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## The Securities Act of Nebraska: An Overview

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# The Securities Act of Nebraska: An Overview

## I. INTRODUCTION

Nebraska's first Blue Sky Law, enacted in 1913,<sup>1</sup> gave the State Railway Commission authority to deny permits for registration of securities when, "in the judgment of the commission, the securities offered for sale do not promise a fair return."<sup>2</sup> That power was later revoked by the legislature in 1922, when a new Blue Sky Law<sup>3</sup> was passed establishing disclosure requirements for the issuance of securities not exempted under the 1922 Act.<sup>4</sup> The 1922 Act, although amended on numerous occasions through the years, retained its central features providing for disclosure requirements in issuing securities and recovery for fraud committed in the "issuance, assignment, sale or transfer of securities."<sup>5</sup>

In 1965, the legislature repealed the "Blue Sky Laws" and enacted, with modifications, the Uniform Securities Act.<sup>6</sup> Titled the

1. NEB. REV. STAT. ch. 14, art. XXI (1913) (current version at NEB. REV. STAT. §§ 8-1101 to 1124 (Reissue 1974)). L.B. 263, 85th Leg., 1st Sess. (1977), introduced by the Banking, Commerce and Insurance Committee in the 1977 Nebraska Legislative Session, was pending before the Legislature during the preparation of this comment and would amend the present Securities Act of Nebraska in many important respects. Section 5 of the Bill would amend NEB. REV. STAT. § 8-1109 (Reissue 1974), giving the Director of Banking the authority to deny or revoke effectiveness of a registration statement if he finds that "[t]he issuer's plan of business, or the plan of financing is either unfair, unjust, inequitable, dishonest, oppressive, or fraudulent or would tend to work a fraud upon the purchaser." This provision would undoubtedly give the director broad statutory power and is likely to be the subject of extensive controversy. Succumbing to pressure from the securities industry, the Banking, Commerce and Insurance Committee deleted the most significant portions of the bill. See 85 LEGIS. J. 1278 (daily ed. Apr. 5, 1977).
2. NEB. REV. STAT. ch. 14, art. XXI, § 254c (1913) (current version at NEB. REV. STAT. § 8-1109 (Reissue 1974)).
3. NEB. COMP. STAT. tit. V, art. XXI (1922) (current version at NEB. REV. STAT. §§ 8-1101 to 1124 (Reissue 1974)).
4. *Id.* § 8117.
5. *Id.* § 8139.
6. The Uniform Securities Act was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association

Securities Act of Nebraska (Act),<sup>7</sup> it embodies the three basic policies central to blue sky regulation over the past sixty-six years:<sup>8</sup> (1) prohibition of fraud in the sale or purchase of securities, (2) registration of broker-dealers, agents, and investment advisers, and (3) registration of securities.

Knowledge of the Act's contents to the practicing attorney in Nebraska becomes particularly important when he or she is dealing with securities exempt from the registration requirements of federal law.<sup>9</sup> If the security is not exempt from federal law, most

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in 1956. See 7 UNIFORM L. ANN. 691 (1970) for the Uniform Securities Act and the accompanying comments accepted by the Conference of Commissioners. Much of the language of the Uniform Securities Act is taken from the Securities Act of 1933 and the Investment Advisers Act of 1940.

7. NEB. REV. STAT. §§ 8-1101 to 1124 (Reissue 1974) [hereinafter referred to as the Act].
8. See 1 L. LOSS, SECURITIES REGULATION 23-62 (1951).
9. A brief treatment of three of the most important exemptions follows:

*Regulation A.* Although termed an exemption, Regulation A merely provides a simplified registration form for issues not exceeding an aggregate amount of \$500,000. All the securities offered or sold within the past year are considered in computing the aggregate offering price limit. Additionally, the \$500,000 limit is available only to persons offering or selling securities on behalf of the issuer. A \$100,000 aggregate amount is available as an exemption for persons offering or selling securities on the behalf of persons other than the issuer or its affiliates.

Ten days prior to the initial offering of any securities under Regulation A, copies of a notification on form 1-A must be filed with the regional office of the Securities and Exchange Commission for the region where the issuer maintains its principal place of business. Four copies of the offering circular, deemed part of the notification, must be filed with the notification. The offering circular, containing the information required by schedule 1 of form 1-A, must be concurrently given to the persons to whom the offer is made. No offering circular is necessary, however, if the aggregate offering price does not exceed \$50,000, provided that the same information is filed as an exhibit to the notification.

The offering circular must include information concerning the business of the issuer, the amount of securities being offered, the aggregate underwriting discounts or commissions, expenses of the issuer, the consideration to be given for the offering, material relationships between the issuer and underwriter, purposes for which the net cash proceeds are to be used, a description of the securities offered, other businesses the issuer is engaged in and appropriate financial statements. 17 C.F.R. §§ 230.251-263 (1977). See also 2 FED. SEC. L. REP. (CCH) ¶ 7325 (1975); Burge, *Regulation A: A Review and a Look at Recent Developments*, 46 LOS ANGELES B. BULL. 290-320 (1971).

*Rule 146—Private Offering Exemption.* The Rule 146 exemption is available only for issuer transactions, and in summary, provides the following requirements:

- 1) No general solicitation for the securities may be made unless

attorneys not familiar with the complexities of federal law or carrying adequate and appropriate insurance will have to farm out the registration requirement.<sup>10</sup> However, when a federal exemption is deemed to have been satisfied, the attorney may want to consider pursuing the state registration requirements, if any, on his own.

Additionally, the Act's fraud and rescission provisions will have particular significance to persons seeking or being subjected to civil

the following conditions have been satisfied:

- a. The issuer has reasonable grounds to believe and does believe that by virtue of the offeree's knowledge and experience in financial matters, he is capable of evaluating the risks and merits of the investment, or that he can bear the economic risk of the investment.
  - b. The issuer has reasonable grounds to believe and does believe prior to making any sale, after reasonable inquiry, that the offeree and his representatives, if any, have sufficient knowledge and experience and would be able to bear the economic risk in the investment.
  - 2) The offeree must be given access to the information required by Schedule A of the 1933 Securities Act, and have the opportunity to obtain additional information.
  - 3) The offeree must be informed that the securities cannot be sold unless they are subsequently registered or an exemption is available.
  - 4) The issuer has reasonable grounds to believe that no more than 35 persons are purchasing the securities of the issuer in any offering pursuant to the rule.
  - 5) The issuer must exercise reasonable care in assuring that persons purchasing the securities are not underwriters.
- 17 C.F.R. § 230.146 (1977).

*Rule 147—Intrastate Offering.* Like Rule 146, Rule 147 is nonexclusive and is available to issuers only. Four conditions must be satisfied to qualify for the exemption.

