

**CHAPTER 485A**  
**UNIFORM SECURITIES ACT**

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### **"PART I. GENERAL PROVISIONS**

**[\$485A-101] Short title.** This chapter shall be known and may be cited as the Uniform Securities Act (2002). [L 2006, c 229, pt of §1]

" **§485A-102 Definitions.** As used in this chapter, unless the context otherwise requires:

"Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions, is an agent only if the individual otherwise falls within this definition. The definition shall not include an individual excluded by rule adopted or order issued under this chapter.

"Bank" means:

- (1) A banking institution organized under the laws of the United States;
- (2) A member bank of the Federal Reserve System;
- (3) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to section 1 of Public Law 87-722 (12 U.S.C. 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this chapter; or
- (4) A receiver, conservator, or other liquidating agent of any institution or firm included in paragraph (1), (2), or (3).

"Broker-dealer" means a person engaged in the business of effecting transactions in securities for the accounts of others or for the person's own account. The term shall not include:

- (1) An agent;

- (2) An issuer;
- (3) A depository institution;
- (4) Any person licensed as a real estate broker or real estate salesperson under the laws of this State while effecting transactions in a security exempted by sections [485A-202(a)(24)] and [485A-202(a)(25)];
- (5) An international banking institution; or
- (6) A person excluded by rule adopted or order issued under this chapter.

"Commissioner" means the commissioner of securities of this State.

"Depository institution" means:

- (1) A bank; or
- (2) A savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law. The term shall not include:
  - (A) An insurance company or other organization primarily engaged in the business of insurance;
  - (B) A Morris Plan bank; or
  - (C) An industrial loan company.

"Director" means the director of commerce and consumer affairs.

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

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

"Filing" means the receipt of a record required under this chapter by the commissioner or a designee of the commissioner.

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

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

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

- (1) A depository institution or international banking institution;

- (2) An insurance company;
- (3) A separate account of an insurance company;
- (4) An investment company as defined in the Investment Company Act of 1940;
- (5) A broker-dealer registered under the Securities Exchange Act of 1934;
- (6) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;
- (7) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;
- (8) A trust, if it has total assets in excess of \$10,000,000, its trustee is a depository institution, and its participants are exclusively plans of the types identified in paragraph (6) or (7), regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;
- (9) An organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10,000,000;
- (10) A small business investment company licensed by the Small Business Administration under section 301(c) of

- the Small Business Investment Act of 1958 (15 U.S.C. 681(c)) with total assets in excess of \$10,000,000;
- (11) A private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(22)) with total assets in excess of \$10,000,000;
  - (12) A federal covered investment adviser acting for its own account;
  - (13) A "qualified institutional buyer" as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);
  - (14) A "major U.S. institutional investor" as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);
  - (15) Any other person, other than an individual, of institutional character with total assets in excess of \$10,000,000, not organized for the specific purpose of evading this chapter; or
  - (16) Any other person specified by rule adopted or order issued under this chapter.

"Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

"Insured" means insured as to payment of all principal and all interest.

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

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

- (1) An investment adviser representative;
- (2) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

- (3) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;
- (4) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;
- (5) A federal covered investment adviser;
- (6) A bank or savings institution;
- (7) Any other person that is excluded by the Investment Advisers Act of 1940 from the definition of investment adviser; or
- (8) Any other person excluded by rule adopted or order issued under this chapter.

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

- (1) Performs only clerical or ministerial acts;
- (2) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;
- (3) Is employed by or associated with a federal covered investment adviser, unless the individual has a "place of business" in this State as that term is defined by rule adopted under section 203A of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3a) and is:
  - (A) An "investment adviser representative" as that term is defined by rule adopted under section 203A of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3a); or
  - (B) Not a "supervised person" as that term is defined in section 202(a)(25) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(25)); or
- (4) Is excluded by rule adopted or order issued under this chapter.

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

- (1) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of a depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;
- (2) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate; and
- (3) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty is the owner of an interest in the lease or in payments out of production under a lease, right, or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale.

"Nonissuer transaction" or "nonissuer distribution" means a transaction or distribution not directly for the benefit of the issuer.

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

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

"Place of business" of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

- (1) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or
- (2) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or



solicits, meets with, or otherwise communicates with customers or clients.

"Predecessor act" means chapter 485, Hawaii Revised Statutes.

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

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

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

"Sale" includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value; and "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. Both terms include:

- (1) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase, and having been offered and sold for value;
- (2) A gift of assessable stock involving an offer and sale; and
- (3) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security.

"Securities and Exchange Commission" means the United States Securities and Exchange Commission.

"Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; variable

annuity contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:

- (1) Includes both a certificated and an uncertificated security;
- (2) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or other specified period;
- (3) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974;
- (4) Includes any contractual or quasi-contractual arrangement pursuant to which:
  - (A) A person furnishes value, other than services, to an offeror;
  - (B) A portion of that value is subjected to the risk of the offeror's enterprise;
  - (C) The furnishing of that value is induced by the representations of an offeror which give rise to a reasonable understanding that a valuable benefit will accrue to the offeree as a result of the operation of the enterprise; and
  - (D) The offeree does not receive the right to exercise practical and actual control over the management of the enterprise in a meaningful way; and
- (5) Includes as an "investment contract", among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement or similar agreement.

"Self-regulatory organization" means a national securities exchange registered under the Securities Exchange Act of 1934, a national securities association of broker-dealers registered under the Securities Exchange Act of 1934, a clearing agency registered under the Securities Exchange Act of 1934, or the

Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934.

"Sign" means, with present intent to authenticate or adopt a record:

- (1) To execute or adopt a tangible symbol; or
- (2) To attach or logically associate with the record an electronic symbol, sound, or process.

"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. [L 2006, c 229, pt of §1; am L 2013, c 165, §1]

" **[\$485A-103] References to federal statutes.** "Securities Act of 1933" (15 U.S.C. 77a et seq.), "Securities Exchange Act of 1934" (15 U.S.C. 78a et seq.), "Public Utility Holding Company Act of 1935" (15 U.S.C. 79 et seq.), "Investment Company Act of 1940" (15 U.S.C. 80a-1 et seq.), "Investment Advisers Act of 1940" (15 U.S.C. 80b-1 et seq.), "Employee Retirement Income Security Act of 1974" (29 U.S.C. 1001 et seq.), "National Housing Act" (12 U.S.C. 1701 et seq.), "Commodity Exchange Act" (7 U.S.C. 1 et seq.), "Internal Revenue Code" (26 U.S.C. 1 et seq.), "Securities Investor Protection Act of 1970" (15 U.S.C. 78aaa et seq.), "Securities Litigation Uniform Standards Act of 1998" (112 Stat. 3227), "Small Business Investment Act of 1958" (15 U.S.C. 661 et seq.), "National Securities Markets Improvement Act of 1996" (Pub. L. No. 104-290, 110 Stat. 3416 (1996)), and "Electronic Signatures in Global and National Commerce Act" (15 U.S.C. 7001 et seq.) mean those statutes and the rules and regulations adopted under those statutes, as in effect on July 1, 2008, or as later amended. [L 2006, c 229, pt of §1]

#### **Revision Note**

"July 1, 2008" substituted for "the date of enactment of this chapter".

" **[\$485A-104] References to federal agencies.** A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department. [L 2006, c 229, pt of §1]

" **[\$485A-105] Electronic records and signatures.** This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede section 101(c) of that Act (15

U.S.C. 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that Act (15 U.S.C. 7003(b)). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or order issued under this chapter, in a manner consistent with section 104(a) of that Act (15 U.S.C. 7004(a)). [L 2006, c 229, pt of §1]

## "PART II. EXEMPTIONS FROM REGISTRATION OF SECURITIES

**[\$485A-201] Exempt securities.** The following securities are exempt from the requirements of sections 485A-301 to 485A-305 and 485A-504:

- (1) A security, including a revenue obligation or a separate security as defined in Rule 131 (17 C.F.R. 230.131) adopted under the Securities Act of 1933, issued, insured, or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency, or instrumentality of one or more states; by a political subdivision of more than one state; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by Congress; or a certificate of deposit for any of the foregoing;
- (2) A security issued, insured, or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer, or guarantor;
- (3) A security issued by and representing or that will represent an interest in or a direct obligation of, or be guaranteed by:
  - (A) An international banking institution;
  - (B) A bank organized under the law of the United States, or any bank, savings institution or trust company organized and supervised under the laws of any state or territory or any investment certificate issued by a financial services loan company duly licensed under the financial services loan law of the State; any savings and loan association or any building and loan or similar association organized under the laws of any state or territory and authorized to do business in this State; any banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution a substantial portion of

its business consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of Currency pursuant to section 1 of Public Law 87-722 (12 U.S.C. 92a); or

- (C) Any other depository institution, unless by rule or order, the commissioner proceeds under section 485A-204;
- (4) A security issued by and representing an interest in, or a debt of, or insured or guaranteed by, an insurance company authorized to do business in this State;
- (5) A security issued or guaranteed by a railroad, other common carrier, public utility, or public utility holding company that is:
  - (A) Regulated in respect to its rates and charges by the United States or a state;
  - (B) Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada, or a Canadian province or territory; or
  - (C) A public utility holding company registered under the Public Utility Holding Company Act of 1935 or a subsidiary of a registered holding company within the meaning of that Act;
- (6) A federal covered security specified in section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. 77r(b)(1)) or by rule adopted under that provision, or a security listed or approved for listing on any exchange registered or exempted under the Securities Exchange Act of 1934 or on another securities market specified by rule under this chapter (including any security of the same issuer which is of senior or substantially equal rank, any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe for any of the foregoing); a put or a call option contract; a warrant; a subscription right on or with respect to such securities; an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the Securities Exchange Act of

1934 and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the Securities Exchange Act of 1934 or an offer or sale, of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the Securities and Exchange Commission under section 9(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78i(b));

(7) A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic, or reformatory purposes, or as a chamber of commerce, and not for pecuniary profit, where no part of the net earnings inures to the benefit of a private stockholder or other person, or a security of a company that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(c)(10)(B)); except that with respect to the offer or sale of a note, bond, debenture, or other evidence of indebtedness issued by such a person, a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons, and transactions, imposing different requirements for different classes, specifying with respect to subparagraph (B), the scope of the exemption and the grounds for denial or suspension, and requiring an issuer to:

- (A) File a notice specifying the material terms of the proposed offer or sale and copies of any proposed sales and advertising literature to be used and provide that the exemption becomes effective if the commissioner does not disallow the exemption within the period established by the rule;
- (B) File a request for exemption authorization for which a rule under this chapter may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process under section 485A-610, and grounds for denial or suspension of the exemption; or

- (C) Register under section 485A-303;
- (8) A member's or owner's interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative; except any cooperative association membership stock, membership certificates or shares, or membership capital, pursuant to section 421C-36 and chapters 421 and 421C; and
- (9) An equipment trust certificate with respect to equipment leased or conditionally sold to a person, if any security issued by the person would be exempt under this section or would be a federal covered security under section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. 77r(b)(1)); or
- (10) Any security for which a registration statement has been filed under the Securities Act of 1933; provided that no sale shall be made until the registration statement has become effective. [L 2006, c 229, pt of §1]

" **§485A-202 Exempt transactions.** (a) The following transactions are exempt from the requirements of sections 485A-301 to 485A-305 and 485A-504:

- (1) An isolated nonissuer transaction, whether or not effected by or through a broker-dealer;
- (2) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter, and a resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940, in a security of a class that has been outstanding in the hands of the public for at least ninety days, if, at the date of the transaction:
  - (A) The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership, and the issuer is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;
  - (B) The security is sold at a price reasonably related to its current market price;

- (C) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the broker-dealer as an underwriter of the security or a redistribution;
- (D) A nationally recognized securities manual or its electronic equivalent designated by rule adopted or order issued under this chapter or a record filed with the Securities and Exchange Commission that is publicly available and contains:
  - (i) A description of the business and operations of the issuer;
  - (ii) The names of the issuer's executive officers and the names of the issuer's directors, if any;
  - (iii) An audited balance sheet of the issuer as of a date within eighteen months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and
  - (iv) An audited income statement for each of the issuer's two immediate previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had audited income statements, a pro forma income statement; and
- (E) Any one of the following requirements is met:
  - (i) The issuer of the security has a class of equity securities listed on a national securities exchange registered under section 6 of the Securities Exchange Act of 1934 or designated for trading on the National Association of Securities Dealers' Automated Quotation System;
  - (ii) The issuer of the security is a unit investment trust registered under the Investment Company Act of 1940;
  - (iii) The issuer of the security, including its predecessors, has been engaged in continuous business for at least three years; or
  - (iv) The issuer of the security has total assets of at least \$2,000,000 based on an audited balance sheet as of a date within eighteen months before the date of the transaction



or, in the case of a reorganization or merger when the parties to the reorganization or merger each had such an audited balance sheet, a pro forma balance sheet for the combined organization;

- (3) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the Board of Governors of the Federal Reserve System;
- (4) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in an outstanding security if the guarantor of the security files reports with the Securities and Exchange Commission under the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));
- (5) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security that:
  - (A) Is rated at the time of the transaction by a nationally recognized statistical rating organization in one of its four highest rating categories; or
  - (B) Has a fixed maturity or a fixed interest or dividend, if:
    - (i) A default has not occurred during the current fiscal year or within the three previous fiscal years or during the existence of the issuer and any predecessor if less than three fiscal years, in the payment of principal, interest, or dividends on the security; and
    - (ii) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous twelve months a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;
- (6) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this

- chapter effecting an unsolicited order or offer to purchase;
- (7) A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;
  - (8) A nonissuer transaction by a federal covered investment adviser with investments under management in excess of \$100,000,000, acting in the exercise of discretionary authority in a signed record for the account of others;
  - (9) A transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;
  - (10) A transaction in a note, bond, debenture, or other evidence of indebtedness secured by a mortgage or other security agreement if:
    - (A) The note, bond, debenture, or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;
    - (B) A general solicitation or general advertisement of the transaction is not made; and
    - (C) A commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under this chapter as a broker-dealer or as an agent;
  - (11) A transaction by an executor, administrator of an estate, personal representative, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;
  - (12) A sale or offer to sell to:
    - (A) An institutional investor;
    - (B) A federal covered investment adviser; or
    - (C) Any other person exempted by rule adopted or order issued under this chapter;
  - (13) Any transaction pursuant to a sale or an offer to sell securities of an issuer, if the transaction is part of an issue in which:
    - (A) There are no more than twenty-five purchasers (other than those designated in paragraph (12)), wherever located, during any twelve consecutive months;
    - (B) The issuer reasonably believes that all purchasers (other than those designated in paragraph (12)), wherever located, are purchasing for investment purposes and not with the view to, or for sales in connection with, a distribution of the security. The purchase shall be presumed to be made with a view to distribute and not to

- invest if any resale of a security sold in reliance on this exemption is within twelve months of sale, except a resale pursuant to a registration statement effective under section 485A-301, or to an accredited investor pursuant to an exemption available under this chapter;
- (C) No commission, discount, or other remuneration is paid or given, directly or indirectly, to a person, other than a broker-dealer or agent registered under this chapter, for soliciting a prospective purchaser in this State; and
  - (D) The securities of the issuer are not offered or sold by general solicitation or any general advertisement or other advertising medium;
- (14) A transaction under an offer to existing security holders of the issuer, including persons who at the date of the transaction are holders of convertible securities, options, or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this State;
- (15) (A) A transaction involving the offer or sale of a security by an issuer to an accredited investor that meets the following requirements:
- (i) The issuer reasonably believes that the sale is to persons who are accredited investors;
  - (ii) The issuer is not in the development stage, without specific business plan or purpose;
  - (iii) The issuer has not indicated that the issuer's business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and
  - (iv) The issuer reasonably believes that all purchasers are purchasing for investment purposes and not with the view to, or for sales in connection with, a distribution of the security. The purchase shall be presumed to be made with a view to distribute and not to invest if any resale of a security sold in reliance on this exemption is within twelve months of sale, except a resale pursuant to a registration statement effective under section 485A-301, or to an accredited investor pursuant to an exemption available under this chapter;

- (B) The exemption under this paragraph shall not apply to an issuer if the issuer; any affiliated issuer; any beneficial owner of ten per cent or more of any class of the issuer's equity securities; any issuer's predecessor, director, officer, general partner, or promoter presently connected in any capacity with the issuer; and any underwriter or partner, director, or officer of the underwriter of the securities to be offered:
- (i) Within the last five years has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the Securities and Exchange Commission;
  - (ii) Within the last five years has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
  - (iii) Is currently subject to any state or federal administrative enforcement order or judgment entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or
  - (iv) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security;
- (C) Subparagraph (B) shall not apply if:
- (i) The party subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the order, judgment, or decree creating the disqualification was entered against such party;
  - (ii) Before the first offer under this exemption, the commissioner, or the court or regulatory authority that entered the order, judgment, or decree waives the disqualifications; or

(iii) The issuer establishes that the issuer did not know and in the exercise of reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this paragraph; and

(D) An issuer claiming the exemption under this paragraph, no later than fifteen days after the first sale in this State, shall file with the commissioner a notice of transaction, a consent to service of process, a copy of the offering circular or similar document provided to the accredited investor and a \$200 filing fee.

For the purposes of this paragraph, "accredited investor" shall have the same meaning as provided in rule 501(a) adopted under the Securities Act of 1933 (17 C.F.R. 230.501(a));

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

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

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

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

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

(B) A solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the commissioner under this chapter; and

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

(18) A transaction involving the distribution of the securities of an issuer to the security holders of

another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other person, or its parent or subsidiary, are parties;

- (19) A rescission offer, sale, or purchase under section 485A-510;
- (20) An offer or sale of a security to a person not a resident of this State and not present in this State if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter;
- (21) Employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees, including offers or sales of such securities to:
  - (A) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisors;
  - (B) Family members who acquire the securities from those persons through gifts or domestic relations orders;
  - (C) Former employees, directors, general partners, trustees, officers, consultants, and advisors if those individuals were employed by or providing services to the issuer when the securities were offered; and
  - (D) Insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than fifty per cent of their annual income from those organizations;
- (22) A transaction involving:
  - (A) A stock dividend or equivalent equity distribution, whether or not the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer, if nothing of value is given by stockholders or other equity holders for the

dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock;

- (B) An act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or
- (C) The solicitation of tenders of securities by an offeror in a tender offer in compliance with Rule 162 adopted under the Securities Act of 1933 (17 C.F.R. 230.162);

(23) A nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this chapter, if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this chapter; has been subject to continuous reporting requirements in the foreign jurisdiction for not less than one hundred eighty days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by rule adopted or order issued under this chapter, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and the Toronto Stock Exchange, Inc., is a designated securities exchange. After an administrative hearing in accordance with chapter 91, the commissioner, by rule adopted or order issued under this chapter, may revoke the designation of a securities exchange under this paragraph, if the commissioner finds that revocation is necessary or appropriate in the public interest and for the protection of investors;

(24) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of this State, of a security issued on or after July 1, 1961, by a corporation organized under the laws of this State, the holder of which is entitled solely by reason of the holder's ownership thereof, to occupy

for dwelling purposes a house, or an apartment in a building, owned or leased by such corporation; provided that the issuer of the security shall apply for the exemption to the commissioner on such form and containing such information as the commissioner may prescribe. If the commissioner finds that the business applicant's proposed plan and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities that the applicant proposes to issue and the method to be used by the applicant in issuing or disposing of the securities will not, in the opinion of the commissioner, work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing the applicant to issue and dispose of the securities in this State in the manner provided herein and in such amounts and for such consideration as the commissioner may provide in the permit. Otherwise, the commissioner shall deny the application and refuse the permit and notify the applicant of the decision in writing, subject to appeal as provided in section 485A-609. In any permit issued under this paragraph, the commissioner may require the deposit in escrow or impoundment of any or all securities, the proceeds from the sale thereof, approval of advertising material, and any of the conditions as set forth in section 485A-304(f). The commissioner may act as escrow holder for securities required to be deposited in escrow by the commissioner's order or as a necessary signatory on any account in which impounded proceeds from the sale of escrowed securities are deposited;

- (25) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of this State of an apartment or unit in a condominium project, and a rental management contract relating to the apartment or unit, including an interest in a partnership formed for the purpose of managing the rental of apartments or units if the rental management contract or the interest in the partnership is offered at the same time as the apartment or unit is offered.

