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2008 BUSINESS REFORM COMMITTEES
MEETING #3
OF THE SECURITIES LAW COMMITTEE

Thursday, July 24, 2008
11:00 A.M.

Secretary of State's Office
700 North Street
Jackson, Mississippi

AGENDA

1. Welcome – Cliff Hodge, Chairman
2. Roll Call – Cheryn Baker
3. Remarks by Co-Chairs
4. Approval of Minutes from Second Meeting held on June 26 – Cliff Hodge
5. Sub-Committee Reports
 - a. Securities Professionals Sub-Group (Article 4 USA) – Acting Chair Greg Frascogna
 - b. Fraud and Civil Liability Sub-Group – William Ray, Chair
 - c. Crime and Punishment Sub-Group -- Mike Huggs, Chair
 - d. Issuer Registration/Exemptions Sub-Group – Keith Parsons
6. Other Business
7. Adjourn 12:00 P.M

Upcoming Meeting Dates

August 7

August 21

Week of September 8 – No Meeting: Recommendations due

**Experience of Other States with the Uniform Securities Act Adoption in their State
Compiled by the MS Secretary of State's Office
As of July 23, 2008**

Several jurisdictions, among them Vermont, Hawaii, and Georgia noted that their adoption of the 2002 Uniform Securities Act ("USA") was too recent to have seen any legal challenges. Contact persons from these states offered little insight. Washington D.C. has offered a slightly modified version to the city council, but it has not yet been adopted.

Maryland has adopted the USA. The Maryland contact person offered no feedback, but suggested contacting Craig Goettsch in Iowa, an expert on the USA, with any questions. His email is craig.goettsch@iid.state.ia.us.

South Dakota, Kansas and Maine have had the USA for several years and offered the most definitive feedback. Indiana adopted the USA recently but offered feedback on the variable annuities option.

South Dakota

The contact person from South Dakota noted that the state has had the act for several years now and chose to treat variable annuities as securities. South Dakota noted no legal challenges to any portion of the USA in its experience.

Kansas

The 2002 Uniform Securities Act became effective in Kansas on July 1, 2005. It was passed during the 2004 legislative session, but the effective date was delayed to give Kansas time to adopt new regulations. The Kansas contact person's comments:

Frankly, I think the 2002 act is a great improvement over the 1956 version. Everything was jumbled together in the 1956 act, and I think the 2002 act is much more user-friendly, especially for a novice. Also, no matter how hard we tried to make changes to our old act to account for federal preemption, it was still difficult to interpret our old act without a fair amount of knowledge concerning federal securities law.

My main criticisms of the 2002 Act are found in the transactional exemptions, particularly 202(14) and 202(20). We narrowed the 202(20) exemption in our version of the act by making it apply only to sales through a broker-dealer that is registered in Kansas.

This satisfied the industry's concern about us being able to shut down an offering nationwide if it couldn't be "blue-skied" in Kansas (see *A.S. Goldmen v. New Jersey*), but we were satisfied because the narrower exemption means that the broker-dealer will

be subject to our jurisdiction if it makes unsuitable sales, etc., to an out-of-state investor. We didn't try to narrow the 202(14) exemption, so that remains the most troublesome aspect of the new act in my opinion.

We also made a number of changes to sections 412 and 604 to preserve our enforcement authority from our old act. Without those changes, we would have opposed the 2002 Act.

Exhibit A is a document that shows all of the variations between the 2002 USA and what was ultimately adopted in Kansas.

Indiana

The Indiana contact person's comments:

Indiana's law just became effective 2 weeks ago and have not had any challenges yet. We did something similar to what you are doing and created a committee of local securities practitioners to discuss and create the final draft. We did not adopt the provision defining variable annuities as securities (the insurance lobby here is incredibly strong), and we had no issues getting it through our General Assembly. It passed without a dissenting vote.

Maine

Maine has the Uniform Securities Act, and while the statute has not been the subject of litigation, Maine identified an important issue:

1. We find § 412(a), (b) and (c) very confusing. Arguably, the sections do not allow adverse licensing action against a broker-dealer or investment adviser because of the misdeeds of its control persons. We expressed our concerns to the relevant NASAA committee in the following e-mail a few years ago:

We have another USA issue, although one that is potentially more serious as it goes to the language of the Act and affects a fundamental function of state securities regulation. The issue relates to § 412(a), specifically the denial of a broker-dealer or investment adviser license application.

Our problem is identifying our authority to deny, condition, or limit the license of a broker-dealer or investment adviser applicant as a result of the misdeeds of its principals. We assume that § 412(a) was intended to allow that, but as worded, it appears to authorize adverse action with respect to the license of the partner, officer, director, or other control person and not adverse

action with respect to the application of the firm because of the wrongs of its control persons. This stands in stark contrast with the § 204(a) of the 1956 Act and § 212(a) of the 1985 Act, both of which expressly allow adverse action against the broker-dealer or investment adviser applicant because one or more of its control persons has committed one or more of the enumerated misdeeds. If our concerns about the new USA are accurate, it would mean that 10 of the worst actors in the history of the securities industry could get together to form a broker-dealer, and states with the new USA would not be able to deny the firm's license application.

As noted above, we assume this was not the intended result, something suggested by comment 4 to the section. We have difficulty putting too much weight on the comment, however, because it cannot be used to override statutory language that is not ambiguous and because the comment itself is not a model of clarity. I would also note that the same problem exists with respect to license suspensions and revocations under §412(b) and (c) although that is not quite as worrisome.

I apologize for involving you in what is now our problem, but it would be of great help if you could let me know whether I am reading the new USA incorrectly, and if so, why. If I am not, we would want to amend Maine law, and you might want to alert other states to this issue.

Idaho

Idaho ran into problems with section 411. An Idaho Supreme Court decision is attached as Exhibit B.

Exhibit A

KANSAS UNIFORM SECURITIES ACT

NOTE: This document shows the variations between the Kansas Uniform Securities Act (House Bill 2347) and the original language of the Uniform Securities Act (2002). Additions to the uniform language are underlined, deletions of uniform language are shown with strike-throughs, and italics are used to show optional or bracketed language. This draft contains the section numbers from House Bill 2347, which follow the same sequence as the sections in the Uniform Securities Act (2002) except for the last three sections. This draft does not contain sections 53 through 65 of House Bill 2347 because those sections simply update other Kansas statutes that cite to provisions of the current Kansas Securities Act.

SECTION 1 ~~101. SHORT TITLE.~~ *Sections 1 through 52, and amendments thereto, may be cited as the Kansas uniform securities act (~~2002~~).*

SECTION 2 ~~102. DEFINITIONS.~~ In this *act*, unless the context otherwise requires:

(1) “Administrator” means the *securities commissioner of Kansas, appointed as provided in K.S.A. 75-6301, and amendments thereto.*

(2) “Agent” means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer’s securities. ~~But~~ but a partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by rule adopted or order issued under this *act*.

(3) “Bank” means:

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

(B) a member bank of the federal reserve system;

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

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

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

(A) an agent;

(B) an issuer;

(C) a bank ~~or~~, savings institution, or trust company if:

(i) its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi), and (viii) through (x), ~~and~~; 3(a)(4)(B)(xi) if limited to unsolicited transactions; 3(a)(5)(B); and 3(a)(5)(C) of the securities exchange act of 1934 (15 U.S.C. sections 78c(a)(4) and (5)), or

(ii) it is a bank that satisfies the conditions described in subsection 3(a)(4)(E) of the securities exchange act of 1934 (15 U.S.C. section 78c(a)(4));

(D) an international banking institution; or

(E) a person excluded by rule adopted or order issued under this *act*.

(5) "Depository institution" means:

(A) a bank; or

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

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

(ii) a Morris Plan bank; or

(iii) an industrial loan company.

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

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

(8) "Filing" means the receipt under this *act* of a record by the administrator or a designee of the administrator.

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

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

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

(A) a depository institution or international banking institution;

(B) an insurance company;

(C) a separate account of an insurance company;

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

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

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

(G) a plan established and maintained by a State, a political subdivision of a State, or an agency or instrumentality of a State or a political subdivision of a State for the benefit

of its employees, if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this *act*, a depository institution, or an insurance company;

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

(I) an organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10,000,000;

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

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

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

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

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

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

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

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

(13) “Insured” means insured as to payment of all principal and all interest.

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

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

(A) an investment adviser contact person;

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

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

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

(E) a federal covered investment adviser;

(F) a bank ~~or~~ savings institution, or trust company;

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

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

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

(A) performs only clerical or ministerial acts;

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

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

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

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

(D) is excluded by rule adopted or order issued under this *act*.

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

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

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

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

(18) “Nonissuer transaction” or “nonissuer distribution” means a transaction or distribution not directly or indirectly for the benefit of the issuer.

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

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

(21) “Place of business” of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

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

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

(22) “Predecessor act” means the act repealed by Section ~~702~~ 52, *and amendments thereto*.

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

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

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

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

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

(B) a gift of assessable stock ~~involving~~ is considered to involve an offer and sale; ~~and.~~

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

(27) “Securities and Exchange Commission” means the United States Securities and Exchange Commission.

(28) “Security” means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a “security”; or a 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. The term:

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

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

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

(D) includes as an “investment contract” an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor, ~~and a~~ A “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(E) ~~includes as an “investment contract,” among other contracts,~~ may include an interest in a limited partnership and a limited liability company and shall include an investment in a viatical settlement or similar agreement investment as defined by rule adopted or order issued under this act.

(29) “Self-regulatory organization” means a national securities exchange registered under the Securities Exchange Act of 1934, a national securities association of broker-dealers registered under the Securities Exchange Act of 1934, a clearing agency registered under the Securities Exchange Act of 1934, or the Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934.

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

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

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

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

(32) “Rules” when used in the context of the rules adopted by the administrator, means rules and regulations adopted by the administrator pursuant to this act.

SECTION 3 ~~103. REFERENCES TO FEDERAL STATUTES.~~ “Securities Act of 1933” (15 U.S.C. Section 77a et seq.), “Securities Exchange Act of 1934” (15 U.S.C. Section 78a et seq.), “Public Utility Holding Company Act of 1935” (15 U.S.C. Section 79 et seq.), “Investment Company Act of 1940” (15 U.S.C. Section 80a-1 et seq.), “Investment Advisers Act of 1940” (15 U.S.C. Section 80b-1 et seq.), “Employee Retirement Income Security Act of 1974” (29 U.S.C. Section 1001 et seq.), “National Housing Act” (12 U.S.C. Section 1701 et seq.), “Commodity Exchange Act” (7 U.S.C. Section 1 et seq.), “Internal Revenue Code” (26 U.S.C. Section 1 et seq.), “Securities Investor Protection Act of 1970” (15 U.S.C. Section 78aaa et seq.), “Securities Litigation Uniform Standards Act of 1998” (112 Stat. 3227), “Small Business Investment Act of 1958” (15 U.S.C. Section 661 et seq.), and “Electronic Signatures in Global and National Commerce Act” (15 U.S.C. Section 7001 et seq.) mean those statutes and the rules and regulations adopted under those statutes, as in effect on the date of ~~enactment~~ the latest amendment to any provision of this act ~~[, or as later amended]~~.

SECTION 4 ~~104. REFERENCES TO FEDERAL AGENCIES.~~ A reference in this *act* to an agency or department of the United States is also a reference to a successor agency or department.

SECTION 5 ~~105. ELECTRONIC RECORDS AND SIGNATURES.~~ This *act* modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)). This *act* authorizes the filing of records and signatures, when specified by provisions of this *act* or by a rule adopted or order issued under this *act*, in a manner consistent with Section 104(a) of that act (15 U.S.C. Section 7004(a)).

SECTION 6 ~~201. EXEMPT SECURITIES.~~ The following securities are exempt from the requirements of Sections ~~301 through 306 and 504 11 through 16 and section 33, and amendments thereto:~~

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

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

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

(A) an international banking institution;

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

(C) any other depository institution, unless by rule or order the administrator proceeds under Section ~~204~~ 9, and amendments thereto;

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

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

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

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

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

(6)~~(A)~~ a federal covered security specified in Section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(1)) or by rule adopted under that provision; ~~or~~

~~(B)~~ a security listed or approved for listing on another securities market specified by rule under this act;

~~(C)~~ a put or a call option contract; a warrant; ~~or~~ a subscription right on or with respect to such securities described in subsections (A) or (B); ~~or~~

~~(D)~~ an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the Securities Exchange Act of 1934 and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the Securities Exchange Act of 1934; ~~or~~

~~(E)~~ an offer or sale; of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or

~~(F)~~ an option or a derivative security designated by the Securities and Exchange Commission under Section 9(b) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78i(b));

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

adopted under this *act* limiting the availability of this exemption by classifying securities, persons, and transactions, imposing different requirements for different classes, specifying with respect to paragraph (B) the scope of the exemption and the grounds for denial or suspension, and requiring an issuer:

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

(B) to file a request for exemption authorization for which a rule under this *act* may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process complying with Section ~~611~~ 50, and amendments thereto, and grounds for denial or suspension of the exemption; or

(C) to register under Section ~~304~~ 14, and amendments thereto;

~~(8) a member's or owner's interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a State, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative~~ any stock or other security evidencing membership or ownership in, evidencing the right to patronize, issued in lieu of a cash patronage dividend by, or representing a debt of a cooperative organized under K.S.A. 17-1601 et seq., and amendments thereto, but the administrator, by rule or order, may require the filing of a notice and place conditions upon the exemption for sales of securities to persons who are not members within the meaning of K.S.A. 17-1606, and amendments thereto; and

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

SECTION 7 202. EXEMPT TRANSACTIONS. The following transactions are exempt from the requirements of Sections ~~301 through 306 and 504 11 through 16 and section 33, and amendments thereto:~~

