UNIFORM SECURITIES ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS SIXTY-FIFTH YEAR
DALLAS, TEXAS
AUGUST 20-25, 1956
AMENDED AUGUST 18-23, 1958

WITH
COMMENTS

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS MEETING AT
DALLAS, TEXAS, AUGUST 30, 1956
AMENDMENTS APPROVED AUGUST 29, 1958
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PREFATORY NOTE

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

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

AN ACT

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

[Be it enacted . . .]

COMMENT

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

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

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

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

PART I

FRAUDULENT AND OTHER PROHIBITED PRACTICES

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

Comment to § 101

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

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

2 SECTION 102. [Advisory Activities.]
3 (a) It is unlawful for any person who receives any considera-
4 tion from another person primarily for advising the other person
5 as to the value of securities or their purchase or sale, whether
6 through the issuance of analyses or reports or otherwise,
7 (1) to employ any device, scheme, or artifice to defraud the
8 other person, or
9 (2) to engage in any act, practice, or course of business which
10 operates or would operate as a fraud or deceit upon the other
11 person.

Comment to § 102(a)

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

11 (b) It is unlawful for any investment adviser to enter into,
12 extend, or renew any investment advisory contract unless it pro-
13 vides in writing
14 (1) that the investment adviser shall not be compensated
15 on the basis of a share of capital gains upon capital apprecia-
16 tion of the funds or any portion of the funds of the client;
17 (2) that no assignment of the contract may be made by the
18 investment adviser without the consent of the other party to the
19 contract; and
20 (3) that the investment adviser, if a partnership, shall notify
21 the other party to the contract of any change in the membership
22 of the partnership within a reasonable time after the change.
23 Clause (1) does not prohibit an investment advisory contract
24 which provides for compensation based upon the total value of a
25 fund averaged over a definite period, or as of definite dates or
26 taken as of a definite date. “Assignment,” as used in clause (2),
27 includes any direct or indirect transfer or hypothecation of an
§ 201 (a) with reference to the phrase "to transact business in this state" is specified in § 401(£).

§ 204(b)(5), which authorizes the Administrator to condition a particular applicant's registration as a broker-dealer upon his not transacting business as an investment adviser if the Administrator finds that he is not qualified as an investment adviser.

§ 203(b)(2) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-8(b)(2), which exempts an investment adviser from registration if his only clients are investment companies and insurance companies.

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

§ 201(d) Every registration expires one year from its effective date unless renewed. When any such state goes over to the scheme of § 201(d), the bracketed language will prevent its continuing to be deluged with a mass of renewal applications on the first of every year.
Section 202. [Registration Procedure.]

(a) A broker-dealer, agent, or investment adviser may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to section 414(g). The application shall contain whatever information the Administrator by rule requires concerning such matters as (1) the applicant’s form and place of organization; (2) the applicant’s proposed method of doing business; (3) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser; and, in the case of an investment adviser, the qualifications and business history of any employee; (4) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (5) the applicant’s financial condition and history. The Administrator may by rule or order require an applicant for initial registration to publish an announcement of the application in one or more specified newspapers published in this state. If no denied order is in effect and no proceeding is pending under section 204, registration becomes effective at noon of the thirtieth day after the filing of any amendment.

The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer, or director, or a person occupying a similar status or performing similar functions.

Comment to § 202(a)

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

Clause (4): The phrase “any person occupying a similar status or performing similar functions,” which modifies “partner, officer, or director” here and elsewhere in the Act, contemplates unincorporated, non-partnership organizations like Massachusetts trusts.

Last sentence: Section 401(b), which defines “agent,” provides in its last sentence: “A director, officer, or partner of a broker-dealer or issuer, to a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.” The reasons for that provision are stated in the comment to that section. But, since § 202(a)(3) contemplates that the qualifications and business history of partners, officers and directors will be disclosed in the application for registration of the partnership or corporation, there is no need to have the same information filed twice. Consequently, under the last sentence of § 202(a) the firm’s registration automatically constitutes registration of any agent who is a partner, officer, or director; and, by virtue of this sentence in conjunction with the last sentence of § 401(b), the Administrator, if he deems it appropriate, may institute a proceeding to deny or revoke the registration of a particular partner, officer or director without disturbing the status of the firm. At the same time, the disqualification of a director, officer or partner, as distinct from an ordinary agent, is also a basis for proceeding against the firm’s registration if the Administrator finds it in the public interest to do so.

(b) Every applicant for initial or renewal registration shall pay a filing fee of $. . . . . in the case of a broker-dealer, $. . . . . in the case of an agent, and $. . . . . in the case of an investment adviser. When application is denied or withdrawn, the Administrator shall retain $. . . . . of the fee.

Comment to § 202(b)

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

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

Comment to § 202(c)

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

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

Comment to § 202(d)

A few states have rules which, instead of prescribing a fixed minimum capital, follow the formula of the SEC and some of the stock exchanges in prescribing a ratio of 15-1 or 20-1 between aggregate indebtedness and net capital. Ill. Rule D-1D; Minn. Reg. VI(a); Wis. Adm. Code s. § 1.01(2). Any state which wants to give its Administrator authority to adopt debt-capital ratio rules should add
the following language at the end of Section 202(d): "or prescribe a ratio between net capital and aggregate indebtedness."

