

Hearing 7-28-06 @ 9 AM  
B/H G/Parrish

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

JUN - 5 2006

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )  
)  
Plaintiff, )

vs. )

Case No. CJ-2006-3311  
Honorable Patricia G. Parrish

FARMERS & MERCHANTS BANK, )  
an Oklahoma banking entity; )  
FARMERS & MERCHANTS BANCSHARES, )  
INC., an Oklahoma corporation; )  
JOHN V. ANDERSON, Individually, as an officer )  
and director of Farmers & Merchants Bank, and )  
as a shareholder of Farmers & Merchants )  
Bancshares, Inc.; and JOHN TOM ANDERSON, )  
Individually, as an officer and director of )  
Farmers & Merchants Bank, and as a shareholder )  
of Farmers & Merchants Bancshares, Inc., )  
)  
Defendants. )

**DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT**

Defendants Farmers & Merchants Bank ("FMB"), Farmers & Merchants Bancshares ("Bancshares"), John V. Anderson and John Tom Anderson (collectively referred to as "Defendants") respectfully move this Court to dismiss various claims brought by Plaintiff Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator ("ODS"), for failure to state a claim for which relief can be granted pursuant to 12 O.S. § 2012. As set forth below, a civil enforcement action cannot be brought against Defendants (1) for purported aiding and abetting arising before the current Oklahoma Securities Act went into effect on July 1, 2004; (2) for restitution under either version of the statutory civil enforcement scheme.

## BACKGROUND

As alleged by ODS in its Petition, Marsha Schubert and her company Schubert and Associates defrauded investors of approximately \$9,000,000. Defendants are named in this action because, according to ODS, it knew or could have known that Ms. Schubert was defrauding investors and that they materially aided in her fraudulent scheme by providing loans and permitting substantial funds to be transferred to and from her bank account.

Due to this purported involvement, ODS has instituted a "civil enforcement" action against Defendants under 71 O.S. § 1-603. *See ODS Petition*, ¶ 20. The ODS Petition seeks: (1) a permanent injunction; (2) restitution; (3) civil penalties; and (4) other equitable relief as deemed necessary, just and proper in connection with enforcement of the Act. *See ODS Petition*, "Prayer for Relief," p. 59-61.

As discussed below, 71 O.S. § 1-603 provides substantial limitations on the nature and scope of the remedies sought by ODS, and thus the ODS Petition must be similarly restricted.

## APPLICABLE STANDARD

12 O.S. §2012(b)(6) provides grounds for dismissal when there is a "[f]ailure to state a claim upon which relief can be granted." In the present case, relative to the relief requested, ODS has (1) failed to allege any cognizable legal theory of recovery against Defendants and (2) failed to allege sufficient facts to support a viable claim for relief against Defendants under *any* cognizable legal theory. *Indiana Nat'l Bank v. Okla. Dep't of Human Services*, 1994 OK 98, 880 P.2d 371, 375 (Okla. 1994), *quoting Kentucky Central Life Ins. Co. v. LeDuc*, 814 F.Supp. 832, 835 (N.D. Cal. 1992). *See also Okla.*

*Quarter Horse Racing Asso. v. Remington Park, Inc.*, 1999 OK CIV APP 75, 987 P.2d, 1216, 1217 (Okla. Civ. App. 1999); *Jadco Mgmt. Co. v. Fed. Ins. Co.*, 2000 OK CIV APP 68, 9 P.3d 92, 94 (Okla. Civ. App. 2000); *Mason v. Board of Regents of the University of Oklahoma*, 2001 OK CIV APP 33, 23 P.3d 964, 968 (Okla. Civ. App. 2001); *Hutchinson v. Carter*, 2001 OK CIV APP 124, 33 P.3d 958, 962 (Okla. Civ. App. 2001).

### **ARGUMENT AND AUTHORITIES**

#### **I. ODS is Bringing a Civil Enforcement Action and is Limited to the Scope and Remedies of Such an Action.**

The Oklahoma Securities Act (“OSA”) was adopted by the Oklahoma Legislature in 2003, with limited variances, from the Uniform Securities Act of 2002.<sup>1</sup> Oklahoma had formerly adopted the Uniform Securities Act of 1956, although it had undergone various amendments over the intervening half-century. Both the Oklahoma and Uniform Acts proscribe various schemes that may be pursued to protect investors when violations of the Act occur, including, administrative enforcement (71 O.S. § 1-604, 71 O.S. § 406 in the Predecessor Act; USA (2002) § 604; USA (1985) § 602) civil liability (71 O.S. § 1-509, 71 O.S. § 408, USA (2002) § 509, USA (1956) § 410), civil enforcement (71 O.S. § 1-603, 71 O.S. § 406.1, USA (2002) § 603, USA (1985) § 603) and criminal penalty schemes (71 O.S. § 1-508, 71 O.S. § 407, USA (2002) § 508, USA (1956) § 409). Here, according to ODS, the action is brought pursuant to the civil enforcement scheme (71

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<sup>1</sup> The various Uniform Act provisions are attached as exhibits hereto as follows: Exh. “1,” USA (2002) § 604; Exh. “2,” USA (1985) § 602; Exh. “3,” USA (2002) § 509; Exh. “4,” USA (1956) § 410; Exh. “5,” USA (2002) § 603; Exh. “6,” USA (1985) § 603; Exh. “7,” USA (2002) § 508; Exh. “8,” USA (1956) § 409.

O.S. § 1-603), *see ODS Petition*, ¶ 20, not the separate and distinct civil liability (71 O.S. § 1-509) or administrative actions (71 O.S. § 1-604).

- A. ***Claims arising prior to July 1, 2004 are governed by, 71 O.S. § 406.1. The Civil Enforcement Provision, 71 O.S. § 406.1, of the OSA's Predecessor Act, does not Provide for Enforcement Against Alleged Aiders and Abettors.***

While ODS has indicated that the action is brought pursuant to 71 O.S. § 1-603, the vast majority of the claims arose prior to July 1, 2004 when 71 O.S. § 406.1 of the predecessor act, rather than 71 O.S. Section 1-603 was in effect. Certain civil remedies, including restitution, are not available to ODS when their claims under 71 O.S. § 406.1 are that defendants were aiders and abettors and not primary actors.

Claims arising before July 1, 2004 are governed by 71 O.S. § 406.1, which provides in pertinent part:

(a) Upon a showing by the Administrator that ***a person has violated or is about to violate*** the Oklahoma Securities Act, except under the provisions of Section 202.1 or 305.2 of this title, or a rule or order of the Administrator under the Oklahoma Securities Act or that a person has ***engaged or is about to engage in dishonest or unethical practices in the securities business***, the Administrator, prior to, concurrently with, or subsequent to an administrative proceeding, may bring an action in the district court of Oklahoma County or the district court of any other county where service can be obtained on one or more of the defendants and the district court may grant or impose one or more of the following appropriate legal or equitable remedies:

(1) Upon a showing of a violation of the Oklahoma Securities Act or a rule or order of the Administrator under the Oklahoma Securities Act or conduct involving dishonest or unethical practices in the securities business:

- (i) a temporary restraining order, permanent or temporary prohibitory or mandatory injunction, or a writ of prohibition or mandamus;
- (ii) a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or of Fifty Thousand Dollars (\$50,000.00) for

multiple violations in a single proceeding or a series of related proceedings;

(iii) a declaratory judgment;

(iv) restitution to investors;

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

(vi) other relief the court deems just.

(emphasis added).

While the civil liability provision, 71 O.S. § 408(b), specifically provides a cause of action against one who "materially aids" in a fraudulent sale or purchase, the civil enforcement scheme as set forth in 71 O.S. § 406.1 (*see also* USA (1985) § 603) makes no provision whatsoever for those who materially aid and abet a violation of the Act. ODS has not alleged that Defendants themselves violated the Act or that Defendants are in the "securities business" within the meaning of § 406.1. In fact, all the allegations set forth in the Petition deal with Defendants' alleged acts or omissions as participants in the banking industry. Therefore, no civil enforcement mechanism is available for Defendants' conduct occurring prior to July 1, 2004.