For the purposes of this paragraph, the terms "apartment", "unit", "condominium", and "project" shall have the meanings prescribed in section 514A-3 or 514B-3; and



- (26) Any transaction not involving a public offering within the meaning of section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d), but not including any transaction specified in the rules and regulations thereunder.
- (b) With respect to the exemption under paragraph (a)(13):
  - (1) The exemption shall not apply to an issuer if the issuer; any affiliated issuer; any beneficial owner of ten per cent or more of any class of the issuer's equity securities; any issuer's predecessor, director, officer, general partner, or promoter presently connected in any capacity with the issuer; and any underwriter or partner, director, or officer of the underwriter of the securities to be offered:
    - (A) Within the last five years has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the United States Securities and Exchange Commission;
    - (B) Within the last five years has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
    - (C) Is currently subject to any state or federal administrative enforcement order or judgment entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or
    - (D) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security; and
  - (2) Paragraph (1) shall not apply if:
    - (A) The party subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the order, judgment, or decree creating the disqualification was entered against such party;
    - (B) Before the first offer under this exemption, the commissioner, or the court or regulatory authority that entered the order, judgment, or decree waives the disqualifications; or

- (C) The issuer establishes that the issuer did not know and in the exercise of reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this paragraph. [L 2006, c 229, pt of §1; am L 2008, c 28, §23; am L 2012, c 54, §1]

" **[\$485A-203] Additional exemptions and waivers.** A rule adopted or order issued under this chapter may exempt a security, transaction, or offer; a rule under this chapter may exempt a class of securities, transactions, or offers from any or all of the requirements of sections 485A-301 to 485A-305 and 485A-504; and an order under this chapter may waive, in whole or in part, any or all of the conditions for an exemption or offer under sections 485A-201 and 485A-202. [L 2006, c 229, pt of §1]

" **[\$485A-204] Denial, suspension, revocation, condition, or limitation of exemptions.** Except with respect to a federal covered security or a transaction involving a federal covered security, an order under this chapter may deny, suspend application of, condition, limit, or revoke an exemption created under section 485A-201(3)(C), 485A-201(7), 485A-201(8), or 485A-202, or an exemption or waiver created under section 485A-203 with respect to a specific security, transaction, or offer. An order under this section may be issued only pursuant to the procedures in section 485A-305(d) or 485A-604, and only prospectively. [L 2006, c 229, pt of §1]

**"PART III. REGISTRATION OF SECURITIES AND NOTICE  
FILING OF FEDERAL COVERED SECURITIES**

**[\$485A-301] Securities registration requirement.** It is unlawful for a person to offer or sell a security in this State unless:

- (1) The security is a federal covered security;
- (2) The security, transaction, or offer is exempted from registration under sections 485A-201 to 485A-203; or
- (3) The security is registered under this chapter. [L 2006, c 229, pt of §1]

" **[\$485A-302] Notice filing.** (a) With respect to a federal covered security, as defined in section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. 77r(b)(2)), that is not otherwise exempt under sections 485A-201 to 485A-203, the following records shall be filed with the commissioner:

- (1) Initial offers.

- (A) Before the initial offer of a federal covered security in this State, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933 and a consent to service of process complying with section 485A-610 signed by the issuer; or
  - (B) After the initial offer of the federal covered security in this State, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933; and
- (2) Report. To the extent necessary or appropriate to compute fees, the commissioner may by rule or order require a report of the value of the federal covered securities sold or offered to persons present in this State, if the sales data are not included in records filed with the Securities and Exchange Commission, and payment of a fee of \$50.

(b) The fee for an initial notice filing for investment company securities shall be \$200 per portfolio or series.

(c) A notice filing under subsection (a) is effective for one year commencing on the later of the notice filing or the effectiveness of the offering filed with the Securities and Exchange Commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the Securities and Exchange Commission that are required by rule or order under this chapter to be filed and by paying a renewal fee of \$50. A previously filed consent to service of process complying with section 485A-610 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(d) With respect to a security that is a federal covered security under section 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. 77r(b)(4)(D)), a rule adopted under this chapter may require a notice filing by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated by the Securities and Exchange Commission, and a consent to service of process complying with section 485A-610 signed by the issuer not later than fifteen days after the first sale of the federal covered security in this State, and the payment of a fee of \$200.

(e) Except with respect to a federal security under section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. 77r(b)(1)), if the commissioner finds that there is a failure to comply with a notice or fee requirement of this section, the

commissioner may issue a stop order suspending the offer and sale of a federal covered security in this State. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the commissioner. [L 2006, c 229, pt of §1]

" **[\$485A-303] Securities registration by qualification.** (a) A security may be registered by qualification under this section.

(b) A registration statement under this section shall contain the information or records specified in section 485A-304, a consent to service of process complying with section 485A-610, and, if required by rule adopted or order issued under this chapter, the following information or records:

- (1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;
- (2) With respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;
- (3) With respect to persons covered by paragraph (2), the aggregate sum of the remuneration paid to those persons during the previous twelve months and estimated to be paid during the next twelve months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries, and affiliates of the issuer;
- (4) With respect to a person owning of record or owning beneficially, if known, ten per cent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) other than the person's occupation;

- (5) With respect to a promoter, if the issuer was organized within the previous three years, the information or records specified in paragraph (2), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;
- (6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;
- (7) The capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue its securities;
- (8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finder's fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of

any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

- (9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;
- (10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8) and by any person that holds or will hold ten per cent or more in the aggregate of those options;
- (11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years, and a copy of the contract;
- (12) A description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action, or proceeding known to be contemplated by governmental authorities;
- (13) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with section [485A-202(a)(17)(B)]; provided that the prospectus required for registration by qualification under paragraph (13) may be satisfied by the Small Corporate Offerings

Registration Form (Form U-7) adopted by the North American Securities Administrators Association; provided further that all of the qualifications in the instructions for use of the form are fulfilled;

- (14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;
- (15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;
- (16) A signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public, which is used in connection with the registration statement;
- (17) A balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and
- (18) Any additional information or records required by rule adopted or order issued under this chapter.

(c) A registration statement under this section becomes effective forty-five days, or any shorter period provided by rule adopted or order issued under this chapter, after the date the registration statement or the last amendment other than a price amendment is filed, if:

- (1) A stop order is not in effect and a proceeding is not pending under section 485A-305;

(2) The commissioner has not issued an order under section 485A-305 delaying effectiveness; or

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

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

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

(1) The first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) The confirmation of a sale made by or for the account of the person;

(3) Payment pursuant to a sale under paragraph (2); or

(4) Delivery of the security pursuant to a sale under paragraph (2). [L 2006, c 229, pt of §1]

" **[§485A-304] Securities registration filings.** (a) A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) A person filing a registration statement shall pay a filing fee of one-tenth of one per cent of the aggregate offering price of the securities to be offered in the State with a minimum fee of \$250 and a maximum fee of \$2,500.

(c) A registration statement filed under section 485A-303 shall specify:

(1) The amount of securities to be offered in this State;

(2) The states in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) Any adverse order, judgment, or decree issued in connection with the offering by a state securities



regulator, the Securities and Exchange Commission, or any court.

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

(e) In the case of a nonissuer distribution, information or a record may not be required under subsection (i) or section 485A-303, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) A rule adopted or order issued under this chapter may require as a condition of registration that a security issued within the previous five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the security either in this State or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this chapter, but the commissioner may not reject a depository institution solely because of its location in another state.

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

(h) Except while a stop order is in effect under section 485A-305, a registration statement is effective for one year after its effective date, or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one year

after its effective date. A registration statement may be withdrawn only with the approval of the commissioner.

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

(j) A registration statement shall be amended after its effective date if there are material changes in information or documents in the registration statement, or if there is an increase in the aggregate amount of securities offered or sold in this State. The posteffective amendment becomes effective when the commissioner provides written notice that the amendment has been accepted. If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing the amendment shall pay a registration fee based upon the increase in such price calculated in accordance with the rate and fee specified in subsection (b). If a posteffective amendment for registration of additional securities and payment of additional fees is not filed in a timely manner, there shall be no penalty assessed if the amendment is filed and the additional registration fee is paid within one year after the date the additional securities are sold in this State. [L 2006, c 229, pt of §1]

" **[\$485A-305] Denial, suspension, and revocation of securities registration.** (a) The commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the commissioner finds that the order is in the public interest and that:

- (1) The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under section 485A-304(j) as of its effective date, or a report under section 485A-304(i), is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;
- (2) This chapter, or a rule adopted or order issued under this chapter, or a condition imposed under this chapter has been wilfully violated in connection with the offering by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; by a promoter of the issuer; or by a person directly or indirectly

controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer, by an underwriter;

- (3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this chapter applicable to the offering; provided that the commissioner may not institute a proceeding against an effective registration statement under this paragraph:
  - (A) More than one year after the date of the order or injunction on which it is based; or
  - (B) On the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;
- (4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;
- (5) The applicant or registrant has not paid the filing fee; provided that the commissioner shall void the order if the deficiency is corrected; or
- (6) The offering:
  - (A) Will work or tend to work a fraud upon purchasers;
  - (B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options; or
  - (C) Is being made on terms that are unfair, unjust, or inequitable.

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

(c) The commissioner may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the commissioner shall promptly notify each person specified in subsection (d) that the order has been issued, the reasons for the revocation, denial, postponement, or

suspension, and that within fifteen days after the receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the commissioner within thirty days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination. During the pendency of any hearing requested under this subsection, the order shall remain in effect unless vacated or modified by the commissioner; provided that any penalty shall not take effect until the final order is issued.

(d) A stop order shall not be issued under this section without:

- (1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;
- (2) An opportunity for hearing; and
- (3) Findings of fact and conclusions of law in a record in accordance with chapter 91.

