



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU


RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 02/14/2008 (Per: ARG)




Appendix A ... Part 05 of 23




 The 2007 drafting file for LRB-1109/2

has been transferred to the drafting file for

2007 LRB-3866 (SB 483)

 This cover sheet, the final request sheet, and the final version of the 2007 draft were copied on yellow paper, and returned to the original 2007 drafting file.

 The attached 2007 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2007 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

07-1109

Working copy

WISCONSIN UNIFORM SECURITIES ACT

Wisconsin Submission Draft

Wisconsin Uniform Securities Act Study Group

October 17, 2005

410 → 411
411 → 412
510 → 511
610 → 613
612 → 614

tax exemption

<u>new</u>		<u>old</u>
<u>SSI. 202</u>		<u>SSI. 23</u>
(13)	→	(8)
(14)	→	(11)
(24)	→	(10)
(25)	→	(9)

WISCONSIN UNIFORM SECURITIES ACT
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WISCONSIN UNIFORM SECURITIES ACT

Wisconsin Study Group Prefatory Notes

Set forth below are the provisions of a new Wisconsin Uniform Securities Act (the "Wisconsin Submission Draft"), which the Wisconsin Study Group respectfully presents for consideration by the Wisconsin State Legislature. The Wisconsin Submission Draft is based on the Uniform Securities Act (2002) dated January 20, 2004, approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Bar Association and recommended for enactment in all states.

The Wisconsin Uniform Securities Law, Chapter 551 of the Wisconsin Statutes, initially became effective on January 1, 1970. The Wisconsin Uniform Securities Law was based on the Uniform Securities Act of 1956 and has been the centerpiece of securities regulation in this state ever since. Chapter 551 has been revised numerous times since its initial adoption in response to developments in securities regulation on a state and national basis, including necessary revisions as a result of the National Securities Markets Improvements Act of 1996 ("NSMIA").

The initial effort to update securities regulation in the State of Wisconsin came from an Advisory Committee appointed by the 1967-69 Legislative Council. Dean George H. Young of the University of Wisconsin Law School chaired the committee, which was comprised of legislators, securities lawyers and representatives from the insurance and securities brokerage industries. The committee considered alternative approaches to updating Wisconsin's law and concluded that a new law should be drafted based on the general format of the Uniform Securities Act of 1956. The committee expressed its belief that uniformity in securities regulation across states was highly desirable based on the need of new securities issues to simultaneously satisfy the requirements of many states.

In light of the evolution of securities regulation over the past decades, and in response to the promulgation of the Uniform Securities Act of 2002, the Wisconsin Study Group was formed during 2002 as a subcommittee of the Securities Law Committee of the State Bar of Wisconsin's Business Law Section. The purpose of the group was to review the Uniform Securities Act (2002) in the context of the existing Wisconsin Uniform Securities Law and to make suggestions for consideration by the Wisconsin State Legislature. Consistent with the views of the original Advisory Committee expressed in 1969, the consensus of the Wisconsin Study Group was to continue a uniform approach to securities regulation.

The Wisconsin Study Group first met during December 2002 and has been comprised of experienced practitioners and professionals from a wide variety of backgrounds. Group members included individuals who represented a broad gambit of interests in relation to securities regulation. Viewpoints and opinions were offered reflecting the interests of the financial services and insurance industries, securities broker-dealers, investment advisers and mutual funds, publicly held companies, start-ups seeking venture capital, aggrieved investors and litigants. This diversity was intended in order to obtain the broadest perspective possible in the Group's review of the Act. While the group included members who represented a divergence of clientele, they approached the task at hand with the intention of proposing legislation that would be in the

overall best interests of the State of Wisconsin.

The Wisconsin Submission Draft, presented below, represents the collective wisdom and effort of all of the members of the Study Group. The Group met several times from late 2002 through the spring of 2005. Subgroups were formed who were tasked with analyzing specific articles and reporting back to the main group with suggested language. Extended discussion occurred regarding specific issues presented under the Act, such as whether, in a departure from existing Wisconsin law, variable annuities would be treated as securities and subjected to the Act's provisions. Long hours were spent at meetings in the process of analyzing the Act on a line-by-line basis. At all times, the interchange of ideas, opinions and perspectives occurred in a collegial and respectful manner.

Special recognition needs to be given to the staff of the Wisconsin Division of Securities for their insights and efforts in comparing the Act with existing Wisconsin law. In participating in Group meetings, the staff ably recognized the balance that exists between effective, aggressive investor protection and a regulatory environment conducive to the needs of the financial services industry while fostering the legitimate capital needs of business. The attitude and approach of the Division of Securities' staff members reflects the progressive leadership in securities regulation that has been Wisconsin's hallmark for the past 35 years – leadership that has been effectively fostered under the direction of Patty Struck, Wisconsin's Securities Administrator and the current President of the North American Securities Administrators Association.

Each article and section of the Wisconsin Submission Draft below includes the NCCUSL's Official Comments, as well as the comments of the Wisconsin Study Group in sections where suggestions are made to modify the Act.

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UNIFORM SECURITIES ACT (2002)
NCCUSL Prefatory Note

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

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

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

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

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

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

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

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

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

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

The Act includes subheadings within sections as an aid to readers. Unlike section captions,

subheadings are not a part of the official text. Each jurisdiction in which this Act is introduced may consider whether to adopt the subheadings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings.

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

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

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

The Act is in seven Articles:

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

7. Transition

There are ~~has~~ three overarching themes of the Act.