***B. Claims arising after July 1, 2004 are governed by 71 O.S. § 1-603. The Current Civil Enforcement Provision of this act do not Provide for Restitution as a Remedy Against Alleged Aiders and Abettors.***

71 O.S. § 1-603 provides:

***A. 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 constituting a dishonest or unethical practice 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 or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained 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. 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 a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; ***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. ordering the payment of prejudgment and post judgment interest; or

3. Order such other relief as the court considers appropriate.

C. The Administrator may not be required to post a bond in an action or proceeding under this act.

(emphasis added).

To the extent 71 O.S. § 1-603 is controlling, civil enforcement actions can be brought, pursuant to the statute, against the following groups of individuals:

(1) Those who:

(a) have engaged in an act, practice or course of business

(i) constituting a violation of this act or a rule adopted under this act

- (ii) constituting a dishonest or unethical practice
  - (b) are engaging in an act, practice or course of business
    - (i) constituting a violation of this act or a rule adopted under this act
    - (ii) constituting a dishonest or unethical practice
  - (c) are about to engage in an act, practice or course of business
    - (i) constituting a violation of this act or a rule adopted under this act
    - (ii) constituting a dishonest or unethical practice
- (2) Those who:
- (a) have engaged in an act, practice, or course of business that materially aids:
    - (i) a violation of this act or a rule adopted under the Act
    - (ii) a dishonest or unethical practice
  - (b) are engaging in an act, practice, or course of business that materially aids:
    - (i) a violation of this act or a rule adopted under the Act
    - (ii) a dishonest or unethical practice
  - (c) are about to engage in an act, practice, or course of business that materially aids:
    - (i) a violation of this act or a rule adopted under the Act
    - (ii) a dishonest or unethical practice

*See also* USA (2002) § 603 (similar to 71 O.S. § 1-603 with the exception that it does not include language relating to a dishonest or unethical practice).

Clearly, ODS contends that Defendants fall into the later category (sub-section “(2)” above) as they purported “materially aided” in Marsh Schubert’s act, practices and course of business that operated as a fraud upon other persons. *ODS Petition*, “Cause of Action,” subtitled “Aiding and Abetting Securities Fraud.”

However, assuming that Defendants’ conduct “materially aids a violation of this act,” Defendants are not subject to universal application of the remedies found in § 1-603. Here, ODS is seeking restitution. *See ODS Petition*, “Prayer for Relief,” II and III. However, § 1-603(B)(2)(c) specifically provides that the Court may provide “an order for 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 ...*” In other words, the plain language of the statute limits an order of restitution to the sub-category—(1)(a)(i) as defined above—of persons who have violated the act. Persons who are about to violate the act, have committed dishonest or unethical business practices or who have materially aided in the violation of the act are simply not included as persons against whom the court may order restitution in civil enforcement proceedings. Thus restitution is not an available remedy under § 1-603.<sup>2</sup>

***B. The Nature of Restitution does not Permit Recovery Against Defendants in this Action.***

ODS is seeking restitution via this civil enforcement action. The Oklahoma Supreme Court has provided the following definition of restitution in the civil context:

Restitution is an equitable remedy that generally will be available whenever one has received a benefit to which another is justly entitled. *Warren v. Century Bankcorporation, Inc.*, Okl., 741 P.2d 846, 852 (1987).

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<sup>2</sup> USA (2002) § 603 provides the same language, limiting restitution in civil enforcement proceedings to persons who have violated the Act.

Restatement, Restitution, § 1 (1937) provides: "A person who has been unjustly enriched at the expense of another is required to make *restitution to the other*." (Emphasis added.) The object of restitution is to put the parties back into the position in which they were before unjust enrichment occurred.

*Stites v. DUIT Const. Co., Inc.*, 1995 OK 69, 903 P.2d 293, 301, n. 28. In short, restitution is "[a] body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment." *Black's Law Dictionary* (8<sup>th</sup> Ed. 2004). Here, ODS has made no allegation (and cannot make such an allegation) that Defendants were unjustly enriched by Ms. Schubert's conduct at the expense of her victims. Ms. Schubert is the person who was unjustly enriched, not the Defendants. Clearly, ODS is seeking damages against the Defendants, something that is not permitted under the civil enforcement scheme. The legislature's determination not to provide for the remedy of restitution against a defendant, who allegedly added or abetted the primary actor's conduct but was not unjustly enriched, is understandable given Oklahoma's body of substantive law on unjust enrichment.

**II. The Civil Liability Provisions of the OSA Section 71 O.S. § 1-509 and 71 O.S. § 408 of the Predecessor Act are not Applicable in an Enforcement Action.**

ODS states: "Pursuant to Section 1-509 of the Act and Section 408 of the Predecessor Act, Defendants are liable, jointly and severally with and to the same extent as Marsha Schubert, for the securities fraud." *ODS Petition*, ¶ 19. This contention relates solely to the civil liability scheme under the Oklahoma Securities Act and is irrelevant to the civil enforcement action currently pending before the Court.

ODS is improperly attempting to incorporate what it must perceive as "favorable" elements of the civil liability scheme into the civil enforcement mechanism. The present

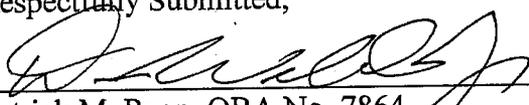
Oklahoma Act and the 2002 USA both provide a civil liability scheme under which a “person is liable to a *purchaser*.” 71 O.S. § 1-509(B) and USA (2000) § 509(b) (emphasis added). “The *purchaser* may maintain an action...to recover the consideration paid for the security...” 71 O.S § 1-509(B)(1) and USA (2002) § 509(b)(1) (emphasis added). Similarly, the prior Oklahoma and Uniform Acts discuss civil liability of the seller “to the *person buying the security*..., who may sue either at law or in equity to recover the consideration paid for the security...” 71 O.S. § 408(a)(2)(A); USA (1956) § 410(a) (emphasis added). The Official Comments to USA (2002) § 509, ¶ 3, further addresses this limitation on civil liability: “As with Section 12(a)(2) of the Securities Act of 1933, Section 509(b) contains a type of privity requirement in that the *purchaser* is required to bring an action against the seller.” (emphasis added). Simply put, § 1-509 (as well as the prior Oklahoma Act and all versions of the USA) is concerned only with civil liability actions brought by the purchasers of the securities (not ODS), and select provisions cannot be bootstrapped into this civil enforcement action.

### CONCLUSION

For the reasons set forth above, Defendants Farmers & Merchants Bank Farmers & Merchants Bancshares, John V. Anderson and John Tom Anderson respectfully request the Court grant their Motion to Dismiss and dismiss all aspects of the ODS claim (1) arising before July 1, 2004, based on acts or omissions prior to that date, as 71 O.S. § 406.1 does not provide a civil enforcement mechanism against those “materially aiding” in the securities violation; or (2) relying on the civil liability scheme (71 O.S. §§ 1-509 and/or 408), as this case has been brought pursuant to a civil enforcement mechanism.

Further, Defendants request an order stating that restitution is not an available remedy against Defendants for any part of the ODS claim.

Respectfully Submitted,



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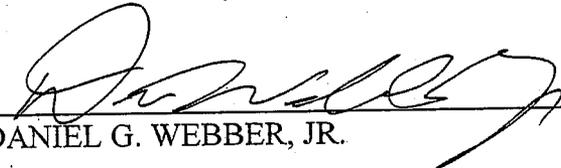
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FARMERS & MERCHANTS BANK, FARMERS  
& MERCHANTS BANCSHARES, INC., JOHN  
V. ANDERSON and JOHN TOM ANDERSON**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of June 2006, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

Melanie Hall, Esq.  
Amanda Cornmesser, Esq.  
Gerri Stuckey, Esq.  
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120 North Robinson Avenue, Suite 860  
Oklahoma City, Oklahoma 73102  
*Attorneys for Plaintiff Oklahoma Department of  
Securities, Irvin L. Faught, Administrator*



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DANIEL G. WEBBER, JR.