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

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

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

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

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

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

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

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

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

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

~~(E)~~ (B)(i) the issuer of the security has a class of equity securities listed on a national securities exchange registered under the Securities Exchange Act of 1934 or designated for trading on the National Association of Securities Dealers Automated Quotation System, unless the issuer of the security is a unit investment trust registered under the Investment Company Act of 1940; ~~or~~

(ii) the issuer of the security, including its predecessors, has been engaged in continuous business for at least three years; ~~or~~ and

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

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

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

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

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

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

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

(ii) the issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous 12 months a

blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(6) a nonissuer transaction by or through a broker-dealer registered or exempt from registration under this *act* effecting an unsolicited order or offer to purchase;

(7) a nonissuer transaction executed by a bona fide pledgee without the purpose of evading this *act*;

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

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

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

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

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

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

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

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

(13) a sale or offer to sell to:

(A) an institutional investor;

(B) a federal covered investment adviser; or

(C) any other person exempted by rule adopted or order issued under this *act*;

(14) a sale or an offer to sell securities ~~of~~ by an issuer, if the transaction is part of a single issue in which:

(A) not more than 25 purchasers are present in this State during any 12 consecutive months, other than those designated in paragraph (13);

(B) a general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(C) a commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this *act* or an agent registered under this *act* for soliciting a prospective purchaser in this State; and

(D) the issuer reasonably believes that all the purchasers in this State, other than those designated in paragraph (13), are purchasing for investment;

(15) a transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options, or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this State;

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

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

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

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

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

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

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

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

(19) a rescission offer, sale, or purchase under Section ~~540~~ 39, and amendments thereto;

(20) an offer or sale of a security through a broker-dealer registered under this act to a person not a resident of this State and not present in this State if the offer or sale does not constitute a violation of the laws of the State or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this *act*;

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

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

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

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

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

(22) a transaction involving:

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

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

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

(23) a nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this *act*, if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this *act*; has been subject to continuous reporting requirements in the foreign jurisdiction for not less than 180 days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by rule adopted or order issued under this *act*, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and The Toronto Stock Exchange, Inc., is a designated securities exchange. After an administrative hearing in compliance with *the Kansas administrative procedure act*, the administrator, by rule adopted or order issued under this *act*, may revoke the designation of a securities exchange under this paragraph, if the administrator finds that revocation is necessary or appropriate in the public interest and for the protection of investors.

SECTION 8 ~~203. ADDITIONAL EXEMPTIONS AND WAIVERS.~~ A rule adopted or order issued under this *act* may exempt a security, transaction, or offer; a rule under this *act* may exempt a class of securities, transactions, or offers from any or all of the requirements of Sections ~~301 through 306 and 504 11 through 16 and section 33, and amendments thereto~~; and an order under this *act* may waive, in whole or in part, any or all of the conditions for an exemption or offer under Sections ~~201 and 202 6 and 7, and amendments thereto~~.

SECTION 9 ~~204. DENIAL, SUSPENSION, REVOCATION, CONDITION, OR LIMITATION OF EXEMPTIONS.~~

(a) **Enforcement related powers.** Except with respect to a federal covered security or a transaction involving a federal covered security, an order under this *act* may deny, suspend application of, condition, limit, or revoke an exemption created under Section ~~201(3)(C), (7) or (8) or 202 6(3)(C), (7) or (8) or section 7, and amendments thereto~~, or an exemption or waiver created under section ~~203 8, and amendments thereto~~, with respect to a specific security, transaction, or offer. An order under this section may be issued only pursuant to the procedures in section ~~306(d) or 604 16(d) or section 43, and amendments thereto~~, and only prospectively.

(b) **Knowledge of order required.** A person does not violate section ~~301, 303 through 306, 504, or 510~~ 11, 13 through 16, 33, or 39, and amendments thereto, by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

SECTION 10. EXEMPTION FILING FEES. The administrator may by rule and regulation set a fee not to exceed \$2,500 for an application or filing made in connection with any exemption from securities registration.

SECTION 11 301. SECURITIES REGISTRATION REQUIREMENT.

It is unlawful for a person to offer or sell a security in this State unless:

- (1) the security is a federal covered security;
- (2) the security, transaction, or offer is exempted from registration under Sections ~~201 through 203~~ 6 through 8, and amendments thereto; or
- (3) the security is registered under this act.

SECTION 12 302. NOTICE FILING.

(a) **Required filing of records.** With respect to a federal covered security, as defined in Section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(2)), that is not otherwise exempt under Sections ~~201 through 203~~ 6 through 8, and amendments thereto, a rule adopted or order issued under this act may require the filing of any or all of the following records:

(1) before the initial offer of a federal covered security in this State, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933 and a consent to service of process complying with Section ~~611~~ 50 signed by the issuer and the payment of a fee ~~of~~ not to exceed \$2,500;

(2) after the initial offer of the federal covered security in this State, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933; and

(3) to the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this State, if the sales data are not included in records filed with the Securities and Exchange Commission and payment of a fee not to exceed \$2,500.

(b) **Notice filing effectiveness and renewal.** A notice filing under subsection (a) is effective for one year commencing on the later of the notice filing or the effectiveness of the offering filed with the Securities and Exchange Commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the Securities and Exchange Commission that are required by rule or order under this act to be filed and by paying a renewal fee not to exceed \$2,500. A previously filed consent to service of process complying with Section 611 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) **Notice filings for federal covered securities under Section 18(b)(4)(D).** With respect to a security that is a federal covered security under Section 18(b)(4)(D) of the

Securities Act of 1933(15 U.S.C. Section 77r(b)(4)(D)), a rule under this *act* may require (1) a notice filing by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated by the Securities and Exchange Commission, and a consent to service of process complying with Section ~~611~~ 50 signed by the issuer, not later than 15 days after the first sale of the federal covered security in this State; and (2) the payment of a fee *not to exceed \$2,500 for a timely filing*; and the payment of a fee *not to exceed \$5,000* for any late filing.

(d) **Stop orders.** Except with respect to a federal security under Section ~~181(b)(1)~~ 18(b)(1) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(1)), if the administrator finds that there is a failure to comply with a notice or fee requirement of this section, the administrator may issue a stop order suspending the offer and sale of a federal covered security in this State. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the administrator other than a late filing fee.

SECTION 13 ~~303. SECURITIES REGISTRATION BY COORDINATION.~~

(a) **Registration permitted.** A security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination under this section.

(b) **Required records.** A registration statement and accompanying records under this section must contain or be accompanied by the following records in addition to the information specified in Section ~~305~~ 15 and a consent to service of process complying with Section ~~611~~ 50, *and amendments thereto*:

(1) a copy of the latest form of prospectus filed under the Securities Act of 1933;

(2) a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security that is required by rule adopted or order issued under this *act*;

(3) copies of any other information or any other records filed by the issuer under the Securities Act of 1933 requested by the administrator; and

(4) an undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the Securities and Exchange Commission.

(c) **Conditions for effectiveness of registration statement.** A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) a stop order under subsection (d) or Section ~~306~~ 16, *and amendments thereto*, or issued by the Securities and Exchange Commission is not in effect, and a proceeding is not pending against the issuer under Section ~~412~~ ~~306~~ 16, *and amendments thereto*, and the administrator has not given written notice of deficiencies that are unresolved and that would constitute grounds for a stop order under section 16, and amendments thereto; and

(2) the registration statement has been on file for at least 20 days or a shorter period provided by rule adopted or order issued under this *act*.

(d) **Notice of federal registration statement effectiveness.** The registrant shall promptly notify the administrator in a record of the date when the federal registration

statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by ~~telegram~~, telephone, or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section, the stop order is void as of the date of its issuance.

(e) ***Effectiveness of registration statement.*** If the federal registration statement becomes effective before each of the conditions in this section is satisfied or is waived by the administrator, the registration statement is automatically effective under this *act* when all the conditions are satisfied or waived. If the registrant notifies the administrator of the date when the federal registration statement is expected to become effective, the administrator shall promptly notify the registrant ~~by telegram, telephone, or electronic means and promptly confirm this notice~~ by a record, indicating whether all the conditions are satisfied or waived and whether the administrator intends the institution of a proceeding under Section ~~306 16~~, and amendments thereto. The notice by the administrator does not preclude the institution of such a proceeding.

SECTION 14 ~~304. SECURITIES REGISTRATION BY QUALIFICATION.~~

(a) ***Registration permitted.*** A security may be registered by qualification under this section.

(b) ***Required records.*** A registration statement under this section must contain the information or records specified in Section ~~305 15~~, and amendments thereto, a consent to service of process complying with Section ~~6H 50~~, and amendments thereto, and, ~~if required by rule adopted under this act~~, the following information or records unless waived by the administrator for good cause shown:

(1) with respect to the issuer and any significant subsidiary, its name, address, and form of organization; the State or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) with respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the 30th day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;

(3) with respect to persons covered by paragraph (2), the aggregate sum of the remuneration paid to those persons during the previous 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries, and affiliates of the issuer;

(4) with respect to a person owning of record or owning beneficially, if known, 10 percent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) other than the person's occupation;

(5) with respect to a promoter, if the issuer was organized within the previous three years, the information or records specified in paragraph (2), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;

(6) with respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;

(7) the capitalization and long term debt, on both a current and 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 of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue 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 at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on 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 each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under 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 that are to be offered otherwise than through an underwriter;

(9) the estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated 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 the funds; and, if a part of the proceeds is to be used to acquire 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 that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses 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, and the amount of those options held or to be

held by each person required to be named in paragraph (2), (4), (5), (6), or (8) and by any person that holds or will hold 10 percent or more in the aggregate of those options;

(11) the dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years, and a copy of the contract;

(12) a description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action, or proceeding known to be contemplated by governmental authorities;

(13) 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 and any solicitation of interest used in compliance with Section ~~202(17)(B)~~ 7(17)(B), and amendments thereto;

(14) a specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) a signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) a signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record; that is public, which is used in connection with the registration statement;

(17) a balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and ~~changes in financial position~~ a statement of cash flows for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) any additional information or records required by rule adopted or order issued under this *act*.

(c) **Conditions for effectiveness of registration statement.** A registration statement under this section becomes effective 30 days, or any shorter period provided by rule adopted or order issued under this *act*, after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) a stop order is not in effect and a proceeding is not pending under Section ~~306~~ 16, and amendments thereto;

(2) the administrator has not issued an order under Section ~~306~~ 16, and amendments thereto, delaying effectiveness; and

(3) the applicant or registrant has not requested that effectiveness be delayed.

(d) **Delay of effectiveness of registration statement.** The administrator may delay effectiveness once for not more than 90 days if the administrator determines the

registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The administrator may also delay effectiveness for a further period of not more than 30 days if the administrator determines that the delay is necessary or appropriate.

(e) **Prospectus distribution may be required.** A rule adopted or order issued under this act may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

- (1) the first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;
- (2) the confirmation of a sale made by or for the account of the person;
- (3) payment pursuant to such a sale; or
- (4) delivery of the security pursuant to such a sale.

SECTION 15 ~~305. SECURITIES REGISTRATION FILINGS.~~

(a) **Who may file.** A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this act.

(b) **Filing fee.** A person filing a registration statement shall pay a fee established by the administrator by rule or order, but not more than \$2,500 for each year that the registration statement is effective. If a registration statement is withdrawn before the effective date or a preeffective stop order is issued under Section ~~306~~ 16, and amendments thereto, the administrator shall retain an amount of the fee established by the administrator by rule or order.

(c) **Status of offering.** A registration statement filed under Section ~~303 or 304~~ 13 or 14, and amendments thereto, must specify:

- (1) the amount of securities to be offered in this State;
- (2) the States in which a registration statement or similar record in connection with the offering has been or is to be filed; and
- (3) any adverse order, judgment, or decree issued in connection with the offering by a State securities regulator, the Securities and Exchange Commission, or a court.

(d) **Incorporation by reference.** A record filed under this act or the predecessor act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) **Nonissuer distribution.** In the case of a nonissuer distribution, information or a record may not be required under subsection (i) or Section ~~304~~ 14, and amendments thereto, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) **Escrow and impoundment.** A rule adopted or order issued under this act may require as a condition of registration that a security issued within the previous five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and 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 conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this *act*, but the administrator may not reject a depository institution solely because of its location in another State.

(g) ***Form of subscription.*** A rule adopted or order issued under this *act* may require as a condition of registration that a security registered under this *act* be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this *act* or preserved for a period specified by the rule or order, which may not be longer than five years.

(h) ***Effective period.*** Except while a stop order is in effect under Section 306 16, and amendments thereto, a registration statement is effective for one year after its effective date, or for any longer period designated by rule adopted or in an order issued under this *act* during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this *act* are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

(i) ***Periodic reports.*** While a registration statement is effective, a rule adopted or order issued under this *act* may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

(j) ***Posteffective amendments.*** A registration statement ~~may~~ shall be amended after its effective date if there are material changes in information or documents in the registration statement or if there is an increase in the aggregate amount of securities offered or sold in this state. The posteffective amendment becomes effective when the administrator ~~so orders~~ provides written notice that the amendment has been accepted. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a registration fee *based upon the increase in such price calculated in accordance with the rate and fee specified in subsection (b).* ~~A posteffective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid.~~ If a posteffective amendment for registration of additional securities and payment of additional fees is not filed in a timely manner, there shall be no penalty assessed if the amendment is filed and the additional registration fee is paid within one year after the date the additional securities are sold in this state.

SECTION 16 ~~306.~~ DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES REGISTRATION.

