Fall 1969

**Missouri Uniform Securities Act, The**

Hal M. Bateman

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

**Recommended Citation**

Available at: https://scholarship.law.missouri.edu/mlr/vol34/iss4/1

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
Hal M. Bateman*

Despite the spectacular events of recent years in the field of federal securities law, the less glamorous arena of state securities regulation—better known as "blue sky law"—continues to play an important and regular role in the securities lawyer's practice. The new Missouri Uniform Securities Act must therefore be carefully considered and analyzed by Missouri attorneys. It is the purpose of this article to assist in such consideration and analysis.

The adoption of the new Missouri Act is particularly significant for two reasons. First, in displacing the prior Missouri statutes, the new Act provides a modern, comprehensive, and well-drafted statute which represents a major improvement in the quality and adequacy of the Missouri law. Second, the new Missouri Act, being based on the Uniform Securities Act, makes an important addition to the growing number of states which have adopted the Uniform Act and thus aids in the realization of the basic policies which prompted the promulgation of that act.

*Associate Professor of Law, University of Missouri.

3. This designation apparently originated in Kansas where promoters of fraudulent securities schemes were plentiful and were often referred to as "blue sky merchants" since they would sell building lots in the blue sky in fee simple. Mulvey, Blue Sky Law, 36 Can. L.T. 37 (1916); L. Loss and E. Cowett, Blue Sky Law 7 (1968).
4. The new act was adopted in 1967 and became effective on January 1, 1968. Since this replaced the former Missouri Securities Act and bears the same chapter number in the Missouri Revised Statutes, it will be referred to as "the new Missouri Act" or "the new Act." See Mills and Jensen, The Missouri Uniform Securities Act, 24 J. Mo. Bar 60 (1968), and Logan, Missouri's New Uniform Securities Act and Securities Regulations, 37 U.M.K.C. L. Rev. 1 (1969) for discussions of the new Act.
5. 9C Uniform Laws Annotated. [Hereinafter cited as the Uniform Securities Act].

(463)
It is therefore appropriate initially to place the new Missouri Act in historical perspective—both with respect to the history of Missouri securities acts and with respect to the history of the Uniform Securities Act and state securities regulation generally. It is then necessary to consider in detail the provisions of the new Act with respect to content and purpose and to compare them with the corresponding portions of the Uniform Act. Finally, the underlying policies and purposes of the Uniform Act and of the Missouri Act should be reviewed and the provisions of the new Act analyzed. Although the adoption of the new Act represents a substantial advance in Missouri securities law as well as an increase in the number of states that have adopted the Uniform Act, certain deviations in the Missouri Act from the provisions of the Uniform Act raise serious questions of policy.

I. THE HISTORICAL CONTEXT

A. STATE SECURITIES REGULATION AND THE UNIFORM SECURITIES ACT

Securities law first developed in England and subsequently developed at both the state and Federal levels in this country. Three basic regulatory techniques have been employed. First, these laws have undertaken to regulate the activities of persons in the securities business such as brokers, dealers, and investment advisers, and the activities of organized securities markets and exchanges. Second, most of these laws have contained anti-fraud provisions with the prevention and redress of securities frauds as a central concern. Third, many of these laws have required the registration of new public offerings of securities with an administrative body or an official and have provided that the sale of the securities to the public may be prohibited under a variety of circumstances.

6. L. Loss, Securities Regulation 3-7, 23 (2d ed. 1961); L. Loss and E. Cowett, supra note 3, at 3.
7. L. Loss, supra note 6, at 33-35; L. Loss and E. Cowett, supra note 3, at 19-21.
8. L. Loss, supra note 6, at 43-49; L. Loss and E. Cowett, supra note 3, at 26-30.
10. L. Loss, supra note 6, at 49-63; L. Loss and E. Cowett, supra note 3, at 30-42. However, as these authors demonstrate, the substance of the securities registration provisions varies widely from a pure disclosure principle, such as is exemplified in the Federal Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1964), under which the investment decision is made solely by the individual investor on the basis of adequate and accurate information required to be furnished to him, to a strict qualification approach, such as exists in many states, including Missouri,
In the United States, state securities regulation preceded Federal securities law by many years. As early as the middle of the nineteenth century, a few states enacted limited and often short-lived statutes dealing with particular businesses or problems. However, the general scheme of state securities regulation found in most states today began with the Kansas act of 1911, which reflected the Populist philosophy of that day and took a rather skeptical view of public financing of business enterprises through the sale of securities and of the investment judgment and sophistication of the public. The Kansas statute became a pattern which was soon copied throughout the central and western United States, including Missouri.

In most of these statutes all three regulatory devices have been incorporated. The typical registration of securities provision has required that a person who seeks to sell securities to the public must first satisfy the securities commissioner that the offering is "fair, just and equitable." In the absence of a favorable finding by the commissioner, sale of the securities is prohibited. Since the "fair, just and equitable" standard has seldom, if ever, been defined, and favorable action by the public official is a prerequisite to legal sale of the securities, the securities commissioner or administrator is vested with a discretionary power of astonishing magnitude over the public financing of private business.

In most cases each state developed its own securities statutes primarily to meet local needs with little or no concern for the laws developing in other states or for the problems being created in interstate financing and securities markets. Hence, an uneven patchwork of restrictive state securities statutes grew up in the second and third decades of the 20th century which posed serious problems for interstate securities activities. A proposed multi-state public offering of securities might face a requirement imposed under which the administrator is granted broad discretion to pass on the investment merits of the security in the first instance and has the power to deny the right to sell upon an adverse finding.

11. L. Loss, supra note 6, at 3, 23.
12. L. Loss, supra note 6, at 23; L. Loss and E. Cowett, supra note 3, at 3-4.
14. L. Loss and E. Cowett, supra note 3, at 7-10. The result of this attitude was to place broad discretion and sizeable powers in the hands of the administrator.
15. L. Loss and E. Cowett, supra note 3, at 10. Within two years 23 states, including Missouri, had copied the Kansas Act of 1911.
16. This broad standard originated in the Kansas Act of 1911, Kan. Laws ch. 133, § 5 (1911), repealed 1965, and has been widely copied.
17. L. Loss, supra note 6, at 30-33, 68-71, 90.
by the commissioner in one state the satisfaction of which might preclude qualification in another. A third state might exempt the offering, and in a fourth state, the rules actually governing the decision of the administrator might be impossible to ascertain.

State securities regulation was well developed when the first Federal securities statutes were enacted dealing with substantially the same problems. Both the Securities Act of 1933,18 and the Securities Exchange Act of 1934,19 expressly provide that the regulation of such matters by the states is not preempted by Federal regulation.20 The Federal requirements were added to those imposed by state law, but no provision was made to harmonize or coordinate the various requirements imposed on a single transaction or individual by the kaleidoscopic variety of federal and state regulatory agencies and laws.

In the early 1900's the capital needs of business through public financing were relatively limited, and securities markets were largely restricted to the financial and business centers.21 The public offering of a new issue of securities was usually in a localized area, which often included the business being financed. A simultaneous nationwide offering, which is common today, was then rare if not impossible. Hence, no serious obstacle to the public financing of business expansion was imposed by state securities laws written on a purely local basis.

The rapid growth of American industry produced substantially larger capital needs, which were met by the development of a nationwide securities industry capable of marketing a new issue of securities in all sections of the country simultaneously and with markedly increased speed.22 But the growth of a national interstate securities industry was confronted by a patchwork of locally-oriented blue sky laws which were generally written and administered with little concern for the burdens imposed on legitimate interstate securities financing. This suggested the need for uniformity on one of two possible bases: the promulgation of a uniform state securities act, or the enactment of a federal corporation law which would displace all state securities laws on the principle of federal pre-

22. United States v. Morgan, supra note 21; L. Loss, supra note 6, at 159-178.
emption. Both approaches were explored, and in 1929 a uniform state securities act was promulgated.

Due to the unanticipated collapse of securities markets beginning in 1929 and the enactment of the Federal securities acts shortly thereafter, the 1929 act received little attention and was later withdrawn. Attention was temporarily diverted from the problem, but in the years following World War II the question of uniformity in the area of blue sky law was again raised. It was urged that the Federal Securities Act of 1933 should be made preemptive of all state securities regulation, but this proposition was strenuously opposed. After initial attempts to develop a new uniform state law were frustrated by the serious differences in policy existing among the states, Professors Louis Loss and Edward Cowett were commissioned to undertake a thorough study of existing laws and to draft a proposed uniform act which could fill the needs of any state. Their work led to the drafting of the statute promulgated by the Commissioners of Uniform State Laws in 1956 as the Uniform Securities Act. The results of their study and the drafting of the Uniform Act are fully described in Blue Sky Law, which is an invaluable aid in understanding and interpreting the Act.

In order to provide a single statute that would be in any sense “uniform” and still acceptable to all of the states, notwithstanding their divergent policies, the Uniform Act was drafted in a flexible four-part structure. Part I contains anti-fraud provisions. Part II contains provisions for registration of brokers, dealers, and investment advisers. Part III deals with registration of securities. Part IV contains definitions, exemptions, sanctions, administrative and other general provisions pertinent to the first three parts of the act. With appropriate alterations in Part IV, a

23. L. Loss, supra note 6, at 90-92, 107-111.
24. L. Loss, supra note 6, at 90.
25. Ibid.
28. L. Loss, supra note 6, at 93; L. Loss and E. Cowett, supra note 3, at 233-234.
29. L. Loss, supra note 6, at 93-94; L. Loss and E. Cowett, supra note 3, Foreword, vi-ix and 233-234.
30. L. Loss, supra note 6, at 94; L. Loss and E. Cowett, supra note 3, at 233-234.
31. L. Loss and E. Cowett, supra note 3.
state may enact any combination of the first three parts of the Act which conforms to its particular philosophy of securities regulation and still have a statute that is essentially "uniform" with those of other adopting states.

The draftsmen of the Uniform Act were guided by the better provisions of both federal and state securities acts then in effect and succeeded in producing what are essentially "model" provisions on many key points, some of which are unique and innovational.32 On the critical question of the standard to be applied in the registration of securities, the draftsmen accepted the fact that a disclosure statute like the Securities Act of 1933 would not be acceptable to a majority of the states. However, the vague "fair, just and equitable" test was replaced with authority in the commissioner to deny registration if he finds "the offering has worked or tended to work a fraud upon purchasers or would so operate."33 It was also provided that "fraud [is] not limited to common-law deceit."34

In the troublesome conflict of laws area the draftsmen devised a separate section to codify the principles for determining all questions of jurisdiction and applicability of the act to transactions which cross state lines.36 Although this statutory approach to conflict of laws problems appears to be unique, it is regarded as one of the most valuable features of the act.37

In order to allow simultaneous effectiveness of registration of an interstate offering of securities both in states where the offering is to be made and under the Securities Act of 1933, the draftsmen made one of the act's major innovations by providing a procedure for registration by "coordination."37 This allows a prospectus filed under the Securities Act of 1933 to be filed in each state as the state registration statement, with authority in each state commissioner to request copies of the other documents included in the federal registration statement. It is then provided that all of the state registrations become effective at approximately the same time as the federal registration unless a state official has initiated stop-order proceedings.

34. Id. § 401(d).
35. Id. § 414.
36. L. Loss, supra note 6, at 85-89; L. Loss and E. Cowett, supra note 3, at 224-229.
The Uniform Securities Act has been adopted or substantially adopted in twenty-seven states and is presently under consideration elsewhere. Unfortunately, however, many of the adopting states have made numerous and often substantial changes in the act to conform to local policy, traditions, or political exigencies. As a result, far less actual uniformity has been achieved than would appear from the number of adoptions. In addition the act leaves considerable room for each administrator to promulgate different rules and regulations and to exercise broad discretion under what appear to be uniform standards.

The adoption of the act by Missouri is an important addition to the growing list of adopting states. However, Missouri has also made a number of significant changes from the Uniform Act, some of which come at critical points. It is hoped that the numerous variations from the uniform text made by the adopting states will not result in widely divergent practices and interpretations among the states. Otherwise the Uniform Act will not have achieved one of its principal purposes, and the plea for federal preemption will likely be revived.

B. The History of Missouri Blue Sky Law

Missouri has had comprehensive statutes regulating securities activities continuously since 1913. Prior to the adoption of the Uniform Act in 1967, Missouri had three successive securities acts, the second of which had been amended once and the last of which although it had remained in effect the longest, had experienced repeated amendments. It is apparent from a study of these statutes that the basic outline of the Missouri policy on securities regulation was established at the outset and has undergone relatively little change or fundamental re-examination in subsequent years.

The original Missouri blue sky law was enacted by the 47th General Assembly in 1913 and was patterned after the influential Kansas Act

---

38. CCH Blue Sky Law Reporter, 701-2, lists 26 adopting states. In 1969 the Uniform Act was also approved in Wisconsin, having been enacted in 1968, Wis. Stat. ch. 71 (1968). In 1969 the Act was presented to the Texas legislature but was not passed at the regular session. A special session has been called.
40. See, e.g., Uniform Securities Act § 412, which grants broad authority to promulgate such rules, forms, and orders "as are necessary to carry out the provisions of this act" if the administrator finds "that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act."
41. See L. Loss, supra note 6, at 104-105.
42. Mo. Laws 1913, 112-118. This was included in the Revised Statutes of 1919 as §§ 11919-11932, RSMo 1919.
Although this early statute lacked much of the precision and detail of modern securities acts, it is clear that it undertook to impose a general requirement of registration of securities offerings and to impose sanctions for fraudulent representations in securities transactions. To a limited degree, registration of persons handling securities transactions was also required. Every “investment company” was required “[b]efore offering or attempting to sell any stocks, bonds or other securities of every kind or character other than those specifically exempted in section 1”, to file documents in the office of the state bank commissioner which amounted to a registration statement or an application for registration. However, the term “investment company” was defined by the statute with such breadth that it included, in effect, every incorporated or unincorporated business organization, (subject to enumerated exceptions) “which shall sell or negotiate for the sale of any stocks, bonds, or other securities of any kind or character” (except specified exempt securities). Hence, any issuer, underwriter, dealer, or other business association proposing an offering of non-exempt securities was subject to the registration requirement, although it was aimed primarily at issuers.

The bank commissioner, who was charged with administration of the act, was authorized to deny both the right to sell the securities as proposed and the right to transact any other business upon a finding that any of the organizational documents, the proposed plan of business, or the proposed offering of securities “contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors” or “that said investment company is not solvent and does not intend to do a fair and honest business.” “Investment companies” under the act were subject

43. The similarity of the two statutes is apparent from a comparison of their provisions. The inference that the Missouri act of 1913 was based on the widely copied Kansas act of 1911 is corroborated by the Historical Note following § 11919, RSMo 1919.

44. Mo. Laws 1913, 112-118, § 2. The act did not use the term “registration statement” or the term “application for registration.” These terms became common in later acts. The 1913 Act merely specified the several documents to be filed and the manner of verification. Id. § 3. Non-compliance was subject to criminal sanctions. Id. § 13.

45. Mo. Laws 1913, 112-118, § 1. Domestic and foreign investment companies were distinguished and the latter were required to appoint the secretary of state agent for service of process. Id. § 4. There is no indication that “investment company” is used here in the narrow, modern sense referring to corporations known as mutual funds.


47. Mo. Laws 1913, 112-118, § 5. The commissioner’s orders were made subject to judicial review.
to general supervision and inspection by the bank commissioner and were required to file annual reports of their financial condition and business affairs. The commissioner was further authorized to request the attorney general to seek receivership for an "investment company" subject to his oversight if he found it was insolvent or "conducting its business in an unsafe, inequitable or unauthorized manner, or . . . jeopardizing the interest of its stockholders or investors in stocks, bonds or other securities by it offered for sale," or had failed to file documents required by the act. Although the 1913 act contained no general regulation of brokers, dealers, and investment advisers except as they came within the definition of "investment company" in connection with securities offerings, it did require that all agents for "investment companies" under the act register annually with the bank commissioner. The act also contained a form of anti-fraud provision which imposed criminal sanctions on anyone making or publishing false or deceptive statements concerning financial condition or the securities offered for sale.

Thus to some extent, all of the three basic regulatory devices were included in the first Missouri securities act, although primary emphasis was placed on registration of securities offerings. It should also be noted that in this act Missouri adopted the "strict qualification" approach to securities registration under which the bank commissioner was given broad discretion to pass on the investment merits of the proposed offering both under the "fair, just and equitable" test and on the basis of the business condition and integrity of the issuer. It will be apparent that the essentials of these basic policies have remained constant in Missouri since 1913 and have been engrafted on the Missouri version of the Uniform Securities Act.