Unif. Securities Act 2002 § 604

**c**

Uniform Laws Annotated Currentness

Uniform Securities Act (Last Revised or Amended in 2002) (Refs &amp; Annos)

■ [Article] 6 Administration and Judicial Review

**→ § 604. Administrative Enforcement.**

(a) **[Issuance of an order or notice.]** If the administrator determines 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) or an investment adviser under Section 403(b)(1)(C); or

(3) issue an order under Section 204.

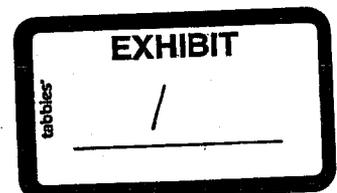
(b) **[Summary process.]** An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement of any civil penalty or costs of investigation the administrator will seek, 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. 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, including the imposition of a civil penalty or requirement for payment of the costs of investigation sought in a statement in 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.

(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) **[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, 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



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recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) **[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 \$[ ] for each violation and may grant any other relief the court determines is just and proper in the circumstances.

**OFFICIAL COMMENTS**

2006 Electronic Pocket Part Update

**Prior Provisions:** RUSA Sections 602, 712.

1. Section 604, unlike Section 603, may be initiated by the administrator without prior judicial process or a prior hearing. The section, among other matters, empowers the administrator to act summarily in appropriate circumstances.
2. Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings against registered broker-dealers, agents, investment advisers, or investment adviser representatives under Section 412. All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604.
3. Service of an order or notice under this Section is not effective unless made in accordance with Section 611.

**ACTION IN ADOPTING JURISDICTIONS**

2006 Electronic Pocket Part Update

**Variations from Official Text:**

**IDAHO**

Subsec. (b) provides:

"An order under subsection (a) of this section 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 fifteen (15) days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the administrator within thirty (30) days after the date of service of the order, the order, which may include a civil penalty or costs of the investigation if a civil penalty or costs were sought in the statement accompanying 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."

Subsec. (d) provides:

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"In a final order under subsection (c) of this section, the administrator may impose a civil penalty not to exceed five thousand dollars (\$5,000) for each violation."

In subsec. (g), the fourth sentence provides: "The court may impose a further civil penalty against the person for contempt in an amount not less than five hundred dollars (\$500) but not greater than five thousand dollars (\$5,000) for each violation and may grant any other relief the court determines is just and proper in the circumstances."

IOWA

In subsec. (b), in the fourth sentence omits "in a statement" following "costs of investigation sought".

Subsec. (d) provides:

"In a final order under subsection 3, the administrator may impose a civil penalty up to an amount not to exceed a maximum of five thousand dollars for a single violation or five hundred thousand dollars for more than one violation."

In subsec. (g), in the fourth sentence substitutes "not less than three thousand dollars but not greater than ten thousand dollars" for "not less than \$[ ] but not greater than \$[ ]".

KANSAS

Section provides:

"(a) **Cease and desist order.** If the administrator 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 18 (b)(1)(D) or (F), and amendments thereto, or an investment adviser under section 20 (b)(1)(C), and amendments thereto; or

"(3) issue an order under section 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;

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"(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.

"(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 procedures 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. The order must include a statement of the reasons for the order and notice that 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 procedures 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).

"(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 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.

"(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 greater than \$25,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances."

**MAINE**

In subsec. (b), in the third sentence substitutes "civil fine" for "civil penalty", and inserts a fifth sentence, which provides: "A summary order issued against any person becomes a final order 30 days after the administrator mails notice to the interested parties of the right to request a hearing if they fail to request a hearing or on the date of the hearing if the person requesting the hearing fails to appear."

Subsec. (d) provides:

"**Civil fine; final orders and remedies.** In a final order under subsection 3, the administrator may: order remedies described in subsection 1; censure that person; bar that person from association with any issuer,

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broker-dealer or investment adviser in this State; or impose a civil fine not to exceed \$5,000 per violation."

In subsec. (g), in the first sentence inserts "request that the Attorney General" preceding "petition a court", and in the fourth sentence substitutes "an amount not to exceed \$10,000 per violation" for "an amount not less than \$[ ] but not greater than \$[ ] for each violation".

Adds a subsection [designated 8 in the Maine act], which provides:

**"8. Appointment of presiding officer.** For purposes of any hearing conducted pursuant to this section, the administrator may appoint a qualified person to preside at the hearing and to make proposed findings of fact and conclusions of law. The responsibility for the entry of the final findings of fact and conclusions of law and for the issuance of any final order remain with the administrator."

## MISSOURI

Subsec. (b) provides:

"An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the commissioner 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 commissioner will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within fifteen days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the commissioner within thirty 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 commissioner, 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."

In subsec. (e), adds a second sentence, which provides: "These funds may be paid into the investor education and protection fund."

Adds a subsection [designated (h) in the Missouri act], which provides:

"(h) The commissioner is authorized to issue administrative consent orders in the settlement of any proceeding in the public interest under this act."

## OKLAHOMA

In subsec. (a), inserts "or constituting a dishonest or unethical practice" following "or order issued under this [Act]" twice.

Subsec. (b) provides:

"An order under subsection A of this section 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 fifteen (15) days after receipt of a request in a record from the person, the matter will be scheduled for a hearing and the hearing shall be commenced within fifteen (15) days of the matter being set for hearing. If a person subject to the order does not request a hearing and none is ordered by the Administrator, within thirty (30) days after the date of service of the order, the order, that may include a civil penalty or costs of the investigation if a civil penalty or costs were sought in the statement accompanying the order, becomes final as to that person by operation of law. If a hearing is

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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."

Subsec. (d) provides:

"In a final order under subsection C of this section, the Administrator may impose a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for multiple violations in a single proceeding or a series of related proceedings."

In subsec. (g), in the fourth sentence substitutes "not to exceed One Thousand Dollars (\$1,000.00)" for "not less than \$[ ] but not greater than \$[ ]".

#### **SOUTH CAROLINA**

Substitutes "Securities Commissioner" for "administrator" throughout.

In subsec. (b), the fourth sentence provides: "If a person subject to the order does not request a hearing and none is ordered by the Securities Commissioner within 30 days after the date of service of the order, the order, which may include a civil penalty or costs of the investigation if a civil penalty or costs were sought becomes final as to that person by operation of law."

In subsec. (c), omits the bracketed materials.

Subsec. (d) provides:

"In a final order under subsection (c), the Securities Commissioner may impose a civil penalty in an amount not to exceed \$10,000 for each violation."

In subsec. (g), the fourth sentence provides: "The court may impose a further civil penalty against the person for contempt in an amount not less than \$500 but not greater than \$5,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances."

#### **SOUTH DAKOTA**

Substitutes "director" for "administrator" throughout.

In subsec. (b), the third sentence provides: "The order must include a statement whether the director will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within fifteen days after receipt of a request in a record from the person, the matter will be scheduled for a hearing."

Subsec. (d) provides:

"In a final order under subsection (c), the director may impose a civil penalty up to ten thousand dollars for each violation."

In subsec. (g), the fourth sentence provides: "The court may impose a further civil penalty against the person for contempt in an amount not more than ten thousand dollars, for each violation and may grant any other relief the court determines is just and proper in the circumstances."

#### **VERMONT**

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Substitutes "commissioner" for "administrator" throughout.

Subsec. (d) provides:

"(d) In a final order under subsection (c) of this section, the commissioner may impose a civil penalty of not more than \$15,000.00 for each violation and not more than \$1,000,000.00 for more than one violation. The commissioner may also require a person to make restitution or provide disgorgement of any sums shown to have been obtained in violation of this chapter, plus interest at the legal rate. The limitations on civil penalties contained in this subsection shall not apply to settlement agreements."

In subsec. (g), the fourth sentence provides: "The court may impose a further civil penalty against the person for contempt in an amount not less than \$5,000.00 but not greater than \$25,000.00 for each violation and may grant any other relief the court determines is just and proper in the circumstances."

