b)(1) of this Act for "any isolated non-issuer transaction." Section 402(b)(3) is not intended to be so limited. Of course, the exemption can in no case be used by an *issuer*, since it is limited to "any non-issuer transaction."

98 (4) any transaction between the issuer or other person on  
99 whose behalf the offering is made and an underwriter, or among  
100 underwriters;

101 (5) any transaction in a bond or other evidence of in-  
102 debtedness secured by a real or chattel mortgage or deed of  
103 trusts, or by an agreement for the sale of real estate or chattels,  
104 if the entire mortgage, deed of trust, or agreement, together  
105 with all the bonds or other evidences of indebtedness secured  
106 thereby, is offered and sold as a unit;

COMMENT TO § 402(b)(5)

This exemption is severely restricted by the requirement that everything be both offered and sold as a unit. But it permits a *public offering as a unit*.

107 (6) any transaction by an executor, administrator, sheriff,  
108 marshal, receiver, trustee in bankruptcy, guardian, or con-  
109 servator;

110 (7) any transaction executed by a bona fide pledgee with-  
111 out any purpose of evading this act;

112 (8) any offer or sale to a bank, savings institution, trust  
113 company, insurance company, investment company as defined  
114 in the Investment Company Act of 1940, pension or profit-  
115 sharing trust, or other financial institution or institutional buyer,  
116 or to a broker-dealer, whether the purchaser is acting for itself  
117 or in some fiduciary capacity;

COMMENT TO § 402(b)(8)

The term "institutional buyer" is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale. The term may be either left to *ad hoc* interpretation or defined by an interpretative rule under § 412(a).

118 (9) any transaction pursuant to an offer directed by the  
119 offeror to not more than ten persons (other than those desig-  
120 nated in paragraph (8)) in this state during any period of  
121 twelve consecutive months, whether or not the offeror or any of  
122 the offerees is then present in this state, if (A) the seller rea-  
123 sonably believes that all the buyers in this state (other than  
124 those designated in paragraph (8)) are purchasing for invest-  
125 ment, and (B) no commission or other remuneration is paid or  
126 given directly or indirectly for soliciting any prospective buyer  
127 in this state (other than those designated in paragraph (8));  
128 but the [Administrator] may by rule or order, as to any secur-  
129 ity or transaction or any type of security or transaction, with-  
130 draw or further condition this exemption, or increase or de-  
131 crease the number of offerees permitted, or waive the condi-  
132 tions in Clauses (A) and (B) with or without the substitution  
133 of a limitation on remuneration;

COMMENT TO § 402(b)(9)

The figure ten is in substance only a *prima facie* figure. An Administrator, for example, may want to reduce it for uranium stocks or oil royalties or increase it for a close corporation which wants to solicit twenty or thirty friends and relatives of the owners for additional capital. The section does not require a written representation by each buyer that he is taking for investment, but it would be prudent on the part of the seller to obtain something in writing. Moreover, one who in good faith buys for investment can later change his mind and resell, although the shorter the interval the harder it will be to show that there was a *bona fide* change of mind. Clause (B) is not intended to preclude solicitation by directors or officers or employees of the issuer so long as it is only an incidental function of their regular duties and they receive no additional compensation. It is also relevant whether such persons are specially hired in connection with the offering, particularly if they have a background in the securities business either as professional promoters or otherwise.

134 (10) any offer or sale of a preorganization certificate or

135 subscription if (A) no commission or other remuneration is  
136 paid or given directly or indirectly for soliciting any prospec-  
137 tive subscriber, (B) the number of subscribers does not exceed  
138 ten, and (C) no payment is made by any subscriber;

COMMENT TO § 402(b)(10)

Sections 402(b)(9) and 402(b)(10), though interrelated, serve different purposes. Since the purpose of § 402(b)(10) is to enable a new enterprise to obtain the minimum number of subscriptions required by the corporation law, the limitation is on the number of subscribers rather than the number of offerees. Hence there may be a publicly advertised offering of preorganization subscriptions. But there may be no *payment* until effective registration *unless another exemption is available*. One of the other exemptions which might be available is § 402(b)(9). In that event registration would not be required at all. But § 402(b)(10) itself simply *postpones* registration; it does not *excuse* registration altogether.

139 (11) any transaction pursuant to an offer to existing se-  
140 curity holders of the issuer, including persons who at the time  
141 of the transaction are holders of convertible securities, non-  
142 transferable warrants, or transferable warrants exercisable  
143 within not more than ninety days of their issuance, if (A) no  
144 commission or other remuneration (other than a standby com-  
145 mission) is paid or given directly or indirectly for soliciting any  
146 security holder in this state, or (B) the issuer first files a notice  
147 specifying the terms of the offer and the [Administrator] does  
148 not by order disallow the exemption within the next five full  
149 business days;

COMMENT TO § 402(b)(11)

The reference to a "standby commission" in Clause (A) is designed to permit payment to an underwriter for his risk and services in connection with his commitment to take down any portion of the offering which is not taken down by the security holders. As to what constitutes the payment of remuneration otherwise, see the comment under § 402(b)(9). The specific authority to disallow by order under Clause (B) is not subject to the general procedure set out in § 402(c) for denying any of the exemptions specified in § 402(b).

150 (12) any offer (but not a sale) of a security for which  
151 registration statements have been filed under both this act and  
152 the Securities Act of 1933 if no stop order or refusal order is  
153 in effect and no public proceeding or examination looking  
154 toward such an order is pending under either act.

COMMENT TO § 402(b)(12)

The Securities Act of 1933 and the SEC rules severely restrict the types of written offers that may be made before the effective date.

155 (c) The [Administrator] may by order deny or revoke any  
156 exemption specified in clause (9) or (11) of subsection (a) or

157 in subsection (b) with respect to a specific security or trans-  
158 action. No such order may be entered without appropriate prior  
159 notice to all interested parties, opportunity for hearing, and  
160 written findings of fact and conclusions of law, except that the  
161 [Administrator] may by order summarily deny or revoke any  
162 of the specified exemptions pending final determination of any  
163 proceeding under this subsection. Upon the entry of a sum-  
164 mary order, the [Administrator] shall promptly notify all in-  
165 terested parties that it has been entered and of the reasons  
166 therefor and that within fifteen days of the receipt of a written  
167 request the matter will be set down for hearing. If no hearing  
168 is requested and none is ordered by the [Administrator], the  
169 order will remain in effect until it is modified or vacated by  
170 the [Administrator]. If a hearing is requested or ordered, the  
171 [Administrator], after notice of and opportunity for hearing to  
172 all interested persons, may modify or vacate the order or ex-  
173 tend it until final determination. No order under this subsection  
174 may operate retroactively. No person may be considered to  
175 have violated section 301 or 403 by reason of any offer or sale  
176 effected after the entry of an order under this subsection if he  
177 sustains the burden of proof that he did not know, and in the  
178 exercise of reasonable care could not have known, of the order.