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

**Comment to § 202(e)**

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

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

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

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

---

1 SECTION 203. [*Post-Registration Provisions.*]
2 (a) Every registered broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the [Administrator] by rule
3
4
5 prescribes. All records so required shall be preserved for three years unless the [Administrator] by rule prescribes otherwise for particular types of records.
6
7 **Comment to § 203(a)**
8
9 This section is modeled on § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a). It is broad enough to permit a continuation of the practice which exists in several states of requiring registered broker-dealers to keep lists of the securities they are handling.
10
11 (b) Every registered broker-dealer and investment adviser shall file such financial reports as the [Administrator] by rule prescribes.
12
13 (e) If the information contained in any document filed with the [Administrator] is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment unless notification of the correction has been given under section 201(b).
14
15 (d) All the records referred to in subsection (a) are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the [Administrator], within or without this state, as the [Administrator] deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the [Administrator], insofar as [he] deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities or national securities association registered under the Securities Exchange Act of 1934.
16
17 **Comment to § 203(d)**
18
19 Section 203(d) is modeled on § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a). This is a visitatorial power which is to be distinguished from the power to investigate and issue subpoenas under § 407. No subpoena is necessary under § 203(d). Failure to submit to a reasonable inspection is a violation of the Act, which may result in an action by the Administrator for a mandatory injunction under § 408 or, if willful, a revocation of the broker-dealer's or investment adviser's registration under § 204(a)(2)(B) or a criminal prosecution under § 409.
20
21 In some states special fees are charged to defray the cost of examinations. The Act specifically provides for fees only in connection with registration under Parts II and III. Any additional fee provision which may be desired should be inserted in § 406(c).
22
23 **SECTION 204. [*Denial, Revocation, Suspension, Cancelation, and Withdrawal of Registration.*]**
24
25 (a) The [Administrator] may by order deny, suspend, or
The completeness and accuracy of the application for registration are to be tested as of its effective date in a suspension or revocation proceeding. That is to say, the fact that an application for registration has become misleading by virtue of developments occurring after its effective date is not a ground for action under Clause (A). Action in such a case would have to be predicated under Clause (B) upon violation of § 203(c). On the other hand, in a proceeding to deny effectiveness to a pending application for registration, the completeness and accuracy of the application cannot be tested as of the effective date. This explains the first "or" clause in Clause (A).

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

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

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

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

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

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

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

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

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

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

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

(5) The [Administrator] shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker-dealer or agent. When [he] finds that an applicant for initial or renewal registration as a broker-dealer is not qualified as an investment adviser, [he] may by order condition the applicant's registration as a broker-dealer upon his not transacting business in this state as an investment adviser.

(6) The [Administrator] may by rule provide for an examination, which may be written or oral or both, to be taken by any class of or all applicants, as well as persons who represent or will represent an investment adviser in doing any of the acts which make him an investment adviser.

Comment to § 204(b)

Clause (1)-(8): These clauses are a limitation upon Clause (2) of § 204(a). Some firms have limited partners or directors who simply supply capital without taking an active role in the firm's business. There is no need for such persons to be qualified.

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

Clause (6): Examinations may be required of any reasonably defined class of applicants. For example, the Administrator may want to examine only applicants for registration as investment advisers, in which event he will wish to examine also those applicants for broker-dealer registration who intend to perform advisory services for special compensation, so that he may properly administer § 204(b)(8).

(c) The [Administrator] may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the [Administrator] shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an agent, that it has been entered and of the reasons therefor and that within fifteen days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the [Administrator], the order will remain in effect until it is modified or vacated by the [Administrator]. If a hearing is requested or ordered, the [Administrator], after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the [Administrator] finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, agent, or investment adviser, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the [Administrator] may by order cancel the registration or application.
COMMENT TO § 204(d)

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

(e) Withdrawal from registration as a broker-dealer, agent, or investment adviser becomes effective thirty days after receipt of an application to withdraw or within such shorter period of time as the [Administrator] may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within thirty days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the [Administrator] by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the [Administrator] may nevertheless institute a revocation or suspension proceeding under section 204(a) and this provision is modeled on § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), and SEC Rule X-15B-6, 17 Code Fed. Regs. § 240.15b-6, although the last sentence goes somewhat further. This provision does not affect an applicant’s privilege of withdrawing his application for registration before it becomes effective. It is simply designed to make it possible to prevent withdrawal of an effective registration under fire. The last sentence is designed to take care of the case where the Administrator does not know of any reason to object to the withdrawal application until after it has become effective; but it is limited to situations where the Administrator can prove a willful violation under § 204(a)(2)(B).

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

COMMENT TO § 204(f)

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

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

PART III

REGISTRATION OF SECURITIES

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

COMMENT TO § 301

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

SECTION 302. [Registration by Notification.]

(a) The following securities may be registered by notification, whether or not they are also eligible for registration by coordination under section 303:

(1) any security whose issuer and any predecessors have been in continuous operation for at least five years if (A) there has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer (or any predecessor) with a fixed maturity or a fixed interest or dividend provision, and (B) the issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal at least five percent of the amount of such outstanding securities (as measured by the maximum offering price or the market price on a day, selected by the registrant, within thirty days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within ninety days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price), or (ii) which, if the issuer and any predecessors have not had any security of the type specified in clause (i) outstanding for three full fiscal years, equal at least five percent of the amount (as measured in clause (1)) of all securities which will be outstanding if all the securities being offered or proposed to be offered (whether or not they are proposed to be registered or offered in this state) are issued;
COMMENT TO § 302(a)

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

Clause (i): Section 302(a)(1) contains essentially a single earnings test, regardless of the type of security being registered. It applies in substance to any security whose issuer has been in continuous operation for five years if (A) there has been no default during the past three full fiscal years on any senior security and (B) the issuer during the past three fiscal years has had average earnings of five percent on its common stock. If the issuer has no outstanding securities of the types specified in Clause (A), it is necessary to satisfy only Clause (B). Under Clause (i) the five-percent test is applied to all outstanding securities at the date the registration statement is filed, and those securities are measured by the offering price (when additional securities are being offered) or by the market price, whichever is higher. In order to permit the calculation to be made so as to determine whether the notification procedure is available, the parenthetical clause within Clause (i) permits the person filing the registration statement to use the market price on any day within thirty days before the date of filing. The phrase “maximum offering price” means the highest price at which any of the securities are offered when they are offered to different people at different prices, as when they are offered to existing stockholders at a lower price than to the public generally. The phrase does not mean the maximum proposed offering price referred to in § 303(c)(3). See the comment under that section.