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

A second overarching theme of the Act is achieving consistency with the National Securities Markets Improvement Act of 1996 ("NSMIA"). New definitions were added to define in Section 102(6), federal covered investment adviser, and in Section 102(7), federal covered security. NSMIA also had implications for several securities registration exemptions (see Sections 201(3), 201(4), 201(6), 202(4), 202(6), 202(13), 202(14), 202(15) and 202(16)); securities registration (Sections 301(1) and 302); and the broker-dealer, agent, investment adviser, and investment adviser representative provisions (see especially Sections 402(b)(1) and (5), 403(b)(1)(A) and (2), 405 and 411).

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

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

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

The new Act does not expressly exclude from the definition of security variable insurance products, but does exempt variable insurance products from securities registration in Section 201(4). The states are divided on the question of whether variable insurance products should be excluded (and not subject to fraud enforcement) or exempted (and subject to fraud enforcement).

✧ For those states that wish to continue to provide or adopt an exclusion for variable insurance products from the definition of security, the brackets should be removed from the phrase “or variable.” For those states that wish variable insurance products to be included in the definition of security, the bracketed phrase should be removed.

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

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

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

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

The options exemption in Section 201(6) was broadened; the “manual” exemption in Section 202(2) has been modernized for an electronic age; a broadened exemption has been provided for specified foreign securities in Section 202(3); a new exemption has been added for nonissuer transactions in securities subject to Securities Exchange Act reporting in Section 202(4); a new exemption has been added for nonissuer transactions rated at the time of a transaction by a

nationally recognized statistical rating organization in one of the four highest rating categories in Section 202(5)(A); and new exemptions were added for specified exchange transactions in Section 202(9), control transactions in Section 202(18), specified out-of-state offers or sales in Section 202(20), specified sales transactions in Section 202(22), and specified foreign issuers whose securities are traded on designated securities markets in Section 202(23).

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

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

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

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

1. the offering will work or tend to work a fraud upon purchasers or would so operate; or
2. the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations or unreasonable amounts or kinds of options.

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

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

federal covered investment adviser notice filing procedure in Section 405.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNIFORM SECURITIES ACT (2002)
NCCUSL Legislative Note

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

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

1
2 [ARTICLE] 1
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4 GENERAL PROVISIONS
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8 SECTION 101. SHORT TITLE. This Chapter shall be known and may be cited as the
9 "Wisconsin Uniform Securities Act."
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11 SECTION 102. DEFINITIONS. In this Chapter, unless the context otherwise requires:

12 (1a) "Accredited investor" has the meaning given in Rule 501(a) adopted under the
13 Securities Act of 1933 (17 C.F.R. 230.501(a)).

14 (1b) "Administrator" means the administrator of the Department of Financial Institutions
15 Division of Securities.

16 (2) "Agent" means an individual, other than a broker-dealer, who represents a broker-
17 dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer
18 in effecting or attempting to effect purchases or sales of the issuer's securities. But a partner,
19 officer, or director of a broker-dealer or issuer, or an individual having a similar status or
20 performing similar functions is an agent only if the individual otherwise comes within the term.
21 The term does not include an individual excluded by rule adopted or order issued under this
22 Chapter.

23 (3) "Bank" means:

24 (A) a banking institution organized under the laws of the United States;

25 (B) a member bank of the Federal Reserve System;

1 (C) any other banking institution, whether incorporated or not, doing business under
2 the laws of a State or of the United States, a substantial portion of the business of which consists
3 of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by
4 national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of
5 Public Law 87-722 (12 U.S.C. Section 92a), and which is supervised and examined by a state or
6 federal agency having supervision over banks, and which is not operated for the purpose of
7 evading this Chapter; and

8 (D) a receiver, conservator, or other liquidating agent of any institution or firm
9 included in subparagraph (A), (B), or (C).

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

12 (A) an agent;

13 (B) an issuer;

14 (C) a bank or savings institution if its activities as a broker-dealer are limited to those
15 specified in subsections 3(a)(4)(B)(i) through (vi), (viii) through (x), and (xi) if limited to
16 unsolicited transactions; 3(a)(5)(B); and 3(a)(5)(C) of the Securities Exchange Act of 1934 (15
17 U.S.C. Sections 78c(a)(4) and (5)) or a bank that satisfies the conditions described in subsection
18 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4));

19 (D) an international banking institution; or

20 (E) a person excluded by rule adopted or order issued under this Chapter.

21 (5) "Depository institution" means:

22 (A) a bank; or

1 (B) a savings institution, trust company, credit union, or similar institution that is
2 organized or chartered under the laws of a State or of the United States, authorized to receive
3 deposits, and supervised and examined by an official or agency of a State or the United States if
4 its deposits or share accounts are insured to the maximum amount authorized by statute by the
5 Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a
6 successor authorized by federal law. The term does not include:

7 (i) an insurance company or other organization primarily engaged in the business
8 of insurance;

9 (ii) a Morris Plan bank; or

10 (iii) an industrial loan company. *change made here*

11 (6) "Federal covered investment adviser" means a person registered under the Investment
12 Advisers Act of 1940.

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

16 (8) "Filing" means the receipt under this Chapter of a record by the administrator or a
17 designee of the administrator.