The 1918 Act remained in effect for ten years when it was replaced with an entirely new and more comprehensive securities act. The major innovation in the 1923 act was the addition of a basic provision requiring annual registration of securities dealers and salesmen, and placing them under the continuing supervision of the bank commissioner, who was au-

50. Mo. Laws 1913, 112-118, § 11. A balance sheet or bankruptcy test of insolvency is used here.
52. Mo. Laws 1913, 112-118, § 12. The crime was a felony subject to imprisonment up to ten years, a fine of $200 to $1000, or both.
Authorized to refuse or cancel a registration on any of four specified grounds.\textsuperscript{54} In addition, the 1923 act introduced sections creating civil liability for sales of securities in violation of the act,\textsuperscript{55} as well as criminal penalties.\textsuperscript{56} The 1923 act also materially enlarged the scope of the anti-fraud provisions, primarily by increasing the role of the commissioner in policing and seeking redress for securities frauds.\textsuperscript{57}

Nevertheless, the primary emphasis of the 1923 act remained in its provisions for registration of securities which were far more comprehensive and adequate than those in the 1913 act, although the strict qualification policy of the 1913 act was firmly retained. All securities offered for sale were required to be registered with the bank commissioner\textsuperscript{58} unless they were exempt securities\textsuperscript{59} or were sold in exempt transactions.\textsuperscript{60} An application for registration in the form specified by the commissioner was required to be filed.\textsuperscript{61} The commissioner was given discretionary authority to require "investigations and examinations respecting the business, affairs, and property of the issuer, and . . . appraisals of property or audits of books by appraisers or auditors" selected by him\textsuperscript{62} prior to granting registration. He was further authorized to deny registration if, in his opinion, "the sale of such securities would work a fraud, deception, or imposition on purchasers, or where the articles of incorporation or association, declaration of trust, charter, constitution and by-laws, plan of business, or proposed contract contain any provision that is unfair, unjust, inequitable, or oppressive . . . [o]r where . . . the issuer is insolvent."\textsuperscript{63} The requirement of annual reporting by issuers of registered securities was continued.\textsuperscript{64} Hence, the commissioner was to pass both on the fairness of the offering

\textsuperscript{54} \textit{Id.} § 22.
\textsuperscript{55} \textit{Mo. Laws} 1923, 200-218, §§ 24, 28. Under § 24 the purchaser could elect to rescind the transaction and recover the purchase price from all who participated in the sale, jointly and severally, subject to a two-year statute of limitations. Section 28 provided for recovery of 80 per cent of the proceeds of the sale in favor of the issuer against those making the sale.
\textsuperscript{56} \textit{Mo. Laws} 1923, 200-218, §§ 25-27, 29-31.
\textsuperscript{57} \textit{Mo. Laws} 1923, 200-218, §§ 14, 16, 19. Section 14 gave the commissioner broad investigatory powers and authority to issue cease and desist orders. Section 16 provided for injunction suits by the attorney general at the request of the commissioner to prevent fraudulent activity. Section 19 authorized the commissioner to give public warnings concerning securities being sold.
\textsuperscript{58} \textit{Id. Laws} 1923, 200-218, §§ 3, 7.
\textsuperscript{59} \textit{Id.} § 4.
\textsuperscript{60} \textit{Id.} § 5.
\textsuperscript{61} \textit{Id.} § 6.
\textsuperscript{62} \textit{Id.} § 10.
\textsuperscript{63} \textit{Id.} § 11.
\textsuperscript{64} \textit{Ibid.} The report required was to cover both financial condition and general business activity as specified by the commissioner.
and on the condition of the issuer's business and affairs. An amendment to
this act in 1925 transferred administration from the bank commissioner
to the supervisor of corporation registration who was under the secretary
of state and defined his office and powers.\footnote{Mo. Laws 1925, 339-343.} With this exception, this act
remained unchanged until it was replaced in 1929 with a new act.\footnote{Mo. Laws 1929, 387-412.}

The basic policies established in the prior acts were perpetuated
without change in the 1929 act which was principally designed to provide
more refined, extensive, and modern provisions to carry out these policies.
The provisions for registration and supervision of securities dealers and
salesmen were expanded in the 1929 act, which was more specific as to the
requirements for registration and contained additional grounds for denial
or revocation of a registration.\footnote{Id. §§ 22, 23.} Substantially the same anti-fraud pro-
visions initiated in the 1923 act were contained in the 1929 act.\footnote{Id. §§ 14-16, 19. See note 57, supra.} Civil
liability and criminal penalty provisions of the 1929 act were changed little
from those in the 1923 act.\footnote{Id. §§ 25-30, 32. See notes 55 and 56, supra.}

The principal innovations and improvements in the 1929 act came
in the area of registration of securities offerings, which, as before, was the
major emphasis of the act. All securities offerings were required to be
registered,\footnote{Id. §§ 3, 6.} unless they involved exempt securities\footnote{Id. 4.} or exempt trans-
actions.\footnote{Id. 5.} However, the 1929 act introduced an abbreviated form of regis-
tration by "notification" which was available for securities of certain es-
tablished issuers and for certain adequately secured bonds or notes.\footnote{Id. 6.} This
was distinguished from full-scale registration by "qualification" applicable
to all other securities.\footnote{Id. 7.} The chief differences between the two forms of
registration was procedural. Under notification, a relatively simple regis-
tration statement was required, and the registration was effective upon
filing unless the commissioner ordered otherwise.\footnote{Id. 8.} Under qualification,
extensive information was called for in the registration statement, and the
registration became effective only when the commissioner so ordered.\footnote{Id. 7.}
In either case the commissioner was authorized to make an extensive in-

\footnote{Id. 8.}
vestigation and to require examinations, appraisals, and audits of the issuer. Under either form of registration the act declared that "[t]he privilege of offering securities to the public in the state of Missouri pursuant to the provisions of this act shall not be granted by the commissioner in any case where it shall appear to the commissioner, upon evidence satisfactory to him, that the sale of such securities would work a fraud, deception, or imposition on purchasers, or where the articles of incorporation or association, declaration of trust, charter, constitution and by laws, plan of business, or proposed contract contain any provisions that are unfair, unjust, inequitable or oppressive ... [o]r where ... the issuer is insolvent."

The 1929 act remained in effect until January 1, 1968, when the Missouri Uniform Securities Act became effective. In the intervening years, however, there were numerous amendments. Most of these were limited in scope and related primarily to definitions, exemptions, and minor procedural matters. The most extensive amendments occurred in 1957 and were influenced by the Uniform Securities Act promulgated the year before, but again these amendments did not effect a major change in the policy or structures of the act.

77. *Id.* § 10

78. *Id.* § 11. The language in §§ 7 and 8 suggests that the broader standard applied only to qualification and that registration by notification could be denied only if the offering might work or tend to work a fraud. However, the quoted language from § 11 makes no such distinction and appears clearly to apply to both forms of registration.

79. In 1951 an exemption was added for securities issued by a Missouri agricultural cooperative association. Mo. Laws 1931, 352. In 1935 an exemption for securities issued by Missouri building and loan associations was removed, and issues by either Missouri or federal building and loan associations were excluded from the definition of "security." Mo. Laws 1935, 358. In 1937 exemptions were added for non-issuer transactions in securities previously distributed to the public lawfully under the act and for certain broker's transactions. Minor procedural changes were also made in both forms of registration. Mo. Laws 1937, 456. The foregoing amendments were codified in 1939, Mo. Laws 1939, 721, and a minor correction in an internal cross-reference was made in 1955. Mo. Laws 1955, 850. Several changes noted below were made in 1957, and in 1961 an exemption was added for non-issuer transactions through registered dealers if certain information pertaining to the security and to the issuer appeared in an approved securities manual. Mo. Laws 1961, 647.

80. Mo. Laws 1957, 812. The section on definitions was revised generally. Four new securities exemptions were added for building and loan securities, for various employee stock purchase plans and profit sharing plans, and for securities issued or guaranteed by Missouri credit unions. Certain changes were made in the transaction exemptions, and four new exemptions were added, (i) for offerings to 15 persons in each 12 month period, (ii) for certain reorganization transactions, (iii) for certain non-issuer transactions in securities held by the public for five years and described in an approved securities manual, and (iv) for offers (but not their acceptance) pending registration. Minor procedural changes were.
It is thus clear that the basic Missouri policy on securities regulation was established in 1913 and has from the outset encompassed all of the three regulatory devices, with principal emphasis on a strict qualification approach to registration of securities offerings, subject to numerous and steadily increasing exemptions. This policy, influenced by the Kansas Act of 1911 and the considerations of that day, has remained relatively constant through the succeeding changes in statutory form. It appears that the perpetuation of this policy and of certain traditional provisions accounts for many of the deviations of the Missouri Uniform Securities Act from the provisions of the Uniform Securities Act, notwithstanding the clear purpose of the latter to achieve uniformity and coordination among the jurisdictions.81

II. THE PROVISIONS OF THE MISSOURI UNIFORM SECURITIES ACT

It is appropriate at this point to consider in detail the provisions of the new Missouri Act and to compare them with the Uniform Act. The new Act has retained the four-part structure of the Uniform Act. However, the diversity of the topics dealt with in Part IV and the complex interrelation of these topics with Parts I, II, and III suggest that a division of the Act into these five substantive areas will facilitate analysis: (a) general administration of the act,82 (b) registration of broker-dealers, agents, and investment advisors,83 (c) registration of securities and exemptions,84 (d) anti-fraud provisions, civil liabilities and other sanctions,85 and (e) scope of the act and the conflict of laws.86 The Official Comments of the National Conference of Commissioners on Uniform State Laws87 and the

made in the two forms of registration of securities, and the sections on registration of dealers and salesmen were revised to include registration and supervision of investment advisers and to remove a requirement that dealers notify the Commissioner if intending to offer securities for sale. Finally, restrictions on the conversion privilege of convertible securities were removed. Most of these amendments incorporated portions of the Uniform Securities Act which had just been promulgated. L. Loss and E. Cowett, supra note 3, at 235-236, and Table 2 at 429-431.

81. Note for example, that § 415 of the Uniform Act ("This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation.") was entirely omitted from the Missouri Act.

83. §§ 409.201-.204, .401, RSMo 1967 Supp.
87. These comments are reported in 9G Uniform Laws Annotated following each section of the Uniform Securities Act. They also appear in L. Loss and E. Cowett, supra note 3, Appendix I. [Hereinafter cited as § —, Official Comment].
unofficial Draftsmen’s Commentary by Professors Loss and Cowett88 on each section of the Uniform Act will be of great assistance in interpretation where the new Missouri Act has substantially adopted the provisions of the Uniform Act.

A. General Administration of the Act

General administration of the new Missouri Act is delegated to the Commissioner of Securities who is to act under the direction of the Secretary of State.89 These officials and their employees are prohibited by the Act from using for their own benefit non-public information they receive in carrying out their duties and from disclosing such information except under limited conditions.90 Section 409.414 deals generally with the filing of documents with the Commissioner, the public availability of the information filed, and the evidentiary value of certificates of the Commissioner pertaining to his records.91 This section also provides that the Commissioner shall keep a public register of registration statements filed under the Act and of all denial, suspension, or revocation orders entered, and may, at his discretion, honor requests from interested persons for interpretative opinions. The Commissioner is also authorized to place certain information in a separate file not open to the public.92 However, a similar provision in the 1929 Missouri Securities Act was construed to apply only to the general availability of the information to the public and not to the availability of the information pursuant to a subpoena issued in a judicial proceeding.93 It would appear likely that the Missouri courts will hold that all information filed with the Commissioner may be obtained by others under appropriate circumstances.

88. The Draftsmen’s Commentary supplements the Official Comment on each section of the Uniform Act and is reported in L. Loss and E. Cowett, supra note 3, Appendix I. [Hereinafter cited as § ___, Draftsmen’s Commentary].
90. The latter provisions were intended to allow existing local law to determine the availability of such information in a judicial proceeding. § 406, Official Comment.
91. Certified copies of documents are “prima facie evidence” of the contents of the documents; the commissioner’s exemplification of any record made or entered by him is “good and sufficient evidence” of such record; the commissioner’s certificate that the securities in question have not been registered is “prima facie evidence” of such fact. § 409.414(d),(f), RSMo 1967 Supp. The later provision giving considerable weight to the commissioner’s certification is not in the Uniform Act.
92. § 409.414(c), RSMo 1967 Supp. This provision is also an addition to the Uniform Act.
93. State ex rel. Ross v. Sevier, 69 S.W.2d 662 (Mo. 1934).
The Commissioner is given broad powers to make and amend such rules, forms, and orders “as are necessary to carry out the provisions of [the] act.”94 Rules and forms must be published, and all rules, forms, and orders must be predicated on a finding by the Commissioner “that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the act.”95 Rules and forms promulgated by the Commissioner (i) may govern all filings under the Act; (ii) may prescribe the form and content of financial statements, when consolidated financial statements may be used, and when certification is necessary; (iii) may make classifications of securities, persons, and other matters and establish different requirements for each class; and (iv) may cooperate with securities commissioners of other states and the S.E.C. to achieve maximum uniformity in the form and content of all filings.96 Any person who in good faith acts in conformity with any rule, form, or order of the commissioner is protected against liability under the Act, if the rule, form, or order relied on should later be amended, rescinded, or held to be invalid.97

Acting pursuant to the authority granted by this section of the new Act, the Missouri Commissioner of Securities in August, 1968, promulgated and published a comprehensive set of rules pertaining to the various aspects of the act.98 The availability of these rules should be of material assistance to the practitioner under the new Act, since in many instances the position of the Commissioner or his interpretation of the Act may be crucial.99

Orders of the Commissioner pursuant to the new Act are subject to

94. § 409.413, RSMo 1967 Supp. This is Uniform Act § 412 without change except that the last paragraph of § 412 of the Uniform Act has been moved to § 409.412(e) in the Missouri Act.
95. § 409.418(b),(d), RSMo 1967 Supp.
96. § 409.418(a),(b),(c), RSMo 1967 Supp.
98. Rules I-X of the Commissioner of Securities were promulgated in August 1968, effective August 1, 1968. Several amendments and additions to these rules were made on August 1, 1969. The provisions of the new Act represent a significant increase in the Commissioner’s rule-making power, and it is believed that these rules are the first comprehensive set of rules pertaining to the administration of the securities laws in Missouri. The content of the various rules will be considered in relation to the part of the Act to which they pertain.
99. In many states one of the major problems in state securities law practice has been the unavailability of the rules under which the administrator is actually acting.
judicial review under section 409.412.100 Except for proceedings under section 409.204,101 any party aggrieved by an order of the Commissioner or by his failure to order is entitled to an administrative hearing before the Commissioner in accordance with chapter 536102 and to judicial review of his ruling in the Circuit Court of Cole County, with subsequent appeal to the Missouri Supreme Court.103 Unless specifically ordered by the court, the commencement of such proceeding does not operate as a stay of the order in question. All hearings are public unless all parties and the Commissioner agree to a private hearing.104

Numerous key terms used in the new Act are defined in section 409.401.105 Definitions106 of most of the critical terms will be considered subsequently in connection with the related portions of the Act. However, the definition of the term “security” is of major importance and is relevant to all parts of the Act.107 With one addition,108 this definition in the Missouri Act follows that in the Uniform Act, which in turn is based on section 2(1) of the Securities Act of 1933109 and includes the broadly construed term “investment contract.”110 The description in the new Act of the oil and gas inter-

100. § 409.412, RSMo 1967 Supp. This is a substantial adaptation of Uniform Act § 411 to conform to the Missouri provisions governing administrative hearings and appeals. Variance from the Uniform Act at this point should present no problem.

101. § 409.204, RSMo 1967 Supp. governs proceedings concerning denial, suspension, or revocation of the registration of broker-dealers and investment advisers and is accordingly related to §§ 161.252-161.352 pertaining to licensing hearings before the Administrative Hearing Commission.

102. Ch. 536 RSMo governs Missouri administrative procedure and review generally. Cf. Rule X, Rules of the Commissioner of Securities [All rules hereinafter referred to as Rule _____], which also incorporates Chapter 536.

103. § 409.412(b),(c), RSMo 1967 Supp. The transcript of any testimony before the commissioner is admissible evidence in the circuit court. § 409.412(b), RSMo. 1967 Supp. Otherwise the record on judicial review and the scope of judicial review would be governed by §§ 536.150 and 536.140.

104. § 409.412(d),(e), RSMo 1967 Supp.

105. § 409.401, RSMo 1967 Supp. This follows Uniform Act § 401 fairly closely, but makes some changes which will be considered in connection with the term defined.

106. In a few cases the footnotes are routine in nature. See, e.g., the definition of "commissioner," "person," "state," and the various federal securities acts in § 409.401(a),(i),(m),(k), RSMo 1967 Supp., respectively.


108. The Missouri Act includes in the definition "any contract or bond for the sale of any interest in real estate on deferred payments or on installment plans when such real estate is not situated in this state or in any state adjoining this state," § 409.401(l), RSMo 1967 Supp. This seems extravagantly broad and somewhat discriminatory. It may also be quite unnecessary in view of the broad construction of "investment contract."


110. This has been held to include any interest in a common enterprise for profit sold to an investor with the expectation that profits will be derived solely from the efforts of the promoter or a third party. Hence, an extremely wide range
ests included in this term is slightly broader than that in the Securities Act of 1933, and all insurance policies and annuities are excluded from the definition.

B. Registration of Broker-Dealers, Agents, and Investment Advisors

Under section 409.201 it is unlawful for any person to transact business as a “broker-dealer,” an “agent,” or an “investment adviser” unless appropriately registered as such with the Commissioner. In addition, a “broker-dealer” may not employ an “agent” who is not registered as such, and the registration of an “agent” is effective only so long as he is associated with a registered “broker-dealer” or with an issuer. “Investment advisers” who are registered as “broker-dealers” without limitation on their functions, or who advise only investment companies or insurance companies, are not required to register separately as “investment advisers.” The Commissioner is required to maintain a register open to public inspection containing the names and addresses of all registered “broker-dealers,” “agents,” and “investment advisers.”

of ventures have been found to be "securities" subject to the securities acts. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); SEC v. W. J. Howey Co., 328 U.S. 293 (1946). See L. Loss, SECURITIES REGULATION 488-511 (2d ed., 1961). The Missouri courts have construed the term with similar breadth and may now draw directly on the precedent of the Federal cases. See, Gales v. Weldon, 282 S.W.2d 522 (Mo. 1955); Covert v. Cross, 311 S.W.2d 576 (Mo. 1960); Teevey v. Hodson, 341 S.W.2d 377 (K.C. Mo. App. 1960).

111. The phrase used is “certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.” This is intended to include the various types of interests that may be created in oil and gas ventures and particularly the commonly used production payment, but is not intended to include the original oil and gas lease itself, unless it is sold under circumstances which create an “investment contract.” See SEC v. C.M. Joiner Leasing Corp., supra note 110; Gales v. Weldon, supra note 110; Covert v. Cross, supra note 110. Cf. Uniform Act § 401(1), Official Comment.

112. The Uniform Act is worded to exclude ordinary policies and annuities but to include variable or "flexible" annuities. See § 401(1), Official Comment. Cf. SEC v. Variable Annuity Co., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967). However, the Missouri Act changes the critical wording to exclude the variable annuity as well. Hence, all types of insurance policies and annuities are excluded from the operation of the Missouri Act.

113. § 409.201(b), RSMo 1967 Supp. Both the agent and his broker-dealer or issuer employer must notify the Commissioner of the beginning and termination of his employment.

114. Under § 409.204(b)(5), RSMo 1967 Supp., the Commissioner may restrict the registration of a broker-dealer to exclude his acting as an investment adviser if the Commissioner finds his experience, training, or familiarity with the securities business is inadequate for the performance of such function.