(e) The commissioner may modify or vacate a stop order issued under this section if the commissioner finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors. The modification or vacation shall not be subject to a hearing or chapter 91. [L 2006, c 229, pt of §1]

" **[§485A-306] Waiver and modification.** The commissioner, in the commissioner's sole discretion, may waive or modify, in whole or in part, any or all of the requirements of sections 485A-302 and 485A-303(b) or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to section 485A-304(i). [L 2006, c 229, pt of §1]

**"PART IV. BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS,  
INVESTMENT ADVISER REPRESENTATIVES, AND  
FEDERAL COVERED INVESTMENT ADVISERS**

**[§485A-401] Broker-dealer registration requirement and exemptions.** (a) It is unlawful for a person to transact business in this State as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d).

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

- (1) A broker-dealer without a place of business in this State if its only transactions effected in this State are with:
  - (A) The issuer of the securities involved in the transactions;
  - (B) A broker-dealer registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;
  - (C) An institutional investor;
  - (D) A nonaffiliated federal covered investment adviser with investments under management in excess of \$100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;
  - (E) A bona fide preexisting customer whose principal place of residence is not in this State and the person is registered as a broker-dealer under the Securities Exchange Act of 1934, or not required to be registered under the Securities Exchange Act of 1934, and is registered under the securities act of the state in which the customer maintains a principal place of residence;
  - (F) A bona fide preexisting customer whose principal place of residence is in this State but was not present in this State when the customer relationship was established, if:
    - (i) The broker-dealer is registered under the Securities Exchange Act of 1934, or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and
    - (ii) Within forty-five days after the customer's first transaction in this State, the person files an application for registration as a broker-dealer in this State and a further transaction is not effected more than the earlier of seventy-five days after the date on which the application is filed, or the date on which the commissioner notifies the person that the commissioner has denied the application for registration or has stayed the pendency of the application for good cause;

- (G) Not more than three customers in this State during the previous twelve months, in addition to those customers specified in subparagraphs (A) to (F) and (H), if the broker-dealer is registered under the Securities Exchange Act of 1934, or not required to be registered under the Securities Exchange Act of 1934, and is registered under the securities act of the state in which the broker-dealer has its principal place of business; or
  - (H) Any other person exempted by rule adopted or order issued under this chapter; and
- (2) A person that deals solely in United States government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision.

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

(d) A broker-dealer that is registered in Canada and has no office or other physical presence in this State may effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by an individual who is a resident of Canada, and:

- (1) Only effects or attempts to effect transactions in securities with or through the issuers of securities involved in the transactions, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, or other financial institutions or

institutional buyers, whether acting for themselves or as trustees; with or for a person from Canada who is present temporarily in this State and with whom a bona fide business relationship existed before the person entered this State; or with or for a person from Canada who is present in this State, whose transactions are in a self-directed tax advantaged retirement plan in Canada of which the person is the holder or contributor;

- (2) Is a member of a duly authorized self-regulatory organization or stock exchange in Canada;
- (3) Maintains the provincial or territorial registration and membership in a self-regulatory organization or stock exchange of the person in good standing; and
- (4) Discloses to the person's clients in this State that the person is not subject to the full regulatory requirements of this chapter; provided that a notice is filed with the commissioner in the form of the individual's current securities registration together with a consent to service of process.

(e) A rule adopted or order issued under this chapter may permit:

- (1) A broker-dealer that is registered in any other foreign jurisdiction and that has no office or other physical presence in this State to effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by:
  - (A) An individual from any other foreign jurisdiction who is temporarily present in this State and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;
  - (B) An individual from any other foreign jurisdiction who is present in this State and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or
  - (C) An individual who is present in this State, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in the other foreign jurisdiction.

An agent who represents a broker-dealer that is exempt under this subsection may effect transactions in securities or attempt to effect the purchase or sale of securities in this

State as permitted for a broker-dealer described in this subsection. [L 2006, c 229, pt of §1]

" **§485A-402 Agent registration requirement and exemptions.**

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

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

- (1) An individual who represents a broker-dealer in effecting transactions in this State limited to those described in section 15(i)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(i)(3)), relating to de minimis transactions by associated persons;
- (2) An individual who represents a broker-dealer that is exempt under section 485A-401(b) or 485A-401(d);
- (3) An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent company or any of the issuer's subsidiaries, and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;
- (4) An individual who represents an issuer and who effects transactions in the issuer's securities exempted by section 485A-202, other than section 485A-202(a)(10) and (13);
- (5) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer; provided that an individual who effects transactions in a federal covered security under section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. 77r(b)(3) or 77r(b)(4)(D)) is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;
- (6) An individual who represents a broker-dealer registered in this State under section 485A-401(a) or exempt from registration under section 485A-401(b) in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of \$100,000,000 acting for the account of others pursuant to discretionary authority in a signed record;



- (7) An individual who represents an issuer in connection with the purchase of the issuer's own securities;
- (8) An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or
- (9) Any other individual exempted by rule adopted or order issued under this chapter.

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

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

(e) If an individual acts as an agent for more than one broker-dealer or one issuer at a time, the broker-dealers and issuers for which the agent acts shall be jointly and severally liable for the acts of the agent unless otherwise agreed to between the agent, broker-dealers, and issuers. [L 2006, c 229, pt of §1; am L 2012, c 54, §2; am L 2013, c 165, §2]

" **[\$485A-403] Investment adviser registration requirement and exemptions.** (a) It is unlawful for a person to transact business in this State as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser under subsection (b).

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

- (1) A person without a place of business in this State that is registered under the securities act of the state in which the person has its principal place of business if its only clients in this State are:
  - (A) Federal covered investment advisers, investment advisers registered under this chapter, or broker-dealers registered under this chapter;
  - (B) Institutional investors;
  - (C) Bona fide preexisting clients whose principal places of residence are not in this State if the investment adviser is registered under the securities act of the state in which the clients maintain principal places of residence; or
  - (D) Any other client exempted by rule adopted or order issued under this chapter;

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

(3) Any other person exempted by rule adopted or order issued under this chapter.

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

(d) It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this chapter as an investment adviser representative who transacts business in this State on behalf of the investment adviser unless the individual is registered under section 485A-404(a) or is exempt from registration under section 485A-404(b). [L 2006, c 229, pt of §1]

" **[§485A-404] Investment adviser representative registration requirement and exemptions.** (a) It is unlawful for an individual to transact business in this State as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser representative under subsection (b).

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

(1) An individual who is employed by or associated with an investment adviser that is exempt from registration under section 485A-403(b) or a federal covered investment adviser that is excluded from the notice filing requirements of section 485A-405; or

(2) Any other individual exempted by rule adopted or order issued under this chapter.

(c) The registration of an investment adviser representative is effective only while the investment adviser

representative is employed by or associated with an investment adviser registered under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under section 485A-405.

(d) If an individual transacts business as an investment adviser representative for more than one investment adviser or federal covered investment adviser, the investment advisers and federal covered investment advisers shall be jointly and severally liable for the business transactions of the investor adviser representative unless otherwise agreed to between the investment adviser representative, investment advisers, and federal covered investment adviser.

(e) It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to conduct business in this State on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser representative is suspended or revoked or the individual is barred from employment or association with an investment adviser or a federal covered investment adviser by an order under this chapter, the Securities and Exchange Commission, or a self-regulatory organization. Upon request from a federal covered investment adviser and for good cause, the commissioner, by order issued, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser. [L 2006, c 229, pt of §1]

" **[\$485A-405] Federal covered investment adviser notice filing requirement.**

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

(b) The following federal covered investment advisers are not required to comply with subsection (c):

- (1) A federal covered investment adviser without a place of business in this State if its only clients in this State are:
  - (A) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter;
  - (B) Institutional investors;
  - (C) Bona fide preexisting clients whose principal places of residence are not in this State; or
  - (D) Other clients specified by rule adopted or order issued under this chapter;

- (2) A federal covered investment adviser without a place of business in this State if the person has had, during the preceding twelve months, not more than five clients that are residents of this State in addition to those specified under paragraph (1); or
- (3) Any other person excluded by rule adopted or order issued under this chapter.

(c) A person acting as a federal covered investment adviser not excluded under subsection (b) shall file a notice on a form designated by the commissioner, a consent to service of process complying with section 485A-610, and records that have been filed with the Securities and Exchange Commission under the Investment Advisers Act of 1940, as required by rule adopted or order issued under this chapter, and pay the fees specified in section 485A-410(e).

(d) The notice under subsection (c) becomes effective upon its filing. [L 2006, c 229, pt of §1]

**" [§485A-406] Registration by broker-dealer, agent, investment adviser, and investment adviser representative. (a)**

A person shall register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with section 485A-610, and paying the fee specified in section 485A-410 and any reasonable fees charged by the commissioner for processing the filing. The application shall contain:

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

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

(c) If an order is not in effect and a proceeding is not pending under section 485A-412, registration becomes effective at noon on the forty-fifth day after a completed application is filed, unless the registration is denied or the commissioner has given written notice of deficiencies that are unresolved. A rule adopted or order issued under this chapter may set an earlier effective date or may defer the effective date until noon on the forty-fifth day after the filing of any amendment completing the application.

(d) A registration is effective until midnight on December 31 of the year for which the application for registration is filed. Unless an order is in effect under

section 485A-412, a registration may be automatically renewed each year by filing records that are required by rule adopted or order issued under this chapter to be filed, by paying the fee specified in section 485A-410, and by paying costs charged by the commissioner for processing the filings.

(e) A rule adopted or order issued under this chapter may impose other conditions, not inconsistent with the National Securities Markets Improvement Act of 1996. An order issued under this chapter may waive, in whole or in part, specific requirements in connection with registration as are in the public interest and for the protection of investors. [L 2006, c 229, pt of §1]

" **[\$485A-407] Succession and change in registration of broker-dealer or investment adviser.** (a) A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for registration pursuant to section 485A-401 or 485A-403 or a notice pursuant to section 485A-405 for the unexpired portion of the current registration or notice filing.

(b) A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the registrant in its filing. The new organization shall be a successor to the original registrant for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for registration. A predecessor registered under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser registration within forty-five days after filing its amendment to effect succession.

(c) A broker-dealer or investment adviser that changes its name may continue its registration by filing an amendment to its registration statement and providing any other information that the commissioner determines is appropriate by rule adopted or order issued under this chapter. The amendment becomes effective when filed or on a date designated by the registrant.

