




# 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 06 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.

1  
2 26. Section 102(25): Record: Prior Provision: Uniform Electronic Transactions Act Section  
3 2(13). Cf. Section 3(a)(37) of the Securities Exchange Act of 1934. The Uniform Electronic  
4 Transactions Act §2(13) defines record in nearly identical terms. The Official Comment  
5 explains:

6  
7 This is a standard definition designed to embrace all means of communicating or storing  
8 information except human memory. It includes any method for storing or communicating  
9 information, including "writings." A record need not be indestructible or permanent, but  
10 the term does not include oral or other communications which are not stored or preserved  
11 by some means.

12  
13 This term is intended to embrace new forms of records that are created or popularized in the  
14 future. A record would include, but not be limited to, a registration statement, report, application,  
15 book, publication, account, paper, correspondence, memorandum, agreement, document,  
16 computer file, or disk, microfilm, photograph, or audio or visual tape.

17  
18 27. Section 102(26): Sale: Prior Provisions: 1956 Act Section 401(j); RUSA Section  
19 101(13). Both the 1956 Act and RUSA definition of "sale" are modeled on Section 2(a)(3) of the  
20 Securities Act of 1933.

21  
22 Language in Section 401(j) of the 1956 Act addressed the now rescinded SEC "no sale"  
23 doctrine and has been eliminated. Merger transactions are usually sales under Section 102(26),  
24 but may be exempted from the securities registration requirements by Section 202(18).

25  
26 28. Section 102(28): Security: Prior Provisions: 1956 Act Section 401(1); RUSA Section  
27 101(16). Much of the definition in Section 102(28), like the definitions in the 1956 Act Section  
28 401(l) and RUSA Section 101(16), is identical to the definition in Section 2(a)(1) of the  
29 Securities Act. State courts interpreting the Uniform Securities Act definition of security have  
30 often looked to interpretations of the federal definition of security. See generally 2 Louis Loss &  
31 Joel Seligman, Security Regulation 923-1138.19 (3d ed. rev. 1999).

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

42  
43 Preorganization certificates or subscriptions are included in this term, obviating the need for a  
44 separate definition as was included in RUSA Section 402(13).  
45

1 Section 102(28) uses RUSA's "fractional undivided interest in oil, gas or other mineral  
2 rights" formulation, which originated in Section 2(a)(1) of the Securities Act of 1933, rather than  
3 the 1956 Act formulation, "certificate of interest or participation in an oil, gas or mining title."  
4 In recent years, courts interpreting Section 2(a)(1) of the Securities Act of 1933 have found  
✓ 5 certain oil, gas or mineral rights to be investment contracts (that is, securities). 2 Louis Loss &  
6 Joel Seligman, Securities Regulation 979-982 (3d ed. rev. 1999).

7  
8 A new sentence was added in Section 102(28)(A) referring to certificated or uncertificated  
✗ 9 securities to indicate that the term is intended to apply whether or not a security is evidenced by a  
10 writing. Section 102(28)(A) is intended to reject Thomas v. State of Tex., 65 S.W.3d 38 (Tex.  
11 Crim. App. 2001) (Under Texas law evidence of indebtedness requires a writing).

12  
13 Insurance or endowment policies or endowment or annuity contracts, other than those on  
14 which an insurance company promises to make variable payments, are excluded from this term.  
15 Variable insurance products are also excluded in many states and are exempted from securities  
16 registration in others under provisions such as Section 201(4). When variable products are  
17 included in the definition of security and exempted from registration state securities  
18 administrators can bring enforcement actions concerning variable insurance sales practices.

19  
20 The Drafting Committee recognized that the decision whether to exclude variable annuities  
21 from the definition of security will be made on a state-by-state basis. Those states which intend  
22 to exclude variable products from the definition of security should add the words "or variable" to  
✗ 23 Section 102(28)(B) so that it will read:

24  
25 (B) The term does not include an insurance or endowment policy or annuity contract  
26 ✗ under which an insurance company promises to pay a fixed or variable sum of money  
27 either in a lump sum or periodically for life or other specified period.

28  
29 In the view of the American Council of Life Insurers:

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

42  
43 In the view of the North American Securities Administrators Association variable products  
44 should be exempted from registration, not excluded from the definition of securities:  
45

1           One of the goals of this Act is to align state and federal law. The United States Supreme  
2 Court ruled that a variable annuity is a security in SEC v. Variable Annuity Life Insurance  
3 Company of America, 359 U.S. 65 (1959). More recently, it has been confirmed that variable  
4 insurance products are "covered securities" as defined in the National Securities Markets  
5 Improvement Act of 1996 (NSMIA) and in the Securities Litigation Uniform Standards Act  
6 of 1998 (SLUSA), see Lander v. Hartford Life Annuity Ins., 251 F.3d 101 (2d Cir. 2001).

7  
8           When variable products are included in the definition of security and exempted from  
9 registration, state securities administrators can bring enforcement actions concerning variable  
10 insurance sales practices. This approach toward functional regulation is supported by the  
11 National Association of Securities Dealers as evidenced by a February 2001 letter from Mary  
12 Schapiro, President of Regulatory Policy & Oversight: "Based on our experience, we have  
13 found that variable products' sales-related problems parallel those of mutual funds and other  
14 securities . . . Because of the substantial similarities between variable contracts and other  
15 securities products, we believe it is incongruous for agents and sales practices involved in  
16 variable annuities not to be covered by state securities laws."

17  
18           State securities regulators support the functional regulation of agents because: 1)  
19 insurance companies are not affected since state securities regulators are preempted from  
20 requiring the registration of variable products; 2) the vast majority of broker-dealer  
21 subsidiaries of insurance companies are already registered to sell securities in most states;  
22 and 3) the vast majority of agents are already dually licensed to sell insurance and securities  
23 in most states.