But as a practical matter, since the market price and hence the offering price may go up while the registration statement is pending, it will not be safe to rely on the notification procedure unless the five-percent test is satisfied on the basis of the maximum proposed offering price. The five-percent test is applied to book value only when there is no readily determinable market price for the security being offered and there is no cash offering price either, as when the offering is made in exchange with security holders of another issuer, or with existing security holders of the same issuer under such circumstances that the exemption in § 402(b)(11) is not available.

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

Clause (1) as applied to senior securities: Under Clause (B) the five-percent earnings test on common stock must be satisfied even though the security being offered is a preferred stock or a bond. This affords some margin of safety beyond the requirement in Clause (A) that there shall have been no default.

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

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

1. a statement demonstrating eligibility for registration by notification;
2. with respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state (or foreign jurisdiction) and the date of its organization; and the general character and location of its business;
3. with respect to any person on whose behalf any part of the offering is to be made in a non-issuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and a statement of his reasons for making the offering;
4. a description of the security being registered;
5. the information and documents specified in clauses (8), (10), and (12) of section 304(b); and
6. in the case of any registration under section 302(a)(2) which does not also satisfy the conditions of section 302(a)(1), a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement, and a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer’s and any predecessors’ existence if less than two years.

COMMENT TO § 302(b)

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

(e) If no stop order is in effect and no proceeding is pending under section 306, a registration statement under this section automatically becomes effective at three o’clock Eastern Standard Time on the afternoon of the second full business day after the
Comment to § 302(c)

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

Comment to § 303(a)

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

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

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

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

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

(2) if the [Administrator] by rule or otherwise requires, a copy of the articles of incorporation and by-laws (or their substantial equivalents) currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;

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

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

Comment to § 303(b)

Section 303(b) limits the Administrator to requiring only such information as is filed with the SEC. Concerning § 303(b)(4), see the comment under § 303(c).
issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as of the time of its entry. The [Administrator] may by rule or otherwise waive either or both of the conditions specified in clauses (2) and (3). If the federal registration statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the registration statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the [Administrator] of the date when the federal registration statement is expected to become effective, the [Administrator] shall promptly advise the registrant by telephone or telegram, at the registrant's expense, whether all the conditions are satisfied and whether [he] then contemplates the institution of a proceeding under section 306; but this advice by the [Administrator] does not preclude the institution of such a proceeding at any time.

Comment to § 303(c)

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

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

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

Clause (3) and the next three sentences are addressed to the problem of getting to the Administrator the content of the federal price amendment in the short interval (seldom more than twenty-four hours) which usually elapses between its filing and the effectiveness of the federal registrant statement. Clause (3) enables the Administrator to apply the stop-order test in § 306(a)(2)(F) by comparing the maximum underwriting commissions with the minimum offering price, and to apply the test in § 306(a)(2)(E) by reference to the maximum proposed offering price. Section 410(a)(1) imposes an absolute civil liability upon any person who "offers or sells a security in violation of section 301," and § 410(f) makes the contract unenforceable. But under the fourth and fifth sentences the validity of offers and sales in the state is not affected unless the registrant was at fault.

The last sentence makes it possible for counsel for the registrant or the underwriter to give a firm opinion to his client that all the conditions of § 303(c) have been satisfied, although it requires nothing further of the registrant.
(6) with respect to any person on whose behalf any part of the offering is to be made in a non-issuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and a statement of his reasons for making the offering;

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

(8) the kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees (including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering) or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a description of the plan of distribution of any securities which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(9) the estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition);

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

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

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

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

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

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

(16) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; a profit and loss statement and analysis of surplus for each of
the three fiscal years preceding the date of the balance sheet
and for any period between the close of the last fiscal year and
the date of the balance sheet, or for the period of the issuer's
and any predecessors' existence if less than three years; and,
if any part of the proceeds of the offering is to be applied to
the purchase of any business, the same financial statements
which would be required if that business were the registrant; and
(17) such additional information as the [Administrator]
requires by rule or order.

Comment to § 304(b)

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

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

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

Comment to § 305(c)

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

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

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

Comment to § 305(a)

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

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

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

Comment to § 305(b)

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

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

Comment to § 304(d)

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

Section 305. [Provisions Applicable to Registration Generally.]

(a) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered broker-dealer.
(e) The [Administrator] may by rule or otherwise permit the omission of any item of information or document from any registration statement.

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

Comment to § 305(d)

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

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

Comment to § 305(f)

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

Comment to § 305(g)

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

(h) The [Administrator] may by rule or order require as a condition of registration that any security registered by qualification or coordination be sold only on a specified form of subscription or sale contract, and that a signed or conformed copy of each contract be filed with the [Administrator] or preserved for any period up to three years specified in the rule or order.

Comment to § 305(h)

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

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

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

Comment to § 305(i), § 305(j) and Related Sections Referring to Non-Issuer Distributions

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

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

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

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

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

5. Apart from these exemptions of general applicability, § 402(b)(2) affords an...
§ 401 (j) (5). The effect is that as long as a registration statement is effective, no exemption by requiring under § 203(a) that registered broker-dealers prepare and keep lists of those securities.