1. The issuer must be a resident, doing business in the state where the securities are issued.
2. All the offerees and purchasers must be residents of the state where the securities are sold.
3. Resale of any security for a period of nine months after the last sale must be made only to persons residing within the state.
4. The issuer must take certain precautions, including the placement of appropriate legends on the certificates, stop-transfer instructions, appropriate notations on stock records, written representations from all purchasers as to their residences, and disclosure in writing of all limitations.

The rule also provides for integration of offers or sales made of similar securities within six months preceding or following any sale of securities sought to be included in the exemption. 17 C.F.R. § 230.147 (1977).

10. Securities registered with the Securities and Exchange Commission may also qualify for a simple "coordination" registration under state law pursuant to NEB. REV. STAT. § 8-1106 (Reissue 1974).

liability for failure to comply with the Act. While federal law, particularly rule 10b-5,<sup>11</sup> has been the cornerstone of fraud liability in the past, recent developments limiting liability may give rise to increased attempts at expanding the role of state law.<sup>12</sup>

Limited Nebraska case law exists which would aid in the interpretation and determination of the scope of the Act. Consequently, this comment will present a review of the Act, focusing on the more important provisions and raising some issues which may arise in its implementation.

## II. "SECURITIES" AND "OFFER OR SALE" UNDER THE ACT

Knowledge of the registration requirements and proscriptions under the Act requires a basic understanding of what is meant by "securities" and "offer or sale," terms which permeate the Act. For instance, the fraud provision sets forth some prohibited practices in connection with the "offer, sale, or purchase of any security." Registration requirements for broker-dealers, issuer-dealers, agents, and investment advisers stem from the participation in the offer or sale of a security. Registration of the security is also required, with certain exceptions, prior to its offer or sale within the state.

### A. Security

Taken from section 2(1) of the Securities Act of 1933,<sup>13</sup> security is defined under the Act to mean,

any note, stock, treasury stock, bond, debenture, units of beneficial interest in a real estate trust, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable shares, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such title or lease or, in general, any interest or instrument commonly known as a security.<sup>14</sup>

The Act specifically excludes from this definition insurance, endowment, and annuity policies issued by insurance companies<sup>15</sup> and

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11. 17 C.F.R. § 240.10b-5 (1977).

12. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the United States Supreme Court held that scienter was required in order for a party to maintain a rule 10b-5 action promulgated under the Securities Exchange Act of 1934.

13. 15 U.S.C. § 77b(1) (1970).

14. NEB. REV. STAT. § 8-1101(12) (Reissue 1974).

15. This exception apparently codifies case law interpreting the scope of the definition of security in blue sky laws prior to adoption of the

nontransferable interests in general and limited partnerships.<sup>16</sup> Treatment of insurance contracts and nontransferable partnership interests as exceptions to the definition of security permits these interests to escape the coverage of the Act's fraud provisions, a benefit not bestowed upon securities and transactions simply exempt from registration.<sup>17</sup> The purpose behind excluding partnership interests from the definition is not clear. If the partner is not actively engaged in the management of the business venture, he or she is an investor in need of the same protections accorded any other investor in securities. If the partner is active in the business operations, he or she would probably not be deemed to be holding a security, depending upon the approach taken for defining a security.

It is also interesting to note that Nebraska did not adopt the approach taken by the Uniform Securities Act in excluding from the definition typical stock dividends and certain acts incidental to corporate reorganizations.<sup>18</sup> Instead, Nebraska has chosen to subject these transactions to fraud liability under the Act, and merely exempt them from the registration requirements.<sup>19</sup>

While the list of common arrangements contained in the above definition of a "security" is extensive, it was not intended to be exclusive. Novel and varied agreements occur in the course of business which defy characterization by many of the listed terms. Accordingly, courts have established definitional standards encompassing those transactions and arrangements deemed to be a "security." The most common vehicle giving rise to a security under both federal and state law is the term "investment contract." While the Nebraska courts have not had an opportunity to define the scope of an investment contract, other federal and state courts have adopted variations of two distinct approaches. Since Nebraska law is based considerably on similar federal and state laws, review of these two approaches is instructive for determining the course Nebraska will eventually take.

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Uniform Securities Act. See, e.g., *Haberman v. The Equitable Life Assurance Society of the United States*, 224 F.2d 401 (5th Cir. 1955).

16. Section 1 of L.B. 263, 85th Leg., 1st Sess. (1977), would remove the present exemptions permitted nontransferable general and limited partnership interests, an exception not contained in the Uniform Securities Act.
17. See UNIFORM SECURITIES ACT § 402(a) (5) note.
18. *Id.* § 401(6). The Nebraska Director of Banking and Insurance has also determined that investments in commodity option contracts are securities under the Act. See 2 BLUE SKY L. REP. ¶ 30,604 (Administrative Order of Aug. 22, 1974).
19. NEB. REV. STAT. § 8-1111(13), (14) (Reissue 1974).

Most state courts are said to follow the definition laid down by the United States Supreme Court in *Securities & Exchange Commission v. W.J. Howey Co.*<sup>20</sup> Under *Howey*, an "investment contract" is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."<sup>21</sup> Examples of arrangements satisfying the *Howey* test are found in various federal and state court decisions. Cattle care contracts providing that the defendant would care for and manage the buyer's breeding cows and calves for a specified percentage of the proceeds have been found to be investment contracts.<sup>22</sup> A limited partnership interest<sup>23</sup> would also be a security under the *Howey* test since under the Uniform Limited Partnership Act,<sup>24</sup> a limited partner may not take part in management of the business, and the profits are derived through the efforts of the general partners.

The second approach pursued by the courts in defining investment contracts is through the "risk capital" test. The risk capital theory is usually applied in franchise cases<sup>25</sup> where some efforts on the part of the investor in the franchise's operation impede strict application of the *Howey* test. In *Silver Hills Country Club v. Sobieski*,<sup>26</sup> the California Supreme Court determined that a security

