

A CRITIQUE OF THE VERMONT SECURITIES ACT: IS VERMONT'S "BLUE SKY" REALLY GREY?

INTRODUCTION

In 1929,¹ Vermont enacted its first "blue sky" law² to regulate the sale of securities within the state.³ The statute empowered the Commissioner of Banking and Insurance⁴ to deny registration of a security when, "in the opinion of the commissioner the . . . sale of the security may work or tend to work a fraud upon the purchaser."⁵ The Vermont legislature revised the 1929 Act on numerous occasions to keep pace with the constantly changing field of securities regulation.⁶ The statute, however, retained the three pro-

1. 1929 Vt. Acts 93 §§ 1-33 (current version at VT. STAT. ANN. tit. 9, §§ 4201-4241 (1984 & Supp. 1985)). The Act of 1929 provided that Vermont's blue sky law shall be known as the "Securities Act." 1929 Vt. Acts 93 § 1. For purposes of this note, the statute will be referred to either as the "Vermont Act" or simply the "Act."

2. 1 L. LOSS, SECURITIES REGULATION 27 (2d ed. 1961). The term "blue sky law" first came into general use in Kansas in 1911 to describe legislation enacted to control promoters who "would sell building lots in the blue sky in fee simple." *Id.* See also 79 C.J.S. *Supplement Securities Regulation* § 188 n.80 (1974). A state securities law is called a "blue sky" law "because it tends to prevent the sale of stock that represents nothing but blue sky, nothing tangible; it pertains to speculative schemes which have no more basis than so many feet of blue sky." *Id.*

3. In the celebrated "Blue Sky Cases" of 1917, the United States Supreme Court held that the state securities laws of Michigan, South Dakota, and Ohio were a valid exercise of police power. The status neither violated the fourteenth amendment nor unduly burdened interstate commerce. *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

The federal securities laws expressly allow for concurrent state regulation under the blue sky laws. 15 U.S.C. §§ 77r, 78bb (1982). Today, all fifty states have enacted a security act. T.L. HAZEN, *THE LAW OF SECURITIES REGULATION* § 8.1 (lawyer's ed. 1985).

4. 1929 Vt. Acts 93 § 2 (current version at VT. STAT. ANN. tit. 9, § 4201 (1984)). The Commissioner of Banking and Insurance is responsible for administering the Vermont Securities Act. *Id.* For purposes of this note, the terms "Commissioner" and "Administrator" are used to refer to the securities administrators of the Vermont and Uniform Securities Acts respectively.

5. 1929 Vt. Acts 93 § 7 (current version at VT. STAT. ANN. tit. 9, § 4207(6) (1984)). See also 1929 Vt. Acts 93 § 8 (current version at VT. STAT. ANN. tit. 9, § 4208(6) (1984)).

6. More recent amendments to the Vermont Securities Act since 1960 include: an exemption for stock of a cooperative savings and loan association, 1985 Vt. Acts 46 § 2 (current version at VT. STAT. ANN. tit. 9, § 4203(8) (1984 & Supp. 1985)); application procedures and fee required for broker-dealer registration, 1985 Vt. Acts 21 § 1 (current version at VT. STAT. ANN. tit. 9, § 4214(a) (1984 & Supp. 1985)); registration of salesmen, 1985 Vt. Acts 21 § 2 (current version at VT. STAT. ANN. tit. 9, § 4217 (1984 & Supp. 1985)); exemptions for securities sold in certain transactions, 1971 Vt. Acts 143 §§ 1-2, 3-6 (current version at VT. STAT. ANN. tit. 9, § 4204(10), (11), (12), (13) (1984)); and filing fees for registration by notification and qualification, 1969 Vt. Acts 174 §§ 1-2 (current version at VT. STAT. ANN. tit. 9, §§

visions generally considered necessary to regulate the sale of securities:⁷ (1) prohibition of fraudulent practices;⁸ (2) registration of securities;⁹ and (3) registration of broker-dealers.¹⁰

Knowledge of the Vermont Securities Act's contents becomes particularly important to the practicing attorney when he is dealing with a security exempt from federal law.¹¹ If the security is not exempt, compliance with federal registration requirements is necessary.¹² In such a case, registration under federal law may satisfy state registration requirements.¹³ However, when a federal exemption is satisfied, the attorney may also be required to register the security under the Vermont Act, unless a state exemption exists.

Additionally, the Vermont Securities Act's fraud and rescission provisions are of particular importance to persons maintaining or defending an action for civil liability.¹⁴ Although federal law, particularly Rule 10b-5,¹⁵ has historically been used to attack securities fraud, recent case law limiting liability¹⁶ may give rise to increased litigation under state law.

As of this writing, only two cases¹⁷ have interpreted the Vermont Securities Act. Thus, this note is not intended to be an exposition of the case law that has accumulated under the Act. Rather, it critiques the Vermont Securities Act in its current form by comparing and contrasting the more important provisions with those

4207(8), 4208(6) (1984)).

7. 1 L. Loss, *supra* note 2, at 33.

8. VT. STAT. ANN. tit. 9, § 4224 (1984).

9. VT. STAT. ANN. tit. 9, § 4205 (1984).

10. VT. STAT. ANN. tit. 9, § 4213 (1984).

11. The three most important exemptions are: (1) the small offering exemption, Regulation A, 17 C.F.R. §§ 230.251-.264 (1985); (2) the limited offering exemption, Regulation D, 17 C.F.R. §§ 230.501-.506 (1985); and (3) the intra-state offering exemption, 17 C.F.R. § 230.147 (1985).

12. A review of the federal securities laws is beyond the scope of this note. *But see* L. Loss, *SECURITIES REGULATION* (2d ed. 1961 & Supp. 1969) for a comprehensive discussion of the federal regulatory scheme.

13. VT. STAT. ANN. tit. 9, § 4208(2)(J) (1984). *See infra* text accompanying note 316.

14. *See infra* text accompanying notes 130-61.

15. 17 C.F.R. § 240.10b-5 (1985).

16. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the United States Supreme Court held that a private party must prove the element of scienter in order to maintain a Rule 10b-5 action. *See, e.g., Lowenfels, Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1971).

17. *Northern Terminals, Inc. v. Leno*, 136 Vt. 369, 392 A.2d 419 (1978), and *Bartels v. Algonquin Properties*, 471 F. Supp. 1132 (D. Vt. 1979). *See infra* text accompanying notes 56-62. Also, *see infra* notes 130-131 and accompanying text.

of the Uniform Securities Act.¹⁸ Particular attention is given to various issues which may surface during implementation of the statute. Accordingly, emphasis is given to the Uniform Securities Act, as well as federal and state case law, to provide the practicing attorney with an indication of how Vermont courts are likely to resolve such issues in the future. Finally, this note recommends state adoption of the Uniform Securities Act in its entirety, or at a minimum those sections that would resolve the major insufficiencies and ambiguities inherent in the Vermont Act.

I. DEFINITIONS

The practicing attorney's knowledge of a blue sky law's registration requirements, exemptions, and proscriptions necessitates a basic understanding of the statute's definitional section. A full understanding of the Vermont and Uniform Securities Acts must therefore begin with a summary of the definitional sections. The terms contained in both acts are similarly defined. However, unlike the Uniform Act, the Vermont Act's definitional section is very limited.¹⁹ Thus, the interpretation of particular terms used throughout the Vermont Act will be left to judicial or administrative discretion, absent legislative action.

A. Issuer

The Vermont Securities Act defines an "issuer" as any person who issues or proposes to issue securities.²⁰ Any natural person acting as a promoter on behalf of a corporation, trust, unincorporated association, or partnership is also considered an issuer.²¹ A "person" is defined as including natural persons, corporations, partnerships, associations, joint stock companies, and unincorporated organizations.²²

18. UNIFORM SECURITIES ACT §§ 101-419, 7B U.L.A. 509 (1958). The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Securities Act in 1956. Unlike Vermont, thirty-six states and the District of Columbia have substantially adopted the Uniform Securities Act in their respective jurisdictions. *Id.*

19. VT. STAT. ANN. tit. 9, § 4202 (1984). Unlike the Uniform Securities Act, the Vermont Act fails to define several important terms, such as "investment advisor," "non-issuer," "fraud," and "guaranteed."

20. VT. STAT. ANN. tit. 9, § 4202(4) (1984).

21. *Id.*

22. VT. STAT. ANN. tit. 9, § 4202(6) (1984).

The Uniform Act contains similar definitions of the terms issuer²³ and person.²⁴ However, the statute also specifies additional qualifications on the term issuer for peculiar situations which are beyond the scope of this note.²⁵

B. Sale

The Vermont Securities Act defines a "sale" as "every disposition or attempt to dispose of a security for value."²⁶ A sale also includes "an exchange, an attempt to sell . . . or an offer to sell directly or by agent, circular, letter, advertisement or otherwise."²⁷

The Vermont Act, unlike the Uniform Securities Act,²⁸ incorporates the definition of an "offer" in the definition of a sale.²⁹ The language defining a sale is very broad, thus vesting in the Commissioner virtually unlimited discretion in determining whether a particular transaction constitutes a sale for purposes of the Act.

The Vermont legislature's adoption of broad definitional language for the term "sale" encourages compliance with the Act's registration provisions³⁰ at the inception of a securities transaction. For example, the statute prohibits the sale of securities within the state unless registered, exempt from registration, or sold in an exempt transaction.³¹ An issuer attempting to sell non-exempt secur-

23. UNIFORM SECURITIES ACT § 401(g). An "issuer" is any person who issues or proposes to issue securities. *Id.*

24. UNIFORM SECURITIES ACT § 401(i). A "person" includes any individual, corporation, partnership, joint-stock company, trust, unincorporated organization, a government or its political subdivision. *Id.*

25. The Uniform Act qualifies the term "issuer" in the following situations: (1) if the securities to be issued are certificates of deposit, collateral-trust certificates, or shares in an unincorporated investment trust not having a board of directors, the term "issuer" means the person performing the acts and assuming the duties of depositor or manager of the trust or other instrument under which the securities are issued, and (2) issuer does not include persons who issue certificates of interest in oil, gas, or mining titles or leases. UNIFORM SECURITIES ACT § 401(g)(1)-(2).

26. VT. STAT. ANN. tit. 9, § 4202(7) (1984).

27. *Id.*

28. UNIFORM SECURITIES ACT § 401(j)(1), (2). A sale is defined as "every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value." UNIFORM SECURITIES ACT § 401(j)(1). An offer includes "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." UNIFORM SECURITIES ACT § 401(j)(2).

29. VT. STAT. ANN. tit. 9, § 4202(7) (1984).

30. VT. STAT. ANN. tit. 9, § 4207-4208 (1984). See *infra* section VI for registration of securities.

31. VT. STAT. ANN. tit. 9, § 4205 (1984).

ities prior to registration would be advised not to offer its securities through advertisement. Advertising such an offering for even informational purposes technically constitutes a sale under the Act.³² The issuer would likely be subject to penalties for violating the Act's registration provisions although no actual exchange of securities for value took place. By prohibiting the advertisement of such securities, the Act fosters the protection of unwary and innocent investors, and eliminates dissemination of possibly misleading or deceptive information prior to registration of the securities. Thus, investors can make a more informed decision to purchase by basing their action upon information about the issuer and its securities required to be disclosed under the Act.³³

Under both the Vermont and Uniform Securities Acts, the requirement of "value"³⁴ contemplates an exchange of consideration in securities transactions. Thus, the drafters of both acts presumably intended that a bona fide gift of a security would not constitute a "sale" under the blue sky laws. Federal and state courts outside of Vermont have generally held that a bona fide gift of stock, which is not part of an associated transaction,³⁵ is not considered to be a sale under the securities laws.³⁶ Although Vermont courts have yet to determine whether a gift of stock constitutes a sale under Vermont law, the requirement of value makes a similar conclusion inevitable. For example, a donor who makes a gift of stock receives no value in exchange. As a result, the disposition of the stock does not constitute a "sale" as defined in the Vermont Act.

Providing an exception for gifts of securities is consistent with the purpose of blue sky regulation.³⁷ State laws regulate disposi-

32. The Vermont Securities Act also makes it unlawful for any person to publish, circulate or distribute any circular, prospectus, advertisement or printed matter constituting an offer to sell unregistered securities. VT. STAT. ANN. tit. 9, § 4234(a) (1984).