COMMENT TO § 402(c)

Section 402(c) permits the Administrator by order to deny or revoke the exemption for any of the exempted transactions, as well as two types of exempted securities, but only with respect to a specific case. He has no authority by rule or otherwise to revoke any statutory exemption generally.

179 (d) In any proceeding under this act, the burden of proving  
180 an exemption or an exception from a definition is upon the  
181 person claiming it.

COMMENT TO § 402(d)

This codifies existing law. See the cases cited in *Loss, Securities Regulation* (1951 with 1955 Supp.), p. 414, n. 365.

1 SECTION 403. [*Filing of Sales and Advertising Literature.*] The  
2 [Administrator] by rule or order may require the filing of any  
3 prospectus, pamphlet, circular, form letter, advertisement, or  
4 other sales literature or advertising communication addressed or  
5 intended for distribution to prospective investors, including clients  
6 or prospective clients of an investment adviser, unless the security  
7 or transaction is exempted by section 402.

COMMENT TO § 403

Many statutes require advertising and sales literature to be *approved* by the Administrator before it is used. Some require merely *filing* prior to use. Some, particularly with respect to securities registered by notification, require sales literature to be filed either concurrently with or after its use. Section 403 affords the necessary flexibility, in conjunction with the authority in § 412(a) to classify, so that the Administrator may by rule or order apply any or all of these formulas to certain types of securities. Consistently with the "unless" clause, any rules or orders under this section can apply only to the person filing a registration statement or his principal.

1 SECTION 404. [*Misleading Filings.*] It is unlawful for any per-  
2 son to make or cause to be made, in any document filed with the  
3 [Administrator] or in any proceeding under this act, any state-  
4 ment which is, at the time and in the light of the circumstances  
5 under which it is made, false or misleading in any material respect.

1 SECTION 405. [*Unlawful Representations Concerning Registra-  
2 tion or Exemption.*]

3 (a) Neither (1) the fact that an application for registration  
4 under part II or a registration statement under Part III has been  
5 filed nor (2) the fact that a person or security is effectively  
6 registered constitutes a finding by the [Administrator] that any  
7 document filed under this act is true, complete, and not mislead-  
8 ing. Neither any such fact nor the fact that an exemption or  
9 exception is available for a security or a transaction means that  
10 the [Administrator] has passed in any way upon the merits or  
11 qualifications of, or recommended or given approval to, any per-  
12 son, security, or transaction.

13 (b) It is unlawful to make, or cause to be made, to any pro-  
14 spective purchaser, customer, or client any representation incon-  
15 sistent with subsection (a).

1 SECTION 406. [*Administration of Act.*]

2 (a) This act shall be administered by the [insert name of  
3 local administrative agency and any related provisions on method  
4 of selection, salary, term of office, budget, selection and re-  
5 muneratation of personnel, annual reports to the legislature or  
6 governor, etc., which are appropriate to the particular state].

7 (b) It is unlawful for the [Administrator] or any of [his]  
8 officers or employees to use for personal benefit any information  
9 which is filed with or obtained by the [Administrator] and which  
10 is not made public. No provision of this act authorizes the [Ad-  
11 ministrator] or any of [his] officers or employees to disclose any  
12 such information except among themselves or when necessary or  
13 appropriate in a proceeding or investigation under this act. No  
14 provision of this act either creates or derogates from any privilege

15 which exists at common law or otherwise when documentary or  
16 other evidence is sought under a subpoena directed to the  
17 [Administrator] or any of his officers or employees.

COMMENT TO § 406(b)

The "except" clause in the second sentence takes care of cases in which the Administrator or a member of his staff is subpoenaed. The law of evidence is not clear in such cases whether and to what extent non-public information in the files of a governmental agency is privileged. The last sentence makes it clear that nothing in the Act affects the question of evidentiary privilege one way or the other. That question is left to the general law in the particular state.

18 [(c) Insert a provision, if desired, covering fees for examina-  
19 tions, filings under section 403, and other miscellaneous filings  
20 for which no fees are specified elsewhere in this act.]

COMMENT TO § 406(c)

The only fees specifically provided for in this statute are the registration fees under §§ 202(b) and 305(b). Many statutes specify a wide variety of additional fees for certain filings, examinations, interpretative opinions and other special purposes.

1 SECTION 407. [*Investigations and Subpoenas.*]

2 (a) The [Administrator] in [his] discretion (1) may make  
3 such public or private investigations within or outside of this  
4 state as [he] deems necessary to determine whether any person  
5 has violated or is about to violate any provision of this act or  
6 any rule or order hereunder, or to aid in the enforcement of this  
7 act or in the prescribing of rules and forms hereunder, (2) may  
8 require or permit any person to file a statement in writing, under  
9 oath or otherwise as the [Administrator] determines, as to all  
10 the facts and circumstances concerning the matter to be in-  
11 vestigated, and (3) may publish information concerning any  
12 violation of this act or any rule or order hereunder.

13 (b) For the purpose of any investigation or proceeding under  
14 this act, the [Administrator] or any officer designated by [him]  
15 may administer oaths and affirmations, subpoena witnesses, com-  
16 pel their attendance, take evidence, and require the production  
17 of any books, papers, correspondence, memoranda, agreements,  
18 or other documents or records which the [Administrator] deems  
19 relevant or material to the inquiry.

20 (c) In case of contumacy by, or refusal to obey a subpoena  
21 issued to, any person, the [insert name of appropriate court],  
22 upon application by the [Administrator], may issue to the person  
23 an order requiring him to appear before the [Administrator], or  
24 the officer designated by [him], there to produce documentary  
25 evidence if so ordered or to give evidence touching the matter

26 under investigation or in question. Failure to obey the order of  
27 the court may be punished by the court as a contempt of court.  
28 (d) No person is excused from attending and testifying or  
29 from producing any document or record before the [Adminis-  
30 trator], or in obedience to the subpoena of the [Administrator]  
31 or any officer designated by [him], or in any proceeding instituted  
32 by the [Administrator], on the ground that the testimony or  
33 evidence (documentary or otherwise) required of him may tend  
34 to incriminate him or subject him to a penalty of forfeiture; but  
35 no individual may be prosecuted or subjected to any penalty or  
36 forfeiture for or on account of any transaction, matter, or thing  
37 concerning which he is compelled, after claiming his privilege  
38 against self-incrimination, to testify or produce evidence (docu-  
39 mentary or otherwise), except that the individual testifying is  
40 not exempt from prosecution and punishment for perjury or  
41 contempt committed in testifying.

#### COMMENT TO § 407

Section 407 is modeled generally on § 21(a)-(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a)-(d).