(d) A change of control of a broker-dealer or investment adviser may be made in accordance with a rule adopted or order issued under this chapter. [L 2006, c 229, pt of §1]

" **[§485A-408] Termination of employment or association of agent and investment adviser representative; transfer of employment or association.** (a) If an agent registered under this chapter terminates employment or association with a broker-dealer or issuer; or if an investment adviser representative registered under this chapter terminates employment or association with an investment adviser or federal covered investment adviser; or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser, or federal covered investment adviser shall promptly file a notice of termination with the commissioner. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant shall promptly notify the broker-dealer, issuer, investment adviser or federal covered investment adviser, to do so.

(b) If an agent registered under this chapter terminates employment or association with a broker-dealer registered under this chapter and begins employment or association with another broker-dealer registered under this chapter; or if an investment adviser representative registered under this chapter terminates employment or association with an investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 485A-405 and begins employment by or association with another investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 485A-405; then upon the filing by or on behalf of the registrant, within thirty days after the termination, of an application for registration that complies with the requirement of section 485A-406(a) and payment of the filing fee required under section 485A-410, the registration of the agent or investment adviser representative shall be:

- (1) Immediately effective as of the date of the completed filing, if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record does not contain any new or amended disciplinary actions or proceedings within the previous twelve months; or
- (2) Temporarily effective as of the date of the completed filing, if the agent's Central Registration Depository record or successor record or the investment adviser

representative's Investment Adviser Registration Depository record or successor record contains any new or amended disciplinary actions or proceedings within the preceding twelve months.

(c) The commissioner may withdraw a temporary registration if there are or were grounds for discipline as specified in section 485A-412 and the commissioner does so within thirty days after the filing of the application. If the commissioner does not withdraw the temporary registration within the thirty-day period, registration becomes automatically effective on the thirty-first day after filing.

(d) The commissioner may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection (b)(1) or (2) based on the public interest and the protection of investors.

(e) If the commissioner determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser, or investment adviser representative, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator, or guardian, or cannot reasonably be located, a rule adopted or order issued under this chapter may require the registration be canceled or terminated or the application denied. The commissioner may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive. [L 2006, c 229, pt of §1]

" **[§485A-409] Withdrawal of registration of broker-dealer, agent, investment adviser, and investment adviser representative.** The withdrawal of registration by a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective sixty days after the filing of the application to withdraw or within any shorter period as provided by rule adopted or order issued under this chapter unless a revocation or suspension proceeding is pending when the application is filed. If a revocation or suspension proceeding is pending, withdrawal becomes effective when and upon such conditions as required by rule adopted or order issued under this chapter. The commissioner may institute a revocation or suspension proceeding under section 485A-412 within one year after the withdrawal became effective and issue a revocation or suspension order as of the last date on which registration was effective. [L 2006, c 229, pt of §1]

" **[§485A-410] Filing fees.** (a) A person shall pay a fee of \$200 when initially filing an application for registration as a

broker-dealer and a fee of \$200 when filing a renewal of registration as a broker-dealer.

(b) The fee for an individual is \$50 when filing an application for registration as an agent, a fee of \$50 when filing a renewal of registration as an agent, and a fee of \$50 when filing for a transfer of registration as an agent.

(c) A person shall pay a fee of \$100 when filing an application for registration as an investment adviser and a fee of \$100 when filing a renewal of registration as an investment adviser.

(d) The fee for an individual is \$50 when filing an application for registration as an investment adviser representative, a fee of \$50 when filing a renewal of registration as an investment adviser representative, and a fee of \$50 when filing for a transfer of registration as an investment adviser representative.

(e) A federal covered investment adviser required to file a notice under section 485A-405 shall pay an annual fee of \$100.

(f) A person required to pay a fee under this section may transmit the fee through or to a designee of the commissioner as provided in a rule adopted or order issued under this chapter.

(g) The fee for copies of documents filed in the office of the commissioner shall be 25 cents per page. [L 2006, c 229, pt of §1]

" **[§485A-411] Postregistration requirements.** (a) Subject to section 15(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(h)) or section 222 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-22), a rule adopted or order issued under this chapter may establish minimum financial requirements for broker-dealers registered or required to be registered under this chapter and investment advisers registered or required to be registered under this chapter.

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

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



- (1) A broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall make and maintain for a period of three years after the close of the calendar or fiscal year to which they pertain, the accounts, correspondence, memoranda, papers, books, and other records required by rule adopted or order issued under this chapter;
- (2) Broker-dealer records required to be maintained under paragraph (1) may be maintained in any form of data storage acceptable under section 17(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)) if they are readily accessible to the commissioner; and
- (3) Investment adviser records required to be maintained under paragraph (1) may be maintained in any form of data storage required by rule adopted or order issued under this chapter.

(d) The records of a broker-dealer registered or required to be registered under this chapter and of an investment adviser registered or required to be registered under this chapter are subject to such reasonable periodic, special, or other audits or inspections by a representative of the commissioner, within or without this State, as the commissioner considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The commissioner may copy, and remove for audit or inspection copies of, all records the commissioner reasonably considers necessary or appropriate to conduct the audit or inspection. The commissioner may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) Subject to section 15(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(h)) or section 222 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-22), a rule adopted or order issued under this chapter may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security. The commissioner may determine the requirements of the insurance, bond, or other satisfactory form of security. The insurance, bond, or other satisfactory form of security shall permit an action by a person to enforce any liability on the insurance, bond, or other satisfactory form of security if instituted within the time limitations in section 485A-509(j) (2).

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

(g) Except as otherwise provided in this subsection, the commissioner may by rule adopted or order issued under this chapter require a minimum capital requirement for registered broker-dealers, which shall not be less than \$5,000 in the case of broker-dealers, and prescribe a ratio between net capital and aggregate indebtedness; provided that this subsection shall not apply to any broker-dealer that is registered under the Securities Exchange Act of 1934. The commissioner may by rule adopted or order issued under this chapter require a net worth requirement which shall not be less than \$5,000 for investment advisers; provided that this subsection shall not apply to any investment adviser that maintains its principal place of business in a state other than this State, and the investment adviser is registered in the state where it maintains its principal place of business and is in compliance with that state's net worth or net capital requirements, if any.

(h) With respect to an investment adviser registered or required to be registered under this chapter, a rule adopted or order issued under this chapter may require that information or records be furnished or disseminated to clients or prospective clients in this State as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(i) A rule adopted or order issued under this chapter may require an individual registered under sections 485A-402 or 485A-404 to participate in a continuing education program approved by the Securities and Exchange Commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or order issued under this chapter may require continuing education for an individual registered under section 485A-404. [L 2006, c 229, pt of §1]

" **[\$485A-412] Denial, revocation, suspension, withdrawal, restriction, condition, or limitation of registration.** (a) If the commissioner finds that it is in the public interest and

subsection (d) authorizes the action, the commissioner, under this chapter may deny an application, or may condition or limit the registration of an applicant to be a broker-dealer, agent, investment adviser, or investment adviser representative, and, if the applicant is a broker-dealer or investment adviser, of a partner, officer, director, or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser.

(b) If the commissioner finds that it is in the public interest and subsection (d) authorizes the action, the commissioner, under this chapter may revoke, suspend, condition, or limit the registration of a registrant and, if the registrant is a broker-dealer or investment adviser, of a partner, officer, director, or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser; provided that the commissioner shall not:

- (1) Institute a revocation or suspension proceeding under this subsection based on an order issued under a law of another state that is reported to the commissioner or a designee of the commissioner more than one year after the date of the order on which it is based; or
- (2) Under subsection (d) (5) (A) or (B), issue an order on the basis of an order issued under the securities act of another state unless the other order was based on conduct for which subsection (d) would authorize the action had the conduct occurred in this State.

(c) If the commissioner finds that it is in the public interest and subsection (d) (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (12), (13), (14), or (15), authorizes the action, the commissioner, under this chapter may censure, impose a bar, or impose a civil penalty in an amount not to exceed a maximum of \$50,000 for each violation on a registrant, and, if the registrant is a broker-dealer or investment adviser, on a partner, officer, director, or person having a similar status or performing similar functions, or on a person directly or indirectly in control, of the broker-dealer or investment adviser.

(d) A person may be disciplined under subsections (a) to (c) if the person:

- (1) Has filed an application for registration in this State under this chapter or the predecessor act within the previous ten years which as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made,

- was false or misleading with respect to a material fact;
- (2) Wilfully violated or wilfully failed to comply with this chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act within the previous ten years;
  - (3) Has been convicted of any felony, or within the previous ten years has been convicted of a misdemeanor, involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;
  - (4) Is enjoined or restrained by a court of competent jurisdiction in an action instituted by the commissioner under this chapter or the predecessor act, a state, the Securities and Exchange Commission, or the United States from engaging in or continuing an act, practice, or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;
  - (5) Is the subject of an order, issued after notice and opportunity for hearing by:
    - (A) The securities or other financial services regulator of a state or the Securities and Exchange Commission or other federal agency denying, revoking, barring, or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative;
    - (B) The securities regulator of a state or the Securities and Exchange Commission against a broker-dealer, agent, investment adviser, investment adviser representative, or federal covered investment adviser;
    - (C) The Securities and Exchange Commission or a self-regulatory organization suspending or expelling the registrant from membership in the self-regulatory organization;
    - (D) A court adjudicating a United States Postal Service fraud order;
    - (E) The insurance regulator of a state denying, suspending, or revoking registration as an insurance agent; or
    - (F) A depository institution or financial services regulator suspending or barring the person from

the depository institution or other financial services business;

