A Comparison of the Florida and Uniform Securities Acts

Richard E. Reckson

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol16/iss3/1
A COMPARISON OF THE FLORIDA AND UNIFORM SECURITIES ACTS

RICHARD E. RECKSON*

INTRODUCTION

A. History of the Florida Securities Act

The first Florida statute regulating the sale of securities was enacted in 1913.1 The act created an "Investment Company Board" for the supervision and regulation of domestic and foreign investment companies.2

In 1931 Florida adopted a modified version of the Uniform Sale of Securities Act.3 The act, although frequently amended,4 is still in force as the existing Florida "blue sky" law.5

B. History of the Uniform Securities Act

The Uniform Sale of Securities Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1929.6 It was adopted in whole or with modifications by seven jurisdictions.7 The entry of the federal government into the field

---

2. The constitutionality of the act was upheld in Ex parte Taylor, 68 Fla. 61, 66 So. 292 (1914).
5. FLA. STAT. ch. 517 (1961). This chapter will be referred to as the Florida Act.
6. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK AND PROCEEDINGS 171 (1929).
7. The act was adopted by Louisiana and Hawaii (then a territory) and with modifi-
of securities regulation rendered the Uniform Act obsolete, and it was withdrawn from the list of approved uniform acts in 1944.8

The federal Securities Act of 19339 did not pre-empt the field of regulation; Congress was explicit in preserving state laws.10 The result is multiple regulation, both by the Securities and Exchange Commission for the federal government, and the regulatory body for each state in which the security is to be sold. The effect of this multiple regulation has been described by a former chairman of the SEC in the following manner:

The "blue sky" laws have come to have a special meaning—a meaning full of complexities and surprise, unsuspected liability for transactions normal and usual—in short, a crazy-quilt of state regulation no longer significant or meaningful in purpose, and usually stultifying in effect, or just plain useless.11

The existing pattern of state and federal regulation has been called "a monument to the shibboleth, not the reality of federalism."12 Another former chairman of the SEC has said that a workable uniform state securities act "would be the greatest invention since the wheel."13

Spurred by the increasing diversity and complexity of existing state regulation of securities, the American Bar Association recommended, in 1947, that the National Conference of Commissioners on Uniform State Laws prepare a new Uniform Sale of Securities Act.14 A committee of the American Bar Association presented proposed drafts to the Conference in 1949, 1951 and 1953. The 1953 draft was withdrawn at the request of the chairman of the American Bar Association’s committee and others, due to the feeling that a comprehensive study of state regulation of securities, made in cooperation with other interested groups, such as the National Association of Securities Administrators, should precede any proposed uniform act. Professor Louis Loss of the Harvard Law School was requested to undertake a study and to prepare a draft of the Uniform Act.15 Professor Loss, with Mr. Edward M. Cowett, undertook an exhaustive study of state regulations by Alabama, Florida, Michigan, Oregon and South Carolina. Loss & Cowett, Blue Sky Law 231 (1958) [hereinafter cited as Loss & Cowett].

8. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK AND PROCEEDINGS 356 (1944), in Loss & Cowett 231.
14. For a complete account of the complex process of drafting and approval of the Uniform Securities Act [hereinafter referred to as Uniform Act] see Loss & Cowett 233-36 from which the textual description was condensed.
15. To prevent the final draft from being "criticized as an ivory tower tract emanating from Harvard," Professor Loss organized an advisory committee consisting of representatives
regulation of securities—the final results of the study being twofold: first, an approved draft of the Uniform Securities Act; second, a treatise on state regulation of securities, Loss and Cowett, *Blue Sky Law*.

The final draft of the Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws,\(^{16}\) the American Bar Association and the National Association of Securities Administrators.\(^{17}\)

The Uniform Act has been adopted in whole or in part by Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Indiana, Kansas, Kentucky, Montana, New Jersey, New Mexico, Oklahoma, South Carolina, Virginia and Washington.\(^{18}\) It is under consideration in a number of other states at the present time.

**C. Structure of the Uniform Act\(^{19}\)**

Existing state "blue sky" laws can be classified into three main types, based upon the system of regulation utilized. These regulatory devices consist of: (1) anti-fraud provisions; (2) registration of brokers, dealers and investment advisors; and (3) registration of securities.\(^{20}\) These regulatory devices exist singly or in combination in the various state statutes.

In order to enable a state to continue its existing method of regulation, and adopt the Uniform Act, the draftsmen made each of the four parts of the act independent of the others.\(^{21}\) The result is a very complex statute. Part I contains general anti-fraud provisions; Part II requires registration...
of brokers, dealers and investment advisors; Part III requires registration of securities; and Part IV contains general provisions, such as definitions, essential in any of the other three parts.22

D. Structure of the Florida Act

The present Florida Act contains provisions employing all three of the regulatory provisions generally used for the supervision of the sale of securities: a general anti-fraud provision;23 registration of brokers and dealers;24 and registration of securities.25 Thus, Florida could adopt the entire Uniform Act without having to make a radical change in its regulatory philosophy.

I. General Anti-Fraud Provisions

Both the Uniform Act and the Florida Act contain provisions designed to prevent fraudulent practices in the sale of securities. Section 101 of the Uniform Act and section 517.19 of the Florida Act are general anti-fraud provisions. Both sections make unlawful the use of any device, scheme or artifice to defraud or engaging in any practice which operates or would operate as a fraud. Both sections are applicable to all securities, whether otherwise exempt from the coverage of the act, or sold in a transaction exempt from the act.

Section 517.19 of the Florida Act grants to the Florida Securities Commission the power to seek an injunction to restrain a variety of unlawful activity as specified in the section. Among the unlawful acts is the use of fraudulent practices in the purchase and sale of securities. In addition to the injunctive remedy, section 517.21 makes voidable every sale in violation of the provisions of the act, and section 517.30 makes this conduct a criminal violation. Thus, fraudulent activity subjects the actor to criminal and civil liability and injunctive action. The Uniform Act is identical.26

Section 101 of the Uniform Act is applicable, by its terms, to both the purchase and the sale of securities. The Florida Act is not as clear on this point. The introductory phrase of section 517.19 makes the section applicable to “any person.” This should include a fraudulent buyer as well as a fraudulent seller. Section 517.19(3) is applicable “to the purchase or sale of securities,” but section 517.19(3)(c) only prohibits conduct “which would operate as a fraud upon the purchaser.” It is apparently safe to

22. The Uniform Act contains extensive appendices to accommodate the various parts when one or more is deleted.
24. FLA. STAT. §§ 517.07-.091 (1961).
25. Uniform Act §§ 409 (criminal liability), 410 (civil liability).
assume that the general provisions of section 517.19 are applicable to both buyers and sellers, and that the limitation in section 517.19(3)(c) to purchasers is only applicable to that subsection. The effect of this limitation is not apparent as section 517.19(3)(b) prohibits fraudulent practices or transactions in the purchase and sale of securities.

Section 101 of the Uniform Act is based upon rule 10b-5 of the Securities Exchange Act. Like rule 10b-5, section 101(2) requires that material facts be disclosed when disclosure is necessary to prevent a statement from being misleading. The draftsmen’s comment states that this provision “does not impose an affirmative obligation to disclose except when there is an express or implied statement which has the effect of a half-truth unless something else is added.” The Florida Act is not explicit on this point, and there is no judicial authority on the question.

In structure the fraud provisions of section 517.19 of the Florida Act are much more verbose than those of the Uniform Act. Illustrative is the provision in section 517.19(2) which prohibits fictitious or pretended purchases or sales of securities. It is questionable, however, whether the inclusion of this type of express provision is necessary or adds anything to a statute which prohibits the use of any device, scheme or artifice to defraud. Experience under the federal rule upon which section 101 of the Uniform Act is based demonstrates that the provisions of section 101 are sufficiently comprehensive to accomplish its purpose.

Section 101(2) of the Uniform Act was designed to make it clear that “fraud” as used in the Uniform Act is not limited to common law deceit. Although the Florida Act is not explicit, the Florida Supreme Court, in Robson Link & Co. v. Leedy Wheeler & Co., allowed rescission against a seller that the court found had no intent to defraud and had made an innocent misrepresentation. Thus, the court did not require the scienter element of common law deceit to be proved in an action for rescission under the Florida Securities Act.

A. Advisory Activities

Section 102 of the Uniform Act regulates the conduct of investment advisors. Section 517.02(4)(d) of the Florida Act defines “dealer” to include an investment advisor, but the Florida Act does not contain any

---

27. 17 C.F.R. § 240.10b-5 (1949).
29. Ibid.
30. Uniform Act § 401(d); Loss & Cowett 251.
31. 154 Fla. 596, 18 So.2d 523 (1944).
32. The term “investment advisor” is not used in § 102. The official comment explains that “the definition of investment advisor in § 401(f) contains a number of exemptions which look to the registration requirement in Part II.” Section 102 is applicable to all persons engaging in advisory activity, including those exempt from registration.
specific regulatory measures for investment advisors, nor has the Florida Securities Commission adopted any regulations for the supervision of investment advisors.

The Uniform Act offers a great improvement in regulation of investment advisors. Sections 102(a)(1) and (2) make unlawful the use of any device to defraud or the engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit. Section 102(b) regulates the investment advisory contract and requires that it provide the following in writing: (1) compensation shall not be based on capital gains or appreciation of the funds or any portion of the funds of a client;33 (2) no assignment of the contract may be made by the advisor without the consent of the other party; and (3) if the investment advisor is a partnership, it will notify the client of any changes in the composition of the partnership. Section 102(c) grants the Administrator the power to prohibit investment advisors from having custody of clients' funds or, in the absence of such a rule, requires the advisor to give notice when he has these funds.

A special problem is created by section 102(c) of the Uniform Act. The official comment makes it clear that the same person may be an investment advisor and a broker-dealer. Neither the present Florida Act nor the Uniform Act prohibits a broker-dealer from having custody of clients' funds. The official comment suggests that section 102(c) may be made inapplicable to persons acting in both capacities or applicable only to those clients that a dealer charges for investment advice.