24  
25           Section 102(28)(C) includes the exclusion in RUSA from the 1956 definition of security for  
26 "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee  
27 Retirement Income Security Act of 1974."

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

33  
34           The courts have divided over the interpretation of the "common enterprise" element of an  
35 investment contract. The courts generally recognize that "horizontal" commonality (for example,  
36 the pooling of an investment by two or more investors) is a common enterprise. A small minority  
37 of the federal circuits will also find a common enterprise in a "vertical" relationship when a  
38 single investor is dependent upon the expertise of a single commodities broker. Since two or  
39 more persons do not share in the profitability of an undertaking, it is difficult to argue that there  
40 is a common enterprise. Section 102(28)(D) follows a significantly larger number of federal  
41 circuits and adopts a more restrictive form of vertical commonality that occurs only when there  
42 is profit sharing between two persons even if, for example, one is a conventional investor and  
43 one is a promoter. See generally 2 Louis Loss & Joel Seligman, Securities Regulation 989-997  
44 (3d ed. Rev. 1999).

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

11  
12 Section 102(28)(E) is consistent with state and federal securities laws which have recognized  
13 interests in limited liability companies and limited partnerships in some circumstances as  
14 "securities," see 2 Louis Loss & Joel Seligman, Securities Regulation 1028-1031 (3d ed. rev.  
15 1999), when consistent with the court decisions interpreting the investment contract concept.  
16 This Act also refers to an investment in a viatical settlement or a similar agreement to make  
17 unequivocally clear that viatical settlement and similar agreements, which otherwise satisfy the  
18 definition of an investment contract, are securities. This is intended to reject the holding of one  
19 court that a viatical contract could not be a security. See SEC v. Life Partners Inc., 87 F.3d 536  
20 (D.C. Cir. 1996), reh'g denied, 102 F.3d 587 (D.C. Cir. 1996). A number of states have done so  
21 by statute.

22  
23 Judicial construction of the term "investment contract" has been the most frequently litigated  
24 issue concerning the term "security." See Gabaldon, A Sense of Security: An Empirical Study,  
25 25 J. Corp. L. 307 (2000), explaining that there had been 792 cases decided to that date in which  
26 the definition of a security played a prominent role. Id. at 308. Some 461 of the 792 cases (58  
27 percent) concerned investment contracts. Id. at 322. A number of states, by statute, rule, or case  
28 law have also adopted the "risk capital" test to find a security when an investment is subject to  
29 the risks of an enterprise with the expectation of profit or other valuable benefit and the investor  
30 has no direct control over the management of the enterprise. See, e.g., 2 Loss & Seligman, supra,  
31 at 939-940 n.50.

32  
33 29. Section 102(29): Self-regulatory organization: Prior Provision: RUSA Section 101(17).  
34 This definition was added by RUSA and is based on a counterpart provision in the American  
35 Law Institute Federal Securities Code. At the current time national securities exchanges are  
36 registered under Section 6 of the Securities Exchange Act of 1934; national securities  
37 associations under Section 15A; clearing agencies under Section 17A; and the Municipal  
38 Securities Rulemaking Board under Section 15B.

39  
40 30. Section 102(30): Sign: No Prior Provision. This definition is intended to facilitate  
41 electronic signatures, to the extent permitted by Section 105.

42  
43 31. Section 102(31): State: Prior Provisions: 1956 Act Section 401(m); RUSA Section  
44 101(18). This is the standard definition used by the National Conference of Commissioners on  
45 Uniform State Laws. It does include territories and possessions of the United States, as well as

1 the District of Columbia and Puerto Rico, but does not include foreign governments, their  
2 territories, or their possessions. In this Act "foreign" always refers to activity, a government, or  
3 person outside of the United States, not a different state within the United States.

### Wisconsin Study Group Comments

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6  
7 Section 102(1a). The definition of "Accredited investor" is being added in order to facilitate the  
8 securities registration exemption under Sec. 202(13)(B) and to conform to current Wisconsin  
9 law.

10  
11 Section 102(4)(C). This section sets forth those exceptions from broker-dealer status for banks  
12 and other financial institutions as provided in the federal Gramm-Leach-Bliley Act that are  
13 adopted as part of the Uniform Act. The specific language set forth is the final language adopted  
14 by NCCUSL. In reviewing this section, the Wisconsin Study Group considered utilizing the  
15 alternative language suggested by the NCCUSL Drafting Committee, as set forth in Official  
16 Comment 6, above. The practical differences between the language in Act Section 102(4)(C) and  
17 the corresponding exceptions accorded to banks under Gramm-Leach-Bliley relate to (i) not  
18 affording banks an automatic exclusion from state broker-dealer registration requirements for  
19 sales activities in connection with private offerings (see Section 3(a)(4)(B)(vii) of the Securities  
20 Exchange Act of 1934); and (ii) limiting the de minimus exception set forth in Section  
21 3(a)(4)(B)(xi) of the 1934 Act to unsolicited transactions only (for example, under the Act, a bank  
22 could not engage in up to 500 solicited securities transactions subject to an exception from  
23 broker-dealer registration).

24  
25 The decision was made to follow the language of this section as originally proposed by NCCUSL  
26 without alteration because of concerns regarding investor protection for unregulated securities  
27 activity. In addition, it was noted that, as of the date of this Submission Draft, the SEC's  
28 proposed Regulation B, which would implement the Gramm-Leach-Bliley exceptions, has not  
29 been finalized. Finally, it should also be noted that, as of the date of this Submission Draft, no  
30 other state has adopted the Uniform Securities Act utilizing the alternative NCCUSL language.

31 Section 102(15). The phrase "or electronic means" is being added to the definition of  
32 "Investment adviser" in order to include those persons within the definition that exclusively use  
33 electronic communications to provide investment advice. The phrase "or securities" is being  
34 added in two places relating to financial planners to make clear that advice provided by such  
35 persons must pertain to securities in order to be included within the definition of "Investment  
36 adviser."