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

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

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

22 (A) a depository institution or international banking institution;

23 (B) an insurance company;

1 (C) a separate account of an insurance company;

2 (D) an investment company as defined in the Investment Company Act of 1940;

3 (E) a broker-dealer registered under the Securities Exchange Act of 1934;

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

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

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

22 (I) an organization described in Section 501(c)(3) of the Internal Revenue Code (26
23 U.S.C. Section 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited

1 liability company, or partnership, not formed for the specific purpose of acquiring the securities
2 offered, with total assets in excess of \$10,000,000;

3 (J) a small business investment company licensed by the Small Business
4 Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C.
5 Section 681(c)) with total assets in excess of \$10,000,000;

6 (K) a private business development company as defined in Section 202(a)(22) of the
7 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of
8 \$10,000,000;

9 (L) a federal covered investment adviser acting for its own account;

10 (M) a "qualified institutional buyer" as defined in Rule 144A(a)(1), other than Rule
11 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);

12 (N) a "major U.S. institutional investor" as defined in Rule 15a-6(b)(4)(i) adopted
13 under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);

14 (O) any other person, other than an individual, of institutional character with total
15 assets in excess of \$10,000,000 not organized for the specific purpose of evading this Chapter; or

16 (P) any other person specified by rule adopted or order issued under this Chapter.

17 (12) "Insurance company" means a company organized as an insurance company whose
18 primary business is writing insurance or reinsuring risks underwritten by insurance companies
19 and which is subject to supervision by the insurance commissioner or a similar official or agency
20 of a State.

21 (13) "Insured" means insured as to payment of all principal and all interest.

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

4 (15) "Investment adviser" means a person that, for compensation, engages in the
5 business of advising others, either directly or through publications writings or electronic means,
6 as to the value of securities or the advisability of investing in, purchasing, or selling securities or
7 that, for compensation and as a part of a regular business, issues or promulgates analyses or
8 reports concerning securities. The term includes a financial planner or other person that, as an
9 integral component of other financially related services, provides investment advice regarding
10 securities to others for compensation as part of a business or that holds itself out as providing
11 investment advice regarding securities to others for compensation. The term does not include:

12 (A) an investment adviser representative;

13 (B) a lawyer, accountant, engineer, or teacher whose performance of investment
14 advice is solely incidental to the practice of the person's profession;

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

18 (D) a publisher of a bona fide newspaper, news magazine, or business or financial
19 publication of general and regular circulation;

20 (E) a federal covered investment adviser;

21 (F) a bank or savings institution;

22 (G) any other person that is excluded by the Investment Advisers Act of 1940 from
23 the definition of investment adviser; or

1 (H) any other person excluded by rule adopted or order issued under this Chapter.

2 (16) "Investment adviser representative" means an individual employed by or associated
3 with an investment adviser or federal covered investment adviser and who makes any
4 recommendations or otherwise gives investment advice regarding securities, manages accounts
5 or portfolios of clients, determines which recommendation or advice regarding securities should
6 be given, provides investment advice or holds herself or himself out as providing investment
7 advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling
8 investment advice, or supervises employees who perform any of the foregoing. The term does
9 not include an individual who:

10 (A) performs only clerical or ministerial acts;

11 (B) is an agent whose performance of investment advice is solely incidental to the
12 individual acting as an agent and who does not receive special compensation for investment
13 advisory services;

14 (C) is employed by or associated with a federal covered investment adviser, unless the
15 individual has a "place of business" in this State as that term is defined by rule adopted under
16 Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a) and is

17 (i) an "investment adviser representative" as that term is defined by rule adopted
18 under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a); or

19 (ii) not a "supervised person" as that term is defined in Section 202(a)(25) of the
20 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(25)); or

21 (D) is excluded by rule adopted or order issued under this Chapter.

22 (17) "Issuer" means a person that issues or proposes to issue a security, subject to the
23 following:

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

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

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

14 (D) With respect to a fractional or pool interest in a viatical settlement investment,
15 "issuer" means every person who creates the fractional or pool interest for the purpose of offering
16 or selling the interest.

17 (E) With respect to a viatical settlement investment that is not a fractional or pool
18 interest, "issuer" means the viatical settlement provider as defined in s. 632.68, Stats., or the
19 person who purchases or otherwise acquires the viatical settlement from a viatical settlement
20 provider, and then offers or sells viatical settlement investments therein, except that, under this
21 subdivision, "issuer" does not include a broker-dealer or agent licensed under Section 406, Stats.,
22 and does not include the viator, as defined in s. 632.68, Stats., of the insurance policy, certificate
23 of insurance or death benefit underlying the viatical settlement investment.

1 (18) "Nonissuer transaction" or "nonissuer distribution" means a transaction or
2 distribution not directly or indirectly for the benefit of the issuer.

3 (19) "Offer to purchase" includes an attempt or offer to obtain, or solicitation of an offer
4 to sell, a security or interest in a security for value. The term does not include a tender offer that
5 is subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)).

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

9 (21) "Place of business" of a broker-dealer, an investment adviser, or a federal covered
10 investment adviser means:

11 (A) an office at which the broker-dealer, investment adviser, or federal covered
12 investment adviser regularly provides brokerage or investment advice or solicits, meets with, or
13 otherwise communicates with customers or clients; or

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

17 (22) "Predecessor act" means the act repealed by Section 702.

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

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

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

8 (26) "Sale" includes every contract of sale, contract to sell, or disposition of, a security or
9 interest in a security for value, and "offer to sell" includes every attempt or offer to dispose of, or
10 solicitation of an offer to purchase, a security or interest in a security for value. Both terms
11 include:

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

15 (B) a gift of assessable stock involving an offer and sale; and

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

20 (27) "Securities and Exchange Commission" means the United States Securities and
21 Exchange Commission.

