




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 08 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 request for additional information relevant to the application prior to January 1.

2 (c)(2) A rule adopted or order issued under this Chapter may set an earlier effective date
3 or may defer the effective date until noon on the 45th day after the filing of any amendment
4 completing the application.

5 (d) [**Registration renewal.**] A registration is effective until midnight on December 31 of
6 the year for which the application for registration is filed. Unless an order is in effect under
7 Section 411, a registration may be automatically renewed each year by filing such records as are
8 required by rule adopted or order issued under this Chapter, by paying the fee specified in
9 Section 410, and by paying costs charged by the designee of the administrator for processing the
10 filings.

11 (e) [**Additional conditions or waivers.**] A rule adopted or order issued under this
12 Chapter may impose such other conditions, not inconsistent with the National Securities Markets
13 Improvement Act of 1996. An order issued under this Chapter may waive, in whole or in part,
14 specific requirements in connection with registration as are in the public interest and for the
15 protection of investors.

16 (f) [**Additional information required.**]

17
18 (1) In addition to the information required elsewhere under this section, an
19 application for registration shall contain the following:

20 (a) in the case of an individual, the individual's social security number.

21
22 (b) in the case of a person who is not an individual, the person's federal
23 employer identification number.

24 (2) the administrator may not disclose any information received under subd.

25 (f)(1)(a) or (b) to any person except as follows:

1 (a) the administrator may disclose information under subd. (f)(1)(a) or (b) to
2 the department of revenue for the sole purpose of requesting certifications under s. 73.0301,
3 Stats.

4 (b) the administrator may disclose information under subd. (f)(a) or (b) to the
5 department of workforce development in accordance with a memorandum of understanding
6 under s. 49.857, Stats.

7 (3) if an applicant for the issuance or renewal of a registration under this
8 section is an individual who does not have a social security number, the applicant, as a condition
9 of applying for or applying to renew the registration, shall submit a statement made or subscribed
10 under oath or affirmation to the administrator that the applicant does not have a social security
11 number. The form of the statement shall be prescribed by the department of workforce
12 development.

13 (4) any license issued or renewed in reliance upon a false statement submitted
14 by an applicant under subd. (f)(1) or (3) is invalid.

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16 **Official Comments**

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

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

25
26 2. Section 406(a) eliminates the listing of specified information delineated in Section 202 of
27 the 1956 Act. As with RUSA Section 205, the intent is to facilitate coordination with widely
28 used standardized forms.

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30 3. Under this Act a single person may act both as an agent and investment adviser

1 representative if the person satisfies applicable registration requirements to be both an agent and
2 investment adviser representative.

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5 **Wisconsin Study Group Comments**
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7 Section 406(a). This section is being revised to provide that the registration application may
8 alternatively be filed with an organization designated by the administrator by rule (which is
9 currently the NASD based on existing Wisconsin law).

10 Section 406(c)(1). This section is being revised to provide that registration automatically
11 becomes effective 30 days from the date of application, in order to conform to current law.

12 Section 406(c)(1)(A) to (C). This section is being revised to include three circumstances under
13 which registration can become effective prior to the expiration of 30 days, based on current
14 Wisconsin law.

15 Section 406(f). This section is being revised to require certain additional information to be filed
16 in connection with the registration application, in order to conform to current law requirements
17 of the Wisconsin Department of Revenue and Department of Work Force Development.

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20 **SECTION 407. SUCCESSION AND CHANGE IN REGISTRATION OF BROKER-**

21 **DEALER OR INVESTMENT ADVISER.**

22 (a) [Succession.] A broker-dealer or investment adviser may succeed to the current
23 registration of another broker-dealer or investment adviser or a notice filing of a federal covered
24 investment adviser, and a federal covered investment adviser may succeed to the current
25 registration of an investment adviser or notice filing of another federal covered investment
26 adviser, by filing as a successor an application for registration pursuant to Section 401 or 403 or a
27 notice pursuant to Section 405 for the unexpired portion of the current registration or notice
28 filing.

29 (b) [Organizational change.] A broker-dealer or investment adviser that changes its
30 form of organization or State of incorporation or organization may continue its registration by
31 filing an amendment to its registration if the change does not involve a change in control. The

1 amendment becomes effective when filed or on a date designated by the registrant in its filing.
2 The new organization is a successor to the original registrant for the purposes of this Chapter. If
3 there is a change in control, the broker-dealer or investment adviser shall file a new application
4 for registration. A predecessor registered under this Chapter shall stop conducting its securities
5 business other than winding down transactions and shall file for withdrawal of broker-dealer or
6 investment adviser registration within 45 days after filing its amendment to effect succession.

7 (c) [Name change.] A broker-dealer or investment adviser that changes its name may
8 continue its registration by filing an amendment to its registration. The amendment becomes
9 effective when filed or on a date designated by the registrant.

10 (d) [Change of control.] A change of control of a broker-dealer or investment adviser
11 may be made in accordance with a rule adopted or order issued under this Chapter.

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Official Comments

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

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

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2. There is no filing fee under Section 407.

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Wisconsin Study Group Comments

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27 Section 407(b). This section is being revised to clarify that only a "change in control" will
28 trigger the requirement to file a new application for registration. The Wisconsin Study Group
29 believes that a material change in financial condition or management alone should not require the
filing of an amendment to broker-dealer or investment adviser registration.

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**SECTION 408. TERMINATION OF EMPLOYMENT OR ASSOCIATION OF
AGENT AND INVESTMENT ADVISER REPRESENTATIVE AND TRANSFER OF
EMPLOYMENT OR ASSOCIATION.**

(a) **[Notice of termination.]** If an agent registered under this Chapter terminates employment by or association with a broker-dealer or issuer, or if an investment adviser representative registered under this Chapter terminates employment by or association with an investment adviser or federal covered investment adviser, or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser, or federal covered investment adviser shall promptly file a notice of termination. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant may do so.

(b) **[Transfer of employment or association.]** If an agent registered under this Chapter terminates employment by or association with a broker-dealer registered under this Chapter and begins employment by or association with another broker-dealer registered under this Chapter; or if an investment adviser representative registered under this Chapter terminates employment by or association with an investment adviser registered under this Chapter or a federal covered investment adviser that has filed a notice under Section 405 and begins employment by or association with another investment adviser registered under this Chapter or a federal covered investment adviser that has filed a notice under Section 405; then upon the filing by or on behalf of the registrant, within 30 days after the termination, of an application for registration that complies with the requirement of Section 406(a) and payment of the filing fee required under Section 410, the registration of the agent or investment adviser representative is:

1 (1) immediately effective as of the date of the completed filing, if the agent's Central
2 Registration Depository record or successor record or the investment adviser representative's
3 Investment Adviser Registration Depository record or successor record does not contain a new or
4 amended disciplinary disclosure within the previous 12 months; or

5 (2) temporarily effective as of the date of the completed filing, if the agent's Central
6 Registration Depository record or successor record or the investment adviser representative's
7 Investment Adviser Registration Depository record or successor record contains a new or
8 amended disciplinary disclosure within the preceding 12 months.

9 (c) **[Withdrawal of temporary registration.]** The administrator may withdraw a
10 temporary registration if there are or were grounds for discipline as specified in Section 411 and
11 the administrator does so within 30 days after the filing of the application. If the administrator
12 does not withdraw the temporary registration within the 30-day period, registration becomes
13 automatically effective on the 31st day after filing.

14 (d) **[Power to prevent registration.]** The administrator may prevent the effectiveness of
15 a transfer of an agent or investment adviser representative under subsection (b)(1) or (2) based on
16 the public interest and the protection of investors.

17 (e) **[Termination of registration or application for registration.]** If the administrator
18 determines that a registrant or applicant for registration is no longer in existence or has ceased to
19 act as a broker-dealer, agent, investment adviser, or investment adviser representative, or is the
20 subject of an adjudication of incapacity or is subject to the control of a committee, conservator,
21 or guardian, or cannot reasonably be located, a rule adopted or order issued under this Chapter
22 may require the registration be canceled or terminated or the application denied. The
23 administrator may reinstate a canceled or terminated registration, with or without hearing, and

1 may make the registration retroactive.

2 **Official Comments**

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

4 1. Under Sections 402(c) and 404(c) registration of an agent or investment adviser
5 representative is effective only while the agent or investment adviser representative is employed
6 by or associated with a broker-dealer, issuer, or investment adviser, as may be the case. Section
7 408(a) specifies a procedure to inform the administrator of a notice of termination.

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

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18 **SECTION 409. WITHDRAWAL OF REGISTRATION OF BROKER-DEALER,**
19 **AGENT, INVESTMENT ADVISER, AND INVESTMENT ADVISER**

20 **REPRESENTATIVE.** Withdrawal of registration by a broker-dealer, agent, investment adviser,
21 or investment adviser representative becomes effective 60 days after the filing of the application
22 to withdraw or within any shorter period as provided by rule adopted or order issued under this
23 Chapter unless a revocation or suspension proceeding is pending when the application is filed. If
24 a proceeding is pending, withdrawal becomes effective when and upon such conditions as
25 required by rule adopted or order issued under this Chapter. The administrator may institute a
26 revocation or suspension proceeding under Section 411 within one year after the withdrawal
27 became effective automatically and issue a revocation or suspension order as of the last date on
28 which registration was effective if a proceeding is not pending.

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30 **Official Comments**

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

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

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

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14 **SECTION 410. POSTREGISTRATION REQUIREMENTS.**

15 (a) [Financial requirements.] Subject to Section 15(h) of the Securities Exchange Act of
16 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15
17 U.S.C. Section 80b-^{18a}~~22~~), a rule adopted or order issued under this Chapter may establish
18 minimum financial requirements for broker-dealers registered or required to be registered under
19 this Chapter and investment advisers registered or required to be registered under this Chapter.

20 (b) [Financial reports.] Subject to Section 15(h) of the Securities Exchange Act of 1934
21 (15 U.S.C. Section 78o(h)) or Section 222(b) of the Investment Advisers Act of 1940 (15 U.S.C.
22 Section 80b-^{18a}~~22~~), a broker-dealer registered or required to be registered under this Chapter and an
23 investment adviser registered or required to be registered under this Chapter shall file such
24 financial reports as are required by a rule adopted or order issued under this Chapter. If the
25 information contained in a record filed under this subsection is or becomes inaccurate or
26 incomplete in a material respect, the registrant shall promptly file a correcting amendment.