(a) **Stop orders.** The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the administrator finds that the order is in the public interest and that:

(1) the registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under Section ~~305(j)~~ 15(j), and amendments thereto, as of its effective date, or a report under Section ~~305(i)~~ 15(i), and amendments thereto, is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) this act or a rule adopted or order issued under this act or a condition imposed under this act has been willfully violated, in connection with the offering, by:

(A) the person filing the registration statement, but only if such person is directly or indirectly controlled by or acting for the issuer;

(B) ~~by~~ the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function;

(C) a promoter of the issuer; ~~or~~

(D) a 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

(E) ~~by~~ an underwriter;

(3) the security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this act applicable to the offering, but the administrator may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the administrator may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another State unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;

(4) the issuer's enterprise or method of business includes or would include activities that are unlawful where performed or in this state;

(5) with respect to a security sought to be registered under Section ~~303~~ 13, and amendments thereto, there has been a failure to comply with the undertaking required by Section ~~303(b)(4)~~ 13(b)(4), and amendments thereto;

(6) the applicant or registrant has not paid the filing fee, but the administrator shall void the order if the deficiency is corrected; or

(7) the offering:

(A) will work or tend to work a fraud upon purchasers or would so operate; ~~or~~

(B) has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options; or

(C) is being made on terms that are unfair, unjust, or inequitable;

(b) **Enforcement of subsection (a)(7).** To the extent practicable, the administrator by rule adopted or order issued under this act shall publish standards that provide notice of conduct that violates subsection (a)(7).

(c) **Institution of stop order.** The administrator may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) **Summary process.** The administrator may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection (e) that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) **Procedural requirements for stop order.**

(1) A stop order may not be issued under this section without:

(1) ~~(A)~~ appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) ~~(B)~~ an opportunity for hearing; and

(3) ~~(C)~~ findings of fact and conclusions of law in a record.

(2) Any proceeding under this section shall be done in accordance with the state administrative procedure act.

(f) **Modification or vacation of stop order.** The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

SECTION 17 ~~307. WAIVER AND MODIFICATION.~~ The administrator may waive or modify, in whole or in part, any or all of the requirements of Sections ~~302, 303, and 304(b)~~ 12, 13, and 14(b), and amendments thereto, or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to Section ~~305(i)~~ 15(i), and amendments thereto.

SECTION 18 ~~401. BROKER-DEALER REGISTRATION REQUIREMENT AND EXEMPTIONS.~~

(a) **Registration requirement.** It is unlawful for a person to transact business in this State as a broker-dealer unless the person is registered under this *act* as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d).

(b) **Exemptions from registration.** The following persons are exempt from the registration requirement of subsection (a):

(1) a broker-dealer without a place of business in this State if its only transactions effected in this State are with:

(A) the issuer of the securities involved in the transactions;

(B) a ~~person~~ broker-dealer registered as a ~~broker-dealer~~ under this *act* or not required to be registered as a broker-dealer under this *act*;

(C) an institutional investor;

(D) a nonaffiliated federal covered investment adviser with investments under management in excess of \$100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;

(E) a bona fide preexisting customer whose principal place of residence is not in this State and the ~~person~~ broker-dealer is registered as a broker-dealer under the Securities Exchange Act of 1934 or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities act of the State in which the customer maintains a principal place of residence;

(F) a bona fide preexisting customer whose principal place of residence is in this State but was not present in this State when the customer relationship was established, if:

(i) the broker-dealer is registered under the Securities Exchange Act of 1934 or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities laws of the State in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(ii) within 45 days after the customer's first transaction in this State, the person files an application for registration as a broker-dealer in this State and a further transaction is not effected more than 75 days after the date on which the application is filed, or, if earlier, the date on which the administrator notifies the person that the administrator has denied the application for registration or has stayed the pendency of the application for good cause;

(G) not more than three customers in this State during the previous 12 months, in addition to those customers specified in subparagraphs (A) through (F) and under subparagraph (H), if the broker-dealer is registered under the Securities Exchange Act of 1934 or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities act of the State in which the broker-dealer has its principal place of business; and

(H) any other person exempted by rule adopted or order issued under this *act*; and

(2) a person that deals solely in United States government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision.

(c) **Limits on employment or association.** It is unlawful for a broker-dealer, or for an issuer engaged in offering, offering to purchase, purchasing, or selling securities in this State, directly or indirectly, to employ or associate with an individual to engage in an activity related to securities transactions in this State if the registration of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser, or a federal covered investment adviser by an order of the administrator under this *act*, the Securities and Exchange Commission, or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer did not know and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar. Upon request from a broker-dealer or issuer and for good cause, an order under this *act* may modify or waive,

in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

(d) **Foreign transactions.** A rule adopted or order issued under this *act* may permit:

(1) a broker-dealer that is registered in Canada or other foreign jurisdiction and that does not have a place of business in this State to effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by:

(A) an individual from Canada or other foreign jurisdiction who is temporarily present in this State and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(B) an individual from Canada or other foreign jurisdiction who is present in this State and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(C) an individual who is present in this State, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

(2) an agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this State as permitted for a broker-dealer described in paragraph (1).

SECTION 19 ~~402.~~ AGENT REGISTRATION REQUIREMENT AND EXEMPTIONS.

(a) **Registration requirement.** It is unlawful for an individual to transact business in this State as an agent unless the individual is registered under this *act* as an agent or is exempt from registration as an agent under subsection (b).

(b) **Exemptions from registration.** The following individuals are exempt from the registration requirement of subsection (a):

(1) an individual who represents a broker-dealer in effecting transactions in this State limited to those described in Section 15(h)(2) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78(o)(2));

(2) an individual who represents a broker-dealer that is exempt under Section ~~401(b)~~ ~~or (d)~~ 18(b) or (d), and amendments thereto;

(3) an individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries, and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(4) an individual who represents an issuer and who effects transactions in the issuer's securities exempted by Section ~~202 7,~~ and amendments thereto, other than Section ~~202(11) and (14)~~ 7(11) and (14), and amendments thereto;

(5) an individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, but an individual who effects transactions in a federal covered security under Section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(3) or 77r(b)(4)(D)) is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(6) an individual who represents a broker-dealer registered in this State under Section ~~401(a)~~ 18(a), and amendments thereto, or exempt from registration under Section ~~401(b)~~ 18(b), and amendments thereto, in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of \$100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;

(7) an individual who represents an issuer in connection with the purchase of the issuer's own securities;

(8) an individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

(9) any other individual exempted by rule adopted or order issued under this *act*.

(c) **Registration effective only while employed or associated.** The registration of an agent is effective only while the agent is employed by or associated with a broker-dealer registered under this *act* or an issuer that is offering, selling, or purchasing its securities in this State.

(d) **Limit on employment or association.** It is unlawful for a broker-dealer, or an issuer engaged in offering, selling, or purchasing securities in this State, to employ or associate with an agent who transacts business in this State on behalf of broker-dealers or issuers unless the agent is registered under subsection (a) or exempt from registration under subsection (b).

(e) **Limit on affiliations.** An individual may not act as an agent for more than one broker-dealer or one issuer at a time, unless the broker-dealer or the issuer for which the agent acts are affiliated by direct or indirect common control or are authorized by rule or order under this *act*.

SECTION 20 ~~403.~~ INVESTMENT ADVISER REGISTRATION REQUIREMENT AND EXEMPTIONS.

(a) **Registration requirement.** It is unlawful for a person to transact business in this State as an investment adviser unless the person is registered under this *act* as an investment adviser or is exempt from registration as an investment adviser under subsection (b).

(b) **Exemptions from registration.** The following persons are exempt from the registration requirement of subsection (a):

(1) a person without a place of business in this State that is registered under the securities act of the State in which the person has its principal place of business if its only clients in this State are:

(A) federal covered investment advisers, investment advisers registered under this *act*, or broker-dealers registered under this *act*;

(B) institutional investors;

(C) bona fide preexisting clients whose principal places of residence are not in this State if the investment adviser is registered under the securities act of the State in which the clients maintain principal places of residence; or

(D) any other client exempted by rule adopted or order issued under this *act*;

(2) a person without a place of business in this State if the person has had, during the preceding 12 months, not more than five clients that are resident in this State in addition to those specified under paragraph (1); or

(3) any other person exempted by rule adopted or order issued under this *act*.

(c) **Limits on employment or association.** It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this State if the registration of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser, or broker-dealer by an order under this *act*, the Securities and Exchange Commission, or a self-regulatory organization, unless the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar. Upon request from the investment adviser and for good cause, the administrator, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

(d) **Investment adviser contact person registration required.** It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this *act* as an investment adviser contact person who transacts business in this State on behalf of the investment adviser unless the individual is registered under Section ~~404(a)~~ 21(a), and amendments thereto, or is exempt from registration under Section ~~404(b)~~ 21(b), and amendments thereto.

SECTION 21 ~~404. INVESTMENT ADVISER CONTACT PERSON REGISTRATION REQUIREMENT AND EXEMPTIONS.~~

(a) **Registration requirement.** It is unlawful for an individual to transact business in this State as an investment adviser contact person unless the individual is registered under this *act* as an investment adviser contact person or is exempt from registration as an investment adviser contact person under subsection (b).

(b) **Exemptions from registration.** The following individuals are exempt from the registration requirement of subsection (a):

(1) an individual who is exclusively employed by or associated with an investment adviser that is exempt from registration under Section ~~403(b)~~ 20(b), and amendments thereto, or a federal covered investment adviser that is excluded from the notice filing requirements of Section ~~405~~ 22, and amendments thereto; and

(2) any other individual exempted by rule adopted or order issued under this *act*.

(c) **Registration effective only while employed or associated.** The registration of an investment adviser contact person is not effective while the investment adviser contact person is not employed by or associated with an investment adviser registered under this *act* or a federal covered investment adviser that has made or is required to make a notice filing under Section ~~405~~ 22, and amendments thereto.

(d) **Limit on affiliations.** An individual may transact business as an investment adviser contact person for more than one investment adviser or federal covered investment adviser unless a rule adopted or order issued under this *act* prohibits or limits an individual from acting as an investment adviser contact person for more than one investment adviser or federal covered investment adviser.

(e) **Limits on employment or association.** It is unlawful for an individual acting as an investment adviser contact person, directly or indirectly, to conduct business in this State on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser contact person is suspended or revoked or the individual is barred from employment or association with an investment

adviser or a federal covered investment adviser by an order under this *act*, the Securities and Exchange Commission, or a self-regulatory organization. Upon request from a federal covered investment adviser and for good cause, the administrator, by order issued, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

(f) **Referral fees.** An investment adviser registered under this *act*, a federal covered investment adviser that has filed a notice under Section 405 22, and amendments thereto, or a broker-dealer registered under this *act* is not required to employ or associate with an individual as an investment adviser contact person if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this *act*, a federal covered investment adviser who has filed a notice under Section 405 22, and amendments thereto, or a broker-dealer registered under this *act* with which the individual is employed or associated as an investment adviser contact person.

~~SECTION 22 405. FEDERAL COVERED INVESTMENT ADVISER NOTICE FILING REQUIREMENT.~~

(a) **Notice filing requirement.** Except with respect to a federal covered investment adviser described in subsection (b), it is unlawful for a federal covered investment adviser to transact business in this State as a federal covered investment adviser unless the federal covered investment adviser complies with subsection (c).

(b) **Notice filing requirement not required.** The following federal covered investment advisers are not required to comply with subsection (c):

(1) a federal covered investment adviser without a place of business in this State if its only clients in this State are:

(A) federal covered investment advisers, investment advisers registered under this *act*, and broker-dealers registered under this *act*;

(B) institutional investors;

(C) bona fide preexisting clients whose principal places of residence are not in this State; or

(D) other clients specified by rule adopted or order issued under this *act*;

(2) a federal covered investment adviser without a place of business in this State if ~~the person~~ it has had, during the preceding 12 months, not more than five clients that are resident in this State in addition to those specified under paragraph (1); and

(3) any other person excluded by rule adopted or order issued under this *act*.

(c) **Notice filing procedure.** A person acting as a federal covered investment adviser, not excluded under subsection (b), shall file a notice, a consent to service of process complying with Section 611 50, and amendments thereto, and such records as have been filed with the Securities and Exchange Commission under the Investment Advisers Act of 1940 required by rule adopted or order issued under this *act* and pay the fees specified in Section 410(e) 27(e), and amendments thereto.

(d) **Effectiveness of filing.** The notice under subsection (c) becomes effective upon its filing, and shall expire on December 31 each year, unless renewed.

~~SECTION 23 406. REGISTRATION BY BROKER-DEALER, AGENT, INVESTMENT ADVISER, AND INVESTMENT ADVISER CONTACT PERSON.~~

(a) **Application for initial registration.** A person shall register as a broker-dealer, agent, investment adviser, or investment adviser contact person by filing an application and a consent to service of process complying with Section ~~611~~ 50, and amendments thereto, and paying the fee specified in Section ~~410~~ 27, and amendments thereto, and any reasonable fees charged by the designee of the administrator for processing the filing. The application must contain:

- (1) the information or record required for the filing of a uniform application; and
- (2) upon request by the administrator, any other financial or other information or record that the administrator determines is appropriate.

(b) **Amendment.** If the information or record contained in an application filed under subsection (a) is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) **Effectiveness of registration.** If an order is not in effect and a proceeding is not pending under section ~~412~~ 29, and amendments thereto, registration becomes effective at noon on the 45th day after a completed application is filed, unless the registration is denied or the administrator has given written notice of deficiencies that are unresolved and that would constitute grounds for denial under section 29, and amendments thereto. A rule adopted or order issued under this *act* may set an earlier effective date or may defer the effective date until noon on the 45th day after the filing of any amendment completing the application.

(d) **Registration renewal.** A registration is effective until midnight on December 31 of the year for which the application for registration is filed. Unless an order is in effect under Section ~~412~~ 29, and amendments thereto, a registration may be automatically renewed each year by filing such records as are required by rule adopted or order issued under this *act*, by paying the fee specified in Section ~~410~~ 27, and amendments thereto, and by paying costs charged by the designee of the administrator for processing the filings.