Inserts a subsection [designated (e) in the Vermont act], which provides:

"(e) For purposes of determining any sanction to be imposed under subsections (a) through (d) of this section, the commissioner shall consider among other factors, the frequency and persistence of the conduct constituting a violation of this chapter or a rule or order of the commissioner under this chapter and the number of persons adversely affected by the conduct, and the resources of the person committing the violation."

#### VIRGIN ISLANDS

Subsecs. (b), (c), and (d) provide:

"(b) 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 shall 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. 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. 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."

"(c) If a hearing is requested or ordered pursuant to subsection (b), a hearing shall be held. A final order may not be issued unless the Administrator makes findings of fact and conclusions of law. The final order may make final, vacate, or modify the order issued under subsection (a)."

"(d) In a final order, the Administrator may impose a civil penalty up to a maximum of \$5,000 for a single violation or up to \$250,000 for more than one violations."

In subsec. (g), in the fourth sentence substitute "\$1,000" for "\$[ ]" twice.

#### LIBRARY REFERENCES

2006 Electronic Pocket Part Update

Securities Regulation ~~€~~270, 276, 277, 291, 310.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 377, 410 to 412, 414, 416, 418, 428 to 429, 441 to 442.

Unif. Securities Act 1985 § 602

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act (1985) with 1988 Amendments (Refs & Annos)

Part VI. Enforcement and Civil Liability

**→ § 602. Enforcement.**

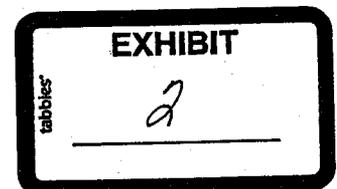
(a) If the [Administrator] reasonably believes, whether or not based upon an investigation conducted under Section 601, that (i) the sale of a security is subject to registration under this [Act] and the security is being offered or has been offered or sold by the issuer or another person in violation of Section 301 or (ii) a person is acting as a broker-dealer or investment adviser in violation of Section 201 or 203, the [Administrator], in addition to any specific power granted under this [Act] and subject to compliance with the requirements of Section 712, may issue, without a prior hearing, an order against the person engaged in the prohibited activities, directing the person to desist and refrain from further activity until the security is registered or the person is licensed under this [Act]. The cease and desist order must state the section of this [Act] or rule or order of the [Administrator] under this [Act] which the [Administrator] reasonably believes has been or is being violated.

(b) If the [Administrator] reasonably believes, whether or not based upon an investigation conducted under Section 601, that a person has violated this [Act] or a rule or order of the [Administrator] under this [Act], the [Administrator], in addition to any specific power granted under this [Act], after notice and hearing in an administrative proceeding unless the right to notice and hearing is waived by the person against whom the sanction is imposed, may:

- (1) issue a cease and desist order against the person;
- (2) censure the person, if the person is a licensed broker-dealer, sales representative, or investment adviser;
- (3) bar or suspend the person from association with a licensed broker-dealer or investment adviser in this State;
- (4) issue an order against an applicant, licensed person, or other person who knowingly violates this [Act] or a rule or order of the [Administrator] under this [Act], imposing a civil penalty up to a maximum of [\$2,500] for a single violation or of [\$25,000] for multiple violations in a single proceeding or a series of related proceedings;  
or
- (5) initiate one or more applicable actions specified in Section 603.

(c) Imposition of the sanctions under this section is limited as follows:

- (1) if the [Administrator] revokes the license of a broker-dealer, sales representative, or investment adviser or bars a person from association with a licensed broker-dealer or investment adviser under this section or Section 212, the imposition of that sanction precludes imposition of the sanction specified in paragraph (4) of subsection (b); and
- (2) the imposition by the [Administrator] of one or more sanctions under subsection (b) with respect to a specific violation precludes the [Administrator] from later imposing any other sanctions under paragraphs (1) through (4) of subsection (b) with respect to the violation.



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(d) For purposes of determining any sanction to be imposed under paragraphs (1) through (4) of subsection (b), the [Administrator] shall consider, among other factors, the frequency and persistence of the conduct constituting a violation of this [Act] or a rule or order of the [Administrator] under this [Act], the number of persons adversely affected by the conduct, and the resources of the person committing the violation.

COMMENT

2000 Main Volume

Prior Provision: None.

1. One of the major revisions from the 1956 Act has been to increase the administrative remedies available to the Administrator when he or she has reasonable grounds to believe that a violation has occurred.

While changed from the 1956 Act, most of the proposed provisions are not alien to current practice. A large number of state administrators currently have cease and desist authority, either by amendment of the 1956 Act or through their administrative procedure law. A lesser number have provisions for bar. On the other hand, most administrators have no present authority to levy civil penalties.

The purpose behind the broader range of sanctions is to give the Administrator greater flexibility in imposing sanctions. Under the 1956 Act, an Administrator often faced the difficult choice of whether or not to suspend the license of a broker-dealer who had violated the Act, irrespective of the severity of the violation--a very drastic remedy and consequence. This section now permits the Administrator to impose a less drastic sanction, e.g., a civil penalty. In egregious cases, on the other hand, an Administrator could, if warranted, impose multiple sanctions.

2. With one exception, none of the above sanctions can be imposed without the person affected having the right to prior notice and opportunity for hearing. The exception concerns the sale of unregistered securities or activities by an unlicensed person who should be licensed and if there is a finding under Section 712 that the situation involves an immediate danger to the public welfare. See subsection (a). In that instance, the Administrator may issue the cease and desist order first and then promptly grant a hearing if requested under Section 712.

Imposition of any of these sanctions is by order of the Administrator which is subject to the applicable provisions of Part VII ("Administration").

3. Subsection (d) borrows from the Truth-in-Lending Act and sets forth the criteria to be considered in levying a civil penalty under this section.

4. All of the remedies in this section are administrative in nature. As provided in subsection (b)(5), the Administrator also can choose to seek directly or subsequently various court-ordered relief under Section 603.

LAW REVIEW AND JOURNAL COMMENTARIES

Nevada Blue Sky Law: An Overview. J. Kenneth Creighton and Sherwood N. Cook. 56 *Inter Alia* 26 (Jan. 1991).

LIBRARY REFERENCES

2000 Main Volume

Securities Regulation ¶270.  
Westlaw Topic No. 349B.  
C.J.S. Securities Regulation § 410 to 411, 414.

Unif. Securities Act 2002 § 509

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act (Last Revised or Amended in 2002) (Refs & Annos)

▣ [Article] 5 Fraud and Liabilities

→ § 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 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 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 [at the legal rate of interest] from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

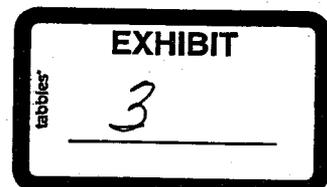
(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as 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 [at the legal rate of interest] from the date of the purchase, 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).



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(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 [at the legal rate of interest] from the date of the sale of the security, 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 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 representative.**] A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of Section 403(a), 404(a), or 506 is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest [at the legal rate of interest] from the date of payment, 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 [at the legal rate of interest] from the date of the fraudulent conduct, 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 representative 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.

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(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, 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, 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 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).

## OFFICIAL COMMENTS

## 2006 Electronic Pocket Part Update

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

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

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

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

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

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5. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of the Securities of 1933. See 9 Louis Loss and Joel Seligman, *Securities Regulations* 4242-4246 (3d ed. 1992). The measure of damages in Section 509(c)(3), however, is that contemplated by Rule 10b-5. Sec. 9 id. 4408-4427. In providing for damages as an alternative to rescission, Section 509(b)(3) follows the 1956 Act and is an improvement upon many earlier state provisions, which conditioned the plaintiff's right of recovery on his or her being in a position to make a good tender. A plaintiff is not given the right under this type of statutory formula to retain stock and also seek damages.