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

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

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

9. If no exemption is available for a non-issuer distribution and a registration statement for securities of the same class is not effective, there arises for the first time the necessity of filing a special registration statement to permit a non-issuer distribution. As in the case of a distribution for the account of the issuer, registration may be affected here by coordination, notification or qualification. Concerning the exclusion of oil, gas and mining interests from § 302(a)(2), see the comment under that section. A registration for a non-issuer distribution, like any other registration, is considered to register all outstanding securities of the same class, and thus to permit anybody to trade for a minimum of one year or however much longer it may take to complete the registered non-issuer distribution. It is thus immaterial whether the registration statement specifically covers 100 shares or 100,000 shares, because the Administrator may not permit the registration statement to become effective unless the statutory standards are satisfied.

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

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

Comment to § 305(k)

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

1. Section 306. [Denial, Suspension, and Revocation of Registration.]

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

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

(B) any provision of this act or any rule, order, or condition lawfully imposed under this act has been willfully violated, in connection with the offering, by (i) the person filing the registration statement, (ii) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer, or (iii) any underwriter;

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

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

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

(F) the offering has been or would be made with unreasonable amounts of underwriters’ and sellers’ discounts, commissions, or other compensation, or promoters’ profits or participation, or unreasonable amounts or kinds of options;

(G) when a security is sought to be registered by notification, it is not eligible for such registration;

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

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

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

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

**Comment to § 306(a)**

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

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

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

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

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

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

Clause (F): This clause is broad enough to cover the statement of policy on options which was adopted in 1946 by the National Association of Securities Administrators, as well as its 1955 statement of policy on so-called "cheap stock." 29 Proceedings of NASA 84-90; 38 id. 113-15.
The Administrator may vacate or modify a stop order if he finds that the conditions which prompted entry have changed or that it is otherwise in the public interest to do so.

PART IV

General Provisions

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

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

(b) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer in (1) effecting transactions in a security exempted by clause (1), (2), (3), (10), or (11) of section 402(a), (2) effecting transactions exempted by section 402(b), or (3) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state. A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.

Comment to § 401(c)

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

Clause (i): See paragraph 12 of the comment under § 414(a)-(f). The reference in Clause (B) to fifteen offers during any period of twelve consecutive months is for that reason alone a "broker-dealer."

(d) "Fraud," "deceit," and "defraud" are not limited to common-law deceit.
Comment to § 401(d)

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

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

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

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

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

Comment to § 401(f)

In general: Section 401(f) has been taken almost verbatim from the definition in § 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11). On the administrative construction of the federal definition, see Loss, Securities Regulation (1951 with 1955 Supp.), pp. 788-92. Clause (e) has been added; see paragraph 12 of the comment under § 414(a)-(f).
interests of the beneficiaries are evidenced by a security, an
unincorporated organization, a government, or a political sub-
division of a government.

(1) “Sale” or “sell” includes every contract of sale of,
contract to sell, or disposition of, a security or interest in a
security for value.

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

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

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

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

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

Comment to § 401(j)

Clauses (1)-(8): The phraseology is borrowed substantially from § 2(3) of the
Securities Act of 1933, 15 U.S.C. § 77b(3), as amended in 1954 to split the defini-
tions of “sale” and “offer.” See the comment under § 402(b)(12).

Clause (5): This clause provides that there is always an “offer” of the se-
curity called for by a conversion privilege or the warrant. Hence that security
must be registered (unless some exemption is available) before the convertible
security or the warrants are offered. Even if the warrants are themselves dis-
tributed without consideration, so that the warrants are not “sold,” a gift of a
warrant involves an offer to sell the stock called for by the warrant. Hence regis-
tration of the stock is necessary before the warrants may even be given away.
Moreover, since the security called for is being continuously “offered” so long as
the conversion privilege or the purchase right remains exercisable, the security
called for remains registered all that time under § 305(i), and the person who
files the registration statement is subject to the Administrator’s power to require
the filing of reports under § 305(j).

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

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

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

(1) “Security” means any note; stock; treasury stock; bond;
debenture; evidence of indebtedness; certificate of interest or
participation in any profit-sharing agreement; collateral-trust
certificate; preorganization certificate or subscription; trans-
ferable share; investment contract; voting-trust certificate;
certificate of deposit for a security; certificate of interest or
participation in an oil, gas, or mining title or lease or in pay-
ments out of production under such a title or lease; or, in
general, any interest or instrument commonly known as a
“security,” or any certificate of interest or participation in,
temporary or interim certificate for, receipt for, guarantee of,
or warrant or right to subscribe to or purchase, any of the
foregoing. “Security” does not include any insurance or endow-
ment policy or annuity contract under which an insurance com-
pany promises to pay [a fixed sum of] money either in a lump
sum or periodically for life or some other specified period.
Comment to § 401(1)

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

Oil, gas and mineral interests: Section 2(1) of the Securities Act of 1933 uses the phrase “fractional undivided interest in oil, gas, or other mineral rights.” The phrase in this statute is modeled on the language in § 2508(a) of the California act—“certificate of interest in an oil, gas, or mining title or lease”—which may be slightly broader than the federal phrase and in any event is by far the most commonly found phrase in the state statutes. The words which have been added to the California language are intended to make it clear that so-called “oil payments” are securities whether or not they may be regarded as interests in a title or lease. Very few states go so far as to include entire leasehold interests. However, it is clear that even entire leasehold interests may be offered under such circumstances that a security is involved in the nature of an “investment contract.” SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943); for other cases, see Loss, Securities Regulation (1951 with 1955 Supp.), p. 312, n. 31.

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

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

1 Section 402. [Exemptions.]
2 (a) The following securities are exempted from sections 301 and 403:

Comment to § 402(a)

The distinction between exemptions and exceptions from definitions is important in view of the fact that the exemptions enumerated in § 402 are not exemptions from the anti-fraud provisions of §§ 301 and 410(a)(2). See the exceptions from the definition of “agent” in § 401(b), the definition of “broker-dealer” in § 401(c), the definition of “investment adviser” in § 401(f), the definitions of “sale” and “offer” in § 401(j)(6), and the definition of “security” in the last sentence of § 401(1).