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

SECTION 24 ~~407. SUCCESSION AND CHANGE IN REGISTRATION OF BROKER-DEALER OR INVESTMENT ADVISER.~~

(a) **Succession.** A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for registration pursuant to Section ~~401 or 403~~ 18 or 20, and amendments thereto, or a notice pursuant to Section ~~405~~ 22, and amendments thereto, for the unexpired portion of the current registration or notice filing.

(b) **Organizational change.** A broker-dealer or investment adviser that changes its form of organization or State of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a

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

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

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

SECTION 25 ~~408. TERMINATION OF EMPLOYMENT OR ASSOCIATION OF AGENT AND INVESTMENT ADVISER CONTACT PERSON AND TRANSFER OF EMPLOYMENT OR ASSOCIATION.~~

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

(b) **Transfer of employment or association.** If an agent registered under this *act* terminates employment by or association with a broker-dealer registered under this *act* and begins employment by or association with another broker-dealer registered under this *act*; or if an investment adviser contact person registered under this *act* terminates employment by or association with an investment adviser registered under this *act*; or, if a federal covered investment adviser, who has filed a notice under Section 405 22, and amendments thereto, and begins employment by or association with another investment adviser registered under this *act*; or if a federal covered investment adviser, who has filed a notice under Section 405 22, and amendments thereto, then upon the filing by or on behalf of the registrant, within 30 days after the termination, of an application for registration that complies with the requirement of Section 406(a) 23(a), and amendments thereto, and payment of the filing fee required under Section 410 27, and amendments thereto, the registration of the agent or investment adviser contact person; is:

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

(2) temporarily effective as of the date of the completed filing, if the agent's Central Registration Depository record or successor record or the investment adviser contact

person's Investment Adviser Registration Depository record or successor record contains a new or amended disciplinary disclosure within the preceding 12 months.

(c) ***Withdrawal of temporary registration.*** The administrator may withdraw a temporary registration if there are or were grounds for discipline as specified in Section ~~412~~ 29, and amendments thereto, and the administrator does so within 30 days after the filing of the application. If the administrator does not withdraw the temporary registration within the 30 day period, registration becomes automatically effective on the 31st day after filing.

(d) ***Power to prevent temporary registration.*** The administrator may prevent the effectiveness of a transfer of an agent or investment adviser contact person under subsection (b)(1) or (2) based on the public interest and the protection of investors.

(e) ***Termination of registration or application for registration.*** The administrator may cancel a registration or deny an application for registration in accordance with the provisions of the Kansas administrative procedure act if the administrator determines finds that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser, or investment adviser contact person, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator, or guardian, or cannot reasonably be located, ~~a rule adopted or order issued under this act may require the registration be canceled or terminated or the application denied.~~ The administrator may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive.

~~SECTION 26 409. WITHDRAWAL OF REGISTRATION OF BROKER-DEALER, AGENT, INVESTMENT ADVISER, AND INVESTMENT ADVISER CONTACT PERSON.~~ Withdrawal of registration by a broker-dealer, agent, investment adviser, or investment adviser contact person becomes effective 60 days after the filing of the application to withdraw or within any shorter period as provided by rule adopted or order issued under this *act* unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by rule adopted or order issued under this *act*. The administrator may institute a revocation or suspension proceeding under Section ~~412~~ 29, and amendments thereto, within one year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending.

~~SECTION 27 410. FILING FEES.~~

(a) The administrator shall establish fees by regulation, subject to the following limitations:

~~(a)~~ (1) ***Broker-dealers.*** A person shall pay a fee of *not more than \$300* when initially filing an application for registration as a broker-dealer and a fee of \$[] when filing a renewal of registration as a broker-dealer. If the filing results in a denial or withdrawal, the administrator shall retain \$[] of the fee.

~~(b)~~ (2) ***Agents.*** The fee for an individual is *not more than \$100* when filing an application for registration as an agent, a fee of \$[] when filing a renewal of registration as an agent, and a fee of \$[] when filing for a change of registration as an

agent. If the filing results in a denial or withdrawal, the administrator shall retain \$[] of the fee.

(e) (3) **Investment advisers.** A person shall pay a fee of *not more than* \$300 when filing an application for registration as an investment adviser and a fee of \$[] when filing a renewal of registration as an investment adviser. If the filing results in a denial or withdrawal, the administrator shall retain \$[] of the fee.

(d) (4) **Investment adviser contact persons.** The fee for an individual is *not more than* \$100 when filing an application for registration as an investment adviser contact person, a fee of \$[] when filing a renewal of registration as an investment adviser contact person, and a fee of \$[] when filing a change of registration as an investment adviser contact person. If the filing results in a denial or withdrawal, the administrator shall retain \$[] of the fee.

(e) (5) **Federal covered investment advisers.** A federal covered investment adviser required to file a notice under Section 405 22, *and amendments thereto*, shall pay an initial fee of \$[] and an annual notice fee of *not more than* \$300.

(f) (b) **Payment.** A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this *act*.

~~(g) [Dual agent/investment adviser contact person.] An investment adviser contact person who is registered as an agent under Section 402 and who represents a person that is both registered as a broker-dealer under Section 401 and registered as an investment adviser under Section 403 or required as a federal covered investment adviser to make a notice filing under Section 405 is not required to pay an initial or annual registration fee for registration as an investment adviser contact person.]~~

SECTION 28 411. ~~POSTREGISTRATION REQUIREMENTS.~~

(a) **Financial requirements.** Subject to Section 15(h) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-22), a rule adopted or order issued under this *act* may establish minimum financial requirements for broker-dealers registered or required to be registered under this *act* and investment advisers registered or required to be registered under this *act*.

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

(c) **Recordkeeping.** Subject to Section 15(h) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-22):

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

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

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

(d) ***Audits or inspections.*** ~~The records of a broker-dealer registered or required to be registered under this *act* and of an investment adviser registered or required to be registered under this *act*~~ every person issuing or guaranteeing any securities subject to the provisions of this Act and of every broker-dealer, agent, investment adviser or investment adviser contact person registered or required to be registered under this Act are subject to such reasonable periodic, special, or other audits or inspections by a contact person of the administrator, within or without this State, as the administrator considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The administrator may copy, and remove for audit or inspection copies of, all records the administrator reasonably considers necessary or appropriate to conduct the audit or inspection. The administrator may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) ***Custody and discretionary authority bond or insurance.*** Subject to Section 15(h) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78o(h)) or Section 222 of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-22), a rule adopted or order issued under this *act* may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security ~~in an amount not to exceed \$[]~~. The administrator may determine the requirements of the insurance, bond, or other satisfactory form of security. Insurance or a bond or other satisfactory form of security may not be required of a broker-dealer registered under this *act* whose net capital exceeds, or of an investment adviser registered under this *act* whose minimum financial requirements exceed, the amounts required by rule or order under this *act*. The insurance, bond, or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond, or other satisfactory form of security if instituted within the time limitations in Section ~~509(j)(2)~~ 38(j)(2), *and amendments thereto*.

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

(g) ***Investment adviser brochure rule.*** With respect to an investment adviser registered or required to be registered under this *act*, a rule adopted or order issued under this *act*

may require that information or other record be furnished or disseminated to clients or prospective clients in this State as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(h) **Continuing education.** A rule adopted or order issued under this *act* may require an individual registered under Section ~~402 or 404~~ 19 or 21, and amendments thereto, to participate in a continuing education program approved by the Securities and Exchange Commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or order issued under this *act* may require continuing education for an individual registered under Section ~~404~~ 21, and amendments thereto.

SECTION 29 412. DENIAL, REVOCATION, SUSPENSION, WITHDRAWAL, RESTRICTION, CONDITION, OR LIMITATION OF REGISTRATION.

(a) **Disciplinary conditions-applicants.** ~~If the administrator finds that the order is in the public interest and subsection (d) authorizes the action,~~ An order issued under this *act* may deny an application, or may condition or limit registration: ~~(1) of an applicant to be a broker-dealer, agent, investment adviser, or investment adviser contact person if the administrator finds that the order is in the public interest and that there is a ground for discipline under subsection (d) against the applicant or, and (2) if the applicant is a broker-dealer or investment adviser, of against any partner, officer, director, person having a similar status or performing similar functions, or person directly or indirectly controlling the broker-dealer or investment adviser.~~

(b) **Disciplinary conditions – registrants.** ~~If the administrator finds that the order is in the public interest and subsection (d) authorizes the action~~ An order issued under this *act* may revoke, suspend, condition, or limit the registration of a registrant if the administrator finds that the order is in the public interest and that there is a ground for discipline under subsection (d) against the registrant or, and if the registrant is a broker-dealer or investment adviser, against any partner, officer, or director, any person having a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser. However, the administrator

(1) may not institute a revocation or suspension proceeding under this subsection based on an order issued by another State that is reported to the administrator or designee later than one year after the date of the order on which it is based; and

(2) under subsection (d)(5)(A) and (B), may not issue an order on the basis of an order under the state securities act of another State unless the other order was based on conduct for which subsection (d) would authorize the action had the conduct occurred in this State.

(c) **Disciplinary penalties – registrants.** ~~If the administrator finds that the order is in the public interest and that there is a ground for discipline under subsection (d)(1) through (6), (8), (9), (10), or (12) and or (13) authorizes the action, an order under this act may censure, impose a bar, or impose a civil penalty in an amount not to exceed a maximum of \$[] for a single violation or \$[] for several violations on a registrant and against a registrant or, if the registrant is a broker-dealer or investment adviser, against any partner, officer, or director, any person having similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser, then the administrator may enter an order against the registrant containing one or more of the following sanctions or remedies:~~

- (1) A censure;
- (2) a bar or suspension from association with a broker-dealer or investment adviser registered in this state;
- (3) a civil penalty up to \$25,000 for each violation. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed \$15,000 for each such violation. The total penalty against a person shall not exceed \$1,000,000;
- (4) an order requiring the registrant to pay restitution for any loss or disgorge any profits arising from a violation, including, in the administrator's discretion, the assessment of interest from the date of the violation at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;
- (5) an order charging the registrant with the actual cost of an investigation or proceeding; or
- (6) an order requiring the registrant to cease and desist from any action that constitutes a ground for discipline, or to take other action necessary or appropriate to comply with this act.

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

- (1) has filed an application for registration in this State under this *act* or the predecessor act within the previous 10 years, which, as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;
- (2) willfully violated or willfully failed to comply with this *act* or the predecessor act or a rule adopted or order issued under this *act* or the predecessor act within the previous 10 years;
- (3) has been convicted of a felony or within the previous 10 years has been convicted of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;
- (4) is enjoined or restrained by a court of competent jurisdiction in an action instituted by the administrator under this *act* or the predecessor act, a State, the Securities and Exchange Commission, or the United States from engaging in or continuing an act, practice, or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;
- (5) is the subject of an order, issued after notice and opportunity for hearing by:
 - (A) the securities, depository institution, insurance, or other financial services regulator of a State or by the Securities and Exchange Commission or other federal agency denying, revoking, barring, or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser contact person;

(B) the securities regulator of a State or by the Securities and Exchange Commission against a broker-dealer, agent, investment adviser, investment adviser contact person, or federal covered investment adviser;

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

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

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

(F) a depository institution regulator suspending or barring a person from the depository institution business;

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

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

(8) refuses to allow or otherwise impedes the administrator from conducting an audit or inspection under Section ~~411(d)~~ 28(d), *and amendments thereto*, ~~or~~ refuses access to a registrant's office to conduct an audit or inspection under Section ~~411(d)~~ 28(d), *and amendments thereto*, fails to keep or maintain sufficient records to permit an audit disclosing the condition of the registrant's business, or fails willfully and without cause to comply with a request for information by the administrator or person designated by the administrator in conducting investigations or examinations under this act;

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

(10) has not paid the proper filing fee within 30 days after having been notified by the administrator of a deficiency, but the administrator shall vacate an order under this paragraph when the deficiency is corrected;

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

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

(B) to have been the subject of an order of a securities regulator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of

securities as a broker-dealer, agent, investment adviser, investment adviser contact person, or similar person; or

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

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

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

(14) is not qualified on the basis of factors such as training, experience, and knowledge of the securities business. However, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser contact person, a denial order may not be based on this paragraph if the individual has successfully completed all examinations required by subsection (e). The administrator may require an applicant for registration under Section ~~402 or 404~~ 19 or 21, and amendments thereto, who has not been registered in a State within the two years preceding the filing of an application in this State to successfully complete an examination.

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

(f) **Summary process.** ~~The administrator may~~ In accordance with the Kansas administrative procedure act, the administrator may use summary or emergency proceedings to suspend or deny an application ~~summarily~~; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil penalty or cease and desist order on a registrant before final determination of an administrative proceeding. ~~Upon the issuance of an order, the administrator shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within 15 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing.~~ If a hearing is not requested and none is ordered by the administrator within 30 days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

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

(1) ~~(A)~~ appropriate notice to the applicant or registrant;

(2) ~~(B)~~ opportunity for hearing; and

(3) ~~(C)~~ findings of fact and conclusions of law in a record.

(2) Proceedings under this subsection shall be conducted *in accordance with the Kansas administrative procedures act*.

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

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

SECTION 30 ~~501. GENERAL SECURITIES FRAUD.~~ It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) to employ a device, scheme, or artifice to defraud;
- (2) to make an untrue statement of a material fact, or to omit to state a material fact necessary in order to make ~~the~~ a statement made, in the light of the circumstances under which it is made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

SECTION 31 ~~502. PROHIBITED CONDUCT IN PROVIDING INVESTMENT ADVICE.~~

(a) **Fraud in providing investment advice.** It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

- (1) to employ a device, scheme, or artifice to defraud another person; or
- (2) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

(b) **Rules defining fraud.** A rule adopted under this *act* may define an act, practice, or course of business of an investment adviser or an investment adviser contact person, other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive, or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser contact persons, other than supervised persons of a federal covered investment adviser, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive, or manipulative.

(c) **Rules specifying contents of advisory contract.** A rule adopted under this *act* may specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser.