B. The Definition of Investment Advisor

The definition of "investment advisor" in the two acts is substantially the same.34 It includes a person who, for compensation, engages in the business of advising others as to the value of securities or the advisability of buying or selling securities, either directly or through publication. Both acts exclude from the definition persons who perform these services as an incident to their regular business or profession. The Uniform Act explicitly exempts a broker-dealer whose performance of these services is solely incidental to the practice of his profession from the definition of investment advisor.35

33. Section 102(b)(1) does not prohibit a contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of a definite date or taken as of a definite date.
34. Fla. Stat. § 517.02(4)(d) (1961); Uniform Act § 401(f).
35. The Florida Act which treats investment advisors as broker-dealers makes such a distinction unnecessary.
C. The Need for Special Regulation of Investment Advisors

The existing structure for regulation of investment advisors in Florida is inadequate. Investment advisors and broker-dealers are not the same, they perform different functions and hold themselves out to the public as having different qualifications. It is unrealistic to subject them to the same regulations. The provisions of the Uniform Act which regulate the activity of investment advisors offer a great improvement over the existing Florida Act in this important area.

II. REGISTRATION OF BROKER-DEALERS, INVESTMENT ADVISORS AND AGENTS

A. Generally

Both the Uniform and Florida Acts require annual registration of broker-dealers and their agents, as well as investment advisors. Registration is mandatory; it is unlawful to transact business without registration. The Florida Act does not require separate registration for investment advisors; they are registered as broker-dealers.

B. Registration Procedure

The registration procedure is substantially similar under both acts. The application for registration must be in writing, accompanied by a consent to service of process and the registration fees. The information required in the registration application is enumerated to a great extent in both acts, which require disclosure of the qualifications of the applicant, the form and place of the applicant's business and related information.

36. See generally 2 Loss, SECURITIES REGULATION 1396-1400 (2d ed. 1961).
37. FLA. STAT. § 517.12 (1961); UNIFORM ACT § 201. The registration of dealers was held constitutional by the Florida Supreme Court in State v. Minge, 19 Fla. 515, 160 So. 670 (1935).
38. FLA. STAT. §§ 517.02(4)(d), (7) (1961).
39. FLA. STAT. § 517.12(2) (1961); UNIFORM ACT § 202(a).
40. FLA. STAT. § 517.12(3) (1961); UNIFORM ACT § 202(a).
41. FLA. STAT. §§ 517.12(4), (6) (1961); UNIFORM ACT § 202(b). The Florida statute requires an annual registration fee of $100 for dealers and $20 for salesmen. The Uniform Act does not set the registration fee; it is left to the states to determine.
42. FLA. STAT. § 517.12(2) (1961). The application shall state the principal office of the applicant; principal office and all branch offices in this state; name and style of doing business; names, residences and business addresses of all persons interested in the business as principals, co-partners, officers and directors, the capacity and title of each; general plan and character of business; length of time the dealer has been engaged in business.
UNIFORM ACT § 202. The requirements are form and place of organization; proposed method of doing business; qualifications and business history of the applicant, any partner, officer or director, person performing similar functions or any person directly or indirectly controlling the applicant; the qualifications and business history of any employee of an investment advisor; any injunctions, administrative orders or convictions of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; applicant's financial condition and history.
The Florida Act grants the Securities Commission the power to provide by rule for additional information relating to the "good business repute" of the applicant; the Uniform Act grants to the Administrator the power to provide by rule for whatever information the Administrator may deem necessary.

C. Registration of Agents

Agents and salesmen are subject to the same registration procedure as their employers. The Florida Act requires that the salesman's application be submitted by a registered dealer and that his registration ceases upon termination of the salesman's employment. The Uniform Act provides that registration of the agent "is not effective" when the agent is not associated with a registered broker-dealer.

D. Denial or Revocation of Registration

The present Florida Act's requirements and the administrative regulations for the licensing of broker-dealers are inadequate to protect the investing public. The only standard that an applicant is required to meet is "good repute in business." The applicant is not subject to a compulsory examination of his knowledge of the securities business. Although the Securities Commission may give an examination at its option, the legislature has failed to provide funds for this.

"Good repute in business" is not satisfactory as a standard for granting registration as a broker-dealer. Section 517.16 contains a list of grounds upon which an application may be denied or revoked; most of these grounds relate to fraud in the sale of securities and the list includes violation of the Securities Act, false statements in the registration application, fraud in the sale of securities and most important, demonstrated unworthiness to transact the business of dealer or salesman. It could be argued that the enumerated grounds for denial in section 517.16 serve as a limitation upon the "good repute in business" standard of section 517.12. If this be true, a

44. Uniform Act § 202(a).
46. Uniform Act § 201(b). This section requires that the agent and the employer notify the Administrator when the relationship ceases and begins. Thus a salesman need not re-register when he changes employers. See the draftsmen's comments to § 201(b).
47. Fla. Stat. § 517.12(2) (1961). The optional examination provision was added to the act in 1957, Fla. Laws 1957, ch. 57-288. Prior to the amendment, the Attorney General had decided that the Securities Commission had no authority to give such an examination; its only authority was to examine the applicant's good repute in business.
convicted felon could receive a dealer's license provided his felony did not relate to the securities business.\footnote{48}

The vague standards of the Florida Act have not gone uncriticized. One of the solutions previously proposed to correct the defects in the Florida Act was the adoption of the Uniform Act.\footnote{49}

The Uniform Act's grant of rule making power allows the Administrator greater flexibility to require complete disclosure of all material facts in the registration application. The application may be denied if the applicant has committed, within the past ten years, any felony or misdemeanor involving a security.\footnote{50}

The Uniform Act provides that registration may be denied if the applicant is not qualified on the basis of such factors as training, experience and knowledge of the securities business.\footnote{51} Unfortunately, the Uniform Act does not require a compulsory examination of the qualifications of the applicant; an examination is optional.

In addition to provisions similar to those of the Florida Act relating to fraud in the sale of securities,\footnote{52} the Uniform Act provides that registration may be denied if the applicant has engaged in dishonest or unethical practices in the securities business.\footnote{53} Although, standing alone, this provision appears no more definite than "good repute in business," the draftsmen explain that the phrase takes on definite meaning under the ethical standards being developed by the National Association of Securities Dealers.\footnote{54}

E. Revocation of a Partnership's Registration

The Florida Act permits the revocation of a partnership's or corporation's registration if any partner or officer or director has been guilty of any act or omission which would be cause for refusing or revoking the registration of an individual dealer or salesman.\footnote{55} The Uniform Act is substantially similar, but requires a finding by the Administrator that revocation would be in the public interest.\footnote{56} The disqualification of any other agent is not grounds for an action against the employer under the Uniform Act, unless the disqualification is due to the failure of the employer to exercise reasonable supervision.\footnote{57}

\footnotesize{48. Harum, Needed Reform in Security Dealer Legislation, 12 U. MIAMI L. REV. 75, 76 (1957). \n49. Id. at 84. \n50. Uniform Act § 204(a) (2) (C). \n51. Uniform Act § 204(a) (2) (I). \n52. Uniform Act §§ 204(a) (2) (A), (B). \n53. Uniform Act § 204(a) (2) (G). \n54. Draftsmen's comment to Uniform Act § 204(a) (2) (G). \n55. Fla. Stat. § 517.16 (1961). \n56. Uniform Act § 204(a) (1). See also official comment to § 204(a). \n57. Uniform Act § 204(a) (2) (I).}
F. Bonding Requirement

The registration of broker-dealers in Florida is conditioned upon their filing a surety bond in the amount of five thousand dollars. In lieu of the bond an equal amount of cash or securities may be deposited. The Florida Act places a one year period of limitation on actions against the bond. The Uniform Act does not impose a mandatory bonding requirement. The Administrator may, by rule, require a bond. The amount suggested is ten thousand dollars, with a two year statute of limitations. Deposit of cash or securities in lieu of the bond is permitted.

G. Post-Registration Supervision

A great void exists in the Florida Act as to provisions regulating the business practices of broker-dealers and investment advisors. Although their registration may be suspended or revoked for the grounds enumerated above, the Florida Securities Commission has not been given the power to create rules to regulate their business activity. Nor does the Securities Commission have adequate supervisory power. The Florida Attorney Generals have been extremely conservative in their interpretation of the Commission's rule making power; in the absence of specific statutory authority to make rules, the Commission has been reluctant to utilize its general grant of rule making power.

Certainly, when a registration may be revoked upon such vague statutory grounds as "demonstrated . . . unworthiness to transact the business of dealer or salesman," the Commission should be able to exercise its rule making power to define what business practices it considers unethical. Charges of arbitrary administrative action could be avoided easily if the broker-dealers know what standards of business conduct they are expected to observe.

The Uniform Act grants to the Administrator the power to regulate and supervise the business activity of brokers, dealers and investment advisors.

59. Fla. Stat. § 517.14 (1961). Riley v. Sweat, 110 Fla. 362, 149 So. 48 (1933) held that the requirement that a bond be furnished as a condition precedent to registration as a dealer was unconstitutional. The act was then amended to allow a deposit of cash or securities in lieu of the bond. The validity of the requirement was then upheld in State ex rel Municipal Bond & Inv. Co. v. Knott, supra note 58. Securities deposited by a dealer, in lieu of bond, may be replaced by other securities, if the Securities Commission is satisfied that no injury will or might accrue to a present claimant to a current deposit. [1955-1956] Fla. Att'y Gen. Biennial Rep. 841.

61. Uniform Act § 202(e).

In addition to a general grant of rule making power to define terms used in the act, the Administrator is given the express power to make rules which require: (a) minimum capital; (b) filing of financial reports; (c) keeping books and accounts; and (d) power to inspect the books and records. This express grant of rule making power gives to the Administrator the flexibility an administrative agency must have if it is to perform its functions in a competent manner. If the Florida Securities Act is to accomplish its purpose of protecting the investor, some supervision of brokers and dealers after registration is necessary. It is not enough that registration may be revoked after the registrant has gotten into difficulty; the grant of supervisory power may well prevent harm to the public from occurring.

Especially since federal legislation and the stock exchanges require the filing of periodic financial reports, little objection should be forthcoming from the industry if its members are also required to submit financial reports to the Florida Commission. The inspection power is a visitorial power which does not require the use of a subpoena. The requirement that books and records be kept is self-explanatory.

H. The Definition of Broker-Dealer

The Uniform Act 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." Exempted from this definition are agents, issuers, banks, savings institutions and trust companies and persons who have no office in the state and have minimal contact with the public in the state.