The immunity provision in § 407(d) is of the broader variety which forecloses subsequent prosecution and not merely the use of the compelled testimony. Compare *Counselman v. Hitchcock*, 142 U.S. 547 (1892), with *Ullmann v. United States*, 350 U.S. 422 (1956). The words "or contempt" in the "except" clause at the end do not appear in § 21(d) of the Securities Exchange Act of 1934, but they do appear in the 1954 revision of § 3486 of the United States Criminal Code, 68 Stat. 745, 18 U.S.C. § 3486, the statute construed in the *Ullmann* case. The purpose is to assure against a witness' obtaining immunity, answering a few questions and then balking. See *United States v. Bryan*, 339 U.S. 323, 335 *et seq.* (1950).

The compulsion of testimony under state process does not grant immunity from federal prosecution so far as the Fifth Amendment is concerned. *Feldman v. United States*, 322 U.S. 487 (1944) (prosecution under mail fraud statute); *Dunham v. Ottinger*, 243 N.Y. 423, 438, 154 N.E. 298, 302 (1926), cert. dismissed for want of a substantial federal question, 276 U.S. 592 (the compulsory testimony provision of the New York blue sky law satisfies the Fifth Amendment so long as it guarantees against state prosecution). On the other hand, compulsion of testimony under state process may violate the self-incrimination clause of the *state* constitution if there is no guarantee against a resulting federal prosecution. *People v. Den Uyl*, 318 Mich. 645, 29 N.W. 2d 284, 2 A.L.R. 2d 625 (1947); *State ex rel. Mitchell v. Kelly*, 71 So. 2d 887, 895 *et seq.* (Fla. 1954).

1 SECTION 408. [*Injunctions.*] Whenever it appears to the [Ad-  
2 ministrator] that any person has engaged or is about to engage  
3 in any act or practice constituting a violation of any provision  
4 of this act or any rule or order hereunder, [he] may in [his]  
5 discretion bring an action in the [insert name of appropriate  
6 court] to enjoin the acts or practices and to enforce compliance  
7 with this act or any rule or order hereunder. Upon a proper

8 showing a permanent or temporary injunction, restraining order,  
9 or writ of mandamus shall be granted and a receiver or con-  
10 servator may be appointed for the defendant or the defendant's  
11 assets. The court may not require the [Administrator] to post  
12 a bond.

#### COMMENT TO § 408

Section 408 is modeled on §§ 21(e) and 21(f) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(e), 78u(f).

1 SECTION 409. [*Criminal Penalties.*]

2 (a) Any person who willfully violates any provision of this  
3 act except section 404, or who willfully violates any rule or order  
4 under this act, or who willfully violates section 404 knowing the  
5 statement made to be false or misleading in any material respect,  
6 shall upon conviction be fined not more than \$5,000 or imprisoned  
7 not more than three years, or both; but no person may be im-  
8 prisoned for the violation of any rule or order if he proves that  
9 he had no knowledge of the rule or order. [No indictment or  
10 information may be returned under this act more than five years  
11 after the alleged violation.]

12 (b) The [Administrator] may refer such evidence as is avail-  
13 able concerning violations of this act or of any rule or order here-  
14 under to the [attorney general or the proper district attorney],  
15 who may, with or without such a reference, institute the appro-  
16 priate criminal proceedings under this act.

17 (c) Nothing in this act limits the power of the state to punish  
18 any person for any conduct which constitutes a crime by statute  
19 or at common law.

#### COMMENT TO § 409

On the meaning of "willfully," see the comment under § 204(a)(2)(B). The sentence in brackets in § 409(a) is an optional provision for any state which does not have a general criminal statute of limitations.

1 SECTION 410. [*Civil Liabilities.*]

2 (a) Any person who  
3 (1) offers or sells a security in violation of section 201(a),  
4 301, or 405(b), or of any rule or order under section 403 which  
5 requires the affirmative approval of sales literature before it  
6 is used, or of any condition imposed under section 304(d),  
7 305(g), or 305(h), or  
8 (2) offers or sells a security by means of any untrue state-  
9 ment of a material fact or any omission to state a material  
10 fact necessary in order to make the statements made, in the  
11 light of the circumstances under which they are made, not

12 misleading (the buyer not knowing of the untruth or omis-  
13 sion), and who does not sustain the burden of proof that he  
14 did not know, and in the exercise of reasonable care could not  
15 have known, of the untruth or omission,  
16 is liable to the person buying the security from him, who may  
17 sue either at law or in equity to recover the consideration paid  
18 for the security, together with interest at six percent per year  
19 from the date of payment, costs, and reasonable attorneys' fees,  
20 less the amount of any income received on the security, upon  
21 the tender of the security, or for damages if he no longer owns  
22 the security. Damages are the amount that would be recoverable  
23 upon a tender less the value of the security when the buyer  
24 disposed of it and interest at six percent per year from the date  
25 of disposition.

COMMENT TO § 410(a)

For a detailed breakdown of the civil liabilities under the present statutes, with annotations of some of the leading cases, see Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 962-82.

*Clause (1)*: Clause (1) imposes civil liability when the offer violates one of the specified provisions even though the sale does not. The making of a non-exempted offer before the effective date can create no civil rights in the offeree unless the offer results in a sale. But when it does, this language means that the buyer may recover even though no contract was made until after the effective date.

*Clause (2)*: This clause is almost identical with § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), which was also borrowed almost verbatim in § 451.116 of the Michigan statute and § 13.1-522(a)(2) of the new Virginia act. For a comparison of § 12(2) of the federal statute with equitable rescission, from which it was adapted, see Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 997-1001, 1003-11. Section 410(a)(2), like § 101, the general fraud provision, applies regardless of whether the security is registered, exempted, or sold in violation of the registration requirements.

*Measure of damages*: The measure of damages, when the plaintiff is not in a position to tender back the security, is the same under Clauses (1) and (2). It is designed to be the substantial equivalent of rescission.

26 (b) Every person who directly or indirectly controls a seller  
27 liable under subsection (a), every partner, officer, or director of  
28 such a seller, every person occupying a similar status or perform-  
29 ing similar functions, every employee of such a seller who ma-  
30 terially aids in the sale, and every broker-dealer or agent who  
31 materially aids in the sale are also liable jointly and severally  
32 with and to the same extent as the seller, unless the non-seller  
33 who is so liable sustains the burden of proof that he did not know,  
34 and in exercise of reasonable care could not have known, of the  
35 existence of the facts by reason of which the liability is alleged

36 to exist. There is contribution as in cases of contract among the  
37 several persons so liable.

COMMENT TO § 410(b)

The defense of lack of knowledge is modeled on § 15 of the Securities Act of 1933, 15 U.S.C. § 77o, and § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a). The last sentence, with reference to contribution, is a safeguard to avoid the common-law rule which prohibits contribution among joint tortfeasors.

38 (c) Any tender specified in this section may be made at any  
39 time before entry of judgment.

