



Securities Industry Association

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October 27, 2004

Mr. H. Wayne Howell
Director
Office of the Secretary of State
Division of Securities & Business Regulation
Two Martin Luther King, Jr. Drive SE
802 West Tower
Atlanta, GA 30334

Dear Mr. Howell,

The State Regulation and Legislation Committee (the “Committee”) of the Securities Industry Association (“SIA”)¹ appreciates the opportunity to provide comments on the Division’s proposed revisions to the Uniform Securities Act (2002) and the accompanying proposed rules (“Rules”). The Committee applauds the Division for adopting much of the Uniform Securities Act (2002) (“2002 USA”) without modification in an effort to promote uniformity with other states. A review of the proposed revisions, however, has generated some concerns and questions, which have been itemized below. In addition, we have also identified below concerns and questions relating to a review of the Rules. Notwithstanding our comments, the proposed drafts demonstrate a clear effort by the Division to work towards uniformity and we recognize and appreciate your effort.

Our comments follow.

Comments on the 2002 USA as Revised (the “Act”):

Sec. 102 Several new definitions are proposed to be added to the Act, including, for example, affiliate, underwriter, viatical settlement and viatical issuer. The proposed definition of affiliate and the inclusion of that term within the revised definition of issuer

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker’s Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 790,600 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated \$213 billion in domestic revenue and an estimated \$283 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

and the new definition of underwriter could significantly expand the scope and applicability of provisions within the Act that include the terms “issuer” and “underwriter”. Therefore, a careful review of the Act and the Rules should be performed to determine whether the inclusion of the term “affiliate” within the definitions of issuer and underwriter will unintentionally expand the application of certain provisions to a class of individuals and entities within the definition of affiliate, but not intended to be covered by such provisions.

In addition, two definitions are proposed to be significantly broadened, “general solicitation” and “security”. It is proposed that the definition of “security” be revised to include an “investment contract”, which relies on the “risk capital” test. The expansion of the term security to include this type of investment contract is not consistent with the 2002 USA definition of security. Moreover, the expansion of the definition of general solicitation could result in a chilling effect on small businesses seeking to raise capital through their own efforts and will likely establish traps for the unwary regarding general communications with the public.

Former Sec. 202(20) The revised Act eliminates the exemption for sales to persons who are not resident in the state. Why is this exemption being eliminated?

Sec. 304 The inclusion of the word “contemplated” in subsection twelve (12) would require an issuer to guess whether any litigation is anticipated to be able to meet its disclosure obligations under this provision. Disclosures based upon conjecture would be misleading to investors.

Sec. 401(c) The deletion of the “lack of knowledge and reasonable care” language from this subsection creates an unreasonable expectation for and obligation of an issuer and a broker-dealer regarding their hiring practices and any associations they may develop. This “strict liability” type standard creates a significant burden on issuers and broker-dealers and could have the unintended consequences of firm’s maintaining smaller-than-necessary staff to avoid such liability or incurring large costs for screening personnel. With this language omitted, this subsection is not consistent with the language in the 2002 USA.

Sec. 402 This section includes issuer-agent registration exemption language that is proposed to be revised. One specific provision, 402(b)(7), combines two previous exemptions into one, with the result being a significant narrowing of the exemption. The remaining exemption, as revised, would only allow employees to perform ministerial and clerical tasks. It is unclear whether the revised language would allow employees to assist at all with the sale or purchase of an issuer’s stock, unless the employee did not receive any direct or indirect compensation for such actions, which is permitted under other exemptions in this section. This would be a significant hardship on small issuers.

Former Sec. 412(i) The 2002 USA, under this section, precludes the Commissioner from instituting a proceeding against applicants and registrants for denial, suspension or

revocation or relating to disciplinary penalties based upon facts known by the Commissioner more than a year earlier but not acted upon. The Act proposes to delete this restriction on the Commissioner. However, two similar provisions would remain that preclude the Commissioner from relying upon actions by another state known to the Commissioner for more than one year. Nevertheless, the deletion of the formerly referenced provision would allow the Commissioner to delay taking action against an applicant or registrant based upon known facts until an unknown time in the future.

Permitting such delays in action by the Commissioner does not promote timely resolutions to possible violations of the Act and serve as an injustice to applicants and registrants.