4 (1) any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;

9 (2) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

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

Comment to § 402(a)(3)

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

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

Comment to § 402(a)(4)

See the comment under § 402(a)(3).

26 (5) any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this state; [but this exemption does not apply to an annuity contract, investment contract, or similar security under which the promised payments are not fixed in dollars but are substantially dependent upon the investment results of a segregated fund or account invested in securities;]

Comment to § 402(a)(5)

See the comment under § 402(a)(3). With respect to the status of insurance policies and annuities, see the comment under the last sentence of § 401(1). By
The reference to federal credit unions is to those organized under 12 U.S.C. § 1751 et seq.

COMMENT TO § 402(a)(6)

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

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

COMMENT TO § 402(a)(7)

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

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

COMMENT TO § 402(a)(11)

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

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

COMMENT TO § 402(b)(1)

See the comment under § 305(i).

(2) any non-issuer distribution of an outstanding security if (A) a recognized securities manual contains the names of the issuer’s officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss state-
§ 412(a) to define the term "solicitation." On the construction of the Securities Act of 1933, 15 U.S.C. § 77d(2), see Loss, (1951 with 1955 Supp.), pp. 405-06. In one important r

85 recent year of operations, or (B) the security has a fixed m-
86 turity or a fixed interest or dividend provision and there has
87 been no default during the current fiscal year or within the three
88 preceding fiscal years, or during the existence of the issuer and
89 any predecessors if less than three years, in the payment of
90 principal, interest, or dividends on the security;
91
92 Comment to § 402(b)(2)

See the comment under § 305(1).

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

Comment to § 402(b)(3)

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

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

Comment to § 402(b)(4)

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

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

Comment to § 402(b)(5)

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

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

108 (7) any transaction executed by a bona fide pledgee with-
109 out any purpose of evading this act;
110 (8) any offer or sale to a bank, savings institution, trust
111 company, insurance company, investment company as defined
112 in the Investment Company Act of 1940, pension or profit-
113 sharing trust, or other financial institution or institutional buyer,
114 or to a broker-dealer, whether the purchaser is acting for itself
115 or in some fiduciary capacity;

Comment to § 402(b)(8)

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

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

Comment to § 402(b)(9)

The figure ten is in substance only a prima facie figure. An Administrator, for example, may want to reduce it for uranium stocks or oil royalties or increase it for a close corporation which wants to solicit twenty or thirty friends and relatives of the owners for additional capital. The section does not require a written representation by each buyer that he is taking for investment, but it would be prudent on the part of the seller to obtain something in writing. Moreover, one who in good faith buys for investment can later change his mind and resell, although the shorter the interval the harder it will be to show that there was a bona fide change of mind. Clause (5) is not intended to preclude solicitation by directors or officers or employees of the issuer so long as it is only an incidental function of their regular duties and they receive no additional compensation. It is also relevant whether such persons are specially hired in connection with the offering, particularly if they have a background in the securities business either as professional promoters or otherwise.

134 (10) any offer or sale of a preorganization certificate or
subsection if (A) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (B) the number of subscribers does not exceed ten, and (C) no payment is made by any subscriber;

**Comment to § 402(b)(10)**

Sections 402(b)(9) and 402(b)(10), though interrelated, serve different purposes. Since the purpose of § 402(b)(10) is to enable a new enterprise to obtain the minimum number of subscriptions required by the corporation law, the limitation is on the number of subscribers rather than the number of offerees. Hence there may be a publicly advertised offering of preorganization subscriptions. But there may be no payment until effective registration unless another exemption is available. One of the other exemptions which might be available is § 402(b)(9).

In that event registration would not be required at all. But § 402(b)(10) itself simply postpones registration; it does not excuse registration altogether.

**Comment to § 402(b)(11)**

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

**Comment to § 402(b)(12)**

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

Comment to § 402(c)

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

**Comment to § 402(d)**

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

1 Section 403. [Filing of Sales and Advertising Literature.] The [Administrator] by rule or order may require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser, unless the security or transaction is exempted by section 402.
Many statutes require advertising and sales literature to be approved by the Administrator before it is used. Some require merely filing prior to use. Some, particularly with respect to securities registered by notification, require sales literature to be filed either concurrently with or after its use. Section 403 affords the necessary flexibility, in conjunction with the authority in § 412(a) to classify, so that the Administrator may by rule or order apply any or all of these formulas to certain types of securities. Consistently with the “unless” clause, any rules or orders under this section can apply only to the person filing a registration statement or his principal.

SECTION 404. [Misleading Filings.] It is unlawful for any person to make or cause to be made, in any document filed with the [Administrator] or in any proceeding under this act, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

SECTION 405. [Unlawful Representations Concerning Registration or Exemption.]

(a) Neither (1) the fact that an application for registration under part II or a registration statement under Part III has been filed nor (2) the fact that a person or security is effectively registered constitutes a finding by the [Administrator] that any document filed under this act is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the [Administrator] has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(b) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (a).

SECTION 406. [Administration of Act.]

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

(b) It is unlawful for the [Administrator] or any of [his] officers or employees to use for personal benefit any information which is filed with or obtained by the [Administrator] and which is not made public. No provision of this act authorizes the [Administrator] or any of [his] officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this act. No provision of this act either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the [Administrator] or any of his officers or employees.

SECTION 407. [Investigations and Subpoenas.]