The definition in the Florida Act is in three parts; it includes persons who buy and sell securities for the purpose of offering them for sale to the public, who trade or deal in securities as agent or principal for a commiss-

---

64. Uniform Act § 412(a).
65. Uniform Act § 202(d). The official comment includes a provision which gives the Administrator authority to adopt a debt-capital ratio rule instead of a minimum capital rule.
66. Uniform Act § 203(b).
67. Uniform Act § 203(a).
68. Uniform Act § 203(d).
70. See draftsmen's comment to Uniform Act § 203(b).
71. Official comment to Uniform Act § 203(b).
72. Uniform Act § 401(c).
73. Uniform Act § 401(c)(4). "'Broker-dealer' does not include...a person who has no place of business in this state if (A) he effects transactions in this state exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other broker-dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies... pension or profit-sharing trusts, or other financial institutions or institutional buyers... or (B) during any period of twelve consecutive months he does not direct more than fifteen offers to sell or buy into this state in any manner to persons other than those specified in clause (A), whether or not the offeror or any of the offerees is then present in this state."
sion or at a profit, or who deal in futures or accept margins on purchases or sales. A broker is defined as a dealer. As previously noted, the Florida Act defines an investment advisor as a dealer.

The major distinction in the definitions in the two acts, aside from the status of investment advisors, is in the application of the definitions to those dealers who have limited contacts with the public within the state. The Uniform Act exempts from the definition, and thus from the registration provisions, broker-dealers who do essentially a wholesale business, if they have no office in the state, and allows these broker-dealers to make fifteen offers or less to individuals within a twelve month period.

The general philosophy of this exemption appears to be that registration is not necessary when the only contacts that the broker-dealer has within the state are with persons who are able “to take care of themselves” as institutional buyers are well able to. The exemption for offers to individuals by an out-of-state dealer is designed to allow a dealer to contact a regular client while he is out of his normal state of residence, but is sufficiently limited to prevent abuse by dealers who desire to remain out of state to avoid registration.

I. The Issuer as Dealer

The Uniform Act excludes issuers from the definition of “dealer.” The Florida Act requires an issuer which sells its own securities to the public to register as a dealer. After registration as a dealer, the principal officers of the issuer may sell its securities. Any other employee of the issuer must be registered as a salesman before he can sell the securities.

The exclusion of the issuer from the definition of dealer in the Uniform Act makes sense. As explained in the draftsmen’s comments, the security must be registered and since any employee of the issuer who does any selling must register as an agent, requiring registration of the issuer as a dealer involves an unnecessary duplication of filing. In addition, treating an issuer as a dealer subjects the issuer to the regulations adopted for the supervision of dealers, such as surety bonds, which are unnecessary for the supervision of an issuer.

77. See note 73 supra.
78. Official comment to Uniform Act § 401(f)(6).
79. See note 75 supra.
80. Uniform Act § 401(c)(2).
81. See note 77 supra.
82. Robinton & Sowards, supra note 81.
83. Draftsmen’s comment to Uniform Act § 401(c).
J. The Definition of Agent

The Florida Act defines a “salesman” as every person, other than a dealer, authorized by a dealer or issuer to sell securities. The partners of a partnership or executive officers of a corporation registered as a dealer are not deemed salesmen. An “agent” is defined as a salesman.

The definition of “agent” in the Uniform Act is substantially similar, except for the provisions, discussed above, relating to the sale of securities by an issuer. Although the issuer need not register, it is necessary for it to sell its securities through a registered agent unless the security is exempt or the transaction is exempt by the definition of agent, not the general exemptions of Part IV of the act.

III. Registration of Securities Under the Florida Act

The Florida Act contains three types of registration procedures for securities: Qualification, Notification and Announcement.

A. Registration by Announcement

The purpose of registration by announcement is to allow secondary distribution of securities through dealers; it is not available for the registration of a primary distribution by an issuer. To be eligible for this type of registration the securities must have been outstanding and in the hands of the public as a result of a prior original marketing by the issuer. The procedure for registration by announcement is quite simple. A registered dealer informs the Securities Commission of his intention to trade in the security. The notification contains: (1) the name and location of the issuer; (2) a brief description of the security; and (3) a statement that the securities have been outstanding and in the hands of the public not less than one year.

86. Uniform Act § 401(b).
87. Ibid. The exempt securities are governmental and bank securities, commercial short term paper and investment contracts issued in connection with employee benefit plans. A person effecting transactions with employees, partners or directors of the issuer is excluded from the definition of agent if no commission or other remuneration is paid.
90. A filing fee of ten dollars is required; the security must be sold at a price or prices reasonably related to the market price. Registration by announcement is not required for secondary trading in securities that have been registered by notification or qualification; such securities are eligible for secondary trading upon completing of the original marketing. Fla. Stat. § 517.091 (1961).
B. Registration by Notification

Registration by notification is designed for "seasoned issues." For securities to be eligible for this registration, the issuer must "own a property, business or industry which has been in continuous operation not less than three years" and have an average annual net earnings record as specified in detail in the act according to the type of security to be issued. The requirement for common stock is that there must be five per cent annual net earnings upon all outstanding common stock of equal rank.

The procedure for registration by notification is not complex. Registration may be accomplished by an issuer or registered dealer filing an application with the Commission that contains five categories of information. The application must be accompanied by a consent to service of process and the registration fees. A copy of the offering circular must also be filed.

The relationship between registration by notification and announcement was well illustrated in an opinion of the Attorney General. In May 1947, a dealer registered by notification 3,000 shares of a new issue of a corporation having 1,250,000 shares outstanding, for sale at not more than twelve dollars and fifty cents a share. On February 7, 1948, another dealer by notice informed the Commission of his intent to trade in the issue of 3,000 shares at not more than twenty dollars a share. The Attorney General advised the Commission that the notice should not be accepted as it constituted a direct contravention of the original registration; that while registration by announcement was possible for the old issue of 1,250,000 shares outstanding, it was not for the new issue of 3,000 shares.

---

94. Fla. Stat. § 517.08(2)(a) (1961). The application shall contain: (1) name of the issuer, location and place of incorporation; (2) brief description of the security and amount of issue; (3) amount of issue to be sold in the state; (4) a brief statement which shows the security is eligible for registration by notification; and (5) the maximum offering price.
96. Fla. Stat. § 517.08(2)(g) (1961). The fee is 1/20 of 1% of the aggregate sales price of the securities to be sold in the state with a minimum fee of $20.
98. Fla. Stat. § 517.12(8) (1961). "Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the commission in writing of his intention so to do."
C. Registration by Qualification

Securities which are not exempt and which do not qualify for registration by notification or announcement must be registered by qualification before they may be offered or sold in the state.\(^ {100}\) The Commission has adopted a standard form for registration by qualification which requires the submission of information which the act itself calls for "and such other relevant information as the Commission may in its judgment deem necessary."\(^ {101}\) Generally, the act and the Commission require complete disclosure of the issuer's financial and business structure and the character and background of its members.\(^ {102}\)

1. Standards for Granting Registration by Qualification

Section 517.09(7) contains four general standards which govern the granting of registration. These are: (1) that the sale of the security would not be fraudulent; (2) that it would not work or tend to work a fraud upon the purchaser; (3) that the terms of the sale are fair, just and equitable; and (4) that the enterprise or business is not based upon unsound business principles. Although these general standards have permitted the Commission a wide range of discretion, the Commission has developed some definite principles in its administration of the general standards.

a. Stock Option Rules

It is the position of the Commission that stock options granted to insiders, but not to the public investor, are violative of the fair, just and equitable principle, and except in unusual circumstances, registration will be denied when the application discloses the existence of these options. The burden is on the applicant to justify the option.\(^ {103}\) The act itself does not prohibit stock options to insiders.

b. Ratio of Insider and Public Price

It is understood that the Commission will deny registration when the ratio between the price paid by the promoters and the public offering price is unreasonably large. Although the Commission has not made any public statement to this effect, it is believed that in the average case the price to the public may not be more than two and a half times that paid by the promoters.\(^ {104}\)

\(^ {100}\) FLA. STAT. §§ 517.07, .09 (1961).

\(^ {101}\) FLA. STAT. § 517.09(3) (1961). Form 8 is the basic form of registration by qualification. In addition the Commission also requires the submission of various exhibits. See Robinton & Sowards, *Florida's Blue Sky Law: The Lawyer's Approach*, 6 MIAMI L.Q. 525, 536 (1952).

\(^ {102}\) FLA. STAT. § 517.09 (1961).


\(^ {104}\) Interview with Professor Hugh L. Sowards, Dec. 1961. The Commission also appears to require that the price per share to the public be not more than thirty times the prior earnings per share. *Ibid.*
c. The Twenty-Five Per Cent Rule

Without express statutory authority, the Commission has adopted a formula under the “sound business principle” standard that the applicant for registration must have tangible assets in excess of liabilities of at least twenty-five per cent of the amount sought to be raised in the proposed public offering. It is the Commission’s view that such assets as patents, trade marks, copyrights and good will are not tangible assets for the purpose of the rule, although the Commission has sometimes allowed accounts receivable to be included as tangible assets.105 This policy of the Commission has never been enacted into a formal rule or regulation.106

d. Escrow Deposits

Section 517.18 of the act requires that stock issued to insiders for services or intangible assets be placed in escrow until a dividend of six per cent or more shall be actually earned and paid to those shareholders who paid for their securities in cash. While in escrow the shares are non-transferable.

Although not provided for in the act, the Commission requires that companies with no history of earnings place the funds received from the sale of their securities in escrow until the entire issue has been subscribed. The escrow requirement is often harsh on a company which needs funds immediately, but, it is reported, without this arrangement “outright denial of the application may result, on the basis that the venture is based upon unsound business principles.”107

e. Capital Structure

The Commission “does not look with favor upon new corporations issuing interest securities or preferred stock.”108 Only in rare instances will registration be granted when the capital structure consists of more than common stock. In those events the Commission requires “a sinking fund and an earnings history commensurate with the obligations the corporation is creating.”109

f. Expenses of the Offering

The Florida Act provides that the total expenses of a public offering of securities registered by qualification cannot exceed twenty per cent of

109. Ibid.
the total sales price of securities sold in the state.110 This limitation applies to all expenses including legal fees, underwriters' commissions and any other expenses, including apparently, the filing fee for registration.111

IV. REGISTRATION OF SECURI TIES UNDER THE UNIFORM ACT

Three methods for registration of securities are specified in the Uniform Act: notification; qualification; and coordination. Registration is mandatory for all securities offered or sold in the state unless the security or transaction is exempt.112

A. Standards for Denial, Suspension or Revocation of Registration

Section 306(a) of the act specifies the standards for granting registration. The standards of section 306 are applicable to all three types of registration. The draftsmen have attempted to eliminate the vague standards generally employed in the typical "blue sky" law, such as the "fair, just and equitable" principle, while preserving the traditional method of state regulation of securities by specifying the substantive standards by which registration is to be determined. Honest and reasonable men can and do differ as to what constitutes "sound business principles" and an administrative agency should not have the power, under a vague statutory standard, to force its judgment upon that of a board of directors as a condition to selling securities within the state. Under section 306(a) registration may be denied for such usual reasons as a violation of the act or the filing of a false or misleading registration statement.113 Two provisions of the section still leave

110. FLA. STAT. § 517.09(5). Although the provisions are applicable only to securities registered by qualification, the Commission has, in practice, applied the 20% rule to securities registered by notification on the grounds that it is necessary in order to prevent "fraud" upon the purchaser. The use of such power has been approved by the Attorney General. [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 428.