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20. 328 U.S. 293 (1946). In *Howey*, the Court held that an offering of citrus grove development units coupled with a management contract was an investment contract under § 2(1) of the Securities Act of 1933.
  21. 328 U.S. at 298-99. The requirement that profits be derived solely through the efforts of others was relaxed in *Securities and Exch. Comm'n. v. Glen W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973). The test was whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Id.* at 482.
  22. *People v. Witzerman*, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972).
  23. The Securities and Exchange Commission has determined that a limited partnership used as a form of real estate syndication is a security. 32 Fed. Reg. 11,705 (1967); 1 FED. SEC. L. REP. (CCH) ¶ 1046 (1973). The limited partnership has become particularly attractive for tax reasons, permitting the pass-through of accelerated depreciation, pre-paid interest, and other costs as deductions. See Note, *Application of the Securities Doctrine of Integration to Real Estate Syndicates*, 46 S. CAL. L. REV. 428 (1973).
  24. See NEB. REV. STAT. § 67-201 to -232 (Reissue 1976).
  25. See, e.g., *Stanley v. Commercial Courier Serv. Inc.*, 411 F. Supp. 818 (D. Or. 1975); *A.B.A. Auto Lease Corp. v. Adam Indus., Inc.*, 387 F. Supp. 531 (E.D. Pa. 1975).
  26. 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961). In *Silver Hills*, plaintiffs had purchased memberships in a country club with the knowledge that they were not entitled to any profits derived from the business, only the right to use the club's facilities.

could arise even in transactions where "capital is placed without any expectation of material benefits."<sup>27</sup> The objective of the securities laws was said to be able to "afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or the other."<sup>28</sup>

## B. Offer or Sale

An offer under the Act is defined to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security."<sup>29</sup> A sale includes "every contract of sale of, contract to sell, or disposition of, a security."<sup>30</sup> Since the prescriptions under the Act generally apply only to offers or sales of securities "within the state," Nebraska law will readily be applied in those instances where all the acts incident to the offer or sale occur within the state. However, recognition of what constitutes offer or sale "within the state" becomes blurred when the transactions involved occur in more than one state. The Uniform Securities Act attempted to deal with potential conflict of laws issues in a section detailing the scope of the act.<sup>31</sup> Under that section an offer to sell is made when it originates from the state, or is directed by the offeror to the state and received at the place where directed. An offer to sell is not made within the state if appearing in a publication of general, paid circulation published outside the state, or on a radio or television program originating outside the state. Thus, if a dealer publishes an advertisement in a newspaper printed in State X, he will not have to comply with the securities laws of State Y. However, if the person in State Y makes an offer to buy as a result of the same newspaper advertisement, State Y's laws are applicable if the dealer then accepts that offer, acceptance taking place when communicated to the person in State Y.<sup>32</sup> The approach suggested by the Uniform Securities Act is patterned after that taken by the First Restatement of Conflicts.<sup>33</sup>

By not enacting section 414 of the Uniform Securities Act, Nebraska has left to the courts the responsibility for determining when an offer or sale of a security occurs within the state. In

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27. *Id.* at 815, 361 P.2d at 908, 13 Cal. Rptr. at 188.

28. *Id.*

29. NEB. REV. STAT. § 8-1101(10) (Reissue 1974).

30. *Id.*

31. UNIFORM SECURITIES ACT § 414.

32. UNIFORM SECURITIES ACT § 414 note (7). See also *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973).

33. 1 RESTATEMENT OF CONFLICT OF LAWS § 394 (1934).



the past, Nebraska has also pursued the First Restatement's approach when determining which law governs the validity of a contract,<sup>34</sup> and has applied its principles to a securities case involving allegations of fraud perpetrated in the sale. In *Rhines v. Skinner Packing Co.*,<sup>35</sup> an agent of the defendant approached the plaintiff at his farm in Missouri and repeatedly importuned him to buy stock. Following alleged deceitful allegations made there, plaintiff signed a subscription contract and executed a note for the amount of the purchase price. The defendant was a Maine corporation with its principal place of business in Nebraska. In attempting to assert that Nebraska law was applicable, defendant argued that the sale was consummated in Nebraska, the acceptance of the note by the Omaha office constituting the final act which gave rise to a sale. The Nebraska Supreme Court regarded this argument as "clearly untenable," noting that the subscription contract was signed in Missouri.<sup>36</sup> If *Rhines* is still good law, Nebraska apparently adopts the same approach through case law that the Uniform Securities Act seeks through codification. No case law was uncovered, however, which would clarify what transactions would constitute an "offer within the state" where some of the acts incident to the offer originated outside Nebraska.<sup>37</sup>

### III. FRAUD

Paraphrased, section 8-1102(1) of the Nebraska Revised Statutes makes it unlawful for anyone engaged in the offer, sale, or purchase of a security to employ any scheme to defraud, make any untrue statement of a material fact, omit to state a material fact making the statements made misleading, or engage in any fraudulent act.<sup>38</sup> The subsection is identical to section 101 of the Uniform Securities Act,<sup>39</sup> which in turn was patterned after the Securities and Exchange Commission's Rule 10b-5.<sup>40</sup> At least one court viewing this

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34. See, e.g., *Jorgensen v. Crandell*, 134 Neb. 33, 277 N.W. 785 (1938).

35. 108 Neb. 105, 187 N.W. 874 (1922).

36. *Id.* at 108, 187 N.W. at 875.

37. For an interesting result where the court considers both the offer and sale see *Hardtke v. Love Tree Corp.*, 386 F. Supp. 1085 (E.D. Wis. 1975). See also *Raymond Lee Organization, Inc. v. Securities Comm'n*, 36 Colo. App. 417, 543 P.2d 75 (1975) (holding that whether contracts between a New York corporation and Colorado inventors relating to the promotion of inventions were executed in Colorado or New York was irrelevant, since the Colorado Securities Act expressly covered solicitation of offers to buy in the State).

38. NEB. REV. STAT. § 8-1102(1) (Reissue 1974).

39. UNIFORM SECURITIES ACT § 101.

40. 17 C.F.R. § 240.10b-5 (1977).

similarity has held that the purpose of the two sections is the same.<sup>41</sup> Nevertheless, state and federal courts will invariably differ as to the elements of proof necessary for recovery. For instance, in *S & F Supply Co. v. Hunter*,<sup>42</sup> the Utah Supreme Court determined that reliance must be proved, an element presumed or omitted by many other jurisdictions.<sup>43</sup> Section 8-1102(2) of the Nebraska Revised Statutes subjects any person receiving consideration for advising someone of the value of securities to similar fraud liability.<sup>44</sup> Thus, an attorney exempted from registration requirements for investment advisers<sup>45</sup> who gives investment advice only incidentally to his primary practice is still liable for fraudulent activities under the Act.

Sanctions for violation of the statutory fraud provisions include certain administrative proceedings,<sup>46</sup> judicial injunctions,<sup>47</sup> criminal prosecution,<sup>48</sup> and civil liability.<sup>49</sup> The first three sanctions mentioned will be discussed later in this comment as they relate to all unlawful activities set out in the Act. A special provision has been prepared for civil liability for fraud which deserves separate treatment. Section 8-1118 of the Nebraska Revised Statutes provides that any person offering or selling a security who makes any untrue statement of a material fact, or who omits to state a material fact and thereby makes the statements made misleading, is liable to the *buyer* if, (1) the "buyer does not know of the untruth or omission," and (2) the "offeror or seller" does not sustain the burden of proof that he was not negligent in making the untruth or omission.<sup>50</sup> Damages include the consideration paid, plus six percent interest per annum on the consideration from the date of

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41. *Norville v. Alton Bigtop Restaurant, Inc.*, 22 Ill. App. 3d 273, 317 N.E.2d 384 (1974).