33. All information filed with the Commissioner pertaining to securities, issuers, and broker-dealers is available for public inspection. The Commissioner may, however, withhold information which would create an injustice to the persons filing the information. VT. STAT. ANN. tit. 9, § 4235 (1984).

34. For a discussion of what constitutes "value" under the federal securities laws, see 1 L. LOSS, *supra* note 2, at 513-18 (1961 & Supp. IV 1969).

35. Generally, a security is part of an "associated transaction" if it is given as a "gift" in conjunction with the sale of other securities. In such a case, the security is considered to "constitute part of the consideration of the subject of the purchase and to have been offered and sold for value." UNIFORM SECURITIES ACT § 401(j)(3).

36. *Shaw v. Dreyfus*, 172 F.2d 140 (4th Cir. 1949); *Andrews v. Chase*, 89 Utah 51, 49 P.2d 938 (1935), *reh'g. denied*, 89 Utah 73, 57 P.2d 702 (1936). See also 69 AM. JUR. 2d *Securities Regulation—State* § 29 (1973).

37. L. LOSS & E. COWETT, *BLUE SKY LAW* 19 (1958). The purpose of the blue sky laws is

tions of securities by issuers and broker-dealers engaged in that business, not individuals desiring to make a gift of a security. Additionally, a bona fide gift involves a gratuitous transfer by the donor, and therefore, there is little concern with preventing fraud on the donee because he has not parted with anything of value.

The absence of consideration or value is the operative mechanism for an exemption of gifts from the securities laws. A question arises as to why the issuer, in the above example, should be held in violation of the Act's registration provisions when the issuer simply advertised an unregistered offering but did not receive any value. The answer presumably lies in the character of the transaction. A gift of security (stock) does not contemplate an exchange of value for the security. By contrast, the issuer's advertisement of its securities represents "a solicitation of a sale" or "an attempt to dispose of" a security for value.³⁸ Thus, the issuer's actions bring it within the broad statutory language defining a "sale."³⁹

C. Security

1. General Definition

The Vermont Securities Act defines as a security:

land situated outside of the state, any note, stock, share, bond, debenture, evidence of indebtedness, beneficial interest in title to property, profits, or earnings, and any other instrument, whether of the same or of a different kind, commonly known as a security, and any certificate, contract, or instrument representing an interest in any of the foregoing.⁴⁰

This definition is similar to the definitions of a security contained in the federal Securities Act of 1933⁴¹ and the Uniform Securities Act.⁴² All three acts merely list examples of securities without elaboration. These listings, however, are not intended to

primarily to protect unwary and innocent investors. *Id.*

38. VT. STAT. ANN. tit. 9, § 4202(7) (1984); UNIFORM SECURITIES ACT § 401(j)(2).

39. The broad statutory language defining a sale may also give rise to a potential conflict of laws problem. This can occur when the issuer's actions incident to the offer and sale of its securities take place in more than one state. A discussion of conflicts among state blue sky laws is beyond the scope of this note. However, for a comprehensive discussion of the subject, see L. LOSS, *Conflicts of Laws*, 71 HARV. L. REV. 209 (1977).

40. VT. STAT. ANN. tit. 9, § 4202(9) (1984).

41. Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1) (1982).

42. UNIFORM SECURITIES ACT § 401(1).

comprise the exclusive definition of a security under each of the respective acts. This assertion is evidenced by similar language contained in each act that any instrument "commonly known as a security"⁴³ will be treated as such. A congressional report on the federal Securities Act of 1933 exemplifies a general legislative attitude favoring a broad statutory definition. The report stated that Congress defined the term security "in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security."⁴⁴ The adoption of broad language defining a security is essential to any statutory scheme which regulates the sale of securities. Otherwise, an incentive inures to persons seeking to evade the statute's reach by devising unconventional and novel instruments possessing the characteristics of securities.⁴⁵

Federal and state courts have played a major role in expanding the definition of a security beyond those instruments contained in the federal and state securities laws.⁴⁶ Notwithstanding the broad language treating as a security any instrument "commonly known as a security," the expansion of the definition has resulted primarily from judicial interpretation of the statutory phrase "investment contract."⁴⁷

2. Investment Contract

The investment contract is the most common vehicle giving rise to a security under the federal and state laws.⁴⁸ The federal Securities Act of 1933 and the Uniform Securities Act specifically mention this type of security, and it is vaguely referred to in the Vermont Securities Act.⁴⁹ Although the investment contract represents a highly complex and often novel agreement, federal and state courts have attempted to define it. Essentially two tests have been developed to define an investment contract: (a) the *Howey*

43. VT. STAT. ANN. tit. 9, § 4202(9) (1984); UNIFORM SECURITIES ACT § 401(l); Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1).

44. H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933).

45. See 1 L. Loss, *supra* note 2, at 455.

46. See *infra* text accompanying notes 87-96.

47. T. L. HAZEN, *supra* note 3, at § 1.5.

48. Grundwaldt, *Securities Regulation in South Dakota*, 24 S.D.L. REV. 36, 38 (1977).

49. VT. STAT. ANN. tit. 9, § 4202(9) (1984). The statute states that a security "shall include . . . any certificate, contract or instrument representing an interest in any of the foregoing." *Id.* (emphasis added).

test,⁵⁰ and (b) the risk capital test.⁵¹

a. *The Howey Test*

The United States Supreme Court, in *SEC v. W.J. Howey Co.*,⁵² first summarized the elements of an investment contract. In *Howey*, the issue was whether an offer of citrus grove development units coupled with a management contract to out-of-state purchasers constituted an unregistered security in violation of the federal Securities Act of 1933.⁵³ The Court held in the affirmative, finding that the development units, coupled with a management contract, constituted an investment contract under section 2(1) of the federal Securities Act of 1933.⁵⁴ The Court defined an investment contract as a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of a promoter or a third party."⁵⁵

Subsequently, in *Northern Terminals, Inc. v. Leno*,⁵⁶ the Vermont Supreme Court adopted the *Howey* test to define the elements comprising a security. In *Northern Terminals*, the plaintiff owned a combination gas station-retail grocery store which it leased to the defendants.⁵⁷ Several months into the ten-year lease period, the parties executed an addendum to the original lease whereby the plaintiff would install a "walk-in" cooler and a "modern island marketer" facility on the leasehold premises.⁵⁸ The installation of the facilities was to be financed by an additional monthly rental payment and a one cent royalty on each gallon of

50. *SEC v. W.J. Howey*, 328 U.S. 293 (1946). See *infra* text accompanying notes 52-62.

51. The risk capital test was first developed by the California Supreme Court in *Silver Hills Country Club v. Sobiesky*, 55 Cal.2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961). See also Note, *Securities Regulation: Risk Capital—Twenty Years After Silver Hills*, 35 OKLA. L. REV. 436 (1982).

52. 328 U.S. 293 (1946). In *Howey*, the respondents offered citrus grove development units to prospective out-of-state purchasers who invested money with the expectation of receiving profits. Each prospective buyer was additionally offered a service contract, after being informed that it was not feasible to invest in a grove unless service arrangements were made. The Securities and Exchange Commission sought to enjoin the sale of the units, claiming that they constituted unregistered securities under the Securities Act of 1933. *Id.* at 294, 295.

53. *Id.*

54. *Id.* at 298, 299.

55. *Id.*

56. 136 Vt. 369, 392 A.2d 419 (1978).

57. *Id.* at 370, 392 A.2d at 420.

58. *Id.*

gas sold on the premises. The plaintiff later sued the defendants for breach of the alleged lease agreement. The defendants denied the existence of the agreement and filed a counterclaim that the agreement was instead an unregistered security investment in violation of the federal Securities Act of 1933 and the Vermont Securities Act.⁵⁹

The Vermont Supreme Court, expressly relying on the *Howey* test, stated that a *security* consists of the following elements: "1) an investment of money 2) in a common enterprise 3) with an expectation of profits solely from the efforts of others."⁶⁰ The court relied on the words "solely from the efforts of others" as dispositive in holding that the agreement was a conventional landlord-tenant lease agreement rather than a security.⁶¹ The court reasoned that any increased profits accruing to the defendants from the acquisition of the facilities under the lease addendum would not have resulted from the managerial efforts of the plaintiff.⁶² The defendants' retention of control over the operation and management of the facilities precluded the court from finding the existence of a security under the *Howey* test.

In *Northern Terminals*, the Vermont Supreme Court adopted the *Howey* test to define a *security*. By contrast, the United States Supreme Court formulated the *Howey* test to define an *investment contract*, a single type of security. Whether the Vermont Supreme Court intended to expand the application of the *Howey* test is unclear. However, the Vermont attorney can expect that the court will apply the *Howey* formula to any unlisted transaction or scheme to determine whether it falls within the purview of the Vermont Securities Act.

b. *The Risk Capital Test*

Although the *Howey* case provides the most frequently cited test used to define "investment contract" under both federal and state statutes,⁶³ it has met with dissatisfaction for two reasons.⁶⁴ First, the *Howey* formula failed to recognize that a security may

59. *Id.*

60. *Id.*

61. *Id.* at 371, 392 A.2d at 421.

62. *Id.*

63. See 1 L. Loss, *supra* note 2, at 483.

64. Grundwaldt, *supra* note 48, at 39.

exist although the investor does not expect a monetary return on his investment.⁶⁵ Second, the *Howey* test led courts to analyze investment projects mechanically, based on a narrow concept of investor participation.⁶⁶ Courts became entrapped in polemics over the phrase "solely from the efforts of others," thus disqualifying agreements as investment contracts where an investor participated in the operation of the business to a limited degree.⁶⁷ These courts did not consider the fundamental question of whether the statutory policy of affording investors broad protection should be applied to situations where an investor risks his capital and participates in the operation of the business to a limited degree.⁶⁸

The risk capital test was first developed by the California Supreme Court in *Silver Hills Country Club v. Sobiesky*.⁶⁹ In *Silver Hills*, the petitioners solicited memberships to build a country club. They signed a contract for seventy-five thousand dollars to purchase several buildings, including a ranch and stable, on a twenty-two acre parcel of property.⁷⁰ The petitioners committed only four hundred dollars of their own equity.⁷¹ The remainder of the project⁷² was to be financed through memberships carrying the right to use the club's facilities.⁷³ The investors expected only to use the facilities and not participate in any profits.⁷⁴

The California Supreme Court noted that a security could arise in transactions where "capital is placed without any expecta-

65. *Id.* at 38.

66. *State v. Hawaii Market Centers*, 52 Hawaii 642, ___, 485 P.2d 105, 108 (1971). See *infra* text accompanying notes 80-85.

67. *Id.* "In *Howey*, the Supreme Court was faced only with the question whether a scheme involving no actual investor participation was an investment contract. That court has not yet decided whether an investment plan involving non-managerial investor participation also falls within the concept of an investment contract security." *Id.* at 642, ___, 485 P.2d at 105, 108 n.3.

68. *Id.* at 642, ___, 485 P.2d at 105, 108. *Hawaii Market Centers* involved a limited degree of investor participation where investors were expected to recruit new members and distribute purchase authorization cards in order to earn income. *Id.*

69. 55 Cal.2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961).

70. *Id.*

71. *Id.*

72. After taking possession of the property, the petitioners sowed grass, installed a swimming pool, and remodeled the main building. They installed showers, a steam room, and health and exercise equipment. The petitioners also planned to make further improvements, including additional swimming pools and a golf course. *Id.* at 812, 361 P.2d at 906-07, 13 Cal. Rptr. at 187.

73. *Id.*, 361 P.2d at 907, 13 Cal. Rptr. at 187.

74. *Id.*

tion of material benefits.”⁷⁵ The court indicated that the “expectation of profits” was not the sole test in determining the existence of a security.⁷⁶ The securities laws were promulgated to protect not only those who seek a material return on their investment, but also “afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or the other.”⁷⁷

In *Silver Hills*, the court was concerned with “the risk to the investor that the benefits, not necessarily profits, would never materialize.”⁷⁸ The court concluded that a security would exist whenever a promoter, seeking to develop his undercapitalized enterprise, uses capital contributions of investors who expect at least some benefit other than profits from the enterprise.⁷⁹ Thus, *Silver Hills* addresses the first dissatisfaction with the *Howey* test by holding that an investment contract could exist despite the lack of expectation of monetary profits.