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

COMMENT TO § 410(d)

This section is designed to codify the majority view of the few cases which have ruled on the question of survivability under the state and federal securities statutes. For the cases, see Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 1077-78. Although the question whether a statutory cause of action is *assignable* involves much the same considerations as whether it survives the death of either party, that question is left to the general law, whether decisional or under the general assignment statutes which exist in some states.

42 (e) No person may sue under this section more than two years  
43 after the contract of sale. No person may sue under this section  
44 (1) if the buyer received a written offer, before suit and at a  
45 time when he owned the security, to refund the consideration  
46 paid together with interest at six percent per year from the date  
47 of payment, less the amount of any income received on the se-  
48 curity, and he failed to accept the offer within thirty days of its  
49 receipt, or (2) if the buyer received such an offer before suit and  
50 at a time when he did not own the security, unless he rejected  
51 the offer in writing within thirty days of its receipt.

COMMENT TO § 410(e)

The purpose of § 410(e)(2) is to take care of the case where the buyer has already disposed of the security before the rescission offer is made to him. In such a case the buyer is not foreclosed from bringing suit if he is not satisfied with the seller's computation of damages, but in order to do so he must reject the rescission offer within thirty days so that the seller may know where he stands.

52 (f) No person who has made or engaged in the performance of  
53 any contract in violation of any provision of this act or any  
54 rule or order hereunder, or who has acquired any purported right  
55 under any such contract with knowledge of the facts by reason  
56 of which its making or performance was in violation, may base  
57 any suit on the contract.

COMMENT TO § 410(f)

This result has been quite generally reached by the courts even in the absence of a specific provision. See the cases cited in Loss, *Securities Regulation* (1951 with 1955 Supp.), p. 967, n. 63.

58 (g) Any condition, stipulation, or provision binding any per-  
59 son acquiring any security to waive compliance with any pro-  
60 vision of this act or any rule or order hereunder is void.

61 (h) The rights and remedies provided by this act are in addi-  
62 tion to any other rights or remedies that may exist at law or in  
63 equity, but this act does not create any cause of action not  
64 specified in this section or section 202(e).

COMMENT TO § 410(h)

The mere presence of certain specific liability provisions in a statute is no assurance that other liabilities will not be implied by the courts under the doctrine which creates a common-law tort action for violation of certain criminal statutes. *Restatement of Torts* §§ 286-88. Notwithstanding the presence of several specific liability provisions in each of the several SEC statutes, the federal courts have implied a civil cause of action by a defrauded seller against the buyer under SEC Rule X-10B-5. See Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 1052-66. The "but" clause in § 410(h) is designed to assure that no comparable development is based on violation of § 101 of this Act.

1 SECTION 411. [*Judicial Review of Orders.*]

2 (a) Any person aggrieved by a final order of the [Adminis-  
3 trator] may obtain a review of the order in the [insert name of  
4 appropriate court] by filing in court, within sixty days after the  
5 entry of the order, a written petition praying that the order be  
6 modified or set aside in whole or in part. A copy of the petition  
7 shall be forthwith served upon the [Administrator], and there-  
8 upon the [Administrator] shall certify and file in court a copy  
9 of the filing and evidence upon which the order was entered.  
10 When these have been filed, the court has exclusive jurisdiction  
11 to affirm, modify, enforce, or set aside the order, in whole or in  
12 part. The findings of the [Administrator] as to the facts, if sup-  
13 ported by competent, material and substantial evidence, are con-  
14 clusive. If either party applies to the court for leave to adduce  
15 additional material evidence, and shows to the satisfaction of  
16 the court that there were reasonable grounds for failure to adduce  
17 the evidence in the hearing before the [Administrator], the court  
18 may order the additional evidence to be taken before the [Ad-  
19 ministrator] and to be adduced upon the hearing in such manner  
20 and upon such conditions as the court considers proper. The  
21 [Administrator] may modify [his] findings and order by reason  
22 of the additional evidence and shall file in court the additional  
23 evidence together with any modified or new findings or order.

24 [The judgment of the court is final, subject to review by the  
25 (insert name of appropriate court).]

26 (b) The commencement of proceedings under subsection (a)  
27 does not, unless specifically ordered by the court, operate as a  
28 stay of the [Administrator's] order.

COMMENT TO § 411

This section is modeled partly on § 12 of the Model Administrative Procedure Act, 54 Handbook of National Conference of Commissioners on Uniform State Laws 334 (1944), and partly on § 25 of the Securities Exchange Act of 1934, 15 U.S.C. § 78y.

1 SECTION 412. [*Rules, Forms, Orders, and Hearings.*]

2 (a) The [Administrator] may from time to time make, amend,  
3 and rescind such rules, forms, and orders as are necessary to  
4 carry out the provisions of this act, including rules and forms  
5 governing registration statements, applications, and reports, and  
6 defining any terms, whether or not used in this act, insofar as  
7 the definitions are not inconsistent with the provisions of this  
8 act. For the purpose of rules and forms, the [Administrator]  
9 may classify securities, persons, and matters within [his] juris-  
10 diction, and prescribe different requirements for different classes.

11 (b) No rule, form, or order may be made, amended, or re-  
12 scinded unless the [Administrator] finds that the action is neces-  
13 sary or appropriate in the public interest or for the protection of  
14 investors and consistent with the purposes fairly intended by  
15 the policy and provisions of this act. In prescribing rules and  
16 forms the [Administrator] may cooperate with the securities ad-  
17 ministrators of the other states and the Securities and Exchange  
18 Commission with a view to effectuating the policy of this statute  
19 to achieve maximum uniformity in the form and content of regis-  
20 tration statements, applications, and reports wherever practicable.

21 (c) The [Administrator] may by rule or order prescribe (1)  
22 the form and content of financial statements required under this  
23 act, (2) the circumstances under which consolidated financial  
24 statements shall be filed, and (3) whether any required financial  
25 statements shall be certified by independent or certified public  
26 accountants. All financial statements shall be prepared in accord-  
27 ance with generally accepted accounting practices.

28 (d) All rules and forms of the [Administrator] shall be pub-  
29 lished.

30 (e) No provision of this act imposing any liability applies to  
31 any act done or omitted in good faith in conformity with any  
32 rule, form, or order of the [Administrator], notwithstanding that  
33 the rule, form, or order may later be amended or rescinded or be

34 determined by judicial or other authority to be invalid for any  
35 reason.

36 (f) Every hearing in an administrative proceeding shall be  
37 public unless the [Administrator] in [his] discretion grants a  
38 request joined in by all the respondents that the hearing be con-  
39 ducted privately.

#### COMMENT TO § 412

(a): Section 412(a) is largely modeled on the rule-making provisions of the SEC statutes. Some states have Administrative Procedure Acts which cut across this area. An order, of course, is directed to one or more particular persons, and a rule or form is of general applicability. Hence, when the Administrator is authorized to adopt rules or forms, he may not act by order, and vice versa.