27 (c) [Recordkeeping.] Subject to Section 15(h) of the Securities Exchange Act of 1934
28 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15 U.S.C.
29 Section 80b-^{18a}~~22~~):

1 (1) a broker-dealer registered or required to be registered under this Chapter and an
2 investment adviser registered or required to be registered under this Chapter shall make and
3 maintain the accounts, correspondence, memoranda, papers, books, and other records required by
4 rule adopted or order issued under this Chapter;

5 (2) broker-dealer records required to be maintained under paragraph (1) may be
6 maintained in any form of data storage acceptable under Section 17(a) of the Securities Exchange
7 Act of 1934 (15 U.S.C. Section 78q(a)) if they are readily accessible to the administrator; and

8 (3) investment adviser records required to be maintained under paragraph (1) may be
9 maintained in any form of data storage required by rule adopted or order issued under this
10 Chapter.

11 (d) **[Audits or inspections.]** The records of a broker-dealer registered or required to be
12 registered under this Chapter and of an investment adviser registered or required to be registered
13 under this Chapter are subject to such reasonable periodic, special, or other audits or inspections
14 by a representative of the administrator, within or without this State, as the administrator
15 considers necessary or appropriate in the public interest and for the protection of investors. The
16 administrator may also conduct an examination of the books, records and affairs of an applicant
17 for registration as a broker-dealer or investment adviser. An audit or inspection may be made at
18 any time and without prior notice. The administrator may copy, and remove for audit or
19 inspection copies of, all records the administrator reasonably considers necessary or appropriate
20 to conduct the audit or inspection. The administrator may assess a reasonable charge for
21 conducting an audit or inspection under this subsection.

22 (e) **[Custody and discretionary authority bond or insurance.]** Subject to Section 15(h)
23 of the Securities Exchange Act of 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the

18a
1 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-~~22~~), a rule adopted or order issued
2 under this Chapter may require a broker-dealer or investment adviser that has custody of or
3 discretionary authority over funds or securities of a customer or client to obtain insurance or post
4 a bond or other satisfactory form of security in an amount prescribed by the administrator by rule.
5 The administrator may determine the requirements of the insurance, bond, or other satisfactory
6 form of security. Insurance or a bond or other satisfactory form of security may not be required
7 of a broker-dealer registered under this Chapter whose net capital exceeds, or of an investment
8 adviser registered under this Chapter whose minimum financial requirements exceed, the
9 amounts required by rule or order under this Chapter. The insurance, bond, or other satisfactory
10 form of security must permit an action by a person to enforce any liability on the insurance, bond,
11 or other satisfactory form of security if instituted within the time limitations in Section 509(j)(2).

12 (f) **[Requirements for custody.]** Subject to Section 15(h) of the Securities Exchange Act
13 of 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15
14 U.S.C. Section 80b-~~22~~), an agent may not have custody of funds or securities of a customer
15 except under the supervision of a broker-dealer and an investment adviser representative may not
16 have custody of funds or securities of a client except under the supervision of an investment
17 adviser or a federal covered investment adviser. A rule adopted or order issued under this
18 Chapter may prohibit, limit, or impose conditions on a broker-dealer regarding custody of funds
19 or securities of a customer and on an investment adviser regarding custody of securities or funds
20 of a client.

21 (g) **[Investment adviser brochure rule.]** With respect to an investment adviser
22 registered or required to be registered under this Chapter, a rule adopted or order issued under
23 this Chapter may require that information or other record be furnished or disseminated to clients

1 or prospective clients in this State as necessary or appropriate in the public interest and for the
2 protection of investors and advisory clients.

3 (h) [**Continuing education.**] A rule adopted or order issued under this Chapter may
4 require an individual registered under Section 402 or 404 to participate in a continuing education
5 program approved by the administrator and administered by a self-regulatory organization or, in
6 the absence of such a program, a rule adopted or order issued under this Chapter may require
7 continuing education for an individual registered under Section 404.

8 (i) No registered broker-dealer shall be subject to s.138.05(1)(a) Wis. Stats. [Maximum
9 rate-Prepayment, disclosure-Corporations] with respect to any debit balance in a customer
10 account if the debit balance is payable on demand and the only collateral for the balance is
11 securities.

12 **Official Comments**

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15 **[Wisconsin Note: Section 410 of the Uniform Act, entitled "Fees and Expenses" has been**
16 **removed from the Wisconsin Draft. All fees provisions of the Wisconsin Draft are set forth**
17 **in Section 612. The NCCUSL Official Comments are reproduced at Section 612. Sections**
18 **411 and 412 of the Uniform Act have been renumbered as Sections 410 and 411,**
19 **respectively, in this Wisconsin Draft. All section references in the Official Comments have**
20 **been changed to reflect the section numbering in the Wisconsin Draft.]**

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22 **Official Comments**

23 **Prior Provisions:** 1956 Act Sections 102(c), 202(d) and (e) and 203; RUSA Sections
24 209, 211 and 215.

25
26 1. Sections 410(a) through (c) and (e) through (f) implicitly refer to "capital, custody,
27 margin, financial responsibility, making and keeping records, bonding, or financial or operational
28 reporting requirements." Under the National Securities Markets Improvement Act of 1996,
29 States may not impose such requirements on covered broker-dealers and investment advisers
30 greater than those specified in Section 15(h) of the Securities Exchange Act of 1934 and Section
31 222 of the Investment Advisors Act of 1940.

32
33 2. Minimum financial requirements must be maintained during the entire time a person is

1 registered and not merely at the time of the registration. See, e.g., National Grange Mut. Ins. Co.
2 v. Prioleau, 236 S.E.2d 808 (S.C. 1977) (continuing bond requirement); Ridgeway, McLeod &
3 Assoc., 281 A.2d 390 (N.J. Super. Ct. App. Div. 1971) (continuing minimum capital
4 requirement).

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6 3. The duty in Section 410(b) to correct or update information is limited to material
7 information which a reasonable investor would continue to consider important in deciding
8 whether to purchase or sell securities. Cf. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444-
9 450 (1970); Securities Act Release No. 6084, 17 SEC Dock. 1048, 1054 (1979) (“persons are
10 continuing to rely on all or any material portion of the statements”).

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12 4. Section 410(c)(1) authorizes the administrator to require all records to be preserved for
13 the period the administrator prescribes by rule or order.

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15 5. Rule 17a-4 is the current rule under Section 17(a) of the Securities Exchange Act
16 referred to in Section 410(c)(2) that addresses acceptable forms of data storage.

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18 6. The administrator’s power to copy and examine records in Section 410(d) is subject to
19 all applicable privileges. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4921-
20 4925 n.69 (3d ed. rev. 1996). The power in Section 410(d) to conduct audits or inspections is
21 distinguishable from the administrator’s enforcement powers under Section 602. No subpoena
22 is necessary under Section 410(d). Failure to submit to a reasonable audit or inspection is a
23 violation of this Act which may result in an action by the administrator under Section 411(d)(8),
24 a criminal prosecution under Section 508, or an injunction under Section 603. An unreasonable
25 audit, inspection or demand for information or documents would be subject to challenge in an
26 appropriate court.

27
28 7. Section 410(f) broadens 1956 Act Section 102(c) and RUSA Section 215 to apply to
29 agents as well as investment adviser representatives. Subject to Section 15(h) of the Securities
30 Exchange Act of 1934 and Section 222 of the Investment Adviser Act of 1940, the administrator
31 is given broad authority to prohibit, limit, or condition custody arrangements.

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33 8. Section 410(g) parallels Rule 204-3, adopted under the Investment Advisers Act of
34 1940, popularly known as the brochure rule, which authorizes the SEC to require dissemination
35 to investment adviser clients of specified information about the investment adviser and
36 investment advice.

37 38 39 **Wisconsin Study Group Comments**

40 Section 410. The filing fee section set forth in Uniform Act 410 is being incorporated within
41 Section 612, in order to conform to the structure under current Wisconsin law where all fee
42 provisions are consolidated into one section.

43 Section 410(d) (previously Act Section 411(d)). This section is being revised to enable the
44 administrator to examine an applicant’s books, records and affairs in order to provide an

1 additional administrative mechanism for screening broker-dealer and investment adviser
2 applicants.

3 Section 410(e). This section is being amended to authorize the administrator to prescribe bond
4 amounts by rule in order to grant the administrator with greater flexibility.

5 Section 410(h). This section is being revised to replace the phrase "Securities and Exchange
6 Commission" with "administrator" as the appropriate person to set the continuing education
7 requirements for registered persons.

8 Section 410(i). This section is being amended in order to conform to current Wisconsin law.

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SECTION 411. DENIAL, REVOCATION, SUSPENSION, CENSURE,

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WITHDRAWAL, RESTRICTION, CONDITION, OR LIMITATION OF

13

REGISTRATION.

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(a) **[Disciplinary conditions-applicants.]** If the administrator finds that the order is in

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the public interest and subsection (d) authorizes the action, an order issued under this Chapter

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may deny an application, or may condition or limit registration of an applicant to be a broker-

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dealer, agent, investment adviser, or investment adviser representative, and, if the applicant is a

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broker-dealer or investment adviser, of a partner, officer, director, or person having a similar

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status or performing similar functions, or a person directly or indirectly in control, of the broker-

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dealer or investment adviser.

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(b) **[Disciplinary conditions – registrants.]** If the administrator finds that the order is in

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the public interest and subsection (d) authorizes the action, an order issued under this Chapter

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may revoke, suspend, censure, condition, or limit the registration of a registrant and, if the

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registrant is a broker-dealer or investment adviser, of a partner, officer, director, or person having

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a similar status or performing similar functions, or a person directly or indirectly in control, of

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the broker-dealer or investment adviser. However, the administrator may not:

1 (1) institute a revocation or suspension proceeding under this subsection based on an
2 order issued under a law of another State that is reported to the administrator or a designee of the
3 administrator more than one year after the date of the order on which it is based; or

4 (2) under subsection (d)(5)(A) or (B), issue an order on the basis of an order issued under
5 the securities act of another State unless the other order was based on conduct for which
6 subsection (d) would authorize the action had the conduct occurred in this State.

7 (c) **[Disciplinary penalties – registrants.]** If the administrator finds that the order is in
8 the public interest and subsection (d)(1) through (6), (8), (9), (10), or (12) and (13) authorizes the
9 action, an order under this Chapter may censure, impose a bar, or impose a civil penalty in an
10 amount not to exceed a maximum of \$10,000 for a single violation or \$100,000 for more than
11 one violation, or in such amount as agreed to by the parties, on a registrant, and, if the registrant
12 is a broker-dealer or investment adviser, a partner, officer, director, or person having a similar
13 status or performing similar functions, or a person directly or indirectly in control, of the broker-
14 dealer or investment adviser.