The Hawaii Supreme Court further refined the risk capital test in *State v. Hawaii Market Centers, Inc.*⁸⁰ In *Hawaii Market Centers*, the court established a modified risk capital test that incorporates the important elements of control and profit motivation established in *Howey* with the element of risk capital.⁸¹ The court stated that an investment contract is created whenever:

- (1) An offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.⁸²

The modified risk capital test, unlike the test developed in

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

76. *Id.*

77. *Id.*

78. Note, *supra* note 51, at 440.

79. *Id.*

80. 52 Hawaii at 642, 485 P.2d at 105.

81. Note, *supra* note 51, at 440.

82. *Hawaii Market Centers*, 52 Hawaii at —, 485 P.2d at 109.

Silver Hills, requires a finding that the investor lacked control over his investment and was motivated by a desire to profit from the investment.⁸³ However, the control element under the modified risk capital test is not as strictly construed as it was under the *Howey* formula. In *Hawaii Market Centers*, the court reasoned that short of actually controlling the managerial aspects of a venture, a limited degree of investor participation should not preclude the finding of an investment contract.⁸⁴ The court stated, "it is irrelevant to the remedial purposes of the Securities Act that an investor participated in a minor way in the operation of the enterprise."⁸⁵

The risk capital test has yet to be adopted by a Vermont court.⁸⁶ However, because the risk capital test was developed in response to dissatisfaction with the *Howey* test in particular situations, its application may be forthcoming should the appropriate factual circumstances arise.

Judicial interpretation of the statutory phrase "investment contract" has resulted in the development of the *Howey* and risk capital tests. By applying these tests, federal and state courts have found a vast array of unconventional investments to be within the securities laws. Courts have held the following to be securities: scotch whiskey,⁸⁷ cosmetics,⁸⁸ earthworms,⁸⁹ beavers,⁹⁰ muskrats,⁹¹ rabbits,⁹² chinchillas,⁹³ fishing boats,⁹⁴ vacuum cleaners,⁹⁵ and self-improvement courses.⁹⁶ Courts have therefore demonstrated a willingness to ensure that unwary and innocent investors who risk

83. Note, *supra* note 51, at 440.

84. *Hawaii Market Centers*, 52 Hawaii at ___, 485 P.2d at 111.

85. *Id.*

86. *But see* *Stanley v. Commercial Courier Service, Inc.*, 411 F. Supp. 818 (D. Or. 1975); *Artistic Door Corp. v. Rheney*, 384 So.2d 179 (Fla. Dist. Ct. App. 1980); *Healy v. Consumer Business Systems, Inc.*, 5 Or. App. 19, 482 P.2d 549 (1971); *A.B.A. Auto Lease Corp. v. Adam Indus., Inc.*, 387 F. Supp. 531 (E.D. Pa. 1975).

87. *SEC v. M. A. Lundy Associates*, 362 F. Supp. 226 (D.R.I. 1973).

88. *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).

89. *In re Worm World, Inc.*, 3 BLUE SKY L. REP. (CCH) ¶ 71,414 (S.D. Dept. of Commerce & Consumer Affairs 1978).

90. *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967).

91. *State v. Robbins*, 185 Minn. 202, 240 N.W. 456 (1932).

92. *Stevens v. Liberty Packing Corp.*, 111 N.J. Eq. 61, 161 A. 193 (1932).

93. *SEC v. Chinchilla, Inc.*, FED. SEC. L. REP. (CCH) ¶ 90,618 (N.D. Ill. 1953).

94. *SEC v. Pyne*, 33 F. Supp. 988 (D. Mass. 1940).

95. *Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir. 1977).

96. *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, 414 U.S. 821 (1973).

their capital have the protections afforded by the securities laws.

D. Other Definitions

The Vermont Securities Act additionally defines such terms as "agent," "broker," "dealer," and "salesman." However, this note does not attempt to define these terms here. Instead, the technical meanings ascribed to such words is provided in Section IV where their discussion is most relevant.

II. ANTI-FRAUD PROVISIONS

The Vermont and the Uniform Securities Acts contain general anti-fraud sections proscribing fraudulent acts and practices in securities transactions.⁹⁷ Both acts, generally, make unlawful the use of any device, scheme, or artifice to defraud, as well as the use of any act or practice which would tend to operate as a fraud.⁹⁸ Both acts additionally prohibit the use of false statements,⁹⁹ and the omission of material facts¹⁰⁰ necessary to prevent misleading statements.

A. Scope

Section 101 of the Uniform Securities Act, patterned after SEC Rule 10b-5,¹⁰¹ prohibits fraud in the *purchase* as well as the sale of a security.¹⁰² Application of the statute's anti-fraud provision to *buyers* and *sellers* alike seems equitable. Originally, blue sky laws were directed against fraudulent sellers alone.¹⁰³ However, experience at both federal and state court levels demonstrates that fraud is not a "one-way street."¹⁰⁴ For example, a stock holder who

97. VT. STAT. ANN. tit. 9, §§ 4224, 4239, 4240 (1984); UNIFORM SECURITIES ACT § 101.

98. VT. STAT. ANN. tit. 9, §§ 4224, 4239 (1984); UNIFORM SECURITIES ACT § 101(1), (3).

99. VT. STAT. ANN. tit. 9, § 4240 (1984); UNIFORM SECURITIES ACT § 101(2).

100. *Id.* A "material fact" is one that a reasonable investor might have considered important to his investment decision. *People v. Cook*, 89 Mich. App. 72, 279 N.W.2d 579 (1979); *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (D. Ark. 1972).

101. 17 C.F.R. § 240.10b-5 (1985).

102. UNIFORM SECURITIES ACT § 101.

103. L. LOSS, COMMENTARY ON THE UNIFORM SECURITIES ACT 7-8 (1976) (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 101) [hereinafter cited as COMMENTARY].

104. *Id.* See *Alley v. Miramon*, 614 F.2d 1372 (5th Cir. 1980), where a shareholder who was fraudulently induced to deliver his shares for collateral in a pledge was held to have standing to sue under Rule 10b-5 as a defrauded seller. Additionally, in *Hackford v. First Security Bank of Utah*, 521 F. Supp. 541 (D. Utah 1981), beneficiaries of a trust that sold shares in an alleged fraudulently induced transaction had standing to maintain a Rule 10b-5

is persuaded to sell securities in reliance on a corporate insider's misrepresentations is defrauded just as one who is persuaded to buy as a result of a seller's false representations is defrauded.¹⁰⁵

In contrast to the Uniform Act, it is unclear whether section 4224 of the Vermont Securities Act applies to fraudulent buyers. Section 4224 prohibits conduct "which would operate as a fraud upon the purchaser,"¹⁰⁶ thus indicating exclusive application to sellers. However, in the same section, it prohibits any unlawful or fraudulent "practice or transaction or course of business relating to the purchase or sale of securities,"¹⁰⁷ thus evidencing application to fraudulent buyers as well. Neither the Vermont legislature nor the Vermont courts have resolved this apparent contradiction as to the reach of section 4224. However, one can safely assume in light of the above statutory language, that section 4224 applies to buyers and sellers alike. In construing statutory language, Vermont courts must ascertain and give effect to the true intent of the legislature, the statutory purpose, and relevant policy considerations.¹⁰⁸ Undoubtedly, one of the purposes and policies underlying the Act is the prohibition of fraudulent practices in securities transactions. Extending section 4224's reach to include fraudulent buyers is consistent with this purpose and policy. In addition, the statutory phrase proscribing any unlawful practice, transaction or course of business relating to the purchase or sale of securities evidences legislative intent to hold fraudulent buyers as well as fraudulent sellers accountable.

B. Sanctions

SEC Rule 10b-5 has been the primary vehicle used to prevent fraud liability in the past.¹⁰⁹ However, the United States Supreme Court has acted to narrow the scope of such actions.¹¹⁰ As a result,

action based on the derivative injury to the beneficiary. See also T. L. HAZEN, *supra* note 3, at §§ 13.2-13.3 for a discussion of fraud in the purchase as well as the sale of securities.

105. COMMENTARY, *supra* note 103, at 7-8 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 101).

106. VT. STAT. ANN. tit. 9, § 4224 (1984).

107. *Id.*

108. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *In re A.C.*, 144 Vt. 37, 42, 470 A.2d 1191, 1194 (1984); *In re G.F.*, 142 Vt. 273, 279, 455 A.2d 805, 808 (1982); *State v. Baldwin*, 140 Vt. 501, 509, 438 A.2d 1135, 1139 (1981).

109. T. L. HAZEN, *supra* note 3, at §§ 13.1-13.2.

110. *Id.* at § 13.1. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Mana Drug Stores*, 421 U.S.

state securities laws may provide the grounds upon which a successful action can be maintained. The Vermont Securities Act and the Uniform Securities Act similarly deter fraudulent acts and practices through imposition of administrative,¹¹¹ criminal,¹¹² and civil sanctions.¹¹³ Thus both acts provide the Commissioner (Administrator) and injured investors with every device available to combat fraud.

1. Administrative Injunction

Section 4224 of the Vermont Act authorizes the Commissioner to bring an action on behalf of the state to enjoin persons from: (1) engaging in fraudulent acts and practices, (2) acting as an unregistered broker-dealer or salesman, or (3) selling securities in violation of the Act.¹¹⁴ Section 4224 also empowers the Commissioner, upon his cognizance, or upon complaint, to conduct investigations into suspected fraudulent activity.¹¹⁵ In connection with any investigation, the Act authorizes the Commissioner to subpoena and depose witnesses if necessary.¹¹⁶

Under the Uniform Act, the Administrator's power to obtain an injunction is broader than that afforded the Commissioner under Vermont law. The Uniform Act authorizes the Administrator to enjoin any person who has engaged or who is about to engage in *any* act or practice which is in violation of any statutory provision.¹¹⁷ Thus, the Administrator can seek an injunction for violations of the statute's anti-fraud section, and also for violations of any provision unrelated to fraud.¹¹⁸ As with the Vermont Act, the Administrator has the power to conduct investigations, issue subpoenas and depose witnesses about any matter being

723 (1975). See also Lowenfels, *supra* note 16, at 891.

111. VT. STAT. ANN. tit. 9, § 4224 (1984); UNIFORM SECURITIES ACT § 408.

112. VT. STAT. ANN. tit. 9, § 4238 (1984); UNIFORM SECURITIES ACT § 409.

113. VT. STAT. ANN. tit. 9, § 4225 (1984); UNIFORM SECURITIES ACT § 410. See *infra* section III for the discussion of civil liability for fraudulent practices.

114. VT. STAT. ANN. tit. 9, § 4224 (1984).

115. *Id.*

116. VT. STAT. ANN. tit. 9, § 4232 (1984).

117. UNIFORM SECURITIES ACT § 408.

118. For example, the unintentional failure of a broker-dealer to file a renewal fee for registration within the time prescribed by the Administrator would be a violation of § 202(c) of the Uniform Act. However, such violation would not necessarily constitute a fraudulent practice. Nevertheless, the Administrator has the power to enjoin the broker-dealer from operating pursuant to § 408 of the Uniform Act.

investigated.¹¹⁹

2. Criminal Penalties

The Vermont Act imposes criminal penalties for violation of any statutory provision.¹²⁰ Violators are subject to imprisonment not exceeding five years and/or a fine not exceeding \$10,000.¹²¹ In a prosecution for fraud, it is unclear whether the state must prove the additional element of scienter.¹²² On its face, the statute only requires proof of a violation. Without proof of a defendant's scienter, criminal and civil violations are indistinguishable. Proof of a violation in a civil proceeding would alone suffice to convict a defendant in a subsequent criminal proceeding. Although the legislature can make any violation of the Act a crime,¹²³ such a result is inconsistent with established criminal jurisprudence at Vermont common law,¹²⁴ as well as the law under the Uniform Securities Act.

Unlike the Vermont Act, the Uniform Act imposes criminal penalties only for *willful* violations of its provisions.¹²⁵ Persons convicted are subject to a term of imprisonment not exceeding three years and/or a fine not exceeding \$5,000.¹²⁶ In jurisdictions adopting the Uniform Act, the state must prove the required mental state of "willfulness" in addition to a violation of the statute. Courts have interpreted willfulness as meaning "knowledge."¹²⁷ Proof of a defendant's specific intent generally does not need to be proven to sustain a conviction under the provisions.¹²⁸ A willful violation is established where the defendant knowingly, as

119. UNIFORM SECURITIES ACT § 409.

120. VT. STAT. ANN. tit. 9, § 4238 (1984).

121. *Id.*

122. In an action for civil damages under the Securities Exchange Act of 1934 and SEC Rule 10b-5, the term scienter refers to a mental state encompassing intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

123. *State v. Labonte*, 120 Vt. 465, 144 A.2d 792 (1958).