Sec. 501(a) Revisions are proposed to this section to expand unlawful acts to include four new types of actions. Three of the new provisions relate to the use of an improper prospectus and representations as to future markets or prices. Although understandable how such actions could be fraudulent, the language of such provisions is very broad and vague, with the potential for significant consequences. For example, the term “prospectus” has a very broad application and an unintentional use of a document could become criminal. In addition, statements made in response to an investor’s question relating to the resale potential of a security could, under the proposed language, be deemed illegal, even if the response is negative. The proposed language could have a chilling effect on broker-client relationships causing salespersons to be unresponsive to clients. It is respectfully recommended that the added language be given further consideration or deleted.

Sec. 501(b) It is unclear why language providing the Commissioner authority to adopt rules to define an act, practice or course of business as fraudulent or deceptive within this section is necessary and such language is not in the 2002 USA. This language should not be interpreted to allow the Commissioner the authority to broaden the application of this section to acts or practices that are not clearly within the intent of the enumerated actions.

Sec. 502(b) The revision of the language in this subsection makes the provision more general in application. Without having the actual language of any rules to be adopted under this subsection, it is unclear what differences, if any, there may be between rules adopted under the 2002 USA language and the proposed language. However, the deletion of the exclusionary language regarding supervised persons of a federal covered adviser from this subsection might suggest the State believes it has jurisdiction over such persons, which may be in conflict with the preemption of state securities laws under the National Securities Markets Improvement Act (“NSMIA”).

Sec. 603 and 604 New provisions have been added to each of these sections to make clear the Commissioner has the authority to take both civil and administrative action based upon the same violation. This type of double jeopardy authority, without any parameters, creates significant hardships on the regulated community.

Sec. 607(b) The proposed deletion of language from this subsection requiring records obtained by the Commissioner that relate to expunged records or other nonpublic or nondisclosable records to remain confidential and nonpublic is contrary to the expungement rule that was finally adopted by the NASD after years of negotiation efforts by and between the states, the industry and the NASD. Furthermore, as proposed the provision is not consistent with the 2002 USA language.

Comments on Proposed Amendments to the Rules:

590-4-1-.01(14) By the State defining the term “promptly” as concurrently, the State has created a potential conflict between the use of the word “promptly” for varying purposes throughout the Act. For example, the State uses the word “promptly” in a provision of these rules relating to emergency orders to require when proceedings related to the emergency order must be instituted. Although an admirable requirement, by defining “promptly” as “concurrently” for the entire Act, the State sets up a potential for conflict for use of the term “promptly” relating to its books and records rules for broker-dealers. The term “promptly” as used in the in the SEC’s revised books and records rules has been purposefully left undefined to allow flexibility in compliance with a document request depending upon the size and scope of the request. NSMIA precludes the states from having books and records rules that “are different from, or in addition to” the SEC’s books and records rules. Therefore, if the State intends to require “prompt” delivery of books and records, the State cannot define “promptly” as “concurrent” because the interpretation of that word relating to the delivery of books and records will be established by the SEC. It is therefore respectfully suggested that the State omit the definition of the word promptly and use the word “simultaneously” to refer to when proceedings must be instituted.

590-4-2-.01(3)(a) This rule includes a definition of “branch office.” The definition, however, varies greatly with the uniform definition of branch office coordinated among the NASD, the NYSE and the states after years of effort. It is respectfully suggested that the State revise its definition of branch office to coordinate with the uniform definition.

590-4-2-.12 Is the temporary registration program for agents still referred to as TAT? If not, the reference should be changed.

590-4-3-.07 Two principal revisions have been made to this rule. First, it has been revised to require a Chief Executive Officer (“CEO”) and Chief Financial Officer (“CFO”) certification of the financial statements of a non-profit issuer within the registration statement for the issuer’s securities. Second, the rule now requires disclosure relating to the use, or non-use, of appraisals to also be included within the registration statement. Furthermore, if an appraisal or opinion is to be included in the materials provided to investors, the appraisal or opinion must be prepared by a person “licensed to do business as an appraiser in the state where the property is located, if applicable, with such professional certifications and standards as the Commissioner may by rule

prescribe.” Although each of these proposed revisions provides investors with some additional assurance that responsibility is being taken for disclosures made within the registration statement, consideration should be given to revising the language regarding the qualifications of an appraiser. By restricting the ability to use an appraisal to scenarios where the appraisal has been prepared by a licensed appraiser, it limits an issuer’s ability to rely upon other qualified professionals such as certified public accountants and investment bankers to provide such valuable information to investors because they are not licensed with the state as an appraiser. We recommend the qualifications for use of appraisals within a registration statement be given further consideration.