116. § 409.201(c), RSMo 1967 Supp.
The terms "broker-dealer," "agent," and "investment adviser" are defined in section 409.401 on the basis of the business functions of each, but with certain critical exclusions. "Agent" means "any individual . . . who represents a broker-dealer or issuer" in securities transactions with the public, but does not include one who represents an issuer in exempt transactions or in transactions in most of the exempt securities listed in section 409.402(a). "Broker-dealer" means anyone "engaged in the business of effecting transactions in securities for the account of others or for his own account" but does not include (a) agents who act only as agents, (b) issuers, (c) banks, savings institutions, or trust companies, or (d) persons who have no place of business in this state and whose securities business in the state (i) is limited to transactions with issuers in their own securities, with broker-dealers, and with other institutional investors and (ii) includes no more than 15 additional offers to sell or buy directed each year to other persons in the state. "Investment adviser" means anyone "who, for compensation, engages in the business of advising others" concerning investments in securities, but does not include (a) banks and similar institutions, (b) lawyers and other professional persons, (c) broker-dealers acting as such, (d) publishers of general, regular periodicals, (e) persons whose activities are limited to exempt securities, (f) persons who have no place of business in this state and whose clients in this state are limited to investment advisers, broker-dealers, institutional investors and not more than five others per year, and (g) other persons designated by the commissioner.

The above provisions in the Missouri Act substantially incorporate the parallel sections of the Uniform Act with two changes: the provision in the Missouri Act for a public register of persons in the securities business is derived from prior Missouri law and is an addition to the Uniform Act; and the Missouri Act in sections 409.201 and 409.401(b) explicitly requires separate registration of "agents" and "broker-dealers," including separate

117. "Agent" is defined in § 409.401(b); "Broker-dealer" is defined in § 409.401(c); "Investment adviser" is defined in § 409.401(f), RSMo 1967 Supp.
118. Transactions for an issuer with the issuer's existing employees, partner, or directors without commission or other remuneration are excluded. § 409.401(b)(3), RSMo 1967 Supp.
119. Exempt transactions are defined in § 409.402(b), and exempt securities are defined in § 409.402(a), discussed hereinafter. The only exempt securities not within the exclusion are those defined in § 409.402(a)(7) and (8) pertaining to securities of certain common carriers and public utilities and to certain securities listed on national securities exchanges.
120. § 409.401(c), RSMo 1967 Supp.
121. § 409.401(f), RSMo 1967 Supp.
122. Uniform Act §§ 201, 401(b), (c), (f).
registration of partners, officers, and directors of a registered "broker-dealer" if they perform the functions of an "agent." Under the corresponding sections of the Uniform Act the registration of the "broker-dealer" automatically constitutes registration of the partners, officers, or directors who may act as "agents" without separate registration.\(^{123}\) It is clear that the underlying concept in the definition of "agent" is that of representing another in securities transactions, and that the concept involved in the definition of "broker-dealer" is that of engaging "in the business" of trading securities for others or with others.\(^{124}\) The potential overlap of these two definitions was eliminated in the Uniform Act\(^ {125}\) but was re-introduced in the Missouri Act.\(^ {126}\) It would appear, for example, that under the Missouri Act an individual who is registered as a broker-dealer must also be registered as an agent in order to represent an issuer or another broker-dealer in the sale or attempted sale of a security although such dual registration seems pointless.

Sections 409.202 and 409.203 govern procedure and requirements for registration and post-registration requirements of agents, broker-dealers, and investment advisers. Section 409.204 deals with proceedings for denial and termination of registration. These provisions have been implemented in many particulars by Rule III promulgated by the Missouri Commissioner.\(^ {127}\) An application for registration, together with a consent to service of process, must be filed with the Commissioner and a filing fee paid.\(^ {128}\) The registration becomes effective automatically in 30 days unless a denial order is in effect, a proceeding is pending, or the Commissioner has either spe-

---

123. Uniform Act §§ 202(a), 401(b).
124. See § 401(b), (c), Official Comment.
125. Uniform Act § 401(b) excludes broker-dealers from the definition of "agent." Cf. §§ 201a, 401(c)(1).
126. § 409.401(b), RSMo 1967 Supp. provides that "'agent' means any individual (including an individual who is a broker-dealer . . . ) who represents a broker-dealer or issuer . . . ." Also the exclusionary language of Uniform Act § 401(b), supra note 125 relating to "broker-dealers" is omitted. This apparently was intended to carry out the requirement of separate registration of agents.
128. The contents of the application are specified in § 409.202(a), RSMo 1967 Supp. and Rule III B. The Commissioner is authorized to require such additional information as he deems necessary to determine the applicant's qualifications. The latter provision augmenting the Commissioner's powers is an addition to the Uniform Act § 202a. The consent to service of process is specified in § 409.415(g). Application may also be made for registration of a successor, in which case no fee is required. § 409.202(c), RSMo 1967 Supp. For broker-dealers and investment advisers the initial registration fee is $50 and the renewal registration fee is $25; for agents the fee in both cases is $10.
cified an earlier date or deferred effectiveness until 30 days after the filing of any amendment. 129

The Commissioner is authorized to require registered broker-dealers and investment advisers to maintain a minimum net capital, a minimum ratio between net capital and aggregate indebtedness, or both. 130 He has in fact required both with respect to broker-dealers in Rule III F. 131 He is also authorized to require registered broker-dealers, agents, and investment advisers to post bonds for the protection of persons with whom they deal and to require registered broker-dealers to carry fidelity bonds covering their employees, general partners, and officers. 132 Bonds for the protection of third parties must be for the benefit of anyone who has a cause of action under section 409.411 against the registrant and may not be required in amounts of more than $25,000 or of registrants with net capital in excess of $100,000. 133 Fidelity bonds may not be required in amounts in excess of $250,000. 134 The Commissioner has implemented these provisions in Rule III(g), in which the forms for bonds are specified and the amounts of the respective bonds for each registrant are fixed well within the statutory authority. 135 Rule III H further implements both minimum capital and bonding requirements by expressly making them continuing requirements which, if not met at any time, become grounds for suspension or termination of registration.

Every registered broker-dealer and investment adviser is required by the Act to maintain and preserve such accounts and records, and to file such financial reports as the Commissioner prescribes. 136 All information filed with the Commissioner must be updated by amendment whenever it

129. § 409.202(a), RSMo 1967 Supp. Similar and complementary provisions are contained in Rule III P.
131. Aggregate indebtedness may not exceed 2,000 per cent of net capital and minimum capital is specified as $10,000 unless the broker-dealer's business is generally limited to investment company and similar shares, in which case minimum capital is set at $5,000. Rule III F also contains certain exemptions and elaborate definitions of relevant terms.
133. § 409.202(e), RSMo 1967 Supp.
135. Public liability bonds for broker-dealers and investment advisers must be at least $10,000, and those for agents must be at least $2,500. No bonds are required of broker-dealers or investment advisers whose net capital exceeds $100,000, or of their agents. Fidelity bonds covering five or less persons must be at least $25,000; those covering six to ten persons must be at least $50,000; and those covering more than ten must be at least $100,000. All officers and employees of a broker-dealer must be covered by the fidelity bond.
136. § 409.203(a),(b), RSMo 1967 Supp.
becomes inaccurate or incomplete, and all records required to be main-
tained are subject to inspection by the Commissioner.\textsuperscript{137} Required financial
reports have been specified by the Commissioner, in Rule III E, and detailed
specification of the various accounts and records to be maintained and
preserved for a period of three years by each of the three types of registrants
has been made in Rule III.\textsuperscript{138}

Section 409.203 of the Missouri Act incorporates Section 203 of the
Uniform Act without change. This section was modeled largely after section
17a of the Securities Exchange Act of 1934.\textsuperscript{139} Section 409.202 of the Mis-
souri Act substantially incorporates Uniform Act, section 202, with a few
changes. Under the Missouri Act the Commissioner is given much broader
authority to require additional information from applicants for registra-
tion. The Uniform Act provisions for publication of initial registrations
and for the automatic registration of partners, officers, and directors of
registered broker-dealers as agents are omitted\textsuperscript{140} since separate registration
of such agents is required in Missouri and a public register of all registrants
must be maintained under Missouri section 409.201. The Missouri Act
makes minor changes in filing fees, and a provision dealing with the ratio
of net capital to indebtedness of certain registrants has been added.\textsuperscript{141}
The Missouri Act increases the maximum amount of the public liability
bond that may be required and adds the further requirement that fidelity
bonds be maintained by registered broker-dealers.\textsuperscript{142} In general, all of these
modifications tend to increase the restrictions imposed on registrants, the
authority of the Commissioner, or both.

Section 409.204, which incorporates section 204 of the Uniform Act
with minor changes, specifies both the grounds upon which registration
of agents, broker-dealers, and investment advisers may be denied, suspended,
or revoked and the rules which govern such proceedings. A registration
may be denied, suspended, or revoked by order of the Commissioner if he
finds that the order is in the public interest and that the applicant or

\textsuperscript{137} § 409.203(c),(d), RSMo 1967 Supp. Cf. similar provisions in Rule III P.
The Commissioner is also authorized to cooperate with the securities commission-
ers of other states, the SEC, and the NASD in obtaining necessary information in
lieu of inspecting the records of a registrant.

\textsuperscript{138} Rule III I, J, K, L, M, and N. Among other things specified in these rules,
broker-dealers are required to maintain strict segregation of customers’ securities
and funds from those of the broker-dealer. The furnishing and content of con-
firmations by broker-dealers are also specified.


\textsuperscript{140} § 409.202(a), RSMo 1967 Supp.

\textsuperscript{141} § 409.202(b),(d), RSMo 1967 Supp.

\textsuperscript{142} § 409.202(e),(f), RSMo 1967 Supp.
registrant (or a partner, officer, director, or person in control of the applicant)\textsuperscript{143} (a) has filed a materially incomplete, false, or misleading application for registration,\textsuperscript{144} (b) has willfully violated the Act or a rule of the Commissioner,\textsuperscript{145} (c) has been convicted of a misdemeanor relating to securities or of any felony,\textsuperscript{146} (d) is subject to an injunction, to an order of the Missouri Commissioner, the securities administrator of another state, or the SEC denying or restricting the right to engage in the securities business, or to a United States Post Office fraud order,\textsuperscript{147} or (e) has engaged in dishonest or unethical practices in the securities business,\textsuperscript{148} is insolvent,\textsuperscript{149} or is unqualified on the basis of training, experience, and knowledge of the securities business.\textsuperscript{150} A registration may also be denied, suspended, or revoked by the Commissioner if he finds that such an order is in the public interest and that the applicant or registrant\textsuperscript{151} has failed reasonably to keep the required records or to supervise his agents or employees,\textsuperscript{152} or has failed to pay the proper filing fee.\textsuperscript{153} The Commissioner

\textsuperscript{143} Responsibility for acts of partners, officers, directors, or control persons pertains only to broker-dealers and investment advisers. \S 409.204(a), RSMo 1967 Supp.

\textsuperscript{144} \S 409.204(a)(2)(A), RSMo 1967 Supp.

\textsuperscript{145} \S 409.204(a)(2)(B), RSMo 1967 Supp. This applies to the present Act or a predecessor act and to rules under either.

\textsuperscript{146} \S 409.204(a)(2)(C), RSMo 1967 Supp.

\textsuperscript{147} \S 409.204(a)(2)(D), (E), (F), RSMo 1967 Supp. This includes permanent and temporary injunctions pertaining to any aspect of the securities business. Relevant orders of the Commissioner are those which deny, suspend, or revoke registration as broker-dealer, agent, or investment adviser. Relevant SEC orders include both orders within the past five years denying or revoking registration as broker-dealer, agent, or investment adviser and orders suspending or expelling such registrants from a national securities exchange or the NASD. Only those orders by administrators in other states which were entered within the past five years and which are based on facts which would constitute a ground for an order under the Missouri Act are relevant. A revocation or suspension proceeding based on a postal fraud order, an order of the SEC, or an order of another state administrator may not be instituted more than one year after the order relied on.

\textsuperscript{148} \S 409.204(a)(2)(G), RSMo 1967 Supp. See the discussion of Rule III P, infra.

\textsuperscript{149} \S 409.204(a)(2)(H), RSMo 1967 Supp. Either the "balance sheet" test of insolvency (liabilities exceed assets) or the "equity" test (inability to pay debts as they mature) will suffice. But insolvency of a partner, officer, director, or controlling person will not support an order against a broker-dealer or an investment adviser.

\textsuperscript{150} \S 409.204(a)(2)(I), RSMo 1967 Supp. This is limited by the provisions of RSMo \S 409.204(b) discussed infra.

\textsuperscript{151} Note that this omits reference to partners, officers, directors, and controlling persons.

\textsuperscript{152} \S 409.204(a)(2)(J), RSMo 1967 Supp. This provision in the Missouri Act varies from the Uniform Act in two respects: (i) failure to keep records does not support an order denying or terminating registration under the Uniform Act; (ii) the Missouri Act adds a provision which defines "reasonable supervision" of agents and employees in at least one respect. Under this provision a person has
may not, however, institute a suspension or revocation proceeding under any of the foregoing provisions on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next thirty days.\textsuperscript{154}

The term “dishonest and unethical practices in the securities business” is not defined in the Act although it was recognized by the draftsmen as being both vague and controversial.\textsuperscript{155} Yet, in an effort to satisfy both the regulators and those who are regulated, the draftsmen concluded that this term represented a necessary compromise and was as precise as possible. The Missouri Commissioner in Rule III P has specified fourteen additional “grounds for denial, suspension, or revocation of registration” not enumerated in section 409.204(a).\textsuperscript{156} The form in which this rule is expressed raises doubts as to its validity. The Act does not authorize the Commissioner to create such additional grounds for denial, suspension, or revocation of registration as he deems to be in the public interest.\textsuperscript{157} Since Rule III P in part purports to do just that, its validity is questionable. However, the Commissioner is authorized to make rules “necessary to carry

not failed to supervise reasonably if there have been established procedures and a system for applying such procedures, which would reasonably be expected to prevent and detect violations of the Act by agents and employees, and such person has used reasonable diligence in applying the procedures and system and reasonably believes they are being complied with. The Uniform Act, unlike § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1964) does not authorize suspension or revocation of a broker-dealer’s registration merely for acts of his agents, but does recognize the broker-dealer’s responsibility to supervise the activities of his agents. See § 204, Official Comment. However, the Uniform Act leaves “reasonable supervision” undefined and hence subject to interpretation by the commissioner. The addition of some criterion in the Missouri Act is altogether desirable. On the other hand the Missouri addition of failure to keep records as a grounds for suspension or revocation of registration is a bit severe.

\textsuperscript{153} § 409.204(a)(2)(K), RSMo 1967 Supp. This is cured, however, by payment of the proper fee. The order is then vacated.

\textsuperscript{154} § 409.204(a), RSMo 1967 Supp. Although this provision appears in the last paragraph of § 409.204(a), it operates as an important limitation on most of the enumerated grounds for action by the Commissioner.

\textsuperscript{155} See § 204(a)(2)(G), Draftsmen’s Commentary.

\textsuperscript{156} These grounds include the following activities in the securities business: unreasonably delay, selling at unfair prices, unauthorized trading for others, churning, inducing excessive investment by a customer, “boiler room” operations, failure to use or to conform to a prospectus when required, misleading or exaggerated selling efforts, nondisclosure of a dual agency, improper underwriting, establishing fictitious accounts, aiding unlicensed sales, failure to comply with other rules, and failure to inform a customer.

\textsuperscript{157} Sections 409.202-204, do not authorize the Commissioner to add grounds. The residual power under § 409.413 is limited to rules “to carry out the provisions of this act” which must be “consistent with the purposes fairly intended by the policy and provisions of this act.” This does not grant unrestrained authority to create additional grounds for the imposition of sanctions.
out the provisions of the act, including rules . . . defining any terms” consistently with the provisions of the Act if such rules are “consistent with the purposes fairly intended by the policy and provisions of [the] act.” Therefore, if Rule III P is actually intended as a definition of the “dishonest and unethical practices in the securities business” referred to in section 409.204(a)(2)(G), it has a clear statutory basis. Since the fourteen “additional grounds” specified in Rule III P relate to improprieties in the conduct of the securities business, this may well be the intended basis of the rule. If so, the effort to specify improper practices within section 409.204(a)(2)(G) is commendable, although the rule is expressly “in addition to . . . other dishonest or unethical practices” within the Act. The practices proscribed by Rule III P are generally improper, but with varying degrees of seriousness.

The Commissioner’s authority to deny, suspend, or revoke a registration under section 409.209(a)(2)(I) on the ground that the applicant or registrant is unqualified is limited in several respects by section 409.204(b). An order may be entered against a broker-dealer only on his own lack of qualification or that of his agent, and an order may be entered against an investment adviser only on his own lack of qualification or that of his representative in investment advising. Experience is not an essential qualification, if the applicant or registrant is qualified by training or knowledge or both, and an agent who will be supervised by a registered broker-dealer need not have the same qualifications as a broker-dealer. Experience as a broker-dealer or an agent alone does not necessarily qualify a person to be an investment adviser. If the Commissioner finds that a broker-dealer is not qualified as an investment adviser, he may condition the registration as broker-dealer upon his not acting as an investment adviser.

The Commissioner is authorized to require a written or an oral examination or both to determine the qualifications of applicants and has exercised this authority by promulgating Rules III C and D, which require written examinations of all applicants except those who have satisfactorily passed an equivalent examination, or who are partners or officers of a broker-dealer and do not intend to engage in selling activity in Missouri.