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

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

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

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

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

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

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

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

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

Before the July 2002 enactment of the Sarbanes-Oxley Act, Rule 10b-5 of the Securities Exchange Act as construed by the United States Supreme Court in *Lampf, Pleva, Lipkind, Preps & Petigrew v. Gilbertson*, 501 U.S. 350 (1991), prohibited equitable tolling under the federal securities law one year after discovery and three years after the act formula. See generally 10 Louis Loss & Joel Seligman, *Securities Regulation* 4505-4525 (3d ed. rev. 1996). The Sarbanes-Oxley Act added 28 U.S.C. § 1658(b) which provides

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

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

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(2) 5 years after such violation.

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

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

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

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

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

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

#### ACTION IN ADOPTING JURISDICTIONS

##### 2006 Electronic Pocket Part Update

##### Variations from Official Text:

##### IOWA

In subsec. (e), in the second sentence adds "and taxed as court costs" following "fees determined by the court".

In subsec. (g)(3), inserts "or a person, whether an employee of such person or otherwise, who materially aids in the act or transaction constituting the violation," preceding "and who materially aids the conduct".

Adds subsections [designated 13A and 13B in the Iowa act], which provide:

**"13A. Informational filing with the administrator.** A copy of any suit or arbitration action filed under this section shall be served upon the administrator within twenty days of the filing in the form and manner prescribed by the administrator by rule or order, provided that all of the following apply:

"a. The failure to comply with this provision shall not invalidate the action which is the subject of the suit.

"b. The suit or arbitration action has not been filed in a record with the central registration depository or the investment adviser registration depository."

**"13B. Liability for takeover violations.** Any person who violates section 502.321B shall be liable to the person selling the security to such violator, which seller may sue either at law or in equity to recover the security, costs, and reasonable attorney fees, plus any income or distributions, in cash or in kind, received by the purchaser thereon, upon tender of the consideration received, or for damages if the purchaser no longer owns the security. Damages shall be the excess of the value of the security when the purchaser disposed of it, plus interest at the legal

## Unif. Securities Act 2002 § 509

rate from the date of disposition, over the consideration paid for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable.

"In addition to other remedies provided in this chapter, in a proceeding alleging a violation of article 3A, the court may provide that all shares acquired from a resident of this state in violation of any provision of this chapter or rule or order issued pursuant to this chapter be denied voting rights for one year after acquisition, that the shares be nontransferable on the books of the target company, or that during this one-year period the target company have the option to call the shares for redemption either at the price at which the shares were acquired or at book value per share as of the last day of the fiscal quarter ended prior to the date of the call for redemption, which redemption shall occur on the date set in the call notice but not later than sixty days after the call notice is given."

**KANSAS**

In subsecs. (b)(1) and (b)(3), inserts "at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto" following "the date of the purchase".

In subsec. (c)(3), inserts "at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto" following "the sale of the security".

In subsec. (e), the second sentence provides: "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."

In subsec. (f)(1), inserts "at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto" following "date of the fraudulent conduct".

**MAINE**

In subsec. (b), in the introductory paragraph, in the first sentence substitutes "violation of section 16301; section 16303, subsection 6; section 16304, subsection 5; or section 16305, subsection 6" for "violation of Section 301".

**OKLAHOMA**

Subsec. (b)(1) provides:

"The purchaser may maintain an action at law or in equity to recover the consideration paid for the security, and interest at the legal rate of interest per year from the date of the purchase, less the amount of any income received on the security, plus costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph 3 of this subsection."

In subsecs. (b)(3), (c)(3), (e), and (f)(1), substitutes "per year" for the bracketed material.

In subsec. (c)(1), and the second sentence of subsecs. (d), and (e), inserts "at law or equity" following "maintain an action".

In subsec. (f)(2), substitutes "conduct of business" for "transacting business".

In subsec. (g), adds a subdivision [designated 5 in the Oklahoma act], which provides:

"5. Any other person who materially aids in the conduct giving rise to the liability under subsections B through F of

Unif. Securities Act 2002 § 509

this section, unless the person sustains the burden or proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which liability is alleged to exist."

In subsec. (j)(1), substitutes "action is commenced" for "action is instituted".

**SOUTH CAROLINA**

In subsec. (e) in the first sentence and in subsec. (f)(2), inserts "regarding securities" following "investment advice" throughout.

In subsec. (g)(3), substitutes "an employee, or a person occupying a similar status or performing a similar function, of a person liable" for "an employee of or associated with a person liable".

In subsec. (g), adds a subdivision [designated (5) in the South Carolina act], which provides:

"(5) a person who, with actual knowledge that a person is committing acts sufficient to violate Sections 35-1-501 and 35-1-502, nonetheless intentionally furthers the violation with actual awareness that the person is rendering substantial assistance to the person committing the violation of Sections 35-1-501 and 35-1-502, thereby becomes an aider and abettor of the violation, and is therefore jointly and severally liable with and to the same extent as the assisted person who engaged in the fraudulent activity, provided, however, this subsection (5) does not require any due diligence investigation nor impose liability for failure to perform any due diligence investigation otherwise required."

Subsec. (l) provides:

"A condition, stipulation, or provision including, but not limited to, any choice of law provision directly or indirectly binding a person purchasing or selling a security or receiving investment advice regarding securities to waive compliance with this chapter or a rule adopted or order issued under this chapter is void."

**VERMONT**

In subsec. (b), the introductory paragraph provides:

"A person is liable to the purchaser if the person sells a security in violation of sections 5301, 5501, or 5502 of this chapter, the purchaser not knowing the untruth or omission or deceptive nature of the conduct 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 or deceptive nature of the conduct. An action under this subsection is governed by the following:"

In subsec. (c), the introductory paragraph provides:

"A person is liable to the seller if the person buys a security in violation of section 5501 or 5502 of this chapter, the seller not knowing of the untruth or omission or deceptive nature of the conduct, 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 or deceptive nature of the conduct. An action under this subsection is governed by the following:"

In subsec. (f)(1), substitutes "person wronged" for "person defrauded".

**VIRGIN ISLANDS**

Unif. Securities Act 2002 § 509

In subsec. (g)(1), (g)(2), and (g)(4), substitutes "the facts" for "conduct".

In subsec. (j)(1) and (j)(2), substitutes "action is commenced" for "action is instituted".

#### LIBRARY REFERENCES

2006 Electronic Pocket Part Update

Securities Regulation ↪ 278, 291, 303.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 378, 418, 428 to 429, 433.

Unif. Securities Act 1956 § 410

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act 1956

As Amended in 1958 (Refs & Annos)

Part IV. General Provisions

**→ § 410. [Civil Liabilities].**

(a) Any person who

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

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

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

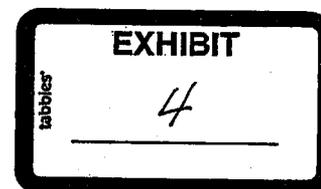
(b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer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

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

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

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

(f) No person who has made or engaged in the performance of any contract in violation of any provision of this act



## Unif. Securities Act 1956 § 410

or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(g) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.

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

## CREDIT(S)

As amended in 1958.

## COMMENT

## 2000 Main Volume

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

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

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

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

Subsec. (b). The defense of lack of knowledge is modeled on § 15 of the Securities Act of 1933, 15 U.S.C. § 77b [15 U.S.C.A. § 77o], and § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a) [15 U.S.C.A. § 78t(a)]. The last sentence, with reference to contribution, is a safeguard to avoid the common-law rule which prohibits contribution among joint tort-feasors.

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

Subsec. (e). The purpose of subsection (e)(2) is to take care of the case where the buyer has already disposed of the security before the rescission offer is made to him. In such a case the buyer is not foreclosed from bringing suit if he is not satisfied with the seller's computation of damages, but in order to do so he must reject the rescission offer within thirty days so that the seller may know where he stands.

## Unif. Securities Act 1956 § 410

Subsec. (f). This result has been quite generally reached by the courts even in the absence of a specific provision. See the cases cited in Loss, *Securities Regulation* (1951 with 1955 Supp.), p. 967, n. 63.

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

## ACTION IN ADOPTING JURISDICTIONS

2000 Main Volume

**Variations from Official Text:****MASSACHUSETTS**

In subsec. (a), following the flush material, adds a sentence, which provides: "Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition."