SECTION 32 ~~503. EVIDENTIARY BURDEN.~~

(a) **Civil.** In a civil action or administrative proceeding under this *act*, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.

(b) *Criminal.* In a criminal proceeding under this *act*, a person claiming an exemption, exception, preemption, or exclusion has the burden of going forward with evidence of the claim.

SECTION 33 ~~504. FILING OF SALES AND ADVERTISING LITERATURE.~~

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

(b) *Excluded communications.* This section does not apply to sales and advertising literature specified in subsection (a) which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by Section 201, 202, or 203 6, 7, or 8, and amendments thereto, except as required pursuant to Section 201(7) for a notice filing under section 201, 202, or 203 6, 7, or 8, and amendments thereto.

SECTION 34 ~~505. FALSE OR MISLEADING FILINGS; COERCION; OBSTRUCTION.~~

(a) It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this *act*, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

(b) It is unlawful for any person to intentionally influence, coerce, manipulate or mislead any person in connection with financial statements or appraisals to be used in the offer, sale or purchase of securities for the purpose of rendering such financial statements or appraisals materially misleading.

(c) It is unlawful for any person to:

(1) Alter, destroy, shred, mutilate, conceal, cover up or falsify any record with the intent to impede, obstruct or influence any investigation by the administrator or the administrator's designee;

(2) alter, destroy, shred, mutilate or conceal a record with the intent to impair the object's integrity or availability for use in a proceeding before the administrator or a proceeding brought by the administrator; or

(3) take action harmful to a person with the intent to retaliate, including, but not limited to, interference with lawful employment of such person, for providing truthful information relating to a violation of this act.

SECTION 35 ~~506. MISREPRESENTATIONS CONCERNING REGISTRATION OR EXEMPTION.~~ The filing of an application for registration, a registration statement, a notice filing under this *act*, the registration of a person, the notice filing by a person, or the registration of a security under this *act* does not constitute a finding by the administrator that a record filed under this *act* is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or

exclusion for a security or a transaction does not mean that the administrator has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction. It is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client a representation inconsistent with this section.

SECTION 36 ~~507. QUALIFIED IMMUNITY.~~ A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser contact person is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser contact person for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the Securities and Exchange Commission, or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

SECTION 37 ~~508. CRIMINAL PENALTIES; STATUTE OF LIMITATIONS.~~

(a) *Criminal penalties.* A person that willfully violates

(1) Except as provided in subsections (a)(2) through (a)(4), a conviction for an intentional violation of this act, or a rule adopted or order issued under this act, except Section 504, 33, and amendments thereto, ~~[filing of sales literature]~~ or the notice filing requirements of Section ~~302 12~~~~[federal covered securities]~~ or 405 22, and amendments thereto, ~~[federal covered advisers]~~, or that willfully violates Section 505 ~~[false filing]~~ knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than \$[] or imprisoned not more than [] years, or both, is a severity level 7, nonperson felony. An individual convicted of violating a rule or order under this act may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

(2) *A conviction for an intentional violation of section ~~501 or 502~~ 30 or 31, and amendments thereto, is:*

(A) *a severity level 4, nonperson felony if the violation resulted in a loss of \$100,000 or more;*

(B) *a severity level 5, nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or*

(C) *a severity level 7, nonperson felony if the violation resulted in a loss of less than \$25,000.*

(3) *A conviction for an intentional violation of section ~~301, 401(a), 401(e), 402(a), 402(d), 403(a), 403(e), 403(d), 404(a), or 404(e)~~ 11, 18(a), 18(c), 19(a), 19(d), 20(a), 20(c), 20(d), 21(a), or 21(e), and amendments thereto, is:*

(A) *a severity level 5, nonperson felony if the violation resulted in a loss of \$100,000 or more;*

(B) *a severity level 6, nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or*

(C) *a severity level 7, nonperson felony if the violation resulted in a loss of less than \$25,000.*

(4) A conviction for an intentional violation of section ~~505 or 506~~ 34 or 35, and amendments thereto, is a severity level 8, nonperson felony.

(5) Any violation of section ~~301, 401(a), 401(e), 402(a), 402(d), 403(a), 403(e), 403(d), 404(a), 404(e), 501 or 502~~ 11, 18(a), 18(c), 19(a), 19(d), 20(a), 20(c), 20(d), 21(a), 21(e), 30 or 31, and amendments thereto, resulting in a loss of \$25,000 or more shall have a presumptive sentence of imprisonment regardless of its location on the sentencing grid block.

(b) **Statute of Limitations.** Except as provided by subsection (9) of K.S.A. 21-3106, and amendments thereto, no prosecution for any crime under this act may be commenced more than 10 years after the alleged violation if the victim is the Kansas public employees retirement system and no prosecution for any other crime under this act may be commenced more than five years after the alleged violation. A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution, except that no prosecution shall be deemed to have been commenced if the warrant so issued is not executed without unreasonable delay.

~~(b) (c) Criminal reference not required.~~ The ~~[Attorney General or the proper prosecuting attorney]~~ with or without a reference from the administrator, may institute ~~criminal proceedings under this act.~~ The administrator may refer such evidence as may be available concerning violations of this act or of any rule and regulation or order hereunder to the attorney general or the proper county or district attorney, who may in the prosecutor's discretion, with or without such a reference, institute the appropriate criminal proceedings under this act. Upon receipt of such reference, the attorney general or the county attorney or district attorney may request that a duly employed attorney of the administrator prosecute or assist in the prosecution of such violation or violations on behalf of the state. Upon approval of the administrator, such employee shall be appointed a special prosecutor for the attorney general or the county attorney or district attorney to serve without compensation from the attorney general or the county attorney or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for assistant attorneys general or assistant county or district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the attorney general or the county attorney or district attorney. If an attorney employed by the administrator acts as a special prosecutor, the administrator may pay extradition and witness expenses associated with the case.

~~(e) (d) No limitation on other criminal enforcement.~~ This act does not limit the power of this State to punish a person for conduct that constitutes a crime under other laws of this State.

SECTION 38 ~~509.~~ CIVIL LIABILITY.

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

(b) **Liability of seller to purchaser.** A person is liable to the purchaser if the person sells a security in violation of Section ~~301~~ 11, and amendments thereto, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make ~~the~~ a statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not

sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest from the date of the purchase *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

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

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest from the date of the purchase *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, costs, and reasonable attorneys' fees determined by the court.

(c) ***Liability of purchaser to seller.*** A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

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

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

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest from the date of the sale of the security *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, costs, and reasonable attorneys' fees determined by the court.

(d) ***Liability of unregistered broker-dealer and agent.*** A person acting as a broker-dealer or agent that sells or buys a security in violation of Section ~~401(a), 402(a), or 506 18(a), 19(a), or 35~~, and amendments thereto, is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3), or, if a seller, for a remedy as specified in subsections (c)(1) through (3).

(e) ***Liability of unregistered investment adviser and investment adviser contact person.*** A person acting as an investment adviser or investment adviser contact person

that provides investment advice for compensation in violation of Section ~~403(a), 404(a), or 506~~ 20(a), 21(a), or 35, and amendments thereto, is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest from the date of payment *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, costs, and reasonable attorneys' fees determined by the court.

(f) **Liability for investment advice.** A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest from the date of the fraudulent conduct *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

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

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

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

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

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

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

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

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

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

(1) under subsection (b) for violation of Section ~~301~~ 11, *and amendments thereto*, or under subsection (d) or (e), unless the action is instituted within one year after the violation occurred; or

(2) under subsection (b), other than for violation of Section ~~301~~ 11, *and amendments thereto*, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation ~~and~~ or five years after the violation.

(k) **No enforcement of violative contract.** A person that has made, or has engaged in the performance of, a contract in violation of this *act* or a rule adopted or order issued under this *act*, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this *act*, may not base an action on the contract.

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

(m) **Survival of other rights or remedies.** The rights and remedies provided by this *act* are in addition to any other rights or remedies that may exist, but this *act* does not create a cause of action not specified in this section or Section ~~411(e)~~ 28(e), *and amendments thereto*.

SECTION 39 ~~510. RESCISSION OFFERS.~~ A purchaser, seller, or recipient of investment advice may not maintain an action under Section ~~509~~ 38, *and amendments thereto*, if:

(1) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(A) an offer stating the respect in which liability under Section ~~509~~ 38, *and amendments thereto*, may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this *act* to be furnished to that person at the time of the purchase, sale, or investment advice;

(B) if the basis for relief under this section may have been a violation of Section ~~509(b)~~ 38(b), *and amendments thereto*, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest from the date of the purchase *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest from the date of the purchase *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto*, in cash equal to the damages computed in the manner provided in this subsection;

(C) if the basis for relief under this section may have been a violation of Section ~~509(e)~~ 38(c), *and amendments thereto*, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest from the date of the sale *at the rate provided for interest on*

judgments by K.S.A. 16-204, and amendments thereto; or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest from the date of the sale at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;

(D) if the basis for relief under this section may have been a violation of Section ~~509(d)~~ 38(d), and amendments thereto; and if the customer is a purchaser, an offer to pay as specified in subparagraph (B); or, if the customer is a seller, an offer to tender or to pay as specified in subparagraph (C);

(E) if the basis for relief under this section may have been a violation of Section ~~509(e)~~ 38(e), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice and interest from the date of payment *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;* or

(F) if the basis for relief under this section may have been a violation of Section ~~509(f)~~ 38(f), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest from the date of the violation causing the loss *at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;*

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

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

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

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

SECTION 40 ~~601.~~ ADMINISTRATION.

(a) **Administration.** ~~The administrator shall administer this act.~~ (1) This act shall be administered by the securities commissioner of Kansas.

(2) *All fees herein provided for shall be collected by the administrator. All salaries and expenses necessarily incurred in the administration of this act shall be paid from the securities act fee fund.*

(3) *The administrator shall remit all moneys received from all fees, charges, deposits or penalties which have been collected under this act or other laws of this state regulating the issuance, sale or disposal of securities or regulating dealers in this state or under the uniform land sales practices act, to the state treasurer at least monthly. Upon receipt of any such remittance, the state treasurer shall deposit the entire amount thereof in the state treasury. In accordance with subsection (a) of K.S.A. 75-3170, and amendments thereto, 20% of each such deposit shall be credited to the state general fund and, except as provided in subsection (d), the balance shall be credited to the securities act fee fund.*

(4) *On the last day of each fiscal year, the director of accounts and reports shall transfer from the securities act fee fund to the state general fund any remaining unencumbered amount in the securities act fee fund exceeding \$50,000 so that the beginning unencumbered balance in the securities act fee fund on the first day of each fiscal year is \$50,000. All expenditures from the securities act fee fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the administrator or by a person or persons designated by the administrator.*

(5) *All amounts transferred from the securities act fee fund to the state general fund under subsection (b) are to reimburse the state general fund for accounting, auditing, budgeting, legal, payroll, personnel and purchasing services and any other governmental services which are performed on behalf of the state agency involved by other state agencies which receive appropriations from the state general fund to provide such services. Such reimbursements are in addition to those authorized by K.S.A. 75-3170a and amendments thereto.*

(b) ~~Unlawful use of records or information~~ Prohibited conduct.

(1) It is unlawful for the administrator or an officer, employee, or designee of the administrator to use for personal benefit or the benefit of others records or other information obtained by or filed with the administrator that are not public under Section ~~607(b)~~ 46(b), and amendments thereto. This act does not authorize the administrator or an officer, employee, or designee of the administrator to disclose the record or information, except in accordance with Section ~~602, 607(e), or 608~~ 41, 46(c), or 47, and amendments thereto.

(2) Neither the administrator nor any employee of the administrator shall be interested as an officer, director, or stockholder in securing any authorization to sell securities under the provisions of this act.

(c) ***No privilege or exemption created or diminished.*** This act does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(d) *Investor education.*

(1) The administrator may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the administrator may collaborate with public and nonprofit organizations with an interest in investor education. The administrator may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives. This subsection does not authorize the administrator to require participation or monetary contributions of a registrant in an investor education program.

~~(e) [The Securities Investor Education and Training Fund.] The Securities Investor Education and Training Fund is created to provide funds for the purposes specified in subsection (d).~~

(2) There is hereby established in the state treasury the investor education fund. Such fund shall be administered by the administrator for the purposes described in subsection (d)(1) and for the education of registrants. Moneys collected as civil penalties under this

act shall be credited to the investor education fund. The administrator may also receive payments designated to be credited to the investor education fund as a condition in settlements of cases arising out of investigations or examinations. All expenditures from the investor education fund, including official hospitality, shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the administrator or by a person or persons designated by the administrator. Two years after the effective date of this act, the administrator shall conduct a review and submit a report to the governor and the legislature concerning the expenditures from the investor education fund and the results achieved from the investor education program.

SECTION 41 602. INVESTIGATIONS AND SUBPOENAS.

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

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

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

(3) publish a record concerning an action, proceeding, or an investigation under, or a violation of, this *act* or a rule adopted or order issued under this *act* if the administrator determines it is necessary or appropriate in the public interest and for the protection of investors.

(4) appoint special investigators to aid in investigations conducted pursuant to this act. Such special investigators shall have authority to make arrests, serve subpoenas and all other process, conduct searches and seizures, store evidence, and carry firearms, concealed or otherwise while investigating violations of this act and to generally enforce all the criminal laws of the state as violations of those laws are encountered by such special investigators. The director of police training at the law enforcement training center is authorized to offer and carry out a special course of instruction for special investigators performing law enforcement duties under authority of this subsection. Such special investigators shall not carry firearms without having first successfully completed such special law enforcement training course.

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

(c) **Procedure and remedies for noncompliance.** If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the administrator under this *act*, the administrator ~~may refer the matter to the Attorney General or the proper attorney, who~~ may apply to any court of competent jurisdiction or a court of another State to enforce compliance. The court may:

- (1) hold the person in contempt;
- (2) order the person to appear before the administrator;
- (3) order the person to testify about the matter under investigation or in question;
- (4) order the production of records;
- (5) grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;
- (6) impose a civil penalty of ~~not less than \$[]~~ and not greater than \$25,000 for each violation; and
- (7) grant any other necessary or appropriate relief.