111. FLA. STAT. § 517.09(6) (1961). The fee is 1/10 of 1% of the aggregate sales price of the securities to be sold in this state with a minimum fee of $40 and a maximum of $1000.

112. UNIFORM ACT § 301.

113. UNIFORM ACT § 306(a). "The [Administrator] may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration statement if [he] finds (1) that the order is in the public interest and (2) that

(A) the registration statement as of its effective date . . . is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(B) any provision of this act or any rule, order, or condition lawfully imposed under this act has been willfully violated, in connection with the offering . . . ;

(C) the security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court of competent jurisdiction . . . ;

(D) the issuer's enterprise or method of business includes or would include activities which are illegal where performed;

(E) the offering has worked or tended to work a fraud upon purchasers or would so operate;

(F) the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options . . . ."
a great amount of discretion to the Administrator. Section 306(a)(2)(E) provides that registration may be denied if "the offering has worked or tended to work a fraud upon purchasers or would so operate." It is clear that "fraud" is not limited to common law deceit, yet the draftsmen state that the provision "is not meant to be as broad as the old sound business principles standard . . . or the fair, just and equitable standard . . . ."114 The extent to which the draftsmen's intent will be operative would appear to be speculative. The Uniform Act will be administered by the same personnel that administer the current state acts, and it may be expected that attitudes under the old standards will not be quickly forgotten.

Section 306(a)(2)(F) allows the Administrator to deny registration if "the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options . . . ." Section 306(a)(2)(F) does not specify the amounts that are considered unreasonable; the Administrator is given that discretion. The present Florida Act is more definite in this respect, but it may be expected that the Commission would not, under the provision of the Uniform Act, depart to any great extent from the present rules of thumb it has developed.

B. Registration by Notification

For securities to be eligible for registration by notification, the issuer and any predecessor must have been in continuous operation for five years and the earnings test of the act satisfied.115 The Uniform Act imposes, in effect, a single earnings test, regardless of the kind of security being registered. Fixed interest or dividend securities are eligible for registration by notification if there has been no default in payment during the previous three fiscal years and the issuer has had annual earnings of five per cent of its common stock.116

Notification may be used for all non-issuer distributions for all securities other than oil, gas and mineral interests, if any security of the same class has been previously registered or issued under any exemption.117

114. Draftsmen's comment to Uniform Act § 306(a).
115. Uniform Act § 302(a)(1).
116. Official comment to Uniform Act § 302(a)(1). "[T]he five-percent test is applied to all outstanding securities at the date the registration statement is filed, and those securities are measured by the offering price (when additional securities are being offered) or by the market price, whichever is higher."
117. Uniform Act § 401(h) defines non-issuer as "not directly or indirectly for the benefit of the issuer."
118. The official comment to Uniform Act § 302(a)(2) explains that mineral interests are excluded because they have no "issuer" as that term is defined by the act, and thus all such securities would be eligible for notification registration if they were not exempted.
1. Procedure

The procedure for registration by notification under the Uniform Act is substantially the same as under the Florida Act, with the exception that the Uniform Act requires more information in the registration statement. This is due to the fact that securities being registered by notification are subject to the general standards of section 306(a) as well as the requirements of the notification procedure. Registration becomes effective on the afternoon of the second full business day after filing. The delayed effectiveness gives the Administrator time to examine the registration statement and institute a stop order proceeding if necessary.

C. Registration by Coordination

"[T]he Uniform Act makes one of its principal contributions through uniform procedures which are closely coordinated with procedures under the federal Securities Act, through generally uniform exemptions, and through a general clarification of the law on a uniform basis."119 No aspect of securities regulation is more in need of reform than the complexities surrounding a multi-state issue of securities. In this situation registration is required under the federal act and under each state act, with each state requiring different information or the same information in a different form.120 The registration by coordination provision of the Uniform Act offers a practical solution to this complex problem.

"Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination."121 The applicant must, in essence, submit to the state administrator the same information filed with the Securities and Exchange Commission and must include an undertaking to file all amendments to the federal registration statement with the Administrator. Securities being "registered" under the limited exemption of Regulation A122 of the federal act do not qualify for registration by coordination.

The draftsmen explain that the registration by coordination procedure streamlines the contents of the registration statement and the procedure by which it becomes effective, but does not govern the standards for granting registration. Securities registered by coordination are subject to the substantive standards of section 306(a). "A coordination procedure has thus been achieved without sacrificing the traditional regulatory philosophy of the states to the disclosure philosophy of the federal statute."123

120. See Loss & Cowett 89-125.
121. Uniform Act § 303(a).
123. Draftsmen's comment to Uniform Act § 303(a). (Italicized in original.)
1. Effectiveness of the Registration Statement

A registration statement filed with the Administrator for registration by coordination becomes effective at the moment the federal registration becomes effective if the following conditions are satisfied: (1) no stop order is in effect and no proceeding is pending under section 306; (2) the registration statement has been on file with the Administrator for at least ten days; and (3) a statement of the maximum and minimum proposed offering price and maximum underwriting discounts and commissions has been on file for two days. The registrant is also required to file the contents of the federal "price amendment" as a "post-effective" amendment to the state registration.\(^\text{124}\)

2. Offers During the "Waiting Period"

Section 301 of the Uniform Act prohibits offers as well as sales of securities unless the security is registered. Prior to the 1954 amendment\(^\text{125}\) of the federal Securities Act which legalized certain types of written offers, but not sales, in the "waiting period" between the filing and effective dates, there was no special problem as state law also prohibited offers until the effective date. After 1954 the federal act allowed offers during the waiting period but state law prohibited the offers.\(^\text{126}\) The Florida Securities Commission has adopted a policy of allowing written offers prior to the effective date of registration in Florida for securities being registered under the federal statute if no price information is given and a legend appears on the offer to the effect that the registration statement has been filed but is not yet effective, and that the prospectus is not an offer to sell or a solicitation to buy.\(^\text{127}\) The Uniform Act allows offers of a security being registered under both the federal and Uniform Acts to be made prior to the effective date if no stop order is in effect or pending.\(^\text{128}\)

The adoption of this provision of the Uniform Act will clarify what is an otherwise questionable legal position of the Florida Securities Commission. The Florida Act provides that an offer to sell is by definition a "sale," which the Florida Act prohibits until registration is effective.\(^\text{129}\) Although the Commission, from a practical viewpoint, is undoubtedly correct in its position of allowing offers during the waiting period for securities being registered under the federal act, the propriety of this position is difficult to sustain under the Florida Act. Although the Florida Act gives the Com-

\(^{\text{124}}\) Uniform Act § 303(c).


\(^{\text{126}}\) See 1 Loss, Securities Regulation 223-24 (2d ed. 1961) for a description of the kinds of written offers allowed during the waiting period under the federal statute.


\(^{\text{128}}\) Uniform Act § 402(b)(12).

mission authority to "make any reasonable rules and regulations . . . to cooperate effectively with . . . any other agency of the United States government which may have supervision or control over the sale of securities in interstate commerce . . . not in conflict with the laws of this state," the proviso to the rule making authority raises the same question that would exist in the absence of this authority. It may be said that as sales cannot be made until the effective date, the waiting period offer is no "offer" at all, since it cannot be accepted. Or it may be argued that the legend and the absence of price information makes the solicitation so indefinite that it is not an offer. But these arguments are tenuous at best, and there is a remote possibility that civil liability may be founded upon an offer made during the waiting period.

D. Registration by Qualification

Securities which do not meet the requirements for registration by notification or coordination must be registered by qualification. Section 304(b) of the Uniform Act contains a detailed list of the contents of the registration statement. As does the Florida Act, the Uniform Act requires a detailed disclosure of the issuer's financial and business history and the character and background of its members.

The adoption of the registration provisions of the Uniform Act would not result in any drastic change in present Florida policy; quite to the contrary, the Uniform Act grants specific authority to the Administrator to provide by rule or regulation many of the standards the Florida Commission now follows as "rules of thumb." Under the Uniform Act the Administrator may require escrow of securities or funds, and he may deny registration if there are unreasonable promoters' profits or underwriting expenses, or if the participation of the promoters is unreasonable. Under the latter clause the twenty-five per cent rule could be continued, as the failure of the promoters to have tangible assets of at least twenty-five per cent of the amount to be solicited from the public may be considered as being insufficient participation by the promoters.

E. Secondary Distributions

All securities being sold in the state, whether for the benefit of the

131. See [1947-1948] Fla. Atty Gen. Biennial Rep. 478, 479. The Attorney General advised that, despite admonitions to the contrary, the prime purpose of the form provided by former SEC rule 131 (11 Fed. Reg. 14725 (1946)), the "red herring prospectus rule," is a solicitation to buy and it may not be used until the security is registered in Florida.
132. See text at notes 100-11 supra.
issuer or not, must be registered unless sold in an exempt transaction, under both the Uniform\textsuperscript{133} and Florida\textsuperscript{134} Acts.

The major exemption in the Florida Act for non-issuer distributions is the "isolated sale exemption."\textsuperscript{135} There is a substantially similar exemption in the Uniform Act.\textsuperscript{136} The Florida courts have not interpreted the meaning of "isolated sale" and the Attorney General has not given a conclusive answer.\textsuperscript{137} To an extent the question is not a vital one under current Florida practice, as registration by announcement offers an easy method of registration should there be any doubt of the applicability of an exemption.

The Uniform Act has a special exemption specifically adopted for non-issuer distributions. Section 402(b)(2) applies to:

any non-issuer distribution of an outstanding security if (A) a recognized security manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or (B) the security has a fixed maturity or fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security.