124. "Unless expressly provided otherwise by the legislature . . . a crime is composed of an act and an intent, which concur at one point in time." *State v. Hanson*, 141 Vt. 228, 232, 446 A.2d 372, 374 (1982).

125. UNIFORM SECURITIES ACT § 409.

126. *Id.*

127. *State v. Fries*, 214 Neb. 874, ___, 337 N.W.2d 398, 404 (1983); *People v. Blair*, 195 Colo. 462, ___, 579 P.2d 1133, 1138 (1978).

128. *Fries*, 214 Neb. at ___, 337 N.W.2d 398, 405 (1983); *Favor v. State*, 389 So.2d 556, __ (Ala. Crim. App. 1980); *State v. Puckett*, 6 Kan. App. 688, ___, 634 P.2d 144, 153 (1981), *aff'd* 230 Kan. 596, 640 P.2d 1198 (1981).

distinguished from accidentally or involuntarily, committed the crime charged.¹²⁹

III. CIVIL LIABILITY

Civil liability for fraudulent sales, and sales made in violation of the blue sky laws is considered to be a major factor in gaining compliance with the acts.¹³⁰ However, not a single case involving civil liability has been maintained under the Vermont Securities Act.¹³¹ This startling fact means either that the Commissioner has done a magnificent job regulating the securities industry in the state, or that the investing public is uniquely unaware of its rights and obligations under the Act. The lack of even a single case during the statute's fifty-seven year history tends to indicate the latter.

A. *Nature of the Action and Extent of Recovery*

The Vermont Securities Act provides that every sale made in violation of *any* provision of the Act shall be voidable at the election of the purchaser.¹³² The action afforded is in the nature of a suit for rescission. Recovery is limited to the full amount paid by the purchaser, together with taxable court costs and reasonable attorney's fees.¹³³ To establish the seller's liability, the purchaser need only show proof of a violation and make tender of the securities or the contract of sale in open court.¹³⁴ In short, the Act's civil liabilities provision represents an extreme form of strict liability because the purchaser need not prove fault or damage.

Granting a right of action in the purchaser for any violation of the Act's provisions appears to be unnecessarily broad for its purpose of protecting the investor. The honest seller may be exposed to an unreasonable liability for unintentional and relatively harmless violations. This is particularly true since the highly complex

129. *Id.*

130. L. LOSS & E. COWETT, *supra* note 37, at 130-31. In addition to the statutory remedy, a defrauded investor can maintain an action under principles of Vermont common law fraud. *Bartels v. Algonquin Properties*, 471 F. Supp. 1132 (D. Vt. 1979).

131. *Bartels*, 471 F. Supp. at 1132. In *Bartels*, the plaintiff based his claim of securities fraud upon the federal securities laws and Vermont common law fraud. The *Bartels* case, however, did not involve an action for civil liability under the Vermont Securities Act. *Id.*

132. VT. STAT. ANN. tit. 9, § 4225 (1984).

133. *Id.*

134. *Id.*

nature of the blue sky laws may contribute to minor violations. For example, the Commissioner may require that persons claiming the "limited offering exemption"¹³⁵ file reports of sale within a prescribed period of time. A broker-dealer's unintentional failure to file the reports within the time prescribed results in a minor violation of the Commissioner's rules.¹³⁶ An otherwise bona fide transaction, therefore, may be voidable at the whim of the purchaser.

Minor violations of the Act's provisions and administrative rules could be administered more efficiently through imposition of small fines, enforced by the Commissioner or another organization legislatively created for such a purpose.¹³⁷ Additionally, the legislature or Commissioner via the rulemaking authority should be responsible for establishing the magnitude of a given violation. Such a determination could be made by establishing classification criteria for minor and major violations, or by specifically enumerating which violations are subject to rescission by the purchaser.

The Uniform Securities Act adopts the latter approach by specifically detailing the type of conduct that will give rise to a purchaser's action for rescission.¹³⁸ Civil liability is imposed on any person who offers or sells a security in violation of the provisions requiring: (1) the registration of broker-dealers, or (2) the registration of securities.¹³⁹ Liability also extends to any person offering or selling a security by means of any false or misleading statement of a material fact, or by omitting to state a material fact necessary to make the representations non-misleading.¹⁴⁰ In contrast to the Vermont Act, the Uniform Act imposes civil liability only on a narrow scale for specifically enumerated instances. As a result, the Uniform Act still grants protection to investors while protecting sellers from liability for inadvertent and minor violations of its provisions. This produces rational, but more heightened compliance with the Act.

135. VT. STAT. ANN. tit. 9, § 4204(10) (1984). See *infra* text accompanying notes 232-45.

136. The Vermont Act empowers the Commissioner to promulgate general rules and regulations necessary to carry the Act into full force and effect. VT. STAT. ANN. tit. 9, § 4237 (1984).

137. Reckson, *A Comparison of the Florida and Uniform Securities Acts*, 16 U. MIAMI L. REV. 351, 376 (1962).

138. UNIFORM SECURITIES ACT § 410(a)(1).

139. *Id.*

140. UNIFORM SECURITIES ACT § 410(a)(2).

B. Standing to Sue

The Vermont Act provides that every sale or contract of sale made in violation of any provision is voidable at the election of the purchaser.¹⁴¹ Thus, only purchasers of securities, but not sellers, are afforded the remedy of rescission. The Act's anti-fraud provisions, however, are equally applicable to buyers and sellers.¹⁴² It is questionable, therefore, why a seller is precluded from maintaining an action for rescission against a buyer whose conduct is clearly fraudulent.

Although most blue sky laws prohibit fraud in the purchaser and sale of securities, there is no reason to impose civil liability on buyers as a category distinct from sellers.¹⁴³ Sellers have available in state court all the common law and equitable remedies of damages and rescission.¹⁴⁴ However, the common law has proven inadequate to "deal with flagrant cases of fraud at the criminal level,"¹⁴⁵ and without statutory authority, no administrative injunction can ensue to prevent a buyer's fraudulent practices.¹⁴⁶ Consequently, all blue sky laws provide for criminal penalties and injunctive relief against fraudulent buyers.¹⁴⁷

Precluding a seller's statutory rescission action lacks merit when considering the underlying purpose of the Vermont Act—the protection of investors. Fraud is prevalent in the purchase as well as the sale of securities. An investor who sells his securities because of a buyer's false statements is defrauded as is a buyer who purchases securities in reliance on a seller's misrepresentations. Affording an injured seller the statutory remedy of rescission would equalize the treatment accorded buyers and sellers. The availability of common law remedies should not preclude a seller's right of

141. VT. STAT. ANN. tit. 9, § 4225 (1984).

142. See *supra* text accompanying notes 101-08.

143. COMMENTARY, *supra* note 103, at 7-8 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 101).

144. *Id.*

145. *Id.*

146. *Id.*

147. Many of the lower federal courts, however, have implied a civil cause of action against fraudulent buyers. These courts recognize that sellers do not have at their disposal all of the common law and equitable remedies of damages and rescission which are generally available at the state level. See *Alley v. Miramon*, 614 F.2d 1372 (5th Cir. 1980); *Falls v. Fickling*, 621 F.2d 1362 (5th Cir. 1980); *Bosse v. Corowell, Collier & MacMillan*, 565 F.2d 602 (9th Cir. 1977); *Hackford v. First Security Bank of Utah*, 521 F. Supp. 541 (D. Utah 1981).

action for rescission. The buyer, to whom these remedies are also available, can nevertheless maintain a rescission action under the Vermont Act. Thus, an amendment to the Vermont Act allowing a seller's rescission action would foster the Act's underlying purpose.

The current language of the Vermont Act's civil liabilities section also raises an issue concerning a purchaser's standing to sue in particular situations. Section 4225 states that the purchaser is entitled to rescind the sale or contract of sale "upon tender to the seller . . . of the securities sold or the contract."¹⁴⁸ Assume, for example, that the purchaser has no written contract of sale. The prerequisite of "tender of securities" may therefore limit an action in rescission only to those who still own their securities. A question also arises concerning what rights inure to a purchaser who resells his securities and then discovers that the seller acted in violation of the Act. Assuming a purchaser can maintain an action although he no longer retains the securities, there is no guidance as to the measure of recovery. Neither the Vermont Act nor Vermont case law provide any solutions to these problems.

By contrast, the Uniform Securities Act resolves any doubt about a purchaser's standing to sue where he has no contract of sale and has resold the "tainted" securities. The Uniform Act provides that a purchaser who can no longer make tender of the "tainted" securities nevertheless can maintain a cause of action for damages.¹⁴⁹

C. *Liable Parties*

The Vermont Securities Act imposes joint and several liability on the person making the unlawful sale and any director, officer, or agent who has participated in or aided the transaction.¹⁵⁰ The phrase "participated or aided" raises several questions concerning the vicarious liability of a seller's director, officer, or agent. First, what degree of involvement is required by the seller's director, officer, or agent before being found to have participated in or aided the transaction? Second, is it enough that a director or officer directly control the seller, or must the director or officer have actually taken part in consummating the transaction? Finally, does the purchaser have the burden of proving that the director, officer, or

148. VT. STAT. ANN. tit. 9, § 4225 (1984).

149. UNIFORM SECURITIES ACT § 410(a)(2).

150. VT. STAT. ANN. tit. 9, § 4225 (1984).

agent participated in or aided the transaction; or must those parties rebut a presumption of liability arising out of the seller's liability? The Vermont Act does not address these points and the courts have not had an opportunity to fashion any guidelines interpreting the words "participated or aided."

The Uniform Act, however, clearly provides answers to these questions. The statute imposes joint and several liability on every partner, officer, or director of the seller who has violated its provisions.¹⁵¹ Thus, proof of the seller's liability creates a presumption of liability for these parties. The liability of an agent, however, is not absolute. An agent is presumed liable only if he "materially aids" in the sale.¹⁵² The burden of negating the presumption is on the partner, officer, director or agent to prove that "he did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist."¹⁵³

Imposing the burden of proof on the seller's partner, officer, director or agent facilitates a purchaser's cause of action. These seller representatives have within their grasp evidence sufficient to rebut the presumption of liability by establishing their lack of knowledge and participation. Presumably, the purchaser has little or no access to facts sufficient to establish the involvement of the partner, officer, director or agent, unless he or she has dealt directly with such person.

D. Seller's Defenses

The Vermont Act provides two defenses to a purchaser's ac-

151. UNIFORM SECURITIES ACT § 410(b). The Uniform Act's derivative liability section imposes absolute liability upon corporate directors to purchasers of securities sold in violation of the act. Liability is based on the director's position in the corporation, regardless of whether he materially aids in the sale in any way, unless he proves that he does not and could not reasonably have had knowledge of the facts on which liability is predicated. *Arnold v. Dirrim*, ___ Ind. App. ___, 398 N.E.2d 426 (1979). See also *Upton v. Trinidad Petroleum Corp.*, 468 F. Supp. 330 (D. Ala. 1979), *aff'd*, 652 F.2d 424 (1980).

152. *Id.* See *Cola v. Terzano*, 129 N.J. Super. 47, 322 A.2d 195 (Law Div. 1974), in which a broker-dealer's agent was held to have "materially aided" in the sale of unregistered stock for receiving bulletins, attending sales meetings, and sending to the buyer an acknowledgement of the purchase of stock. *But see Jensen v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983), where an accountant for the seller of unregistered securities was held not to have materially aided the sale by performing an independent audit of the seller's balance sheet.

153. UNIFORM SECURITIES ACT § 410(b).

tion for rescission of a sale. First, a purchaser who refuses or fails to accept a written offer of the seller to take back the securities and refund the full purchase price is barred from recovery.¹⁵⁴ The purchaser has thirty days from the date of the offer to make the acceptance.¹⁵⁵ The seller's defense, however, is somewhat vague as stated in the Act. The statute is unclear if such a defense is applicable after suit has been filed or at any time the seller discovers that the sale is subject to some defect. The form that rescission must take is also unclear. The Act does not state whether the seller's written offer must provide the reasons he is making the offer so that the buyer can make an informed choice in deciding whether to accept.