42. 527 P.2d 217 (Utah 1974).

43. See UNIFORM SECURITIES ACT § 102(a). This section was modeled after Section 205 of the Investment Advisers Act of 1940.

44. NEB. REV. STAT. § 8-1102(2) (Reissue 1974). This subsection of Nebraska law, as does its Uniform Securities Act counterpart, omits the sentence appearing in subsection (1) of the same act making it unlawful "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." The impact of such an omission appears minimal. NEB. REV. STAT. § 8-1102(2)(b) (Reissue 1974) makes all fraudulent activities unlawful, which would certainly encompass material untruths and omissions.

45. NEB. REV. STAT. § 8-1101(5) (Reissue 1974).

46. *Id.* §§ 8-1103(7)(b), -1109, -1109.01 (Reissue 1974).

47. *Id.* § 8-1116 (Reissue 1974).

48. *Id.* § 8-1117 (Reissue 1974).

49. *Id.* § 8-1118 (Reissue 1974).

50. *Id.* § 8-1118(1).

its payment, plus costs and reasonable attorneys' fees, less the amount of any income received on the security.<sup>51</sup> If the buyer no longer owns the security, recovery is reduced by the value of the security when the buyer disposed of it and six percent interest per annum from the date of disposition.<sup>52</sup>

In two significant respects, recovery for fraud liability is easier under Nebraska law than under its federal counterpart, rule 10b-5. With the federal cause of action created under decisional law,<sup>53</sup> the burden of proof rests with the plaintiff in most rule 10b-5 cases.<sup>54</sup> Nebraska, like other states adopting the Uniform Securities Act, places the burden on the defendant. Additionally, Nebraska permits recovery for *negligent* untruths or omission. While the scope of the decision remains to be determined, the United States Supreme Court in *Ernst & Ernst v. Hochfelder*,<sup>55</sup> has recently held that scienter must be proved in order to maintain recovery under rule 10b-5.

Civil recovery under the Act is not without its difficulties, however. Recovery under the Act is limited to purchasers of securities. Most federal courts allowing recovery under rule 10b-5 do not place this restriction on its coverage.<sup>56</sup> While the measure of damages may be more difficult to ascertain when a sale by the plaintiff is involved, there otherwise appears to be little reason to distinguish availability of civil liability for sales, but not purchases.<sup>57</sup> The Nebraska Legislature may have left one avenue open to the enterprising attorney, however, by not enacting section 410 of the Uniform Securities Act,<sup>58</sup> which prohibits the bringing of civil actions for unlawful conduct involving the sale or purchase of securities except as provided under the Act.<sup>59</sup> Consequently, the path is left open for state courts to follow the same approach taken under rule 10b-5<sup>60</sup> by some federal courts, creating a civil right of action for sellers of securities.

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51. *Id.*

52. *Id.*

53. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), was the first case which created a rule 10b-5 private right of action.

54. See 1 A. BROMBERG, *SECURITIES LAW—FRAUD: SEC RULE 10b-5*, 193-225 (1975).

55. 425 U.S. 185 (1976).

56. 1 A. BROMBERG, *supra* note 54, at 35.

57. The distinction can perhaps be attributed to the borrowing of language from federal law which was drafted when fraud committed in the purchase of securities was not evident.

58. *UNIFORM SECURITIES ACT* § 410.

59. Nebraska had omitted *UNIFORM SECURITIES ACT* § 401(d) which provides that "fraud, deceit, and defraud" are not limited to their meaning under common law.

60. One might also question the significance of providing recovery for neg-

## IV. REGISTRATION OF BROKER-DEALERS, INVESTMENT ADVISERS, AND AGENTS UNDER THE ACT

The Act makes it unlawful for any person to transact business in Nebraska as a broker-dealer, issuer-dealer, agent or an investment adviser unless he has registered with the Department of Banking.<sup>61</sup>

Essentially, "broker-dealer" includes "persons engaged in the business of effecting transactions in securities for the account of others or for his own account," but does not include issuer-dealers, agents, banks, savings institutions, persons with no place of business in Nebraska effecting transactions on behalf of any of the preceding mentioned persons or trust companies and investment companies, and persons with no place of business in the state who direct no more than fifteen offers to persons in Nebraska.<sup>62</sup>

To understand who is included as a broker-dealer under the definition of broker-dealer, it is necessary to construe the meaning of "in the business of effecting transactions in securities." Without this clause, all ordinary investors in securities would be broker-dealers. The official code comment to the Uniform Securities Act refers the reader to Professor Loss' explanation in his well-known treatise, *Securities Regulation*.<sup>63</sup> The distinction centers on business and nonbusiness engagements, listing some attributes of a "dealer":

He ordinarily tries to obtain a regular clientele. He is apt to transact a substantial portion of his business directly with investors rather than with other dealers or through exchange members, although there are "dealers' dealers" who trade principally with other professionals. A dealer ordinarily holds himself out as one engaged in buying and selling securities at a regular place of business. And his business (except when he participates in underwriting) is ordinarily characterized by a regular turnover, whereas a trader's transactions are generally more irregular in both volume and time. A trader, on the other hand, does not handle other people's money or securities; he does not "make a market"; and he does not furnish the services which are usually provided by dealers, such as quoting the market, rendering incidental investment advice, extending or arranging for the extension of credit and lending securities to customers. Needless to say, a person does not have

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ligent omissions and untruths but not for all activities as provided in NEB. REV. STAT. § 8-1102(3) (Reissue 1974). Professor Bromberg looks at these separate provisions for maintaining fraud liability and generally concludes that they are usually not distinguished by agencies responsible for their enforcement. See 1 A. BROMBERG, *supra* note 54, at § 2.6.

61. NEB. REV. STAT. § 8-1103 (Reissue 1974).

62. *Id.* § 8-1101(3) (Reissue 1974).