The Administrator may define the term "recognized security manual" and may deny the exemption for certain distributions.\textsuperscript{138}

Section 305(i) of the Uniform Act provides that every registration statement is effective for one year from its effective date and that all outstanding securities of the same class as the registered security are considered to be registered for the purpose of any non-issuer transaction as long as the registration statement is effective. The draftsmen explain that "the net effect of this class registration technique is that whenever a registration statement has become effective, no matter who has filed it or how many units of the class have been registered, all securities of the same class can be legally traded by anybody as if they were registered."\textsuperscript{139} Only if section

\textsuperscript{133} Uniform Act § 301.

\textsuperscript{134} Fla. Stat. § 517.07 (1961).

\textsuperscript{135} Fla. Stat. § 517.06(3) (1961).

\textsuperscript{136} Uniform Act § 402(b)(1).

\textsuperscript{137} In [1957-1958] Fla. Att’y Gen. Biennial Rep. 77, the opinion of the Attorney General was that the question of what constitutes an "isolated sale" of securities is not a question capable of specific and definite answer. Whether the sale of stock is an isolated sale or one of repeated and successive transactions indicating a course of dealing in stocks, depends on the facts of each case in the light of the purposes of the act.

\textsuperscript{138} Draftsmen’s comment to Uniform Act § 305(i).

\textsuperscript{139} Ibid.
305(i) is not applicable must a registration statement be filed for secondary trading.

The class registration provisions of the Uniform Act would result in a major change in practice if it were adopted in Florida. Secondary trading is now permitted in Florida only for securities actually registered, not for an entire class. In addition, the securities actually registered must be traded, at least by registered dealers, within the price range of the original registration statement or a new registration statement must be filed. The effect of these provisions is that multiple registration is required for secondary trading; however, the announcement procedure greatly facilitates the requirement. The class registration provision of the Uniform Act more than makes up for its lack of a special registration procedure for secondary distributions.

F. Prospectus Requirement

The Florida Act does not require that a prospectus be filed with an application for registration of a security; the Securities Commission is granted authority to require that a prospectus be filed with the registration application. In practice the Commission has translated the statutory "may" into an administrative "must" and not only requires that a prospectus be filed with each registration application but also requires that a prospectus "be in the hands of a prospective purchaser prior to the consummation of any sale . . . ." The Commission has adopted a model prospectus, perhaps due to the fact that the act is silent as to the contents of the prospectus that the Commission "may" require to be filed with the application for registration.

The Uniform Act also grants the Administrator the power to require that a prospectus be filed and delivered to the buyer, but the grant of power in the Uniform Act is intended to be narrow. The official comment indicates that this power is limited for use "in those unusual cases where he deems it in the public interest." The extent to which the official comment and draftsmen's intent will be followed should the Uniform Act be adopted is speculative at best; nevertheless it is submitted that the provision of the Uniform Act is superior to the present Florida Securities Commission's rule for the following reasons:

1) From a theoretical viewpoint, the prospectus is used as a vehicle

---

140. See text accompanying notes 98-99 supra.
141. FLA. STAT. § 517.09(3)(d) (1961).
143. Ibid.
144. UNIFORM ACT § 304(d).
145. Official comment to UNIFORM ACT § 304(d).
for dissemination of information under a disclosure type of regulatory statute. Its purpose is to place information about the security in the hands of a prospective buyer, so he can reach a well informed judgment as to its value. The Florida Act is not a disclosure statute; it requires that securities must qualify under substantive standards to be sold in the state. Therefore, why require the principal means of a disclosure type statute to be used in all cases and under all events under a statute which requires the Commission to pass upon the merits of a security before it can be sold?  

2) The Florida Act, while not a model of clarity in this area, does not appear to justify the position of the Commission. It would appear that the legislature did not contemplate an absolute requirement that a prospectus be filed in all cases, much less that one be delivered to a buyer in all circumstances. Of course it can be argued that if the use of a prospectus was not contemplated, then the filing of the prospectus would not have been provided for. But it is still difficult to translate the statutory "may be filed" into a requirement that the prospectus "must be used" in all cases.

G. Approval of Sales Literature

Section 403 of the Uniform Act provides that the Administrator may, by rule or order, require the filing of any sales literature intended for distribution to prospective buyers, unless the security or transaction is exempt under section 402. The Administrator is given authority to determine in what situations approval of this literature is required and in what situations filing before use is sufficient.

The Florida Act also grants the Commission discretion to require the filing of sales literature for securities being registered by qualification. The act does not state if approval before use is also required. The act also requires that a copy of the offering circular be filed in cases of registration by notification.

V. CIVIL LIABILITY

Civil liability for sales made in violation of the securities acts is said to be a major factor in gaining compliance with the acts. Yet, the number

---

146. See generally 1 Loss, Securities Regulation 121-28 (2d ed. 1961).
147. The author is not unaware of the Florida Securities Commission's avowed position that it does not pass upon the merits of any security. But it is difficult to imagine what it is that the Commission does when it decides that an offering is "fair, just and equitable," or that the issuer does not run his business on "unsound business principles." See Fla. Securities Comm'n Release No. 11, Nov. 22, 1955, 1 Blue Sky L. Rep. ¶ 13641.
148. The exemptions in section 402 are discussed in the text accompanying notes 185-234 infra.
149. Uniform Act § 412(a).
of cases involving civil liability for the violation of these statutes is small; in Florida there are apparently only three. One of two conclusions may be drawn from this rather startling fact: (1) either the Florida Securities Commission is doing a magnificent job of regulating the securities industry; or (2) the investing public is unaware of its rights under the act.

The available evidence would appear to indicate the latter. For example, it is reported that in the years 1954, 1955 and 1956 not one registration was filed for a cooperative apartment development in Florida, despite their great popularity and an opinion of the Attorney General that shares in these projects were securities.

A. Persons Liable and Extent of Liability

The Florida Act provides that every sale made in violation of the act is voidable at the option of the purchaser. Every person making such sale and every director, officer or agent of or for the seller is liable, with the exception that directors, officers or agents are liable only if they shall have personally participated or aided in any way in making the sale.

The proviso to the liability of officers and directors creates many difficult questions, not the least of which is what constitutes sufficient aid or personal participation in the sale for liability to arise? The sole Florida case in point, Nichols v. Yandre, held that directors did not personally participate when they ratified a sale made by the president of the company and thus were not liable. Beyond the holding of the Nichols case, one may question what the liability of directors would be for authorizing the use of a misleading prospectus. Would approval of a plan to defraud prior to the sale stand in a different position than ratification after sale? The answer is by no means certain.

The right of action granted to the purchaser by the Florida Act appears to be unnecessarily broad for its purpose — protection of the investing public. Declaring that any sale made in violation of the act is voidable

References:


155. Anderson, Cooperative Apartments in Florida: A Legal Analysis, 12 U. Miami L. Rev. 13, 42-43 (1957). Anderson states that this report is “incredible” and attributes it to an error in filing by the Commission. Yet he states that the “conclusion is irresistible” that many have ignored the requirements of the act.


158. 151 Fla. 87, 9 So.2d 157 (1942). In Sorenson v. Elrod, 286 F.2d 72 (5th Cir. 1960) it was held that a bank did not aid or personally participate in the sale, within the meaning of the Florida Act, when it acted as a depository for the seller.
exposes honest sellers to an unreasonable contingent liability, for in an act
as complex as the Securities Act the possibility of unintended and relatively
harmless violations is present. There appears to be no valid reason why
the failure or delay in filing a report should render an otherwise bona fide
transaction voidable at the whim of the purchaser, dependent upon the
vagaries of the market. These more "technical" phases of the statute could
be administered more efficiently through a series of fines for violation,
enforced by the Securities Commission, or by creating an organization of
Florida securities dealers, similar to the National Association of Security
Dealers.

The Uniform Act does not impose liability for all violations of the act.
Liability is imposed on any person who offers or sells a security without
complying with the registration requirements, either broker-dealer, investment
advisor or security; or who represents that registration or the availability
of an exemption indicates official approval of the security. Liability is
also imposed for violation of any rule requiring the use of a prospectus, the
escrow of securities and proceeds of sale, and the use of a specified contract
form in making sales. Violation of any order requiring approval of sales
literature before its use also gives rise to liability.¹⁵⁹

In addition to the above violations, civil liability is also imposed upon
any person who offers or sells a security by means of an untrue statement
of a material fact or who omits to state a material fact necessary in order
to prevent statements made from being misleading in the light of the
circumstances under which they were made. Two limitations are provided
by the act. First, the buyer may not recover if he knew of the untruth or
omission at the time the statement was made. Second, the seller can avoid
liability by proving that he did not know, and in the exercise of reasonable
care could not have known, of the untruth or omission.¹⁶¹

The Uniform Act also places liability upon the following classes of
persons, in addition to the seller: (1) persons who control, directly or
indirectly, a seller liable under any of the above provisions; (2) the partners,
officers and directors of such a seller or person performing similar functions;
(3) employees who materially aid in the sale; and (4) broker-dealers and
agents who materially aid in the sale. The only defense provided these
persons in the act is one of lack of knowledge and the exercise of reasonable
care to discover the existence of the facts giving rise to the alleged liability.¹⁶²

¹⁵⁹. For example, Fla. Stat. § 517.06(15) (1961) requires in certain exempt transac-
tions that notice be given to the Commission containing the names of all persons connected
with the sale. Failure to amend a notice to include a new person should not result in all
sales becoming voidable.
¹⁶⁰. Uniform Act § 410(a)(1).
¹⁶¹. Uniform Act § 410(a)(2).
¹⁶². Uniform Act § 410(b).
The provisions of the Uniform Act are capable of granting protection to the investing public while protecting the securities industry from liability for inadvertent and insignificant violations of the act. It might be said that the Uniform Act makes "the punishment fit the crime." In addition the Uniform Act places the liability where it properly belongs, upon controlling persons and officers and directors, by requiring them to exercise adequate supervision of the acts of their employees. The Florida Act in this respect is too narrow. Personal participation by officers and directors is generally a doubtful proposition and may result in a defrauded buyer having a right of action without a defendant capable of paying the judgment.