37 Section 102(17)(D) and (E). Separate definitions of "Issuer" are being added relating to viatical  
38 settlement investments [as newly added to the definition of "Security" in section 102(28)],  
39 depending upon whether fractional or pooled interests are involved.

40 Section 102(28)(Intro.). The reference to "limited partnership interest" is being inserted in the  
41 definition of "Security" as a "per se" security (in contrast to the Uniform Act's placement under  
42 section 102(28)(E) as a category of "Investment contract") in order to maintain current  
43 Wisconsin securities law treatment. The reference to "viatical settlement investment" [separately

1 defined in Section 102(32)] is also being inserted in this provision as a "per se" security (in  
2 contrast to the Uniform Act placement as a category of investment contract). It is anticipated that  
3 securities registration exemption treatment for viatical settlement investments will be adopted by  
4 rule.

5  
6 Section 102(28)(B). The brackets around the terminology "or variable" in the Uniform Act are  
7 being removed to maintain the status under the current Wisconsin securities law, which excludes  
8 variable annuities from the definition of "Security."

9  
10 Section 102(28)(D). The Uniform Act language defining what constitutes an "Investment  
11 contract" is being amended to incorporate the current definitions under Wisconsin securities law  
12 rules DFI-Sec 102(6)(a) & (b), which adopt both the so-called "broad form of vertical  
13 commonality"/"modified Howey" test, and the "risk capital" test.

14  
15 Section 102(28)(E). The Uniform Act language of this subsection is being revised in the  
16 following respects:

17 (1). A specific reference is added for limited liability partnerships.

18 (2). The section's applicability is being limited solely to LLCs and LLPs.

19 (3). Two specific exceptions from investment contract are added, namely, under (E)(i), if  
20 each interest holder is "actively involved in management" (subject to the so-called  
21 "California qualifier" language included in (E)(i) which the California securities law  
22 establishes in order for an LLC interest not to be an investment contract) and, under  
23 (E)(ii), if each interest holder can act for and bind the LLC/LLP, provided the total number  
24 of holders does not exceed 15. The regulatory treatment under (E)(i) and (ii) supersedes  
25 current Wisconsin securities law treatment in Stats. 551.02(13)(b) & (c).

26 (4). Enabling authority is being granted for the Division to, by rule or order, exclude a  
27 contract or contracts from the definition of "Investment contract." The Wisconsin Study  
28 Group notes that, in contrast to the current Wisconsin securities law treatment of LLCs,  
29 the regulatory treatment under this section for LLCs and LLPs is applicable to Wisconsin  
30 as well as non-Wisconsin entities (which is consistent with the treatment under the  
31 Uniform Act).

32  
33 Section 102(32). The definition of "viatical settlement investment" is being added which,  
34 together with the identified exclusions, are based on internal Division of Securities regulatory  
35 proposals for treatment of viatical settlement investments.

36  
37  
38 **SECTION 103. REFERENCES TO FEDERAL STATUTES.** "Securities Act of 1933"

39 (15 U.S.C. Section 77a et seq.), "Securities Exchange Act of 1934" (15 U.S.C. Section 78a et

1 seq.), "Public Utility Holding Company Act of 1935" (15 U.S.C. Section 79 et seq.), "Investment  
2 Company Act of 1940" (15 U.S.C. Section 80a-1 et seq.), "Investment Advisers Act of 1940" (15  
3 U.S.C. Section 80b-1 et seq.), "Employee Retirement Income Security Act of 1974" (29 U.S.C.  
4 Section 1001 et seq.), "National Housing Act" (12 U.S.C. Section 1701 et seq.), "Commodity  
5 Exchange Act" (7 U.S.C. Section 1 et seq.), "Internal Revenue Code" (26 U.S.C. Section 1 et  
6 seq.), "Securities Investor Protection Act of 1970" (15 U.S.C. Section 78aaa et seq.), "Securities  
7 Litigation Uniform Standards Act of 1998" (112 Stat. 3227), "Small Business Investment Act of  
8 1958" (15 U.S.C. Section 661 et seq.), and "Electronic Signatures in Global and National  
9 Commerce Act" (15 U.S.C. Section 7001 et seq.) mean those statutes and the rules and  
10 regulations adopted under those statutes, as in effect on the date of enactment of this Chapter.

11 See ~~the~~ uniform act; p. 36 Official Comments → not will stand??

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

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

20  
21 2. Section 12(d) of the Uniform Statute and Rule Construction Act, adopted by NCCUSL in  
22 1995, provides: "A statute or rule that incorporates by reference a statute or rule of another  
23 jurisdiction does not incorporate a later enactment or adoption or amendment of the other statute  
24 or rule." Nevertheless, it is not uncommon for States to permit later amendments to statutes and  
25 rules referenced in enacted legislation to become automatically effective. In those states the final  
26 bracketed language in this Section should be included in the Act.

27  
28 3. In those states which do not permit automatic effectiveness of later amendments and that  
29 follow Section 12(d) of the Uniform Statute and Rule Construction Act, this problem has been  
30 addressed by either giving the administrator the power to update by rule or the duty to notify the  
31 legislature when amendment is necessary. When the legislature notification approach is adopted,  
32 to prevent a gap period, the administrator might be given the power to act by rule until the  
33 legislature has acted.