(d): Local Administrative Procedure Acts may provide specific procedures for publishing rules and forms. In the absence of any such statute, § 412(d) leaves the procedure of publication to each Administrator.

(e): Section 412(e) is modeled on the comparable provisions in the SEC acts and many other federal administrative statutes.

#### 1 SECTION 413. [*Administrative Files and Opinions.*]

2 (a) A document is filed when it is received by the [Adminis-  
3 trator].

4 (b) The [Administrator] shall keep a register of all applica-  
5 tions for registration and registration statements which are or  
6 have ever been effective under this act and all denial, suspension,  
7 or revocation orders which have been entered under this act. The  
8 register shall be open for public inspection.

9 (c) The information contained in or filed with any registra-  
10 tion statement, application, or report may be made available to  
11 the public under such rules as the [Administrator] prescribes.

12 (d) Upon request and at such reasonable charges as [he] pre-  
13 scribes, the [Administrator] shall furnish to any person photo-  
14 static or other copies (certified under [his] seal of office if  
15 requested) of any entry in the register or any document which is  
16 a matter of public record. In any proceeding or prosecution under  
17 this act, any copy so certified is prima facie evidence of the  
18 contents of the entry or document certified.

19 (e) The [Administrator] in [his] discretion may honor re-  
20 quests from interested persons for interpretative opinions.

#### COMMENT TO § 413

Section 413(a) prescribes no particular method of filing, although the Administrator is free to do so by rule under § 412(a). Section 413(b) refers to a register of the applications and registration statements, not the physical documents.

#### 1 SECTION 414. [*Scope of the Act and Service of Process.*]

2 (a) Sections 101, 201(a), 301, 405, and 410 apply to persons who

3 sell or offer to sell when (1) an offer to sell is made in this state,  
4 or (2) an offer to buy is made and accepted in this state.

5 (b) Sections 101, 201(a), and 405 apply to persons who buy  
6 or offer to buy when (1) an offer to buy is made in this state,  
7 or (2) an offer to sell is made and accepted in this state.

8 (c) For the purpose of this section, an offer to sell or to buy  
9 is made in this state, whether or not either party is then present  
10 in this state, when the offer (1) originates from this state or (2)  
11 is directed by the offeror to this state and received at the place  
12 to which it is directed (or at any post office in this state in the  
13 case of a mailed offer).

14 (d) For the purpose of this section, an offer to buy or to sell  
15 is accepted in this state when acceptance (1) is communicated  
16 to the offeror in this state and (2) has not previously been com-  
17 municated to the offeror, orally or in writing, outside this state;  
18 and acceptance is communicated to the offeror in this state,  
19 whether or not either party is then present in this state, when  
20 the offeree directs it to the offeror in this state reasonably be-  
21 lieving the offeror to be in this state and it is received at the place  
22 to which it is directed (or at any post office in this state in the  
23 case of a mailed acceptance).

24 (e) An offer to sell or to buy is not made in this state when  
25 (1) the publisher circulates or there is circulated on his behalf in  
26 this state any bona fide newspaper or other publication of gen-  
27 eral, regular, and paid circulation which is not published in this  
28 state, or which is published in this state but has had more than  
29 two-thirds of its circulation outside this state during the past  
30 twelve months, or (2) a radio or television program originating  
31 outside this state is received in this state.

32 (f) Sections 102 and 201(c), as well as section 405 so far as  
33 investment advisers are concerned, apply when any act instru-  
34 mental in effecting prohibited conduct is done in this state,  
35 whether or not either party is then present in this state.

#### COMMENT TO § 414(a)-(f)

Section 414 defines and delimits the application of the Act in interstate or international transactions with only some of their elements in the state. It is not limited in its impact to the civil liability provisions of § 410. Section 414 and its appendages, §§ 401(c)(4) and 401(f)(6), determine the scope of the Act for all kinds of proceedings—civil, criminal, injunctive and administrative. It is quite clear that a person may violate the law of a given state, even criminally, without ever being within the state or performing within the state every act necessary to complete the offense. *Strassheim v. Daly*, 221 U.S. 280 (1911). So far as applying the Act in civil or injunctive or administrative proceedings is concerned, see the comment under §§ 414(g) and 414(h).

Section 414(a)-(f) can best be explained in the context of a civil action under § 410(a) by a buyer in State B against a selling broker-dealer in State S:

1. The basic approach of § 414(a)(1) is to apply the specified sections when "an offer to sell is made in this state."

2. Section 414(c) provides, in substance, that an offer which originates in State S and is directed to State B is made in both states. Hence the statute of State B applies under § 414(c)(2) in the hypothetical case.

3. By the same token, the statute of State S also applies to the offer under § 414(c)(1), on the theory that State S should not be used as a base of operations for defrauding persons in other states. It is thus quite possible for more than one statute to apply to a given transaction.

4. Section 414(e)(1) deals with the problem of offers in the form of newspaper and magazine advertisements. It provides, in substance, that an advertisement in a regular newspaper or periodical is not an "offer" in any state other than the state of publication. Thus a seller may insert an advertisement in the New York Times and have it circulated freely in other states.

5. A slight variation of this problem occurs in connection with magazines of national circulation. The place of publication of these magazines is purely fortuitous so far as the purposes of § 414 are concerned. Accordingly, § 414(e)(1) refers also to a publication which is published *within* the state but has more than two-thirds of its circulation *outside* the state.

6. Section 414(e)(2) treats radio and television programs originating outside the state in the same way as newspapers or magazines published outside the state. For purposes of this section a radio or television program is considered to originate in the state where the microphone or television camera is, not at any relay station.

7. The door left open in § 414(e) is then closed somewhat by § 414(a)(2), which provides in effect that a person in State B who makes an offer to *buy* as a result of an advertisement he sees in a paper published in State S (or a radio or television program originating in State S) may render the statute applicable if the seller then accepts the offer "in this state" (that is, State B). And § 414(d) specifies when an offer is "accepted in this state."

8. If the selling dealer in State S merely sends a confirmation or delivers the security into State B, or the buyer in State B sends a check in payment from within State B, the statute of State B does not apply except when under § 414(d) the confirmation or delivery constitutes the seller's acceptance of the buyer's offer to buy.

9. The parenthetical references in §§ 414(c) and 414(d) to "any post office in this state" are designed to make it clear that, when a person in State X directs an offer or acceptance to a person in State Y who has moved or gone temporarily to State Z, the act of State Y does apply and the act of State Z does not. This prevents entrapment of innocent persons who have no reason to believe that a communication will be forwarded into another state whose act has not been complied with.

10. The applicability of the statute to *buyers* as distinct from *sellers* is covered by § 414(b), which is precisely the converse of § 414(a). Here, of course, there is no civil liability.