B. Extent of Recovery

The action granted by the Florida Act is in the nature of a suit for rescission. Recovery is limited to the purchase price plus interest, costs and reasonable attorney's fees. The plaintiff must tender the securities or the contract sued upon as a condition to recovery. Several important questions are left unanswered by the act and no Florida cases supply possible solutions. First, what are the rights of a purchaser who sells the securities and then discovers that the sale to him was in violation of the act? Having sold the securities he cannot tender them to his vendor as the act requires. Is it necessary for him to repurchase an equal amount of securities in order to make tender? Assuming that such a plaintiff can maintain the action, what is the measure of his recovery? To allow recovery of the purchase price grants him a windfall profit; to allow recovery based on the difference between what he bought and sold allows the perpetrator of the fraud to retain some of the funds, with the tainted securities still outstanding. Finally, what effect should the receipt of dividends or other income in respect to the securities have on the amount recovered?

The action under the Uniform Act is likewise an action in the nature of a suit for rescission. Recovery is the consideration paid for the security plus six per cent interest annually, costs and attorney's fees. Any income received in respect of the securities is deducted from the total. Tender is required if the plaintiff still owns the security; if the securities have been sold, damages are computed by deducting the sum the plaintiff received from the sale from the price he originally paid for the security, plus interest at six per cent yearly from the date of disposition. Thus, the major difference in the two acts is that the Uniform Act provides a clear cut guide for many possible situations that may arise while the Florida Act leaves more questions to be answered by the courts.

164. Ibid.
165. Uniform Act § 410(a).
C. Defenses to Liability

The Florida Act provides that the right of recovery granted in the act shall not extend to any purchaser who refuses to accept a written offer of rescission within thirty days from the date of the offer. It is not clear if this provision is applicable after suit is filed or is applicable at any time the seller discovers that the sale is subject to some defect. The act is silent as to the form the offer of rescission must take — thus it is questionable whether the written offer must state the reasons for the seller making the offer so the buyer can make an informed choice as to whether to accept. An offer couched in the statutory language should not be held to be sufficient notice to the buyer so as to constitute a waiver of his statutory right of rescission should he decline the offer.

The Uniform Act bars the right of action if the buyer receives a written offer, before suit and at a time when he owns the security, to refund the consideration paid plus interest, and he fails to accept within thirty days. The act also provides that if the buyer receives an offer before suit but at a time when he does not own the security, his action is barred unless he rejects the offer in writing within thirty days. The official comment states that the purpose of the latter provision is to allow a rejection of the offer when the buyer is dissatisfied with the seller's computation of damages. Much the same problem as to the form of the written offer of rescission that is discussed in connection with the Florida Act arises under the Uniform Act.

1. IMPLIED DEFENSES

A Florida appellate court has held that the statutory action of rescission is subject to the implied defense of estoppel. In Popper v. Havana Publications, Inc. it was held that the plaintiff, due to her direct participation in the corporate defendant as an officer and director, and her control over the disposition of the corporate funds after becoming a stockholder, was estopped to bring the statutory action. The violation of the act upon which the action was based was the failure to register the securities sold to the plaintiff. Beyond the general grounds enumerated above, the specific reasons for finding an estoppel were not given in the opinion.

In an earlier decision, Robson Link & Co. v. Leedy Wheeler & Co., the Florida Supreme Court refused to allow a defense of negligence on the part of the plaintiff in an action for rescission. It is not clear from the

---

167. Uniform Act § 410(e).
168. Official comment to Uniform Act § 410(e).
170. 154 Fla. 596, 18 So.2d 523 (1944).
opinion whether the action was based on the Securities Act or was a general equity action for rescission. The case involved two dealer firms who traded utility bonds with each other, the basis for the plaintiff's claim being that false financial statements were supplied to him. The defendant argued that the issuer of the bonds supplied the false information and that the plaintiff was offered an opportunity to examine the books of the issuer, which he declined. The defendant argued that the failure of the plaintiff to exercise due care should be a defense to the action. In denying the defense the court made an illuminating comment on the policy of the Securities Act:

The enactment of the law establishing the Florida Securities Commission . . . recognizes this principle of reasonable responsibility to the investing public, and makes it a part of the public policy of the State. And we think this public policy is extended by the statute to transactions between bond dealers, and is especially applicable where the seller is the underwriter of the bonds and is presumed to have made a thorough investigation of the issuing company. Thus, where, as here, a reputable underwriting bond dealer, innocently and without any intent to defraud, relying upon an agreement with the issuing company which is not kept, furnishes to a prospective bond purchaser a financial statement, . . . which statement is materially misleading . . . and is relied on and acted upon by such prospective purchaser, who, though himself a bond dealer, does not know the real facts and who . . . in reliance upon such statement, purchases some of the bonds, and in so doing acts to his own detriment or injury, such purchaser is entitled to relief, when, as here, he acts promptly upon discovering the true facts.¹⁷¹

2. STATUTE OF LIMITATIONS

Both the Uniform and Florida Acts provide a two year statute of limitations for the action for rescission.¹⁷² In both acts the two year period begins to run from the date of the sale. The draftsmen's comment to the Uniform Act states that this position was selected, over that which would provide that the period runs from the date the defect could be reasonably discovered by the purchaser, so as to avoid the introduction of unnecessary uncertainty in the act.¹⁷³

D. LIABILITY ON SURETY BONDS

Under the Florida Act the liability of both principal and surety on broker-dealer surety bonds is limited to five thousand dollars regardless of the number of acts or omissions in default on the bond. A claimant against

¹⁷¹. Id. at 611, 18 So.2d at 531.
¹⁷². Fla. Stat. § 517.21(1) (1961); Uniform Act § 410(e).
¹⁷³. Draftsmen's comment to Uniform Act § 410(e).
the bond must give notice of his claim within one year after termination of the bond, the notice being a condition precedent to the right of recovery. Liability of the surety is limited to cases of actual fraud or dishonesty on the part of the principal or its salesmen.\textsuperscript{174}

The Uniform Act does not require a surety bond. The Administrator may require a bond and may also determine its conditions. The act provides that suit against the surety bond is limited to those violations which give rise to the action for rescission, provided that the Administrator may provide by rule for suit against the bond by persons who have a cause of action not arising under the act.\textsuperscript{175}

E. Nonstatutory Remedies

The Florida Act provides that any right of action, statutory or nonstatutory, involved in the sale of securities is not limited to the remedies created by the Securities Act.\textsuperscript{176} The common law actions of deceit, breach of warranty and rescission are thus preserved, as well as any statutory remedy that may be available. It is also possible that the court will imply a remedy under the Securities Act by use of the doctrine that violation of a criminal statute is a tort.\textsuperscript{177} However, discussion of these various rights of action is beyond the scope of this article.\textsuperscript{178}

The Uniform Act also provides for the saving of existing remedies, but adds a proviso that prohibits a court from implying an action for violation of the act which is not otherwise provided for in the act.\textsuperscript{179} The draftsmen's comment states that the purpose of the provision is to define civil liability as specifically as possible and prevent the courts from creating liability by implication.\textsuperscript{180}

The Florida Act also provides that any civil remedy provided by the laws of the United States for purchasers of securities in interstate commerce shall also extend to purchasers of securities under the Florida Act.\textsuperscript{181} This provision apparently has never been utilized in Florida; it is conceivable for a statutory remedy to be available under it, even when the Florida Act fails to provide one. For example, a defrauded seller may be able to bring an action in Florida under rule 10b-5\textsuperscript{182} of the Securities Exchange Act of 1934, even though the Florida Act provides no remedy for a defrauded seller.

\begin{thebibliography}{99}
\bibitem{174} Fl. Stat. § 517.13 (1961).
\bibitem{175} Uniform Act § 202(e).
\bibitem{176} Fl. Stat. § 517.22 (1961).
\bibitem{177} Restatement, Torts §§ 286-88 (1934).
\bibitem{178} See 3 Loss, Securities Regulation 1623-30 (2d ed. 1961).
\bibitem{179} Uniform Act § 410(h).
\bibitem{180} Draftsmen's comment to Uniform Act § 410(h).
\bibitem{181} Fl. Stat. § 517.28 (1961).
\bibitem{182} 17 C.F.R. § 240.10b-5 (1949). For a discussion of rule 10b-5 see 3 Loss, Securities Regulation 1763-97 (2d ed. 1961).
\end{thebibliography}
F. Unenforceability of Illegal Contracts

The Uniform Act provides that no person who has made or engaged in the performance of any contract in violation of the act or any rule or order thereunder, or who acquired any right with knowledge of the violation, may enforce the contract. Much the same result has been reached in Florida, although the act is silent on the question. The Attorney General has ruled that a contract between a municipality and an unregistered investment advisor was void as the advisor could not perform in assisting to float a bond issue without violating the Florida Securities Act.

VI. Exemptions

A. Exempt Securities

Not all securities are subject to the registration provisions of the Florida and Uniform Acts. Both acts contain a list of securities which, for various reasons, are exempted. It is important to note that these exemptions are not from all the provisions of the respective acts; both acts subject exempt securities to the anti-fraud provisions and the Florida Act requires that exempt securities be sold by a registered dealer, unless sold in an exempt transaction.

The securities exempted by both acts are generally the same; with few exceptions the differences relate to the qualifications of the exemption and are mostly semantic, not substantive. Both acts exempt, subject to differing qualifications, securities of: (1) federal, state and local governments; (2) foreign governments; (3) banks and saving and loan associations; (4) railroads, regulated common carriers, and public utilities; and (5) nonprofit charitable and educational institutions and organizations.
Securities listed on national stock exchanges are exempted in both acts. The Florida Act exempts all securities, other than common stock, providing for a fixed return, which have been outstanding and in the hands of the public for five years and which have had no default in payment of principal or interest for the preceding five years. Agricultural cooperatives whose shareholders are all Florida residents are also exempted by the Florida Act.

The Uniform Act also exempts securities of: (1) insurance companies; (2) credit unions; (3) employee benefit plans; and (4) commercial short term paper. The Florida Act was recently amended to delete a similar exemption for commercial short term paper.

**B. Exempt Transactions**

As in the case of exempt securities, the transaction exemptions do not government for the exemption to be available; the Florida Act allows a corporation regulated as to the issuance of securities to come within the exemption even if it is not regulated as to its rates. The Florida Act also exempts equipment securities based on chattel mortgages for rolling stock.

*Compare* [1951-1952] Fla. Att'y Gen. Biennial Rep. 606 holding that bonds of a Massachusetts business trust which operated a public utility are not exempt under § 517.05(4), as a trust is not a corporation owning a public utility, with [1951-1952] Fla. Att'y Gen. Biennial Rep. 604 holding exchange of stock for rights and interests of members of a fraternal benefit society exempt under §§ 517.06(4) and (6), the fraternal benefit society being analogized to a corporation.