The Uniform Act also bars recovery by the purchaser if he fails to accept a written offer, before suit and at a time when he owns the security, to refund the consideration paid plus interest.¹⁵⁶ The purchaser is also barred from maintaining an action if he receives an offer before suit, but at a time when he does not own the security, unless he rejects the offer within thirty days.¹⁵⁷ The official comment notes that this latter provision allows rejection of the seller's offer when the purchaser is dissatisfied with the seller's computation of damages.¹⁵⁸ A purchaser who can no longer tender his securities in an action for rescission is entitled to receive damages instead.¹⁵⁹ Thus, a purchaser may seek a determination of damages in court, rather than accept a relatively inadequate computation of damages by the seller.

A second defense to a purchaser's rescission action provided for by both acts is a two year statute of limitations,¹⁶⁰ commencing on the date of the original sale. The drafters' comments to the Uniform Act state that the date of sale, as opposed to the date the defect could reasonably be discovered by the purchaser, was chosen to avoid unnecessary uncertainty in the application of the defense.¹⁶¹

154. VT. STAT. ANN. tit. 9, § 4225 (1984).

155. *Id.*

156. UNIFORM SECURITIES ACT § 410(e).

157. *Id.*

158. UNIFORM SECURITIES ACT § 410(e) official comment, subsection f.

159. See *supra* text accompanying note 149.

160. VT. STAT. ANN. tit. 9, § 4225 (1984); UNIFORM SECURITIES ACT § 410(e).

161. COMMENTARY, *supra* note 103, at 151 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 410(e)).

IV. REGISTRATION OF BROKER-DEALERS, SALESMEN, AND INVESTMENT ADVISORS

A. Broker-Dealers

The Vermont and Uniform Securities Acts¹⁶² define broker-dealers in similar terms.¹⁶³ In Vermont, a broker-dealer is defined as "every person other than a salesman who in this state engages either for all or part of his time directly or through an agent in the business of selling any securities issued by himself or another person."¹⁶⁴ The Uniform Securities Act similarly defines a broker-dealer as "any person engaged in the business of effecting transactions in securities for the account of others or for his own account."¹⁶⁵ Under both acts, a person must be engaged "in the business"¹⁶⁶ of buying and selling securities to be considered a broker-dealer. Without that clause, all ordinary investors who sell their securities on a one-time basis would be considered broker-dealers subject to registration.¹⁶⁷ The drafters' comments to the Uniform Act state that the phrase, "engaged in the business," as applied to broker-dealers, "connotes a certain regularity of participation in purchasing and selling activities rather than a few isolated transactions."¹⁶⁸

Excluded from the definition of a broker-dealer under both acts, and therefore exempt from registration, are persons not having a place of business within the state who sell, or offer to sell, securities exclusively to registered broker-dealers doing business within the state.¹⁶⁹ This exemption makes it unnecessary for an out-of-state underwriter¹⁷⁰ to register as a broker-dealer before ne-

162. VT. STAT. ANN. tit. 9, § 4202(3) (1984); UNIFORM SECURITIES ACT § 401(c). The Vermont Securities Act defines "broker" to mean "dealer." VT. STAT. ANN. tit. 9, § 4202(2) (1984). Therefore, this note will use the term "broker-dealer" for consistency with the UNIFORM SECURITIES ACT § 401(c).

163. See 2 L. LOSS, *supra* note 2, at 1297 for some distinguishing attributes of a broker-dealer.

164. VT. STAT. ANN. tit. 9, § 4202(3) (1984).

165. UNIFORM SECURITIES ACT § 401(c).

166. VT. STAT. ANN. tit. 9, § 4202(3) (1984); UNIFORM SECURITIES ACT § 401(c).

167. See 2 L. LOSS, *supra* note 2, at 1296-97.

168. *Id.* at 1295.

169. VT. STAT. ANN. tit. 9, § 4202(3) (1984); UNIFORM SECURITIES ACT § 401(c). Additionally exempted from the definition of a broker-dealer under the Uniform Securities Act are agents, issuers, banks, and foreign broker-dealers who transact business with issuers, broker-dealers, banks, and a limited class of investors within the state. UNIFORM SECURITIES ACT § 401(c).

170. The term "underwriter" refers to any person who purchased "from an issuer with

gotiating with an in-state issuer or arranging a selling group with local broker-dealer involvement.¹⁷¹

The primary difference between the definition of a broker-dealer in the two acts lies in an additional exemption accorded foreign broker-dealers under the Uniform Act. Exempt from the definition are foreign broker-dealers who, during any consecutive twelve month period, do not direct more than fifteen offers to buy or sell to persons within the state.¹⁷² This exclusion is not concerned with the public versus private offering issue; rather, it is intended to remedy the situation which arises when a small broker-dealer, registered in only one or two states, is called upon to temporarily service the accounts of customers located in states where he is unregistered.¹⁷³ For example, this exemption is designed to permit a New Hampshire broker-dealer, not registered in any other state, to transact business with a few customers who live in Vermont, or others vacationing in Florida.¹⁷⁴ Without this exemption, the broker-dealer confronted with such a situation may find that he must either violate the local blue sky law by effecting sales without registering, or risk losing his clientele because he is unable to transact business on short notice.¹⁷⁵ Thus, while providing flexibility to the small foreign broker-dealer, the exemption is sufficiently limited to prevent abuse by broker-dealers, who desire to remain out-of-state to avoid registration.¹⁷⁶

The Vermont Securities Act fails to provide similar flexibility to foreign broker-dealers. The adoption of similar legislation would relieve the small out-of-state broker-dealer of the hardship of registering simply to transact business for a limited period of time.¹⁷⁷

a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in such an undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." BLACK'S LAW DICTIONARY 1369 (5th ed. 1979). An underwriter is generally one who agrees to purchase an entire issue of securities for a specified price, and intends to reoffer or resell the securities to the public. *Id.*

171. UNIFORM SECURITIES ACT § 414(a)-(f) official comment 12.

172. UNIFORM SECURITIES ACT § 401(c).

173. L. LOSS & E. COWETT, *supra* note 37, at 181-83.

174. UNIFORM SECURITIES ACT § 414(a)-(f) official comment 12.

175. Note, *The Uniform Securities Act*, 12 STAN. L. REV. 105, 164 (1959).

176. Reckson, *supra* note 137, at 362.

177. Note, *supra* note 175, at 164. Although a greater burden may be placed on the Commissioner in policing the number of offers made within the state, broker-dealers could be required to submit a memorandum of each offer made with the Commissioner. *Id.*

B. Salesman

The Vermont Act's definition of a salesman¹⁷⁸ is similar to that of an agent under the Uniform Act.¹⁷⁹ The Vermont Act defines a salesman as "every natural person who, other than a broker-dealer, is employed, authorized, or appointed by a broker-dealer or issuer to sell securities in the state."¹⁸⁰ Whether an individual who represents a broker-dealer or issuer is a salesman or agent depends upon many of the same factors which create an agency relationship at common law.¹⁸¹ Thus, a person is considered a salesman or agent if he has manifested a consent to the broker-dealer or issuer to act subject to the broker-dealer's or issuer's control.¹⁸²

C. Registration Procedure for Broker-Dealers and Salesmen

The basic purpose of requiring registration of broker-dealers is "to prevent fraudulent or unqualified persons from entering the securities business, to supervise their activities within the state once registration has been achieved, and to remove them from registration if they fall below any of the statutory grounds."¹⁸³ In Vermont, all broker-dealers and salesmen engaged in the business of selling securities within the state must register with the Commissioner.¹⁸⁴ The broker-dealer's application must contain certain information in a form prescribed by the Commissioner.¹⁸⁵ Additionally, a non-resident broker-dealer must submit to an irrevocable

178. VT. STAT. ANN. tit. 9, § 4202(8) (1984). In Vermont, "agent" is synonymous with "salesman." VT. STAT. ANN. tit. 9, § 4202(1) (1984). This note therefore uses the term "salesman" in reference to the Vermont Act; the term "agent," however, will be used in reference to the Uniform Act.

179. UNIFORM SECURITIES ACT § 401(b). An "agent" means an individual other than a broker-dealer who represents a broker-dealer or issuer in effecting purchases and sales of securities. *Id.*

180. VT. STAT. ANN. tit. 9, § 4202(8) (1984).

181. UNIFORM SECURITIES ACT § 401(b) official comment, subsection b.

182. RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

183. L. LOSS & E. COWETT, *supra* note 37, at 19.

184. VT. STAT. ANN. tit. 9, § 4213 (1984).

185. VT. STAT. ANN. tit. 9, § 4214(a) (Supp. 1985). The information submitted on the application for registration includes the name and address of the broker-dealer's principal place of business, and any branch offices located within the state. The broker-dealer must specify the general character of his business, and the length of time he has been in operation. Also, the information submitted must list the parties interested in the business, such as principals, copartners, officers, and directors. Each party's title and capacity is to be submitted, together with any other information requested by the Commissioner. *Id.*

written consent to service of process¹⁸⁶ upon the Secretary of State regarding any transaction within the state. Upon a finding by the Commissioner that the applicant has complied with the provisions of the statute, the broker-dealer will be registered after payment of a fee and the posting of a bond.¹⁸⁷

In Vermont, the registration formalities required of a salesman are less rigorous. A salesman is granted registration upon the filing of an application by the broker-dealer employing the salesman, satisfactory evidence of the salesman's good character, and a fee.¹⁸⁸

The names and addresses of all registered broker-dealers and salesmen are recorded in a register kept in the Commissioner's office.¹⁸⁹ All information is open to public inspection.¹⁹⁰ Additionally, registrations for broker-dealers and salesmen must be renewed annually.¹⁹¹ The renewal applications must be made within a time and manner prescribed by the Commissioner.¹⁹² The parties re-registering are required to submit a written application and a fee.¹⁹³ The Commissioner may, in his discretion, require additional information concerning the applicant.¹⁹⁴

Registrations of broker-dealers and salesmen, however, may be revoked for: (1) any violation of the statute; (2) a false statement of a material fact in the application for registration; (3) fraudulent acts in connection with the sale of securities; (4) demonstrated unworthiness to transact the business of broker-dealers or salesmen; or (5) with respect to a broker-dealer, to knowingly employ a salesman who has engaged in fraudulent acts.¹⁹⁵ The broker-dealer or salesman is entitled to receive reasonable notice of the charges and an opportunity for a hearing.¹⁹⁶

186. VT. STAT. ANN. tit. 9, § 4215 (1984).

187. VT. STAT. ANN. tit. 9, § 4216 (Supp. 1985). The filing fee for broker-dealer registration is \$200. *Id.* The registration procedures provided for in the Uniform Securities Act are very similar to those contained in the Vermont Act. UNIFORM SECURITIES ACT § 202. Thus, they are not discussed to avoid redundancy.

188. VT. STAT. ANN. tit. 9, § 4217 (Supp. 1985).

189. VT. STAT. ANN. tit. 9, § 4218 (1984).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* The registration fee for each annual renewal is \$200 for broker-dealers and \$30 for salesmen. *Id.*

194. *Id.*

195. VT. STAT. ANN. tit. 9, § 4221(a)(1)-(5) (1984).

196. VT. STAT. ANN. tit. 9, § 4221(a) (1984).

The Uniform Act's registration procedures for broker-dealers and agents are very similar to Vermont's procedures. Broker-dealers and agents must obtain initial or renewal registration by filing with the Administrator an application, consent to service of process, and a fee.¹⁹⁷ Registration may be denied, revoked, or suspended for: (1) willful violations of the act or administrative rules;¹⁹⁸ (2) dishonest or unethical practices in securities transactions;¹⁹⁹ or (3) demonstrated unworthiness to transact business due to inexperience, training, or lack of knowledge of the securities business.²⁰⁰

D. Investment Advisors

The federal Investment Advisors Act of 1940²⁰¹ regulates persons who use the mails or any means of interstate commerce in connection with investment advisory activities.²⁰² Thus, an investment advisor located in Vermont, whose business crosses state lines, is subject to the registration requirements of federal law. However, a person engaged in advisory activities solely within Vermont is exempt from coverage of federal law.²⁰³ In such a case, regulation of investment advisors by state law becomes particularly important. The Vermont Securities Act, however, completely fails to regulate such investment advisors. The statute neither defines the term "investment advisor" nor requires the registration of persons engaged in advisory activities within the state.