22 (28) "Security" means a note; stock; treasury stock; security future; bond; debenture;
23 evidence of indebtedness; limited partnership interest; viatical settlement investment or similar

1 agreement; certificate of interest or participation in a profit-sharing agreement; collateral trust
2 certificate; preorganization certificate or subscription; transferable share; investment contract;
3 voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil,
4 gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of
5 deposit, or group or index of securities, including an interest therein or based on the value
6 thereof; put, call, straddle, option, or privilege entered into on a national securities exchange
7 relating to foreign currency; or, in general, an interest or instrument commonly known as a
8 "security"; or a certificate of interest or participation in, temporary or interim certificate for,
9 receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The
10 term:

11 (A) includes both a certificated and an uncertificated security;

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

15 (C) does not include an interest in a contributory or noncontributory pension or
16 welfare plan subject to the Employee Retirement Income Security Act of 1974;

17 (D) subject to the exception in subd. (E), includes (i) an investment in a "common
18 enterprise" (defined, for purposes of this section, as an enterprise in which the fortunes of the
19 investor are tied to the efficacy of the efforts of those seeking the investment or a third party)
20 with the expectation of profits to be derived through the essential managerial efforts of someone
21 other than the investor; and (ii) any investment by which an offeree furnishes initial value to an
22 offeror, and a portion of this initial value is subjected to the risks of the enterprise, and the
23 furnishing of the initial value is induced by the offeror's promises or representations which give

1 rise to a reasonable understanding that a valuable benefit of some kind over and above the initial
2 value will accrue to the offeree as a result of the operation of the enterprise, and the offeree does
3 not receive the right to exercise practical and actual control over the managerial decisions of the
4 enterprise; and

5 (E) includes as an "investment contract," among other contracts, an interest in a
6 limited liability partnership, and a limited liability company; except an interest (or class or series
7 thereof) in a limited liability partnership or limited liability company is not an "investment
8 contract" if (i) each holder of such interest (or class or series thereof) is actively engaged in the
9 management of the limited liability partnership or limited liability company (provided that
10 evidence that partners or members vote or have the right to vote, or the right to information
11 concerning the business and affairs of the limited liability partnership or limited liability
12 company, or the right to participate in management, shall not establish, without more, that all
13 partners or members are actively engaged in the management of the limited liability partnership
14 or limited liability company) or (ii) each holder of such interest (or class or series thereof) is
15 authorized under applicable law or under the partnership, operating or other governing agreement
16 or document to act for and bind the limited liability partnership or limited liability company and
17 the total number of holders of all interests in the limited liability partnership or limited liability
18 company does not exceed 15. The Division may by rule or order exclude a contract or contracts
19 from the definition of "investment contract."

20 (29) "Self-regulatory organization" means a national securities exchange registered under
21 the Securities Exchange Act of 1934, a national securities association of broker-dealers registered
22 under the Securities Exchange Act of 1934, a clearing agency registered under the Securities

1 Exchange Act of 1934, or the Municipal Securities Rulemaking Board established under the
2 Securities Exchange Act of 1934.

3 (30) "Sign" means, with present intent to authenticate or adopt a record:

4 (A) to execute or adopt a tangible symbol; or

5 (B) to attach or logically associate with the record an electronic symbol, sound, or
6 process.

7 (31) "State" means a State of the United States, the District of Columbia, Puerto Rico, the
8 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
9 the United States.

10 Official Comments

11 **Prior Provisions:** 1956 Act Section 401; RUSA 101.

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

14 2. All definitions include corresponding meanings. For example, "filing" would include
15 "file" or "filed"; "sale" would include "sell."
16

17 3. Prefatory Phrase: "In this [Act], unless the context otherwise requires": Prior Provisions:
18 1956 Act Section 401 Preface; RUSA Section 101 Preface. This prefatory phrase which is in the
19 counterpart provisions of the federal securities statutes, see, e.g., Securities Act of 1933 Section
20 2(a), provides the basis for the courts to take into account the statutory and factual context of
21 each definition, see, e.g., *Reves v. Ernst & Young*, 494 U.S. 56 (1990); 2 Louis Loss & Joel
22 Seligman, Securities Regulation 927-929 (3d ed. rev. 1999), and will allow the courts to
23 harmonize this Act's definitions with the counterpart federal securities definitions to the extent
24 appropriate. Cf. *Akin v. Q-L Inv., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992) ("Texas courts
25 generally look to decisions of the federal courts to interpret the Texas Securities Act because of
26 obvious similarities between the state and federal laws"); *Koch v Koch Indus., Inc.* 203 F.3d
27 1202, 1235 (10th Cir. 2000) (following federal definition of materiality); *Biales v. Young*, 432
28 S.E.2d 482, 484 (S.C. 1993) ("Section 35-1-1490(2) is substantially similar to Section 12(1) of
29 the Federal Securities Act").
30

31 4. Section 102(2): Agent: Prior Provisions: 1956 Act Section 401(b); RUSA Section
32 101(14). Section 102(2), in part, follows the 1956 Act definition. The 1956 Act used the term
33 "agent" while the RUSA Section 101(14) used the term "sales representative." Given the
34

1 broader enactment of the 1956 Act, this Act also uses the term “agent.” Certain exclusions from
2 the 1956 Act are exemptions in this Act. See Section 402(b).

3
4 Whether a particular individual who represents a broker-dealer or issuer is an “agent”
5 depends upon much the same factors that create an agency relationship at common law. See,
6 e.g., *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 179 (Minn. Ct. App. 1986) (following
7 Official Comment that establishing agency under the Uniform Securities Act “depends upon
8 much the same factors which create an agency relationship at common law”); *Shaughnessy &*
9 *Co., Inc. v. Commissioner of Sec.*, 1971-1978 Blue Sky L. Rep. (CCH) ¶71,348 (Wis. Cir. Ct.
10 1977) (unlicensed person who took information relevant to securities transactions and turned it
11 over to securities agents was himself an agent).