191. Fla. Stat. § 517.05(5) (1961); Uniform Act § 402(a)(9). Uniform Act § 402(c) provides that this exemption may be denied for any specific security.

192. Fla. Stat. § 517.05(6) (1961); Uniform Act § 402(a)(9). The Florida exemption applies to any stock exchange in any city of the United States with more than one million inhabitants; the Uniform Act allows the state to insert any regional exchanges for which an exemption is desired. Both acts exempt securities of the same issuer senior to those of the listed security. The Florida Act grants the Securities Commission authority to deny this exemption as to any particular security. Securities which are to be listed on an exchange “on notice of issuance” are not within the exemption. [1947-1948] Fla. Att'y Gen. Biennial Rep. 480. See also [1957-1958] Fla. Att'y Gen. Biennial Rep. 783. Securities represented by transferable subscription rights are exempt when such rights are listed on a recognized stock exchange.


194. Fla. Stat. § 517.10 (1961). These cooperatives must be organized under chapter 618 of the Florida Statutes and no nonresident promoter may have any interest therein for the exemption to be available. Uniform Act § 402(a)(12) allows the enacting state to provide any desired exemption for cooperatives.

195. Uniform Act § 402(a)(5). The exemption is limited to insurance companies authorized to do business within the state. The exemption does not apply to the variable annuity.

196. Uniform Act § 402(a)(6).

197. Uniform Act § 402(a)(11). Fla. Stat. § 517.06(5) (1961) provides a transaction exemption for the sale of securities to pension plans. The security exemption in the Uniform Act and the transaction exemption in the Florida Act may provide essentially the same privilege to employee benefit plans, although the provision of the Uniform Act appears to be more comprehensive. Uniform Act § 402(c) provides that this exemption may be denied for any specific security.


199. Fla. Laws 1959, ch. 59-256, § 1, at 905; repealed by Fla. Laws 1961, ch. 61-78. The present exemptions were renumbered accordingly.
grant complete immunity from the coverage of the respective acts. Securities sold in exempt transactions are excluded from the registration requirements of both acts and from the requirement of the Uniform Act that sales literature be approved before use. The anti-fraud provisions of both acts are applicable to securities sold in exempt transactions.

The Florida Act requires that when the “pre-incorporation,” “post-incorporation,” and real and tangible personal property mortgage exemptions are claimed, written notice must be given to the Florida Securities Commission. The notice must show that the particular transaction is within the exemption and must contain the names of all persons connected with the offering. The act provides that the Commission “may” require that all funds received from these sales be placed in escrow; in practice the Commission requires an escrow in all cases.

The major transaction exemptions in the Florida Act are the “pre” and “post” incorporation exemptions and the exemption for “isolated non-issuer” sales. The mechanics of the exemptions have been fully described elsewhere. Generally, the “pre-incorporation” exemption provides that a corporation to be incorporated in Florida may sell without registration twenty-five subscriptions for shares of capital stock before incorporation, if no expenses, commissions or other remuneration is paid in connection with the sale. The “post-incorporation” exemption allows a corporation incorporated in Florida to sell its shares without registration when the total number of shareholders after the sale will not exceed twenty, and the total face amount or sales price of such shares does not exceed 10,000 dollars. This exemption, like the “pre-incorporation” exemption, is limited to stock, not securities generally, and is so narrow as to be practically useless for

204. Fla. Stat. § 517.06(8) (1961) exempts bonds or notes secured by a mortgage upon real or tangible personal property situated within the state, when such bonds or notes are sold to not more than twenty persons and the total face amount of such bonds is not more than ten thousand dollars. Successive offering under this exemption is prohibited.
206. Ibid.
211. [1951-1952] Fla. Att’y Gen. Biennial Rep. 600. The value of stock which determines the availability of the exemption is the amount of stock issued, not the amount authorized.
all but the smallest companies. The “isolated non-issuer” exemption has been discussed in relation to secondary trading.\textsuperscript{212}

The Uniform Act does not contain a “pre-incorporation” exemption as lenient as that of the Florida Act. The Uniform Act exempts the sale of pre-organization certificates or subscriptions.\textsuperscript{213} The exemption in the Uniform Act is limited to not more than ten subscribers and no commission or other remuneration may be paid. The availability of the exemption is further conditioned upon \textit{no payment} being made by any subscriber. Thus, the exemption cannot be used as a vehicle for fund raising as can the Florida “pre-incorporation” exemption. The official comment to the exemption in the Uniform Act states that the purpose of the exemption is “to enable a new enterprise to obtain the minimum number of subscribers required by the corporation law ...”\textsuperscript{214} If immediate funds are necessary the exemption cannot be used; the “pre-incorporation” subscriptions must be registered or another exemption relied upon. In such a situation the exemption most likely to be available is the exemption for “offerings to a limited number of persons”\textsuperscript{215} which may be analogized to the “post-incorporation” exemption of the Florida Act. This exemption allows the offeror to direct an offer to not more than ten persons during any consecutive twelve month period, if the seller reasonably believes the buyer is taking for investment and no commission or other remuneration is paid. There is no limitation upon the amount of money that may be raised or upon the number of shareholders after sale, nor is the exemption limited to shares of stock as is the analogous exemption in the Florida Act. The Uniform Act also allows the Administrator to increase or decrease the number of persons to whom offers may be made under this exemption. The official comment explains that the Administrator may wish to decrease the number of exempt offers for uranium stock and increase it for a close corporation which wishes to solicit twenty or thirty relatives and friends of the owners for additional capital.\textsuperscript{216} This authority grants some flexibility to an otherwise rigid provision.

The Florida Act exempts the issuance of securities as a stock dividend by a corporation to its existing security holders, or the issuance of securities to creditors or security holders in a bona fide reorganization, either in exchange for securities of the creditors or their claims, or partly for cash and partly in exchange for the security or claim.\textsuperscript{217} The transfer or exchange of securities between corporations in connection with a consolidation or

\textsuperscript{212} See note 135 \textit{supra} and accompanying text.
\textsuperscript{213} \textbf{UNIFORM ACT} § 402(b)(10).
\textsuperscript{214} Official comment to \textbf{UNIFORM ACT} § 402(b)(10).
\textsuperscript{215} \textbf{UNIFORM ACT} § 402(b)(9).
\textsuperscript{216} Official comment to \textbf{UNIFORM ACT} § 402(b)(9).
\textsuperscript{217} \textbf{FLA. STAT.} § 517.06(4) (1961).
merger is also exempted by the Florida Act. The same result is reached in the Uniform Act by excluding the above types of transactions from the definition of "sale." The definition of "sale" in the Uniform Act provides that the sale of a warrant or right to purchase another security of the same or another issuer, as well as the offer or sale of a convertible security, is considered to include an offer of the other security as well. Both securities must be registered, therefore, at the time the first is offered or sold. At the time of conversion registration will not be necessary as the second security will have already been registered. If the convertible security is offered or sold in an exempt transaction, registration of the second security will not normally be required, as the exemption for offers to existing security holders will be available. The Florida Act provides a transaction exemption for the conversion of a convertible security, provided that the first security was registered or was sold in an exempt transaction. However, the definition of "sale" in the Florida Act provides that "a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale of such other security ... ." It is therefore possible for securities to be issued without any regulation at all by the Commission. It is difficult to justify this approach to convertible securities. The convertible feature is often added to glamorize an otherwise dull security; certainly it is a strong inducement to buy. Registration of the second security would seem to be necessary for protection of the investor. The provisions of the Uniform Act in regard to convertible securities offer a sounder regulatory pattern than does the Florida Act.

Both the Uniform and Florida Acts exempt the sale of mortgage notes

219. Uniform Act § 401(i)(6). "The terms defined in this subsection do not include (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 nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in 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 incidental 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."
220. Uniform Act § 401(i)(5).
221. Uniform Act § 402(b)(11).
224. An opinion of the Attorney General contains an implication that registration would be necessary in some situations. The Attorney General decided that when a corporation which issued type A convertible securities to its stockholders, convertible to B securities in a time certain, the conversion would be exempt if the B securities were eligible for registration by notification upon the date of exchange. [1957-1958] Fla. Attorney General Biennial Rep. 66. How the Attorney General arrived at the conclusion is not apparent.
and bonds provided the entire note is sold as a unit.\textsuperscript{225} Other transactions exempted by both acts include: (1) transactions by an executor, administrator, guardian or trustee;\textsuperscript{226} (2) transactions by a bona fide pledgee;\textsuperscript{227} (3) sales to institutional buyers and broker-dealers;\textsuperscript{228} (4) sales to existing security holders;\textsuperscript{229} and (5) sales by broker-dealers.\textsuperscript{230}

The Florida Act exempts the sale, by employees of the issuer, of exempt public utility securities.\textsuperscript{231} The effect of the exemption is to allow the employees of such an issuer to sell without registering as salesmen. The Florida Act also exempts the sale of securities by a bank or trust company, at a profit of not more than two per cent of the total sales price, when the bank acts as an agent in the sale without solicitation.\textsuperscript{232}

Section 402(c) of the Uniform Act grants the Administrator the power to deny any of the transaction exemptions in the act with respect to any specific transaction. Notice and hearing must be given, but a summary order pending hearing is allowed. However, this section does not give the Administrator the power to deny a statutory exemption generally.

The Florida Act grants the Securities Commission the power to apply to a court of equity for an injunction to restrain violations of the anti-fraud provisions; the transaction exemptions are subject to this power.\textsuperscript{233} But, aside from the notice provision previously discussed,\textsuperscript{234} the Commission does not have the power to deny an exemption in particular cases.

VII. CONFLICT OF LAWS

The Uniform Act contains a section of conflict of laws rules defining the scope of the act.\textsuperscript{235} The Uniform Act is unique in this respect for no other securities act, including Florida's, contains these provisions.

\textsuperscript{225} FLA. STAT. § 517.06(8) (1961); \textsc{Uniform Act} § 402(b)(5). See also Sowards, \textit{Corporations and Corporate Finance}, 16 U. MIAMI L. REV. 208, 214 (1961).

\textsuperscript{226} FLA. STAT. § 517.06(1) (1961); \textsc{Uniform Act} § 402(b)(6).

\textsuperscript{227} FLA. STAT. § 517.06(2) (1961); \textsc{Uniform Act} § 402(b)(7).

