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Oklahoma Uniform Securities Act of 2004

Stephanie Chapman
Stephen Hetrick

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I. Introduction

In August 2002, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Securities Act (Uniform Act). Before the NCCUSL adopted the Uniform Act, there were two versions of the Uniform Securities Act in force throughout the country. Thirty-seven jurisdictions had adopted the Uniform Securities Act of 1956 (1956 Act), while only a few states had adopted the Revised Uniform Securities Act of 1985 (RUSA).

On July 1, 2004, Oklahoma became one of the first states to adopt a version of the Uniform Act by enacting the Oklahoma Uniform Securities Act of 2004 (New Act). Before the Oklahoma legislature enacted the New Act, the Oklahoma Securities Act (Old Act) was based on the 1956 Act. Although Oklahoma had modified its version of the 1956 Act to solve securities law issues that were not addressed by the 1956 Act, the Old Act, like the 1956 Act, was not designed to accommodate new federal preemptive legislation, significant changes in technology of securities trading and regulation, and the increasingly global securities market. The New Act is nearly identical to the Uniform Act; however, there are a few modifications that the Oklahoma legislature has made to Oklahoma’s version of the Uniform Act.
The purpose of this Article is to provide an overview of the differences between the Old Act and the New Act, as well as the differences between the New Act and the Uniform Act. In particular, Part II of this Article focuses on a number of exempt securities and transactions under the New Act. Part III addresses notice filing and registration of securities. Next, Parts IV and V discuss the new exemptions for and registration of broker-dealers, agents, investment advisers, and investment adviser representatives. Part VI explains the new provisions relating to qualified immunity and civil liability. Finally, Part VII outlines the transition periods of the New Act.

II. Exemptions from the Registration of Securities

The New Act includes a number of new types of exempt securities and exempt transactions, as well as a number of modifications to existing exemptions. There are also a number of noteworthy exemptions that the Oklahoma legislature had included in the Old Act that are not present in the New Act, which are discussed below.

A. New and Modified Exemptions

1. Exempt Securities

a) Insurance Company Securities

The New Act adds an exemption for securities issued, insured, or guaranteed by an insurance company that is authorized to transact insurance business in Oklahoma. The Old Act did not specifically address insurance company securities.

b) Federal Covered Securities

The New Act defines a federal covered security as any security described in section 18(b) of the Securities Act. The exemption for federal covered securities found in title 71, section 1-201(6) of the Oklahoma Statutes, however, applies only to a portion of federal covered securities.

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9. This article does not address every change from the Old Act and is intended only to provide a broad overview of changes that would be most significant to a diverse audience. Depending on the specific circumstances involved, however, changes that are not discussed in this article may be of particular relevance.
10. 71 OKLA. STAT. § 1-201(4) (Supp. 2003).
11. Id. § 1-102(9) (defining federal covered security as “a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933 . . . .”). Section 18(b) of the Securities Act is codified at 15 U.S.C. § 77r(b) (2000).
12. Id. § 1-201(6). This section also exempts from registration put or call option contracts, warrants, or subscription rights on such securities. Id.
Specifically, the New Act exempts two types of federal covered securities. First, the Act exempts those securities that any National Exchange lists or authorizes to be listed. Second, the Act exempts those federal covered securities that are equal in seniority or senior to a security of the same issuer that any National Exchange lists or authorizes to be listed. Although similar exemptions existed under the Old Act, the Old Act’s provisions were more expansive than section 1-201(6).

The notice filing provisions of section 1-302 address the remaining federal covered securities not covered in section 1-201(6). These provisions include securities issued by an investment company registered under the Investment Company Act of 1940.

c) Equipment Trust Certificates

The New Act specifically exempts equipment trust certificates, which cover equipment leased or conditionally sold, if the security would otherwise be exempt or would be a nationally listed federal covered security described in section 18(b)(1) of the Securities Act. The Old Act, in contrast, did not specifically address equipment trust certificates.

The drafting committee included the exemption in response to the “extensive development of equipment lease financing through leveraged leases, conditional sales, and other devices.” Because the definition of “security” under the New Act would include equipment trust certificates, this exemption was necessary to cover the certificates. The committee reasoned that if some other form of security issued to evidence the debt would be exempt under another provision, the choice of form should not preclude an exemption.

14. 71 OKLA. STAT. § 1-201(6); see also 15 U.S.C. § 77r(b)(1).
15. Repealed sections 401(b)(20) and (21) exempted transactions involving the type of securities that are exempted by section 1-201(6). Compare 71 OKLA. STAT. § 401(b)(20)-(21) (repealed 2004), with id. § 1-201(6) (Supp. 2003). As discussed in Part II.B of this article, the Old Act also exempted securities that were exempt under section 4(6) of the Securities Act, regulations under section 4(2) of the Securities Act, and rules 501 through 508 of Regulation D. Id. § 401(B)(10)(b) (repealed 2004). The New Act does not provide such a broad exemption.
16. See infra Part III.
17. Id. § 1-201(9) (Supp. 2003).
18. UNIF. SEC. ACT, supra note 2, § 201 cmt. 9; see also Seligman, supra note 8, at 264.
19. 71 OKLA. STAT. § 1-102(32).
20. UNIF. SEC. ACT, supra note 2, § 201 cmt. 9.
2. Exempt Transactions

a) Manual Exemptions

The New Act greatly expands the requirements for exempting from registration securities of an issuer for which information is available in a nationally recognized securities manual\textsuperscript{21} (manual exemption).\textsuperscript{22} The new manual exemption incorporates requirements from sections 401(b)(2) and 401(b)(19). Under the Old Act, section 401(b)(2) provided the standard manual exemption,\textsuperscript{23} but it did not require a broker-dealer’s involvement. Section 401(b)(19) acted as an alternative but similar exemption, where an issuer was not listed in an approved securities manual and did not file with the Securities and Exchange Commission (SEC), but substantially the same information was available in a state filing.\textsuperscript{24} In contrast to section 401(b)(2), section 401(b)(19) under the Old Act required use of a broker-dealer.