15 (d) **[Grounds for discipline.]** A person may be disciplined under subsections (a) through
16 (c) if the person:

17 (1) has filed an application for registration in this State under this Chapter or the
18 predecessor act within the previous 10 years, which, as of the effective date of registration or as
19 of any date after filing in the case of an order denying effectiveness, was incomplete in any
20 material respect or contained a statement that, in light of the circumstances under which it was
21 made, was false or misleading with respect to a material fact;

22 (2) willfully violated or willfully failed to comply with this Chapter or the predecessor
23 act or a rule adopted or order issued under this Chapter or the predecessor act within the previous

1 10 years;

2 (3) has been convicted of a felony or within the previous 10 years has been convicted
3 of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a
4 business involving securities, commodities, investments, franchises, insurance, banking, or
5 finance;

6 (4) is enjoined or restrained by a court of competent jurisdiction in an action instituted
7 by the administrator under this Chapter or the predecessor act, a State, the Securities and
8 Exchange Commission, or the United States from engaging in or continuing an act, practice, or
9 course of business involving an aspect of a business involving securities, commodities,
10 investments, franchises, insurance, banking, or finance;

11 (5) is the subject of an order, issued after notice and opportunity for hearing by:

12 (A) the securities or other financial services regulator of a State or the Securities
13 and Exchange Commission or other federal agency denying, revoking, barring, or suspending
14 registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or
15 investment adviser representative;

16 (B) the securities regulator of a State or the Securities and Exchange Commission
17 against a broker-dealer, agent, investment adviser, investment adviser representative, or federal
18 covered investment adviser;

19 (C) the Securities and Exchange Commission or a self-regulatory organization
20 suspending or expelling the registrant from membership in the self-regulatory organization;

21 (D) a court adjudicating a United States Postal Service fraud order;

22 (E) the insurance regulator of a State denying, suspending, or revoking registration
23 as an insurance agent; or

1 (F) a depository institution or financial services regulator suspending or barring
2 the person from the depository institution or other financial services business;

3 (6) is the subject of an adjudication or determination, after notice and opportunity for
4 hearing, by the Securities and Exchange Commission, the Commodity Futures Trading
5 Commission; the Federal Trade Commission; a federal depository institution regulator, or a
6 depository institution, insurance, or other financial services regulator of a State that the person
7 willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the
8 Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodity
9 Exchange Act, the securities or commodities law of a State, or a federal or state law under which
10 a business involving investments, franchises, insurance, banking, or finance is regulated;

11 (7) is insolvent, either because the person's liabilities exceed the person's assets or
12 because the person cannot meet the person's obligations as they mature, but the administrator
13 may not enter an order against an applicant or registrant under this paragraph without a finding of
14 insolvency as to the applicant or registrant;

15 (8) refuses to allow or otherwise impedes the administrator from conducting an audit
16 or inspection under Section 410(d) or refuses access to a registrant's office to conduct an audit or
17 inspection under Section 410(d);

18 (9) has failed to reasonably supervise an agent, investment adviser representative, or
19 other individual, if the agent, investment adviser representative, or other individual was subject
20 to the person's supervision and committed a violation of this Chapter or the predecessor act or a
21 rule adopted or order issued under this Chapter or the predecessor act within the previous 10
22 years;

23 (10) has not paid the proper filing fee within 30 days after having been notified by the

1 administrator of a deficiency, but the administrator shall vacate an order under this paragraph
2 when the deficiency is corrected;

3 (11) after notice and opportunity for a hearing, has been found within the previous 10
4 years:

5 (A) by a court of competent jurisdiction to have willfully violated the laws of a
6 foreign jurisdiction under which the business of securities, commodities, investment, franchises,
7 insurance, banking, or finance is regulated;

8 (B) to have been the subject of an order of a securities regulator of a foreign
9 jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a
10 broker-dealer, agent, investment adviser, investment adviser representative, or similar person; or

11 (C) to have been suspended or expelled from membership by or participation in a
12 securities exchange or securities association operating under the securities laws of a foreign
13 jurisdiction;

14 (12) is the subject of a cease and desist order issued by the Securities and Exchange
15 Commission or issued under the securities, commodities, investment, franchise, banking,
16 finance, or insurance laws of a State;

17 (13) has engaged in dishonest or unethical practices in the securities, commodities,
18 investment, franchise, banking, finance, or insurance business within the previous 10 years;

19 (14) is not qualified on the basis of factors such as training, experience, and
20 knowledge of the securities business. However, in the case of an application by an agent for a
21 broker-dealer that is a member of a self-regulatory organization or by an individual for
22 registration as an investment adviser representative, a denial order may not be based on this
23 paragraph if the individual has successfully completed all examinations required by subsection

1 (f). The administrator may require an applicant for registration under Section 402 or 404 who
2 has not been registered in a State within the two years preceding the filing of an application in
3 this State to successfully complete an examination;

4 (15) is the subject of an order of the administrator denying an application or
5 suspending or revoking a registration as a broker-dealer, agent or investment adviser;

6 (16) is selling or has sold, or is offering or has offered for sale, in the State securities
7 through any unlicensed agent or for any broker-dealer or issuer with knowledge that the broker-
8 dealer or issuer has not complied with this chapter;

9 (17) has made any material misrepresentation to or withheld or concealed any
10 material fact from the administrator, or has refused to furnish information reasonably requested
11 by the administrator; or

12 (18) has not complied with the conditions or limitations of a registration issued under
13 this chapter.

14 (19) (A) The administrator shall deny an application for the issuance or renewal of a
15 registration if any of the following applies:

16 (1) the applicant fails to provide any information required under Section
17 406(f)(1)(a) or (b).

18 (2) the department of revenue certifies under Section 73.0301 that the applicant is
19 liable for delinquent taxes. An applicant whose application for the issuance or renewal of a
20 registration is denied under this subdivision for delinquent taxes is entitled to a notice under
21 Section 73.0301(12)(b)1.b. and hearing under Section 73.0301(5)(a), but is not entitled to any
22 other notice, hearing or review under this subchapter.

23 (3) the applicant is an individual who fails to comply, after appropriate notice,

1 with a subpoena or warrant issued by the department of workforce development or a county child
2 support agency under Section 59.53(5) and related to paternity or child support proceedings or
3 who is delinquent in making court-ordered payments of child or family support, maintenance,
4 birth expenses, medical expenses or other expenses related to the support of a child or former
5 spouse, as provided in a memorandum of understanding entered under Section 49.857. An
6 applicant whose application is denied under this subdivision for delinquent payments is entitled
7 to a notice and hearing under Section 49.857 but is not entitled to any other notice or hearing
8 under this section.

9 (B) Unless Section 406 (f)(3), applies to the registrant, the administrator shall
10 restrict or suspend a registration under this subchapter if the registrant is an individual who fails
11 to provide his or her social security number. The administrator shall restrict or suspend a
12 registration under this subchapter if the registrant is an individual who fails to comply, after
13 appropriate notice, with a subpoena or warrant issued by the department of workforce
14 development or a county child support agency under Section 59.53(5) and related to paternity or
15 child support proceedings or who is delinquent in making court-ordered payments of child or
16 family support, maintenance, birth expenses, medical expenses or other expenses related to the
17 support of a child or former spouse, as provided in a memorandum of understanding entered into
18 under Section 49.857. A registrant whose registration is restricted or suspended under this
19 paragraph is entitled to a notice and hearing under Section 49.857 but is not entitled to any other
20 notice or hearing under this section.

21 (C) The administrator shall revoke a registration if the department of revenue certifies
22 under Section 73.0301 that the registrant is liable for delinquent taxes. A registrant whose
23 registration is revoked under this paragraph for delinquent taxes is entitled to a notice under

1 Section 73.0301(2)(b)1.b. and hearing under Section 73.0301(5)(a) but is not entitled to any other
2 notice, hearing or review under this subchapter .

3 (e) The enumeration of the causes stated in subd. (d) shall not be exclusive and the
4 administrator may deny an application or suspend or revoke any registrant or censure any
5 registrant for any cause whether similar to or different from these causes when necessary or
6 appropriate in public interest or for the protection of investors.

7 (f) **[Examinations.]** A rule adopted or order issued under this Chapter may require that an
8 examination, including an examination developed or approved by an organization of securities
9 regulators, be successfully completed by a class of individuals or all individuals. An order issued
10 under this Chapter may waive, in whole or in part, an examination as to an individual and a rule
11 adopted under this Chapter may waive, in whole or in part, an examination as to a class of
12 individuals if the administrator determines that the examination is not necessary or appropriate in
13 the public interest and for the protection of investors.

14 (g) **[Summary process.]** The administrator may suspend or deny an application
15 summarily; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil
16 penalty on a registrant before final determination of an administrative proceeding. Upon the
17 issuance of an order, the administrator shall promptly notify each person subject to the order that
18 the order has been issued, the reasons for the action, and that within 15 days after the receipt of a
19 request in a record from the person the matter will be scheduled for a hearing. If a hearing is not
20 requested and none is ordered by the administrator within 30 days after the date of service of the
21 order, the order becomes final by operation of law. If a hearing is requested or ordered, the
22 administrator, after notice of and opportunity for hearing to each person subject to the order, may
23 modify or vacate the order or extend the order until final determination.

1 (h) **[Procedural requirements.]** An order issued may not be issued under this section,
2 except under subsection (g), without:

3 (1) appropriate notice to the applicant or registrant;

4 (2) opportunity for hearing; and

5 (3) findings of fact and conclusions of law in a record in accordance with the Chapter
6 227.

7 (i) **[Control person liability.]** A person that controls, directly or indirectly, a person not
8 in compliance with this section may be disciplined by order of the administrator under
9 subsections (a) through (c) to the same extent as the noncomplying person, unless the controlling
10 person did not know, and in the exercise of reasonable care could not have known, of the
11 existence of conduct that is a ground for discipline under this section.

12 (j) **[Limit on investigation or proceeding.]** The administrator may not institute a
13 proceeding under subsection (a), (b), or (c) based solely on material facts actually known by the
14 administrator unless an investigation or the proceeding is instituted within one year after the
15 administrator actually acquires knowledge of the material facts.

16
17 **Official Comments**

18
19 **[Wisconsin Note: This section was originally designated Section 412 in the Uniform Act.**
* 20 **All section references in the comments below have been changed to Section 411, to be**
21 **consistent with section numbering in this Wisconsin Draft.]**

22
23 Prior Provisions: 1956 Act Section 204; RUSA Sections 207, 212-213.

24
25 1. Section 411 generally follows Section 204 of the 1956 Act and Sections 207 and 212-
26 213 of RUSA, but has been modified to reflect subsequent developments that have broadened the
27 scope and remedies of counterpart federal and state statutes.

28
29 2. Section 411 authorizes the administrator to seek a sanction based on the seriousness of
30 the misconduct. Under Section 411 the administrator must prove that the denial, revocation,

1 suspension, cancellation, withdrawal, restriction, condition, or limitation both is (1) in the public
2 interest and (2) involves one of the enumerated grounds in Section 411(d). See, e.g., *Mayflower*
3 *Sec. Co., Inc. v. Bureau of Sec.*, 312 A.2d 497 (N.J. 1973). The “public interest” is a much
4 litigated concept that has come to have settled meanings. See generally 6 L. Loss & J. Seligman,
5 *Securities Regulation* 3103.5-3103.18 (3d ed. rev. 2002) (under federal securities laws). The
6 public interest will not require imposition of a sanction for every minor or technical violation of
7 subsection (d).