(d) **Application for relief.** This section does not preclude a person from applying to *any court of competent jurisdiction* or a court of another State for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

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

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

SECTION 42 ~~603. CIVIL ENFORCEMENT.~~

(a) **Civil action instituted by administrator.** If the administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this *act* or a rule adopted or order issued under this *act* or that a

person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this *act* or a rule adopted or order issued under this *act*, the administrator may maintain an action in *any court of competent jurisdiction* to enjoin the act, practice, or course of business and to enforce compliance with this *act* or a rule adopted or order issued under this *act*.

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

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

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

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

(B) ordering the administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) imposing a civil penalty up to \$25,000 for each violation. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the court may impose an additional penalty not to exceed \$15,000 for each such violation. The total penalty against a person shall not exceed \$1,000,000;

(D) an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this *act* or the predecessor act or a rule adopted or order issued under this *act* or the predecessor act; and

~~(D)~~ (E) ordering the payment of prejudgment and postjudgment interest; or

(3) order such other relief as the court considers appropriate.

(c) **No bond required.** The administrator may not be required to post a bond in an action or proceeding under this *act*.

SECTION 43 604. ADMINISTRATIVE ENFORCEMENT.

(a) ~~[Issuance of an order or notice.]~~ **Cease and desist order.** If the administrator determines finds that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this *act* or a rule adopted or order issued under this *act* or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this *act* or a rule adopted or order issued under this *act*, the administrator may:

(1) issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this *act*;

(2) issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under Section ~~401(b)(1)(D) or (F)~~ 18(b)(1)(D) or (F), and amendments thereto, or an investment adviser under Section ~~403(b)(1)(C)~~ 20(b)(1)(C), and amendments thereto; or

(3) issue an order under Section ~~204 9~~, and amendments thereto.

(b) Additional administrative sanctions and remedies. If the administrator finds, by written findings of fact and conclusions of law, that a person has violated this act or a rule adopted or order issued under this act, the administrator, in addition to any other power granted under this act, may enter an order against the person containing one or more of the following sanctions or remedies:

(1) a civil penalty up to \$25,000 for each violation. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed \$15,000 for each such violation. The total penalty against a person shall not exceed \$1,000,000;

(2) a bar or suspension from association with a broker-dealer or investment adviser registered in this state;

(3) an order requiring the person to pay restitution for any loss or disgorge any profits arising from the violation, including, in the administrator's discretion, the assessment of interest from the date of the violation at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto; or

(4) an order charging the person with the actual cost of the investigation or proceeding.

~~(b) [Summary process.]~~

(c) Procedures for orders.

(1) An order under subsection (b) shall not be entered unless the administrator first provides notice and opportunity for hearing in accordance with the provisions of the Kansas administrative procedure act.

(2) An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order ~~and a notice that the order has been entered.~~ The order must include a ~~statement whether the administrator will seek a civil penalty or costs of the investigation,~~ a statement of the reasons for the order, and notice that, ~~within 15 days after receipt of a request in a record from the person, the matter will be scheduled for a hearing upon~~ receipt of a written request the matter will be set for a hearing which shall be conducted in accordance with the provisions of the Kansas administrative procedure act. If a person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(3) An order under subsection (a) may contain a notice of the administrator's intent to seek administrative sanctions or remedies under subsection (b). If the person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after service of the order, the administrator may modify the order to include sanctions or remedies under subsection (b). If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing, shall by written findings of fact and conclusions of law vacate, modify, or make permanent the order, and the administrator may modify the order to include sanctions or remedies under subsection (b).

(c) [**Procedure for final order.**] If a hearing is requested or ordered pursuant to subsection (b), a hearing must be held [pursuant to the state administrative procedure act]. A final order may not be issued unless the administrator makes findings of fact and conclusions of law in a record [in accordance with the state administrative procedure act]. The final order may make final, vacate, or modify the order issued under subsection (a).

(d) [**Civil penalty.**] In a final order under subsection (c), the administrator may impose a civil penalty up to \$[] for a single violation or up to \$[] for more than one violation.

(e) [**Costs.**] In a final order, the administrator may charge the actual cost of an investigation or proceeding for a violation of this *act* or a rule adopted or order issued under this *act*.

(f) (d) **Filing of certified final order with court; effect of filing.** If a petition for judicial review of a final order is not filed in accordance with Section 609 48, and amendments thereto, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) (e) **Enforcement by court; further civil penalty.** If a person does not comply with an order under this section, the administrator may petition a court of competent jurisdiction to enforce the order. The court may not require the administrator to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than \$[] but not greater than \$25,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances.

SECTION 44 605. RULES, FORMS, ORDERS, INTERPRETATIVE OPINIONS, AND HEARINGS.

(a) **Issuance and adoption of forms, orders, and rules.** The administrator may:

(1) issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this *act* and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records;

(2) by rule, define terms, whether or not used in this *act*, but those definitions may not be inconsistent with this *act*; and

(3) by rule, classify securities, persons, and transactions and adopt different requirements for different classes.

(b) **Findings and cooperation.** Under this *act*, a rule or form may not be adopted or amended, or an order issued or amended, unless the administrator finds that the rule, form, order, or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this *act*. In adopting, amending, and repealing rules and forms, Section 608 47, and amendments thereto, applies in order to achieve uniformity among the States and coordination with federal laws in the form and content of registration statements, applications, reports, and other records, including the adoption of uniform rules, forms, and procedures.

(c) **Financial statements.** Subject to Section 15(h) of the Securities Exchange Act and Section 222 of the Investment Advisers Act of 1940, the administrator may require that a financial statement filed under this *act* be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or order issued under this *act*. A rule adopted or order issued under this *act* may establish:

(1) subject to Section 15(h) of the Securities Exchange Act and Section 222 of the Investment Advisers Act of 1940, the form and content of financial statements required under this *act*;

(2) whether unconsolidated financial statements must be filed; and

(3) whether required financial statements must be audited by an independent certified public accountant.

(d) **Interpretative opinions.** The administrator may provide interpretative opinions or issue determinations that the administrator will not institute a proceeding or an action under this *act* against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this *act*. A rule adopted or order issued under this *act* may establish a reasonable charge for interpretative opinions or determinations that the administrator will not institute an action or a proceeding under this *act*.

(e) **Effect of compliance.** ~~A penalty under this *act* may not be imposed for, and liability does not arise from conduct that is engaged in or omitted in good faith believing it conforms to a rule, form, or order of the administrator under this *act*.~~ No provision of this act imposing any liability applies to any act done or omitted in good faith in conformity with any rules and regulations, form, or order of the commissioner, notwithstanding that the rules and regulations, form or order may later be amended, revoked or rescinded or be determined by judicial or other authority to be invalid for any reason.

(f) **Presumption for public hearings.** A hearing in an administrative proceeding under this *act* must be conducted in public unless the administrator for good cause consistent with this *act* determines that the hearing will not be so conducted.

SECTION 45 606. ADMINISTRATIVE FILES AND OPINIONS.

(a) **Public register of filings.** The administrator shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser contact persons; notice filings by federal covered investment advisers that are or have been effective under this *act* or the predecessor act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this *act* or the predecessor act; and interpretative opinions or no action determinations issued under this *act*.

(b) **Public availability.** The administrator shall make all rules, forms, interpretative opinions, and orders available to the public.

(c) **Copies of public records.** The administrator shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted under this *act* may establish a reasonable charge for furnishing the record or certification. A copy of the record certified or a certificate by the

administrator of a record's nonexistence is prima facie evidence of a record or its nonexistence.

SECTION 46 ~~607. PUBLIC RECORDS; CONFIDENTIALITY.~~

(a) **Presumption of public records.** Except as otherwise provided in subsection (b), records obtained by the administrator or filed under this *act*, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination in accordance with the open records act.

(b) **Nonpublic records.** The following records are not public records and are not available for public examination under subsection (a):

(1) a record obtained by the administrator in connection with an audit or inspection under Section ~~411(d)~~ 28(d), and amendments thereto, or an investigation under Section ~~602~~ 41, and amendments thereto;

(2) a part of a record filed in connection with a registration statement under Sections ~~301 and 303 through 305~~ 11 and 13 through 15, and amendments thereto, or a record under Section ~~411(d)~~ 28(d), and amendments thereto, that contains trade secrets or confidential information if the person filing the registration statement or report has asserted a claim of confidentiality or privilege that is authorized by law;

(3) a record that is not required to be provided to the administrator or filed under this *act* and is provided to the administrator only on the condition that the record will not be subject to public examination or disclosure;

(4) a nonpublic record received from a person specified in Section ~~608(a)~~ 47(a), and amendments thereto; and

(5) any social security number, residential address unless used as a business address, and residential telephone number contained in a record that is filed~~]; and~~

~~(6) a record obtained by the administrator through a designee of the administrator that a rule or order under this *act* determines has been:~~

~~(A) expunged from the administrator's records by the designee; or~~

~~(B) determined to be nonpublic or nondisclosable by that designee if the administrator finds the determination to be in the public interest and for the protection of investors].~~

(c) **Administrator discretion to disclose.** If disclosure is for the purpose of a civil, administrative, or criminal investigation, action, or proceeding or to a person specified in Section ~~608(a)~~ 47(a), and amendments thereto, the administrator may disclose a record obtained in connection with an audit or inspection under Section ~~411(d)~~ 28(d), and amendments thereto, or a record obtained in connection with an investigation under Section ~~602~~ 41, and amendments thereto.

SECTION 47 ~~608. UNIFORMITY AND COOPERATION WITH OTHER AGENCIES.~~

(a) **Objective of uniformity.** The administrator ~~shall, in its discretion,~~ may cooperate, coordinate, consult, and, subject to Section ~~607~~ 46, and amendments thereto, share records and information with the securities regulator of another State, Canada, a Canadian province or territory, a foreign jurisdiction, the Securities and Exchange Commission, the United States Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection

Corporation, a self-regulatory organization, a national or international organization of securities regulators, a federal or state banking ~~and~~ or insurance regulator, and a governmental law enforcement or regulatory agency to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, States, and foreign governments.

(b) **Policies to consider.** In cooperating, coordinating, consulting, and sharing records and information under this section and in acting by rule, order, or waiver under this *act*, the administrator shall, in ~~its~~ the administrator's discretion, take into consideration in carrying out the public interest the following general policies:

- (1) maximizing effectiveness of regulation for the protection of investors;
- (2) maximizing uniformity in federal and state regulatory standards; and
- (3) minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

(c) **Subjects for cooperation.** The cooperation, coordination, consultation, and sharing of records and information authorized by this section includes:

- (1) establishing or employing one or more designees as a central depository for registration and notice filings under this *act* and for records required or allowed to be maintained under this *act*;
- (2) developing and maintaining uniform forms;
- (3) conducting a joint examination or investigation;
- (4) holding a joint administrative hearing;
- (5) instituting and prosecuting a joint civil or administrative proceeding;
- (6) sharing and exchanging personnel;
- (7) coordinating registrations under Sections ~~301 and 401 through 404~~ 13, 14 and 18 through 21, and amendments thereto, and exemptions under Section ~~203~~ 8, and amendments thereto;
- (8) sharing and exchanging records, subject to Section ~~607~~ 46, and amendments thereto;
- (9) formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases;
- (10) formulating common systems and procedures;
- (11) notifying the public of proposed rules, forms, statements of policy, and guidelines;
- (12) attending conferences and other meetings among securities regulators, which may include contact persons of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and
- (13) developing and maintaining a uniform exemption from registration for small issuers, and taking other steps to reduce the burden of raising investment capital by small businesses.

SECTION 48 ~~609.~~ JUDICIAL REVIEW.

(a) ~~[Judicial review of orders.]~~ A final order issued by the administrator under this *act* is subject to judicial review in accordance with *the provisions of the act for judicial review and civil enforcement of agency actions*.

~~[(b) [Judicial review of rules.] A rule adopted under this *act* is subject to judicial review in accordance with [the state administrative procedure act].]~~

SECTION 49 ~~610~~. JURISDICTION.

(a) ***Sales and offers to sell.*** Sections ~~301, 302, 401(a), 402(a), 403(a), 404(a), 501, 506, 509, and 510~~ 11, 12, 18(a), 19(a), 20(a), 21(a), 30, 35, 38, and 39, and amendments thereto, do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this State or the offer to purchase or the purchase is made and accepted in this State.

(b) ***Purchases and offers to purchase.*** Sections ~~401(a), 402(a), 403(a), 404(a), 501, 506, 509, and 510~~ 18(a), 19(a), 20(a), 21(a), 30, 35, 38, and 39, and amendments thereto, do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this State or the offer to sell or the sale is made and accepted in this State.

(c) ***Offers in this State.*** For the purpose of this section, an offer to sell or to purchase a security is made in this State, whether or not either party is then present in this State, if the offer:

(1) originates from within this State; or

(2) is directed by the offeror to a place in this State and received at the place to which it is directed.

(d) ***Acceptances in this State.*** For the purpose of this section, an offer to purchase or to sell is accepted in this State, whether or not either party is then present in this State, if the acceptance:

(1) is communicated to the offeror in this State and the offeree reasonably believes the offeror to be present in this State and the acceptance is received at the place in this State to which it is directed; and

(2) has not previously been communicated to the offeror, orally or in a record, outside this State.