1  
2 4. After enactment, amendments to a preemptive federal statute, to rules adopted by a federal  
3 agency under a preemptive provision of a federal statute, or to amendments to such rules should  
4 be enforced in all states under the Supremacy Clause of the United States Constitution. A  
5 number of such references are in this Act.  
6

7  
8 **SECTION 104. REFERENCES TO FEDERAL AGENCIES.**

9  
10 A reference in this Chapter to an agency or department of the United States is also a reference  
11 to a successor agency or department.  
12

13 **Official Comment**

14 **No Prior Provision.**  
15

16 **SECTION 105. ELECTRONIC RECORDS AND SIGNATURES.** This Chapter

17 modifies, limits, and supersedes the federal Electronic Signatures in Global and National  
18 Commerce Act, but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C.  
19 Section 7001(c)) or authorize electronic delivery of any of the notices described in Section  
20 103(b) of that act (15 U.S.C. Section 7003(b)). This Chapter authorizes the filing of records and  
21 signatures, when specified by provisions of this Chapter or by a rule adopted or order issued  
22 under this Chapter, in a manner consistent with Section 104(a) of that act (15 U.S.C. Section  
23 7004(a)).  
24

*What about state electronic  
signatures act?*

25 **Official Comment**

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

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[ARTICLE] 2

EXEMPTIONS FROM REGISTRATION OF SECURITIES

Official Comments

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

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

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

Neither the exempt security nor the transaction exemptions are <sup>not</sup> meant to be mutually exclusive. A security or transaction may qualify for two or more exemptions.

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

**SECTION 201. EXEMPT SECURITIES.** The following securities are exempt from the requirements of Sections 301 through 306 and 504:

(1)(a) a security, including a revenue obligation or a separate security as defined in Rule 131 (17 C.F.R. 230.131) adopted under the Securities Act of 1933, issued, insured, or guaranteed by the United States; by a State; by a political subdivision of a State; by a public authority, agency, or instrumentality of one or more States; by a political subdivision of one or more States; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by the Congress; or a certificate of deposit for any of the foregoing

1 but any revenue obligation payable from payments to be made in respect of property or money  
2 used under a lease, sale or loan arrangement by or for a nongovernmental industrial or  
3 commercial enterprise is exempted only as provided under par. (1)(b);

4 (1)(b) unless subject to a letter of credit of a bank, savings bank or savings and loan  
5 association as provided in this paragraph, a revenue obligation of an issuer specified under par.  
6 (1)(a) that is payable from payments to be made in respect of property or money used under a  
7 lease, sale or loan arrangement by or for a nongovernmental industrial or commercial enterprise  
8 is exempted subject to rules adopted by the division. A revenue obligation is exempt from any  
9 filing under the rules of the division if it is the subject of a guarantee or an irrevocable letter of  
10 credit from a depository institution in favor of holders of the revenue obligations providing for  
11 payment of all principal of the revenue obligations and all accrued and unpaid interest to the date  
12 of an event of default on the revenue obligations, and the letter of credit is accompanied by an  
13 opinion of counsel stating;

14 1a. That payment of debt service will not constitute a preference under federal  
15 bankruptcy law if a petition in bankruptcy with respect to the enterprise is filed; or

16 1b. That the guarantee or letter of credit will provide for reimbursement to holders of  
17 the revenue obligations if they are required by order of a federal bankruptcy court to  
18 disgorge as a preference any payment of a debt service; and

19 2. That the enforceability of the guarantee or letter of credit would not be materially  
20 affected by the filing of a petition under federal bankruptcy law with respect to the  
21 enterprise or any person obligated to reimburse the depository institution for payments  
22 made under the guarantee or letter of credit.

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

4 (3) a security issued by and representing or that will represent an interest in or a direct  
5 obligation of, or be guaranteed by:

6 (A) an international banking institution;

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

15 (C) any other depository institution, unless by rule or order the administrator proceeds  
16 under Section 204;

17 (4) a security issued by and representing an interest in, or a debt of, or insured or  
18 guaranteed by, an insurance company authorized to do business in this State;

19 (5) a security issued or guaranteed by a railroad, other common carrier, public utility, or  
20 public utility holding company that is:

21 (A) regulated in respect to its rates and charges by the United States or a State;

22 (B) regulated in respect to the issuance or guarantee of the security by the United  
23 States, a State, Canada, or a Canadian province or territory; or

*check related  
provisio*

1 (C) a public utility holding company registered under the Public Utility Holding  
2 Company Act of 1935 or a subsidiary of such a registered holding company within the meaning  
3 of that act;

4 (6) a federal covered security specified in Section 18(b)(1) of the Securities Act of 1933  
5 (15 U.S.C. Section 77r(b)(1)) or by rule adopted under that provision or a security listed or  
6 approved for listing on another securities market specified by rule under this Chapter; a put or a  
7 call option contract; a warrant; a subscription right on or with respect to such securities; or an  
8 option or similar derivative security on a security or an index of securities or foreign currencies  
9 issued by a clearing agency registered under the Securities Exchange Act of 1934 and listed or  
10 designated for trading on a national securities exchange, a facility of a national securities  
11 exchange, or a facility of a national securities association registered under the Securities  
12 Exchange Act of 1934 or an offer or sale, of the underlying security in connection with the offer,  
13 sale, or exercise of an option or other security that was exempt when the option or other security  
14 was written or issued; or an option or a derivative security designated by the Securities and  
15 Exchange Commission under Section 9(b) of the Securities Exchange Act of 1934 (15 U.S.C.  
16 Section 78i(b));

17 (7) a security issued by a person organized and operated exclusively for religious,  
18 educational, benevolent, fraternal, charitable, social, athletic, or reformatory purposes, or as a  
19 chamber of commerce, and not for pecuniary profit, no part of the net earnings of which inures to  
20 the benefit of a private stockholder or other person, or a security of a company that is excluded  
21 from the definition of an investment company under Section 3(c)(10)(B) of the Investment  
22 Company Act of 1940 (15 U.S.C. Section 80a-3(c)(10)(B)); except that with respect to the offer  
23 or sale of a note, bond, debenture, or other evidence of indebtedness issued by such a person, a

1 rule may be adopted under this Chapter limiting the availability of this exemption by classifying  
2 securities, persons, and transactions, imposing different requirements for different classes,  
3 specifying with respect to paragraph (B) the scope of the exemption and the grounds for denial or  
4 suspension, and requiring an issuer:

5 (A) to file a notice specifying the material terms of the proposed offer or sale and  
6 copies of any proposed sales and advertising literature to be used and provide that the exemption  
7 becomes effective if the administrator does not disallow the exemption within the period  
8 established by the rule;

9 (B) to file a request for exemption authorization for which a rule under this Chapter  
10 may specify the scope of the exemption, the requirement of an offering statement, the filing of  
11 sales and advertising literature, the filing of consent to service of process complying with Section  
12 611, and grounds for denial or suspension of the exemption; or

13 (C) to register under Section 304;

14 (8) a member's or owner's interest in, or a retention certificate or like security given in  
15 lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit  
16 membership cooperative under the cooperative laws of a State, but not a member's or owner's  
17 interest, retention certificate, or like security sold to persons other than bona fide members of the  
18 cooperative; and

19 (9) an equipment trust certificate with respect to equipment leased or conditionally sold to  
20 a person, if any security issued by the person would be exempt under this section or would be a  
21 federal covered security under Section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. Section  
22 77r(b)(1)).

23

Official Comments

how does this compare to ch. 551 thing; useful for checking X-refs

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

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

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

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

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

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

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

1 agencies.

2

3 Under this Act insurance, endowment policies, or annuity contracts under which an insurance

\* 4 \* company promises to pay fixed sums are excluded from the definition of a security in Section  
5 102(28)(B).

6

7 Unless brackets are removed from the words "or variable" in Section 102(28)(B), a variable

8 \ annuity or other variable insurance product would be considered a security under this Act and

9 \ under federal securities law. See SEC v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65

10 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967).

11

12 A variable annuity or other variable insurance product issued by an investment company

13 registered with the Securities and Exchange Commission under the Investment Company Act of

14 1940 would be a "federal covered security," see Section 102(7). See Lander v. Hartford Life &

15 Annuity Ins. Co., 251 F.3d 101 (2d Cir. 2001).

16

17 A variable annuity or other variable insurance product not issued by a registered investment

18 company would be exempted by Section 201(4), but would be subject to the antifraud provisions

19 in Article 5.

20

21 5. Section 201(5): Common carrier and public utility securities: Prior Provisions: 1956 Act

22 Section 401(a)(7); RUSA Section 401(b)(5). Both the 1956 Act and RUSA include references,

23 omitted here, to the Interstate Commerce Commission, whose enabling legislation subsequently

24 was repealed. Public utility holding companies covered by this exemption are subject both to the

25 Public Utility Holding Company Act and to state or Canadian utility regulation.

26

27 6. Section 201(6): Certain options and rights: No Prior Provision. The 1956 Act Section

28 402(a)(8) provided an exemption for securities listed on the New York, American, Midwest (now

29 Chicago), or other designated stock exchanges, senior or substantially equal securities of the

30 \ same issuer listed on the exchange and any security covered by listed or approved subscription

31 rights or warrants, or any warrant or right to purchase or subscribe to any security exempted by

32 Section 402(a)(8).

33

34 RUSA essentially retained this exemption in Section 401(b)(7) and added securities

35 designated for inclusion in the National Market System by the National Association of Securities

36 Dealers in Section 401(b)(8) and specified options issued by a clearing agency registered under

37 the Securities Exchange Act of 1934 in Section 401(b)(9).

38

39 In 1996 Congress enacted the National Securities Markets Improvement Act and provided in

40 Section 18(b)(1) that securities listed on the New York, American or Nasdaq Stock Exchange, or

41 designated by rule of the Securities and Exchange Commission, as well as any security of the

42 same issuer that is equal in seniority or senior to any of these securities will be a federal covered

43 security. Under Rule 146 the SEC has designated as federal covered securities under Section

\* 44 18(b)(1) Tier I of the Pacific Exchange; Tier I of the Philadelphia Stock Exchange; and The

45 Chicago Board Options Exchange on condition that the relevant listing standards continue to be



1 substantially similar to those of the New York, American, or Nasdaq stock markets. See  
2 Reporter's Note to Section 102(7). A federal covered security subject to Section 18(b)(1) of the  
3 Securities Act of 1933 will not be subject to the securities registration requirements of Sections  
4 301 and 303 through 306.

5  
6 The exemption in Section 201(6) addresses specified options, warrants, and rights that are not  
7 federal covered securities under Section 18(b)(1) of the Securities Act of 1933, but generally  
8 would have been exempted under RUSA. The 1956 Act, which was narrower, was drafted  
9 before the computerized Nasdaq stock market began trading the National Market List and the  
10 development of standardized options markets.

11  
12 The final clause of Section 201(6) makes clear that any offer or sale of the underlying  
13 security that occurs as a result of the offer or sale of an option or other derivative security  
14 exempted under this provision or as the result of the exercise of the option or other derivative  
15 security, is covered by the exemption if the option met the terms of the exemption at the time  
16 such derivative security was written (that is, sold) or issued. The sale of the underlying security  
17 when an option is exercised would be exempt even if the underlying security is not at that time  
18 subject to any exemption under the Act. This is consistent with existing precedent under federal  
19 law suggesting that the legality of the sale of an underlying security when an option is exercised  
20 should be determined by the status of the security at the time the option was written rather than at  
21 the time of exercise. See, e.g., *H. Kook & Co., Inc. v. Scheinman, Hochstin & Trotta, Inc.*, 414  
22 F.2d 93 (2d Cir. 1969). Any transaction in an underlying security that results from the offer, sale,  
23 or exercise of any derivative security issued by a registered clearing agency and traded on a  
24 national securities exchange or association is exempt if the derivative security when written was  
25 exempt under Section 201(6).

26  
27 The Securities and Exchange Commission has adopted Rule 9b-1 under Section 9(b).

28  
29 7. Section 201(7): Nonprofit organization securities: Prior Provision: Section 3(a)(4) of the  
30 Securities Act of 1933. Section 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA  
31 exempt specified nonprofit securities. Both are modeled on Section 3(a)(4) of the Securities Act,  
32 which was subsequently amended.