8
9 3. The term “foreign” means a jurisdiction outside of the United States, not a different
10 state within the United States.

11
12 4. Section 411(a) through (c) authorizes the administrator to proceed against an entire
13 firm, regardless of whether the administrator proceeds against any individual, when an
14 individual partner, officer, or director or person occupying a similar status or performing similar
15 functions, or a controlling person is disciplined under subsection (d), but only if proceeding
16 against the entire firm is in the public interest. The discipline of such an individual may not
17 automatically be used against a broker-dealer or investment adviser. When, however, there is a
18 failure to reasonably supervise, see Section 411(d)(9) or control person liability, see Section
19 411(h), the administrator is empowered to proceed against a firm in an appropriate case. In
20 Section 411, “any partner, officer, or director, any person occupying a similar status or
21 performing similar function.” can include a branch manager, assistant branch manager, or other
22 supervisor.

23
24 5. In Section 411(d)(1) the completeness and accuracy of an effective application for
25 registration is tested as of the appropriate effective date. An application that becomes incomplete
26 or inaccurate after its effective date is not a ground for discipline under paragraph (d)(1). In an
27 appropriate case, an action might be available under paragraph (d)(2) and Section 406(b). On the
28 other hand, in a proceeding to deny effectiveness to a pending application for registration, the
29 completeness and accuracy of the application is not limited to the effective date and can be
30 judged on any date after filing.

31
32 6. The term “willfully” in Section 411(d)(2) and (11)(A) is discussed in Comment 2 to
33 Section 508.

34
35 7. There is no time limit or statute of limitations on felony convictions in Section
36 411(d)(3) as a ground for disciplinary action.

37
38 8. The present tense of the verb “is” in Sections 411(d)(4) through (6) and (12) means
39 that an injunction, order, adjudication, or determination that has expired or been vacated is no
40 longer a ground for discipline.

41
42 9. In Sections 411(d)(5) and (6) the administrator is not required to prove the validity of
43 the ground which led to the earlier disciplinary order.

44
45 10. Under Section 411(d)(7) the administrator may not proceed against a broker-dealer or

1 investment adviser firm on the basis of the insolvency of a partner, officer, director, controlling
2 person or other person specified in subsection (b), unless it is a sole proprietorship.

3
4 11. Section 411(d)(8) can be violated by a refusal to cooperate with an administrator's
5 reasonable audit or inspection, including by withholding or concealing records, refusing to
6 furnish required records, or refusing the administrator reasonable access to any office or location
7 within an office to conduct an audit or inspection under this Act. However, a request by a
8 person subject to an audit or inspection for a reasonable delay to obtain assistance of counsel
9 does not constitute a violation of Section 411(d)(8).

10
11 12. The term "failed to supervise reasonably" in Section 411(d)(9) includes not having
12 reasonable supervisory procedures in place as well as a proper system of supervision and internal
13 control. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990), *cert. denied*, 499
14 U.S. 976 (1991). Section 15(b)(4)(E) of the Securities Exchange Act of 1934 similarly addresses
15 "failure to supervise reasonably." See 6 Louis Loss & Joel Seligman, *Securities Regulation*
16 3097-3101 (3d ed. rev. 2002).

17
18 13. The term "dishonest and unethical practices" in Section 411(d)(13) has been held not
19 to be unconstitutionally vague. See, e.g., *Brewster v. Maryland Sec. Comm'n*, 548 A.2d 157,
20 160 (M.D. Ct. Spec. App. 1988) ("a broad statutory standard is not vague if it has a meaningful
21 referent in business practice, custom or usage"); *Johnson-Bowles Co. v. Division of Sec.*, 829
22 P.2d 101, 114 (Utah Ct. App. 1992) (such legislative language bespeaks a legislative intent to
23 delegate the interpretation of what constitutes "dishonest and unethical practices" in the
24 securities industry to the administrator). Ministerial or clerical violations of a statute or rule, if
25 immaterial and occurring without intent or recklessness, typically would not constitute dishonest
26 or unethical practices.

27
28 14. Under the counterparts to Section 411(d)(14) and (e) applicants to become agents of
29 broker-dealers typically take standardized tests administered by the National Association of
30 Securities Dealers, Inc.

31
32 15. Sections 411(f) and (g) amplify the earlier procedures found in Section 204(f) of the
33 1956 Act and are intended to facilitate summary disciplinary proceedings, when these are
34 appropriate.

35
36 16. Section 411(i) parallels the language of Section 204 of the 1956 Act and Section
37 212(b) of RUSA with some significant changes. The time period in which the administrator can
38 act has been extended to one year from 30 days in the 1956 Act and 90 days in RUSA. The
39 limitation on instituting a proceeding can also be tolled by instituting a formal investigation. The
40 addition of the word "solely" is intended to make it clear that an administrator may consider the
41 prior history of an applicant or registrant even if that prior history had been known to the
42 administrator for more than one year if there are additional material facts which are actually
43 known to the administrator within the last year.

44
45 17. "Actually known" in Section 411(i) is used to signify that the mere filing of material

1 facts in the Central Registration Depository or Investment Advisory Registration Depository
2 systems does not constitute actual knowledge, unless that information was received by the
3 administrator, or, but for a decision by the administrator, would have been received by the
4 administrator.

5
6
7 **Wisconsin Study Group Comments**

8
9 Section 411(b). This section is being amended to authorize the administrator to impose a
10 “censure” as an additional form of disciplinary action.

11 Section 411(c). This section is being revised to establish maximum penalties and to permit the
12 negotiation of monetary penalties in a negotiated settlement.

13 Section 411(d)(15-19). This section is being revised to add provisions in order to conform to
14 current Wisconsin law.

15
16 **[ARTICLE] 5**

17 **FRAUD AND LIABILITIES**

18
19 **SECTION 501. GENERAL FRAUD.** It is unlawful for a person, in connection with the
20 offer, sale, or purchase of a security, directly or indirectly:

21 (1) to employ a device, scheme, or artifice to defraud;

22 (2) to make an untrue statement of a material fact or to omit to state a material fact
23 necessary in order to make the statements made, in light of the circumstances under which they
24 were made, not misleading; or

25 (3) to engage in an act, practice, or course of business that operates or would operate as a
26 fraud or deceit upon another person.

27
28 **Official Comments**

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

30
31
32 1. Section 501, which was Section 101 in the 1956 Act, was modeled on Rule 10b-5
33 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of

1 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a),
2 and Section 101 of the 1956 Act. Section 501 is not identical to either Rule 10b-5 or Section
3 17(a).

4
* 5 2. There are no exemptions from Section 501.
6

7 3. Section 501 applies to any securities offer, sale or purchase, including offers, sales, or
* 8 purchases involving registered, exempt, or federal covered securities. It would also apply to a
9 rescission offer under Section 510.
10

11 4. The possible consequences of violating Section 501 are many. These include denial,
12 suspension, or revocation of securities registration under Section 306; denial, revocation,
13 suspension, withdrawal, restriction, condition or limitation of a broker-dealer, agent, investment
* 14 adviser, or investment adviser representative registration under Section 412; criminal prosecution
15 under Section 508; civil enforcement proceedings under Sections 603; and administrative
16 proceedings under 604.
17

18 5. Because Section 501, like Rule 10b-5, reaches market manipulation, see 8 Louis Loss
19 & Joel Seligman, Securities Regulation Ch.10.D (3d ed. 1991), this Act does not include the
20 RUSA market manipulation Section 502, which had no counterpart in the 1956 Act.
21

22 6. The culpability required to be pled or proved under Section 501 is addressed in the
23 relevant enforcement context. See, e.g., Section 508, criminal penalties, where "willfulness"
* 24 must be proven; Section 509, civil liabilities, which includes a reasonable care defense; or civil
25 and administrative enforcement actions under Sections 603 and 604, where no culpability is
26 required to be pled or proven.
27

28 7. There is no private cause of action, express or implied, under Section 501. Section
* 29 509(m) expressly provides that only Section 509 provides a private cause of action for conduct
30 that could violate Section 501.
31

32 33 34 **SECTION 502. PROHIBITED CONDUCT IN PROVIDING INVESTMENT**

35 **ADVICE.**

36 (a) [**Fraud in providing investment advice.**] It is unlawful for a person that advises
37 others for compensation, either directly or indirectly or through publications or writings, as to the
38 value of securities or the advisability of investing in, purchasing, or selling securities or that, for

1 compensation and as part of a regular business, issues or promulgates analyses or reports relating
2 to securities:

3 (1) to employ a device, scheme, or artifice to defraud another person; or

4 (2) to engage in an act, practice, or course of business that operates or would operate
5 as a fraud or deceit upon another person.

6 (b) [Rules defining fraud.] A rule adopted under this Chapter may define an act,
7 practice, or course of business of an investment adviser or an investment adviser representative,
8 other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive,
9 or manipulative, and prescribe means reasonably designed to prevent investment advisers and
10 investment adviser representatives, other than supervised persons of a federal covered investment
11 adviser, from engaging in acts, practices, and courses of business defined as fraudulent,
12 deceptive, or manipulative.

13 (c) [Rules specifying contents of advisory contract.] A rule adopted under this Chapter
14 may specify the contents of an investment advisory contract entered into, extended, or renewed
15 by an investment adviser.

16
17

Official Comments

18 **Prior Provisions:** 1956 Act Section 102(a); RUSA Section 503.

19

20 1. Section 502(a) applies to any person that commits fraud in providing investment
21 advice. Section 502(b) is not limited to persons registered as investment advisers or investment
22 adviser representatives.

23

24 2. A person can violate both Section 501 and Section 502 if the person violates Section
25 502 in connection with the offer, purchase, or sale of a security.

26

27 3. The rulemaking authority under Sections 502(b) and (c) would provide the basis for
28 existing NASAA rules concerning investment advisers, to the extent these rules are not
29 preempted by the National Securities Markets Improvement Act of 1996.

1
2 4. Under Section 203A(b)(2) of the Investment Advisers Act States retain their authority
3 to investigate and bring enforcement actions with respect to fraud or deceit against a federal
4 covered investment adviser or a person associated with a federal covered investment adviser.
5 Under Section 502(a), which applies to any person, a State could bring an enforcement action
6 against a federal covered investment adviser, including a federal covered investment adviser
7 excluded from the definition of investment adviser in Section 102(15)(E).
8

9 5. There is no private cause of action, express or implied, under Section 502. Section
10 509(m) expressly provides that only Section 509 provides for a private cause of action for
11 prohibited conduct in providing investment advice that could violate Section 502.
12

13 **SECTION 503. EVIDENTIARY BURDEN.**

14
15 (a) [Civil.] In a civil action or administrative proceeding under this Chapter, a person
16 claiming an exemption, exception, preemption, or exclusion has the burden to prove the
17 applicability of the claim.