(e) ***Publications, radio, television, or electronic communications.*** An offer to sell or to purchase is not made in this State when a publisher circulates or there is circulated on the publisher's behalf in this State a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this State, or that is published in this State but has had more than two thirds of its circulation outside this State during the previous 12 months or when a radio or television program or other electronic communication originating outside this State is received in this State. A radio or television program, or other electronic communication is considered as having originated in this State if either the broadcast studio or the originating source of transmission is located in this State, unless:

(1) the program or communication is syndicated and distributed from outside this State for redistribution to the general public in this State;

(2) the program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this State for redistribution to the general public in this State;

(3) the program or communication is an electronic communication that originates outside this State and is captured for redistribution to the general public in this State by a community antenna or cable, radio, cable television, or other electronic system; or

(4) the program or communication consists of an electronic communication that originates in this State, but which is not intended for distribution to the general public in this State.

(f) **Investment advice and misrepresentations.** Sections ~~403(a), 404(a), 405(a), 502, 505, and 506~~ 20(a), 21(a), 22(a), 31, 34, and 35, and amendments thereto, apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this State, whether or not either party is then present in this State.

SECTION 50 ~~611. SERVICE OF PROCESS.~~

(a) **Signed consent to service of process.** A consent to service of process ~~complying with Section 611~~ required by this *act* must be signed and filed in the form required by a rule or order under this *act*. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal contact person under this *act* or a rule adopted or order issued under this *act* after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

(b) **Conduct constituting appointment of agent for service.** If a person, including a nonresident of this State, engages in an act, practice, or course of business prohibited or made actionable by this *act* or a rule adopted or order issued under this *act* and the person has not filed a consent to service of process under subsection (a), the act, practice, or course of business constitutes the appointment of the administrator as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal contact person.

(c) **Procedure for service of process.** Service under subsection (a) or (b) may be made by providing a copy of the process to the office of the administrator, but it is not effective unless:

(1) the plaintiff, which may be the administrator, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and

(2) the plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the administrator in a proceeding before the administrator, allows.

(d) **Service in administrative proceedings or civil actions by administrator.** Service pursuant to subsection (c) may be used in a proceeding before the administrator or by the administrator in a civil action in which the administrator is the moving party. In an administrative proceeding under this act, service of process may also be made in accordance with the Kansas administrative procedure act.

(e) **Opportunity to defend.** If process is served under subsection (c), the court, or the administrator in a proceeding before the administrator, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

SECTION 51 ~~612. SEVERABILITY CLAUSE.~~ If any provision of this *act* or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this *act* that can be given effect without the invalid provision or application, and to this end the provisions of this *act* are severable.

SECTION 66 ~~701. EFFECTIVE DATE.~~ This *act* shall take effect and be in force from and after July 1, 2005, and its publication in the statute book.

SECTION 52 ~~702. REPEALS.~~ The following act is repealed: *The Kansas Securities Act, K.S.A. 17-1252 through K.S.A. 17-1275, is hereby repealed subject to the following limitation:*

SECTION 52 (cont'd) ~~703. APPLICATION OF ACT TO EXISTING PROCEEDING AND EXISTING RIGHTS AND DUTIES.~~

(a) ***Applicability of predecessor act to pending proceedings and existing rights.*** The predecessor act exclusively governs all actions or proceedings that are pending on the effective date of this *act* or may be instituted on the basis of conduct occurring before the effective date of this *act*, but a civil action may not be maintained to enforce any liability under the predecessor act unless instituted within any period of limitation that applied when the cause of action accrued or within five years after the effective date of this *act*, whichever is earlier.

(b) ***Continued effectiveness under predecessor act.*** All effective registrations under the predecessor act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations under the predecessor act remain in effect while they would have remained in effect if this *act* had not been enacted. They are considered to have been filed, issued, or imposed under this *act*, but are exclusively governed by the predecessor act.

(c) ***Applicability of predecessor act to offers or sales.*** The predecessor act exclusively applies to an offer or sale made within one year after the effective date of this *act* pursuant to an offering made in good faith before the effective date of this *act* on the basis of an exemption available under the predecessor act.

Exhibit B

In re Karel
Idaho, 2007.

Supreme Court of Idaho,
Boise, May 2007 Term.
In the Matter of Vondean Renee **KAREL**, a Registered Broker-Dealer Agent Under the Uniform Securities Act (2004.).
Vondean Renee **Karel**, Petitioner-Appellant,
v.
State of **Idaho**, Department of Finance, Respondent.
No. 33191.

June 27, 2007.

Background: Licensed securities agent sought judicial review of a Department of Finance decision suspending her license for a six-month period for refusing to provide records requested during audit and investigation. The District Court, Fourth Judicial District, Ada County, [D. Duff McKee](#), J., affirmed Department's decision. Agent appealed.

Holdings: The Supreme Court, [Trout](#), J., held that:
(1) as a matter of first impression, Department did not have the authority to request documents that were not subject to statutory recordkeeping requirements for broker-dealers and registered investment advisors, and
(2) parties would be denied attorney fees on appeal.

Reversed and remanded.

[Jones](#), J., filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Administrative Law and Procedure 15A **683**

[15A](#) Administrative Law and Procedure
[15AV](#) Judicial Review of Administrative Decisions
[15AV\(A\)](#) In General
[15Ak681](#) Further Review
[15Ak683](#) k. Scope. [Most Cited Cases](#)

In an appeal from the district court's decision, where it was acting in its appellate capacity in a review under the Administrative Procedure Act (APA), the Supreme Court reviews the agency record independently of the district court's decision. [West's I.C.A. § 67-5279](#).

[2] Searches and Seizures 349 **79**

[349](#) Searches and Seizures
[349I](#) In General
[349k79](#) k. Administrative Inspections and Searches; Regulated Businesses. [Most Cited Cases](#)

A warrantless inspection will be deemed reasonable, under the Fourth Amendment, if three criteria are met: first, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made; second, the inspection must be necessary to further the regulatory scheme; and third, the regulatory statute must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and must limit the discretion of the inspecting

officer. [U.S.C.A. Const.Amend. 4](#).

[3] Searches and Seizures 349 79

[349](#) Searches and Seizures

[349I](#) In General

[349k79](#) k. Administrative Inspections and Searches; Regulated Businesses. [Most Cited Cases](#)

To be constitutional, under the Fourth Amendment, a regulatory statute authorizing an inspection must provide an adequate substitute for a warrant in terms of the certainty and regularity of its application by first, advising the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and second, the statute must limit the discretion of the inspecting officers. [U.S.C.A. Const.Amend. 4](#).

[4] Constitutional Law 92 990

[92](#) Constitutional Law

[92VI](#) Enforcement of Constitutional Provisions

[92VI\(C\)](#) Determination of Constitutional Questions

[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality

[92k990](#) k. In General. [Most Cited Cases](#)

Constitutional Law 92 1030

[92](#) Constitutional Law

[92VI](#) Enforcement of Constitutional Provisions

[92VI\(C\)](#) Determination of Constitutional Questions

[92VI\(C\)4](#) Burden of Proof

[92k1030](#) k. In General. [Most Cited Cases](#)

A party challenging a statute on constitutional grounds bears the burden of proving the statute is unconstitutional and must overcome a strong presumption of validity.

[5] Statutes 361 47

[361](#) Statutes

[361I](#) Enactment, Requisites, and Validity in General

[361k45](#) Validity and Sufficiency of Provisions

[361k47](#) k. Certainty and Definiteness. [Most Cited Cases](#)

A statute must give adequate notice to people of the conduct it proscribes.

[6] Constitutional Law 92 990

[92](#) Constitutional Law

[92VI](#) Enforcement of Constitutional Provisions

[92VI\(C\)](#) Determination of Constitutional Questions

[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality

[92k990](#) k. In General. [Most Cited Cases](#)

In interpreting a statute, an appellate court is obligated to seek an interpretation that upholds its constitutionality.

[7] Statutes 361 47

[361](#) Statutes

[361I](#) Enactment, Requisites, and Validity in General

[361k45](#) Validity and Sufficiency of Provisions

[361k47](#) k. Certainty and Definiteness. [Most Cited Cases](#)

A statute should not be held void for uncertainty if any practical interpretation can be given it.

[8] Searches and Seizures 349 79

[349](#) Searches and Seizures

[349I](#) In General

[349k79](#) k. Administrative Inspections and Searches; Regulated Businesses. [Most Cited Cases](#)

Statute permitting Department of Finance to conduct a reasonable audit and inspection of records that broker-dealers and investment advisers were required to maintain to meet their statutory recordkeeping obligation was a constitutionally adequate substitute for a warrant, under the Fourth Amendment; statute informed securities business broker-dealers and agents that inspections to which they were subject did not constitute discretionary acts by a government official, but were conducted pursuant to statute. [U.S.C.A. Const.Amend. 4](#); [West's I.C.A. § 30-14-411\(c, d\)](#).

[9] Securities Regulation 349B 274

[349B](#) Securities Regulation

[349BII](#) State Regulation

[349BII\(A\)](#) In General

[349Bk274](#) k. Investigations. [Most Cited Cases](#)

A search is only “reasonable” pursuant to statute permitting Department of Finance to conduct a reasonable audit and inspection if it is limited to documents that the law requires broker-dealers or registered investment advisors to make or maintain. [West's I.C.A. § 30-14-411\(c, d\)](#).

[10] Securities Regulation 349B 274

[349B](#) Securities Regulation

[349BII](#) State Regulation

[349BII\(A\)](#) In General

[349Bk274](#) k. Investigations. [Most Cited Cases](#)

Even though licensed securities agent was not personally required to make or maintain the records outlined in statute establishing documents which broker-dealers and registered investment advisors were required to make or maintain, agent could be required to surrender those documents for inspection, pursuant to statute permitting Department of Finance to conduct a reasonable audit and inspection of such records. [West's I.C.A. § 30-14-411\(c, d\)](#).

[11] Securities Regulation 349B 274

[349B](#) Securities Regulation

[349BII](#) State Regulation

[349BII\(A\)](#) In General

[349Bk274](#) k. Investigations. [Most Cited Cases](#)

List of clients with their addresses and telephone numbers, financial records for business that licensed securities agent conducted with her father, and agent's personal bank account records into which she deposited her commission checks were not subject to statutory recordkeeping requirements for broker-dealers and registered investment advisors and, thus, Department of Finance did not have the authority to request these documents from agent, in connection with inspection, which was prompted by information suggesting agent was allowing her father to conduct a securities business with her clients, despite his being an unregistered agent. [West's I.C.A. § 30-14-411\(c, d\)](#).

[12] Securities Regulation 349B 275

[349B](#) Securities Regulation
[349BII](#) State Regulation
[349BII\(A\)](#) In General
[349Bk275](#) k. Judicial Review. [Most Cited Cases](#)

Given that appeal from Department of Finance decision suspending securities agent's license for refusing to provide records requested during audit and investigation presented a matter of first impression for the Supreme Court, appeal was neither pursued nor defended frivolously, and thus, both parties would be denied attorney fees on appeal. [West's I.C.A. §§ 12-117, 12-121, 30-14-411](#); [Appellate Rule 41](#).

*759 Givens Pursley, LLP, Boise, for Appellant. [David R. Lombardi](#) argued.
Hon. [Lawrence G. Wasden](#), Attorney General, Boise, for Respondent. [Joseph B. Jones](#) argued.
[TROUT](#), Justice.

Vondean Renee Karel appeals from a district court decision affirming a final order by the Department of Finance (Department), which resulted in the suspension of Karel's *760 license as a securities agent. The Department suspended her license for a six-month period based on its finding that Karel violated [Idaho Code section 30-14-411\(d\)](#) by refusing to provide records requested during a 2005 audit and investigation.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Karel has been licensed by the Department as a securities agent since 1998. She worked at Morgan Stanley Dean Witter until February 2002, when she and her father, Milt Erhart, joined Wachovia Securities Financial Network. Both were licensed to sell securities and they conducted business under the name of "Milt Erhart & Associates." She and her father had combined accounts and shared their clients until March of 2005, when Milt Erhart's registration as a securities dealer was terminated. Thereafter, Karel became affiliated, as an agent, with Summit Brokerage Services, Inc. (Summit), but continued to work out of her father's office and to conduct business under the Milt Erhart & Associates name. Karel's father remained in the office, where he conducted a real estate business.

On June 7, 2005, based upon a suspicion that Milt Erhart was conducting securities business with Karel's clients despite being an unregistered agent, the Department investigators made an unannounced visit to Karel's office. The investigators requested that Karel produce the following documents: a list of clients with their addresses and telephone numbers; financial records for Milt Erhart and Associates; and Karel's personal bank account records into which she deposited her commission checks from Summit. Although Karel had these documents, she refused to give them to the investigators, based on her belief that the Department did not have the authority to request to inspect that information. As a result of her refusal to turn over the documents, the Department suspended her securities license for six months.

Karel filed an appeal, contending the Department did not have the authority to audit or inspect the records they had requested, and therefore, her license should not have been suspended. The matter was assigned to a hearing officer who took testimony and made detailed findings about the business being operated by Karel in conjunction with her father. The hearing officer concluded that the Department's request for the documents was reasonable pursuant to [I.C. § 30-14-411\(d\)](#), as the documents were directly related to the Department's suspicions that Karel was improperly engaged in the securities business with an unlicensed individual. Therefore, the hearing officer recommended that the suspension of Karel's license by the Department be upheld. Karel then sought judicial review in the district court. The district judge concluded the hearing officer's findings and conclusions were correct, and therefore, he affirmed the Department. Karel now appeals the district court's decision.

II.

STANDARD OF REVIEW

[1] “In an appeal from the district court's decision, where it was acting in its appellate capacity in a review under the APA [Administrative Procedure Act], this Court reviews the agency record independently of the district court's decision.” [Haw v. Idaho State Bd. of Med., 140 Idaho 152, 157, 90 P.3d 902, 907 \(2004\)](#). Pursuant to [I.C. § 67-5279](#), this Court does not substitute its judgment for that of the administrative agency as to the weight of evidence, but defers to the agency's findings of fact unless clearly erroneous. The agency's order may be overturned only where it: a) violates statutory or constitutional provisions; b) exceeds the agency's statutory authority; c) was made upon unlawful procedure; d) is not supported by substantial evidence in the record as a whole; or e) is arbitrary, capricious, or an abuse of discretion.