In subsec. (e), the first sentence provides: "No person may sue under this section more than four years after the discovery by the person bringing the action of a violation of this chapter or any rule promulgated or order issued thereunder."

## LAW REVIEW AND JOURNAL COMMENTARIES

Arkansas Securities Act of 1959. Charles W. Stewart. 13 *Ark.L.Rev.* 323 (Fall 1959).

California measures the Uniform Securities Act against its corporate securities law. Robert H. Edwards. 15 *Bus.Law.* 814 (July 1960).

Clearing Arrangements. Henry F. Minnerop. 58 *Bus. Law.* 917 (May 2003).

Collateral participant liability under state securities laws. Douglas M. Branson. 19 *Pepp.L.Rev.* 1027 (1992).

Comparison of Florida and Uniform Security Acts. Richard E. Reckson. 16 *U.Miami L.Rev.* 351 (1962).

Comparison of the Mississippi Securities Act with the Uniform Securities Act. Richard B. Wilson Jr. 35 *Miss.L.J.* 421 (May 1964).

Conflict of laws and the blue sky laws. Louis Loss. 71 *Harv.L.Rev.* 209 (1957).

Fraud in securities transactions. James B. Farmer and Toba Jeanne Feldman. 49 *U.Cin.L.Rev.* 814 (1980).

Georgia blue sky laws and the Uniform Act. George S. Parthemos. 22 *Ga.St.B.J.* 437 (May 1960).

Maryland remedies for misrepresentation in securities transactions. 13 *U.Balt.L.Rev.* 574 (1984).

Unif. Securities Act 1956 § 410

Purchasing the Stock of a Privately Held Company: The legal Effect of an Acquisition Review. 51 Bus. Law. 479 (1996).

Securities issuance and regulation; the new Indiana Securities Law. Arthur J. Pasmans Jr. 38 Ind. L.J. 38 (Fall 1962).

Securities regulation in New Jersey. 17 Rutgers L. Rev. 602 (Spring 1963).

Securities regulation in Utah. Wallace R. Bennett. 8 Utah L. Rev. 216 (Summer 1963).

Should Utah adopt the new Uniform Securities Act? Wallace R. Bennett. 5 Utah L. Rev. 471 (Fall 1957).

Uniform Securities Act; enforcement. 12 Stan. L. Rev. 105 (1959).

Uniform Securities Act; report of the Committee on Corporations. 33 Los Angeles B. Bull. 67 (Jan. 1958).

#### LIBRARY REFERENCES

##### 2000 Main Volume

Securities Regulation ↪291.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 228, 237.

Unif. Securities Act 2002 § 603

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act (Last Revised or Amended in 2002) (Refs & Annos)

▣ [Article] 6 Administration and Judicial Review

→ § 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 the [insert the name of the court] 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 \$[ ] for a single violation or up to \$[ ] for more than one violation; 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) ordering the payment of prejudgment and postjudgment interest; or

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

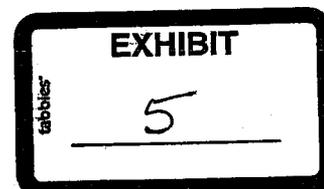
(c) **[No bond required.]** The administrator may not be required to post a bond in an action or proceeding under this [Act].

OFFICIAL COMMENTS

2006 Electronic Pocket Part Update

**Prior Provisions:** 1956 Act Section 408; RUSA Section 603

1. Section 408 of the 1956 Act was limited to injunctions. This Section follows RUSA in broadening the civil



Unif. Securities Act 2002 § 603

remedies available when the administrator believes that a violation has occurred. A primary purpose of a broad range of potential sanctions is to enable administrators to better tailor appropriate sanctions to particular misconduct.

2. The administrator alternatively may proceed to seek administrative enforcement under Section 604; to deny, suspend, or revoke a securities registration under Section 306; or to deny, suspend, revoke, or take other action against a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412.

3. Constitutional due process considerations can also be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions of each jurisdiction. The term "upon a proper showing" has a settled meaning in the federal securities laws. See, e.g., Securities Act of 1933 Section 20(b).

4. As with Sections 509(g)(3) and (4), materially aid in Section 603(a) does not include ministerial or clerical acts.

**ACTION IN ADOPTING JURISDICTIONS**

2006 Electronic Pocket Part Update

**Variations from Official Text:**

**IDAHO**

In subsec. (b)(2)(C), substitutes "Imposing a civil penalty not to exceed ten thousand dollars (\$10,000) for each violation" for "imposing a civil penalty up to \$[ ] for a single violation or up to \$[ ] for more than one violation".

**IOWA**

Subsec. (b)(2)(C) provides:

"Imposing a civil penalty not to exceed a maximum of five thousand dollars for a single violation or five hundred thousand dollars for more than one violation; 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 chapter or the predecessor chapter or a rule adopted or order issued under this chapter or the predecessor chapter."

**KANSAS**

In subsec. (a), substitutes "maintain an action in any court of competent jurisdiction to enjoin" for "maintain an action in the [insert the name of the court] to enjoin".

Subsec. (b)(2)(C) provides:

"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;"

**MAINE**

Unif. Securities Act 2002 § 603

Adds a subsection [designated 4 in the Maine act], which provides:

"4. **Securities agency of another state.** Upon a showing by the administrator or securities agency of another state that a person has violated any provision of the securities act of that state or any rule or order of the administrator or securities agency of that state, the Superior Court may grant appropriate legal and equitable remedies."

#### MISSOURI

In subsec. (b)(2), adds a paragraph [designated (E) in the Missouri act], which provides:

"(E) Ordering the payment to the investor education and protection fund of an amount equal to ten percent of the total rescission, restitution, or disgorgement ordered, or such other amount as awarded by the court; or"

Adds subsections [designated (d) and (e) in the Missouri act], which provide:

"(d) The commissioner is authorized to enter into a consent injunction and judgment in the settlement of any proceeding in the public interest under this act."

"(e) The commissioner may create an 'Investor Restitution Fund' for the purpose of preserving and distributing to aggrieved investors, disgorgement or restitution funds obtained through enforcement proceedings under this act. In addition to the equitable powers of the court authorized above, the court may order that such funds be paid into the investor restitution fund for distribution to aggrieved investors. It shall be the duty of the commissioner to distribute such funds to those persons injured by the unlawful acts, practices, or courses of business. Such funds may or may not be in interest-bearing accounts, but any interest, which accrues to any such account, shall be paid to the credit of the investor education and protection fund. Notwithstanding the provisions of section 33.080, RSMo, any funds remaining in the secretary of state's investor restitution fund at the end of any biennium shall not be transferred to the general revenue fund, but if the commissioner is unable with reasonable efforts to ascertain the aggrieved investors, then the funds may be transferred to the investor education and protection fund."

#### OKLAHOMA

Subsecs. (a) and (b)(2)(C) provide:

"A. 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 constituting a dishonest or unethical practice 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 or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained 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."

"c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; 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"

#### SOUTH CAROLINA

Substitutes "Securities Commissioner" for "administrator" throughout.

Unif. Securities Act 2002 § 603

In subsec. (a), substitutes "Richland County Court of Common Pleas" for the bracketed material.

#### **SOUTH DAKOTA**

Substitutes "director" for "administrator" throughout.

Subsec. (b)(2)(C) provides:

"Imposing a civil penalty up to ten thousand dollars for each violation; 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 chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act; and"

#### **VERMONT**

Substitutes "commissioner" for "administrator" throughout.

In subsec. (a), substitutes "superior court of Washington County" for the bracketed material.

Subsec. (b)(2)(C) provides:

"imposing a civil penalty up to \$15,000.00 for each violation and not more than \$1,000,000.00 for more than one violation; 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 chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act. The limitations on civil penalties contained in this subdivision shall not apply to settlement agreements; and"

#### **VIRGIN ISLANDS**

In subsec. (a), substitutes "If it appears to the Administrator that a person" for "If the administrator believes that a person" and "Territorial Court of the Virgin Islands" for the bracketed material.