- (6) Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the Securities and Exchange Commission, the Commodity Futures Trading Commission; the Federal Trade Commission; a federal depository institution regulator, or a depository institution, insurance, or other financial services regulator of a state that the person wilfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodity Exchange Act, the securities or commodities law of a state, or a federal or state law under which a business involving investments, franchises, insurance, banking, or finance is regulated;
- (7) Is insolvent, either because the person's liabilities exceed the person's assets or because the person cannot meet the person's obligations as they mature; provided that the commissioner may not enter an order against an applicant or registrant under this paragraph without a finding of insolvency as to the applicant or registrant;
- (8) Refuses to allow or otherwise impedes the commissioner from conducting an audit or inspection under section 485A-411(d) or refuses access to a registrant's office to conduct an audit or inspection under section 485A-411(d);
- (9) Has failed to reasonably supervise an agent, investment adviser representative, or other individual, if the agent, investment adviser representative, or other individual was subject to the person's supervision and committed a violation of this chapter or the predecessor act or a rule adopted or order issued under this chapter or the predecessor act within the previous ten years of the violation;
- (10) Has not paid the proper filing fee within thirty days after having been notified by the commissioner of a deficiency; provided that the commissioner shall vacate an order under this paragraph when the deficiency is corrected;
- (11) After notice and opportunity for a hearing, has been found within the previous ten years:
  - (A) By a court of competent jurisdiction to have wilfully violated the laws of a foreign jurisdiction under which the business of

- securities, commodities, investment, franchises, insurance, banking, or finance is regulated;
- (B) To have been the subject of an order of a securities regulator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative, or other similar person; or
  - (C) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;
- (12) Is the subject of a cease and desist order issued by the Securities and Exchange Commission or issued under the securities, commodities, investment, franchise, banking, finance, or insurance laws of a state;
  - (13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years;
  - (14) Has demonstrated unworthiness to transact the business of broker-dealer, investment adviser, agent, or investment adviser representative;
  - (15) Has not complied with an order of child support or has failed to comply with a subpoena or warrant relating to a paternity or child support order pursuant to chapter 576D; or
  - (16) Is not qualified on the basis of factors such as training, experience, and knowledge of the securities business; provided that in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser representative, a denial order may not be based on this paragraph if the individual has successfully completed all examinations required by subsection (e). The commissioner may require an applicant for registration under section 485A-402 or 485A-404 who has not been registered in a state within the two years preceding the filing of an application in this State to successfully complete an examination.

(e) A rule adopted or order issued under this chapter may require that an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all

individuals to be registered under this chapter. An order issued under this chapter may waive, in whole or in part, an examination as to an individual and a rule adopted under this chapter may waive, in whole or in part, an examination as to a class of individuals if the commissioner determines that the examination is not necessary or appropriate in the public interest and for the protection of investors.

(f) The commissioner may suspend or deny an application summarily; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon the issuance of an order, the commissioner shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within fifteen days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the commissioner within thirty days after the date of service of the order, the order shall become final 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 the order until a final determination is made. During the pendency of any hearing requested under this subsection, the order shall remain in effect unless vacated or modified by the commissioner; provided that any penalty shall not take effect until the final order is issued.

(g) An order issued under this section, except under subsection (f), shall include:

- (1) Appropriate notice to the applicant or registrant;
- (2) Opportunity for hearing; and
- (3) Findings of fact and conclusions of law in accordance with chapter 91.

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

(i) The commissioner may not institute a proceeding under subsection 485A-412(a), 485A-412(b), or 485A-412(c) based solely on material facts actually known by the commissioner unless an investigation or the proceeding is instituted within one year after the commissioner actually acquires knowledge of the material facts. [L 2006, c 229, pt of §1]

**"PART V. FRAUD AND LIABILITIES**

**§485A-501 General fraud.** (a) It shall be unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) To employ a device, scheme, or artifice to defraud;
- (2) To make an untrue statement of a material fact or to fail to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading;
- (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person;
- (4) To issue, circulate, or publish any prospectus, circular, advertisement, printed matter, document, pamphlet, leaflet, or other literature (in this chapter collectively referred to as "advertising matter"), which contains an untrue statement of a material fact or fails to state a material fact necessary to make the statements therein made, in light of the circumstances under which they are made, not misleading;
- (5) To issue, circulate, or publish any advertising matter or make any written representation, unless the name of the person issuing, circulating, publishing, or making the same and the fact that the person is issuing, circulating, or making the same shall be clearly indicated thereon;
- (6) To make any statement or representation or issue, circulate, or publish any advertising matter containing any statement, to the effect that the security has been in any way approved or endorsed by the commissioner; or
- (7) To issue, circulate, or publish any advertising matter unless a copy thereof has been previously filed with the office of the commissioner, or unless the commissioner has by rule adopted or order issued under this chapter exempted the filing of any advertising material.

(b) Subsections (a) (5) and (7) shall not apply to any advertising matter that is covered by section 18(a) of the Securities Act of 1933 (15 U.S.C. 77), and that relates to or is used in connection with the offer or sale of a federal covered security. [L 2006, c 229, pt of §1; am L 2012, c 54, §3]

**" §485A-502 Prohibited conduct in providing investment advice.** (a) It shall be unlawful for a person that advises



others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

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

(b) It shall be unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract, if the contract, in writing:

- (1) Provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;
- (2) Fails to provide that no assignment, as defined in section 202(a)(1) of the Investment Advisers Act of 1940, of the contract shall be made by the investment adviser without the consent of the other party to the contract; or
- (3) Fails to provide that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(c) Notwithstanding subsection (b)(1), an investment adviser may enter into, extend, or renew an investment advisory contract that:

- (1) Provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; or
- (2) Provides for compensation to the investment adviser on the basis of a share of capital gains or capital appreciation of the funds of the client; provided that the conditions and requirements as defined and set forth in rule 205-3 under the Investment Advisers Act of 1940 (17 C.F.R. 275.205-3) shall be met; and provided further that before entering into the advisory contract, and in addition to the requirements of Form ADV, the investment adviser shall disclose in writing to the client or the client's independent agent all material information concerning the proposed advisory arrangement, including the following:
  - (A) That the fee arrangement may create an incentive for the investment adviser to make investments

that are riskier or more speculative than would be the case in the absence of a performance-based fee;

- (B) Where relevant, that the investment adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;
- (C) The periods that will be used to measure investment performance throughout the contract and their significance in the computation of the fee;
- (D) The nature of any index that will be used as a comparative measure of investment performance, the significance of the index, and the reason the investment adviser believes that the index is appropriate; and
- (E) Where the investment adviser's compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of rule 2a-4(a)(1) under the Investment Company Act of 1940 (17 C.F.R. 270.2a-4(a)(1)), how the securities will be valued and the extent to which the valuation will be independently determined.

(d) It shall be unlawful for any investment adviser or investment adviser representative to:

- (1) Fail to disclose to the client in a separate disclosure statement the capacity in which the investment adviser and investment adviser representative are acting and the compensation to be received in situations in which:
  - (A) The investment adviser is acting as principal for the investment adviser's own account and knowingly sells any security to or purchases any security from a client for whom the investment adviser is acting as investment adviser; or
  - (B) The investment adviser is acting as a broker-dealer for a person other than the client and knowingly effects any sale or purchase of securities, real estate, insurance contracts, annuities contracts, or any types of real or personal property for the account of the client; and
- (2) Fail to provide the disclosure statement described in paragraph (1) and obtain the written consent of the client to the transactions described in the disclosure statement prior to the closing of the transactions.

(e) A rule adopted or order issued under this chapter may define an act, practice, or course of business of an investment adviser or an investment adviser representative, other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive, or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, other than supervised persons of a federal covered investment adviser, from engaging in acts, practices, and courses of business that are fraudulent, deceptive, or manipulative.

(f) A rule adopted or order issued under this chapter may specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser.

(g) It shall be unlawful for any investment adviser to use any scheme, device, or artifice to circumvent or attempt to circumvent the prohibitions or limitations in subsection (b).

(h) Nothing in this section shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law. [L 2006, c 229, pt of §1; am L 2012, c 54, §4]

" **[\$485A-503] Evidentiary burden.** (a) In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion shall have the burden to prove the applicability of the claim.

(b) In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion shall have the burden of going forward with evidence of the claim. [L 2006, c 229, pt of §1]

" **[\$485A-504] Filing of sales and advertising literature.**

(a) Except as otherwise provided in subsection (b) and section [485A-501(a)(7)], a rule adopted or order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

(b) This section shall not apply to sales and advertising literature specified in subsection (a) that relate to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by section 485A-201, 485A-202, or 485A-203, except as required pursuant to section 485A-201(7). [L 2006, c 229, pt of §1]

" **[\$485A-505] Misleading filings.** It shall be unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to fail to state a material fact necessary to make the statement made, in light of the circumstances under which it was made, not false or misleading. [L 2006, c 229, pt of §1]

" **[\$485A-506] Misrepresentations concerning registration or exemption.** (a) The filing of an application for registration, a registration statement, a notice filing under this chapter, the registration of a person, the notice filing by a person, or the registration of a security under this chapter shall not constitute a finding by the commissioner that the record filed under this chapter is true, complete, and not misleading.

(b) The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a transaction does not mean that the commissioner has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction.

(c) It shall be unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client, a representation that is inconsistent with this section. [L 2006, c 229, pt of §1]

" **[\$485A-507] Qualified immunity.** A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative shall not be liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by or filed with the commissioner or a designee of the commissioner, the Securities and Exchange Commission, or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity. [L 2006, c 229, pt of §1]

" **[\$485A-508] Criminal penalties.** (a) Whoever violates this chapter shall be punished as follows:

- (1) An offense in which the total value of all money and anything else of value paid by or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to under \$5,000 shall be a class C felony;

- (2) An offense in which the total value of all money and anything else of value paid by or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to \$5,000 but less than \$100,000 shall be a class B felony; and
- (3) An offense in which the total value of all money and anything else of value paid or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to \$100,000 or more shall be a class A felony.

In addition to the above, whoever violates this chapter shall forfeit to the State any interest or property the person has acquired or maintained in violation of this chapter and any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of this chapter.

(b) The value of all money and anything else of value paid or lost by various victims pursuant to the same scheme, plan, or representations or to the same entity may be aggregated in determining the class or grade of the offense.

(c) Upon conviction of a person under this chapter, the circuit court shall authorize the county attorney or prosecutor, or the attorney general, to seize all property or other interest declared forfeited under this chapter upon such terms and conditions as the court shall deem proper. The State shall dispose of all property or other interest seized under this chapter as soon as feasible making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the State, it shall not revert to the convicted person and the commissioner shall dispose of the property as deemed proper by the commissioner.