The Uniform Securities Act, by contrast, provides a comprehensive regulatory scheme requiring the registration of investment

197. UNIFORM SECURITIES ACT § 202(a).

198. UNIFORM SECURITIES ACT § 204(a)(B).

199. UNIFORM SECURITIES ACT § 204(a)(G).

200. UNIFORM SECURITIES ACT § 204(a)(I). See section 204(b) for provisions governing the application of § 204(a)(I). UNIFORM SECURITIES ACT § 204(b). Also, see UNIFORM SECURITIES ACT § 204(a) for additional factors upon which the Administrator may revoke a broker-dealer's or agent's registration.

201. 15 U.S.C. §§ 80b-1 to 80b-21 (1982). For a discussion of federal regulation of investment advisory publishers under the Investment Advisors Act of 1940, see Note, *Regulation of Investment Newsletter Publishers: The SEC's Power Reaches a New Lowe*, 11 Vt. L. Rev. 175 (1986).

202. 15 U.S.C. § 80b-3(a), (b).

203. *Id.* at § 80b-3(b)(1). To qualify under this "local advisor" exemption two requirements must be met: (1) an investment advisor's clients must be residents of the state of its principal place of business, and (2) the investment advisor must not furnish advice with regard to exchange listed securities. *Id.*

advisors²⁰⁴ and proscribing fraudulent advisory activities.²⁰⁵ The Uniform Act defines an investment advisor as "a person who receives compensation for advising others as to the value of securities either directly or indirectly through publications, writing, reports, or other analysis."²⁰⁶ The definition contains several exceptions,²⁰⁷ including a broker-dealer who performs advisory services that are *solely incidental* to the conduct of his business and who receives no special compensation for them.²⁰⁸ The official comment to the Uniform Act recognizes that a broker-dealer commonly gives a certain amount of advice to his customers during the regular course of business.²⁰⁹ On the other hand, a broker-dealer who gives advice which is *not* solely incidental to his business, or receives special compensation for advisory services, is classified as an investment advisor.²¹⁰ The broker-dealer is therefore required to register and is subject to the provisions proscribing fraudulent advisory activities.²¹¹ Whether a broker-dealer is classified as an investment advisor depends upon the "distinction between compensation for advice itself and compensation for services of another character to which advice is merely incidental."²¹²

The Uniform Act's provisions regulating the conduct of investment advisors compliments those sections regulating broker-dealers. State regulation of investment advisors is necessary where federal law is inapplicable. The Vermont legislature should consider adopting provisions similar to those contained in the Uniform Act. This would greatly improve the state's ability to regulate the securities industry. Such provisions would likely deter fraudulent advisory activities and ensure the competency of persons providing

204. UNIFORM SECURITIES ACT § 201(c).

205. UNIFORM SECURITIES ACT § 102.

206. UNIFORM SECURITIES ACT § 401(f).

207. The exclusions from the definition of an investment advisor are: (1) a bank, savings institution, or trust company; (2) a lawyer, accountant, engineer, or teacher whose performance of advisory services is only incidental to the practice of his profession; (3) a publisher of a bona fide newspaper or literary magazine; (4) a person whose advice relates only to exempt securities under the act; and (5) a person who has no place of business within the state if (A) his only clients in the state are other investment advisors, broker-dealers, banks, insurance companies or other financial institutions, or (B) during any consecutive twelve month period he does not direct more than five business communications into the state to persons other than those described in part (A). UNIFORM SECURITIES ACT § 401(f).

208. *Id.*

209. UNIFORM SECURITIES ACT § 401(f) official comment, subsection f, clause 3.

210. *Id.*

211. *Id.*

212. *Id.*

advisory services.

V. EXEMPT SECURITIES AND TRANSACTIONS

A. *Exempt Securities*

The Vermont Securities Act makes it unlawful to sell any security within the state unless it is registered, exempt from registration, or sold in an exempt transaction.²¹³ Ten separate classes of securities are exempt from registration.²¹⁴ Exempt securities, however, are subject to the statute's anti-fraud provisions²¹⁵ and must be sold by a registered broker-dealer.²¹⁶

Securities entitled to exemption under the Vermont and Uniform Acts are generally the same. Both acts exempt securities issued by federal, state, or local governments.²¹⁷ Also entitled to exemption are securities issued by a foreign government with which the United States is at the time having diplomatic relations.²¹⁸ Other classes of securities entitled to exemption from registration under both acts include: securities of banks and savings and loan associations;²¹⁹ securities of railroads and public utilities;²²⁰ negotiable promissory notes and commercial paper;²²¹ and issues of non-profit charitable organizations and educational institutions.²²²

A final class of securities exempt under both acts are those listed on a national stock exchange, such as the New York Stock Exchange, the Boston Stock Exchange, and the Midwest Stock Exchange.²²³ Securities listed on national exchanges are given an exemption because they are sold beyond state boundaries and are therefore regulated by federal law.²²⁴

The Vermont Act offers two additional exemptions. First, an exemption is allotted for stock of a cooperative savings and loan association or a farmers cooperative organized under the laws of

213. VT. STAT. ANN. tit. 9, § 4205 (1984).

214. VT. STAT. ANN. tit. 9, § 4203 (1984).

215. VT. STAT. ANN. tit. 9, § 4224 (1984).

216. VT. STAT. ANN. tit. 9, § 4213 (1984).

217. VT. STAT. ANN. tit. 9, § 4203(1) (1984); UNIFORM SECURITIES ACT § 402(a)(1).

218. VT. STAT. ANN. tit. 9, § 4203(2) (1984); UNIFORM SECURITIES ACT § 402(a)(2).

219. VT. STAT. ANN. tit. 9, § 4203(3) (1984); UNIFORM SECURITIES ACT § 402(a)(3).

220. VT. STAT. ANN. tit. 9, § 4203(4) (1984); UNIFORM SECURITIES ACT § 402(a)(7).

221. VT. STAT. ANN. tit. 9, § 4203(7) (1984); UNIFORM SECURITIES ACT § 402(a)(10).

222. VT. STAT. ANN. tit. 9, § 4203(5) (1984); UNIFORM SECURITIES ACT § 402(a)(9).

223. VT. STAT. ANN. tit. 9, § 4203(6) (1984); UNIFORM SECURITIES ACT § 402(a)(8).

224. 1 L. LOSS, *supra* note 2 at 65-66.

Vermont for the purpose of doing business within the state.²²⁵ The association or cooperative cannot have authorized capital stock exceeding fifty thousand dollars in value. In addition, no commission, compensation, or remuneration may be paid in connection with the sale.²²⁶ A second exemption is allowed for any security which under state law is a legal investment for savings banks and trusts companies.²²⁷ The theory underlying this exemption is that institutional investors are "sophisticated investors,"²²⁸ and therefore require less protection from the securities laws.

B. Exempt Transactions

In addition to the exemptions allotted for certain types of securities, the Vermont Securities Act exempts thirteen types of transactions involving the sale of securities.²²⁹ Although securities sold in an exempt transaction need not be registered, the anti-fraud provisions are nevertheless still applicable.²³⁰ With a few exceptions,²³¹ the transaction exemptions allotted under Vermont law are similar to those provided for under the Uniform Securities Act.

1. "Limited Offering Exemption"

Perhaps the most important and commonly sought exemption is the "limited offering exemption."²³² Under the Vermont Act, a

225. VT. STAT. ANN. tit. 9, § 4203(8) (1984).

226. *Id.*

227. VT. STAT. ANN. tit. 9, § 4203(9) (1984).

228. L. LOSS & E. COWETT, *supra* note 37, at 319-20.

229. VT. STAT. ANN. tit. 9, § 4204 (1984).

230. VT. STAT. ANN. tit. 9, § 4224 (1984).

231. The Uniform Securities Act provides for two transaction exemptions not contained in the Vermont Act. First, an exemption is allotted for any transaction between an issuer and an underwriter, or between underwriters. UNIFORM SECURITIES ACT § 402(4). Second, an exemption is provided for offers of securities made within the state if a registration statement has been filed under both the Uniform Act and the federal Securities Act of 1933. However, no stop order may be in effect, and no public proceeding or examination seeking such an order is pending. UNIFORM SECURITIES ACT § 402(b)(12). This latter exemption allows the underwriter or selling group to make offers of the issuer's securities during the "waiting" or pre-effective period. The rationale for such an exemption is that federal law will adequately police these kinds of offers. See COMMENTARY, *supra* note 103, at 135 (citing draftsmen's commentary to the UNIFORM SECURITIES ACT § 402(b)(12)).

The Vermont Securities Act also contains three exemptions not provided for in the Uniform Act. See *infra* text accompanying notes 267-69.

232. A major push for uniformity is underway in connection with a uniform limited offering exemption for small issues to be coordinated with Regulation D under the federal Securities Act of 1933. See T. L. HAZEN, *supra* note 3 at § 8.1.

transaction pursuant to an offer of sale directed to no more than twenty-five persons is exempt if, following the sale, the aggregate number of holders of all the issuer's securities does not exceed twenty-five, and no commission is paid for the solicitation of any sales.²³³ Under the Uniform Act, the limited offering exemption is more restrictive. It exempts any transaction pursuant to an offer directed to no more than ten persons within the same state during any consecutive twelve month period.²³⁴

The limited offering exemption is intended for private, rather than public, offerings of securities.²³⁵ The most obvious beneficiary of this exemption is the closely held corporation.²³⁶ The draftsmen of the Uniform Act evidenced their concern with this type of issuer by stating: "it seems quite clear that some exemption along these lines is essential . . . if for no other reason than to permit the incorporated corner grocery store . . . to raise additional capital from a few relatives and friends. . . ."²³⁷ The limitation on the number of offerees coupled with the drafters' emphasis on the localized character of the "corner grocery store" indicates that the exemption was designed for issuers operating an intra-state business.²³⁸

Proponents of the limited offering exemption argue that small businesses are seldom able to cover registration costs in their search for capital.²³⁹ In addition, the prospective investor in a limited offering, perhaps not schooled in finance, is usually well acquainted with the seller and his or her plan of operation.²⁴⁰ An investor who is informed of the risks should be able to freely invest. A state securities administrator should not have the power to stop the investor simply because he feels that the investment is unsound.²⁴¹ Finally, incorporation is usually accomplished without the aid of competent legal advice, and thus registration require-

233. VT. STAT. ANN. tit. 9, § 4204(10) (1984).

234. UNIFORM SECURITIES ACT § 402(b)(9).

235. COMMENTARY, *supra* note 103, at 125-30 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 402(b)(9)).

236. Note, *supra* note 175, at 147.

237. COMMENTARY, *supra* note 103, at 128 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 402(b)(9)).

238. Note, *supra* note 175, at 147.

239. *Id.* at 148.

240. *Id.*

241. *Id.*

ments are often overlooked.²⁴² As a result, buyers are protected through a windfall if the business loses money since they can usually rescind their purchase because the seller failed to comply with the blue sky laws.²⁴³

Opponents of the exemption argue that state regulation, unlike federal, does not impose an undue financial burden on the small incorporator.²⁴⁴ Second, it is feared that sellers may use the exemption to disguise what is in reality a public distribution.²⁴⁵ Third, the investor in a closely held corporation is not always informed of the risks.

The proponents' arguments have greater merit, because without the limited offering exemption small business growth would be impaired. The exemption promotes the expansion and growth of small business by facilitating capital formation in closely held corporations. The regulation of securities must be balanced with small business interests. To require registration of closely held corporations would be paradoxical. Especially where initial incorporation is concerned, small businesses would be required to expend a portion of accumulated capital on registration costs.

2. "Isolated Transactions"

In Vermont, securities sold in any isolated transaction are exempt from registration.²⁴⁶ The Uniform Act, however, limits the exemption to sales of securities in any "isolated non-issuer transaction."²⁴⁷ Thus, in a jurisdiction adopting the Uniform Act, issuers cannot take advantage of this exemption.