590-4-4-.06 This new rule is meant to address recent reports of abusive practices related to market timing and late trading. Consideration should be given to revising the proposed language to make the practices, as specifically described in the provisions (although omitting the words “in some forms”), dishonest and unethical practices as provided for in 590.4-4-.05 in the immediately preceding rule. In addition, due to the unfolding nature of these issues, the proposed language should be given careful consideration to avoid any conflict with policies that have been, or will be, adopted by the SEC. Furthermore, if a fund permits market timing under certain scenarios and that practice is disclosed in the prospectus, the proposed language would override that decision as made by the fund’s directors and disclosed to investors.

590-4-6 Administrative Hearings This new rule incorporates within the State’s securities regulations specific administrative procedures relating to contested securities cases. However, as stated within this section, the provisions may not conflict with the Administrative Procedures Act (“APA”) of Georgia. The following comments are made independent of any check that the provisions in question are consistent with the requirements of the APA of Georgia.

590-4-6-.05 This rule permits the Hearing Officer to alter the burden of proof before a hearing. It is unclear what considerations a Hearing Officer would rely upon to alter the burden of proof between the parties and what type of notice to the parties would be provided or required. Procedural safeguards are important rights that cannot be understated. Please explain how this rule is intended to operate.

590-4-6-.16 This rule permits the Hearing Officer to consider evidence that would otherwise be inadmissible in a civil nonjury case, which appears to be the standard for evidence to be used by a Hearing Officer pursuant to the APA of Georgia. For example, the Hearing Officer may admit into evidence reports prepared for other reasons beyond the current case. It is unclear if such authority granted to the Hearing Officer would “conflict” with the requirements of the APA of Georgia, or if the authority goes beyond the authority provided for in the APA of Georgia. Although an administrative hearing, parties must be provided procedural safeguards to avoid the introduction of irrelevant evidence or evidence that has not been properly vetted.

590-4-6-.31 This rule provides that in a pending proceeding or other administrative proceeding a party may not access *public* records pertaining to the subject of the proceeding without the prior approval of the Commissioner. This limitation on the access to public records appears arbitrary and without merit at a time when the party to the proceeding should have access to all public records as a means to defend him/herself. Please explain the basis for the limitation and how such limitation does not conflict with the State's freedom of information requirements.

590-4-8-.02(4) and (5) The statement in this rule that an amendment to Form ADV is considered to be filed "promptly" if the amendment is filed within ten (10) business days of the event requiring the filing is very burdensome and inconsistent with the guidance for similar filings relating to amendments to Form BD and Forms U-4 and U-5, which is thirty (30) days. Notwithstanding the inconsistency with the filing time periods for other similar filings, ten business days is not sufficient to investigate the matter/event that requires the filing to be made. Setting arbitrary, short, time frames for filings will not provide for full and accurate filings to the regulators. It is respectfully suggested that the time period be amended to thirty (30) days. In addition, this rule states that certain filings will be deemed initial applications for registration although the filing is designated an amendment. Please explain how this process will work in the CRD.

590-4-8-.03 The comment to 590-4-7-.02 above relating to the ten (10) business day filing time period applies here as well.

590-4-8-.10 Two substantial revisions have been proposed to this rule. The revisions include a requirement to conduct annual inspections of *each office location* and a deletion of the safe harbor language relating to proper supervision. Although this rule only applies to state registered investment advisers (investment adviser as defined under the Act), the language requiring annual inspections of each office location should be clarified to indicate a physical inspection is not necessary if other prudent inspection methods are available (e.g., technology surveillance, regular communications) to preclude high costs being borne by these small firms. This clarification is even more important in light of the proposed deletion of the safe harbor language relating to proper supervision.

Once again, we want to congratulate you on a difficult, but successful, effort to revise the Georgia Securities Act and the accompanying rules to conform more closely to the 2002 USA and NASAA Model Rules. Although we have areas of concern regarding language included in both the Act and the proposed rules, we believe the concerns can be addressed if we work together.

If you have any questions regarding our comments, please do not hesitate to call me at (212) 618-0533. Thank you.

Sincerely,

Mr. H. Wayne Howell
October 21, 2004
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