In subsec. (b)(2)(C), substitutes "up to a maximum of \$10,000 for each violation" for "up to \$[ ] for a single violation or up to \$[ ] for more than one violation", and omits "the predecessor act" following "[Act] or" twice.

In subsec. (b)(2)(D), substitutes "an order for the payment" for "ordering the payment".

In subsec. (b)(3), substitutes "granting other relief" for "order such other relief".

#### **LIBRARY REFERENCES**

2006 Electronic Pocket Part Update

Securities Regulation ↪ 270, 291, 303, 310.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 410 to 411, 414, 418, 428 to 429, 433, 441 to 442.

#### **NOTES OF DECISIONS**

**Generally 1**

Unif. Securities Act 1985 § 603

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act (1985) with 1988 Amendments (Refs & Annos)

Part VI. Enforcement and Civil Liability

**→ § 603. Power of Court to Grant Relief.**

(a) Upon a showing by the [Administrator] that a person has violated or is about to violate this [Act] or a rule or order of the [Administrator] under this [Act], the [designate the appropriate court] may grant or impose one or more of the following appropriate legal or equitable remedies:

(1) upon a showing of a violation of this [Act] or a rule or order of the [Administrator] under this [Act]:

(i) a temporary restraining order, permanent or temporary prohibitory or mandatory injunction, or a writ of prohibition or mandamus;

(ii) a civil penalty up to a maximum of [\$2,500] for a single violation or of [\$25,000] for multiple violations in a single proceeding or a series of related proceedings;

(iii) a declaratory judgment;

(iv) restitution to investors;

(v) the appointment of a receiver or conservator for the defendant or the defendant's assets; and

(vi) other relief the court considers just.

(2) upon a showing that the defendant is about to violate this [Act] or a rule or order of the [Administrator] under this [Act] only:

(i) a temporary restraining order;

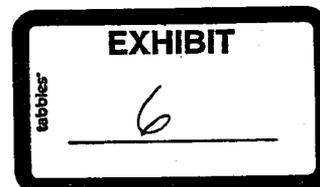
(ii) a temporary or permanent injunction; or

(iii) a writ of prohibition or mandamus.

(b) In determining the appropriate relief under subsection (a), the court shall consider enforcement actions taken and sanctions imposed by the [Administrator] under Section 602 in connection with the transactions constituting violations of this [Act] or a rule or order of the [Administrator] under this [Act].

(c) The [Administrator] is not required to post a bond in an action under this section.

(d) Upon a showing by the securities agency or administrator of another state that a person has violated the securities act of that state or a rule or order of the securities agency or administrator of that state, the court, in addition to any other legal or equitable remedies, may impose one or more of the following remedies:



Unif. Securities Act 1985 § 603

- (1) appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this State; and
- (2) other relief the court considers just.

COMMENT

2000 Main Volume

Prior Provision: USA 408; New.

1. This provision has been expanded to match and reflect the various administrative remedies now provided under Section 602.
2. While many of the remedies enumerated in this section may well be authorized under some other statute of this State, it was determined to list them here to make clear the range of authority a state court has in acting upon violations of this Act.
3. The remedies with respect to prospective conduct are limited in subsection (a)(2) to injunctive forms of relief.

LIBRARY REFERENCES

2000 Main Volume

Securities Regulation ↪275.  
Westlaw Topic No. 349B.  
C.J.S. Securities Regulation § 417.

Unif. Securities Act 1985 § 603, ULA SECUR § 603

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END OF DOCUMENT

Unif. Securities Act 2002 § 508

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act (Last Revised or Amended in 2002) (Refs & Annos)

▣ [Article] 5 Fraud and Liabilities

→ § 508. Criminal Penalties.

(a) **[Criminal penalties.]** A person that willfully violates this [Act], or a rule adopted or order issued under this [Act], except Section 504 or the notice filing requirements of Section 302 or 405, or that willfully violates Section 505 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. 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.

(b) **[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].

(c) **[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.

OFFICIAL COMMENTS

2006 Electronic Pocket Part Update

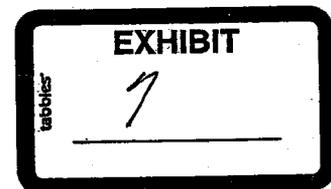
**Prior Provisions:** 1956 Act Section 409; RUSA Section 604; Securities Exchange Act of 1934 Section 32(a).

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

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

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

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



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5. This section does not specify maximum dollar amounts for criminal fines, maximum terms for imprisonment, nor the years of limitation, but does provide for each state to specify appropriate magnitudes for criminal fines or maximum terms for imprisonment.

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

## ACTION IN ADOPTING JURISDICTIONS

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**Variations from Official Text:****IDAHO**

Section provides:

"(a) A person that willfully violates this chapter, or a rule adopted or an order issued under this chapter, except section 30-14-504, Idaho Code, or the notice filing requirements of section 30-14-302 or 30-14-405, Idaho Code, or that willfully violates section 30-14-505, Idaho Code, knowing the statement made to be false or misleading in a material respect, shall be guilty of a felony and upon conviction, shall be fined not more than ten thousand dollars (\$10,000) or imprisoned not more than five (5) years, or both. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

"(b) A person that willfully violates section 30-14-501 or 30-14-502(a), Idaho Code, and in connection with that violation, the violator knowingly accepts any money representing:

"(1) Equity in a person's home;

"(2) A withdrawal from any individual retirement account or similar retirement account; or

"(3) A withdrawal from any qualified retirement plan as defined in the Internal Revenue Code,

"shall upon conviction be punished by imprisonment for not less than three (3) years or more than fifteen (15) years if, at the time the crime was committed, the property, money or thing unlawfully obtained or sought to be obtained was worth ten thousand dollars (\$10,000) or more.

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"(c) If, in the commission of an offense described in subsection (a) or (b) of this section, the victim is an elder or dependent adult, and the violator has knowledge that the victim is an elder or dependent adult, the defendant shall receive an additional term of imprisonment as follows:

"(1) Three (3) years if the victim is under seventy (70) years of age.

"(2) Five (5) years if the victim is seventy (70) years of age or older.

"(d) As used in this section, 'elder' means any person who is sixty-five (65) years of age or older.

"(e) As used in this section, 'dependent adult' means any person who is between the ages of eighteen (18) and sixty-four (64) years, who has physical or mental limitations which restrict the person's ability to carry out normal activities or to protect the person's rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.

"(f) No indictment or information may be returned under this chapter more than five (5) years after the alleged violation.

"(g) The attorney general or the proper prosecuting attorney with or without a reference from the administrator, may institute criminal proceedings under this chapter.

"(h) This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state."

**IOWA**

Subsecs. (a) and (b) [designated 1 and 2 in the Iowa act] provide:

**"1. Criminal penalties.**

"a. Except as provided in paragraph 'b', a person who willfully violates any provision of this chapter, or any rule adopted or order issued under this chapter, is guilty of a class 'D' felony.

"b. A person who willfully violates section 502.501 or section 502.502, subsection 1, resulting in a loss of more than ten thousand dollars is guilty of a class 'C' felony.

**"2. Criminal reference not required.** The attorney general or the proper county attorney, with or without a reference from the administrator, may institute criminal proceedings under this chapter."

**KANSAS**

Section provides:

"(a) **Criminal penalties.** (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 K.S.A. 2005 Supp. 17-12a504, and amendments thereto, or the notice filing requirements of K.S.A. 2005 Supp. 17-12a302 or 17-12a405, and amendments thereto, 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 K.S.A. 2005 Supp. 17-12a501 or 17-12a502, and amendments

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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 K.S.A. 2005 Supp. 17-12a301, 17-12a401(a), 17-12a401(c), 17-12a402(a), 17-12a402(d), 17-12a403(a), 17-12a403(c), 17-12a403(d), 17-12a404(a), or 17-12a404(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 K.S.A. 2005 Supp. 17-12a505 or 17-12a506, and amendments thereto, is a severity level 8, nonperson felony.