III.

DISCUSSION

A. Department's authority to request the documents

Karel argues the Department had no authority to request the records it did because *761 the pertinent statutes did not list those items as records Karel was required to maintain and provide for inspection. While Karel acknowledges the Department does have the statutory authority to conduct an audit or inspection, she argues that the inspection must be reasonable. She asserts a reasonable inspection must be limited to those records which the broker-dealer (in this case, Summit) is required by statute to maintain. If the investigation is not so limited, then Karel argues the statutes are unconstitutionally vague and violate her right to adequate notice of her recordkeeping responsibilities.

We begin our analysis with [I.C. § 30-14-411\(d\)](#) which states in pertinent part:

The records of ... every broker-dealer, agent ... are subject to such reasonable periodic, special or other audits or inspections ... as the administrator considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The administrator may copy, and may remove for audit or inspection copies of, all records the administrator reasonably considers necessary or appropriate to conduct the audit or inspection.

[2] In support of her contention that any inspection must be limited in scope and specific in its reach, Karel cites to [New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 \(1987\)](#). In [Burger](#), the appellant, Burger, contested the legality of an inspection of his business that occurred pursuant to [New York Vehicle & Traffic Law § 415-a5](#), which allows the inspection of records during regular business hours “which are subject to the record keeping requirements of this section and which are on the premises.” Burger argued that the evidence obtained should be suppressed because the inspection was not limited in scope. The United States Supreme Court disagreed and ruled that [§ 415-a5](#) satisfied the three criteria of a “reasonable” warrantless inspection under the Fourth Amendment. The Supreme Court noted that an owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy, and therefore, may be subject to a warrantless inspection of such premises. [Burger, 482 U.S. at 702, 107 S.Ct. at 2643, 96 L.Ed.2d at 613](#). This warrantless inspection will be deemed reasonable if three criteria are met. [Id. at 702, 107 S.Ct. at 2644, 96 L.Ed.2d at 613](#).

First, there must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made. [Id.](#) Second, the inspection must be necessary to further the regulatory scheme; and last, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officer. [Id.](#) In reference to the third criterion, the Supreme Court found that the statute provided a constitutionally adequate substitute for a warrant because it informed the business operators that inspections would be made on a regular basis, and thus, the operator would know that inspections would not constitute discretionary acts, but would be conducted pursuant to the statute. [Burger, 482 U.S. at 711, 107 S.Ct. at 2648, 96 L.Ed.2d at 619](#). Further, the Court held, the statute placed adequate limits upon the inspecting officers by limiting the hours of

inspection and what could be inspected, and therefore, the search was constitutional. [Burger, 482 U.S. at 711-12, 107 S.Ct. at 2648, 96 L.Ed.2d at 619-20.](#)

[3] Karel acknowledges that the first and second criteria are satisfied by [I.C. § 30-14-411\(d\)](#) and that the Department was authorized by the statute to conduct a “reasonable ... audit or inspection” of her office. Karel argues, however, that the inspection was not reasonable because it did not limit the discretion of the investigating officers. As discussed above, in order to be constitutional, the statute in question must provide an adequate substitute for a warrant in terms of the certainty and regularity of its application by first, advising the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and second, the statute must limit the discretion of the inspecting officers. Specifically, Karel contends the Department, in conducting*762 an inspection pursuant to [I.C. § 30-14-411\(d\)](#), must limit its inspection to records that are required to be made or maintained pursuant to [I.C. § 30-14-411\(c\)](#); otherwise, the statute is unconstitutional because it does not limit the Department's discretion as required by [Burger](#).

[4][5][6][7] A party challenging a statute on constitutional grounds bears the burden of proving the statute is unconstitutional and must overcome a strong presumption of validity. [State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 \(2003\)](#). A statute must give adequate notice to people of the conduct it proscribes. [Korsen, 138 Idaho at 712, 69 P.3d at 132](#). In interpreting a statute, an appellate court is obligated to seek an interpretation that upholds its constitutionality. [State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 \(1998\)](#). A statute should not be held void for uncertainty if any practical interpretation can be given it. [Id.](#)

[8] As noted above, [I.C. § 30-14-411\(d\)](#) simply permits the Department to conduct a reasonable audit and inspection of “all records the administrator reasonably considers necessary or appropriate to conduct the audit or inspection.” Looking solely at this language, it is difficult to see how this in any way limits the discretion of the inspecting officials. No guidance is given about what records may be demanded other than the circuitous statement that it must be those records necessary to the conduct of the inspection; i.e. the official may demand to inspect those records he deems necessary to his inspection. Immediately preceding this section is [I.C. § 30-14-411\(c\)](#) entitled “Recordkeeping.” That subsection sets forth recordkeeping requirements for broker-dealers and investment advisers, which include accounts, correspondence, books and other records required by rules adopted by the Department. During oral argument, the Department's attorney candidly acknowledged that the records demanded of Karel are not among those required to be kept pursuant to subsection (c). While the recordkeeping obligation of subsection (c) is placed on broker-dealers, not agents like Karel, subsection (d) includes securities agents within its description of persons who are subject to the Department's audit and inspection requirements. The logical interpretation of these two subsections is that, while broker-dealers are the ones on whom the recordkeeping obligation is placed, securities agents like Karel have an obligation to make those records available upon reasonable request by the Department. It makes no sense to have detailed recordkeeping responsibilities on broker-dealers, but to allow the Department to demand virtually unlimited records (those “necessary ... to conduct the audit”), from a securities agent. Thus, we agree with Karel that the records to be made available for audit and inspection are those required to be maintained in subsection (c).

[9][10] With that interpretation, [I.C. § 30-14-411\(d\)](#) is a constitutionally adequate substitute for a warrant as required by [Burger](#). First, the statute informs the securities business broker-dealer or agent that he or she is “subject to such reasonable periodic, special or other audits or inspections ... within or without this state, as the administrator considers necessary or appropriate in the public interest and time and without prior notice.” Thus, similar to [§ 415-a5](#) in [Burger](#), the statute informs the dealers and agents that inspections to which they are subject do not constitute discretionary acts by a government official, but are conducted pursuant to the statute. Further, we agree with Karel that the statute limits any inspections pursuant to subsection (d) to documents that are subject to the recordkeeping requirements in subsection (c). In other words, a search is only “reasonable” pursuant to [I.C. § 30-14-411\(d\)](#) if it is limited to documents that the law requires broker-dealers or registered investment advisors to make or maintain pursuant to [I.C. § 30-14-411\(c\)](#). Thus, even though Karel was not personally required to make or maintain the records outlined in subsection (c), she was required to surrender those documents for inspection pursuant to [I.C. § 30-14-411\(d\)](#).

[11] In this case, the Department's inspection was prompted by information it had received that suggested Karel was allowing her father to conduct a securities business with her clients, despite being an unregistered*763 agent. While there appear to be other statutes which would permit the Department to obtain the information it sought, it cannot do so under the guise of a normal audit without limiting the request as indicated above. Therefore, the Department did not have the authority to request those documents pursuant to [I.C. § 30-14-411\(d\)](#).

In this case, the district court did not interpret a “reasonable” audit or inspection to be limited in scope, and therefore, it was in error. As a result, Karel's securities license should not have been suspended. Given our interpretation of these statutes, we need not address Karel's other argument that the statute is unconstitutionally vague.

B. Attorney's fees on appeal

[12] Karel seeks attorney's fees on appeal pursuant to [I.C. § 12-117](#), arguing that the Department had no reasonable basis in fact or law for its interpretation of [I.C. § 30-14-411](#). The Department requests attorney's fees and costs pursuant to [I.A.R. 41](#) and [I.C. §§ 12-121](#) and [12-117](#), arguing that Karel has brought this appeal frivolously, unreasonably and without foundation. Given that this appeal presents a matter of first impression for this Court, we find that the appeal was neither pursued nor defended frivolously, and thus, both parties are denied attorney's fees on appeal.

IV.

CONCLUSION

We hold that the Department of Finance did not have the authority to request the documents it did from Karel pursuant to [I.C. § 30-14-411\(d\)](#), as the documents were not subject to the recordkeeping requirements of [I.C. § 30-14-411\(c\)](#). Karel's securities license should not have been suspended as a result of her refusal to produce the records requested by the Department for inspection, and we remand this matter to the Department for further action in accordance with this opinion. We award costs on appeal to Karel.

Chief Justice [SCHROEDER](#), and Justices [EISMANN](#) and [BURDICK](#) concur. [JONES, J.](#), concurring in part and dissenting in part.

I concur in the Court's opinion in all respects except for the conclusion that the Department did not have the authority under [I.C. § 30-14-411\(d\)](#) to request Karel's client list. The Department determined that when the investigators requested the client list, Karel either had a client list or could have produced one through her computerized records. The client records were required to be maintained under [I.C. § 30-14-411\(c\)](#) and Karel was obligated to surrender them upon the Department's request. While it is true the Department conceded these records were not required to be maintained, a review of the applicable provisions indicates the Department conceded too much.

The Court correctly holds that securities agents are obligated to make available to the Department upon its reasonable request those records within their possession which their broker-dealer is required by law to maintain. Broker-dealers are required to maintain a wide array of records, mostly dealing with client (customer) contracts, accounts, and trade transactions. [I.C. § 30-14-411\(c\)\(1\)](#) requires that broker-dealers (which does not include agents) make and maintain such records as are required pursuant to rules adopted by the Department. The Department's Rule 88 (IDAPA 12.01.08.088.01) requires broker-dealers to make and maintain records compliant with SEC rules found at [17 C.F.R. §§ 240.17a-3](#), [17a-4](#), [15g-9](#) and [15c2-11](#). Those SEC rules require maintenance of records primarily related to customers, including customer contracts, their personal information and their security transactions. For example, [17 C.F.R. § 240.17a-3\(a\)\(17\)\(i\)\(A\)](#) requires maintenance of account records including the names of customers who are natural persons, together with each customer's tax identification number, address, telephone number, date of birth, employment status, annual income, net worth and investment objectives. A current record of this and other

information required by the SEC rules must be maintained and kept current for each office of the broker-dealer and is subject to examination*764 by the SEC at any time during business hours. [17 C.F.R. 240.17a-3\(b\)](#).

Based on the SEC rules, brokers-dealers have a strong incentive to carefully maintain customer records. Additionally, those records are the lifeblood of the broker-dealer's business and contractual relationships with agents generally reflect that the customer records are the property of the broker-dealer, rather than the agent. The agreement between Summit and Karel specifies, "It is understood and agreed that all books and records pertaining to Summit customers are the property of Summit." Karel further agreed that Summit had the sole discretion to conduct unannounced examinations and audits of these and other records related to her business.

One of the items that the Department sought to obtain from Karel when its agents made the unannounced visit to Karel's office on June 7, 2005, was a list of clients to include their addresses and telephone numbers. Karel was required to surrender such information to the Department. The parties dispute what customer information was available and what should have been turned over. The Department contends Karel acknowledged she had a list of customers but refused to turn it over. Karel contends that she turned over information pertaining to her customers but that she was not obligated to furnish a list of the customers.

We need not try to reconcile the conflict in the evidence because the hearing officer addressed the matter in her findings, which the Department adopted in its order. The hearing officer found that Karel acknowledged she had the documents requested by the Department, including the client list, but declined to turn them over. The hearing officer went on to find:

With respect to production of the client list, Ms. Karel testified she understood the Department wanted a list of anyone currently doing investment business with Summit. She testified that, in June, 2005, she did not have a separate client list and indicated she did not know how to generate a client list from the ILX system. Her hearing testimony conflicts with her admissions to the Department investigators in which she admitted she had a client list, but refused to provide it. Further, Exhibits 10 and 11, produced by Ms. Karel on June 7, 2005, and June 15, 2005, indicate through her computerized records she had the capability of producing lists of clients. She testified that, in order to provide a current client list, she would need to update her records and eliminate old clients. However, Ms. Karel never explained that to the investigators. Instead, she refused to provide a list.

Thus, the hearing officer found that Karel either had a client list at the time it was requested or that she had the capability of producing one at that time. This finding, which was adopted by the Department, is supported by substantial, albeit conflicting, evidence and should be sustained. Karel's refusal to provide the customer list was a violation of her obligations under [I.C. § 30-14-411\(d\)](#).

At oral argument, Karel's counsel acknowledged that Karel had a list that she declined to provide the investigators but contended it was not information required to be maintained under [I.C. § 30-14-411\(c\)](#). According to counsel, the client list was not updated and not complete. The list included the names of clients from her former broker-dealer, Wachovia, and was being used by Karel as a "working list". This contention provides no relief to Karel, however. Wachovia was a broker-dealer and the same record maintenance and production requirements pertained to Wachovia, as applied to Summit. The pertinent SEC rule requires customer information to be maintained for at least six years. [17 C.F.R. 240.17a-4](#). Whether the customer information requested by the Department pertained to Karel's customers under either broker-dealer, she was obligated to furnish the information to the Department under [I.C. § 30-14-411\(d\)](#).

The same does not apply to the bank account records, as the Court holds. The requirement in [I.C. § 30-14-411\(c\)](#) to maintain records applies to broker-dealers, which does not include agents. While a broker-dealer is required to maintain its check books, bank statements, canceled checks and cash reconciliations in its records, pursuant to [*76517 C.F.R. § 240.17a-4\(b\)\(2\)](#), these are not the banking records that the

Department sought. If the Department wished to obtain Karel's personal checking account records or the records of a checking account apparently owned by her father (and upon which she was able to draw checks), the Department should have sought those records pursuant to its subpoena power. [I.C. § 30-14-602](#). Therefore, I concur in the Court's determination regarding the banking records but dissent with regard to the determination pertaining to customer information.

Idaho, 2007.

In re Karel

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