12
13 An individual can be an agent for a broker-dealer or issuer for a purpose other than effecting
14 or attempting to effect purchases or sales of securities and not be a statutory agent under this Act.
15 See, e.g., *Baker, Watts & Co. v. Miles & Stockridge*, 620 A.2d 356, 367 (Md. Ct. App. 1993)
16 (attorney-client relationship is generally one of agency, but that alone does not bring an attorney
17 within securities act definition of agent). An individual will not be an agent under Section
18 102(2) because of the person’s status as a partner, officer, or director of a broker-dealer or issuer
19 if such an individual does not effect or attempt to effect purchases or sales of securities. See,
20 e.g., *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988).

21
22 Section 102(2) is intended to include any individual who acts as an agent, whether or not the
23 individual is an employee or independent contractor. Cf. *Hollinger v. Titan Capital Corp.*, 914
24 F.2d 1564 (9th Cir. *en banc* 1990), *cert. denied*, 499 U.S. 976 (1991).

25
26 The word “individual” in the definition of the term “agent” is limited to human beings and
27 does not include a juridical “person” such as a corporation. Cf. definition of “person” in Section
28 102(20). The 1956 Act Section 401(b) similarly was limited to individuals and did not include
29 juridical persons. See, e.g., *Connecticut Nat’l Bank v. Giacomi*, 699 A.2d 101, 111-112 (Conn.
30 1997) (“agent” only includes natural persons when it used the term individual); *Schpok v.*
31 *Fodale*, 236 N.W.2d 97, 99 (Mich. Ct. App. 1975) (agent defined to be individual and did not
32 include a corporation).

33
34 An individual whose acts are solely clerical or ministerial would not be an agent under
35 Section 102(2). Cf. Section 402(b)(8). Ministerial or clerical acts might include preparing
36 written communications or responding to inquiries.

37
38 5. Section 102(3): Bank: Prior Provision: Subsection 3(a)(6) of the Securities Exchange Act
39 of 1934. A United States branch of a foreign bank that otherwise satisfies this definition would
40 be a bank.

41
42 6. Section 102(4): Broker-Dealer: Prior Provisions: 1956 Act Section
43 401(c); RUSA Section 101(2). This definition generally follows the definition of broker-dealer
44 in the 1956 Act and RUSA. The use of the compound term is meant to include either a broker or
45 a dealer. The recognized distinction is that a broker acts for the benefit of another while a dealer

1 acts for itself in buying for or selling securities from its own inventory.

2
3 The distinction between “a person engaged in the business of effecting transactions in
4 securities” and an investor, who may buy and sell with some frequency and is outside the scope
5 of this term, has been well developed in the case law. See 6 Louis Loss & Joel Seligman,
6 Securities Regulation 2980-2984 (3d ed. 1990).

7
8 The 1956 Act Section 401(c) excluded from the definition of broker-dealer a person who
9 during any 12 consecutive months did not direct more than 15 offers to buy or sell in this State.
10 In this Act exemptions from broker-dealer registration are provided in Section 401(b).

11
12 The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the blanket
13 exemption of banks from the definition of broker and dealer in Sections 3(a)(4) and (5) of the
14 Securities Exchange Act of 1934. The Gramm-Leach-Bliley Act permits a bank to avoid
15 registration as a broker or dealer at the federal level if the bank limits its activities to those
16 specified in the Securities Exchange Act. This Act generally adopts the activity focused
17 exceptions for banks included in the Gramm-Leach-Bliley Act, with minor modifications relating
18 to the private placement and de minimis brokerage activities of banks (15 U.S.C.
19 78c(a)(4)(B)(vii) and (xi)). This Act also reaches savings institutions.

20
21 A state may decide to adopt an exclusion in Section 102(4)(C) that fully conforms with the
22 bank exceptions contained in the Gramm-Leach-Bliley Act. For states that choose this approach,
23 the language of Section 102(4)(C) should read:

24
25 (C) a bank or savings institution if its activities as broker-dealer are limited to those
26 specified in Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C.
27 Section 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section
28 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

29
30 Section 102(4)(E) of this Act also permits a securities administrator to adopt additional
31 exclusions that exclude banks and other depository institutions, in whole or in part, from the
32 definition of “broker-dealer.”

33
34 States that promptly adopt this Act should consider whether it is appropriate to provide banks
35 a transition period to comply with the Act’s new activity focused exceptions. The activity
36 focused exceptions for banks in the Gramm-Leach-Bliley Act were originally to become effective
37 at the federal level on May 12, 2001. However, the Securities and Exchange Commission has
38 delayed the effective date of these activity focused exceptions and thus continued the blanket
39 exemption for banks beyond May 12, 2001, and commenced a rulemaking designed to clarify and
40 define the scope of the bank exceptions in the Gramm-Leach-Bliley Act. See Sec. Ex. Act Rels.
41 44,291, 74 SEC Dock. 2155 (2001) (proposal); 45,897, 77 SEC Dock. 1555 (2002) (proposal).
42 To avoid disrupting the activities of banks, states should consider delaying implementation of the
43 activity focused exceptions in this Act until these exceptions are implemented at the federal
44 level.