63. L. LOSS, *supra* note 8.

to exhibit all or any given number of these dealer characteristics in order to be considered a dealer.<sup>64</sup>

An "issuer-dealer" means an issuer located in Nebraska intending to sell its securities in the state without the assistance of a registered broker-dealer.<sup>65</sup>

"Agent" is defined as any individual, other than a broker-dealer, who represents a broker-dealer or issuer in effecting sales of securities.<sup>66</sup> Individuals representing the issuer in exempt transactions or with exempt securities are specifically excluded from the definition. Also excluded are individuals effecting transactions with existing employees, partners or directors of the issuer or its subsidiaries, providing no remuneration is given to the individual for those services.<sup>67</sup>

The last class of persons required to register are investment advisers. Broadly defined, an "investment adviser" includes any person who receives compensation and engages in the business of advising persons as to the value of securities.<sup>68</sup> The definition provides a number of specific exclusions from the term, including banks, savings institutions, broker-dealers,<sup>69</sup> issuer-dealers, publishers of newspapers, persons analyzing government securities, and lawyers, accountants, and teachers who provide advice incidental to the practice of their profession.<sup>70</sup> The complete exemption of broker-dealers from the registration requirements does not parallel the Uniform Securities Act, which treats broker-dealers as excluded from the definition to the extent the advising services are only in-

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64. *Id.* at 1297.

65. NEB. REV. STAT. § 8-1101(7). The Act does not define "located," although it is perhaps broad enough to include any transaction of any issuer offering or selling securities within the State.

The Uniform Securities Act does not require the registration of issuer-dealers. L.B. 263, 85th Leg., 1st Sess. (1977), if enacted, would eliminate the "assistance of a registered broker-dealer" exception to registration.

66. NEB. REV. STAT. § 8-1101(2) (Reissue 1974).

67. *Id.*

68. *Id.* § 8-1101(5) (Reissue 1974). Since the definition is taken almost verbatim from the Investment Advisers Act of 1940, § 202(a)(11), 15 U.S.C. § 80b-2(a)(11) (1970), the same construction given the phrase under federal law arguably applies. "Business" has been construed under federal law to connote a certain regularity of participation in purchasing and selling activities, rather than a few isolated transactions. However, there seems to be no requirement that investment advice be a person's principal business or source of income. See 2 L. LOSS, *supra* note 8, at 1295.

69. See UNIFORM SECURITIES ACT § 401(f).

70. NEB. REV. STAT. § 8-1101(5) (Reissue 1974).

cidental to the conduct of their business and who receive no special compensation for those services.

The Act parallels the Uniform Securities Act in its requirements for registration with two significant exceptions. First, the Act requires that issuer-dealers register in addition to broker-dealers, agents, and investment advisers.<sup>71</sup> Registration entails, in addition to consent of service of process<sup>72</sup> and payment of requisite fees,<sup>73</sup> that all four classes disclose certain information in the application.<sup>74</sup> Information to be disclosed in the application includes the applicant's form and place of business, its proposed method of doing business, its qualifications, business history, financial condition, and the orders or convictions it has been subject to involving any aspect of the securities business.<sup>75</sup> The second exception is that the applicant, including its directors, officers, or partners, if any, must pass an examination as prescribed by the director.<sup>76</sup> A proviso under the Act permits the director to waive the examination requirement for applicants who, by reason of past experience, can demonstrate sufficient knowledge of the securities business.<sup>77</sup> A Bureau of Securities' Policy Statement allows broker-dealers to waive the requirement only if they have passed a written examination given by the Securities and Exchange Commission, the New York, American, or Midwest Stock Exchange, the National Association of Securities Dealers, or a comparable examination given by another state.<sup>78</sup> Agents may have the examination waived if they have had four years experience as an agent with a registered broker-dealer or seven years experience as a securities analyst with a bank or insurance company.<sup>79</sup>

In addition to the disclosure and examination requirements, broker-dealers and issuer-dealers must have a minimum net capital of \$25,000.<sup>80</sup> Broker-dealers are, however, permitted to post a surety bond for the same amount upon permission of the director.<sup>81</sup>

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71. *Id.* § 8-1103(1).

72. *Id.* § 8-1112.

73. *Id.* § 8-1103(5). Issuer-dealers and broker-dealers pay an initial fee of \$100. Investment advisers pay a fee of \$50, and agents, \$15.

74. *Id.* § 8-1103(2).

75. *Id.*

76. The UNIFORM SECURITIES ACT, § 204(b) (6), gives the director authority to provide for examination by rule.

77. NEB. REV. STAT. § 8-1103(3) (c) (Reissue 1974).

78. 2 BLUE SKY L. REP. (CCH) ¶ 30,603 (1976) (statement issued June 23, 1967).

79. *Id.*

80. NEB. REV. STAT. § 8-1103(3) (c) (Reissue 1974). The Uniform Securities Act allows broker-dealers maintaining net capital below \$25,000 to post bond of \$10,000.

81. *Id.* L.B. 263, 85th Leg., 1st Sess. (1977), would give the director the

Once an application has been filed, it becomes effective thirty days later<sup>82</sup> and remains effective for one year.<sup>83</sup> The registration may be renewed after that time by filing an application with the director containing information relative to any material changes in the information disclosed in the original application.<sup>84</sup>

Following registration, all broker-dealers, issuer-dealers, and investment advisers must keep accounts and records prescribed by the director.<sup>85</sup> All records are subject to periodic examinations by the director and must be kept for at least three years.<sup>86</sup>

## V. SECURITIES AND TRANSACTIONS EXEMPT FROM REGISTRATION

The Act makes it unlawful for any person to offer or sell a security in Nebraska unless the security or transaction is exempt or the security has been registered with the State Department of Banking.<sup>87</sup>

### A. Exempt Securities

Ten classes of securities are exempt from registration under Nebraska law. The distinction between these exemptions and exceptions from the definition of security should be kept in mind, since exempt securities are still subject to the anti-fraud provisions, while securities recognized as exceptions from the definition are not regulated in any respect under the Act.

Six classes of securities are exempt because the securities, or an entity involved in their issuance, are heavily regulated or issued by federal or state governments. They include securities issued or guaranteed by a political subdivision or agency of the United States, any state,<sup>88</sup> or Canada,<sup>89</sup> and securities issued by and representing an interest in a debt of, or guaranteed by, banks, savings institutions, trust companies,<sup>90</sup> savings and loan associations,<sup>91</sup> and credit unions.<sup>92</sup> The words "issued by or representing an interest

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same alternative with respect to issuer-dealers.

82. NEB. REV. STAT. § 8-1103(3) (Reissue 1974).

83. *Id.* § 8-1103(3) (c).

84. *Id.* § 8-1103(4).

85. *Id.* § 8-1103(6).

86. *Id.*

87. *Id.* § 8-1104.

88. *Id.* § 8-1110(1).

89. *Id.* § 8-1110(2).

90. *Id.* § 8-1110(3).

91. *Id.* § 8-1110(4).