11. Section 414(f) applies only to *investment advisers*.

12. Sections 401(c)(4) and 401(f)(6) exclude from the definitions of "broker-dealer" and "investment adviser" certain persons who have no place of business in the state. Clause (A) of each section has much the same rationale as the exemption in § 402(b)(8) for sales to institutional buyers or broker-dealers. Clause (A) of § 401(c)(4), insofar as it refers to issuers or other broker-dealers, has the additional purpose of making it unnecessary for an out-of-state underwriter to register as a broker-dealer before negotiating with an issuer in the state or setting up a selling group with local broker-dealers in it. Clause (B) of each

section is designed to permit a New York broker-dealer or investment adviser, for example, to take care of a few customers who live in New Jersey or are vacationing in Florida without registering as a broker-dealer or investment adviser in those states, as he would otherwise have to do under § 414.

13. Nothing in the statute requires or permits one state to enforce the criminal provisions of another state's blue sky law.

36 (g) Every applicant for registration under this act and every  
37 issuer which proposes to offer a security in this state through any  
38 person acting on an agency basis in the common-law sense shall  
39 file with the [Administrator], in such form as [he] by rule pre-  
40 scribes, an irrevocable consent appointing the [Administrator]  
41 or [his] successor in office to be his attorney to receive service  
42 of any lawful process in any non-criminal suit, action, or pro-  
43 ceeding against him or his successor executor or administrator  
44 which arises under this act or any rule or order hereunder after  
45 the consent has been filed, with the same force and validity as if  
46 served personally on the person filing the consent. A person who  
47 has filed such a consent in connection with a previous registra-  
48 tion need not file another. Service may be made by leaving  
49 a copy of the process in the office of the [Administrator], but it  
50 is not effective unless (1) the plaintiff, who may be the [Ad-  
51 ministrator] in a suit, action, or proceeding instituted by [him],  
52 forthwith sends notice of the service and a copy of the process  
53 by registered mail to the defendant or respondent at his last  
54 address on file with the [Administrator], and (2) the plaintiff's  
55 affidavit of compliance with this subsection is filed in the case  
56 on or before the return day of the process, if any, or within such  
57 further time as the court allows.

#### COMMENT TO § 414(g)

The *issuer* does not have to file a consent to service unless it proposes to offer the security in the state through somebody acting on an agency basis in the common-law sense.

58 (h) When any person, including any nonresident of this state,  
59 engages in conduct prohibited or made actionable by this act or  
60 any rule or order hereunder, and he has not filed a consent to  
61 service of process under subsection (g) and personal jurisdiction  
62 over him cannot otherwise be obtained in this state, that conduct  
63 shall be considered equivalent to his appointment of the [Ad-  
64 ministrator] or [his] successor in office to be his attorney to re-  
65 ceive service of any lawful process in any non-criminal suit,  
66 action, or proceeding against him or his successor executor or  
67 administrator which grows out of that conduct and which is  
68 brought under this act or any rule or order hereunder, with the  
69 same force and validity as if served on him personally. Service



70 may be made by leaving a copy of the process in the office of the  
71 [Administrator], and it is not effective unless (1) the plaintiff,  
72 who may be the [Administrator] in a suit, action, or proceeding  
73 instituted by [him], forthwith sends notice of the service and a  
74 copy of the process by registered mail to the defendant or re-  
75 spondent at his last known address or takes other steps which  
76 are reasonably calculated to give actual notice, and (2) the  
77 plaintiff's affidavit of compliance with this subsection is filed in  
78 the case on or before the return day of the process, if any, or  
79 within such further time as the court allows.

COMMENT TO § 414(h)

The purpose of § 414(h) is to provide for substituted service of process when a seller in State S directs an offer into State B in violation of the registration provisions of State B or fraudulently. Under § 414(h) the buyer may sue the seller in State B and then bring suit on the judgment in State S. The section has been closely modeled on the type of nonresident motorist statute whose constitutionality was sustained in *Hess v. Pawlowski*, 274 U.S. 352 (1927). Recent cases indicate that it is due process of law for a court of State B to enter a judgment in the hypothetical case discussed in this paragraph if the person in State S effected only an isolated transaction in State B without ever entering the state. In addition to the nonresident motorist precedents, see *Travelers Health Ass'n v. Commonwealth of Virginia ex rel. State Corporation Commission*, 339 U.S. 643 (1950); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Parmalee v. Iowa State Traveling Mens Ass'n*, 206 F. 2d 518 (5th Cir. 1953), cert. denied, 346 U.S. 877; *Schutt v. Commercial Travelers Mutual Accident Ass'n*, 206 F. 2d 158 (2d Cir. 1956). If this is correct, a court in State S will have to give full faith and credit to the judgment of the court of State B.

80 (i) When process is served under this section, the court, or the  
81 [Administrator] in a proceeding before [him], shall order such  
82 continuance as may be necessary to afford the defendant or  
83 respondent reasonable opportunity to defend.

1 SECTION 415. [*Statutory Policy.*] This act shall be so construed  
2 as to effectuate its general purpose to make uniform the law of  
3 those states which enact it and to coordinate the interpretation  
4 and administration of this act with the related federal regulation.

1 SECTION 416. [*Short Title.*] This act may be cited as the Uni-  
2 form Securities Act.

1 SECTION 417. [*Severability of Provisions.*] If any provision of  
2 this act or the application thereof to any person or circumstance  
3 is held invalid, the invalidity shall not affect other provisions or  
4 applications of the act which can be given effect without the  
5 invalid provision or application, and to this end the provisions of  
6 this act are severable.

1 SECTION 418. [*Repeal and Saving Provisions.*]

2 (a) The [identify the existing act or acts] is [are] repealed  
3 except as saved in this section.

4 (b) Prior law exclusively governs all suits, actions, prosecu-  
5 tions, or proceedings which are pending or may be initiated on  
6 the basis of facts or circumstances occurring before the effective  
7 date of this act, except that no civil suit or action may be main-  
8 tained to enforce any liability under prior law unless brought  
9 within any period of limitation which applied when the cause of  
10 action accrued and in any event within two years after the  
11 effective date of this act.

12 (c) All effective registrations under prior law, all administra-  
13 tive orders relating to such registrations, and all conditions im-  
14 posed upon such registrations remain in effect so long as they  
15 would have remained in effect if this act had not been passed.  
16 They are considered to have been filed, entered, or imposed under  
17 this act, but are governed by prior law.

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

22 (e) Judicial review of all administrative orders as to which  
23 review proceedings have not been instituted by the effective date  
24 of this act are governed by section 411, except that no review  
25 proceeding may be instituted unless the petition is filed within  
26 any period of limitation which applied to a review proceeding  
27 when the order was entered and in any event within sixty days  
28 after the effective date of this act.

1 SECTION 419. [*Time of Taking Effect.*] This act shall take effect  
2 on [insert date, which should be at least sixty or ninety days after  
3 enactment].

COMMENT TO § 419

If the act is adopted in a particular state before the more essential uniform forms and rules have been drafted, the effective date should be suitably delayed.