33  
34 Securities issued under Section 3(a)(4) of the Securities Act of 1933 are not treated as federal  
35 covered securities in Section 18(b)(4)(C), although a separate Section 3(a)(13) exemption which  
36 addresses certain church plan securities are federal covered securities under Section 18(b)(4)(C).

37  
38  
39 RUSA included an optional notice and review requirement for nonprofit securities in Section  
40 401(b)(10) "if at least ten days before a sale of the security the person has filed with the  
41 administrator a notice setting forth the material terms of the proposed sale and copies of any sales  
42 and advertising literature to be used and the administrator by order does not disallow the  
43 exemption within the next five full business days."

44  
45 The nonprofit exemption is of particular concern to state securities administrators. See, e.g.,

1 State Regulators Announce Dramatic Rise in Religious Scams; Tens of Thousands Lured, 33  
2 Sec. Reg. & L. Rep. (BNA) 1189 (2001).

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

12  
13 Section 201(7) provides statutory authority for the states to adopt rules with respect to notes,  
14 bonds, debentures and other evidences of indebtedness issued by nonprofit organizations. Each  
15 state may adopt different rules tailored for various types of nonprofit debt offerings, (e.g., local  
16 church bond offerings, national church bond offerings, church extension funds, charitable gift  
17 annuities). For states that do not wish to provide an automatic exemption from registration for a  
18 particular type of nonprofit debt instrument or offering, Section 201(7) creates three categories of  
19 regulatory review that may be required by rule: (a) exemption by notice filing, (b) exemption by  
20 state authorization, and (c) registration by qualification. These categories are consistent with the  
21 manner in which many states currently review different types of nonprofit debt securities. See  
22 Horner & Makens, Securities Regulation of Religious and Other Nonprofit Organizations, 27  
23 Stetson L. Rev. 473 (1997).

24  
25 8. Section 201(8): Cooperatives: Prior Provision: RUSA Section 401(b)(13). Section  
26 201(8) is derived from RUSA Section 401(b)(13) which was included in that act after a number  
27 of states had adopted exemptions for securities issued by cooperatives. Section 201(8) is not  
28 intended to be available if securities are offered or sold to the public generally.

29  
30 The 1956 Act Section 402(a)(12) had instead provided: "insert any desired exemption for  
31 cooperatives." The Reporter for the 1956 Act had found such sharp variation among the 18  
32 states that then had adopted a cooperative exemption that "no common pattern can be found."  
33 Louis Loss, Commentary on the Uniform Securities Act 118 (1976).

34  
35 9. Section 201(9): Equipment trust certificates: Prior Provision: RUSA Section 401(b)(6).  
36 The Securities Act of 1933 Section 3(a)(6) includes a narrower exemption for railroad equipment  
37 trusts. Section 201(9) follows RUSA. The Official Comment to RUSA Section 401(b)(6)  
38 explained:

39  
40 The new paragraph (b)(6) reflects the extensive development of equipment lease financing  
41 through leveraged leases, conditional sales, and other devices. The underlying premise is that if  
42 the securities of the person using such a financing device would be exempt under some other  
43 paragraph of Section 401, the equipment trust certificate or other security issued to acquire the  
44 property in question also is exempt.

1 **Wisconsin Study Group Comments**

2 Section 201(1)(a). The Uniform Act's "governmental security" exemption treatment is being  
3 revised in the following respects:

4 (1). In new subd. (1)(a), exception language is added from current law relating to  
5 industrial revenue bonds ("IRBs") on the basis that such bonds are not "true"  
6 governmental securities because a private, for-profit entity (not the governmental unit) is  
7 the underlying obligor who has the payment responsibility for the bond principal and  
8 interest.

9 (2). Subd. (b) adds language from the current Wisconsin securities law treatment of IRBs  
10 in Stats. Sec. 551.22(1)(b) establishing alternative regulatory treatments of either making  
11 a notice filing with the Division, or having a letter of credit in place that meets the  
12 requirements in the subsection.

13  
14  
15 **SECTION 202. EXEMPT TRANSACTIONS.** The following transactions are exempt  
16 from the requirements of Sections 301 through 306 and 504:

17 (1) an isolated nonissuer transaction, whether effected by or through a broker-dealer or  
18 not;

19 (2) a nonissuer transaction by or through a broker-dealer registered, or exempt from  
20 registration under this Chapter, and a resale transaction by a sponsor of a unit investment trust  
21 registered under the Investment Company Act of 1940, in a security of a class that has been  
22 outstanding in the hands of the public for at least 90 days, if, at the date of the transaction:

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

28 (B) the security is sold at a price reasonably related to its current market price;

1 (C) the security does not constitute the whole or part of an unsold allotment to, or a  
2 subscription or participation by, the broker-dealer as an underwriter of the security or a  
3 redistribution;

4 (D) a nationally recognized securities manual or its electronic equivalent designated  
5 by rule adopted or order issued under this Chapter or a record filed with the Securities and  
6 Exchange Commission that is publicly available contains:

7 (i) a description of the business and operations of the issuer;

8 (ii) the names of the issuer's executive officers and the names of the issuer's  
9 directors, if any;

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

14 (iv) an audited income statement for each of the issuer's two immediately  
15 previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the  
16 case of a reorganization or merger when each party to the reorganization or merger had audited  
17 income statements, a pro forma income statement; and

18 (E) any one of the following requirements is met:

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

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

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

5 (iv) the issuer of the security has total assets of at least \$2,000,000 based on an  
6 audited balance sheet as of a date within 18 months before the date of the transaction or, in the  
7 case of a reorganization or merger when the parties to the reorganization or merger each had such  
8 an audited balance sheet, a pro forma balance sheet for the combined organization;