158. §§ 409.413(a), (b), RSMo 1967 Supp.
159. §§ 409.204(b)(1), (2), RSMo 1967 Supp.
162. §§ 409.204(b)(6), RSMo 1967 Supp. An exception for persons previously registered is an addition to the Uniform Act provision.
163. Equivalent examinations include those of the New York Stock Exchange,
Proceedings to deny, suspend, or revoke a registration are governed by the procedural provisions of section 409.204(c) and (f). Section 409.204(f) of the Missouri Act varies substantially from the Uniform Act provision in an attempt to conform with the requirements of sections 161.252-342, RSMo 1967. A proceeding by the Commissioner to revoke or suspend a registration must be referred to the Administrative Hearing Commission for determination, and the Commissioner has the burden of proving the ground relied on for suspension or revocation.164 A petition by an applicant to review the Commissioner's denial of registration is also heard and determined by the Administrative Hearing Commission.165 The Administrative Hearing Commission is to cause copies of the petition in either proceeding to be served on the appropriate parties together with notice of the hearing. All procedural matters are governed by sections 161.252-342 RSMo 1967.166

In addition to these provisions, section 409.204(c) empowers the Commissioner by order to postpone or suspend registration summarily, pending final determination. The Commissioner is required to give prompt notice of such an order to the applicant or registrant advising him of the reasons and extending him an opportunity to request a hearing within fifteen days. If no hearing is requested within fifteen days, the summary order remains in effect. The provision for a summary order pending final determination supplements section 409.204(f). But these sections appear to provide inconsistent procedures for notice and hearing. Under subsection (f), where the Commissioner has the burden of going forward and the burden of proof, both notice and hearings are required. Under subsection (c) the burden is placed on the applicant or registrant, and a hearing occurs only if promptly requested. This apparently results from the Missouri changes in subsection (f) without corresponding clarifications in subsection (c). Arguably, the notice and hearing provisions in subsection (c) should relate only to the summary orders provided for in subsection (c). Yet, the Commissioner is able to obtain what amounts to full relief through an extended summary order unless the language in subsection (c)—"pending final determination of any proceeding under this section"—is interpreted to mean that the

Commissioner may act under subsection (c) only if a proceeding under subsection (f) has already been properly initiated.

A registration or application may be cancelled by order of the Commissioner if he finds the applicant or registrant is no longer in existence, has ceased to do business, cannot be located, or has been adjudicated incompetent. This provision from the Uniform Act is based on section 15(b) of the Securities Exchange Act of 1934, and is designed to provide a simplified method of dealing with the applicant or registrant who ceases to function as such, without the necessity of formal proceedings.

Withdrawal from registration automatically becomes effective thirty days after an application to withdraw is filed unless a proceeding to revoke or suspend is then pending or is filed within thirty days thereafter. In either event, withdrawal is subject to the Commissioner's order. When withdrawal has become effective, automatically, the Commissioner may still, within one year, institute a revocation or suspension proceeding on the ground of willful violation of the Act or any rule, and a revocation or suspension order may be entered in lieu of the withdrawal. These provisions which are based on section 15(b) of the Securities Exchange Act of 1934 and SEC Rule 15b-6 are designed to prevent withdrawal of an effective registration when the registrant is subject to formal proceedings or has willfully violated the Act.

C. Registration of Securities and Exemptions

A major concern of the draftsmen and sponsors of the Uniform Securities Act was to reconcile, if possible, the complex maze of different and conflicting requirements to which a single interstate securities offering might be subjected by the securities registration laws of several applicable jurisdictions. This problem could arise in two instances: (i) where those states in which an offering was made each imposed very different requirements, and (ii) where a conflict existed between the requirements of one

167. § 409.204(d), RSMo 1967 Supp.
169. See § 204(d), Official Comment and Draftsmen's Commentary. Ironically, neither this provision nor § 204(a)(2)(H) (insolvency as grounds for a proceeding) make any reference to bankruptcy, receivership, or other liquidation or insolvency proceedings.
170. § 409.204(e), RSMo 1967 Supp. This incorporates Uniform Act § 204a without change.
173. See § 204(e), Official Comment.
or more of those states and the SEC under the Securities Act of 1933. In any event, many independent regulatory authorities had to be contended with in an effort to make the offering as nearly simultaneous as possible in all jurisdictions. The Uniform Act's solution to these problems is contained in sections 301 through 306, which have been adopted in the Missouri Act with relatively few changes. These sections directly involve certain key definitions found in section 401 and exemptions specified in section 402, which have been adopted in the Missouri Act with several modifications. While the departures in the Missouri Act from the Uniform Act are not numerous, some of them are of major significance.

Central to these provisions is the registration requirement expressed in section 409.301:

It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 409.402.

The terms “offer,” “sell,” and “security” are carefully defined in section 409.401 and elaborate provisions clarifying the meaning of “offer or sell . . . in this state” are set forth in section 409.415. Section 409.402(a) defines the securities which are exempt in all transactions, and section 409.402(b) defines the transactions in which non-exempt securities may be offered and sold without registration. Registration under the Act may be accomplished by any one of three methods—“notification,” “coordination,” or “qualification”—and in any case is subject to the additional requirements of section 409.305 and to the provisions of section 409.306, which governs denial, suspension, and revocation of securities registrations. Hence, when registration of a securities offering is necessary, the requirements of one of the three methods of registration and sections 409.305 and 409.306 must be satisfied. Whether registration is necessary will depend on the definitions and exemptions.

177. § 409.301, RSMo 1967 Supp. This is Uniform Act § 301 without change.
178. § 409.401(j), RSMo 1967, Supp., defines “offer” and “sell.” The definition of “security” in RSMo § 409.401(b) is discussed supra at 478-79.
180. Some of these additional requirements pertain only to certain registrations.
181. This includes both the grounds upon which a registration may be denied, suspended, or revoked and the procedure to be followed.
1. The Three Types of Registration

Any security may be registered by "qualification." Registration by "coordination" is available when a registration statement for the offering is filed under the Securities Act of 1933 or the offering is made through a prospectus or offering circular filed under sections 3b or 3c of that act. Only securities of certain established issuers may be registered by the simpler method of "notification." If more than one type of registration is available for a particular offering, the choice of the type to be used is discretionary with the person filing the registration statement.

For a security to be eligible for registration by notification, the issuer and any predecessors must have been in continuous operation for at least five years and during the past three fiscal years must have made no default on any senior security with a fixed maturity or a fixed interest or dividend provision, and had average net earnings applicable to all other outstanding securities equal to at least five per cent of their value. To determine whether the five per cent earnings test is met, all securities without a fixed maturity or a fixed interest or dividend provision which are outstanding on the date of filing the registration statement are valued at either the maximum offering price or the market value, whichever is higher. If there is neither a readily determinable market price nor a cash offering price, book value is used. If the issuer has had no securities subject to the five per cent earnings test outstanding for three full fiscal years, the earnings test is applied to those securities which will be outstanding if all offered securities are issued.

The registration statement filed under notification must contain a

182. § 409.304(a), RSMo 1967 Supp.
183. §§ 409.303(a),(d), RSMo 1967 Supp.
185. § 302(a), Official Comment.
186. § 409.502(a), RSMo 1967 Supp.
187. Market value is determined as the market price on a day, selected by the registrant, within 30 days before filing the registration statement.
188. This would occur, for example, where there is no public market for the security and the offering is made in exchange for other securities with the existing security holders of the issuer or those of another corporation. Book value is determined on a day, selected by the registrant, within 90 days prior to filing the registration statement. See § 302(a), Official Comment.
189. Since the issuer or a predecessor must have been in continuous operation for five years, this would occur only where the business had been begun in a different form—for example as a partnership, a limited partnership, or a sole proprietorship—and was later incorporated shortly before the public offering. The earnings of the business for the past three years would be applied to the value of the securities to be offered (valued as discussed above) to determine the availability or not of registration by notification. See § 302(a), Official Comment.
consent to service of process and certain information pertaining to interstate aspects of the offering. It must also include (i) a statement demonstrating eligibility for notification, (ii) a description of the issuer and its business, (iii) a description of the security being offered and the terms and expenses of the offering, (iv) a description of all stock options outstanding or being issued, and (v) copies of the underwriting agreement and all sales literature to be used. These provisions follow the Uniform Act with two exceptions, both of which relate to non-issuer distributions. In lieu of sections 302(a)(2) and 302(b)(6) of the Uniform Act, the Missouri Act provides a complete exemption from registration for a non-issuer distribution if the issuer of the security would be eligible for registration by notification. Hence, in a non-issuer distribution registration is either unnecessary or cannot be achieved by notification. However, the Missouri Act has retained the requirement that a notification registration statement must include certain descriptive information pertaining to a person "on whose behalf any part of the offering is to be made in a non-issuer distribution." Since the non-issuer himself is not required to register, the only apparent function of this provision would seem to be to compel the issuer to furnish the required information concerning the non-issuer in a joint offering of securities by the issuer and one or more selling shareholders. The reason for such a requirement is less than clear.

The registration statement filed for registration by notification automatically becomes effective at two o'clock in the afternoon of the second full business day after it is filed unless stop order proceedings are begun or the Commissioner accelerates effectiveness. This follows the Uniform Act without change except that the hour is defined in the Uniform Act as "standard time" but in the Missouri Act as simply "central time." This apparently would make the time of effectiveness depend on whether daylight or standard time was in effect at the time of a given registration.

The difference could cause confusion in a multi-state offering where registration by notification is used. In any event if registration is by notification,
the registration statement will become effective automatically unless some action is taken by the Commissioner.

In contrast to registration by notification, which is designed to simplify the registration of securities of established issuers, the purpose of registration by coordination is to provide a method of synchronizing state and Federal registration under the Securities Act of 1933 when both are necessary for a single securities offering. This is of particular value in a multi-state offering where the pricing of the issue and the execution of the underwriting agreements are deferred until near the effective date of the registrations. Registration by coordination enables all registrations to become effective simultaneously in order that the offering may begin everywhere at the same time. Also, the prospectus filed as part of the Federal registration statement serves as the principal part of the state registration statements, eliminating the necessity of preparing several different registration statements. Coordination is not, however, intended to change the substantive standards applied by any state in determining whether or not the issue may be qualified for sale in that state.198

Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.199 The registration statement must contain a consent to service of process,200 certain information pertaining to interstate aspects of the offering,201 and the latest form of prospectus filed under the Securities Act of 1933 together with an undertaking to forward all future amendments to the federal prospectus promptly upon filing them with the SEC.202 In addition, the Missouri Commissioner may require copies of the issuer's articles of incorporation and bylaws, the underwriting agreements, the security and any indenture governing the security, and "any other information or copies of any other document."203 These provisions in the Missouri Act follow the Uniform Act with one major exception. Under the Uniform Act the administrator may only require such additional

---

198. § 303, Official Comment and Draftsmen's Commentary; See also L. Loss and E. Cowett, Blue Sky Law 242 (1968), and L. Loss, Securities Regulation 99-101 (2d ed. 1961).
199. § 409.303(a), RSMo 1967 Supp.
200. § 409.415(g), RSMo 1967 Supp.
201. § 409.305(c), RSMo 1967 Supp. This includes the amount of the securities to be offered in Missouri, other states in which the offering is to be made, and any adverse rulings regarding the offering.
202. §§ 409.303(b)(1),(4), RSMo 1967 Supp. Delaying amendments need not be filed. "Promptly" means not later than the first business day after the amendment is forwarded to or filed with the SEC, whichever first occurs.
information as is filed with the SEC. 204 Under the Missouri Act this restriction is removed and there is no limit on the additional information the Commissioner may request. 205

If no stop order proceedings have been instituted, the coordination registration statement automatically becomes effective the moment the federal registration statement becomes effective, provided it has been on file with the Commissioner at least fifteen days, and a statement indicating the range within which the final pricing information will fall has been on file for two full business days. 206 Either or both of these conditions may be waived by the Commissioner. If they are neither satisfied nor waived when the federal registration statement becomes effective, the state registration statement will become effective automatically when they are satisfied. 207 If the registrant advises the Commissioner of the date when the federal registration statement is expected to become effective, the Commissioner must advise the registrant promptly whether stop order proceedings are then contemplated. 208 Thus, although stop order proceedings may subsequently be instituted, attorneys handling the offering are able to give a firm opinion at this point that all the conditions of this section have been satisfied. 209 When the federal registration statement becomes effective, the registrant must promptly notify the Commissioner by telephone or telegram of the time of its effectiveness and the content of the price amendment, 210 if any, and must file a post-effective amendment containing this information. Failure to do either entitles the Commissioner without prior notice or hearing to enter a stop order retroactively denying effectiveness. 211 These provisions follow the Uniform Act exactly with the exception that the Missouri Act increases the period during which

204. Uniform Act § 303(b)(3). See Official Comment.
205. Cf. § 409.306(a)(2)(H), RSMo 1967 Supp., which is also changed from the Uniform Act. Although the wording is obscure, it is apparently intended that failure to furnish any information requested by the Commissioner on coordination is sufficient grounds for a stop order.
206. The statement must include the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions.
207. § 409.303(c), RSMo 1967 Supp.
208. Ibid. This provision is, of course, optional and imposes no additional requirement on the registrant.
209. See, § 303(c), Official Comment.
210. "Price amendment" means the final federal amendment stating the offering price, underwriting and selling discounts and commissions, proceeds, conversion rates, call prices and similar matters. § 409.305(c), RSMo 1967 Supp.
211. The Commissioner is to notify the registrant that the stop order has been entered. The order may either deny effectiveness or suspend effectiveness until compliance. If the registrant proves compliance with the post-effective duties, the stop order is void as of the time of its entry. § 409.303(c), RSMo 1967 Supp.
the registration statement must be on file with the Commissioner from ten to fifteen days.\textsuperscript{212}

The Missouri Act has made a significant addition to the coordination provisions of the Uniform Act. Under the Missouri Act registration by coordination may also be used whenever a prospectus or offering circular is required to be filed and has been filed with the SEC pursuant to a regulation adopted by the SEC under section 3(b) or section 3(c) of the Securities Act of 1933.\textsuperscript{213} Thus, under the Missouri Act, unlike the Uniform Act, registration by coordination may be used in a small offering under Regulation A\textsuperscript{214} and is not limited to offerings which involve a full-scale registration with the SEC. It should be noted, however, that the Missouri modification does not apply to small offerings within sections 3(b) and 3(c) of the Securities Act of 1933 where no offering circular or prospectus is required.\textsuperscript{215} In a registration under this provision of the Missouri Act, (i) sections 409.303(b) and (c) are to be complied with "in such manner as the commissioner by rule or order may prescribe,"\textsuperscript{216} (ii) the prospectus or offering circular required by the SEC regulation is interpreted as being the "federal prospectus," and (iii) the effective date is the date on which the SEC authorizes the offering to commence.\textsuperscript{217}

Unlike registration by notification or by coordination, registration by "qualification" is available for any security\textsuperscript{218} and the registration statement does not become effective until the Commissioner so orders.\textsuperscript{219}

\textsuperscript{212} Cf. Uniform Act § 303(c)(2) and § 409.303(c)(2), RSMo 1967 Supp. This gives the Commissioner longer to review the registration statement, but is, of course, still subject to waiver by the Commissioner. Thus, although uniformity is slightly jeopardized in the critical timing provisions of coordination, this may not prove a significant problem in practice—especially so long as the SEC maintains a substantial backlog in processing registration statements.

\textsuperscript{213} § 409.303(d), RSMo 1967 Supp. There is no comparable provision in the Uniform Act.


\textsuperscript{215} For example, offerings pursuant to SEC Rules 234, 235 and 256 and a Regulation A offering of $50,000 or less within Rule 257; 17 C.F.R. §§ 230.234, 235, 236, 257 are exempt under § 3b of the Securities Act of 1933 but do not involve use of an offering circular or prospectus, although some SEC filing may be involved.

\textsuperscript{216} As yet the Commissioner does not appear to have adopted rules governing this. However, the language of § 409.303(d), RSMo 1967 Supp. should be interpreted as authorizing use of coordination with a Regulation A offering, subject to order of the Commissioner and notwithstanding the absence of implementing rules.

\textsuperscript{217} § 409.303(d), RSMo 1967 Supp.

\textsuperscript{218} § 409.304(a), RSMo 1967 Supp.

\textsuperscript{219} § 409.304(c), RSMo 1967 Supp.
Where an offering is eligible for more than one type of registration, the choice is within the discretion of the registrant, but presumably most registrants would prefer the more streamlined methods of notification or coordination when they are available. Hence, qualification tends to become the route used only by issuers in the promotional stage and by smaller local businesses making offerings within a single state.220

In order to register by qualification, a registration statement must be filed containing extensive information pertaining to the issuer, the interests of various insiders, and the terms of the proposed offering.221 It must be accompanied by a consent to service of process222 and must include the following general types of information: (i) a description of certain interstate aspects of the offering, if any;223 (ii) a description of the issuer and its business, assets, and competitive position;224 (iii) identification of all directors, officers, ten per cent shareholders, promoters, and non-issuers who are participating in the offering plus a disclosure of the amount of securities held and to be subscribed by each, stock options issued or to be issued to each, and any material interest each has in any material transaction with the issuer which occurred within the past three years or which is proposed;225 (iv) remuneration paid and to be paid to officers and directors;226 (v) a description of the past and proposed capitalization of the issuer;227 (vi) a description of the proposed offering, including the terms of the security offered, the pricing of the offering, underwriting and selling costs and arrangements, estimated proceeds to the issuer and the

220. See § 304(a), Draftsmen’s Commentary.
221. § 409.304(b), RSMo 1967 Supp. This generally follows Uniform Act § 304(b) which, in turn, is modeled on Schedule A of the Securities Act of 1933, 15 U.S.C. § 77aa (1964), and SEC registration Form S-1. See § 304(b), Official Comment.
223. §§ 409.305(c), RSMo 1967 Supp.
225. §§ 409.305(b)(2),(4),(5),(6),(10), RSMo 1967 Supp. Ten percent shareholders include everyone owning beneficially or of record ten percent of the outstanding shares of any class of equity security. § 409.304(b)(4), RSMo 1967 Supp. The information regarding promoters is necessary only if the issuer was organized within the past three years and must also include any amount paid to promoters within that period or to be paid and the consideration therefore. § 409.304(b)(5), RSMo 1967 Supp. The registration statement must also disclose the amount of stock options to be held by anyone who holds or will hold ten percent or more of such options. § 409.304(b)(10), RSMo 1967 Supp.
226. That paid during the year before and that estimated to be paid the year after the filing of the registration statement. § 409.304(b)(3), RSMo 1967 Supp.
227. This includes long-term debt and a description of all securities issued and to be issued, and the consideration received for those securities issued within the past two years or obligated to be issued. § 409.304(b)(7), RSMo 1967 Supp.
intended uses thereof; (vii) copies of all sales literature to be used, the
form of security and any indenture, the issuer's articles of incorporation
and bylaws, and an attorney's opinion on the legality of the security;\textsuperscript{228}
(viii) the consent of experts whose reports or valuations are used in con-
nection with the registration statement;\textsuperscript{229} (ix) current financial state-
ments of the issuer;\textsuperscript{230} (x) and such additional information "including
appraisals, audits, examinations and engineering studies, at the expense
of the applicant" as the Commissioner requires.\textsuperscript{231} The quoted phrase is
the single variation from the Uniform Act in these provisions, but this
amounts to a substantial enlargement of the Commissioner's powers which
could entail considerable expense. The purpose for this enlargement of
powers will be pointed out later.\textsuperscript{232}

In addition to filing the registration statement the Commissioner
may require as a condition of registration by qualification that a pros-
spectus containing any designated parts of the information in the registra-
tion statement be furnished to each offeree on or before the earlier of (1)
the first written offer to him, (2) the confirmation of a sale to him, (3)
payment by him, or (4) delivery of the security to him.\textsuperscript{233} This section in
the Missouri Act adopts without change the Uniform Act provision, which
was intended only to authorize the administrator "to require the use of
a prospectus in those unusual cases where he deems it in the public
interest" recognizing that "[t]his Act, unlike the federal statute, is not
primarily a disclosure act."\textsuperscript{234}

In this connection Rule V promulgated by the Missouri Commissioner
is highly significant. This rule undertakes to require the use of a prospectus

\textsuperscript{228} § 409.304(b)(8),(9),(12),(13),(14), RSMo 1967 Supp. This must
include identification of all underwriters and finders and all compensation, including
stock options received and to be received by them, and a copy of the underwriting
agreements. § 409.304(b)(8),(10), RSMo 1967 Supp. The intended uses of the
proceeds must also disclose priorities, sources of other necessary funds, and a
description of intended major acquisitions of assets to be financed in any part
by the offering. § 409.304(b)(9), RSMo 1967 Supp. The attorney's opinion must
also state whether the security when sold will be fully paid and nonassessable and,
if a debt security, whether there will be a binding obligation of the issuer. §

\textsuperscript{229} § 409.304(b)(15), RSMo 1967 Supp.