## APPENDIX A

### ACCOMMODATION OF THE ACT TO THE DELETION OF PART III (REGISTRATION OF SECURITIES)

- PREAMBLE Change the third clause to read: "requiring the registration of broker-dealers, agents, and investment advisers;"
- SEC. 202(a): In the first sentence change "414(g)" to "314(g)"
- SEC. 202(e): In the fourth sentence change "410" to "310"
- PART III: Delete this part and renumber Part IV as Part III, Sec. 401 as Sec. 301, etc.
- SEC. 401(b): Delete the first two sentences and substitute: "'Agent' means any individual other than a broker-dealer who represents a broker-dealer or issuer (except as provided in section 302) in effecting or attempting to effect purchases or sales of securities."
- SEC. 401(f): In Clause (5) change "402(a)(1)" to "302(a)(1)"
- SEC. 401(h): Delete this subsection and renumber the following subsections of Sec. 401 accordingly.
- SEC. 402(a): Change the introductory clause to read: "Agents of issuers with respect to the following securities are excepted from sections 301(b) and 303:"  
Delete Clauses (4)-(9) and (12); renumber the remaining clauses accordingly; and at the end of Clause (11), to be renumbered (5), change the semi-colon to a period.
- SEC. 402(b): Change the introductory clause to read: "Agents of issuers with respect to the following transactions are excepted from sections 301(b) and 303:"  
Delete Clauses (1)-(3) and (7) and renumber the remaining clauses accordingly.  
Change Clause (6), to be renumbered (3), to read: "any transaction by a receiver or trustee in bankruptcy;"  
At the end of Clause (12), to be renumbered (8), change the period to a semi-colon and add the following new Clause (9): "any transaction effected with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state."

- SEC. 402(c): Delete this subsection and renumber Sec. 402(d) accordingly.
- SEC. 402(d): Delete "an exemption or"
- SEC. 403: Change this section to read: "The [Administrator] may by rule or order require any registered broker-dealer or agent to file any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature addressed or intended for distribution to prospective investors, except with respect to the securities and transactions specified in section 302."
- SEC. 405(a): Change the first sentence to read: "Neither (1) the fact that an application for registration has been filed nor (2) the fact that a person is \*\*\*."  
In the second sentence delete "exemption or" and "for a security or a transaction"
- SEC. 406(c): Delete the reference to Sec. 403.
- SEC. 409(a): Change "404" to "304" twice.
- SEC. 410(a): Change Clause (1) to read: "(1) offers or sells a security in violation of section 201(a) or 305(b), or"
- SEC. 413(b): Delete "and registration statements"
- SEC. 413(c): Change this subsection to read: "The information contained in or filed with any application or report \*\*\*."
- SEC. 414(a): Change this subsection to read: "Sections 101, 201(a), 305, and 310 are \*\*\*."
- SEC. 414(b): Change "405" to "305"
- SEC. 414(f): Change "405" to "305"
- SEC. 418(d): Delete this subsection and renumber Sec. 418(e) accordingly.
- SEC. 418(e): Change "411" to "311"

## APPENDIX B

### ACCOMMODATION OF THE ACT TO THE DELETION OF PARTS II AND III

Any state which desires nothing more than a "fraud" type of statute may adopt only Part I and a few provisions of Part IV, which would be renumbered as Part II. Only the provisions in the following table should be retained. They should be renumbered as indicated. Otherwise they should be unchanged except as indicated.

| <i>Present<br/>Provision</i> | <i>Renumbered<br/>Provision<br/>if Sec. 102<br/>Is Retained<br/>in Full</i> | <i>Renumbered<br/>Provision if<br/>Sec. 102(b) and<br/>Sec. 102(c) Are<br/>Deleted</i> |
|------------------------------|---|--|
| PREAMBLE                     | PREAMBLE  | PREAMBLE   |
| SEC. 101                     | SEC. 101  | SEC. 101   |
| SEC. 102 (a)                 | SEC. 102 (a)  | SEC. 102   |
| SEC. 102 (b)                 | SEC. 102 (b)  | .....  |
| SEC. 102 (c)                 | SEC. 102 (c)  | .....  |
| SEC. 401 (a)                 | SEC. 201 (a)  | SEC. 201 (a)   |
| SEC. 401 (d)                 | SEC. 201 (b)  | SEC. 201 (b)   |
| SEC. 401 (f)                 | SEC. 201 (c)  | .....  |
| SEC. 401 (i)                 | SEC. 201 (d)  | SEC. 201 (c)   |
| SEC. 401 (j)                 | SEC. 201 (e)  | SEC. 201 (d)   |
| SEC. 401 (k)                 | SEC. 201 (f)  | .....  |
| SEC. 401 (l)                 | SEC. 201 (g)  | SEC. 201 (e)   |
| SEC. 401 (m)                 | SEC. 201 (h)  | .....  |
| SEC. 402 (a)                 | SEC. 202  | SEC. 202   |
| SEC. 406 (a) - (b)           | SEC. 203 (a) - (b)  | SEC. 203 (a) - (b)   |
| SEC. 407 (a) - (d)           | SEC. 204 (a) - (d)  | SEC. 204 (a) - (d)   |
| SEC. 408                     | SEC. 205  | SEC. 205   |
| SEC. 409 (a) - (c)           | SEC. 206 (a) - (c)  | SEC. 206 (a) - (c)   |
| SEC. 410 (a) - (h)           | SEC. 207 (a) - (h)  | SEC. 207 (a) - (h)   |
| SEC. 412                     | SEC. 208  | .....  |
| SEC. 414 (a) - (f)           | SEC. 209 (a) - (f)  | SEC. 208 (a) - (f)   |
| SEC. 414 (h)                 | SEC. 209 (g)  | SEC. 208 (g)   |
| SEC. 415                     | SEC. 210  | SEC. 209   |
| SEC. 416                     | SEC. 211  | SEC. 210   |
| SEC. 417                     | SEC. 212  | SEC. 211   |
| SEC. 418 (a) - (b)           | SEC. 213 (a) - (b)  | SEC. 212 (a) - (b)   |
| SEC. 419                     | SEC. 214  | SEC. 213   |