1 Section 15(h)(1) of the Securities Exchange Act of 1934, as amended by the National
2 Securities Markets Improvement Act of 1996, preempts state law from “[establishing] capital,
3 custody, margin, financial responsibility, making and keeping records, bonding, or financial or
4 operational reporting requirements for brokers, dealers, municipal securities dealers, government
5 securities brokers, or government securities dealers that differ from, or are in addition to the
6 requirements in those areas established under [the Securities Exchange Act].” These
7 preemptions are recognized in the substantive broker-dealer provisions in Article 4.
8

9 7. Section 102(5): Depository institution: No Prior Provision. A depository institution’s
10 securities are addressed by the exemption in Section 201(3). A depository institution is an
11 institutional investor in Section 102(11)(A).
12

13 8. Section 102(6): Federal covered investment adviser: No Prior Provision. This provision
14 is necessitated by Section 203A of the Investment Advisers Act of 1940, added by Title III of the
15 National Securities Markets Improvement Act of 1996, which allocates to primary state
16 regulation most advisers with assets under management of less than \$25 million. SEC
17 registration is permitted, but not required, for investment advisers having between \$25 and \$30
18 million of assets under management and is required of investment advisers having at least \$30
19 million of assets under management. Investment Advisers Act of 1940 Rule 203A-1. Most
20 advisers with assets under management of \$25 million or more register solely under Section 203
21 of the Investment Advisers Act of 1940 and not state law. This division of labor is intended to
22 eliminate duplicative regulation of investment advisers.
23

24 9. Section 102(7): Federal covered security: No Prior Provision. The National Securities
25 Markets Improvement Act of 1996, as subsequently amended, partially preempted state law in
26 the securities offering and reporting areas. Under Section 18(a) of the Securities Act of 1933, no
27 state statute, rule, order, or other administrative action may apply to:
28

29 (1) The registration of a “covered” security (1) a security that will be a covered security upon
30 completion of the transaction;
31

32 (2)(A) any offering document prepared by or on behalf of the issuer of a covered security;
33

34 (2)(B) any proxy statement, report to shareholders, or other disclosure document relating to a
35 covered security or its issuer that is required to be filed with the SEC or any national securities
36 association registered under Section 15A of the Securities Exchange Act such as the National
37 Association of Securities Dealers (NASD); or
38

39 (3) the merits of a covered security or a security that will be a covered security upon
40 completion of the transaction.
41

42 Section 18(b) of the Securities Act of 1933 applies to four types of “covered securities”:
43

44 (1) Securities listed or authorized for listing on the New York Stock Exchange (NYSE), the
45 American Stock Exchange (Amex); the National Market System of the Nasdaq stock market; or

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

6
7 (2) securities issued by an investment company registered with the SEC (or one that has filed
8 a registration statement under the Investment Company Act of 1940);

9
10 (3) securities offered or sold to "qualified purchasers." This category of covered securities
11 will become operational when the SEC defines the term "qualified purchaser" as used in Section
12 18(b)(3) of the Securities Act of 1933, by rule. To date the SEC has proposed, but not adopted,
13 Rule 146(c) of the Securities Act of 1933; and

14
15 (4) securities issued under the following specified exemptions of the Securities Act of 1933:

16
17 (A) Sections 4(1) (transactions by persons other than an issuer, underwriter or dealer), and
18 4(3) (dealers after specified periods of time), but only if the issuer files reports with the
19 Commission under Sections 13 or 15(d) of the Securities Exchange Act;

20
21 (B) Section 4(4) (unsolicited brokerage transactions);

22
23 (C) Securities Act exemptions in Section 3(a) with the exception of the charitable exemption
24 in Section 3(a)(4), the exchange exemption in Section 3(a)(10), the intrastate exemption in
25 Section 3(a)(11), and the municipal securities exemption in Section 3(a)(2) but only with
26 "respect to the offer or sale of such [municipal] security in the State in which the issuer of such
27 security is located"; and

28
29 (D) securities issued in compliance with SEC rules under Section 4(2) (private placements).

30
31 Section 18(c)(1) preserves state authority "to investigate and bring enforcement actions with
32 respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities
33 or securities transactions."

34
35 The National Securities Markets Improvement Act, in essence, preempts aspects of the
36 securities registration and reporting processes for specified federal covered securities. The Act
37 does not diminish state authority to investigate and bring enforcement actions generally with
38 respect to securities transactions.

39
40 The States are authorized to require filings of any document filed with the SEC for notice
41 purposes "together with annual or periodic reports of the value of securities sold or offered to be
42 sold to persons located in the State (if such sales data is not included in documents filed with the
43 Commission), solely for notice purposes and the assessment of any fee, together with a consent
44 to service of process and any required fee." Section 18(c)(2). However, no filing or fee may be
45 required with respect to any listed security that is a covered security under Section 18(b)(1)

1 (traded on specified stock markets). Section 302 of this Act addresses notice filings and fees
2 applicable to federal covered securities.

3
4 10. Section 102(8): Filing: Prior Provision: RUSA Section 101(4). The RUSA definition
5 was revised to recognize that records may be filed in paper form or electronically with the
6 administrator, or designees such as the Web-CRD (Central Registration Depository) or
7 Investment Adviser Registration Depository (IARD) or the Securities and Exchange
8 Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or successor
9 systems.

10
11 In the RUSA definition, the term "filed" referred to "actual delivery of a document or
12 application." This Act substitutes the term "record" which is defined in Section 102(25) to refer
13 broadly to "information that is inscribed on a tangible medium or that is stored in an electronic or
14 other medium and is retrievable in perishable form". This definition requires the receipt of a
15 record. The definition does not limit filing to any specific medium such as mail, certified mail,
16 or a particular electronic system. The definition is intended to permit an administrator to accept
17 filings over the Internet or through a direct modem system, both of which are now used to
18 transmit documents to EDGAR, or through new electronic systems as they evolve.