\textsuperscript{230} § 409.304(b)(16), RSMo 1967 Supp. These include a balance sheet with-
in the past four months, a profit and loss statement, and an analysis of surplus for
the past three fiscal years. If the proceeds are to be used to purchase a business,
such statements for the business to be acquired must also be filed.

\textsuperscript{231} § 409.304(b)(17), RSMo 1967 Supp.

\textsuperscript{232} See the discussion of § 409.306(a)(2)(E), RSMo 1967 Supp., infra at 501-03.

\textsuperscript{233} § 409.304(d), RSMo 1967 Supp.

\textsuperscript{234} § 304(d), Official Comment.
in connection with every registered offering "[i]n order to effectuate a
full disclosure of material facts affecting the sale of securities. . . ."

An extensive form of prospectus is specified in Rule V, which may in some
respects go beyond a "designated part of the information specified" in the
registration statement. An SEC prospectus may be used as an alternative
to the form specified. The Act, however, appears to provide no authority
for the Commissioner to impose a general prospectus requirement in con-
nection with every registered offering. Although the disclosure objective
is entirely sound, it appears that Rule V must be interpreted as having
no legal effect except in offerings registered by qualification.

2. Provisions Applicable to Registration Generally

Several additional provisions relating to all three types of registration
are contained in section 409.305, which has been implemented in part by
the Missouri Commissioner in Rule IV. Section 409.305 specifies the
persons who may file a registration statement, the fees to be paid on
filing, certain information to be included pertaining to interstate aspects

---

235. Rule V.
236. § 409.304(d), RSMo 1967 Supp. This, however, is unexceptional since the
Commissioner is fully empowered under § 409.304(b)(17), RSMo 1967 Supp., to
expand the registration statement sufficiently to include everything in the pros-
cpectus form.
237. § 409.304(d), RSMo 1967 Supp., is limited to registration by qualification.
§ 409.413, RSMo 1967 Supp., authorizes a wide range of rule-making "consistent
with the purposes fairly intended by the policy and provisions of this act." It is
clear that the Uniform Act is predicated on the qualification principle of securi-
ties registration and is not essentially a disclosure act. See § 304(d), Official
Comment.
238. In the author's opinion a disclosure statute would be preferable to this
Act, but the policy of this Act seems clearly to the contrary. Of course, on regis-
tration by coordination a Federal prospectus or offering circular will be in use.
However, on this and on notification, the effect of non-use of the prospectus in
terms of administrative action by the Commissioner and potential liability to
purchasers would turn on the legal scope of Rule V.
239. Rule IV specifies registration application forms and additional informa-
tion to be filed in certain types of registrations.
240. § 409.305(a), RSMo 1967 Supp. The issuer, the person on whose behalf
the offering is to be made or a registered broker-dealer may file. Cf. Uniform
Act § 305(a).
Subsection (b) in the Missouri Act varies from the Uniform Act and requires
a $50 filing fee plus a registration fee of 1/20 of 1 percent of the aggregate
offering price in Missouri in excess of $100,000, with a maximum registration fee
of $450. If the registration statement is withdrawn or denied, this filing
fee is retained by the Commissioner, who may require it to be paid separately
from the registration fee. In addition, the Missouri Act adds a provision imposing
a ceiling of $2,000,000 on the maximum aggregate offering price of securities
covered by a single registration statement where the securities are part of a
continuous offering. This has been implemented in part in Rule IV A. The pur-
of the offering, material which may be incorporated by reference or omitted, and the period for which the registration statement remains effective. This section also authorizes the Commissioner by rule or order in certain cases to require an escrow of certain securities and the impounding of sales proceeds to specify the form of sale contract and require contracts to be preserved and to require certain periodic reports by the issuer after registration. Except as noted, these provisions in the Missouri Act generally adopt the provisions of the Uniform Act.

Upon registration by qualification or coordination, the Commissioner may require the deposit in escrow of (i) any security of the issuer issued within the past three years or to be issued to a promoter, (ii) any security

pose of this rule and its relation to § 409.305(j), RSMo 1967 Supp., which adheres to the Uniform Act and allows subsequent amendments to enlarge the amount of securities registered in continuous offerings provided a new filing fee is paid, are not entirely clear. Apparently the purpose is simply to assure that enough fees are paid in continuous offerings, since the registration fee depends on the amount offered but is subject to a ceiling and since § 409.305(b), RSMo 1967 Supp. does not prohibit the filing of a second registration statement, but requires only that the amount covered by each may not exceed $2,000,000. But see Rule IV A (1), which suggests an additional 2 year limitation on registration statements in continuous offerings.

242. § 409.305(c), RSMo 1967 Supp.; Cf. Uniform Act § 305(c) which is identical. The required information includes: (a) the amount of securities to be offered in Missouri, (b) other states in which the offering is registered, and (c) any adverse rulings in other states or by the SEC relating to the offering.

243. §§ 409.305(d)(e), RSMo 1967 Supp.; Cf. Uniform Act §§ 305(d)(e) which are identical. Documents filed within five years under this or prior acts may be incorporated by reference to the extent they are current. The commissioner may, by rule or otherwise, permit the omission of any information or document.

244. § 409.305(h), RSMo 1967 Supp. The registration statement remains effective for one year after its effective date and as long thereafter as is necessary to complete the distribution, except during the effectiveness of any stop order. Cf. Rule VII, A and B, which deal with sales and distribution arrangements and with withdrawal or termination of a registration subject to order of the Commissioner and specify a duty to notify the Commissioner on completion of the offering. § 409.305(h), RSMo 1967 Supp., adopts Uniform Act § 305(i) except for the omission of a provision in § 305(i) to the effect that all outstanding securities of the same class as those registered are also considered to be registered. This provision in the Uniform Act is intended, however, to facilitate nonissuer trading in securities some of which have been registered. See § 305(f), Official Comment and Draftsmen's Commentary. This purpose is even more fully accomplished in the Missouri Act, which provides an outright exemption for such trading by nonissuers who are not "control persons." See § 409.402(b)(18), RSMo 1967 Supp., which is discussed infra at 511.

246. §§ 409.305(g), RSMo 1967 Supp.
248. Uniform Act § 305(f) is omitted from the Missouri Act. This provision limits nonissuers' duties to furnish information to that known or reasonably available to them. Since most nonissuer distributions in Missouri are totally exempt, the omission of this provision seems harmless. See note 244 supra, and the discussion of § 409.402(b)(18), RSMo 1967 Supp. infra at 511.
issued to a promoter within the past ten years for a consideration substantially different from the public offering price, or (iii) any security issued to any person for consideration other than cash. This provision in the Missouri Act follows the Uniform Act except that the categories of promoters' securities subject to the escrow requirement are significantly enlarged. The Commissioner may also require that the proceeds from the sale of the registered security in Missouri be impounded until the issuer receives a specified amount, and he may determine the conditions of any escrow or impounding. These provisions have been implemented in Rule VI F and G which define the terms and conditions of escrows of securities and of proceeds under the Act.

The provision authorizing the Commissioner to require that a specified form of sale contract or subscription be used and that a copy of each contract be filed with the Commissioner or preserved by the registrant is identical to the Uniform Act provision but has apparently not been implemented by rule. This is consistent with the fact that this section of the Uniform Act which was intended only for the benefit of the very few states which used this device already, and was not expected to be used elsewhere.

The Commissioner may also require the issuer of any registered security to file reports "as may be required to adequately disclose the financial condition and to adequately disclose any changes in management and control of the issuer." This is a substantial enlargement of the Uniform Act provision which permits the administrator to require reports only "to keep reasonably current the information contained in the registration statement and to disclose the progress of the offering." Apparently the Missouri Commissioner could require reports to be filed indefinitely. This authority has been partially exercised in Rules VII D and E, which

250. Cf. Uniform Act § 305(g).
251. § 409.305(1)(2), RSMo 1967 Supp. This adheres to the Uniform Act provision.
253. See however, Rule VII F, which requires the issuer to preserve various records where the offering is not made through a broker-dealer, and Rule VIII, which requires all sales literature to be filed and prohibits certain sales presentations. The legal basis of these rules is unclear. Cf. § 409.413, RSMo 1967 Supp.
254. See § 305(h), Official Comment and Draftsmen's Commentary.
255. § 409.305(f), RSMo 1967 Supp. Reports may be required no more often than quarterly.
256. Uniform Act § 305(1).
require amendments updating the registration statement and periodic reports in certain cases.\(^\text{257}\)

3. Stop Order Proceedings

All registration statements are subject to the provisions of section 409.306, which governs stop order proceedings by the Commissioner to deny, suspend, or revoke the effectiveness of a registration statement. In most respects this section adopts the Uniform Act provision.\(^\text{258}\) The relatively few changes, however, are highly significant.\(^\text{259}\)

Under section 409.306(a) the Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of any registration if he finds that the order is in the public interest and that any one or more of nine broadly defined grounds exist. However, a stop order may not be issued on the basis of a fact or transaction known to the Commissioner when the registration statement became effective unless the proceeding is instituted within the next thirty days.\(^\text{260}\) No final stop order may be entered without prior notice to the interested parties, an opportunity for hearing, and written findings of fact and conclusions of law.\(^\text{261}\) The Commissioner may, however, summarily postpone or suspend the effectiveness of a registration statement pending a final determination, provided he promptly notifies the interested parties of the summary order and extends an opportunity to request a hearing.\(^\text{262}\) The Commissioner may

---

\(^\text{257}\) Correcting amendments must be filed during effectiveness within 15 days after any of several enumerated events. If this is a form of reporting, it violates the "not more often than quarterly" limitation. Otherwise, the legal basis of the rule is unclear. Reports required under Rule VII E are limited to semi-annual reports during the effectiveness of the offering in intra-state issues only. Hence, these reports are far less extensive than might be called for under § 409.305(i), RSMo 1967 Supp.

\(^\text{258}\) Uniform Act § 306.

\(^\text{259}\) Typographical errors appear to have occurred in § 409.306 (a)(2)(A) and § 409.306(b). In the former, the references to §§ 409.305(i) and (j) are evidently reversed. Cf. Uniform Act § 306(a)(2)(A). In the latter, the word "an" in the last sentence should read "and." Cf. Uniform Act § 306(b). The only changes from the Uniform Act which appear to have been intended occur in §§ 409.306(a)(2)(E),(H).

\(^\text{260}\) § 409.306(a), RSMo 1967 Supp., last sentence.

\(^\text{261}\) § 409.306(c), RSMo 1967 Supp. Parties entitled to notice are the applicant or registrant, the issuer, and anyone on whose behalf the offering is being made. The Commissioner's order is, of course, reviewable under § 409.412, RSMo 1967 Supp.

\(^\text{262}\) § 409.306(b), RSMo 1967 Supp. Presumably this power may only be invoked if a stop order proceeding is in fact pending but is necessary to deal with the fact that many issues would be fully distributed by the time a final stop order after notice and hearing could be obtained. Cf. § 306(b), Official Comment. If no hearing is requested, the summary order remains in effect. On a hearing it may
vacate or modify a stop order if circumstances warrant.\(^{263}\)

The grounds which will support the entry of a stop order include: (i) the filing of a registration statement, amendment, or report which is materially incomplete, false, or misleading,\(^{264}\) (ii) any willful violation of the Act or of any rule or order, in connection with the offering, by any of the parties interested in the offering,\(^{265}\) (iii) an adverse ruling concerning the security entered under any other federal or state act applicable to the offering,\(^{266}\) (iv) a finding that the issuer's enterprise or method of business includes or would include illegal activities,\(^{267}\) (v) a finding that a security sought to be registered by notification is not eligible,\(^{268}\) (vi) failure to file the additional documents required on registration by coordination,\(^{269}\) and (vii) failure to pay the proper filing fee.\(^{270}\)

In addition, a stop order may be entered if the Commissioner finds that it is in the public interest and that,

(i) the offering has worked or tended to work a fraud upon purchasers or would so operate; or (ii) any aspect of the offering is substantially unfair, unjust, unequitable or oppressive, or (iii)

be modified or vacated. The same parties entitled to notice under § 409.306(c) are entitled to notice of the summary order.

263. § 409.306(d), RSMo 1967 Supp.
264. § 409.306(a)(2)(A), RSMo 1967 Supp. The accuracy of a registration statement is tested as of its effective date in a suspension or revocation proceeding. In a denial proceeding prior to effectiveness, an earlier date must necessarily be used. See § 306(a)(2)(A), Official Comment.
265. § 409.306(a)(2)(B), RSMo 1967 Supp. This includes violations by the person filing the registration statement, any underwriter, or the issuer or any partner, officer, director, or person in a control relationship with the issuer. However, violations by the issuer or its insiders are not included unless the person who files the registration is controlled by or acting for the issuer.
266. § 409.306(a)(2)(C), RSMo 1967 Supp. This includes both administrative stop orders and temporary or permanent injunctions, but is limited to such rulings as were entered within the past year (if the registration statement is already effective), and were based on facts which would currently constitute a ground for a stop order under this Act.
267. § 409.306(a)(2)(D), RSMo 1967 Supp. Illegality is determined under the law of the place where the act is done and is intended to refer to more obviously illegal activities such as a racetrack or gambling casino where illegal. See § 302(a)(2)(D), Official Comment.
269. § 409.306(a)(2)(H), RSMo 1967 Supp. The Missouri Act makes "failure to comply with the undertaking required by §§ 409.303(b)(2) and (4)" a ground for stop order proceedings. The Uniform Act limits this to the undertaking required by § 303(b)(4). As noted above the Missouri Act substantially expands the information that may be called for under § 409.303(b)(3) over that under Uniform Act § 303(b)(3). See the discussion supra at note 207. While the syntax is confused (only § 409.303(b)(4) requires an "undertaking"), the Missouri Act has vastly widened the Commissioner's powers on registration by coordination.
270. § 409.306(a)(2)(I), RSMo 1967 Supp. On this ground the Commissioner may enter only a denial order, which is to be vacated when the proper fee is paid.
the enterprise or business of the issuer is based upon unsound business principles.271

This provision in the Missouri Act is a radical expansion of the Uniform Act provision, which includes only the first of the three clauses.272 The second and third clauses are obviously adaptations from provisions of prior Missouri acts which were engrafted on the Uniform Act virtually unchanged, notwithstanding the clear intention of the draftsmen and sponsors of the Uniform Act to eliminate such far-reaching standards in favor of a single, uniform standard.273 This sweeping authorization for administrative stop orders becomes, in effect, the major standard applied to the registration of all non-exempt securities offerings in Missouri, regardless of the form of registration used. A stop order may also be based upon a finding by the Commissioner that the offering involves unreasonable amounts of underwriters' and sellers' discounts, commissions or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options.274

Obviously these two provisions repose a wide latitude of discretion in the Commissioner in determining whether non-exempt securities offerings may be made in Missouri. Fortunately, the Commissioner in Rule VI has articulated, in readily ascertainable form, the bases on which this discretion will be exercised in most cases. Although the requirements imposed in Rule VI are extensive and may in some cases be onerous,275 the fact that the rules can be ascertained in advance is of major assistance to the practitioner. It should be noted, however, that Rule VI does not

272. Uniform Act § 306(a)(2)(E). Note that under § 401(d) "fraud" is defined as not being limited to common law deceit. This broader concept of fraud is widely used in securities regulation. See § 401(d), Draftsmen's Commentary and Official Comment.
273. See the discussion of the prior Missouri acts on this point, supra at 469-75. Both "fair, just and equitable" and "sound business principles" were standards well known to, and intentionally rejected by the draftsmen and the promulgators of the Uniform Act. It was their belief that these represented an unsound, impractical, and somewhat archaic approach to state securities regulation, and it was their hope to achieve uniformity on a simpler "fraud" standard. See § 906(a)(2)(E), Official Comment and Draftsmen's Commentary.
275. Rule VI sets forth elaborate regulations governing the following matters: (A) maximum permissible commissions and expenses for the offering; (B) permissible offering price for the security registered; (C) warrants or options other than those offered pro rata to all purchasers; (D) the treatment of "cheap stock" previously issued to various insiders for less than the proposed offering price; (E) minimum permissible promoters' equity investment in relation to the
purport to be exhaustive of the possibilities under Sections 409.306(a)(2)(E) and (F). In cases not covered by Rule VI the Commissioner may still find that one of the conditions described in these two sections exists. In such case advance knowledge of the standard that the Commissioner may apply is difficult to obtain.