92. *Id.* § 8-1110(5).

in" are intended to make clear that these exemptions do not apply when the entity is merely acting as an agent. For example, certificates of deposit issued by a bank acting as a depository for a protective committee does not represent an interest in the bank.<sup>93</sup> Additionally, securities issued or guaranteed by common carriers and public utilities are exempt from registration if they are subject to the jurisdiction of the Interstate Commerce Commission, or their rates are regulated by an agency of the United States government, state, or municipality.<sup>94</sup>

Securities listed on stock exchanges approved by the director are exempt<sup>95</sup> since those securities presumably involve public offerings spreading beyond the boundaries of any one state and can appropriately and feasibly be regulated only by the federal government.

Recognizing that certain securities are purchased with the knowledge that they are not intended to provide returns, the drafters have also excluded securities issued by nonprofit religious, educational, charitable, social, or trade organizations.<sup>96</sup>

The commercial paper exemption<sup>97</sup> is modeled after section 3(a) (3) of the Securities Act of 1933.<sup>98</sup> It applies where commercial paper is issued from a current transaction, or the proceeds are to be used for current transactions,<sup>99</sup> and which evidences an obligation to pay cash within nine months of the date of issuance. However, the fact that an instrument qualifies under article 3 of the Uniform Commercial Code as "commercial paper" is not dispositive of its meaning for securities law purposes.<sup>100</sup> The scope of the term "commercial paper" under the Act was generally not meant to encompass sales of securities to the investing public used to raise capital for a business venture, but to include only the type of short term paper available for discount at the federal reserve bank, paper rarely bought by private investors.<sup>101</sup>

A final exemption covers investment contracts issued in connection with employee's stock purchase, savings, pension, or profit-sharing plans.<sup>102</sup> This exemption is available, however, only if the

93. UNIFORM SECURITIES ACT § 402 comment.

94. NEB. REV. STAT. § 8-1110(6) (Reissue 1974).

95. *Id.* § 8-1110(7).

96. *Id.* § 8-1110(8).

97. *Id.* § 8-1110(9).

98. 15 U.S.C. § 77(c) (3) (1970).

99. See 1 L. LOSS, *supra* note 8, at 567.

100. See *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976).

101. See 1 L. LOSS, *supra* note 8, at 567.

102. NEB. REV. STAT. § 8-1110(10) (Reissue 1974).



director is notified in writing thirty days before the inception of the plan.<sup>103</sup>

## B. Exempt Transactions

In addition to exemptions for certain securities, the Act allows twelve transactions involving the transfer of securities to be exempt from the registration requirements.

Read literally without the exemption clause, section 8-1104 of the Nebraska Revised Statutes prohibits the offer or sale of any security in Nebraska unless it has been registered.<sup>104</sup> Thus, it would be unlawful for a father to sell securities to his son in a closely-held corporation unless the securities were registered. The first exempt transaction provided by the Act covers this type of transaction, however, by exempting "any isolated transaction, whether effected through a broker-dealer or not."<sup>105</sup> The Act does not define the scope of an "isolated" transaction, but case and statutory law in other jurisdictions provide some helpful clues as to its meaning. Under some Blue Sky Laws, an exemption is allowed for "isolated" sales, as opposed to "successive" and "repeated" sales of securities.<sup>106</sup> The issue of whether a repeated or isolated sale exists is one of fact to be determined in each case, with consideration of such factors as the purpose for which the sale is made and the proximity of the sales.<sup>107</sup>

Unlike the Uniform Securities Act, which exempts "isolated non-issuer transactions,"<sup>108</sup> the Act applies to any "isolated transaction." It is not known whether omission of the word "non-issuer" was intentional or simply a drafting error. Its significance is just as speculative. Taken literally, the exemption for isolated transactions could be utilized by issuers in making distributions of a portion of its securities. For instance, if shares of stock are sold to a new investor, the isolated transaction exemption may shield the issuer from the registration requirements. In such a case, however, the issuer would qualify for the limited offering exemption provided to offers directed to not more than ten persons within a twelve month period, discussed below. Accordingly, it is difficult,

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103. *Id.*

104. *Id.* § 8-1104.

105. *Id.* § 8-1111(1).

106. See 69 AM. JUR. 2d *Securities Regulation*—State § 79, 1113 (1973); Annot., 6 A.L.R.3d 1425 (1966); Annot., 1 A.L.R.3d 614 (1965).

107. See, e.g., *Arkansas Real Estate Co. v. Fullerton*, 232 Ark. 713, 339 S.W.2d 947 (1960), and *Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 102 N.W.2d 293 (1960).

108. UNIFORM SECURITIES ACT § 402(b) (1).

if not impossible, to conceive of a case in which the issuer would be able to rely on the isolated transaction exemption and not the limited offering exemption or other exemptions under the Act.

A second exemption from registration is made available to non-issuer distributions of an outstanding security by a registered broker if;

(a) a recognized securities manual contains the name of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date for the most recent year of operations, or (b) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security.<sup>109</sup>

A sale by a registered broker following an unsolicited offer<sup>110</sup> and a distribution to an underwriter from the issuer<sup>111</sup> are also exempt.

Notes or other evidences of indebtedness secured by mortgages, deed of trusts, or sale agreements do not have to be registered if they are sold as a unit.<sup>112</sup> Nebraska has added the condition that the exemption is not available if the land sale must be registered under the Interstate Land Sales Full Disclosure Act, passed by Congress in 1968.<sup>113</sup>

As is the case with exempt securities, many of the exempt transactions look to the status of the offeror or offeree. Executors, administrators, sheriffs, marshals, receivers, trustees in bankruptcy, guardians and conservators do not have to register in order to transfer securities pursuant to their duties and powers.<sup>114</sup> Likewise, if an offer or sale of a security is made to a bank, savings institution, trust company, insurance company, certain investment companies, a pension or profit-sharing trust, or other institutional buyers, the security need not be registered.<sup>115</sup> By virtue of their sometimes

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109. NEB. REV. STAT. § 8-1111(2) (Reissue 1974).

110. *Id.* § 8-1111(3).

111. *Id.* § 8-1111(4).

112. *Id.* § 8-1111(5).

113. 15 U.S.C. § 1701 (1970). The Interstate Land Sales Full Disclosure Act requires certain information to be disclosed in certain land sales, including but not limited to sales or leases within a subdivision of fifty or more lots, or sales or leases of subdivision lots in excess of five acres. An exemption is provided under the Disclosure Act for sales of evidences of indebtedness secured by a mortgage or deed of trust on real estate.

114. NEB. REV. STAT. § 8-1111(6) (Reissue 1974).

115. *Id.* § 8-1111(8).

large and multiple dealings, the Legislature deemed these purchasers to be sophisticated enough so that the same governmental protection accorded individual investors is not necessary.