19
20 "Receipt" refers to the actual delivery of a record to the administrator or a designee and does
21 not refer to a subsequent examination of the record by the administrator. See, e.g., Fehrman v.
22 Blunt, 825 S.W.2d 658 (Mo. Ct. App. 1992). If a deficient form was provided to a designee, but
23 not provided to the administrator because of the deficiency, it would not be filed under this
24 definition.

25
26 11. Section 102(9): Fraud, deceit and defraud: Prior Provisions: 1956 Act Section 401(d);
27 RUSA Section 101(6). This definition, which is identical to the 1956 Act and RUSA, codifies the
28 holdings that "fraud" as used in the federal and state securities statutes is not limited to common
29 law deceit. See generally 7 Louis Loss & Joel Seligman, Securities Regulation 3421-3448 (3d
30 ed. 1991).

31
32 12. Section 102(10): Guaranteed: Prior Provisions: 1956 Act Section 401(e); RUSA
33 Section 401(a)(1). The 1956 Act definition of "guaranteed" applies generally to payment of
34 "principal, interest, or dividends." The RUSA definition of "guaranteed," which was solely
35 applicable to exempt securities, applied to the guarantee of "all or substantially all of principal
36 and interest or dividends."

37
38 Section 102(10) follows the 1956 Act approach and applies generally to the guarantee of "all
39 principal and all interest." Any method of guarantee that results in a guarantee of payment of all
40 principal and all interest will suffice including, for example, an irrevocable letter of credit.

41
42 This definition does not address whether or not a guarantee, whether whole or partial, is itself
43 a security. That issue is addressed by the definition of "security" in Section 102(28).

44
45 13. Section 102(11): Institutional investor: Prior Provisions: RUSA Section 101(5);

1 Securities Act of 1933 Rules 144A and 501(a).

2
3 Sections 102(11)(A) through (K) are based on Rule 501(a) of the Securities Act of 1933, but
4 do not include the paragraphs of Rule 501(a) that address individuals. Given the significant
5 period of time since Rule 501(a) was adopted, this Act has used a \$10 million minimum for
6 several categories of institutional investor rather than \$5 million minimum used in Rule 501(a).

7
8 Section 102(11)(H) concludes with an except clause meant to exclude self-directed plans for
9 individuals from this definition.

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

14
15 Section 102(11)(O) is meant to reach persons similar to those listed in Sections 102(11)(A)
16 through (N), but not otherwise listed. Under Section 503, if challenged in a proceeding, the
17 burden of proving the availability of an exemption is on the person claiming it. An interpretive
18 opinion may be sought from the administrator under Section 605(d).

19
20 14. Section 102(12): Insurance company: No Prior Provision. This definition is based on
21 Securities Act of 1933 Section 2(a)(13).

22
23 15. Section 102(13): Insured: Prior Provision: RUSA Section 401(a)(2). The RUSA
24 definition of "insured," which was solely applicable to exempt securities, applied to the insurance
25 of "all or substantially all of principal, interest, or dividends." Section 102(13) is applicable
26 generally but is limited to "payment of all principal and all interest."

27
28 16. Section 102(14): International banking institution: No Prior Provision. Securities
29 issued or guaranteed by the International Bank for Reconstruction and Development, 22 U.S.C.
30 Section 286k-1(a); the Inter-American Development Bank, 22 U.S.C. Section 283h(a); the Asian
31 Development Bank, 22 U.S.C. Section 285h(a); the African Development Bank, 22 U.S.C.
32 Section 290i-9; and the International Finance Corporation, see 22 U.S.C. Section 282k; are
33 treated as exempt securities under Section 3(a)(2) of the Securities Act of 1933, see generally 3
34 Louis Loss & Joel Seligman, Securities Regulation 1191-1194 (3d ed. rev. 1999), and are within
35 this term.

36
37 17. Section 102(15): Investment adviser: Prior Provisions: 1956 Act Section 401(f); RUSA
38 Section 101(7). This term generally follows the definition in Section 202(a)(11) of the
39 Investment Advisers Act of 1940, but has been updated to take into account new media such as
40 the Internet.

41
42 The first sentence in Section 102(15) is identical to the first sentence in the 1956 Act Section
43 401(f) and the counterpart language in Section 202(a)(11). The RUSA definition deleted the
44 phrases "either directly or through publications or writings" and "regular" before business.
45 These terms have been returned to Section 102(15) because of the intention that this definition be

1 construed uniformly with the definition in Section 202(a)(11) of the Investment Advisers Act of
2 1940. This first sentence would not reach the author of a book who did not receive compensation
3 as part of a regular business for providing investment advice.

4
5 The second sentence in the term addressing financial planners is new. The purpose of this
6 sentence is to achieve functional regulation of financial planners who satisfy the definition of
7 investment adviser. Cf. Investment Advisers Act Release 1092, 39 SEC Dock. 494 (1987)
8 (similar approach in Securities and Exchange Commission interpretative Release). This
9 reference is not intended to preclude persons who hold a formally recognized financial planning
10 or consulting designation or certification from using this designation. The use by a person of a
11 title, designation or certification as a financial planner or other similar title, designation, or
12 certification alone does not require registration as an investment adviser.

13
14 Sections 102(15)(A) through (H) are exclusions from the term "investment adviser." An
15 excluded person can be held liable for fraud in providing investment advice, see Section 502, but
16 would not be subject to the registration and regulatory provisions in Article 4.

17
18 Sections 102(15)(A) and (E) are new and recognize that investment adviser representatives
19 and federal covered investment advisers are separately treated in this Act. See definitions in
20 Sections 102(6) and 102(16); registration and exemptions in Sections 404-405.