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

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

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the [insert name of appropriate court], upon application by the [Administrator], may issue to the person an order requiring him to appear before the [Administrator], or the officer designated by [him], there to produce documentary evidence if so ordered or to give evidence touching the matter
under investigation or in question. Failure to obey the order of
the court may be punished by the court as a contempt of court.
(d) No person is excused from attending and testifying or
from producing any document or record before the [Administr-30
ator], or in obedience to the subpoena of the [Administrator]
or any officer designated by [him], or in any proceeding instituted
by the [Administrator], on the ground that the testimony or
evidence (documentary or otherwise) required of him may tend
to incriminate him or subject him to a penalty of forfeiture; but
no individual may be prosecuted or subjected to any penalty or
forfeiture for or on account of any transaction, matter, or thing
concerning which he is compelled, after claiming his privilege
against self-incrimination, to testify or produce evidence (docu-
mental or otherwise), except that the individual testifying is
not exempt from prosecution and punishment for perjury or
contempt committed in testifying.

COMMENT TO § 407
Section 407 is modeled generally on § 21(a)-(d) of the Securities Exchange
The immunity provision in § 407(d) is of the broader variety which forecloses
subsequent prosecution and not merely the use of the compelled testimony. Compare
Counselman v. Hitchcock, 142 U.S. 547 (1892), with Ullman v. United
States, 350 U.S. 422 (1956). The words "or contempt" in the "except" clause at
the end do not appear in § 21(d) of the Securities Exchange Act of 1934, but they
do appear in the 1954 revision of § 3486 of the United States Criminal Code, 68
Stat. 745, 18 U.S.C. § 3486, the statute construed in the Ullman case. The
purpose is to assure against a witness' obtaining immunity, answering a few ques-
tions and then balk, See United States v. Bryan, 339 U.S. 323, 335 et seq.
(1950).
The compulsion of testimony under state process does not grant immunity
from federal prosecution so far as the Fifth Amendment is concerned. Feldman
v. United States, 322 U.S. 487 (1944) (prosecution under mail fraud statute);
Dunham v. Ottenger, 243 N.W. 423, 438, 154 N.E. 298, 302 (1926), cert. dismissed
for want of a substantial federal question, 276 U.S. 592 (1926) (the compulsory testi-
ymony provision of the New York blue sky law satisfies the Fifth Amendment so
long as it guarantees against state prosecution). On the other hand, compulsion
of testimony under state process may violate the self-incrimination clause of the
state constitution if there is no guarantee against a resulting federal prosecution.
People v. Den Uyl, 318 Mich. 645, 29 N.W. 2d 284, 2 A.L.R. 2d 625 (1947); State

SECTION 408. [Injunctions.] Whenever it appears to the [Ad-
ministrator] that any person has engaged or is about to engage
in any act or practice constituting a violation of any provision
of this act or any rule or order hereunder, [he] may in [his]
discretion bring an action in the [insert name of appropriate
court] to enjoin the acts or practices and to enforce compliance
with this act or any rule or order hereunder. Upon a proper
8 showing a permanent or temporary injunction, restraining order,
9 or writ of mandamus shall be granted and a receiver or con-
10 servator may be appointed for the defendant or the defendant's
11 assets. The court may not require the [Administrator] to post
12 a bond.

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

SECTION 409. [Criminal Penalties.]
(a) Any person who willfully violates any provision of this
act except section 404, or who willfully violates any rule or order
under this act, or who willfully violates section 404 knowing the
statement made to be false or misleading in any material respect,
upon conviction be fined not more than $5,000 or imprisoned
not more than three years, or both; but no person may be im-
prisoned for the violation of any rule or order if he proves that
he had no knowledge of the rule or order. [No indictment or
information may be returned under this act more than five years
after the alleged violation.]

(b) The [Administrator] may refer such evidence as is avail-
able concerning violations of this act or of any rule or order here-
under to the [attorney general or the proper district attorney],
who may, with or without such a reference, institute the appro-
 priate criminal proceedings under this act.
(c) Nothing in this act limits the power of the state to punish
any person for any conduct which constitutes a crime by statute
or at common law.

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

SECTION 410. [Civil Liabilities.]
(a) Any person who

1 (1) offers or sells a security in violation of section 201(a),
  301, or 405(b), or of any rule or order under section 403 which
  requires the affirmative approval of sales literature before it
  is used, or of any condition imposed under section 304(d),
  305(g), or 305(h), or

2 (2) offers or sells a security by means of any untrue state-
  ment of a material fact or any omission to state a material
  fact necessary in order to make the statements made, in the
  light of the circumstances under which they are made, not
misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

Comment to § 410(a)

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

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

Clause (2): This clause is almost identical with § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), which was also borrowed almost verbatim in § 451.116 of the Michigan statute and § 13.1-522(a)(2) of the new Virginia act. For a comparison of § 12(2) of the federal statute with equitable rescission, from which it was adapted, see Loss, Securities Regulation (1951 with 1955 Supp.), pp. 997-1001, 1003-11. Section 410(a)(2), like § 101, the general fraud provision, applies regardless of whether the security is registered, exempted, or sold in violation of the registration requirements.

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

(b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

Comment to § 410(b)


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

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

Comment to § 410(d)

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

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

Comment to § 410(e)

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

(f) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.
(g) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.

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

Comment to § 410(h)

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

SECTION 411. [Judicial Review of Orders.]

(a) Any person aggrieved by a final order of the [Administrator] may obtain a review of the order in the [insert name of appropriate court] by filing in court, within sixty days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the [Administrator], and thereupon the [Administrator] shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the [Administrator] as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the [Administrator], the court may order the additional evidence to be taken before the [Administrator] and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The [Administrator] may modify [his] findings and order by reason of the additional evidence and shall file in court the additional evidence together with any modified or new findings or order.

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

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

(b) No rule, form, or order may be made, amended, or rescinded unless the [Administrator] finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act. In prescribing rules and forms the [Administrator] may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

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

(d) All rules and forms of the [Administrator] shall be published.