"(5) Any violation of K.S.A. 2005 Supp. 17-12a301, 17-12a401(a), 17-12a401(c), 17-12a402(a), 17-12a402(d), 17-12a403(a), 17-12a403(c), 17-12a403(d), 17-12a404(a), 17-12a404(e), 17-12a501 or 17-12a502, 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.

"(c) **Criminal reference.** The administrator may refer such evidence as may be available concerning violations of this act or of any rules and regulations 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.

"(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."

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## MAINE

Section provides:

"1. **Criminal penalties.** A person that intentionally or knowingly violates this chapter, or a rule adopted or order issued under this chapter, except section 16504 or the notice filing requirements of section 16302 or 16405, or that intentionally or knowingly violates section 16505 knowing the statement made to be false or misleading in a material respect, upon conviction, commits a Class C crime. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

"2. **Referral to Attorney General.** The administrator may refer such evidence as is available concerning violations of this chapter or any rule or order issued under this chapter to the Attorney General, who may, with or without such a reference from the administrator, institute the appropriate criminal proceedings under this chapter. The Attorney General may request assistance from the administrator or employees of the administrator.

"3. **No limitation on other criminal enforcement.** This chapter does not limit the power of this State to punish a person for conduct that constitutes a crime under other laws of this State.

"4. **Venue.** When a person pursuant to one scheme or course of conduct, whether upon the same person or several persons, engages in fraudulent or other prohibited practices, engages in unlawful transactions of business or other unlawful conduct or engages in unlawful offers to sell or purchase or unlawful sales or purchases under this chapter, the State may opt for a single Class C count, and, in that circumstance, prosecution may be brought in any venue in which one or more of the unlawful acts were committed."

## MISSOURI

Subsec. (a) provides:

"A person that willfully violates this act, or a rule adopted or order issued under this act, except Section 409.5-504 or the notice filing requirements of section 409.3-302 or 409.4-405, or that willfully violates section 409.5-505 knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than one million dollars or imprisoned not more than ten years, or both. 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."

## OKLAHOMA

Section provides:

"A. A person who willfully violates this act, or a rule adopted or order issued under this act, except Section 32 of this act or the notice filing requirements of Section 11 or 22 of this act, or that willfully violates Section 33 of this act knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than One Hundred Thousand Dollars (\$100,000.00) or imprisoned not more than ten (10) years, or both such fine and imprisonment. An individual convicted of violating a rule adopted or order issued under this act may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

"B. 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.

"C. On a criminal matter referred by the Administrator, the prosecuting attorney may designate and appoint one or

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more lawyers of the Department as special assistants as available for the purpose of assisting in or conducting a criminal prosecution arising by reason of an investigation or proceeding under this section."

## **SOUTH CAROLINA**

Section provides:

"(a) A person that wilfully violates this chapter, or a rule adopted or order issued under this chapter, except Section 35-1-504 or the notice filing requirements of Section 35-1-302 or 35-1-405, or that wilfully violates Section 35-1-505 knowing that the statement made is false or misleading in a material respect, is guilty of a:

"(1) felony and, upon conviction, must be fined not more than fifty thousand dollars or imprisoned not more than ten years, or both, if the person's actions result in loss to an investor of twenty thousand dollars or more;

"(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both, if the person's actions result in loss to an investor of more than one thousand dollars but less than twenty thousand dollars;

"(3) misdemeanor and, upon conviction, must be fined not more than thirty thousand dollars or imprisoned not more than three years, or both, if the person's actions result in loss to an investor of one thousand dollars or less, or if no losses are proven. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

"(b) The Securities Commissioner may refer that evidence as is available concerning violations of this chapter or of any rule or order under this chapter to the appropriate Division of the Attorney General's Office or other appropriate prosecution, law enforcement, or licensing authorities who may institute the appropriate proceedings under this chapter.

"(c) This chapter does not limit the power of this State to punish a person for conduct that constitutes a crime under other laws of this State."

## **SOUTH DAKOTA**

Subsec. (a) provides:

"It is a class four felony for any person that willfully violates this chapter, or a rule adopted or order issued under this chapter, except § 47-31B-504 or the notice filing requirements of § 47-31B-302 or § 47-31B-405, or that willfully violates § 47-31B-505 knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than ten thousand dollars per violation. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order. A subsequent violation is a Class 3 felony."

In subsec. (b), substitutes "director" for "administrator".

## **VERMONT**

Section provides:

"(a)(1) Upon conviction, any person shall be fined not more than \$100,000.00 or imprisoned not more than five years, or both who:

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"(A) willfully violates this chapter, or a rule adopted or order issued under this chapter, except section 5504 of this chapter or the notice filing requirements of section 5302 or 5405 of this chapter; or

"(B) willfully violates section 5505 of this chapter knowing the statement made to be false or misleading in a material respect.

"(2) An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

"(3) For purposes of subdivision (a)(1) of this subsection, the term 'willfully' means purposely or willingly committing the act or making the omission and does not require an intent to violate the law or to injure another or to acquire any advantage.

"(b) The attorney general with or without a reference from the commissioner may institute criminal proceedings under this chapter.

"(c) This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state."

**VIRGIN ISLANDS**

In subsec. (a), in the first sentence substitutes "\$1,000,000 or imprisoned not more than 10 years, or both" for "\$[ ] or imprisoned not more than [ ] years, or both".

In subsec. (b), inserts "appropriate" preceding "criminal proceedings".

**LIBRARY REFERENCES**

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Securities Regulation ⇨323.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 445 to 446, 448 to 450.

Unif. Securities Act 2002 § 508, ULA SECUR § 508

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END OF DOCUMENT

Unif. Securities Act 1956 § 409

**C**

Uniform Laws Annotated Currentness

Uniform Securities Act 1956

▣ As Amended in 1958 (Refs & Amos)

▣ Part IV. General Provisions

**→ § 409. [Criminal Penalties].**

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

(b) The [Administrator] may refer such evidence as is available concerning violations of this act or of any rule or order hereunder to the [attorney general or the proper district attorney], who may, with or without such a reference, institute the appropriate criminal proceedings under this act.

(c) Nothing in this act limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law.

COMMENT

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

ACTION IN ADOPTING JURISDICTIONS

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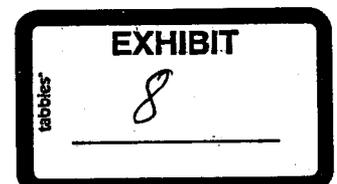
**Variations from Official Text:**

**MASSACHUSETTS**

Subsec. (a) now provides:

"(a) Any person who willfully violates any provision of this chapter except section 404, or who willfully violates any rule or order under this chapter, or who willfully violates section 404 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than \$100,000 or imprisoned not more than 10 years in the state prison, or both; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

"Fines collected under this subsection shall be immediately sent to the state treasurer for deposit in the Securities



Unif. Securities Act 1956 § 409

Fraud Prosecution Fund, established by section 69 of chapter 10."

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**Variations from Official Text:**

**MASSACHUSETTS**

In subsec. (a), omits the bracketed second sentence.

**LAW REVIEW AND JOURNAL COMMENTARIES**

Arkansas Securities Act of 1959. Charles W. Stewart. 13 Ark.L.Rev. 323 (Fall 1959).

Comparison of the Mississippi Securities Act with the Uniform Securities Act. Richard B. Wilson Jr. 35 Miss.L.J. 421 (May 1964).

Georgia blue sky laws and the Uniform Act. George S. Parthemos. 22 Ga.St.B.J. 437 (May 1960).

Securities regulation in Utah. Wallace R. Bennett. 8 Utah L.Rev. 216 (Summer 1963).

Should Utah adopt the new Uniform Securities Act? Wallace R. Bennett. 5 Utah L.Rev. 471 (Fall 1957).

Uniform Securities Act; enforcement. 12 Stan.L.Rev. 105 (1959).

**LIBRARY REFERENCES**

2000 Main Volume

Securities Regulation ↪321.

Westlaw Topic No. 349B.

C.J.S. Securities Regulation §§ 252, 253.