(d) Notwithstanding any other law to the contrary, a person convicted of a felony under this chapter who has a prior conviction for a felony under this chapter or a prior conviction for a crime which would constitute a felony under this chapter shall be sentenced to a mandatory minimum period of imprisonment of one year without possibility of parole. Nothing in this subsection shall be construed to in any way limit the maximum term of imprisonment imposed pursuant to chapter 706.

(e) Notwithstanding any other law to the contrary, the following period of limitations shall apply to prosecutions for felony violations of this chapter:

- (1) Prosecution for a felony under this chapter shall be commenced within five years after the offense is committed; and

(2) If the period prescribed in paragraph (1) has expired, prosecution for a felony under this chapter may be commenced within two years after the discovery of the offense by an aggrieved party who is not a party to the offense, but in no event more than seven years after the offense is committed.

(f) The attorney general or the proper county attorney or prosecutor, may institute criminal proceedings with or without a referral from the commissioner under this chapter.

(g) This chapter shall not limit the power of the State to punish a person for conduct that constitutes a crime under other laws of the State. [L 2006, c 229, pt of §1]

" **[\$485A-509] Civil liability.** (a) Enforcement of civil liability under this section shall be subject to the Securities Litigation Uniform Standards Act of 1998.

(b) A person is liable to the purchaser if the person sells a security in violation of section 485A-301 or, by means of an untrue statement of a material fact or an omission of a material fact necessary 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 shall be 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 attorney's 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); and
- (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 attorney's fees determined by the court.

(c) A person shall be liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission of a material fact necessary 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 shall be 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 attorney's 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); and
- (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 attorney's fees determined by the court.

(d) A person acting as a broker-dealer or agent that sells or buys a security in violation of section 485A-401(a), 485A-402(a), or 485A-506 shall be liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsection (b), or, if a seller, for a remedy as specified in subsection (c).

(e) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 485A-403(a), 485A-404(a), or 485A-506 shall be 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 attorney's fees determined by the court.

(f) 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, shall be liable to the other person. An action under this subsection shall be 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 attorney's fees determined by the court, less the amount of any income received as a result of the fraudulent conduct; and
- (2) This subsection shall 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) The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) to (f):

- (1) A person that directly or indirectly controls a person liable under subsections (b) to (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) to (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) to (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) to (f), unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.
- (h) 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) A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.
- (j) A person may not obtain relief:
- (1) Under subsection (b) for violation of section 485A-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 485A-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) A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or order issued under this chapter, 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 chapter, may not base an action on the contract.
- (l) A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.
- (m) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist. [L 2006, c 229, pt of §1]

" **[§485A-510] Rescission offers.** A purchaser, seller, or recipient of investment advice may not maintain an action under section 485A-509 if:

- (1) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:
- (A) An offer stating the respect in which liability under section 485A-509 may have arisen and fairly

advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale, or investment advice;

- (B) If the basis for relief under this section may have been a violation of section 485A-509(b), an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest at the legal rate of interest, from the date of the purchase, less the amount of any income received on the security; or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest at the legal rate of interest, from the date of the purchase in cash equal to the damages computed in the manner provided in this subsection;
- (C) If the basis for relief under this section may have been a violation of section 485A-509(c), an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest at the legal rate of interest, from the date of the sale; or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest at the legal rate of interest, from the date of the sale;
- (D) If the basis for relief under this section may have been a violation of section 485A-509(d); and if the customer is a purchaser, an offer to pay as specified in subparagraph (B); or, if the customer is a seller, an offer to tender or to pay as specified in subparagraph (C);

- (E) If the basis for relief under this section may have been a violation of section 485A-509(e), an offer to reimburse in cash the consideration paid for the advice and interest at the legal rate of interest, from the date of payment; or
  - (F) If the basis for relief under this section may have been a violation of section 485A-509(f), an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest at the legal rate of interest, from the date of the violation causing the loss;
- (2) The offer under paragraph (1) states that it must be accepted by the purchaser, seller, or recipient of investment advice within thirty days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any shorter period, of not less than three days, that the commissioner, by order, specifies;
  - (3) The offeror has the present ability to pay the amount offered or to tender the security under paragraph (1);
  - (4) The offer under paragraph (1) is delivered to the purchaser, seller, or recipient of investment advice, or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and
  - (5) The purchaser, seller, or recipient of investment advice that accepts the offer under paragraph (1) in a record within the period specified under paragraph (2) is paid in accordance with the terms of the offer. [L 2006, c 229, pt of §1]

## **"PART VI. ADMINISTRATION AND JUDICIAL REVIEW**

**[\$485A-601] Commissioner of securities.** (a) The administration of this chapter shall be vested in the commissioner. The director, with the approval of the governor, shall appoint the commissioner who shall not be subject to chapter 76. The commissioner shall hold the commissioner's office at the pleasure of the director and shall be responsible for the performance of the duties imposed under this chapter.

(b) The commissioner shall employ from time to time such other officers, deputies, attorneys, clerks, and employees, as are necessary for the administration of this chapter. They shall perform such duties as the commissioner assigns to them, and their compensation, and the compensation of the deputies herein provided for, shall be fixed by the commissioner with the

approval of the governor, subject to chapter 76. The commissioner, deputies, or any person appointed or employed by the commissioner under this subsection shall be paid, in addition to their salary or compensation when required to travel on official duties, the transportation cost, board, lodging, and other traveling expenses necessary and actually incurred by each of them in the performance of the duties required by this chapter or performed by the direction of the commissioner.

(c) Notwithstanding any other law to the contrary, the commissioner, by contract, may retain the services of attorneys for the enforcement of this chapter. The attorneys shall serve at the pleasure of the commissioner. At the option of the commissioner, attorneys retained by contract under this subsection may be compensated on a fixed-price basis, an hourly rate basis, with or without a fixed cap, or through a contingent fee arrangement to be specified in the contract and payable out of all sums the attorney recovers for the State by judgment, order, or settlement.

(d) Upon the filing of the application for registration of securities as provided in section 485A-302 or 485A-303, the applicant, in writing, may request that the registration be reviewed by a private consultant and, when requested, the commissioner may contract with private consultants for such review. The cost of the review shall be borne by the applicant; provided that upon payment of the cost of review, the applicant shall be reimbursed one-half of the respective filing fee.

(e) The governor shall cause the commissioner to be furnished with such quarters, stationery, furniture, office equipment, and other supplies as may be necessary for the efficient execution of the functions vested in the commissioner by this chapter.

(f) The commissioner shall report to the governor annually upon a date as the governor shall establish. The report shall contain an account of the work of the commissioner during the period covered and data and information deemed necessary or appropriate.

(g) The commissioner may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the commissioner may collaborate with public and nonprofit organizations with an interest in investor education. The commissioner may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives.

(h) It shall be unlawful for the commissioner or an officer, employee, or designee of the commissioner to use for personal benefit or the benefit of others records or other information obtained by or filed with the commissioner that are not public under section 485A-608(b). This chapter does not authorize the commissioner or an officer, employee, or designee of the commissioner to disclose the record or information, except in accordance with section 485A-602 or 485A-608(c). [L 2006, c 229, pt of §1]

#### **Revision Note**

In subsection (h), "485A-608(b)" substituted for "485A-607(b)" and "485A-602 or 485A-608(c)" substituted for "485A-602, 485A-607(c), or 485A-608" pursuant to §23G-15.

" **[§485A-602] Investigations and subpoenas.** (a) The commissioner may:

- (1) Conduct public or private investigations within or outside of this State which the commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter, or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;
- (2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and
- (3) Publish a record concerning an action, proceeding, or an investigation under, or a violation of, this chapter or a rule adopted or order issued under this chapter if the commissioner determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) For the purpose of an investigation under this chapter, the commissioner or its designee may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the commissioner considers relevant or material to the investigation.

(c) If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the commissioner under this chapter, the

commissioner may apply to a court of competent jurisdiction to enforce compliance. The court may:

- (1) Hold the person in contempt;
- (2) Order the person to appear before the commissioner;
- (3) Order the person to testify about the matter under investigation or in question;
- (4) Order the production of records;
- (5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;
- (6) Impose a civil penalty not greater than \$100,000 for each violation; and
- (7) Grant any other necessary or appropriate relief.

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

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

(f) At the request of the securities regulator of another state or a foreign jurisdiction, the commissioner may provide assistance if the requesting regulator states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting regulator administers or enforces. The commissioner may provide the assistance by using the authority to investigate and the powers conferred by this chapter as the commissioner determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also

constitute a violation of this chapter or other law of this State if occurring in this State. In deciding whether to provide the assistance, the commissioner may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the commissioner when requested; whether compliance with the request would violate or prejudice the public policy of this State; and the availability of resources and employees of the commissioner to carry out the request for assistance.

(g) The commissioner shall, in its discretion, cooperate, coordinate, consult, and, subject to section 485A-608, share records and information with the securities regulator of another state, a foreign jurisdiction, the Securities and Exchange Commission, the Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection Corporation, a self-regulatory organization, a national or international organization of securities regulators, a federal or state banking and insurance regulator, and any other governmental law enforcement agency among the federal government, self-regulatory organizations, states, and foreign governments. Chapter 92F shall apply to records and information. [L 2006, c 229, pt of §1]

#### **Revision Note**

In subsection (g), "485A-608" substituted for "485A-607".

" **[§485A-603] Civil enforcement.** (a) If the commissioner 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 chapter or a rule adopted or order issued under this chapter 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 chapter or a rule adopted or order issued under this chapter, the commissioner may maintain an action in a court of competent jurisdiction to enjoin the act, practice, or course of business, and to enforce compliance with this chapter or a rule adopted or order issued under this chapter.

(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 commissioner, for the defendant or the defendant's assets;

- (B) Ordering the commissioner 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 \$50,000 for a single violation;
  - (D) Ordering 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
  - (E) The payment of prejudgment and postjudgment interest;
- (3) Order the payment of costs and reasonable attorney's fees; and
  - (4) Order such other relief as the court considers appropriate.

(c) The commissioner shall not be required to post a bond in an action or proceeding under this chapter.