|                |   |
|----------------|---|
| PREAMBLE       | Change the preamble to read: "[AN ACT Relating to securities; prohibiting fraudulent practices in relation thereto; and making uniform the law with reference thereto.]"  |
| SEC. 401 (f) : | If Sec. 102 (b) and Sec. 102 (c) are retained (see Appendix C), change Sec. 401 (f) as follows:<br>Change Clause (3) to read: "a person engaged as a broker or dealer in the business of effecting transactions in securities if the performance of these services is solely incidental to the conduct of his business as a broker or dealer and he receives no special compensation for these services;"<br>Change Clause (5) to read: "a person whose advice, analyses, or reports relate only to securities (including revenue obligations) issued or guaranteed as to payment of principal, interest, or dividends by the United States, any state, or any agency or corporate or other instrumentality of one or more of the foregoing, or certificates of deposit for any of the foregoing;"<br>In Clause (6) delete "broker-dealers," and substitute "brokers, dealers," |
| SEC. 401 (k) : | If Sec. 401 (f) is retained, change Sec. 401 (k) to read: "Investment Company Act of 1940" means the federal statute of that name as amended before or after the effective date of this act."   |
| SEC. 402 (d) : | Since Sec. 402 (d) is the only provision of Sec. 402 to be retained, delete the letter "(d)" and change the section heading to read: "[ <i>Burden of Proving Exceptions</i> ]"<br>Delete "an exemption or"  |
| SEC. 406 (b) : | In the first sentence delete "filed with or"  |
| SEC. 407 :     | This entire section should be retained with the following changes in Sec. 407 (a) :<br>In Clause (1) delete "and forms"<br>In Clauses (1) and (3) delete "or any rule or order hereunder" and, if Sec. 102 (c) is retained, substitute "or any rule under section 102 (c)"  |
| SEC. 408 :     | Delete "or any rule or order hereunder" twice in the first sentence and, if Sec. 102 (c) is retained, substitute "or any rule under section 102 (c)"  |
| SEC. 409 (a) : | Change the first sentence to read as follows: "Any person who willfully violates any provision of this act [or any rule under section 102 (c)] shall upon conviction be fined not more than \$5,000 or imprisoned   |

not more than three years, or both [; but no person may be imprisoned for the violation of any rule under section 102(c) if he proves that he had no knowledge of the rule].” The bracketed language in the first sentence should be included only if Sec. 102(c) is retained.

- SEC. 409(b): Delete “or of any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or of any rule under section 102(c)”
- SEC. 410(a): Delete Clause (1) and the figure “(2)” and arrange Sec. 410(a) as one continuous paragraph without indentation.
- SEC. 410(b): Delete “broker-dealer or agent” and substitute “broker or dealer or employee of a broker or dealer”
- SEC. 410(f): Delete “or any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”
- SEC. 410(g): Delete “or any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”
- SEC. 410(h): Delete “or section 202(e)”
- SEC. 412: If Sec. 102(c) is retained, change the entire Sec. 412 to read:

“Sec. 412. [*Rules and Orders.*] The [Administrator] may from time to time make, amend, and rescind such rule and orders as are necessary to carry out the provisions of sections 102(c) and 201(c). For the purpose of rules under section 102(c), the [Administrator] may classify investment advisers and prohibit custody by all investment advisers or by one or more classes. No rule or order may be made, amended, or rescinded unless the [Administrator] finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act. All rules shall be published.”

- SEC. 414(a): Change this section to read: “Section 101 applies \*\*\*.”
- SEC. 414(b): Change this section to read: “Section 101 applies \*\*\*.”
- SEC. 414(f): Change this section to read: “Section 102 applies \*\*\*.”
- SEC. 414(h): In the first sentence delete “or any rule or order hereunder” twice and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”

In the first sentence delete “and he has not filed a consent to service of process under subsection (g)”

Delete “suit, action, or proceeding” twice and substitute “suit or action”

Add at the end: “When process is served under this subsection, the court shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend.”

## APPENDIX C

### ACCOMMODATION OF THE ACT TO THE DELETION OF SOME OR ALL OF THE PROVISIONS RELATING TO INVESTMENT ADVISERS

The Act lends itself to four alternative treatments of investment advisers. In decreasing order of strictness they are as follows:

1. If Parts I and II are adopted as they stand, investment advisers will be subject to the prohibitions of certain fraudulent and other practices in Sec. 102 and will also be registered along with broker-dealers under Part II.

2. It is possible to adopt all of Sec. 102 without requiring investment advisers to be registered. The changes required to accomplish this are enumerated in Appendix C-1.

3. It is possible to adopt only Sec. 102(a), which prohibits fraudulent advisory activities by any person without using the term "investment adviser," and forego not only the registration of investment advisers but also Sec. 102(b) and Sec. 102(c), which deal with investment advisory contracts and custody of clients' funds and securities. The changes required to accomplish this are enumerated in Appendix C-2.

4. It is possible to delete all references to investment advisers or investment advice, including Sec. 102(a). The changes required to accomplish this are enumerated in Appendix C-3.

#### APPENDIX C-1

- PREAMBLE Delete "investment advisers,"
- SEC. 201(c): Delete this subsection and renumber Sec. 201(d) accordingly.
- SEC. 202(a): Change the first sentence to read: "A broker-dealer or agent may obtain \*\*\*." Change Clause (3) to read: "the qualifications and business history of the applicant and, in the case of a broker-dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer;"
- SEC. 202(b): Change the first sentence to read: "Every applicant for initial or renewal registration shall pay a filing fee of \$. . . . . in the case of a broker-dealer and \$. . . . . in the case of an agent."
- SEC. 202(c): Delete "or investment adviser"
- SEC. 202(d): Delete "and investment advisers"

- SEC. 202(e): Change the first sentence to read: "The Administrator may by rule require registered broker-dealers and agents to post \*\*\*."
- SEC. 203(a): Delete "and investment adviser"
- SEC. 203(b): Delete "and investment adviser"
- SEC. 204(a): In the first Clause (2) delete "or investment adviser" twice. Change Clause (E) to read: "\*\*\* revoking registration as a broker-dealer or agent;" In Clause (H) delete "or investment adviser" twice. In Clause (J) delete "or his employees if he is an investment adviser"
- SEC. 204(b): Delete Clauses (2) and (5) and renumber the remaining clauses accordingly. In Clause (6) delete everything after "applicants" except the period.
- SEC. 204(d): Change this subsection to read: "\*\*\* has ceased to do business as a broker-dealer or agent, or is subject \*\*\*."
- SEC. 204(e): Change the first sentence to read: "Withdrawal from registration as a broker-dealer or agent becomes effective \*\*\*."
- SEC. 403: Delete "including clients or prospective clients of an investment adviser."
- SEC. 414(f): Change this subsection to read: "Section 102 applies \*\*\*"

#### APPENDIX C-2

- In addition to all the changes specified in Appendix C-1:
- SEC. 102: Delete Sec. 102(b) and Sec. 102(c) and the letter "(a)" in the first line.
- SEC. 401(f): Delete this subsection and renumber the remaining subsections of Sec. 401 accordingly.

#### APPENDIX C-3

- In addition to all the changes specified in Appendix C-1:
- SEC. 102: Delete this section.
- SEC. 401(f): Delete this subsection and renumber the following subsections of Sec. 401 accordingly.
- SEC. 405(b): Delete "purchaser, customer, or client" and substitute "purchaser or customer"
- SEC. 414(f): Delete this subsection and renumber the following subsections of Sec. 414 accordingly.