18 (b) [Criminal.] In a criminal proceeding under this Chapter, a person claiming an
19 exemption, exception, preemption, or exclusion has the burden of going forward with evidence
20 of the claim.

21 **Official Comment**

22
23 **Prior Provisions:** 1956 Act Section 402(d); RUSA Section 608.

24 1. As specified in Section 503(a), in a civil or administrative action, the person claiming
25 an exemption, exception, preemption, or exclusion has the burden of persuasion.

26
27 2. In contrast, in a criminal action under Section 503(b), the prosecutor is required to
28 prove each element of a crime "beyond a reasonable doubt." The defendant only has the burden
29 of producing evidence of an exemption, exception, preemption, or exclusion. Some court
30 decisions have characterized this burden as an affirmative defense. See, e.g., *United States ex.*
31 *rel. Schott v. Tehan*, 365 F.2d 191, 195 (6th Cir. 1966) (Ohio blue sky law constitutionally shifts
32 burden of production to defendant); *Commonwealth v. David*, 309 N.E.2d 484, 488 (Mass. 1974)
33 (exemption is an affirmative defense); *State v. Frost*, 387 N.E.2d 235, 238-239 (Ohio 1979) (it is
34 not unconstitutional to require the burden of proof as an affirmative defense to prove a securities
35 law exemption); *State v. Andersen*, 773 A.2d 328 (Conn. 2001) (an exemption from registration
36 is an affirmative defense to the charge of selling unregistered securities).

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SECTION 504. FILING OF SALES AND ADVERTISING LITERATURE.

(a) **[Filing requirement.]** Except as otherwise provided in subsection (b), a rule adopted or order issued under this Chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this Chapter.

(b) **[Excluded communications.]** This section does not apply to sales and advertising literature specified in subsection (a) which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by Section 201, 202, or 203 except as required pursuant to Section 201(7).

Official Comments

Prior Provisions: 1956 Act Section 403; RUSA Section 405.

1. The prospectuses, pamphlets, circulars, form letters, advertisements, sales literature or advertising communications, include material disseminated electronically or available on a web site.
2. The administrator may bring a civil enforcement action in a court under Section 603 or institute administrative enforcement under Section 604 to prevent publication, circulation or use of any materials required by the administrator to be filed under Section 504 that have not been filed.
3. Section 504(b) is meant to refer to the communications described in Section 504(a).

1 **SECTION 505. MISLEADING FILINGS.** It is unlawful for a person to make or cause to
2 be made, in a record that is used in an action or proceeding or filed under this Chapter, a
3 statement that, at the time and in the light of the circumstances under which it is made, is false or
4 misleading in a material respect, or, in connection with the statement, to omit to state a material
5 fact necessary to make the statement made, in the light of the circumstances under which it was
6 made, not false or misleading.

7
8

Official Comment

9 **Prior Provisions:** 1956 Act Section 404; RUSA Section 504.

10 The definition of “materiality” in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449
11 (1976) (“an omitted fact is material if there is a substantial likelihood that a reasonable
12 shareholder would consider it important in deciding how to vote”) has generally been followed in
13 both federal and state securities law. See 4 Louis Loss & Joel Seligman, *Securities Regulation*
14 2071-2105 (3d ed. rev. 2000).
15
16
17

18 **SECTION 506. MISREPRESENTATIONS CONCERNING REGISTRATION OR**
19 **EXEMPTION.** The filing of an application for registration, a registration statement, a notice
20 filing under this Chapter, the registration of a person, the notice filing by a person, or the
21 registration of a security under this Chapter does not constitute a finding by the administrator that
22 a record filed under this Chapter is true, complete, and not misleading. The filing or registration
23 or the availability of an exemption, exception, preemption, or exclusion for a security or a
24 transaction does not mean that the administrator has passed upon the merits or qualifications of,
25 or recommended or given approval to, a person, security, or transaction. It is unlawful to make,
26 or cause to be made, to a purchaser, customer, client, or prospective customer or client a
27 representation inconsistent with this section.

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Official Comment

Prior Provisions: 1956 Act Section 405; RUSA Section 505.

This Section follows the 1956 Act and RUSA, as well as state securities statutes generally, in providing that a misrepresentation concerning registration or an exemption is unlawful.

SECTION 507. QUALIFIED IMMUNITY. A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the Securities and Exchange Commission, or a self-regulatory organization unless the person knew, or should have known at the time that the statement was made, that the statement was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

Official Comments

Source of Law: National Association of Securities Dealers, Inc. Proposal Relating to Qualified Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.

1. In 1994 The Securities and Exchange Commission Division of Market Regulation published *The Large Firm Project: A Review of Hiring, Retention, and Supervisory Practices* (1994), which found that a small number of "rogue brokers" were responsible for a significant proportion of customer disciplinary complaints. These brokers in some instances moved from one broker-dealer firm to another, it was explained, without full and complete disclosure of disciplinary problems by the broker-dealer, because of broker-dealer firms' fear of state law defamation claims. See also GAO, *Actions Needed to Better Protect Investors against Unscrupulous Brokers* 3 (1994); Testimony of SEC Chairman Arthur Levitt Concerning the Large Firm Project, Subcomm. on Telecommunications & Fin., House Comm. on Energy & Commerce (Sept. 14, 1994), *reprinted in* 1994-1995 Fed. Sec. L. Rep. (CCH) ¶85,433 (1994).

2. In 1998, the National Association of Securities Dealers proposed qualified immunity for statements made in Forms U-4 and U-5 to address this problem. This proposal was reprinted

1 in Securities Exchange Act Release 39,892, 66 SEC Dock. 2473 (1998). This proposal was
2 limited to arbitration proceedings. It was not acted on by the Securities and Exchange
3 Commission.

4
5 3. An alternative approach would be a standard providing for absolute immunity. See
6 generally Anne Wright, Form U-5 Defamation, 52 Wash. & Lee L. Rev. 1299 (1995); Acciardo
7 v. Millennium Sec. Corp., 83 F. Supp. 2d 413 (S.D.N.Y. 2000) (discussing both New York
8 qualified and absolute immunity cases).

9
10 4. Securities administrators or self-regulatory organizations generally are subject to
11 absolute or qualified immunity for actions of their employees within the course of their official
12 duties. See 10 Louis Loss & Joel Seligman, Securities Regulation 4818-4821 (3d ed. rev. 1996).

13
14 5. As is generally the law "truth is a complete defense to a defamation action." Andrews
15 v. Prudential Sec., Inc., 160 F.3d 304, 308 (6th Cir. 1998).

16
17 6. An agent who has been the subject of a Form U-5, Uniform Termination Notice for
18 Securities Industry Registration, may respond to specified adverse disclosures and have her or his
19 responses reprinted on the published version of Form U-5.

20
21 7. Through September 2002 no state had adopted an immunity provision in its securities
22 statute. No state has rejected immunity in this context by judicial decision. A number of states
23 have adopted qualified immunity by judicial decision. See, e.g., Eaton Vance Distrib., Inc. v.
24 Ulrich, 692 So.2d 915 (Fla. Dist. Ct. App. 1997); Bavarati v. Josephal, Lyon & Ross, Inc., 28
25 F.3d 704 (7th Cir. 1994) (Illinois); Andrews v. Prudential Sec., Inc., 160 F.3d 304 (6th Cir. 1998)
26 (Michigan); Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996) (Oklahoma);
27 Glennon v. Dean Witter Reynolds Inc., 83 F.3d 132 (6th Cir. 1996) (Tennessee).

28 29 30 **SECTION 508. CRIMINAL PENALTIES.**

31 (a) [**Criminal penalties.**] A person that willfully violates this Chapter, or a rule adopted
32 or order issued under this Chapter, except Section 504 or the notice filing requirements of
33 Section 302 or 405, or that willfully violates Section 505 knowing the statement made to be false
34 or misleading in a material respect, upon conviction, shall be guilty of a Class H felony. An
35 individual convicted of violating a rule or order under this Chapter may be fined, but may not be
36 imprisoned, if the individual did not have knowledge of the rule or order. Each of the acts

1 specified shall constitute a separate offense and a prosecution or conviction for any one of such
2 offenses shall not bar prosecution or conviction for any other offense.

3 (b) **[Criminal reference not required.]** The [Attorney General or the proper prosecuting
4 attorney] with or without a reference from the administrator, may institute criminal proceedings
5 under this Chapter.

6 (c) **[No limitation on other criminal enforcement.]** This Chapter does not limit the
7 power of this State to punish a person for conduct that constitutes a crime under other laws of
8 this State.

9
10 **Official Comments**

11 **Prior Provisions:** 1956 Act Section 409; RUSA Section 604; Securities Exchange Act
12 of 1934 Section 32(a).

13
14 1. This Section follows the 1956 Act and the federal securities laws in imposing criminal
15 penalties for any willful violation of the Act. RUSA Section 604 distinguished between felonies
16 and misdemeanors, limiting willful violations of cease and desist orders to a misdemeanor.

17
18 2. The term "willfully" has the same meaning in Section 508 as it did in the 1956 Act.
19 All that is required is proof that a person acted intentionally in the sense that the person was
20 aware of what he or she was doing. Proof of evil motive or intent to violate the law or
21 knowledge that the law was being violated is not required.

22
23 3. The final sentence of Section 508(a) is based on Section 32(a) of the Securities
24 Exchange Act of 1934, which provides: "[N]o person shall be subject to imprisonment under this
25 section in violation of any rule or regulation if he proves that he had no knowledge of such rule
26 or regulation." The "no knowledge" clause in Section 508(a) is relevant only to sentencing. The
27 person convicted has the burden of persuasion to prove no knowledge at sentencing. Because
28 this does not impose a burden on the defendant to disprove the elements of a crime, Section 32(a)
29 of the Securities Exchange Act of 1934 has been held not to raise a constitutional problem.
30 United States v. Mandel, 296 F. Supp. 1038, 1040 (S.D.N.Y. 1969).

31
32 4. The appropriate state prosecutor under Section 508(b) may decide whether to bring a
33 criminal action under this statute, another statute, or, when applicable, common law. In certain
34 states the administrator has full or limited criminal enforcement powers.

35
36 5. This section does not specify maximum dollar amounts for criminal fines, maximum

1 terms for imprisonment, nor the years of limitation, but does provide for each state to specify
2 appropriate magnitudes for criminal fines or maximum terms for imprisonment.