(e) No provision of this act imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the [Administrator], notwithstanding that the rule, form, or order may later be amended or rescinded or be
determined by judicial or other authority to be invalid for any reason.

(f) Every hearing in an administrative proceeding shall be public unless the [Administrator] in [his] discretion grants a request joined in by all the respondents that the hearing be conducted privately.

COMMENT TO § 412

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

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

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

SECTION 413. [Administrative Files and Opinions.]

(a) A document is filed when it is received by the [Administrator].

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

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

(d) Upon request and at such reasonable charges as [he] prescribes, the [Administrator] shall furnish to any person photostatic or other copies (certified under [his] seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this act, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The [Administrator] in [his] discretion may request from interested persons for interpretative opinions.

COMMENT TO § 413

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

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

(a) Sections 101, 201(a), 301, 405, and 410 apply to persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state.

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

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

(d) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance (1) is communicated to the offeror in this state and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance).

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

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

COMMENT TO § 414(a)-(f)

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

Section 414(a)-(f) can best be explained in the context of a civil action under § 410(a) by a buyer in State B against a selling broker-dealer in State S:
1. The basic approach of § 414(a)(1) is to apply the specified sections when “an offer to sell is made in this state.”

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

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

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

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

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

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

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

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

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

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

12. Sections 401(c)(4) and 401(f)(6) exclude from the definitions of “broker-dealer” and “investment adviser” certain persons who have no place of business in the state. Clause (A) of each section has much the same rationale as the exemption in § 402(b)(8) for sales to institutional buyers or broker-dealers. Clause (A) of § 401(c)(4), insofar as it refers to issuers or other broker-dealers, has the additional purpose of making it unnecessary for an out-of-state underwriter to register as a broker-dealer before negotiating with an issuer in the state or setting up a selling group with local broker-dealers in it. Clause (B) of each section is designed to permit a New York broker-dealer or investment adviser, for example, to take care of a few customers who live in New Jersey or are vacationing in Florida without registering as a broker-dealer or investment adviser in those states, as he would otherwise have to do under § 414.

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

(g) Every applicant for registration under this act and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the [Administrator], in such form as [he] by rule prescribes, an irrevocable consent appointing the [Administrator] or [his] successor in office to be his attorney to receive service of any lawful process in any non-criminal suit, action, or proceeding against him or his successor executor or administrator which arises under this act or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration need not file another. Service may be made by leaving a copy of the process in the office of the [Administrator], but it is not effective unless (1) the plaintiff, who may be the [Administrator] in a suit, action, or proceeding instituted by [him], forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the [Administrator], and (2) the plaintiff’s affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

Comment to § 414(g)

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

(h) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this act or any rule or order hereunder, and he has not filed a consent to service of process under subsection (g) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the [Administrator] or [his] successor in office to be his attorney to receive service of any lawful process in any non-criminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this act or any rule or order hereunder, with the same force and validity as if served on him personally. Service
may be made by leaving a copy of the process in the office of the
[Administrator], and it is not effective unless (1) the plaintiff,
who may be the [Administrator] in a suit, action, or proceeding
instituted by [him], forthwith sends notice of the service and a
copy of the process by registered mail to the defendant or re-
spendent at his last known address or takes other steps which
are reasonably calculated to give actual notice, and (2) the
plaintiff's affidavit of compliance with this subsection is filed in
the case on or before the return day of the process, if any, or
within such further time as the court allows.

Comment to § 414(h)

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

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

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

§ 416. [Short Title.] This act may be cited as the Uni-
form Securities Act.

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

§ 418. [Repeal and Saving Provisions.]
(a) The [identify the existing act or acts] is [are] repealed
except as saved in this section.
(b) Prior law exclusively governs all suits, actions, prosecu-
tions, or proceedings which are pending or may be initiated on
the basis of facts or circumstances occurring before the effective
date of this act, except that no civil suit or action may be main-
tained to enforce any liability under prior law unless brought
within any period of limitation which applied when the cause of
action accrued and in any event within two years after the
effective date of this act.
(c) All effective registrations under prior law, all administra-
tive orders relating to such registrations, and all conditions im-
posed upon such registrations remain in effect so long as they
would have remained in effect if this act had not been passed.
They are considered to have been filed, entered, or imposed under
this act, but are governed by prior law.
(d) Prior law applies in respect of any offer or sale made
within one year after the effective date of this act pursuant to
an offering begun in good faith before its effective date on the
basis of an exemption available under prior law.
(e) Judicial review of all administrative orders as to which
review proceedings have not been instituted by the effective date
of this act are governed by section 411, except that no review
proceeding may be instituted unless the petition is filed within
any period of limitation which applied to a review proceeding
when the order was entered and in any event within sixty days
after the effective date of this act.

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

Comment to § 419

If the act is adopted in a particular state before the more essential uniform forms and rules have been drafted, the effective date should be suitably delayed.
APPENDIX A
ACCOMMODATION OF THE ACT TO THE DELETION OF
PART III (REGISTRATION OF SECURITIES)

PREAMBLE
Change the third clause to read: “requiring the registration of broker-dealers, agents, and investment advisers;”

Sec. 202(a): In the first sentence change “414(g)” to “314(g)”
Sec. 202(e): In the fourth sentence change “410” to “310”

PART III:
Delete this part and renumber Part IV as Part III, Sec. 401 as Sec. 301, etc.

Sec. 401(b): Delete the first two sentences and substitute: “‘Agent’ means any individual other than a broker-dealer who represents a broker-dealer or issuer (except as provided in section 302) in effecting or attempting to effect purchases or sales of securities.”
Sec. 401(f): In Clause (5) change “402(a)(1)” to “302(a)(1)”
Sec. 401(h): Delete this subsection and renumber the following subsections of Sec. 401 accordingly.