9 (3) a nonissuer transaction by or through a broker-dealer registered or exempt from  
10 registration under this Chapter in a security of a foreign issuer that is a margin security defined in  
11 regulations or rules adopted by the Board of Governors of the Federal Reserve System;

12 (4) a nonissuer transaction by or through a broker-dealer registered or exempt from  
13 registration under this Chapter in an outstanding security if the guarantor of the security files  
14 reports with the Securities and Exchange Commission under the reporting requirements of  
15 Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

16 (5) a nonissuer transaction by or through a broker-dealer registered or exempt from  
17 registration under this Chapter in a security that:

18 (A) is rated at the time of the transaction by a nationally recognized statistical rating  
19 organization in one of its four highest rating categories; or

20 (B) has a fixed maturity or a fixed interest or dividend, if:

21 (i) a default has not occurred during the current fiscal year or within the three  
22 previous fiscal years or during the existence of the issuer and any predecessor if less than three  
23 fiscal years, in the payment of principal, interest, or dividends on the security; and

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

6 (6) a nonissuer transaction by or through a broker-dealer registered or exempt from  
7 registration under this Chapter effecting an unsolicited order or offer to purchase, but with  
8 respect to a nonissuer transaction involving a security that is not a federal covered security the  
9 administrator may require by rule that the records of the broker-dealer confirm that the order or  
10 offer to purchase was unsolicited;

11 (7) a nonissuer transaction executed by a bona fide pledgee without the purpose of  
12 evading this Chapter;

13 (8) a nonissuer transaction by a federal covered investment adviser with investments  
14 under management in excess of \$100,000,000 acting in the exercise of discretionary authority in  
15 a signed record for the account of others;

16 (9) a transaction in a security, whether or not the security or transaction is otherwise  
17 exempt, in exchange for one or more bona fide outstanding securities, claims, or property  
18 interests, or partly in such exchange and partly for cash, if the terms and conditions of the  
19 issuance and exchange or the delivery and exchange and the fairness of the terms and conditions  
20 have been approved by the administrator after a hearing;

21 (10) a transaction between the issuer or other person on whose behalf the offering is made  
22 and an underwriter, or among underwriters;

1 (11) a transaction in a note, bond, debenture, or other evidence of indebtedness secured  
2 by a mortgage or other security agreement if:

3 (A) the note, bond, debenture, or other evidence of indebtedness is offered and sold  
4 with the mortgage or other security agreement as a unit;

5 (B) a general solicitation or general advertisement of the transaction is not made; and

6 (C) a commission or other remuneration is not paid or given, directly or indirectly, to  
7 a person not registered under this Chapter as a broker-dealer or as an agent;

8 (12) a transaction by an executor, administrator of an estate, sheriff, marshal, receiver,  
9 trustee in bankruptcy, guardian, or conservator;

10 (13) a sale or offer to sell to:

11 (A) an institutional investor;

12 (B) an accredited investor, provided that prior to a sale or offer to sell to an accredited  
13 investor listed in Rule 501(a)(5) or (6) of the Securities Act of 1933, the offeror files a consent to  
14 service of process with the administrator in the form required under Sec. 611 of this Chapter.

15 Failure to file the consent as required is a cause for administrative action by the administrator  
16 under Sec. 604 but does not result in the loss of this exemption; this filing does not apply if:

17 (i) the issuer of the securities to be offered or sold has its principal place of  
18 business or a majority of its full-time employees located in this State;

19 (ii) the issuer or offeror of the securities files or has previously filed a consent  
20 to service of process with the administrator; or

21 (iii) the offeror is a broker-dealer or agent of the issuer registered under this  
22 Chapter;

23 (C) a federal covered investment adviser; or

1 (D) any other person exempted by rule adopted or order issued under this Chapter;  
2 (14) (A) subject to paragraph 14(B) below, any transaction pursuant to an offer directed  
3 by the offeror to not more than 25 persons in this State excluding those persons designated in  
4 paragraph (13) but including persons exempt under paragraph (24), during any period of 12  
5 consecutive months whether or not the offeror or any of the offerees is then present in this State  
6 if:  
7 (i) no general solicitation or general advertising is made in connection with the  
8 offer to sell or sale of the securities unless it has been permitted by the administrator;  
9 (ii) no commission or other remuneration is paid or given, directly or indirectly, to  
10 a person other than a broker-dealer registered under this Chapter or an agent registered under this  
11 Chapter for soliciting any person in this State other than those persons designated in paragraph  
12 (13); and  
13 (iii) the offeror reasonably believes that all the purchasers in this State, other than  
14 those designated in paragraph (13), are purchasing for investment;  
15 (B) the administrator may by rule or order, as to any security or transaction or any type  
16 of security or transaction, withdraw or further condition this exemption, or increase or decrease  
17 the number of offerees permitted, or waive the conditions in paragraph (14)(A), and may require  
18 reports of sales under this exemption;  
19 (15) a transaction under an offer to existing security holders of the issuer, including  
20 persons that at the date of the transaction are holders of convertible securities, options, or  
21 warrants, if a commission or other remuneration, other than a standby commission, is not paid or  
22 given, directly or indirectly, for soliciting a security holder in this State, and if, prior to any offer  
23 or sale of any security that is not a federal covered security, the issuer files a notice specifying the



1 terms of the offer, all other information which the administrator by rule requires and any  
2 additional information reasonably related to the offering required to be filed by the administrator  
3 within 10 days after the filing date of the notice, and the administrator does not by order disallow  
4 the exemption within 10 days after the date of filing the notice or, if additional information is  
5 required, within 10 days after the date of filing that information;

6 (16) an offer to sell, but not a sale, of a security not exempt from registration under the  
7 Securities Act of 1933 if:

8 (A) a registration or offering statement or similar record as required under the  
9 Securities Act of 1933 has been filed, but is not effective, or the offer is made in compliance with  
10 Rule 165 adopted under the Securities Act of 1933 (17 C.F.R. 230.165); and