3
4 6. The definition of willfulness in Comment 2 to Section 508 has been followed by most
5 courts. See, e.g., *State v. Hodge*, 460 P.2d 596, 604 (Kan. 1969) (“No specific intent is necessary
6 to constitute the offense where one violates the securities act except the intent to do the act
7 denounced by the statute”); *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979) (“[I]t is widely
8 understood that the legislature may forbid the doing of an act and make its commission a crime
9 without regard to the intent or knowledge of the doer”); *State v. Fries*, 337 N.W.2d 398, 405
10 (Neb. 1983) (proof of a specific intent, evil motive, or knowledge that the law was being violated
11 is not required to sustain a criminal conviction under a state’s blue sky law); *People v. Riley*, 708
12 P.2d 1359, 1362 (Colo. 1985) (“A person acts ‘knowingly’ or ‘willfully’ with respect to conduct .
13 . . . when he is aware that his conduct . . . exists”); *State v. Larsen*, 865 P.2d 1355, 1358 (Utah
14 1993) (willful implies a willingness to commit the act, not an intent to violate the law or to injure
15 another or acquire any advantage); *State v. Montgomery*, 17 P.3d 292, 294 (Idaho 2001) (bad
16 faith is not required for a violation of a state securities act; willful implies “simply a purpose or
17 willingness to commit the act or make the omission referred to”); *State v. Dumke*, 901 S.W.2d
18 100, 102 (Mo. Ct. App. 1995) (*mens rea* not required); *State v. Mueller*, 549 N.W.2d 455, 460
19 (Wis. Ct. App. 1996) (willfulness does not require proof that the defendant acted with intent to
20 defraud or knowledge that the law was violated); *United States v. Lilley*, 291 F. Supp. 989, 993
21 (S.D. Tex. 1968) (“no knowledge” clause in federal statute not available to defendant claiming
22 lack of knowledge of particular SEC rule).

23 24 25 Wisconsin Study Group Comments

26 Section 508(a). This section is being revised to include language from current Wisconsin law,
27 Stats. Sec. 551.58(1), which specifies that (i) criminal penalty violations are classified as Class H
28 felonies; (ii) each violation constitutes a separate offense; and (iii) prosecution or conviction for
29 any one offense shall not bar prosecution or conviction for any other offense.

30 31 32 SECTION 509. CIVIL LIABILITY.

33 (a) [Securities Litigation Uniform Standards Act.] Enforcement of civil liability under
34 this section is subject to the Securities Litigation Uniform Standards Act of 1998.

35 (b) [Liability of seller to purchaser.] A person is liable to the purchaser if the person
36 sells a security in violation of Section 301 or 501, and as to section 501(2) the purchaser did not
37 know the untruth or omission and the seller can not sustain the burden of proof that the seller did

1 not know and, in the exercise of reasonable care, could not have known of the untruth or
2 omission. An action under this subsection is governed by the following:

3 (1) The purchaser may maintain an action to recover the consideration paid for the
4 security, less the amount of any income received on the security, and interest [at the legal rate of
5 interest] from the date of the purchase, costs, and reasonable attorneys' fees determined by the
6 court, upon the tender of the security, or for actual damages as provided in paragraph (3).

7 (2) The tender referred to in paragraph (1) may be made any time before entry of
8 judgment. Tender requires only notice in a record of ownership of the security and willingness to
9 exchange the security for the amount specified. A purchaser that no longer owns the security
10 may recover actual damages as provided in paragraph (3).

11 (3) Actual damages in an action arising under this subsection are the amount that
12 would be recoverable upon a tender less the value of the security when the purchaser disposed of
13 it, and interest [at the legal rate of interest] from the date of the purchase, costs, and reasonable
14 attorneys' fees determined by the court.

15 (c) [**Liability of purchaser to seller.**] A person is liable to the seller if the person buys a
16 security in violation of Section 501, and as to section 501(2) the seller did not know the untruth
17 or omission and the purchaser can not sustain the burden of proof that the purchaser did not
18 know and, in the exercise of reasonable care, could not have known of the untruth or omission.
19 An action under this subsection is governed by the following:

20 (1) The seller may maintain an action to recover the security, and any income received
21 on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of
22 the purchase price, or for actual damages as provided in paragraph (3).

1 (2) The tender referred to in paragraph (1) may be made any time before entry of
2 judgment. Tender requires only notice in a record of the present ability to pay the amount
3 tendered and willingness to take delivery of the security for the amount specified. If the
4 purchaser no longer owns the security, the seller may recover actual damages as provided in
5 paragraph (3).

6 (3) Actual damages in an action arising under this subsection are the difference
7 between the price at which the security was sold and the value the security would have had at the
8 time of the sale in the absence of the purchaser's conduct causing liability, and interest [at the
9 legal rate of interest] from the date of the sale of the security, costs, and reasonable attorneys'
10 fees determined by the court.

11 (d) [**Liability of unregistered broker-dealer and agent.**] A person acting as a broker-
12 dealer or agent that sells or buys a security in violation of Section 401(a), 402(a), or 506 is liable
13 to the customer. The customer, if a purchaser, may maintain an action for recovery of actual
14 damages as specified in subsections (b)(1) through (3), or, if a seller, for a remedy as specified in
15 subsections (c)(1) through (3).

16 (e) [**Liability of unregistered investment adviser and investment adviser**
17 **representative.**] A person acting as an investment adviser or investment adviser representative
18 that provides investment advice for compensation in violation of Section 403(a), 404(a), or 506
19 is liable to the client. The client may maintain an action to recover the consideration paid for the
20 advice, interest [at the legal rate of interest] from the date of payment, costs, and reasonable
21 attorneys' fees determined by the court.

22 (f) [**Liability for investment advice.**] A person that receives directly or indirectly any
23 consideration for providing investment advice to another person and that employs a device,

1 scheme, or artifice to defraud the other person or engages in an act, practice, or course of
2 business that operates or would operate as a fraud or deceit on the other person, is liable to the
3 other person. An action under this subsection is governed by the following:

4 (1) The person defrauded may maintain an action to recover the consideration paid for
5 the advice and the amount of any actual damages caused by the fraudulent conduct, interest [at
6 the legal rate of interest] from the date of the fraudulent conduct, costs, and reasonable attorneys'
7 fees determined by the court, less the amount of any income received as a result of the fraudulent
8 conduct.

9 (2) This subsection does not apply to a broker-dealer or its agents if the investment
10 advice provided is solely incidental to transacting business as a broker-dealer and no special
11 compensation is received for the investment advice.

12 (g) [**Joint and several liability.**] The following persons are liable jointly and severally
13 with and to the same extent as persons liable under subsections (b) through (f):

14 (1) a person that directly or indirectly controls a person liable under subsections (b)
15 through (f), unless the controlling person sustains the burden of proof that the person did not
16 know, and in the exercise of reasonable care could not have known, of the existence of conduct
17 by reason of which the liability is alleged to exist;

18 (2) an individual who is a managing partner, executive officer, or director of a person
19 liable under subsections (b) through (f), including an individual having a similar status or
20 performing similar functions, unless the individual sustains the burden of proof that the
21 individual did not know and, in the exercise of reasonable care could not have known, of the
22 existence of conduct by reason of which the liability is alleged to exist;

1 (3) an individual who is an employee of or associated with a person liable under
2 subsections (b) through (f) and who materially aids the conduct giving rise to the liability, unless
3 the individual sustains the burden of proof that the individual did not know and, in the exercise
4 of reasonable care could not have known, of the existence of conduct by reason of which the
5 liability is alleged to exist; and

6 (4) a person that is a broker-dealer, agent, investment adviser, or investment adviser
7 representative that materially aids the conduct giving rise to the liability under subsections (b)
8 through (f), unless the person sustains the burden of proof that the person did not know and, in
9 the exercise of reasonable care could not have known, of the existence of conduct by reason of
10 which liability is alleged to exist.

11 (h) [**Right of contribution.**] A person liable under this section has a right of contribution
12 as in cases of contract against any other person liable under this section for the same conduct.

13 (i) [**Survival of cause of action.**] A cause of action under this section survives the death
14 of an individual who might have been a plaintiff or defendant.

15 (j) [**Statute of limitations.**] A person may not obtain relief:

16 (1) under subsection (b) for violation of Section 301, or under subsection (d) or (e),
17 unless the action is instituted within one year after the violation occurred; or

18 (2) under subsection (b), other than for violation of Section 301, or under subsection
19 (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts
20 constituting the violation or five years after the violation.

21 (k) [**No enforcement of violative contract.**] A person that has made, or has engaged in
22 the performance of, a contract in violation of this Chapter or a rule adopted or order issued under
23 this Chapter, or that has acquired a purported right under the contract with knowledge of conduct

1 by reason of which its making or performance was in violation of this Chapter, may not base an
2 action on the contract.

3 (l) [No contractual waiver.] A condition, stipulation, or provision binding a person
4 purchasing or selling a security or receiving investment advice to waive compliance with this
5 Chapter or a rule adopted or order issued under this Chapter is void.

6 (m) [Survival of other rights or remedies.] The rights and remedies provided by this
7 Chapter are in addition to any other rights or remedies that may exist, but this Chapter does not
8 create a cause of action not specified in this section or Section 411(e).

9
10

Official Comments

11 **Prior Provisions:** 1956 Act Section 410; RUSA Sections 605-607, 609, 802.

12

13 1. Under Section 509 violations of two or more sections can be proven, but the remedy is
14 limited either to rescission or actual damages. Actual damages means compensatory damages.
15 Punitive or “double” damages are not provided by this section which also is the standard under
16 Section 28(a) of the Securities Exchange Act of 1934. See 9 Louis Loss & Joel Seligman,
17 Securities Regulation 4408-4427 (3d ed. rev. 1992).

18

19 2. The Securities Litigation Uniform Standards Act of 1998 cited in Section 509(a)
20 modifies the entire Section 509.

21

22 3. As with Section 12(a)(2) of the Securities Act of 1933, Section 509(b) contains a type
23 of privity requirement in that the purchaser is required to bring an action against the seller.
24 Section 509(b) is broader than Section 12(a)(2) in that it will reach all sales in violation of
25 Section 301, not just sales “by means of a prospectus” as is the law under Section 12(a)(2). See
26 Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).

27

28 4. Unlike the current standards on implied rights of action under Rule 10b-5, neither
29 causation nor reliance has been held to be an element of a private cause of action under the
30 precursor to Section 509(b). See Gerhard W. Gohler, IRA v. Wood, 919 P.2d 561 (Utah 1996);
31 Ritch v. Robinson-Humphrey Co., 748 So. 2d 861 (Ala. 1999); Kaufman v. I-Stat Corp., 754
32 A.2d 1188 (N.J. 2000).