Application of the "isolated transaction" exemption can be illustrated as follows: The exemption would cover the sale of X Corporation by Jones to Smith, but not an offering of Ford stock by the Ford Foundation to the public.²⁴⁸ In the former situation, Jones sells X Corporation in a private, isolated sale which thereafter cannot be made by Jones again. By contrast, the sale of Ford's

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. VT. STAT. ANN. tit. 9, § 4204(3) (1984).

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

248. COMMENTARY, *supra* note 103, at 73 (citing official comment 9 to UNIFORM SECURITIES ACT § 305(i), (j)).

stock involves multiple transactions because sales would normally occur at repeated intervals. However, if Jones sells 1,000 shares of X Corporation stock to several persons concurrently, the application of the exemption would depend upon the interpretation of the term "isolated."²⁴⁹ Jurisdictions adopting the Uniform Act have defined an isolated transaction as a sale of a security standing alone, disconnected from any others.²⁵⁰ Successive sales, on the other hand, means transactions undertaken and performed one after the other within a reasonable time which promote the same general plan, as opposed to a single detached plan.²⁵¹ This definition focuses on the repetition of sales and whether they bear some relation to each other as part of a plan or scheme. Thus, whether Jones's sale of 1,000 shares of X Corporation to several persons is an isolated transaction depends upon the facts and circumstances involved.

3. Secondary Distributions

The Vermont and Uniform Securities Acts each contain two transaction exemptions for *non-issuer*²⁵² distributions of securities effected through a broker-dealer.²⁵³ Non-issuer distributions involve secondary, rather than initial, distributions of securities by the issuer. Secondary distributions present many problems in securities regulations.²⁵⁴ It is often difficult to determine whether registration of such a distribution should be required. Broker-dealers can take advantage of these exemptions in selling the issuer's securities if the specified requirements listed below are met.

First, both acts exempt a non-issuer distribution of an out-

249. *Id.*

250. *Kneeland v. Emerton*, 280 Mass. 371, 389, 183 N.E. 155, 163 (1932) (followed in *Gales v. Weldon*, 282 S.W.2d 522, 526 (Mo. 1955)).

251. *Kneeland*, 280 Mass. at 389, 183 N.E. at 163.

252. The term "non-issuer" means "not directly or indirectly for the benefit of the issuer." UNIFORM SECURITIES ACT § 401(h).

253. VT. STAT. ANN. tit. 9, § 4204(11), (12) (1984); UNIFORM SECURITIES ACT § 402(b)(2), (3).

254. The draftsmen's commentary to the Uniform Securities Act states that secondary distributions of an issuer's securities is perhaps the most difficult aspect of securities regulation. It is often difficult to determine with certainty when registration is required, who must register, how many units of the offering should be registered, and who should be civilly liable. COMMENTARY, *supra* note 103, at 72 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 305(i), (j)). For a discussion of secondary distributions under the federal securities laws, see 1 L. LOSS, *supra* note 2, at 697-706, and T. L. HAZEN, *supra* note 3, at §§ 4.23, 4.25.

standing security by a registered broker-dealer if: (A) a recognized securities manual contains the names of the issuer's officers and directors, and financial statements for the most recent fiscal year, or (B) the security has a fixed maturity date, interest, or dividend provision, and no default has occurred during the current or three preceding fiscal years.²⁵⁵ Thus, under this latter exemption, securities are exempt if they have been outstanding for at least three years and have produced sufficient earnings.²⁵⁶ The rationale for this exemption is that securities complying with these requirements represent stable and quality investments.²⁵⁷

Second, both acts exempt a non-issuer transaction effected through a broker-dealer which involves an "unsolicited offer to buy" securities.²⁵⁸ Application of this exemption often hinges on the interpretation given to the term "solicited." The Securities and Exchange Commission has construed the term "solicitation" to exclude a broker's merely hanging out his or her shingle, advertising generally for business, or even soliciting discretionary accounts.²⁵⁹ This interpretation suggests that a solicitation involves an active, rather than a passive endeavor to obtain an offer of purchase from an investor. The Vermont Act does not define solicitation. As a result, the Commissioner should be responsible for defining the term pursuant to his rulemaking authority.²⁶⁰

4. Other Transaction Exemptions

Additional exemptions available under both acts include: the sale of any security at a judicial, executor, administrative or guardian's sale by a receiver or trustee in bankruptcy or insolvency;²⁶¹ a pledge holder or mortgagee's sale of securities in the ordinary course of business to liquidate a bona fide debt;²⁶² an offer or sale to institutional investors such as banks, savings institutions and other financial institutions, whether the purchaser acts for himself

255. VT. STAT. ANN. tit. 9, § 4204(11) (1984); UNIFORM SECURITIES ACT § 402(b)(2).

256. COMMENTARY, *supra* note 103, at 75 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 305(i) (j)).

257. *Id.*

258. VT. STAT. ANN. tit. 9, § 4202(12) (1984); UNIFORM SECURITIES ACT § 402(b)(3).

259. COMMENTARY, *supra* note 103, at 120 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 402(b)(3)). See also 1 L. Loss, *supra* note 2, at 698-700 for construction of the term "solicitation."

260. VT. STAT. ANN. tit. 9, § 4237 (1984).

261. VT. STAT. ANN. tit. 9, § 4204(i) (1984); UNIFORM SECURITIES ACT § 402(b)(6).

262. VT. STAT. ANN. tit. 9, § 4204(2) (1984); UNIFORM SECURITIES ACT § 402(b)(7).

or in a fiduciary capacity for another;²⁶³ an offer or sale of preincorporation subscriptions for the purchase of capital stock, provided the purchaser incurs no expense, and no commission or remuneration is paid in connection with the sale;²⁶⁴ bonds and notes secured by mortgages upon real estate or tangible personal property located within the state, if the mortgage, together with the secured notes or bonds, is sold to a single purchaser at a single sale;²⁶⁵ and the issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion.²⁶⁶

The Vermont Act expressly exempts distributions by a corporation of capital stock to its shareholders as a stock dividend, or pursuant to a bona fide reorganization.²⁶⁷ Also exempt are transfers or exchanges of securities by one corporation to another pursuant to a consolidation or merger.²⁶⁸ A final exemption provided for in the Vermont Act gives the Commissioner discretion to exempt any transaction that he finds need not be registered for the protection of investors.²⁶⁹

Under both acts in any proceeding, the person claiming an exemption for either a class of securities or a particular transaction has the burden of proving that he is entitled to the exemption.²⁷⁰

VI. REGISTRATION OF SECURITIES

Section 4205 of the Vermont Securities Act prohibits the sale of any security within the state which is not exempt or sold in an

263. VT. STAT. ANN. tit. 9, § 4204(5) (1984); UNIFORM SECURITIES ACT § 402(b)(8).

264. VT. STAT. ANN. tit. 9, § 4204(9) (1984); UNIFORM SECURITIES ACT § 402(b)(10).

265. VT. STAT. ANN. tit. 9, § 4204(7) (1984); UNIFORM SECURITIES ACT § 402(b)(5).

266. VT. STAT. ANN. tit. 9, § 4204(8) (1984); UNIFORM SECURITIES ACT § 402(b)(11).

267. VT. STAT. ANN. tit. 9, § 4204(4) (1984).

268. VT. STAT. ANN. tit. 9, § 4204(6) (1984). The Uniform Act produces the same result by excluding these types of transactions from its definition of "sale." This definition excludes: (a) any bona fide pledge or loan; (b) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if stockholders give nothing for the dividend other than the surrender of a right to cash or property or in stock; (c) any act incident to a class vote by stockholders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or (d) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash. UNIFORM SECURITIES ACT § 401(j)(6).

269. VT. STAT. ANN. tit. 9, § 4204(13) (1984).

270. VT. STAT. ANN. tit. 9, § 4222 (1984); UNIFORM SECURITIES ACT § 402(d).

exemption transaction, unless such security has been registered by *notification* or *qualification*.²⁷¹ The Uniform Act likewise prescribes registration by *notification*²⁷² and *qualification*,²⁷³ as well as a third type of registration known as *coordination*.²⁷⁴ Registration by notification and qualification are similar under both acts. Therefore, this note concentrates on the notification and qualification procedures required by the Vermont Act. Registration by coordination, however, will be discussed in reference to the Uniform Act.

A. Registration by Notification

Registration by notification is also known as registration by "description."²⁷⁵ This procedure is termed "registration by notification" because the issuer's filing of the appropriate information and fee *notifies* the Commissioner that he has ten days to act upon the application for registration.²⁷⁶ Failure by the Commissioner to formally act on the application within ten days after its receipt results in effective registration of the securities.²⁷⁷

In Vermont, two classes of securities are entitled to register by notification: (1) securities with "average earnings," and (2) "first mortgage notes."²⁷⁸ Securities with "average earnings" include any security of an issuer that has been in continuous operation for at least three years, if: (1) the issuer can show the prescribed "average annual net earnings" on its outstanding securities, and (2) such earnings covered a period of at least two years prior to the close of the fiscal year preceding the offering.²⁷⁹

The Act prescribes three tests for "average annual earnings" depending upon the type of securities to be registered.²⁸⁰ In the case of interest bearing securities, the issuer's earnings must equal

271. VT. STAT. ANN. tit. 9, § 4205 (1984). The Uniform Securities Act similarly makes it unlawful for any person to offer or sell any security in the state unless the security is exempt under the act, or the security is sold in an exempt transaction. UNIFORM SECURITIES ACT § 301.

272. UNIFORM SECURITIES ACT § 302.

273. UNIFORM SECURITIES ACT § 304.

274. UNIFORM SECURITIES ACT § 303.

275. 1 L. LOSS, *supra* note 2, at 54.

276. VT. STAT. ANN. tit. 9, § 4207(5) (1984).

277. *Id.*

278. VT. STAT. ANN. tit. 9, § 4207(1), (2) (1984).

279. VT. STAT. ANN. tit. 9, § 4207(1) (1984).

280. VT. STAT. ANN. tit. 9, § 4207(1)(A), (B), (C) (1984).

at least one and one-half times the annual interest charge on such securities, and on all outstanding interest bearing obligations of equal rank.²⁸¹ Registration of preferred stock requires that earnings equal at least one and one-half times the annual dividend requirements on such stock, and on all outstanding preferred stock of equal rank.²⁸² In the case of common stock, the issuer must have average annual earnings of at least six percent on its outstanding common stock of equal rank.²⁸³ Thus, at the filing date, these tests ensure that the issuer's business can satisfy the dividend and interest charges to be incurred on the securities being registered, and on those already outstanding.

The second class of securities entitled to register by notification is "first mortgage notes."²⁸⁴ These are notes or bonds secured by a first mortgage on real estate or leaseholds on real estate.²⁸⁵ The Vermont Act provides three situations for registering first mortgage notes or bonds. First, such notes or bonds are entitled to register if the mortgage is upon lands used principally for agricultural purposes.²⁸⁶ Additionally, the aggregate face value of the notes or bonds, excluding interest notes, together with all outstanding notes and bonds secured by the same mortgage, cannot exceed sixty percent of the fair market value of the land.²⁸⁷

Second, first mortgage notes or bonds may register by notification if the mortgage is upon city or village real estate.²⁸⁸ If the real

281. VT. STAT. ANN. tit. 9, § 4207(1)(A) (1984).

282. VT. STAT. ANN. tit. 9, § 4207(1)(B) (1984).

283. VT. STAT. ANN. tit. 9, § 4207(1)(C) (1984). Registration of securities with "average earnings" can be illustrated by the following example involving common stock. Assume X Corporation was incorporated in July, 1980, for the purpose of producing widgets. Of X Corporation's 1,000 authorized shares of common stock, 100 shares are outstanding. From July 1, 1982 through July 1, 1985, the outstanding common stock had seven percent average annual net earnings. In July, 1985, X Corporation wishes to sell 100 more shares of authorized common stock to raise capital for expansion purposes. X Corporation may register the new offering of 100 shares of common stock by notification. The issuer, X Corporation, has been in business for at least three consecutive years, from 1980 through 1985. The 100 outstanding shares of common stock had average annual net earnings above the statutory requirement of six percent. Additionally, the earnings covered a period of at least two years prior to the close of the fiscal year preceding the offering. The close of the fiscal year preceding the offering is December 31, 1984 (the offering was made in 1985). The earnings covered a period of two and one-half years prior to this date—from July, 1982 to December, 1984—which exceeds the two year requirement.