Sec. 402(a): Change the introductory clause to read: “Agents of issuers with respect to the following securities are excepted from sections 301(b) and 303:”
Delete Clauses (4)-(9) and (12); renumber the remaining clauses accordingly; and at the end of Clause (11), to be renumbered (5), change the semicolon to a period.

Sec. 402(b): Change the introductory clause to read: “Agents of issuers with respect to the following transactions are excepted from sections 301(b) and 303:”
Delete Clauses (1)-(3) and (7) and renumber the remaining clauses accordingly.
Change Clause (6), to be renumbered (3), to read: “any transaction by a receiver or trustee in bankruptcy;”
At the end of Clause (12), to be renumbered (8), change the period to a semi-colon and add the following new Clause (9): “any transaction effected with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state.”
APPENDIX B

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

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

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<tr>
<th>Present Provision</th>
<th>Renumbered Provision if Sec. 102 Is Retained in Full</th>
<th>Renumbered Provision if Sec. 102(b) and Sec. 102(c) Are Deleted</th>
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PREAMBLE

Change the preamble to read: "[An Act Relating to securities; prohibiting fraudulent practices in relation thereto; and making uniform the law with reference thereto.]"

SEC. 401(f)

If Sec. 102(b) and Sec. 102(c) are retained (see Appendix C), change Sec. 401(f) as follows:

Change Clause (3) to read: "a person engaged as a broker or dealer in the business of effecting transactions in securities if the performance of these services is solely incidental to the conduct of his business as a broker or dealer and he receives no special compensation for these services;"

Change Clause (5) to read: "a person whose advice, analyses, or reports relate only to securities (including revenue obligations) issued or guaranteed as to payment of principal, interest, or dividends by the United States, any state, or any agency or corporate or other instrumentality of one or more of the foregoing, or certificates of deposit for any of the foregoing;

In Clause (6) delete "broker-dealers," and substitute "brokers, dealers,"

SEC. 401(k)

If Sec. 401(f) is retained, change Sec. 401(k) to read: "'Investment Company Act of 1940' means the federal statute of that name as amended before or after the effective date of this act."

SEC. 402(d)

Since Sec. 402(d) is the only provision of Sec. 402 to be retained, delete the letter "(d)" and change the section heading to read: "[Burden of Proving Exceptions]"

Delete "an exemption or"

SEC. 406(b): In the first sentence delete "filed with or"

SEC. 407: This entire section should be retained with the following changes in Sec. 407(a):

In Clause (1) delete "and forms"

In Clauses (1) and (3) delete "or any rule or order hereunder" and, if Sec. 102(c) is retained, substitute "or any rule under section 102(c)"

SEC. 408: Delete "or any rule or order hereunder" twice in the first sentence and, if Sec. 102(c) is retained, substitute "or any rule under section 102(c)"

SEC. 409(a): Change the first sentence to read as follows: "Any person who willfully violates any provision of this act [or any rule under section 102(c)] shall upon conviction be fined not more than $5,000 or imprisoned [52075]"
not more than three years, or both [; but no person may be imprisoned for the violation of any rule under section 102(c) if he proves that he had no knowledge of the rule].” The bracketed language in the first sentence should be included only if Sec. 102(c) is retained.

Sec. 409(b): Delete “or of any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or of any rule under section 102(c)”

Sec. 410(a): Delete Clause (1) and the figure “(2)” and arrange Sec. 410(a) as one continuous paragraph without indentation.

Sec. 410(b): Delete “broker-dealer or agent” and substitute “broker or dealer or employee of a broker or dealer”

Sec. 410(f): Delete “or any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”

Sec. 410(g): Delete “or any rule or order hereunder” and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”

Sec. 410(h): Delete “or section 202(e)”

Sec. 412: If Sec. 102(c) is retained, change the entire Sec. 412 to read:

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

Sec. 414(a): Change this section to read: “Section 101 applies ***.”

Sec. 414(b): Change this section to read: “Section 101 applies ***.”

Sec. 414(f): Change this section to read: “Section 102 applies ***.”

Sec. 414(h): In the first sentence delete “or any rule or order hereunder” twice and, if Sec. 102(c) is retained, substitute “or any rule under section 102(c)”
APPENDIX C

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

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

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

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

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

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

APPENDIX C-1

PREAMBLE
Delete "investment advisers,"

Sec. 201 (e):
Delete this subsection and renumber Sec. 201 (d) accordingly.

Sec. 202 (a):
Change the first sentence to read: "A broker-dealer or agent may obtain ***."
Change Clause (3) to read: "the qualifications and business history of the applicant and, in the case of a broker-dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer;"

Sec. 202 (b):
Change the first sentence to read: "Every applicant for initial or renewal registration shall pay a filing fee of $ . . . . . . . in the case of a broker-dealer and $ . . . . . . . in the case of an agent."

Sec. 202 (c):
Delete "or investment adviser"

Sec. 202 (d):
Delete "and investment advisers"

APPENDIX C-2

In addition to all the changes specified in Appendix C-1:

Sec. 102:
Delete Sec. 102 (b) and Sec. 102 (c) and the letter "(a)" in the first line.

Sec. 401 (f):
Delete this subsection and renumber the remaining subsections of Sec. 401 accordingly.

APPENDIX C-3

In addition to all the changes specified in Appendix C-1:

Sec. 102:
Delete this section.

Sec. 401 (f):
Delete this subsection and renumber the following subsections of Sec. 401 accordingly.

Sec. 405 (b):
Delete "purchaser, customer, or client" and substitute "purchaser or customer"

Sec. 414 (f):
Delete this subsection and renumber the following subsections of Sec. 414 accordingly.