4. Definitions and Exemptions

In many cases the actual scope and impact of the registration requirements and sanctions depend primarily, if not entirely, on the definitions of key terms in section 409.401 and the applicability of the exemptions from registration in section 409.402. Of particular relevance to stop order proceedings under section 409.306(a)(2)(E) is the provision that "'[f]raud, 'deceit' and 'defraud' are not limited to common-law deceit." This provision was intended to codify the holdings of numerous securities cases. With two qualifications the term "issuer" is defined as "any person who issues or proposes to issue any security," as in section 2(4) of the Securities Act of 1933, and the term "non-issuer" is defined as "not directly or indirectly for the benefit of the issuer." Since most of the sanctions of the Act turn on offers to sell and sales of securities, the definitions of "sell" and "offer to sell" are of critical importance. "Sale" and "sell" include every contract to sell and every disposition of a security for value. Hence, the disposition of a security by gift is ordinarily beyond the scope of the Act, since it is not a disposition "for value." "Offer" and "offer to sell" similarly include "every attempt or offer to dispose of, or solicitation of an offer to buy,

proposed public investment where the issuer is in the promotional or developmental stage; (F) escrow arrangements required for the stock of certain insiders and promoters; (G) provisions for impounding sales proceeds in certain cases; (H) trust indenture, minimum capital, and other restrictions relating to real estate investment trusts; (I) voting rights required for registered common stock; (J) package or combination offerings; (K) registration of periodic payment plans; (L) permissible expense ratios for certain investment companies; and (M) earnings necessary to justify an offering of preferred stock or debentures.

276. § 409.401(d), RSMo 1967 Supp.
278. § 409.401(g), RSMo 1967 Supp. Cf. 15 U.S.C. § 77b(4) (1964). The two qualifications are; (1) that the "issuer" of certificates of deposit, voting trust certificates, or collateral-trust certificates or similar securities is deemed to be the depositior, manager, or person performing similar duties, and (2) there is considered to be no "issuer" with respect to certificates of interest or participation in oil, gas, or mining titles, leases or production payments.
279. § 409.401(h), RSMo 1967 Supp.
a security . . . for value." But the basic rule that gifts of securities are beyond the scope of the Act is qualified in two particulars. Any security given as a bonus with the purchase of another security or of other property is deemed to have been offered and sold for value, and a gift of assessible stock is deemed to involve an offer and sale.

Every sale or offer of a warrant, a right, or a security which is convertible into another security is deemed to include an offer of the underlying security into which the first is convertible. As intended by the draftsmen of the Uniform Act, this would require registration of the underlying security at the time the convertible security is offered or sold, even if the convertible security is exempt, unless the offer of the underlying security is also exempt. It is then expressly provided that the terms "sale," "sell," "offer," and "offer to sell" do not include (i) a bona fide pledge or loan, (ii) a stock dividend, if nothing of value is given by the stockholders other than surrender of the right to a cash dividend where each stockholder may elect to take a stock or a cash dividend, (iii) any act incident to a class vote of shareholders on a merger, consolidation, reclassification, or sale of assets for securities, or (iv) any act incident to a judicially approved reorganization involving the issuance of securities in exchange for existing securities or claims. It should be noted that these transactions, by virtue of being excluded from the definitions of key terms, are not merely exempted from registration requirements, but are beyond the scope of all aspects of the Act, including the anti-fraud provisions. In all of these definitions the Missouri Act has strictly adhered to the provisions of the Uniform Act.

284. See § 401(j)(5), Official Comment. This may occur, for example, under § 409.402(b)(11). See note 312 infra. Note that unlike section 2(3) of the Securities Act of 1933, 15 U.S.C. § 77b(3) (1964), no distinction is made here between securities which are convertible immediately upon issuance and those which are convertible only at some future date.
285. § 409.401(j)(6), RSMo 1967 Supp. Note that the first clause excludes only the pledge itself and not the foreclosure sale pursuant thereto with respect to which an exemption is provided in § 409.402(b)(7), RSMo 1967 Supp., if there is no purpose to evade the Act. Cf. SEC v. Guild Films Company, Inc., 279 F.2d 485 (2d Cir. 1960). The third and fourth clauses relating to voluntary and judicially approved reorganizations are intended to incorporate the SEC's traditional "no-sale" theory and to exclude these transactions generally. This, however, pertains only to the reorganization transaction and not to the security issued therein if it is later resold under circumstances where no exemption is available. The second clause relating to stock dividends is intended to broaden the SEC rule to cover also a stock dividend where a right to receive a cash dividend is individually surrendered by the shareholder. See § 401(j)(6), Draftsmen's Commentary.
In contrast to the stringent standards imposed on those securities offerings which must be registered, section 409.402 provides extensive exemptions from all of the registration requirements of the Act for a great many offerings.\(^{286}\) These exemptions, however (unlike exclusions from the definitions), pertain only to the securities registration requirements and do not provide any exemption from the anti-fraud sanctions of the Act. There are two types of exemptions covered by section 409.402 which operate quite differently. First, certain enumerated types of securities are exempted from the registration requirements, regardless of the transaction in which they are offered or sold.\(^{287}\) Second, certain transactions are exempted, even though the security involved is not itself exempt and will be subject to registration in other transactions not covered by the exemptions.\(^{288}\) The distinction is quite significant in planning, since non-exempt securities offered or sold in an exempt transaction are not permanently free of the registration requirements and will be subject to registration in later sales unless such sales are also exempt transactions.

The burden of proving an exemption or an exception from a definition in any proceeding under the Act is on the person claiming the benefit of the exemption or exception.\(^{289}\) The Commissioner is given broad power to deny or revoke any of the transaction exemptions and two of the securities exemptions.\(^{290}\) The exemption may be denied summarily, pending final determination, or may be denied after a hearing, but in either case prior notice, opportunity for hearing, and written findings of fact and conclusions of law are guaranteed before a permanent denial order is entered.\(^{291}\) This confers on the Commissioner only authority to deny an exemption in a particular case and not to deny the exemption categorically, which would amount to a partial repeal of the statute. Nor, is the Commissioner authorized to create exemptions.\(^{292}\) However, in a particular case he is apparently given compete discretion as to the reasons for denial of the exemption since the grounds which will support such an order are not specified.\(^{293}\)

\(^{286}\) Specifically, § 409.402 provides exemptions from §§ 409.301 and 409.403, which impose the securities registration requirements.

\(^{287}\) § 409.402(a), RSMo 1967 Supp.

\(^{288}\) 409.402(b), RSMo 1967 Supp.

\(^{289}\) 409.402(d), RSMo 1967 Supp.

\(^{290}\) 409.402(c), RSMo 1967 Supp. The exemptions for securities which the Commissioner may deny or revoke are those in §§ 409.402(a)(9) and (11) pertaining respectively to securities issued by charitable and other non-profit organizations and to securities issued in connection with employee stock benefit plans. Section 409.402(c) adopts Uniform Act § 402(c) without change.

\(^{291}\) § 409.402(c), RSMo 1967 Supp.

\(^{292}\) See § 402(c), Official Comment and Draftsmen’s Commentary.

\(^{293}\) Presumably, of course, the Commissioner is subject to the restraints of
Most of the exemptions in section 409.402(a) for particular securities relate to the nature of the issuer. These include exemptions for the securities of domestic and foreign governments,\textsuperscript{294} state and national banks, trust companies and savings and loan associations,\textsuperscript{295} Missouri agricultural cooperative corporations,\textsuperscript{296} regulated federal and state credit unions,\textsuperscript{297} regulated common carriers and public utilities,\textsuperscript{298} and non-profit organizations.\textsuperscript{299} In addition, exemption is provided for all commercial paper involved in current transactions with a maturity of nine months or less, exclusive of days of grace,\textsuperscript{300} and for any investment contract issued in connection with various types of employee benefit plans.\textsuperscript{301} An exemption of major significance is also provided for any security listed on the principal national securities exchanges, and for all other securities of the same
due process and may not act arbitrarily or capriciously. He is also subject to the requirements of § 409.413(b), under which he must find "that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions" of the Act.

294. § 409.402(a)(1),(2), RSMo 1967 Supp. This includes the securities of all domestic governments and their agencies and of all foreign governments with which the United States currently maintains diplomatic relations.


297. § 409.402(a)(6), RSMo 1967 Supp. Note, however, that this includes only federal and Missouri credit unions—not those supervised only under the laws of other states.

298. § 409.402(a)(7), RSMo 1967 Supp. This includes carriers subject to the ICC, holding companies subject to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1964), and their subsidiaries, and utilities and carriers regulated by any governmental authority of the United States, any state, Canada or any Canadian province. Domestic regulation need only pertain to rates and charges. Canadian regulation must pertain to the issuance or guarantee of the security. See § 402(a)(7), Draftsmen's Commentary.

299. § 409.402(a)(9), RSMo 1967 Supp. To qualify the organization must be operated exclusively for religious, educational, benevolent, charitable, paternal, social, athletic or reformatory purposes or as a chamber of commerce or trade or professional association. The Commissioner must be notified in writing 30 days prior to the offer or sale of the security except in an exempt transaction and is thus given an opportunity to exercise his discretionary authority to deny the exemption under § 409.402(c). This notice requirement is an addition to the Uniform Act and has been implemented in Rule IX B and Form S-29 by the Missouri Commissioner.

300. § 409.402(a)(10), RSMo 1967 Supp. This is based on the Securities Act of 1933, § 3a(8), 15 U.S.C. § 77c(a)(8) (1964), which also uses the nine months period. The exemption also covers renewals of such paper provided the renewal is similarly limited to nine months maturity.

301. § 409.402(a)(11), RSMo 1967 Supp. This includes stock purchase, savings, pension, profit-sharing, and similar benefit plans. The Commissioner must be notified in writing 30 days before the inception of the plan (or before the reopening of the plan, if it was closed on January 1, 1968). This also gives the Commissioner an opportunity to deny the exemption under § 409.402(c) and has been implemented in Rule IX C.
issuer which are of senior or equal rank with the listed security.\textsuperscript{302} However, the Missouri Act has omitted the exemption provided by section 402(a)(5) of the Uniform Act for securities issued by insurance companies authorized to do business in this state.\textsuperscript{303} Except as noted,\textsuperscript{304} section 409.402 (a) adopts the Uniform Act provisions in all other respects.

A wide range of transactions in non-exempt securities are defined in section 409.402(b) as exempt transactions. However, in a significant deviation from the Uniform Act, the Missouri Act excludes from these exemptions all transactions in certificates of interest or participation in oil, gas, or mining titles or leases, or in payments out of production under such a title or lease.\textsuperscript{305} The transaction exemptions defined in the 15 clauses of section 409.402(b) may be grouped for convenience under four categories: (i) those related to particular transactions of an exceptional nature; (ii) those related to a pending registration; (iii) those related to transactions by the issuer with a limited or "private" group; and (iv) those related to transactions by non-issuers. Except as individually noted, these exemptions in the Missouri Act follow the Uniform Act.

Under the first category fairly standard exemptions are provided for transactions by various judicial officers and judicially supervised fiduciaries,\textsuperscript{306} transactions by bona fide pledgees without any purpose of evading the Act,\textsuperscript{307} and transactions in bonds or other evidences of indebted-

\textsuperscript{302} § 409.402(a)(8), RSMo 1967 Supp. This applies to securities listed on the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange, and other exchanges approved by the Commissioner. The Commissioner has also approved for this purpose the Chicago Board of Trade and the Pacific Coast Stock Exchange. Rule IX A. The exemption in § 409.402(a)(8) also extends to any security called for by subscription rights or warrants which are listed on an approved exchange and to any warrant or right to purchase a security which is so listed.

\textsuperscript{303} See § 402(a)(5), Official Comment and Draftsmen's Commentary. This is a fairly common exemption in other states based, usually, on the fact that insurance companies, like banks, carriers, and utilities are regulated adequately by a specialized agency. It, of course, relates only to the securities issued by the insurance company and not to its insurance policies or annuities which are excluded from the definition of "security" in § 409.401(1), RSMo 1967 Supp. See note 12 supra.

\textsuperscript{304} See note 299, supra.

\textsuperscript{305} This exclusion is added to the opening sentence in § 409.402(b), RSMo 1967 Supp. Cf. Uniform Act § 402(b).

\textsuperscript{306} § 409.402(b)(6), RSMo 1967 Supp. This includes transactions by an executor, administrator, sheriff, marshal, receiver in bankruptcy, guardian, or conservator.

\textsuperscript{307} § 409.402(b)(7), RSMo 1967 Supp. This should be compared to § 409.401 (j)(6)(A), RSMo 1967 Supp. which excludes the pledge transaction itself from the definition of "offer" and "sale" and, therefore, from all aspects of the Act, and to SEC v. Guild Films Company, Inc., 279 F.2d 485 (2d Cir. 1960).
ness secured by a real or chattel mortgage in which the entire mortgage and all debt securities secured thereby are sold as a unit. Two exemptions for transactions related to a pending registration are provided under the second category. First, transactions among underwriters and transactions between the issuer or other person on whose behalf the offering is made and an underwriter are exempt. Second, where a registration statement has been filed under the Securities Act of 1933 and under the Missouri Act, exemption is provided for any offer—but not a sale—of securities covered by the registration statement, provided no stop order or refusal order is in effect and no proceeding looking toward such an order is pending under either act. The third group of exemptions, relating to transactions by the issuer with certain limited or “private” groups includes: (i) transactions with various financial institutions and institutional buyers; (ii) transactions with existing security holders, if no remuneration is paid for soliciting security holders or if the Commissioner is notified of the terms of the offer and does not disallow the exemption within five days; and (iii) transactions which either result in no more than 25 security holders

309. § 409.402(b)(4), RSMo 1967 Supp. This is related to the similar provision in the Securities Act of 1933, § 2(3), 15 U.S.C. § 77b(3) (1964). However, this provision is only an exemption from registration and not an exclusion from the definition of “sale” or “offer” and, from all aspects of the Act, as is the case in the Federal act. See § 402(b)(4), Draftsmen’s Commentary.
310. § 409.402(b)(12), RSMo 1967 Supp. This accommodates the federal aspect of a registration by coordination by permitting those offers of a security covered by a pending registration statement to be made prior to the effective date which are permissible under the Federal act during the waiting period and which may be a condition to acceleration. Such offers included the preliminary or “red-herring” prospectus, the summary prospectus, the tombstone ad, and oral offers. See Securities Act of 1933 §§ 2(10), 5(b), 8(a), 10(b), 15 U.S.C. §§ 77b(10), 77c(b), 77h(a), 77j(b) (1964).
311. § 409.402(b)(8), RSMo 1967 Supp. This includes banks, savings and loan associations, trust companies, insurance companies, investment companies, pension and profit sharing trusts, and other financial institutions and institutional buyers and broker-dealers, whether the purchaser is acting for itself or in some fiduciary capacity. Hence, a great many private placements would be covered by this exemption.
312. § 409.402(b)(11), RSMo 1967 Supp. This expressly includes transactions with holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance. Cf. § 409.401 (j)(5), RSMo 1967 Supp, which makes the convertible security a continuing offer of the underlying security. See the discussion at note 284, supra. But if the issuance of the convertible security is to existing security holders and, thus, exempt under § 409.402(b)(11), the concurrent offer of the underlying security will also be exempt under § 409.402(b)(11). See § 401(j)(5), Official Comment. The limitation prohibiting remuneration for soliciting security holders does not include standby commissions to an underwriter who agrees to take any part of the offering not subscribed by security holders.
of the issuer or which constitute no more than fifteen transactions during a twelve month period.\textsuperscript{313}

The exemptions for transactions which result in no more than 25 security holders or fifteen transactions within a year are derived solely from prior Missouri law. They are entirely foreign to the Uniform Act and are substantially broader than the two Uniform Act exemptions which they displace.\textsuperscript{314} Prior uncertainty in Missouri law as to the relationship between these two exemptions has been expressly resolved in the new Act by the provision in section 409.402(b)(10) that the fifteen transactions within that exemption include only transactions under that section and not transactions which are exempt under sections 409.402(b)(8) and (9), relating respectively to financial and institutional buyers and to 25 total security holders. Hence, an issuer may sell to 25 security holders within section 409.402(b)(9) and make an additional fifteen sales under section 409.402(b)(10) during the same year.\textsuperscript{315} After one year another fifteen transactions may be brought within section 409.402(b)(10).

The fourth and most extensive group of transaction exemptions relates to offers and sales of securities by "non-issuers"\textsuperscript{316} where other exemptions are inapplicable. By implication this means that unless an exemption is available, a non-issuer is subject to the registration requirement of section 409.301, and that even if the transaction is exempt from registration, the non-issuer is subject to the anti-fraud sanctions of the Act which include potential liability to the purchaser.\textsuperscript{317}

The basic exemptions for non-issuers' transactions include: (i) exempt-

\textsuperscript{313} §§ 409.402(b)(9),(10), RSMo 1967 Supp. Clause (9) exempts transactions by the issuer in its own securities if thereafter the total number of holders of any securities of the issuer (of record or beneficially) which are known to the issuer do not exceed 25 and no remuneration is paid for soliciting the transaction. Clause (10) exempts up to 15 transactions within a twelve month period by an issuer in its own security, if the issuer reasonably believes the buyer is purchasing for investment, the buyer so represents in writing, and no remuneration is paid for soliciting the sale. The Commissioner is given broad latitude to withdraw or place further conditions on the latter exemption, to vary the number of permitted transactions, or to waive the conditions pertaining to representations of investment intent and remuneration. The Commissioner has promulgated Rule IX F which requires 30 days notice to the Commissioner prior to a transaction under clause (10). The notice must include several items of relevant information.

\textsuperscript{314} See Uniform Act §§ 402(b)(9),(10).

\textsuperscript{315} But notice to the Commissioner is necessary 30 days before the latter 15 transactions under Rule IX F. See note 313 supra.

\textsuperscript{316} "Non-issuer" is defined simply as "not directly or indirectly for the benefit of the issuer," § 409.401(h), RSMo 1967 Supp., and does not necessarily involve the "control" concept employed in the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1964).