33

34 5. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of
35 the Securities of 1933. See 9 Louis Loss and Joel Seligman, Securities Regulations 4242-4246
36 (3d ed. 1992). The measure of damages in Section 509(c)(3), however, is that contemplated by

1 Rule 10b-5. Sec. 9 id. 4408-4427. In providing for damages as an alternative to rescission,
2 Section 509(b)(3) follows the 1956 Act and is an improvement upon many earlier state
3 provisions, which conditioned the plaintiff's right of recovery on his or her being in a position to
4 make a good tender. A plaintiff is not given the right under this type of statutory formula to
5 retain stock and also seek damages.

6
7 6. Sections 509(e) and (f) are based on a proposed NASAA amendment to the Uniform
8 Securities Act adopted in order "to establish civil liability for individuals who willfully violate
9 Section 102 dealing with fraudulent practices pertaining to advisory activities." Neither
10 provision is intended to limit other state law claims for providing investment advice.

11
12 7. Broker-dealer employees, including research analysts, who receive no special
13 compensation from third parties for investment advice would not be liable under Section 509(f).

14
15 8. The control liability provision in Section 509(g)(1) is modeled on that in the 1956 Act.
16 On the meaning of "control," see 4 Louis Loss & Joel Seligman, Securities Regulations 1703-
17 1727 (3d ed. rev. 2000).

18
19 9. The defense of lack of knowledge in Sections 509(g) is also modeled on the 1956 Act.

20
21 10. Under Section 509(g)(2) partners, officers, and directors are liable, subject to the
22 defense afforded by that subsection, without proof that they aided in the sale. In Section
23 509(g)(2), the term "partner" is intended to be limited to partners with management
24 responsibilities, rather than a partner with a passive investment.

25
26 11. Under 509(g)(4), the performance by a clearing broker of the clearing broker's
27 contractual functions – even though necessary to the processing of a transaction – without more
28 would not constitute material aid or result in liability under this subsection. See, e.g., Ross v.
29 Bolton, 904 F.2d 819 (2d Cir. 1990).

30
31 12. The "reasonable attorneys' fees" specified in Section 509 are permissive, not
32 mandatory. See, e.g., Andrews v. Blue, 489 F.2d 367, 377 (10th Cir. 1973), (Colorado statute).

33
34 13. The contribution provision in Section 509(h) is a safeguard to avoid the common law
35 principle that prohibited contribution among joint tortfeasors.

36
37 14. The statute of limitations in Section 509(j) is a hybrid of the 1956 Act and federal
38 securities law approaches. The 1956 Act Section 410(p) provided that: "No person may sue
39 under this section more than two years after the contract of sale." Under this provision, the state
40 courts generally decline to extend a statute of limitations period on grounds of fraudulent
41 concealment or equitable tolling.

42
43 Before the July 2002 enactment of the Sarbanes-Oxley Act, Rule 10b-5 of the Securities
44 Exchange Act as construed by the United States Supreme Court in Lampf, Pleva, Lipkind, Preps
45 & Petigrew v. Gilbertson, 501 U.S. 350 (1991), prohibited equitable tolling under the federal

1 securities law one year after discovery and three years after the act formula. See generally 10
2 Louis Loss & Joel Seligman, Securities Regulation 4505-4525 (3d. ed. rev. 1996). The
3 Sarbanes-Oxley Act added 28 U.S.C. §1658(b) which provides

4
5 . . . a private right of action that involves a claim of fraud, deceit, manipulation, or
6 contrivance in contravention of a regulatory requirement concerning the securities laws,
7 as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C.
8 78c(a)(47)), may be brought not later than the earlier of ---

9
10 (1) 2 years after the discovery of the facts constituting the violation; or

11
12 (2) 5 years after such violation.

13
14 Section 509(j)(1), as with the 1956 Act, is a unitary statute of repose, requiring an action
15 to be commenced within one year after a violation occurred. It is not intended that equitable
16 tolling be permitted.

17
18 Section 509(j)(2), in contrast, generally follows the federal securities law model. An
19 action must be brought within the earlier of two years after discovery or five years after the
20 violation. As with federal courts construing the statute of limitations under Rule 10b-5, it is
21 intended that the plaintiff's right to proceed is limited to two years after actual discovery "or after
22 such discovery should have been made by the exercise of reasonable diligence" (inquiry notice),
23 see, e.g., Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997), or five years after the
24 violation.

25
26 The rationale for replicating the basic federal statute of limitations in this Act is to
27 discourage forum shopping. If the statute of limitations applicable to Rule 10b-5 were to be
28 changed in the future, identical changes should be made in Section 509(j)(2).

29
30 15. Section 509(k) is similar to Section 29(b) of the Securities Exchange Act and is
31 intended to apply only to actions to enforce illegal contracts. See Louis Loss, Commentary on
32 the Uniform Securities Act 150 (1976).

33
34 16. Section 509(m) follows the 1956 Act.

35
36 17. Section 509 and Section 411(e) provide the exclusive private causes of action under
37 this Act.

38
39
40
Wisconsin Study Group Comments

1 Section 509(b). This section is being amended to conform to the current Wisconsin securities
2 law civil liability provisions, Stats. Sec. 551.59(1)(a), (b), which impose civil liability for
3 violations of any of the antifraud provisions in Uniform Act Section 501, instead of just
4 subsection (b) relating to material misrepresentations or omissions.

5 Section 509(c). Similar to the changes in Uniform Act section 509(b), this section is being
6 amended to conform to the current Wisconsin Securities Law civil liability provisions, Stats. Sec.
7 551.59(2)(a), (b), which impose civil liability for violations of any of the antifraud provisions in
8 Section 501, instead of just sub. (b) relating to material misrepresentations or omissions.

9
10
11 **SECTION 510. RESCISSION OFFERS.** A purchaser, seller, or recipient of investment

12 advice may not maintain an action under Section 509 if:

13 (1) The purchaser, seller, or recipient of investment advice receives in a record, before the
14 action is instituted, an offer stating the respect in which liability under Section 509 may have
15 arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's
16 rights in connection with the offer, and any financial or other information necessary to correct all
17 material misrepresentations or omissions in the information that was required by this Chapter to
18 be furnished to that person at the time of the purchase, sale, or investment advice;

19 (A) if the basis for relief under this section may have been a violation of Section
20 509(b), an offer to repurchase the security for cash, payable on delivery of the security, equal to
21 the consideration paid, and interest [at the legal rate of interest] from the date of the purchase,
22 less the amount of any income received on the security, or, if the purchaser no longer owns the
23 security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that
24 would be recoverable upon a tender, less the value of the security when the purchaser disposed of
25 it, and interest [at the legal rate of interest] from the date of the purchase in cash equal to the
26 damages computed in the manner provided in this subsection;

1 (B) if the basis for relief under this section may have been a violation of Section
2 509(c), an offer to tender the security, on payment by the seller of an amount equal to the
3 purchase price paid, less income received on the security by the purchaser and interest [at the
4 legal rate of interest] from the date of the sale; or if the purchaser no longer owns the security, an
5 offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the
6 difference between the price at which the security was purchased and the value the security
7 would have had at the time of the purchase in the absence of the purchaser's conduct that may
8 have caused liability and interest [at the legal rate of interest] from the date of the sale;

9 (C) if the basis for relief under this section may have been a violation of Section
10 509(d); and if the customer is a purchaser, an offer to pay as specified in subparagraph (B); or, if
11 the customer is a seller, an offer to tender or to pay as specified in subparagraph (C);

12 (D) if the basis for relief under this section may have been a violation of Section
13 509(e), an offer to reimburse in cash the consideration paid for the advice and interest [at the
14 legal rate of interest] from the date of payment; or

15 (E) if the basis for relief under this section may have been a violation of Section
16 509(f), an offer to reimburse in cash the consideration paid for the advice, the amount of any
17 actual damages that may have been caused by the conduct, and interest [at the legal rate of
18 interest] from the date of the violation causing the loss;

19 (2) the offer under paragraph 1 states that it must be accepted by the purchaser, seller, or
20 recipient of investment advice within 30 days after the date of its receipt by the purchaser, seller,
21 or recipient of investment advice or any shorter period, of not less than three days, that the
22 administrator, by order, specifies;

1 (3) the offeror has the present ability to pay the amount offered or to tender the security
2 under paragraph (1);

3 (4) the offer under paragraph (1) is delivered to the purchaser, seller, or recipient of
4 investment advice, or sent in a manner that ensures receipt by the purchaser, seller, or recipient of
5 investment advice; and

6 (5) the purchaser, seller, or recipient of investment advice that accepts the offer under
7 paragraph (1) in a record within the period specified under paragraph (2) is paid in accordance
8 with the terms of the offer.

9
10 **Official Comments**

11 **Prior Provisions:** 1956 Act Section 410(e); RUSA Section 607.

12
13 1. A rescission offer must meet the specific requirements of Section 510 for civil liability
14 under Section 509 to be extinguished. Cf. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663, 666
15 (N.D. Ga. 1990). See generally Rowe, *Rescission Offers under Federal and State Securities*
16 *Law*, 12 J. Corp. L. 383 (1987).

17
18 2. A rescission offer that does not comply with Section 510 is subject to civil liability,
19 administrative enforcement, or criminal penalties under this Act. A rescission offer, for example,
20 could violate Section 501, the general fraud provision.

21
22 3. The administrator may publish a form that would comply with Section 510, but the
23 form would not be the only one that could be used by the parties.

24
25 4. A valid rescission offer will be exempt from securities registration. See Section
26 202(19).

27
28 5. If a state chooses to add a notice or filing provision, it could provide this provision in
29 Section 510(6), which would state:

30
31 (6) The offer [or a notice] is required to be filed with the administrator 10 business
32 days before the offering and conform in form and content with a rule prescribed by the
33 administrator.

1 [ARTICLE] 6

2 ADMINISTRATION AND JUDICIAL REVIEW

3
4
5 SECTION 601. ADMINISTRATION.

6
7 (a) [Administration.] The administrator shall administer this Chapter [insert any related
8 provisions on such matters as method of selection, salary, term of office, selection and
9 remuneration of personnel, and annual reports to the legislature or governor that are appropriate
10 to the particular State].

11 (b) [Unlawful use of records or information.] It is unlawful for the administrator or an
12 officer, employee, or designee of the administrator to use for personal benefit or the benefit of
13 others records or other information obtained by or filed with the administrator that are not public
14 under Section 607(b). This Chapter does not authorize the administrator or an officer, employee,
15 or designee of the administrator to disclose the record or information, except in accordance with
16 Section 602, 607(c), or 608.

17 (c) [No privilege or exemption created or diminished.] This Chapter does not create or
18 diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

19 (d) [Investor education.] The administrator may develop and implement investor
20 education initiatives to inform the public about investing in securities, with particular emphasis
21 on the prevention and detection of securities fraud. In developing and implementing these
22 initiatives, the administrator may collaborate with public and nonprofit organizations with an
23 interest in investor education. The administrator may accept a grant or donation from a person
24 that is not affiliated with the securities industry or from a nonprofit organization, regardless of
25 whether the organization is affiliated with the securities industry, to develop and implement

1 investor education initiatives. This subsection does not authorize the administrator to require
2 participation or monetary contributions of a registrant in an investor education program.