(d) In an action under this section, the commissioner may apply for and on due showing be entitled to have issued by the court, a subpoena requiring forthwith the appearance of any defendant and the defendant's employees, salespersons, or agents and the production of documents, books, and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or things complained of in the application for the injunction. [L 2006, c 229, pt of §1]

" **[\$485A-603.5] Additional civil penalties for securities violations committed against elders.** If a person commits a violation under this chapter and the violation is directed toward, targets, or is committed against a person who at the time of the violation is sixty-two years of age or older, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$50,000 for each violation; provided that this section shall not apply to registered broker-dealers for violations of [section] 485A-412(d)(9). [L 2007, c 95, pt of §2]

#### **Cross References**



Some other actions or penalties for violations committed against elders, see §§28-94, 412:3-114.5, 444-10.7, 454-4.5, 480-13, 480-13.5, 485A-604.5, and 487-14.

" **[\$485A-604] Administrative enforcement.** (a) If the commissioner 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 chapter or a rule adopted or order issued under this chapter 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 chapter or a rule adopted or order issued under this chapter, the commissioner 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 chapter;
- (2) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under section 485A-401(b)(1)(D) or (F), or for an investment adviser under section 485A-403(b)(1)(C); or
- (3) Issue an order under section 485A-204.

(b) An order under subsection (a) shall be 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. The order shall include a statement of any civil penalty or costs of investigation the commissioner will seek, 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 shall be scheduled for a hearing in accordance with chapter 91. The order may include 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. 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, 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 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 a final determination is made. During the pendency of any hearing requested under this subsection, the cease and desist order shall remain in effect unless vacated or

modified by the commissioner; provided that any penalty shall not take effect until the final order is issued.

(c) If a hearing is requested or ordered pursuant to subsection (b), a hearing shall be held pursuant to chapter 91. A final order may not be issued unless the commissioner makes findings of fact and conclusions of law in a record in accordance with chapter 91. The final order may make final, vacate, or modify the order issued under subsection (a).

(d) In a final order under subsection (c), the commissioner may impose a civil penalty of not more than \$50,000 for each violation. The order may include 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.

(e) In a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or order issued under this chapter.

(f) If a petition for judicial review of a final order is not filed in accordance with section 485A-609, the commissioner may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) If a person does not comply with an order under this section, the commissioner may petition a court of competent jurisdiction to enforce the order. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the commissioner's order, the court may find 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 to exceed \$2,000 for each violation and may grant any other relief the court determines is just and proper in the circumstances. [L 2006, c 229, pt of §1]

" **[\$485A-604.5] Additional administrative penalties for securities violations committed against elders.** If a person commits a violation under this chapter and the violation is directed toward, targets, or is committed against a person who at the time of the violation is sixty-two years of age or older, the commissioner, in addition to any other administrative penalty, may impose an administrative penalty not to exceed \$50,000 for each violation; provided that this section shall not

apply to registered broker-dealers for violations of [section] 485A-412(d)(9). [L 2007, c 95, pt of §2]

### **Cross References**

Some other actions or penalties for violations committed against elders, see §§28-94, 412:3-114.5, 444-10.7, 454-4.5, 480-13, 480-13.5, 485A-603.5, and 487-14.

" **[§485A-605] Venue.** Any action brought by the commissioner under this chapter may be brought in any circuit in the State at the commissioner's discretion. Any other action under this chapter shall be brought in the circuit of the plaintiff's residence or in the circuit in which the commissioner has the commissioner's office. [L 2006, c 229, pt of §1]

" **[§485A-606] Rules, forms, orders, [interpretative] opinions, and hearings.** (a) The commissioner may adopt, amend, and repeal, pursuant to chapter 91, such rules as may be necessary to carry out the purposes of this chapter. Notwithstanding this subsection, the commissioner may adopt, amend, and repeal forms and orders necessary to implement this chapter without regard to chapter 91. No form or order shall be adopted, amended, or repealed without regard to chapter 91, unless the commissioner finds that the action is in the public interest, necessary or appropriate for the protection of investors, and consistent with the purposes of this chapter.

(b) Subject to section 15(h) of the Securities Exchange Act (15 U.S.C. 780) and section 222 of the Investment Advisers Act of 1940 (15 U.S.C. 806-18a), the commissioner may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or order issued under this chapter. A rule adopted or order issued under this chapter may establish:

- (1) Subject to section 15(h) of the Securities Exchange Act (15 U.S.C. 780) and section 222 of the Investment [Advisers] Act of 1940 (15 U.S.C. 806-18a), the form and content of financial statements required under this chapter;
- (2) Whether unconsolidated financial statements must be filed; and
- (3) Whether required financial statements must be audited by an independent certified public accountant.

(c) The commissioner may provide interpretative opinions or issue determinations that the commissioner will not institute a proceeding or an action under this chapter against a specified

person for engaging in a specified act, practice, or course of business if the determination is consistent with this chapter. A rule adopted or order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations that the commissioner will not institute an action or a proceeding under this chapter.

(d) A hearing in an administrative proceeding under this chapter shall be conducted in public unless the commissioner for good cause consistent with this chapter determines that the hearing will not be so conducted. [L 2006, c 229, pt of §1]

" **[\$485A-607] Administrative files and opinions.** (a) The commissioner shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor act; and interpretative opinions or no action determinations issued under this chapter.

(b) The commissioner shall make all rules, forms, interpretative opinions, and orders available to the public in accordance with chapter 92F.

(c) The commissioner shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests in accordance with chapter 92F. A copy of the record certified or a certificate by the commissioner of a record's nonexistence is prima facie evidence of a record or its nonexistence. [L 2006, c 229, pt of §1]

" **[\$485A-608] Public records; confidentiality.** (a) Except as otherwise provided in subsection (b) or chapter 92F, records obtained by the commissioner or filed under this chapter, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

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

- (1) A record obtained by the commissioner in connection with an audit or inspection under section 485A-411(d) or an investigation under section 485A-602;
- (2) A part of a record filed in connection with a registration statement under sections 485A-301 and

485A-303 to 485A-305, or a record under section 485A-411(c) that contains trade secrets or confidential information if the person filing the registration statement or report has asserted a claim of confidentiality or privilege that is authorized by law;

- (3) A record that is not required to be provided to the commissioner or filed under this chapter and is provided to the commissioner only on the condition that the record will not be subject to public examination or disclosure;
- (4) A nonpublic record received from a person specified in section 485A-602(g);
- (5) Any social security number, residential address unless used as a business address, and residential telephone number unless used as a business telephone number, contained in a record that is filed; and
- (6) A record obtained by the commissioner through a designee of the commissioner that a rule or order under this chapter determines has been:
  - (A) Expunged from the commissioner's records by the designee; or
  - (B) Determined to be nonpublic or nondisclosable by that designee if the commissioner finds the determination to be in the public interest and for the protection of investors.

(c) If disclosure is for the purpose of a civil, administrative, or criminal investigation, action, or proceeding or to a person specified in section 485A-602(g), the commissioner may disclose a record obtained in connection with an audit or inspection under section 485A-411(d) or a record obtained in connection with an investigation under section 485A-602. [L 2006, c 229, pt of §1]

" **[\$485A-609] Appeals to court, first circuit; time; bonds; costs; decree; further appeal.** (a) An appeal may be taken by any aggrieved person from any final order of the commissioner to the circuit court of the first circuit in the manner provided in chapter 91. The appellant shall execute a bond in the penal sum of \$1,000 to the State, with sufficient surety, to be approved by the commissioner or the court, conditioned upon the faithful prosecution of the appeal to final judgment, and the payment of all such costs as shall be adjudged against the appellant.

(b) The appeal shall be conducted without a jury and confined to the record, and it may be given precedence by the court over other matters pending in the court.

(c) If the order of the commissioner is reversed the court shall by its mandate specifically direct the commissioner as to the commissioner's further action in the matter, including the making and entering of any order or orders in connection therewith, and the conditions, limitations, or restrictions to be therein contained; provided that the commissioner shall not thereby be barred from thereafter revoking or altering the order for any proper cause which may thereafter accrue or be discovered.

(d) If the order is affirmed, the appellant shall not be barred after thirty days from filing a new application; provided the application is not otherwise barred or limited.

(e) The appeal shall not in any way suspend the operation of the order appealed from during the pendency of the appeal unless upon proper order of the commissioner or the court.

(f) An appeal may be taken from the decree of the circuit court to the supreme court. [L 2006, c 229, pt of §1]

### **Rules of Court**

Appeal to circuit court, see HRCF rule 72; appeals, see Hawaii Rules of Appellate Procedure.

" **[§485A-610] Service of process.** (a) A consent to service of process complying with this section shall be signed and filed in the form required by a rule or order under this chapter. A consent appointing the commissioner the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this chapter or a rule adopted or order issued under this chapter after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

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

(c) Service under subsection (a) or (b) may be made by providing a copy of the process to the office of the commissioner; provided that it shall not be effective unless:

- (1) The plaintiff, which may be the commissioner, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and
- (2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the commissioner in a proceeding before the commissioner, allows.

(d) Service pursuant to subsection (c) may be used in a proceeding before the commissioner or by the commissioner in a civil action in which the commissioner is the moving party.

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

(f) If any process or pleadings mentioned in this chapter are served upon the commissioner, it shall be by duplicate copies, one of which shall be filed in the office of the commissioner and another immediately forwarded by the commissioner by registered mail to the principal office of the issuer against which the process or pleadings are directed. [L 2006, c 229, pt of §1]

## "PART VII. TRANSITION

**[§485A-701] Application of act to existing proceeding and existing rights and duties.** (a) The predecessor act exclusively governs all actions or proceedings that are pending on July 1, 2008, or may be instituted on the basis of conduct occurring before July 1, 2008; provided that a civil action may not be maintained to enforce any liability under the predecessor act unless instituted within any period of limitation that applied when the cause of action accrued or within five years after July 1, 2008, whichever is earlier.

(b) All effective registrations under the predecessor act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no-action determinations, and conditions imposed on the registrations under the predecessor act shall remain in effect

for the period that they would have remained in effect if this chapter had not been enacted. The registration orders, rules, statements, opinions, rulings, determinations, and conditions, shall be deemed to have been filed, issued, or imposed under this chapter, but shall be exclusively governed by the predecessor act. [L 2006, c 229, pt of §1]

**Revision Note**

"July 1, 2008" substituted for "the effective date of this chapter".