\textsuperscript{228} FLA. STAT. § 517.06(5) (1961); \textsc{Uniform Act} § 402(b)(8). It is interesting and somewhat anomalous to note that along with the sophisticated investors such as banks, savings institutions, trust companies, trusts and pension plans mentioned in § 517.06(5), corporations are also included within the exemption.

\textsuperscript{229} FLA. STAT. § 517.06(4) (1961); \textsc{Uniform Act} § 402(b)(11).

\textsuperscript{230} FLA. STAT. § 517.06(14) (1961); \textsc{Uniform Act} § 402(b)(13). Unlike the Florida Act, which grants the exemption to any broker-dealer acting as agent, the exemption in the Uniform Act is conditioned upon there being no solicitation by the broker-dealer.

\textsuperscript{231} FLA. STAT. § 517.06(12) (1961).

\textsuperscript{232} FLA. STAT. § 517.06(13) (1961).

\textsuperscript{233} FLA. STAT. § 517.19 (1961).

\textsuperscript{234} See text at note 205 \textit{infra}.

\textsuperscript{235} \textsc{Uniform Act} § 414.

"(a) Sections 101, 201(a), 301, 405, and 410 apply to persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state.
A legion of practical problems have been created due to the lack of codified conflict of laws rules in the securities acts. The courts which have decided cases calling for the application of conflict of laws rules have used almost all of the common law choice of law rules; confusion has resulted. These problems have been fully discussed by Professor Loss.\textsuperscript{236}

In Florida there have been no cases dealing with conflict of laws in the context of the Securities Act. The Attorney General has decided that the Florida Act would be applicable in connection with an offering of securities of a Florida corporation, all to be sold in another state, if any act whatever in connection with the sale is performed in Florida.\textsuperscript{237} But this states the problem without answering it. What is any act? For example, would preparation of a financial statement in Florida for use in the offering be sufficient to require registration in Florida? The answer is uncertain.

The Attorney General has also decided that the Florida Act was not applicable in the following situation. A North Carolina corporation had outstanding convertible preferred stock, which had been registered in Florida and was convertible on demand into common. The common was not registered in Florida. Without solicitation by the company, Florida residents mailed written notices of demand for conversion to North Carolina. The Attorney General decided that the transaction was a "sale," but a sale in North Carolina, not in Florida.\textsuperscript{238} The reasons for the conclusion were not stated.
These and other problems are provided for in the conflicts provisions of the Uniform Act. These rules are set out in their entirety in the attending footnote. They offer a definite pattern of regulation which will provide certainty in planning security transactions. The existing situation is needlessly vague. When civil liability is imposed for violations of the act, the act should be made as definite as possible.

VIII. Definitions

The statutory definitions govern, to a great extent, the scope and application of the acts. Throughout this paper the definitions have been discussed where they were thought to be most applicable. However, several important definitions remain to be mentioned.

A. Security

Both the Uniform and Florida Acts include in the definition of "security" any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit sharing agreement, collateral trust certificate, pre-organization certificate or subscription or transferable share, investment contract, certificate of interest or participation in an oil, gas or mining lease or any interest commonly known as a security.

The Florida Supreme Court has said that "of necessity no definition of a security can be given to fit all cases. The thing sold will in each case be examined to determine if it falls within the purview of the statute." The court stated the general rule that the investment of the vendee's capital in an enterprise in control of the vendor, when profit would come from the efforts of the vendor, is a security. The leading case on the interpretation of the definition of security is SEC v. W. J. Howey Co., in which the United States Supreme Court held that the sale of units of a citrus grove development in Florida, coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor, was the sale of a security. The Court found that the sale was of an "investment contract" and stated that the test for the determination of an investment contract was "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."

239. See note 235 supra.
240. UNIFORM ACT § 401(1); FLA. STAT. § 517.02(1) (1961).
242. Id. at 143-44, 9 So. 2d at 278.
244. Id. at 301. Compare State v. Hemphill, 142 Fla. 728, 195 So. 915 (1940). Sale of warranty deeds to portions of a tung grove, the seller to clear and cultivate the land and retain a percentage of the profits, remitting the rest to the buyer, was held not a security. The reasoning of the court, "in a nutshell," was that these deeds did not look like securities.
Although the Howey case was based on the federal Securities Act, the definition of security in all three acts is substantially the same. The Florida Attorney General has given the definition of security a broad interpretation in line with Howey, and it may be expected that this interpretation will be approved by the Florida courts.

1. OIL, GAS AND MINERAL INTERESTS

For some years the applicability of the Florida Securities Act to oil, gas and mineral interest securities was in serious doubt. The confusion resulted from an amendment to the definition of security in the act in 1943 to include mineral interests “in or on lands situated outside this state.” This amendment was declared violative of the Florida Constitution by the Florida Supreme Court in 1944. Because of the dicta in the opinion, the entire minerals clause in the definition of security was in question. In 1947 the legislature removed the offending language and restored the original definition, thereby solving the problem. Mineral interest securities pertaining to lands either in or out of the state are now subject to the Florida Securities Act. They are also within the definition of security in the Uniform Act.

2. OTHER SPECIAL SECURITIES

The Florida Act specifically includes whiskey warehouse receipts and other commodity receipts in the definition of security. The inclusion of the receipts as securities is an historical accident, arising from the end of the prohibition era, when these receipts became extremely valuable. In Mutual Bankers Co. v. Terrell, it was held that these receipts were not securities; the legislature promptly amended the act to include them.

Insurance, endowment policies, or annuity contracts under which the insurance company promises to pay a fixed number of dollars, either in a lump sum or periodically are exempt from the definition of security in the

245. In the following opinions various interests were found to be securities. [1957-1958] Fla. Att'y Gen. Biennial Rep. 340 (real property interest where profit to arise from efforts of others); id. at 382 (guaranteed short term mortgages); id. at 527 (cooperatives); id. at 688 (mineral interests under land); id. at 753 (limited partnership interest); [1947-1948] Fla. Att'y Gen. Biennial Rep. 476.


251. 130 Fla. 583, 178 So. 399 (1938).

252. Fla. Law 1939, ch. 19190, § 1, at 384.
Uniform Act,253 but the recently developed variable annuity is not within the exemption.254 Section 517.26 of the Florida Act provides that the soliciting, writing and issuance of contracts of insurance, surety or indemnification are not subject to the Securities Act. Variable annuities are also exempt from the Securities Act; they are regulated by the Commissioner of Insurance.255

B. Offer and Sale

The Florida Act does not have separate definitions for offer and sale. Sale is defined to include what is normally a definition of offer. The act provides that a sale is "every disposition, or attempt to dispose, of a security . . . for value . . . a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell . . ."256

The Uniform Act, unlike the Florida Act, permits offers to be made in the waiting period for securities being registered under the federal Securities Act.257 Therefore, the Uniform Act provides separate definitions for offer and sale. An offer is defined as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."258 The definition of sale "includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."259

The definitions of sale in both acts provide that any security given or delivered as a bonus on account of the purchase of a security or any other thing is considered to be a part of the purchase and offered and sold for value. The Uniform Act provides that "a purported gift of assessable stock is considered to involve an offer and sale."260 The provisions of the two definitions relating to convertible securities have already been discussed,261 as have the provisions of the Uniform Act relating to mergers and reorganizations.262

C. Issuer

The definition of "issuer" in the Florida Act includes every person who proposes to issue, has issued or shall hereafter issue any security. Any person who acts as a promoter for and on behalf of a corporation, trust

253. UNIFORM ACT § 401(1).
254. Official comment to UNIFORM ACT § 401(1).
255. FLA. STAT. §§ 627.0975-.0979 (1961).
256. FLA. STAT. § 517.02 (1961).
257. See text at note 128 supra.
258. UNIFORM ACT § 401(1)(2).
259. UNIFORM ACT § 401(1)(1).
260. UNIFORM ACT § 401(1)(4).
261. See text at notes 220-24 supra.
262. See text at notes 217-19 supra.
or unincorporated association or partnership of any kind to be formed shall be deemed an issuer. 263

The Uniform Act defines "issuer" as any person who issues or proposes to issue any security with the following exceptions: (1) with respect to certificates of deposit, voting-trust certificates or collateral-trust certificates or certificates or shares in an unincorporated investment trust, issuer means the persons performing and assuming the duties of depositor or manager, and (2) there is no "issuer" with respect to certificates of interest or participation in oil, gas and mining leases. 264 Registration for oil, gas and mining leases must be made by the dealer actually handling the sale. 265

D. Administrator

Section 401(a) of the Uniform Act defines "Administrator" as the official agency of the state which will administer the act. The term is bracketed throughout the act so that the enacting state can insert the name of the existing agency; in Florida, Commission would be substituted.

VIII. Administrative Procedure and Judicial Review

Both the Uniform and Florida Acts provide procedural sections regulating administrative hearings and judicial review of administrative action. 266 These provisions, while necessary in the Uniform Act for a complete code, do not actually pertain to the regulation of securities. The confused state of the law in Florida regarding appeals from administrative bodies has recently been described. 267 A new statute can only add to the confusion already existing.

CONCLUSION

Why should Florida adopt the Uniform Act? The existing act, while perhaps not the best of all the blue sky laws, is not the worst either, and the bar and the securities industry have become relatively familiar with it. Change for the sake of change alone would be foolish. But, it is submitted, two very valid reasons exist for Florida to adopt the Uniform Act.

First, the Uniform Act offers a sounder statute than the existing Florida Act. The regulation of broker-dealers, investment advisors and their agents is one area where the Uniform Act is vastly superior to the present Florida Act. The registration by coordination provision of the Uniform Act is an absolute necessity. The remaining registration provisions provide a sounder

263. FLA. STAT. § 517.02(5) (1961).
264. UNIFORM ACT § 401(g).
265. Official comment to UNIFORM ACT § 401(1).
266. FLA. STAT. §§ 517.20, .24 (1961); UNIFORM ACT §§ 413, 414.
regulatory system. The fair, just and equitable standard is too broad and grants too much discretion to the Commission. The definitions, exemptions and registration provisions of the Uniform Act are better coordinated than those in the Florida Act. Finally, the civil liability provisions of the Uniform Act are sounder and more complete than those of the Florida Act.

The second reason may be less practical but more important. Dual regulation of interstate commerce in securities has been more or less accepted since 1933. But the chaos that is now involved in a multi-state issue of securities cannot continue without the federal government pre-empting the field. The Uniform Act is the soundest way yet proposed to cure the problem without federal pre-emption. If the states fail to act, Congress may.