\textsuperscript{317} See § 305(f), Official Comment and Draftsmen's Commentary; Cf. §§ 409.101, 408-411 RSMo 1967 Supp.
tion for isolated transactions, whether effected through a broker-dealer or not;\textsuperscript{318} (ii) exemption for secondary distributions of outstanding securities which are adequately covered in recognized securities manuals, or which have a fixed maturity or a fixed dividend or interest provision on which there has been no default over a three-year period;\textsuperscript{319} and (iii) exemption for transactions effected by or through a registered broker-dealer pursuant to an unsolicited order to buy.\textsuperscript{320} These exemptions have been adopted from the Uniform Act. In Rule IX D the Commissioner has approved both Standard and Poor's and Moody's manuals as "recognized securities manuals" within section 409.402(b)(2).\textsuperscript{321} Rule IX D also provides that "the distribution of large blocks of securities by controlling persons in firmly underwritten offerings will ordinarily be presumed to be for the direct or indirect benefit of the issuer, and not within the provisions of the manual exemption." In this provision the Commissioner has injected the "control" concept into the matter of non-issuer or secondary distributions under the Act but has left several questions unanswered. No definition of the term

\textsuperscript{318} § 409.402(b)(1), RSMo 1967 Supp. This exemption was contained in the prior Missouri act and was construed in Gales v. Weldon, 282 S.W.2d 522 (Mo. 1955), and Teefey v. Hodson, 341 S.W.2d 977 (K.C. Mo. App. 1960). In both cases the sales were held not to be "isolated transactions."

\textsuperscript{319} § 409.402(b)(2), RSMo 1967 Supp. The securities manuals must contain the names of the officers and directors and current financial statements of the issuer. Regarding securities with fixed maturity, dividend, or interest provisions, there must have been no default on any such payments during the current or three preceding fiscal years.

\textsuperscript{320} § 409.402(b)(3), RSMo 1967 Supp. The Missouri Act has substantially changed the Uniform Act provision on this exemption and has both narrowed its scope and created uncertainties. Under Uniform Act § 402(b)(3) the exemption extends to the non-issuer who sells through his broker-dealer either directly to a buyer or through a broker-dealer who is acting for a buyer, provided in either case that the buyer's order is not solicited by the seller or his broker-dealer. However, under the Missouri Act, § 409.402(b)(3), the exemption is only available if the broker-dealer acts as agent for the purchaser and is compensated exclusively by the purchaser. Thus, in the case of a transaction effected by a single broker-dealer, the scope of the exemption is narrowed significantly. But in the not unlikely case involving two broker-dealers—one representing the seller and one representing the buyer—the availability of the exemption to the seller is entirely uncertain. If the exemption is not available in such case, its scope has been peculiarly and drastically restricted. See § 402(b)(3), Official Comment and Draftsmen's Commentary. But any employment of a broker-dealer by the seller may contravene the restriction of the exemption in the Missouri Act that "the broker-dealer" must act as agent for and be compensated by the purchaser. The Missouri Act has also altered the second part of § 402(b)(3) of the Uniform Act by authorizing the Commissioner to require the purchaser to acknowledge that his order to buy was unsolicited and to require broker-dealers to preserve such acknowledgments. This has been implemented by the Commissioner in Rule IX E.

\textsuperscript{321} Specifically, the manuals "recognized" in Rule IX D are Standard & Poor's Standard Corporation Descriptions, Moody's Industrial Manual, and Moody's Bank and Finance Manual.
"controlling persons" is provided in the Act or in the present Rules. Further, it is unclear whether the presumption declared in Rule IX D is rebuttable or conclusive, although the fact that it is only "ordinarily . . . presumed" to benefit the issuer suggests that a control person could rebut the presumption by proof of the absence of benefit to the issuer. Finally, Rule IX D is ambiguous as to whether the presumption applies only with respect to the manual exemption of section 409.402(b)(2) or to all of the non-issuer transaction exemptions.

In addition to these exemptions, the Missouri Act has added three extensive exemptions for non-issuers' transactions, none of which is found in the Uniform Act, and which are based partly on prior Missouri law. First, an exemption is extended to non-issuer transactions by a person who is not in a control relationship with the issuer where the securities sold, or other securities of the same class, have previously been either registered in Missouri or lawfully sold in Missouri pursuant to an exemption from registration. 322 Second, any non-issuer transaction in a security which would be eligible for registration by notification at the time of the transaction is exempted. 323 Third, an entirely new exemption has been created for any non-issuer transaction by a person who is not in a control relationship with the issuer if: (i) the transaction is at a price reasonably related to the current market price, (ii) the issuer has registered with the SEC under section 12 and is reporting under section 13 of the Securities Exchange Act of 1934, 324 and (iii) a copy of the SEC registration statement has been filed with the Missouri Commissioner together with such other reports and exhibits as he may require. 325 Of these three exemptions the first is by far the most extensive and stands in curious contrast with the stringent registration standards of the Missouri Act. 326 Together the six exemptions in the Act for non-issuer transactions have the effect of exempting most non-issuer distributions and non-issuer trading from the registration requirements of the Act.

322. § 409.402(b)(13), RSMo 1967 Supp. Persons in a "control relationship with the issuer" are those who control, or are controlled by or under common control with the issuer.
323. § 409.402(b)(14), RSMo 1967 Supp. See the discussion of registration by notification at 490-92, supra.
325. § 409.405(b)(15), RSMo 1967 Supp. This is an interesting and laudable innovation which is entirely consistent, in a novel way, with the general policy of the Uniform Act to coordinate state and federal securities registration.
326. See the discussion at 500-03, supra.
D. Anti-Fraud Provisions, Civil Liabilities and Other Sanctions

The fourth substantive area with which the Act is concerned is the prohibition of securities frauds and misconduct and the sanctions applicable to violations of the Act. Except as individually noted, these sections of the Missouri Act follow the corresponding provisions of the Uniform Act. The anti-fraud provisions relate to all transactions in securities, whether or not compliance with the registration requirements of the Act is also involved. Thus these provisions form an independent phase of the Act. The broadest is section 409.101, which declares:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

This provision is obviously based on the well-known SEC Rule 10b-5, which has been involved in a great deal of private litigation in recent years. However, the possibility of similar litigation arising out of section 409.101 has been foreclosed by the fact that no private right of action for violations of this section is expressly created by the Act and the fact that section 409.411(h) declares that the Act does not create any implied right of action.

Section 409.102 contains prohibitions similar to those in the first and third clauses of section 409.101 which are applicable to any person who receives any compensation primarily for giving investment advice. In

327. § 409.101, RSMo 1967 Supp. This is identical to Uniform Act § 101.
328. 17 C.F.R. § 240.10b-5. Rule 10b-5 itself was based on the language of § 17a of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1964), which contains substantially the same three prohibitions with respect to offers and sales of securities.
329. This result was expressly intended by the draftsmen of the Uniform Act. See § 101, Official Comment and Draftsmen's Commentary. However, developments in the Rule 10b-5 area since the Uniform Act was drafted have raised doubts as to whether this decision was wise. Perhaps state corporate and securities law with respect to securities frauds would be considerably improved by allowing a private right of action with more precise limits and guidelines than have existed thus far under Rule 10b-5.
330. § 409.102(a), RSMo 1967 Supp. Section 409.102 adopts Uniform Act § 102 without change.
addition, this section prohibits all investment advisers from making investment advisory contracts which do not provide in writing: (i) that compensation shall not be based on capital gains or capital appreciation, (ii) that the contract may not be assigned without the customer's consent, and (iii) that if the investment adviser is a partnership, the customer will be advised of any change in membership.\textsuperscript{331} Investment advisers are also required to notify the Commissioner if they have or may have custody of the client's funds or securities.\textsuperscript{332}

Supplementing these two basic anti-fraud provisions, section 409.404 declares it to be unlawful to make any false or misleading statement in any document filed with the Commissioner or in any proceeding under the Act. Also, section 409.405 prohibits any representation to a prospective purchaser, customer, or client to the effect that the Commissioner has made a finding that any filed document is true or correct or has approved or passed on the merits or qualifications of the person, security, or transaction involved.\textsuperscript{333} While the latter provision is customary under the Securities Act of 1933,\textsuperscript{334} which is predicated on a disclosure rather than a qualification theory, it seems somewhat inconsistent with the stringent qualification standards imposed by other parts of the Missouri Act and particularly with the Commissioner's responsibilities under section 409.306.\textsuperscript{335}

The Act provides three types of sanctions for violations of its provisions and for misconduct in securities transactions—civil liability, ad-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{331} § 409.102(b), RSMo 1967 Supp. This is based on § 205 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-5 (1964). \textit{See} Official Comment. Under Clause (1) compensation \textit{may} be based on the total value of a fund averaged over a definite period or taken as of definite dates. The term "assignment" as used in Clause (2) is defined very broadly but does not include a change of membership of a partnership investment adviser which does not exceed a minority of the firm.
\item \textsuperscript{332} § 409.102(c), RSMo 1967 Supp. This section allows the Commissioner by rule to prohibit investment advisers from having custody of funds or securities of customers. As yet, however, the Commissioner has not adopted such a rule, which presumably, would not apply to investment advisers who were also broker-dealers. \textit{Cf.} § 102(c), Official Comment.
\item \textsuperscript{333} §§ 409.404, 405, RSMo 1967 Supp. These follow Uniform Act §§ 404 and 405 without substantial change. Section 409.405 also provides that such findings and actions by the Commissioner do not in fact occur. Similarly, no such inference is to be drawn from the availability of an exemption.
\item \textsuperscript{334} \textit{Cf.} 15 U.S.C. § 77w (1964).
\item \textsuperscript{335} For example, under § 409.306(a)(2)(E), RSMo 1967 Supp., the Commissioner may issue a stop order if he finds that a proposed offering works a fraud on purchasers or is "unfair, unjust, inequitable (sic) or oppressive" or that "the enterprise or business of the issuer is based on unsound business principles." It would seem that, unless the Commissioner fails to do his job, he must have passed in some way on the merits of the offering.
\end{enumerate}
\end{footnotesize}
ministerial action, and criminal penalty. Of these three, the various administrative sanctions are by far the broadest, but in many situations all three types of sanctions may be applicable to the same transaction.336

Civil liabilities under the Act are defined in section 409.411, which also provides that the Act creates no implied liabilities.337 The basic civil liabilities are parallel to those under section 12 of the Securities Act of 1933.338 First, any person who offers or sells a security in violation of the registration requirements of the Act or with a representation in violation of section 409.405 is liable to the purchaser and does not have the benefit of any affirmative defenses.339 Second, any person who offers or sells a security by means of any untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is similarly liable to the purchaser, if the purchaser did not know of the untruth or omission. Here, however, the defendant is given the benefit of an affirmative defense if he can establish that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.340 In

336. For example, a non-exempt sale of non-exempt securities without registration, if willful, will be subject to the full range of civil, administrative, and criminal sanctions.
337. § 409.411(h), RSMo 1967 Supp. The only causes of action created by the Act are those specified in § 409.411 and those under § 409.202(e) relating to suits on broker-dealers', agents', and investment advisers' public liability bonds. These causes of action are, however, cumulative of any other rights or remedies at law or in equity. § 409.411, RSMo 1967 Supp., is identical to Uniform Act § 410.
339. § 409.411(a)(1), RSMo 1967 Supp. This includes offers or sales by unregistered broker-dealers or agents in violation of § 409.201(a); offers and sales of unregistered securities in violation of § 409.301; violation of a rule or order under § 409.405(b) pertaining to sales literature; and violations of a prospectus requirement under § 409.304(d), an escrow arrangement required under § 409.305(f), or restrictions pertaining to sales contracts under § 409.305(g). Through oversight, the latter two sections are erroneously referred to in § 409.411 (a)(1) as §§ 409.305(g) and 409.305(h). This confusion is probably due to the fact that the Missouri Act omits Uniform Act § 305(f) and subsequent paragraphs in § 409.305 were relettered accordingly. Obviously the reference in § 409.411 should be to paragraphs (f) and (g)—not (g) and (h)—of § 409.305. Cf. § 410 (a)(1), Draftsmen's Commentary.
340. § 409.411(a)(2), RSMo 1967 Supp. The language here is substantially the same as that used in § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77I(2) (1964), and should be construed accordingly. This will apply to both offers and sales, to both written and oral misrepresentations, and to both distributions of securities and subsequent trading activities in outstanding securities. It is not intended that the plaintiff have the burden of proving reliance on the misrepresentations but only that he did not know of the untruth or omission. See §§ 410(a)(2), Draftsmen's Commentary. Privity is necessary between the plaintiff and the defendant who makes the misrepresentation. Either intentional or negligent misrepresentation should be sufficient. See 3 L. Loss, Securities Regulation 1699-1705, 1708-1712 (2d ed. 1961).
either case the purchaser may sue either at law or in equity to rescind the transaction upon tender of the security, or for damages, if he no longer owns the security. If in any such suit plaintiff may recover his costs and reasonable attorney’s fees.

It is important to notice the distinctions between the two types of actions encompassed by section 409.411(a). Clause (1) is based entirely on the registration requirements of the Act. A suit under this clause for sale of unregistered securities in violation of section 409.301 need not involve any misrepresentation whatever and will, of course, be subject to the exemptions from registration in section 409.402. For this reason, such suit will usually be related to a distribution of securities. On the other hand, clause (2) is concerned only with misrepresentations (broadly defined) in any offer or sale of securities, whether involved in trading activity, in outstanding securities or in an original distribution. It is of basic importance since this cause of action is not predicated on the registration requirements of the Act, that the exemptions in section 409.402 are entirely inapplicable. Hence, the cause of action under clause (2) is essentially much broader in its potential reach than that in clause (1), although in a given case, the two may overlap.

These statutory causes of action also go far beyond the parallel common law actions for deceit and misrepresentation with respect to the persons who may be held liable. In addition to the seller who is liable under either cause of action specified in section 409.411(a), any person who controls the seller, or is an officer, director, or partner of the seller, and any broker-dealer, agent, or employee of the seller, who materially aids in the sale, is also liable jointly and severally with the seller with right

341. § 409.411(a), RSMo 1967 Supp. Although the format of the Missouri Statute is not entirely clear, this provision is definitely intended to relate to both clause (1) and clause (2). See, e.g., Uniform Act § 410a. This is an important modification of common law rights, since the plaintiff, without proving either scienter or reliance, can recover even if he has already disposed of the security. If he still owns it, he may tender it to defendant “at any time before entry of judgment,” § 409.411(c), and recover the consideration he paid with interest at 6 percent per annum, less the amount of any income received on the security. If he has previously disposed of the security, he can recover damages in the same amount less the value of the security when he disposed of it and 6 percent interest on such value.

342. For example, a sale of unregistered securities in violation of § 409.301 which involved a misrepresentation would give rise to a cause of action under both clause (1) and clause (2). If the security were exempt under § 409.402 or had been duly registered, only the cause of action under § 409.411(a)(2) would be available. Conversely, if there were neither registration nor exemption but the evidence showed either that the plaintiff knew of the untruth or omission or that the defendant did not know and had used reasonable care, only the cause of action under § 409.411(a)(1) would be available.
of contribution among all defendants. However, each non-seller who may be liable is given an affirmative defense if he proves he neither knew nor in the exercise of reasonable care could have known of the facts giving rise to the liability.

The statutory causes of action survive the death of any potential plaintiff or defendant and are subject to a two-year statute of limitations. It is further provided that any agreement purporting to waive compliance with the Act or with any rule or order under the Act is void. No suit may be based on any contract in violation of the Act, or any rule or order thereunder, by a person who entered the transaction with knowledge of the facts creating the violation. A seller who is exposed to potential liability under either statutory cause of action may curtail the contingency of a possible suit by making a rescission offer to the buyer. Unless the buyer accepts the offer within thirty days of its receipt (if he still owns the security), or rejects the offer within the same period (if he no longer owns the security), he is barred from suit. If the market value of the security at the time of the rescission offer is above the price originally paid by the buyer and he still owns it, he is not likely to accept the offer to rescind. In this case the defendant by a timely offer can actually eliminate liability which has accrued under the Act.

A wide range of administrative sanctions is provided by the Act. First, the Commissioner is given broad discretionary power to make such public or private investigations and inspection as he deems necessary to enforce the Act. In this respect he may obtain statements concerning the matter being investigated, may publish information concerning any violation,

---

344. § 409.411(b), RSMo 1967 Supp.
345. §§ 409.411(d), (e), (h), RSMo 1967 Supp. The two-year limitation period begins when the contract of sale is made.
346. §§ 409.411(f), (g), RSMo 1967 Supp.
347. § 409.411(e), RSMo 1967 Supp. The seller must offer to refund the consideration paid for the security with interest at 6 percent per year less any income received on the security.
348. § 409.407(a)(1), RSMo 1967 Supp. This is based on Uniform Act § 407(a)(1) but adds the authority to make “inspections” as well as “investigations.” These may be made as the Commissioner deems necessary to aid in the enforcement of the act generally, to determine whether any registration should be granted, denied, or revoked, or to determine whether any violation of the Act, any rule, or any order has occurred or is threatened. The phrase pertaining to decisions on registrations is an addition to the Uniform Act.
and may subpoena witnesses, take evidence, and compel the production of documentary evidence. In the event of refusal to obey a subpoena or order of the Commissioner, any circuit court in the state may, on application by the Commissioner, order compliance and punish disobedience of its order as contempt. All Missouri criminal law enforcement officers are obligated to cooperate with the Commissioner. Persons called to give evidence are denied the privilege against self-incrimination and granted immunity from prosecution on such evidence.

Second, the Commissioner is authorized, in his discretion, to bring an action in any circuit court in the state to enjoin violations of the Act or of any rule or order and to compel compliance therewith whenever it appears to him that a violation has occurred or is about to occur. In such suit, permanent or temporary injunctions, restraining orders, or mandamus may be granted and a receiver or conservator may be appointed for the defendant's assets.