284. VT. STAT. ANN. tit. 9, § 4207(2) (1984).

285. *Id.*

286. VT. STAT. ANN. tit. 9, § 4207(2)(A) (1984).

287. *Id.*

288. VT. STAT. ANN. tit. 9, § 4207(2)(B) (1984).

estate *is not* used to produce rental income, the aggregate face value of the notes or bonds, excluding interest notes, together with all outstanding notes or bonds secured by the same mortgage, must not exceed sixty percent of the fair market value of the real estate.²⁸⁹ If the real estate *is* used principally for producing rental income, the net annual income or fair rental value, less operating expenses and taxes, must at least equal the annual interest on the notes or bonds plus at least three percent of the principal of such mortgage indebtedness.²⁹⁰

Third, first mortgage notes and bonds qualify for registration by notification where the mortgage is upon city or village real estate, and a building is to be erected.²⁹¹ If the real estate *is not* used to produce rental income, the aggregate face value of the notes or bonds, excluding interest notes, plus all outstanding notes or bonds secured by the same mortgage, must not exceed sixty percent of the fair market value of the mortgaged property, including the building to be erected.²⁹² If the real estate *is* used principally to produce rental income, the net annual income, less operating expenses and taxes, must at least equal the annual interest on the notes or bonds plus at least three percent of the principal of such mortgage indebtedness.²⁹³

Registration by notification is a short form registration procedure.²⁹⁴ In Vermont, the issuer accomplishes registration by filing with the Commissioner an application and a statement containing information pertaining to the issuer and the security.²⁹⁵ The Commissioner has ten days after receipt of the application to prevent registration by issuing a suspension order if, in his opinion, the offering may tend to work a fraud upon the purchaser.²⁹⁶ The suspension order suspends the issuer's rights to sell the securities

289. *Id.*

290. *Id.*

291. VT. STAT. ANN. tit. 9, § 4207(2)(C) (1984).

292. *Id.*

293. *Id.*

294. T. L. HAZEN, *supra* note 3, at § 8.2.

295. VT. STAT. ANN. tit. 9, § 4207(4) (1984). The information filed with the Commissioner must contain the following: (A) the issuer's name, location, and place of incorporation, if incorporated; (B) a description of the security and the amount of the issue; (C) the amount of securities to be offered in the state; (D) a statement showing that the security falls within one of the classes in this section; and (E) the price at which the securities are originally offered for sale. VT. STAT. ANN. tit. 9, § 4207(4) (1984).

296. VT. STAT. ANN. tit. 9, § 4207(6) (1984).

pending further investigation.²⁹⁷ Should the Commissioner fail to issue a suspension order, the securities are effectively registered after the tenth day.²⁹⁸

Registration by notification is important "primarily for those intrastate issues of high quality which are not registered under the federal statute, or for some of the better private offerings and interstate issues of \$300,000 or less which are exempted under section 4(1) of the Federal Securities Act of 1933 . . . or SEC Regulation A."²⁹⁹ The rationale for this type of registration is that securities which qualify are necessarily "well seasoned" and have already proven their stability in the market.³⁰⁰ Thus, there is no need to subject them to close additional administrative scrutiny.

B. Registration by Qualification

In Vermont, securities which are not exempt or sold in an exempt transaction, and which are not entitled to register by notification, must be registered by qualification. Registration by qualification is accomplished by filing an application containing information requested by the Commissioner,³⁰¹ and a fee.³⁰² Generally, the information requested pertains to the issuer's directors and officers, as well as its financial structure.³⁰³

Unlike registration by notification, registration of securities by qualification does not become effective simply by filing the re-

297. *Id.*

298. VT. STAT. ANN. tit. 9, § 4207(5) (1984).

299. COMMENTARY, *supra* note 103, at 42 (citing draftsmen's commentary to UNIFORM SECURITIES ACT § 302(a)).

300. Reckson, *supra* note 137, at 364.

301. VT. STAT. ANN. tit. 9, § 4208(1) (1984).

302. The filing fee is \$1 for each \$1,000 par value of the securities to be sold in this state for which the applicant is seeking registration. However, the fee shall not be less than \$50 or more than \$500. If the securities to be issued is stock with no par value, or par value less than \$100, the price at which the stock is to be offered to the public is deemed to be its par value. VT. STAT. ANN. tit. 9, § 4208(5) (1984).

303. The Commissioner may require the following data respecting the issuer: (A) names and addresses of directors, trustees, and officers; (B) location of the principal business office; (C) character of the business; (D) a statement of capitalization, a balance sheet, and copies of circulars and advertisements to be used or published in the state; (E) an income statement; (F) the proposed price at which the securities are to be sold; (G) a statement showing the consideration received in exchange for the securities; (H) the amount of capital stock to be set aside and disposed of as promotional stock; (I) a copy of the articles of incorporation and bylaws, if the issuer is a corporation. If the issuer is a partnership, then a copy of the articles of partnership must be filed. VT. STAT. ANN. tit. 9, § 4208(2)(A)-(I) (1984).

quired information. The Commissioner must examine the issuer's application and formally record the registration of securities.³⁰⁴ Section 4208(6) contains three standards which govern the granting of registration by qualification: (1) the sale is not fraudulent; (2) it would not tend to work a fraud upon the purchaser; and (3) the enterprise or business of the issuer is not based upon "unsound business principles."³⁰⁵

By applying these standards, the Commissioner has the power to pass on the merits of an investment to determine whether it "qualifies" for registration. The Commissioner's ability to deny registration based upon unsound business principles is extremely vague, thus vesting the Commissioner with unbridled discretion. Administrative flexibility is important but it should be balanced against the proper claim of legitimate business interests to the greatest extent possible.³⁰⁶ The Vermont legislature should amend section 4208(6) by deleting the "unsound business principles" standard as a condition precedent to registration. The Commissioner may still deny registration if the offering would work a fraud upon the purchaser.³⁰⁷ Additionally, the Commissioner has the power to suspend or revoke registration of a security if he finds it necessary.³⁰⁸

C. Registration by Coordination

Unlike the Vermont Act, the Uniform Securities Act provides for registration by coordination.³⁰⁹ A security is eligible for this form of registration if a registration statement has been filed for the security under the federal Securities Act of 1933 in connection with the same offering.³¹⁰ This type of registration is the normal method of registration for nation-wide offerings of securities which are not exempt under federal or state law.³¹¹ The importance of simultaneous federal-state approval of an offering, and the fact that an overwhelming majority of security issues are registered

304. VT. STAT. ANN. tit. 9, § 4208(6) (1984).

305. *Id.*

306. Note, *supra* note 175, at 109-10.

307. VT. STAT. ANN. tit. 9, § 4208(6) (1984).

308. VT. STAT. ANN. tit. 9, § 4211(a), (e) (1984). See *infra* text accompanying notes 317-20.

309. UNIFORM SECURITIES ACT § 303.

310. UNIFORM SECURITIES ACT § 303(a).

311. L. LOSS & E. COWETT, *supra* note 37, at 242.

with the SEC, led the draftsmen of the Uniform Act to call the registration by coordination "perhaps the most important reform . . . in the entire [uniform] statute."³¹²

The registration statement required by the Uniform Act for registration by coordination is quite simple. The person seeking registration need only supply three copies of the prospectus filed under the Securities Act of 1933, along with an undertaking to forward to the Administrator all future amendments to the federal prospectus.³¹³ In addition, the Administrator may require three copies of the articles of incorporation, bylaws, or other investment governing issuance of the security to be registered.³¹⁴

The registration statement automatically becomes effective, provided that the following conditions are satisfied: (1) no stop order is in effect; (2) the registration statement has been filed with the Administrator for at least ten days; (3) the required statement of the maximum and minimum proposed offering prices has been on file for at least two business days.³¹⁵

Although the Vermont Act does not formally provide for registration by coordination, it attempts to achieve a similar result. Where a security is to be registered by qualification, the Commissioner may, in lieu of the information required to be filed, accept a copy of the registration statement or prospectus filed under the federal Securities Act of 1933.³¹⁶ Thus, registration under federal law may suffice for registration under state law. The issuer need only file copies of the information filed with the SEC. As stated above, this method of registration is advantageous to an issuer whose nationwide offering is not exempt from registration under federal or state law. Enabling the issuer to forego duplication of information necessary to register under Vermont law results in substantial savings in time and expense.

D. Revocation of Registration

In Vermont, the Commissioner has the power to revoke or suspend the registration of an issuer's securities.³¹⁷ Registration may

312. *Id.*

313. UNIFORM SECURITIES ACT § 303(b).

314. *Id.*

315. UNIFORM SECURITIES ACT § 303(c).

316. VT. STAT. ANN. tit. 9, § 4208(2)(J) (1984).

317. VT. STAT. ANN. tit. 9, § 4211 (1984). The Uniform Act similarly empowers the Ad-

be revoked if the Commissioner finds that the issuer: (1) is insolvent; (2) has violated any provision of the Act; (3) has engaged in fraudulent practices; (4) is dishonest, or has made fraudulent representations by an agent, circular, or advertisement; (5) is of bad business repute; (6) fails to conduct his business within the law; (7) is in unsound financial condition; or (8) is not conducting its business upon sound business principles.³¹⁸ The Commissioner may conduct examinations of the issuer, compel production of documents, and depose officers of the issuer concerning its financial affairs.³¹⁹ If the Commissioner finds it necessary, he may suspend the right to sell securities pending further investigation.³²⁰ Thus, the Commissioner has every conceivable means available to closely scrutinize the issuer and its business.

CONCLUSION

The Vermont Securities Act, if considered in a vacuum, provides adequate protection to the investing public. However, closer scrutiny of the Act's contents reveals a host of problems, some technical and others of a greater magnitude. The Vermont Securities Act is a difficult statute to master. Consequently, one would expect the Act to provide solutions to problems rather than raise questions. The Vermont Legislature should therefore consider adoption of the Uniform Securities Act in its entirety, or at least those sections that would resolve many of the ambiguities currently plaguing the Vermont Act.

Perhaps the Vermont Act's greatest inadequacy is its failure to regulate the activities of investment advisors. State regulation of investment advisors would protect investors from fraudulent advisory activities and ensure that persons rendering such advice are competent. The Uniform Securities Act contains a comprehensive scheme designed to regulate investment advisors. Adoption of these provisions would increase investor protection by enhancing state regulation in the securities industry.

Additionally, adoption of the Uniform Act would clarify the many ambiguities surrounding the seller's defense to a purchaser's

ministrator to deny, suspend, or revoke the registration of any security registered by notification, qualification, or coordination. UNIFORM SECURITIES ACT § 306.

318. VT. STAT. ANN. tit. 9, § 4211(a)(1)-(8) (1984).

319. VT. STAT. ANN. tit. 9, § 4211(b) (1984).

320. VT. STAT. ANN. tit. 9, § 4211(e) (1984).

rescission action, and the derivative liability of a seller's directors, officers, and agents. The legislature should be responsible for clearly defining the rights and remedies of the parties to a securities transaction. The Uniform Act's civil liabilities section accomplishes this desired result.

The Vermont legislature should also consider adoption of the Uniform Act's anti-fraud provisions. The Uniform Act prohibits fraudulent conduct in the purchase and sale of a security. However, whether the Vermont Act applies to buyers is unclear. Sellers, as well as buyers, should be protected against fraudulent conduct in the sale as well as the purchase of securities.

Although the need for investor protection is great, it should be balanced against legitimate business interests. Adoption of the Uniform Act would, unlike the Vermont Act, provide flexibility to foreign broker-dealers, who may need to temporarily engage in business within the state. The Uniform Act also provides an exemption for securities in transactions between the issuer and the underwriter. Thus, the Uniform Act accommodates the needs of investors while also providing for legitimate business interests.

In addition, Vermont should adopt the Uniform Act because it offers a comprehensive scheme for registering securities by coordination. The securities industry is inherently "interstate" in nature. Because a high volume of securities transactions occur across state lines, there is a need for federal-state coordination in the registration process. The Uniform Act's provision for registration by coordination facilitates in-state registration of a federally registered offering. Although the Vermont Act attempts to provide for similar coordination of federal-state registration, such a procedure is subject to the discretion of the Commissioner. Finally, the adoption of the Uniform Act would provide uniformity in securities transactions with jurisdictions that have substantially enacted the Uniform Act as their blue sky legislation.

Scott K. Seelagy