3 (e) [**The Securities Investor Education and Training Fund.**] The Securities Investor
4 Education and Training Fund is created to provide funds for the purposes specified in subsection
5 (d). All monies collected from civil penalties imposed under Section 604 shall be credited to the
6 appropriation under s. 20.144(1)(i), Wis. Stats.

7
8 **Official Comments**

9 **Prior Provisions:** 1956 Act Section 406; RUSA Sections 701-702.

10 1. Section 601(b) should be read with Section 607. Section 601(b) prohibits the
11 administrator or the administrator's officers and employees from using for personal benefit
12 records or information that Section 607(b) specifies do not constitute public records. Section
13 601(b) is not intended to limit the operation of Section 607(a). Neither Section 601(b) nor
14 607(b) is intended to impede the ability of the agencies specified in Section 608(a) from sharing
15 records or other information in connection with an examination or an investigation.

16
17 2. Section 601(c) makes clear that nothing in this Act alters the availability of evidentiary
18 privileges. That question is left to the general law of the particular state.

19
20 3. Sections 601(d) and (e) were adopted in recognition of the importance of investor
21 education. An increasing number of jurisdictions are earmarking specific funds for this purpose.
22 The lack of financial acumen among public investors, seniors, and students continues to be
23 demonstrated in recent industry and regulatory studies. The importance of investor financial
24 literacy is increasingly crucial given the decades long shift from defined benefit retirement plans
25 toward defined contribution plans where employees are left to direct their own retirement
26 accounts.

27
28 **Wisconsin Study Group Comments**

29 Section 601(e). This subsection is being amended by adding language from current Wisconsin
30 Stats. Sec. 551.605(2) which provides that all monies collected from administrative assessments
31 shall be credited to the state appropriation under Stats. Sec. 20.144(1)(i).

32
33
34 **SECTION 602. INVESTIGATIONS AND SUBPOENAS.**

35 (a) [**Authority to investigate.**] The administrator may:

1 (1) conduct public or private investigations within or outside of this State which the
2 administrator considers necessary or appropriate to determine whether a person has violated, is
3 violating, or is about to violate this Chapter or a rule adopted or order issued under this Chapter,
4 or to aid in the enforcement of this Chapter or in the adoption of rules and forms under this
5 Chapter;

6 (2) require or permit a person to testify, file a statement, or produce a record, under
7 oath or otherwise as the administrator determines, as to all the facts and circumstances
8 concerning a matter to be investigated or about which an action or proceeding is to be instituted;
9 and

10 (3) publish a record concerning an action, proceeding, or an investigation under, or a
11 violation of, this Chapter or a rule adopted or order issued under this Chapter.

12 (b) **[Administrator powers to investigate.]** For the purpose of an investigation under
13 this Chapter, the administrator or its designated officer may administer oaths and affirmations,
14 subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of
15 statements, and require the production of any records that the administrator considers relevant or
16 material to the investigation.

17 (c) **[Procedure and remedies for noncompliance.]** If a person does not appear or
18 refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as
19 required by the administrator under this Chapter, the administrator may apply to, or may refer the
20 matter to the Attorney General or the proper attorney, who may apply to [insert name of the
21 appropriate court] or a court of another State to enforce compliance. The court may:

22 (1) hold the person in contempt;

23 (2) order the person to appear before the administrator;

- 1 (3) order the person to testify about the matter under investigation or in question;
2 (4) order the production of records;
3 (5) grant injunctive relief, including restricting or prohibiting the offer or sale of
4 securities or the providing of investment advice;
5 (6) impose a civil penalty of not less than \$5,000 and not greater than \$250,000 for
6 each violation; and
7 (7) grant any other necessary or appropriate relief.

8 (d) [**Application for relief.**] This section does not preclude a person from applying to
9 [insert name of appropriate court] or a court of another State for relief from a request to appear,
10 testify, file a statement, produce records, or obey a subpoena.

11 (e) [**Use immunity procedure.**] An individual is not excused from attending, testifying,
12 filing a statement, producing a record or other evidence, or obeying a subpoena of the
13 administrator under this Chapter or in an action or proceeding instituted by the administrator
14 under this Chapter on the ground that the required testimony, statement, record, or other
15 evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to
16 a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or
17 produce a record or other evidence on the basis of the individual's privilege against self-
18 incrimination, the administrator may apply [to the name of the appropriate court] to compel the
19 testimony, the filing of the statement, the production of the record, or the giving of other
20 evidence. The testimony, record, or other evidence compelled under such an order may not be
21 used, directly or indirectly, against the individual in a criminal case, except in a prosecution for
22 perjury or contempt or otherwise failing to comply with the order.

1 (f) [Assistance to securities regulator of another jurisdiction.] At the request of the
2 securities regulator of another State or a foreign jurisdiction, the administrator may provide
3 assistance if the requesting regulator states that it is conducting an investigation to determine
4 whether a person has violated, is violating, or is about to violate a law or rule of the other State or
5 foreign jurisdiction relating to securities matters that the requesting regulator administers or
6 enforces. The administrator may provide the assistance by using the authority to investigate and
7 the powers conferred by this section as the administrator determines is necessary or appropriate.
8 The assistance may be provided without regard to whether the conduct described in the request
9 would also constitute a violation of this Chapter or other law of this State if occurring in this
10 State. In deciding whether to provide the assistance, the administrator may consider whether the
11 requesting regulator is permitted and has agreed to provide assistance reciprocally within its State
12 or foreign jurisdiction to the administrator on securities matters when requested; whether
13 compliance with the request would violate or prejudice the public policy of this State; and the
14 availability of resources and employees of the administrator to carry out the request for
15 assistance.

16 Official Comments

17
18 **Prior Provisions:** 1956 Act Section 407; RUSA Section 601.

19 1. Sections 602 (a) and (b) follow the 1956 Act, which was modeled generally on
20 Sections 21(a) through (d) of the Securities Exchange Act of 1934 as it then read.

21
22 2. Standards for issuance of subpoenas have been generally established in federal and
23 state securities law. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4917-4937
24 (3d ed. rev. 1996) (discussing Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) and
25 other cases). The scope of subpoena enforcement in each state is a general matter for judicial
26 determination. Under Section 602, an individual subpoenaed to testify by the administrator is not
27 compelled to testify within the meaning of these sections simply by service of a subpoena. Under
28 Section 602(b) the individual can be subpoenaed and compelled to attend. Once in attendance an

1 individual can assert an evidentiary privilege or exemption, see Section 601(c), including the
2 Fifth Amendment privilege against self-incrimination. If an individual refuses to testify or give
3 evidence, the administrator may apply (or have the appropriate State attorney apply) to the
4 appropriate court for the relief specified in Section 602(c). If the individual invokes the privilege
5 against self-incrimination, Section 602(d) allows the administrator to apply to the appropriate
6 court to compel testimony under the "use immunity" provision barring the record compelled or
7 other evidence obtained from being used in a criminal case. See *People v. District Co. of*
8 *Arapahoe County*, 894 P.2d 739 (Colo. 1995). The phrase "directly or indirectly" in Section
9 602(e) is intended to include testimony, other evidence, or other information derived from
10 immunized testimony, statements, records, or evidence.

11
12 3. Section 602 is intended to apply generally to securities offers and sales under Article
13 3 and broker-dealer and investment adviser activity under Article 4, when there is noncompliance
14 with the first sentence of Section 602(c). This subsection does not limit the powers of an
15 administrator under other provisions of this Act.

16
17 4. A court may quash a subpoena for good cause under Section 602(d). The court may
18 decline to enforce a subpoena that is arbitrary, capricious, or oppressive.

19
20 5. Where appropriate under Section 602(f), an administrator could move to authorize
21 admission of a requesting state's attorney under existing *pro hac vice* rules.

22
23 6. Section 602(f) is consistent with the Securities Litigation Uniform Standard Act of
24 1998 which provides in Section 102(e):

25
26 The Securities and Exchange Commission, in consultation with State securities
27 commissions (or any agencies or offices performing like functions), shall seek to
28 encourage the adoption of State laws providing for reciprocal enforcement by State
29 securities commissions of subpoenas issued by another State securities commission
30 seeking to compel persons to attend, testify in, or produce documents or records in
31 connection with an action or investigation by a State securities commission of an alleged
32 violation of State securities laws.

33
34 7. There are limitations on financial institutions being subject to visitorial powers by State
35 officials, such as those affecting national banks contained in 12 U.S.C. 484 and 12 C.F.R. Sec.
36 7.4000. Law outside this Act may place similar limits on state chartered financial institutions
37 being subjected to visitorial powers. This Act does not negate these limitations.

40 **Wisconsin Study Group Comments**

41 Section 602(a)(3). This subsection is being amended by deleting from the Uniform Act
42 language, the last phrase "if the administrator determines it is necessary or appropriate." The
43 Wisconsin Study Group believes such language would create the need for a specific finding by
44 the Division concerning the publication of information regarding Division enforcement actions or

1 investigations that could be subject to potential abuse in connection with settlement negotiations
2 of enforcement cases.

3 Section 602(c). This section is being amended to include the Uniform Act's bracketed language
4 enabling the Division to ask the state Attorney General, a District Attorney, or a U.S. Attorney to
5 enforce a Division subpoena. This Wisconsin Study Group believes the inclusion of this
6 language will provide flexibility to the Administrator and the Division to decide in individual
7 cases whether to directly seek judicial enforcement of the Division's subpoena, or to refer the
8 matter to the state Attorney General/District Attorney/U.S. Attorney.

9
10

SECTION 603. CIVIL ENFORCEMENT.

11 (a) **[Civil action instituted by administrator.]** If the administrator believes that a person
12 has engaged, is engaging, or is about to engage in an act, practice, or course of business
13 constituting a violation of this Chapter or a rule adopted or order issued under this Chapter or
14 that a person has, is, or is about to engage in an act, practice, or course of business that materially
15 aids a violation of this Chapter or a rule adopted or order issued under this Chapter, the
16 administrator may maintain, or may refer the matter to the Attorney General or the proper
17 attorney, who may maintain an action in the [insert the name of the court] to enjoin the act,
18 practice, or course of business and to enforce compliance with this Chapter or a rule adopted or
19 order issued under this Chapter.

20 (b) **[Relief available.]** In an action under this section and on a proper showing, the court
21 may:

22 (1) issue a permanent or temporary injunction, restraining order, or declaratory
23 judgment;

24 (2) order other appropriate or ancillary relief, which may include:

25 (A) an asset freeze, accounting, writ of attachment, writ of general or specific
26 execution, and appointment of a receiver or conservator, that may be the administrator, for the
27 defendant or the defendant's assets;