21
22 Sections 102(15)(B), (C), and (G) are substantively identical to the 1956 Act, RUSA, and the
23 Investment Advisers Act of 1940. The Official Comment to the 1956 Act Section 401(f) quoted
24 an opinion of the Securities and Exchange Commission General Counsel in Investment Advisers
25 Act Release 2 on the meaning of "special compensation" included in Section 102(15)(C):

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

38
39 Similarly, other broker-dealer employees such as research analysts who receive no special
40 compensation from third parties for investment advice would not be required to register as
41 investment advisers.

42
43 The 1956 Act definition added the word "paid" in Section 401(f)(4) to the counterpart
44 exclusion in Section 202(a)(11) of the Investment Advisers Act "to emphasize," as the Official
45 Comment explained, "that a person who periodically distributes a 'tipster sheet' free as a way to

1 get paying clients is not excluded from the definition as a ‘publisher.’”

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

5
6 Congress did not intend to exclude publications that are distributed by investment
7 advisers as a normal part of the business of servicing their clients. The legislative history
8 plainly demonstrates that Congress was primarily interested in regulating the business of
9 rendering personalized investment advice, including publishing activities that are a
10 normal incident thereto. On the other hand, Congress, plainly sensitive to First
11 Amendment concerns, wanted to make clear that it did not seek to regulate the press
12 through the licensing of nonpersonalized publishing activities.

13
14 *Id.* at 185.

15
16 Responsive to this language RUSA rewrote this exclusion to provide:

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

23
24 Recent experience at the federal and state levels suggest that the 1956 Act and RUSA
25 approaches may be too broad. The retention of the Investment Advisers Act approach provides a
26 better balance between First Amendment concerns and protection of investors from non-“bona
27 fide” publicizing of investment advice. The exclusion in Section 102(15)(D) is intended to
28 exclude publishers of Internet or electronic media, but only if the Internet or electronic media
29 publication or website satisfies the “bona fide” and “publication of general and regular
30 circulation” requirements. Cf. *SEC v. Park*, 99 F. Supp. 2d 889, 895-896 (N.D. Ill. 2000) (court
31 declined to dismiss complaint against an Internet website when there were allegations that the
32 website was not “bona fide” or of “general and regular circulation”).

33
34 The exclusion in Section 102(15)(G) is required by the National Securities Markets
35 Improvement Act of 1996. This exclusion will reach banks and bank holding companies as
36 described in Investment Advisers Act Section 202(a)(11)(A) and persons whose advice solely
37 concerns United States government securities as described in Section 202(a)(11)(E).

38
39 18. Section 102(16): Investment adviser representative: No Prior Provision. Investment
40 adviser representatives have not been required to register under the federal Investment Advisers
41 Act, before or after the National Securities Markets Improvement Act.

42
43 The term investment adviser representative is not intended to preclude persons who hold a
44 formally recognized financial planning or consulting title, designation, or certification from using
45 such a designation. The use by a person of a title, designation or certification as a financial

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

3
4 19. Section 102(17): Issuer: Prior Provisions: 1956 Act Section 401(g); RUSA Section
5 101(8). This Section generally follows the 1956 Act and RUSA.

6
7 In paragraph (B), the phrase "or that is otherwise contractually responsible for assuring
8 payment of the certificate" is intended to address forms of payment other than leases or
9 conditional sales contracts. It would also reach guarantors.

10
11 20. Section 102(18): Nonissuer transaction or nonissuer distribution: Prior Provisions: 1956
12 Act Section 401(h); RUSA Section 101(9). This definition is relevant to several exempt
13 transactions in Section 202.

14
15 In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320 (Utah Ct. App. 1987), the court
16 declined to limit the term benefit to monetary benefits and instead held a spinoff transaction
17 could provide direct or indirect benefits to an issuer. *Id.* at 323-324, *following* *SEC v. Datronics*
18 *Eng'r, Inc.*, 490 F.2d 250 (4th Cir. 1973), *cert. denied*, 416 U.S. 937; *SEC v. Harwin Indus.*
19 *Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971). In a similar fashion, transactions by officers, directors,
20 promoters, and other insiders of the issuer may benefit the issuer and may not qualify as
21 nonissuer transactions.

22
23 21. Section 102(19): Offer to purchase: No Prior Provision: A rescission offer under Section
24 510 would be an offer to purchase with respect to a security that earlier had been sold.

25
26 22. Section 102(20): Person: Prior Provisions: 1956 Act Section 401(i); RUSA Section
27 101(10). This is the standard definition used by the National Conference of Commissioners for
28 Uniform State Laws with the addition of "limited liability company" to reflect current usage.
29 The use of the concluding phrase "or any other legal or commercial entity" is intended to be
30 broad enough to include other forms of business entities that may be created or popularized in the
31 future.

32
33 23. Section 102(21): Place of business: Prior Provision: Rules 203A-3(b) and 222-1 of the
34 Investment Advisers Act of 1940.

35
36 24. Section 102(23): Price amendment: Prior Provision: RUSA Section 101(11). A price
37 amendment may be used in a registration coordinated with the Securities and Exchange
38 Commission procedure in Section 303(d). In the case of noncash offerings, required information
39 concerning such matters as the offering price and underwriting arrangements is normally filed in
40 a "price" amendment after the rest of the registration statement has been reviewed by the
41 Securities and Exchange Commission staff. See generally 1 Louis Loss & Joel Seligman,
42 *Securities Regulation* 542-550 (3d ed. rev. 1998).

43
44 25. Section 102(24): Principal place of business: Prior Provision: Rule 222-1(b) of the
45 Investment Advisers Act of 1940.