One of the most important exemptions under the Act is commonly referred to as the "limited offering" exemption.<sup>116</sup> Under Nebraska law, an offer without registration may be made to not more than ten persons during any period of twelve consecutive months if the seller reasonably believes<sup>117</sup> that all the buyers are purchasing for investment and no remuneration is being paid to solicit any prospective buyer, unless the solicitation is by a registered broker-dealer. While a written statement by each buyer disclosing his or her intentions to purchase for investment is not required, it would be prudent on the seller's part to obtain some type of documented assurance.<sup>118</sup> Additionally, the seller should be alerted to the fact that a resale by the purchaser within a short time after the buyer's initial purchase will raise serious doubt as to the buyer's intentions to purchase for an investment. The allowance for remuneration to be paid a broker-dealer under this exemption has no parallel under the Uniform Securities Act.<sup>119</sup>

Offers or sales of preorganization certificates and subscriptions do not have to be registered if three conditions are satisfied: (1) no remuneration is paid for solicitations of any prospective subscriber, (2) the number of subscribers does not exceed ten, and (3) no payment is made by a subscriber.<sup>120</sup>

Offers to existing security holders possessing convertible securities, nontransferable warrants, or transferable warrants exercisable within ninety days of their issuance need not be registered, providing no remuneration is paid for soliciting those security holders, or the issuer files a notice specifying the terms of the offer.<sup>121</sup> The director, after a notice filing, has five days in which to disallow the exemption by order.<sup>122</sup>

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116. *Id.* § 8-1111(9).

117. L.B. 263, 85th Leg., 1st Sess. (1977), would reduce the restrictions by exempting offerings of 10 sales, rather than 10 offers. The Nebraska Act contains a grammatical error. A comma should have been placed after "subdivision (8) of this section." The present wording of the Act shifts the 12 month limitation to a clause relating to institutional buyers, a result not intended by the drafters of the Uniform Securities Act.

118. UNIFORM SECURITIES ACT § 402 comment.

119. *Id.* § 402(b).

120. NEB. REV. STAT. § 8-1111(10) (Reissue 1974).

121. *Id.* § 8-1111(11).

122. *Id.*

A stock dividend where the holder can elect to take a dividend in cash or stock, transactions incident to rights of conversion or statutory or judicially approved reorganizations or mergers are not subject to registration. Nebraska has followed the approach pursued by most states adopting the uniform act in treating reorganizations and mergers as exempt, rather than as excluding them from the definitions of sale and offer.<sup>123</sup> On the other hand, it is arguable that no exemption should be permitted for securities transferred in reorganizations and mergers. The security holder is often confronted with the same considerations whether he is being asked to surrender cash for a security or a security for another type of security. While an existing security holder may be presumed to know more about the operations of the enterprise and value of the security than a prospective shareholder, he would be just as unknowledgeable when asked to trade his shares for those issued in a merger with another corporation.

## VI. REGISTRATION

The Act provides three methods for registering a security: (1) notification, (2) qualification, and (3) coordination.<sup>124</sup> All three may not be applicable in each instance, and the attorney would be wise in remembering the general requirements for each, since one may be more convenient and expeditious in one situation, but not in another.

123. Note, *State Regulation of Securities Issued in Corporate Reorganizations: A Cloud in the Blue Sky*, 25 CASE W. RES. L. REV. 149 (1974).

124. The total number of registrations in Nebraska for the past five fiscal years follows:

1971-72	917
1972-73	1,007
1973-74	634
1974-75	682
1975-76	738

The number of registrations withdrawn or revoked during the same period follows:

1971-72	2
1972-73	28
1973-74	103
1974-75	31
1975-76	30

Mr. Barry Lake, Assistant Director and Legal Counsel of the Nebraska Bureau of Securities, estimated that 75% of the withdrawals were due to substantive review by the Nebraska Securities Bureau, with the exception for the 1973-74 fiscal year when the drop in market prices made securities difficult to sell at the asking prices. Letter from Mr. Barry K. Lake, Assistant Director and Legal Counsel for the Nebraska Securities Bureau to Author (Feb. 4, 1977).

### A. Notification

Two classes of securities may be registered by notification; those of high grade issuers and securities previously registered or exempt in a non-issuer distribution.

An issuer, or its predecessor, which has been in operation at least five years qualifies if there has been no default over the past three fiscal years in payment of principal, interest, or dividends on any security of the issuer, the security having a fixed maturity, interest, or dividend provision.<sup>125</sup> The issuer must have maintained net earnings of at least five percent on any other securities during that period.<sup>126</sup> If securities without a fixed maturity interest or dividend provision have not been outstanding for three years, all other securities must have net earnings equal to at least five percent.<sup>127</sup>

Any security, other than those involving mineral interests, may be registered by notification for non-issuer distribution if any security of the same class has ever been registered under Nebraska securities laws or was originally issued pursuant to an exemption under Nebraska law.<sup>128</sup>

The notification registration statement must contain the following information: (1) the location of the issuer, (2) the description of the securities being registered, (3) the amount of securities to be offered in Nebraska in relation to the total offering, (4) the price at which the securities are to be offered to the public and the amount of any underwriting and selling discounts, (5) location of the managing underwriters or description of the plan of distribution if not offered through an underwriter, (6) a description of any security options outstanding or to be created with the offering, (7) any adverse decrees entered against the issuer, (8) a copy of the offering circular or prospectus, and (9) in certain instances, a balance sheet and earnings summary of the issuer.<sup>129</sup>

Providing no stop order is pending, the registration statement becomes effective two full business days after filing, or at an earlier time if determined by the director.<sup>130</sup> Generally, a stop order may be issued when it is in the public interest and the filing is incomplete.<sup>131</sup>

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125. NEB. REV. STAT. § 8-1105(1) (a) (i) (Reissue 1974).

126. *Id.* § 8-1105(1) (a) (ii).

127. *Id.* (method for determining return).

128. *Id.* § 8-1105(1) (b).

129. *Id.* § 8-1105(2).

130. *Id.* § 8-1105(3).

131. *Id.* § 8-1109.