The Missouri Act has added a third provision, not found in the Uniform Act, which creates administrative sanctions of sweeping magnitude. This novel provision was derived from two sections in the prior Missouri Securities Act which have been combined into a single section. Under this provision the Commissioner may require a person who is offering or selling, or about to offer or sell, a security in this state to file a statement of any exemption he claims and to furnish any further information necessary to establish the exemption. Upon a refusal to furnish such information, the Commissioner may suspend the person's right to sell the security, or if he is a broker-dealer, agent, or investment adviser, the Commissioner

351. § 409.407(b), RSMo 1967 Supp. This follows the Uniform Act and includes testimony or documentary evidence "which the commissioner deems relevant or material to the inquiry."
352. § 409.407(c), RSMo 1967 Supp., follows the Uniform Act.
353. § 409.407(d), RSMo 1967 Supp. This provision is based on the prior Missouri Statute and is an addition to the Uniform Act.
354. § 409.407(e), RSMo 1967 Supp. This follows the Uniform Act. The privilege against self-incrimination must be claimed before the immunity is available. The immunity extends to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, except punishment for perjury or contempt committed in testifying. This does not, however, foreclose the risk of prosecution under federal law. See § 407(d), Official Comment and Draftsmen's Commentary.
355. § 409.409, RSMo 1967 Supp. This is § 408 of the Uniform Act without change, which, in turn, was based on §§ 21(e) and 21(f) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(e), (f) (1964).
357. § 409.408, RSMo 1967 Supp., contains the basic ingredients of §§ 409.120 and 409.160 in the old statute.
may suspend or cancel his registration. In addition, this provision authorizes the Commissioner, whenever it appears to him that anyone is committing or about to commit any of several enumerated securities frauds\textsuperscript{358} to require such person to file a statement of all relevant facts and circumstances and to investigate the matter fully. If the Commissioner believes "from evidence satisfactory to him" that the person is engaged or is about to engage in any of the specified securities frauds, he may issue an order prohibiting such conduct and any other orders "as he may deem just," including orders fixing the terms and conditions of or prohibiting altogether any further sales of the security. It is then declared to be unlawful for any person who has been served with an order under this section, or who knows of the issuance of such order, to violate the provisions of the order. Broad power has thus been vested in the Missouri Commissioner to restrain securities frauds by administrative order, which may materially reduce the importance of the injunctive relief available under section 409.409.

The criminal sanctions of the Act are defined in section 409.410,\textsuperscript{359} which is based on Uniform Act, section 409. Under this section any person is subject to a fine of not more than §5,000, imprisonment of not more than three years, or both, upon conviction of willfully violating any provision of the Act.\textsuperscript{360} However, before he can be convicted for making false or misleading statements in documents filed or in proceedings under the Act in violation of section 409.404, it must be shown that the defendant knew the statement was false or misleading. The Missouri Act omits the Uniform Act provision which makes the criminal sanctions applicable to violations of rules and orders of the administrator.\textsuperscript{361} However, the Missouri Act substitutes a provision, not found in the Uniform Act, which subjects a person to the criminal sanctions of the Act for willful violation of a cease and desist order under the Act which has been personally served on him.\textsuperscript{362} Criminal prosecutions under the Act may only be instituted by the attorney

\textsuperscript{358} This includes, "in connection with the sale of any security," acting "fraudulently," or employing "any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or attempting to make in the state of Missouri fictitious or pretended purchases or sales of any such security," or engaging "in any practice or transaction or course of business relating to the purchase or sale of any such security which is fraudulent or in violation of law . . . ."

\textsuperscript{359} § 409.410(e), RSMo 1967 Supp., provides that "[n]othing in this act limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law."

\textsuperscript{360} § 409.410(a), RSMo 1967 Supp.

\textsuperscript{361} Uniform Act § 409(a).

\textsuperscript{362} § 409.410(a), RSMo 1967 Supp.
general or by the proper prosecuting attorney or circuit attorney, but the Commissioner is authorized to refer evidence of violations to these officials for prosecution.363 These officials are, of course, obligated to cooperate with the Commissioner.364

E. Scope of the Act and Conflict of Laws

One of the more troublesome areas in state securities regulation which confronted the draftsmen of the Uniform Securities Act was applicability of the Act to transactions which cross state lines in part and the jurisdiction of the courts over non-residents. In order to resolve many uncertainties in this area of conflict of laws, the draftsmen undertook in section 414 of the Uniform Act to codify basic rules to determine the applicability of the substantive provisions of the Act to interstate securities transactions and to define the jurisdiction of the courts over non-residents in actions under the Act. This section, which is incorporated in the Missouri Act with only one change,365 consists essentially of two parts.

The first portion of this section contains rules which govern the applicability of the Act to interstate offers and sales of securities.366 Essentially, these rules provide (i) that the Act applies to the seller, if his offer to sell is made in Missouri, or if he accepts, in Missouri, an offer to buy made in Missouri, and (ii) that the Act applies to the buyer, if his offer to buy is made in Missouri, or if he accepts, in Missouri, an offer to sell made in Missouri.367 However, this general pattern is materially affected by the definitions which follow. First, an offer is "made in Missouri" if it originates in Missouri or is directed by the offerer to Missouri and received where directed, whether or not either party is present in Missouri.368 This, however, is qualified in two respects: (i) an offer is not "made" in Missouri if it is directed to another state where it is lawful,369 and (ii) the offer is

363. § 409.410(b), RSMo 1967 Supp. This division of functions—authorizing the Commissioner to seek administrative and injunctive relief but only to refer evidence to the appropriate officials for any criminal prosecution—is consistent with the pattern of the federal securities acts relating to the authority of the SEC. See, e.g., Securities Act of 1933, § 20(b), 15 U.S.C. § 77t(b) (1964), and Securities Exchange Act of 1934, § 21(e), 15 U.S.C. § 78u(e) (1964).
364. § 409.407(d), RSMo 1967 Supp. Presumably this would not, however, give the Commissioner authority to decide whether to prosecute or the right to control the course of a prosecution. It would obligate the prosecutor to give careful consideration to the Commissioner's recommendations.
366. § 409.415(a)-(f), RSMo 1967 Supp.
367. § 409.415(a), (b), RSMo 1967 Supp.
368. § 409.415(c), RSMo 1967 Supp.
369. Ibid. This provision is the Missouri variation from Uniform Act § 414. It materially restricts the apparent scope of § 409.415(c)(1).
not "made" in Missouri when it is circulated in a periodical with general, regular, paid circulation, which is published out of state or has over two-thirds of its circulation out of state, or when it is part of a radio or television broadcast originating out of state.\textsuperscript{370} Second, an offer is "accepted" in Missouri when the original communication of the acceptance is directed to the offeror in Missouri. This will occur, whether or not either party is then present in the state, when the offeree directs it to the offeror in Missouri reasonably believing him to be in Missouri and it is received where directed.\textsuperscript{371} Obviously, the combined effect of these rules encompasses a wide range of possible situations. With respect to investment advisers, it is specially provided that sections 409.102, 409.201(c), and 409.405 "apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state."\textsuperscript{372}

The second aspect of section 409.415 is concerned with service of civil process on non-residents in matters arising under the Act.\textsuperscript{373} First, every applicant for registration and every issuer who proposes a securities offering in Missouri on an agency basis must file an irrevocable consent appointing the Commissioner his attorney to receive service of process in noncriminal matters under the Act.\textsuperscript{374} Second, any person who has not filed a consent to service of process and who engages in conduct prohibited by or actionable under the Act, or any rule or order thereunder, is deemed by such conduct to have appointed the Commissioner, or his successor in office, as his attorney to receive service of process in noncriminal matters under the Act arising out of such conduct, if jurisdiction over the person cannot otherwise be obtained.\textsuperscript{375} Substituted service of process may be made by (i) leaving a copy of the process in the office of the Commissioner, (ii) sending a notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address,\textsuperscript{376} and (iii) filing in the

\begin{itemize}
\item \textsuperscript{370} § 409.415(e), RSMo 1967 Supp.
\item \textsuperscript{371} § 409.415(d), RSMo 1967 Supp.
\item \textsuperscript{372} § 409.415(f), RSMo 1967 Supp.
\item \textsuperscript{373} § 409.415(g)-(i), RSMo 1967 Supp. It should be noted that these provisions do not apply to criminal actions.
\item \textsuperscript{374} § 409.415(g), RSMo 1967 Supp. \textit{See} Form U-2 promulgated by the Commissioner for this purpose, based on the Uniform Consent form. Any person need only file one consent which will cover subsequent registrations. The scope of the consent includes "any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this act or any rule or order hereunder after the consent has been filed."
\item \textsuperscript{375} § 409.415(h), RSMo 1967 Supp. The scope of the implied consent is the same as that of the express consent noted at note \textsuperscript{374} supra.
\item \textsuperscript{376} Under express consent, § 409.415(g), RSMo 1967 Supp., this is the last address on file with the Commissioner. Under implied consent, § 409.415(h),
\end{itemize}
case an affidavit of compliance with this provision on or before the return date of the process.\textsuperscript{377} A defendant or respondent who is served with process under this provision is entitled to such continuance as is necessary to afford a reasonable opportunity to defend.\textsuperscript{378}

III. Conclusions

The enactment of the Missouri Uniform Securities Act represents a major advance in the development of Missouri securities law and a significant event in the history of the Uniform Securities Act. Generally, the provisions of the Uniform Act have been followed in Missouri. Since many of these are essentially model provisions,\textsuperscript{379} this represents a substantial improvement in the quality, clarity, and modernity of the Missouri law on many points in the field of securities regulation.

The adoption of the Uniform Act in Missouri also means that Missouri securities law is now in general accord with that in a majority of the other states and is harmonized with the parallel provisions of the federal securities acts. In three areas this is particularly significant. First, the unique provisions of the Uniform Act for registration by coordination have now been adopted in Missouri. This will enable an issuer to coordinate the registration of an interstate offering in Missouri with registration in other states and under the Securities Act of 1933. Second, in most cases the Uniform Act definitions and exemptions have been followed. This also materially reduces the difficulties faced in handling an interstate offering and at the same time improves the quality and clarity of the Missouri law. Third, the complex problems of conflict of laws, concerning both the applicability of the Act to interstate securities transactions and the jurisdiction of Missouri courts over non-resident violations of the Act are now resolved by the adoption of the carefully drafted Uniform Act provision.

Unfortunately, Missouri, like many of the states which have adopted the Uniform Act, has made numerous changes in the Uniform Act provisions in order to preserve traditional local policy and practice despite the policy of the Uniform Act to promote uniformity and coordination. Often these deviations suggest a rather casual disregard for the value of uniformity and

\textsuperscript{377} RSMo 1967 Supp., this is the last known address of the defendant or respondent. In the latter case the plaintiff may take other steps “reasonably calculated to give actual notice” in lieu of mailing to the last known address.

\textsuperscript{378} § 409.415(g), (h), RSMo 1967 Supp.

\textsuperscript{379} § 409.415(i), RSMo 1967 Supp.

coordination. This suspicion is confirmed in the surprising omission of Uniform Act section 415 which requires that the act be construed "to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of the act with the related federal regulation." It is hoped that the Missouri courts and the Commissioner will nevertheless recognize and follow this obvious rule of construction and interpretation of the new Missouri Act.

In a few instances, however, variations in the Missouri Act do not interfere with the policies and structure of the Uniform Act but actually further its policy of coordination and recommend themselves for consideration by the sponsors of the Uniform Act in making future amendments to that Act. This is particularly true of two provisions. First, under the Missouri Act registration by coordination is possible not only when a registration statement is filed under the Securities Act of 1933 but also when the offering is made pursuant to an exemption under sections 3(b) or 3(c) of that act if the use of a prospectus or offering circular is required.380

This is a laudable and logical provision since the widely used Regulation A381 offering, although technically an exemption from registration, actually amounts to a simplified and expeditious form of registration. Second, the Missouri Act has originated a transaction exemption for offers and sales by non-issuers, who are not in a control relationship with the issuer, if the price is reasonably related to the current market price and the issuer has registered and is reporting under the Securities Exchange Act of 1934.382

This has the effect of achieving a type of coordination with the increasingly important registration and disclosure requirements of the Securities Exchange Act of 1934383 and is a commendable step toward harmonization of the Missouri Act with the federal securities acts.

380. § 409.303(d), RSMo 1967 Supp. See 15 U.S.C. §§ 77c(b), 77c(c) (1964). These sections authorize the SEC to create exemptions for small issues by rules or regulations. The SEC has adopted several provisions under this authority, most of which entail the requirement that a prospectus or offering circular be used. These "exemptions" are modeled on the registration and prospectus requirements of the Securities Act of 1933. See 15 U.S.C. §§ 78l, 78m (1969).


383. Since the 1964 amendments to the Federal securities acts, these requirements have become applicable to a substantially larger number of corporations and have assumed an increasingly important role in Federal securities regulation. Prior to the 1964 amendments they applied only to corporations with securities listed on a national securities exchange. Today, they also apply to other corporations which have gross assets of at least $1,000,000 and at least 500 equity security
Nevertheless, many of the Missouri deviations from the Uniform Act materially alter the substance of the provisions changed and frustrate the attempt of the Uniform Act to promote uniformity and coordination in state regulation of interstate securities transactions as an alternative to Federal preemption. These deviations generally reflect a strict adherence to traditional Missouri policies and practice in securities regulation.

One of the most serious deviations is the standard for registration of securities expressed in section 409.306(a)(2)(E) which gives the Commissioner sweeping discretion to determine not only whether the offering constitutes a fraud on purchasers (the Uniform Act standard) but also whether "any aspect of the offering is substantially unfair, unjust, unequitable (sic) or oppressive, or . . . the enterprise of the issuer is based upon unsound business principles." Apparently, from the separation of the three clauses in the paragraph, each is intended to identify a distinct and independent criterion. Hence, the Commissioner may conclude that some aspect of the offering is substantially "unfair, unjust, unequitable (sic) or oppressive," even though the offering does not work or tend to work a fraud on purchasers, and may therefore deny registration. And even if neither of these conditions which relate essentially to the fairness of the offering exist, the Commissioner may still deny registration if he concludes that the business venture is "based upon unsound business principles." This phrase is totally undefined in the Act and apparently gives the Commissioner unlimited discretion to pass on the investment merits of the security offered. In such case the prospective public investor is denied the opportunity to make his own investment decision however well informed he may be. The fact that decisions of the Commissioner denying applications for registration of securities are seldom appealed for practical reasons and the fact that a discretionary standard of this breadth would rarely admit of reversal on appeal mean, in effect, that the Commissioner's discretion becomes the ultimate criterion for registration of securities in Missouri. If

such vague standards are indeed constitutional, the Commissioner is vested with an awesome power over the growth of business enterprise and business investment in Missouri.

The exercise of this discretion is implemented by further Missouri variations from the Uniform Act which give the Commissioner authority to require, in addition to the registration statement, an unlimited amount of information, including "appraisals, audits, examinations and engineering studies." That this burden is also placed on registration by coordination is consistent with the fact that the same registration standards are applicable under both qualification and coordination. But this is a substantial departure from the Uniform Act coordination provision which limits the administrator to other information and documents filed under the Securities Act of 1933. Thus, the Missouri Act is in direct conflict with the basic policies of uniformity and coordination at a critical point.

In harmony with these broad grants of discretionary authority is the additional administrative power to police the general area of securities frauds vested in the Commissioner under section 409.408. This provision, derived from prior Missouri statutes, is also foreign to the Uniform Act which requires the administrator to resort to judicial proceedings to enjoin securities frauds and other violations of the act. While this deviation from the Uniform Act does not seriously interfere with its basic policies and purposes, it does create an extraordinarily broad degree of discretionary power in the Commissioner to impose administrative sanctions on a wide range of private transactions subject only to extremely vague limitations.

Further substantial deviations from the Uniform Act found in the area of exemptions from registration have the effect of enlarging the exemptions available, rather than narrowing their scope as might be expected from the stringent securities registration standards in the Missouri Act. Most of these changes are based on prior Missouri law despite the fact that substantial uniformity in this area was an important concern of the draftsmen of the Uniform Act. In this respect the Missouri Act has materially enlarged the size of the small offering exemptions available to an issuer.

384. § 409.304(b)(17), RSMo 1967 Supp. In effect, the same requirement is included in the Missouri Act provisions on registration by coordination. § 409.309(b)(9), RSMo 1967 Supp. In addition, the Missouri Act has greatly enlarged the scope and substance of the periodic reports which the Commissioner may require and the duration of the reporting requirement. § 409.305(1), RSMo 1967 Supp. But cf. Commissioner's Rules VII D and VII E.

and has added extensive exemptions for non-issuer transactions. On the other hand, several Missouri variations in this area have the effect of narrowing the exemptions available. These include the general exclusion of transactions in interests in oil and gas and other mining properties from all of the transaction exemptions. Also included are the qualifications imposed on the exemption for securities of non-profit organizations and on the exemption for transactions by registered broker-dealers.

The repeated deviation from the Uniform Act to perpetuate the policies and practices of past Missouri securities laws is regrettable for two distinct reasons. First, the fundamental purposes of the Uniform Act have been seriously hindered by the fact that many states like Missouri have changed basic provisions in order to preserve local traditions. It is to be hoped that in the near future the Missouri General Assembly will give serious consideration to amendments which will reject these variations and substitute the provisions of the Uniform Act in their place. Second, it is regrettable that Missouri has so frequently retained antiquated policies and approaches securities regulation without critical re-evaluation under contemporary conditions. If, indeed, these are still the best policies for Missouri, they will withstand review. But if public investment today in corporate securities has become sufficiently common-place and well-understood to warrant a new policy and approach which would facilitate both public financing of business enterprise and private investment, the public in Missouri is ill-served by archaic policies and excessively restrictive legislation.

It is submitted that a critical review of the fundamental policy in this area is overdue and should be undertaken in the near future. The need for re-evaluation is most conspicuous in the provisions of the new Act regarding the registration of securities. On the one hand, a severely protective qualification philosophy is retained. On the other hand, the Missouri Act also includes some elements of a disclosure philosophy, and contains numerous exemptions from registration. Thus, when registration is required, the standards are severe. Yet, in many cases no registration whatever is

387. § 409.402(b), RSMo 1967 Supp. Cf. § 409.401(l), RSMo 1967 Supp. Apparently a sale to a Missouri resident of a 1/2 interest in an oil and gas lease would require full-scale registration under the Act.
389. See, e.g., § 409.304(d), RSMo 1967 Supp. and Commissioner's Rule V. See also §§ 409.402(a)(6), (b)(2)(A), (b)(15), RSMo 1967 Supp. These exemptions essentially involve disclosure or the availability of information.
required on either a qualification or a disclosure principle. Upon a re-examination of basic policy, serious consideration should be given to whether Missouri should abandon the protective qualification philosophy of securities registration altogether and adopt a modern statute based on the principle of full disclosure of all material facts to prospective purchasers of securities offered for sale, in accord with the policy of the federal securities acts, coupled with an appropriate reduction in the number of available exemptions.