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

15 (17) an offer to sell, but not a sale, of a security exempt from registration under the  
16 Securities Act of 1933 if:

17 (A) a registration statement has been filed under this Chapter, but is not effective;

18 (B) a solicitation of interest is provided in a record to offerees in compliance with a  
19 rule adopted by the administrator under this Chapter; and

20 (C) a stop order of which the offeror is aware has not been issued by the  
21 administrator under this Chapter and an audit, inspection, or proceeding that may culminate in a  
22 stop order is not known by the offeror to be pending;

1 (18) a transaction involving the distribution of the securities of an issuer to the security  
2 holders of another person in connection with a merger, consolidation, exchange of securities, sale  
3 of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other  
4 person, or its parent or subsidiary, are parties;

5 (19) a rescission offer, sale, or purchase under Section 510;

6 (20) an offer or sale of a security to a person not a resident of this State and not present in  
7 this State if the offer or sale does not constitute a violation of the laws of the State or foreign  
8 jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or  
9 scheme to evade this Chapter;

10 (21) employees' stock purchase, savings, option, profit-sharing, pension, or similar  
11 employees' benefit plan, including any securities, plan interests, and guarantees issued under a  
12 compensatory benefit plan or compensation contract, contained in a record, established by the  
13 issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the  
14 issuer's parent for the participation of their employees including offers or sales of such securities  
15 to:

16 (A) directors; general partners; trustees, if the issuer is a business trust; officers;  
17 consultants; and advisors;

18 (B) family members who acquire such securities from those persons through gifts or  
19 domestic relations orders;

20 (C) former employees, directors, general partners, trustees, officers, consultants, and  
21 advisors if those individuals were employed by or providing services to the issuer when the  
22 securities were offered; and

1 (D) insurance agents who are exclusive insurance agents of the issuer, or the issuer's  
2 subsidiaries or parents, or who derive more than 50 percent of their annual income from those  
3 organizations;

4 (22) a transaction involving:

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

11 (B) an act incident to a judicially approved reorganization in which a security is  
12 issued in exchange for one or more outstanding securities, claims, or property interests, or partly  
13 in such exchange and partly for cash; or

14 (C) the solicitation of tenders of securities by an offeror in a tender offer in  
15 compliance with Rule 162 adopted under the Securities Act of 1933 (17 C.F.R. 230.162);

16 (23) a nonissuer transaction in an outstanding security by or through a broker-dealer  
17 registered or exempt from registration under this Chapter, if the issuer is a reporting issuer in a  
18 foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this  
19 Chapter; has been subject to continuous reporting requirements in the foreign jurisdiction for not  
20 less than 180 days before the transaction; and the security is listed on the foreign jurisdiction's  
21 securities exchange that has been designated by this paragraph or by rule adopted or order issued  
22 under this Chapter, or is a security of the same issuer that is of senior or substantially equal rank  
23 to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For

1 purposes of this paragraph, Canada, together with its provinces and territories, is a designated  
2 foreign jurisdiction and The Toronto Stock Exchange, Inc. and the TSX Venture Exchange, Inc.  
3 are designated securities exchanges. After an administrative hearing in compliance with Chapter  
4 227, the administrator, by rule adopted or order issued under this Chapter, may revoke the  
5 designation of a securities exchange under this paragraph, if the administrator finds that  
6 revocation is necessary or appropriate in the public interest and for the protection of investors; or

7 (24) any offer or sale of its securities by an issuer, having its principal office in this State,  
8 if the aggregate number of persons holding directly or indirectly all of the issuer's securities, after  
9 the securities to be issued are sold, does not exceed 25, exclusive of persons under paragraph 13,  
10 if no commission or other remuneration is paid or given directly or indirectly for soliciting any  
11 person in this state, except to broker-dealers and agents licensed in this state, and if no  
12 advertising is published unless it has been permitted by the division.

13 (25) any offer or sale of a preorganization subscription, if no commission or other  
14 remuneration is paid or given directly or indirectly for soliciting any subscriber in this state and  
15 no advertising is published or circulated unless it has been permitted by the division, and if the  
16 subscription is not binding and no payment is made by any subscriber until the securities  
17 subscribed for may legally be sold.

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#### Official Comments

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

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

1 in Section 102(17).

2  
3 2. Section 202(1): Isolated nonissuer transactions: Prior Provisions: 1956 Act Section  
4 402(b)(1); RUSA Section 402(1). The term “isolated transaction” is not defined in this Act, but  
5 left to the states to develop. Historically under state law there has been somewhat varied case  
6 law development of the term “isolated transactions.” See, e.g., *Blinder, Robinson & Co., Inc. v.*  
7 *Goettsch*, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer transaction exemption is not  
8 unconstitutionally vague); *Allen v. Schauf*, 449 P.2d 1010 (Kan. 1969) (regulation defined  
9 isolated transactions to not exceed four persons solicited in a 12 month period); *Nelson v. State*,  
10 355 P.2d 413, 420 (Okla. Ct. Crim. App. 1960) (“[a]n isolated sale means one standing alone,  
11 disconnected from any other”); see generally 1 Louis Loss & Joel Seligman, *Securities*  
12 *Regulation* 125-130 (3d ed. rev. 1998).

13  
14 In general this subsection is intended to cover the occasional sale by a person. It would not  
15 exempt multiple or successive transactions by a person or group, whether those sales are  
16 sufficient to constitute a “distribution” as that term is used for purposes of the federal securities  
17 laws, see 2 Louis Loss & Joel Seligman, *Securities Regulation* 1138.50-1138.52 (3d ed. rev.  
18 1999), or merely too frequent to be considered “isolated” under the relevant state law.

19  
20 Limited issuer offering transactions are separately addressed in Section 202(14).

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

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

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

44  
45 5. Section 202(4): Nonissuer transactions in securities subject to Securities Exchange Act