## B. Qualification

A security to be offered under the Act may be registered by qualification.<sup>132</sup> The information disclosed and the documents included with the registration are much more extensive than that required under a statement filed through notification. For example, not only does the location and general nature of the business have to be disclosed, but a description of the physical properties must be made as well.<sup>133</sup> Every director, officer, promoter, and shareholder owning more than ten percent of the equity securities is required to disclose his or her interests in the issuer and primary occupation.<sup>134</sup> Other detailed information to be filed includes the capitalization of the issuer, the description of the securities to be offered and the use of the proceeds, a copy of any prospectus or circular, a signed or conformed copy of opinion of counsel, any adverse judgments entered, a balance sheet of the issuer, and profit and loss statements.<sup>135</sup>

As a condition of registration the director may require that the proceeds from the sale be impounded until a certain specified amount has been received or until the applicant complies with the Federal Securities Act of 1933.<sup>136</sup> In addition, the director has the broad power to impose reasonable conditions or limitations upon the offering "as may be in the public interest."<sup>137</sup> The director may also deny or revoke effectiveness of the statement if he finds any one of thirteen conditions present.<sup>138</sup> Three of the broadest conditions are that the plan of financing is unfair, the issuer's advertising is misleading, or the amount of securities being offered exceeds the reasonable value of the property for which they are issued. While the uniform act contains powers similar to the Act, none would seem to give the director the extensive authority provided by these three provisions.<sup>139</sup>

A registration statement filed by qualification becomes effective only after approval by the director. As a condition of registration, the prospectus containing substantially all of the information required to be filed with the director must be sent to all offerees.<sup>140</sup>

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132. *Id.* § 8-1107.

133. *Id.* § 8-1107(2)(a).

134. *Id.* §§ 8-1107(2)(b) to 1107(2)(c).

135. *Id.* § 8-1107(2).

136. *Id.* § 8-1108(2).

137. *Id.*

138. *Id.* § 8-1109.01.

139. See UNIFORM SECURITIES ACT § 303. L.B. 263, 85th Leg., 1st Sess. (1977), would give the Director these same powers when reviewing statements filed through notification and coordination registrations.

140. NEB. REV. STAT. § 8-1107(3) (Reissue 1974).

### C. Coordination

The final method of registration, coordination,<sup>141</sup> is accomplished through filing of three copies of the prospectus filed with the Securities and Exchange Commission under the Securities Act of 1933, and disclosure of the amount of securities to be offered in this state and the states in which a registration statement is expected to be filed.<sup>142</sup> In his discretion, the director may also require inclusion of any agreements with underwriters or other instruments governing the issuance of the security.<sup>143</sup> The person filing the registration statement must also undertake to forward to the director all amendments to the federal registration statement.<sup>144</sup>

The registration statement filed with the state becomes effective when the federal registration statement becomes effective, providing three conditions are satisfied: (1) no stop order is pending under the Securities Act of 1933, (2) the registration statement has been on file for at least ten days, and (3) the offering is made within the minimum and maximum price offerings proposed in a statement previously filed with the director.<sup>145</sup>

As with registration through notification, the director may issue a stop order suspending or revoking a registration statement filed by coordination if he finds it to be in the public interest and the filing is defective.<sup>146</sup>

## VII. SANCTIONS AND RELIEF UNDER THE ACT

Discussion has previously been made of liability for fraud to purchasers of securities under the Act and imposition of stop orders for inadequate registration. There are a number of other vehicles for recovery and imposition of sanctions as well.

The director has broad investigatory powers to determine whether any person has violated or is about to violate any provisions of the Act.<sup>147</sup> Witnesses may be subpoenaed and any papers, documents or records relevant to the inquiry are required to be produced.<sup>148</sup> The investigation need not be limited to activities within the state, and can be public or private in scope.<sup>149</sup> Nebraska

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141. *Id.* § 8-1106.

142. *Id.* §§ 8-1106(2) (a) to 1106(2) (c).

143. *Id.* § 8-1106(2) (e).

144. *Id.* § 8-1106(2) (g).

145. *Id.* § 8-1106(3).

146. *Id.* § 8-1109.

147. *Id.* § 8-1115.

148. *Id.* § 8-1115(2).

149. *Id.* § 8-1115(1) (a).

has also given the director the discretion to assess the expenses of any investigation to the person subject to it,<sup>150</sup> a power not granted under the Uniform Securities Act.<sup>151</sup>

If it appears to the director that any person has engaged or is about to engage in any act constituting a violation of the Act, he may seek an injunction. Upon the requisite showing a permanent or temporary injunction, restraining order, or writ of mandamus will be granted and a receiver may be appointed for the defendant's assets.<sup>152</sup>

If the violation of any provision is willful, the person may be subject to a \$5,000 fine, imprisoned up to three years, or both a fine and imprisonment.<sup>153</sup> However, a person may not be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.<sup>154</sup> Would the burden be satisfied if the defendant establishes that he does not subscribe to any reporter service containing such rules and asserts that he has never sought information relative to it? If not, the burden of proof would be intolerable. At the same time it seems to place a premium on ignorance, although the imposition of a fine would still serve as an inducement to the person to obtain copies of all relevant rules and orders.

Under the Act, a person purchasing a security may recover damages if it was sold without being registered and no exemption is otherwise available.<sup>155</sup> The amount of recovery is the consideration paid for the security, interest at six percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security.<sup>156</sup> If the purchaser no longer owns the security, his recovery is limited to the amount which would have been recoverable upon tender, less the value of the security when it was disposed of and the six percent interest accruing from the date of disposition.<sup>157</sup>

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150. *Id.* § 8-1115(1).

151. UNIFORM SECURITIES ACT § 407.

152. NEB. REV. STAT. § 8-1116 (Reissue 1974).

153. *Id.* § 8-1117(1).

154. *Id.*

155. *Id.* § 8-1118(1).

156. *Id.*

157. *Id.* Joint and several liability for violation of NEB. REV. STAT. § 8-1118(1) (Reissue 1974), extends to every person controlling the seller, and partners, officers, directors, or employees materially aiding in the sale, and every broker-dealer, issuer-dealer, or agent who materially aids in the sale and 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 existence of the facts by reason of which the liability



## VIII. CONCLUSION

The Securities Act of Nebraska has not been a major vehicle for the imposition of fraud liability in the past. The active enforcement of federal securities laws by the Securities and Exchange Commission and the liberal expansion of civil liability for violation of federal law are major reasons for its restricted growth. However, with the advent of recent Supreme Court cases, particularly *Ernst & Ernst v. Hockfelder*,<sup>158</sup> prospective litigants should re-examine the remedies provided under state law. Additionally, the recent introduction of Legislative Bill No. 263<sup>159</sup> in the 1977 session of the Nebraska Legislature, directed toward broadening the powers of the Director of Banking under the Act, signifies the initiation of an expanded administrative role by that department in protecting the investor.

*Larry V. Albers '77*

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is alleged to exist. See *Huryta v. White*, 184 Neb. 24, 165 N.W.2d 354 (1969); *Townstein v. Midwest Investment Co.*, 181 Neb. 547, 149 N.W.2d 512 (1967).

158. 425 U.S. 185 (1976). See note 12 *supra*.

159. L.B. 263, 85th Leg., 1st Sess. (1977).