The new manual exemption requires not only the use of a broker-dealer, but also that the information be found in an approved securities manual or a record filed with the SEC.\textsuperscript{25} In addition, the New Act mandates that: (1) the issuer not be in organizational stages, bankruptcy, or receivership; (2) the security be sold at a price “reasonably related to its current market price”; and (3) the issuer either (a) have a class of equity securities listed on an approved exchange, (b) have been “engaged in continuous business” for at least three years, or (c) have total assets of at least $2 million as shown on an audited balance sheet as of a date within eighteen months before the date of the transaction.\textsuperscript{26}


\textsuperscript{22} Compare 71 OKLA. STAT. § 1-202(2) (Supp. 2003), with id. § 401(B)(2), (19) (repealed 2004).

\textsuperscript{23} Id. § 401(B)(2) (repealed 2004).

\textsuperscript{24} Id. § 401(B)(19).

\textsuperscript{25} Id. § 1-202(2) (Supp. 2003).

\textsuperscript{26} Id. The comment to this provision of the Uniform Act indicates that the drafters intended the changes to be a “modernization” of the old exemption and based the changes on input from the Securities Industry Association. UNIF. SEC. ACT, supra note 2, § 202 cmt. 3; Seligman, supra note 8, at 267. The new manual exemption also specifies additional information about the issuer that must be included in the manual or SEC filing for the transaction to qualify for the exemption. 71 OKLA. STAT. § 1-202(2)(d)(1), (3), (4).
b) Additional Nonissuer Exemptions

The New Act also exempts nonissuer transactions, by or through a person, either registered or exempt, from registration as a broker-dealer in: (1) securities of a foreign issuer that are margin securities; (2) an outstanding security, if the guarantor of the security files reports with the SEC under section 13 or 15(d) of the Exchange Act, and (3) securities that (a) are rated in one of the four highest rating categories of a nationally recognized, statistical-rating organization, (b) have a fixed maturity or fixed interest or dividend, (c) have experienced no default in the payment of principal, interest, or dividends in the current fiscal year and within the last three fiscal years, and (d) are issued by an issuer that is engaged in business and is not in organizational stages, bankruptcy, or receivership. The New Act also exempts nonissuer transactions by a federal covered investment adviser with investments under management in excess of $100 million if the federal covered investment adviser is exercising discretionary authority in a signed record for the account of others.

c) Exchange of Securities

The New Act exempts transactions in which a security is exchanged for one or more bona fide outstanding securities, claims, or property interests — including an exchange that is partly for securities and partly for cash — if the administrator has approved the terms and conditions of the transaction after a hearing. This provision, modeled after the exemption found in section 3(a)(10) of the Securities Act, does not track the exact language of the Securities Act. Section 3(a)(10) refers to a

hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or

27. A “nonissuer transaction” is defined as “a transaction or distribution not directly or indirectly for the benefit of the issuer.” 71 OKLA. STAT. § 1-102(20). An “issuer” is any person that “issues or proposes to issue a security.” Id. § 1-102(19).
28. Id. § 1-202(3).
29. Id. § 1-202(4).
30. Id. § 1-202(5).
31. The term “federal covered investment adviser” is defined in section 1-102(8) as a person registered under the Investment Advisers Act of 1940. Id. § 1-102(8).
32. Id. § 1-202(8).
33. This is the administrator appointed by the Oklahoma Securities Commission. Id. § 1-102(1).
34. Id. § 1-202(9).
agency of the United States, or by any State or Territorial banking
or insurance commission or other governmental authority expressly
authorized by law to grant such approval.\textsuperscript{35}

Although the Oklahoma section is based on the Uniform Act provision, it
excludes the quoted language. The comment to the Uniform Act fails to
explain why the drafters excluded this language,\textsuperscript{36} but its exclusion could limit
the type of hearing that may be used to qualify for this exemption and may
create doubt about whether a sufficient hearing has been conducted. Because
the New Act provides for a hearing by the administrator, however, the
administrator would be a "governmental authority expressly authorized by law
to grant such approval" and such a hearing would qualify the transaction for
the federal exemption.

d) Mortgage-Backed Securities

In an effort to further protect investors, the New Act adds requirements to
the exemption for mortgage-backed securities, including that no general
solicitations or advertisements have been made and that no commission has
been given to a person other than a registered broker-dealer or broker-dealer
agent.\textsuperscript{37} This exemption indicates a trend toward treating debt securities more
like equity securities.

\begin{quote}
\textit{e) Small Issuance Exemption}
\end{quote}

The revisions to the small issuance exemption close a loophole that
possibly existed under the Old Act. Moreover, the changes to this exemption
could provide significant opportunities to businesses wishing to make a
number of small issuances.

The new exemption includes sales and offers to sell.\textsuperscript{38} The exemption
under the Old Act applied only to "sales."\textsuperscript{39} Because a person could be liable
for selling and offering to sell without a proper exemption or registration,\textsuperscript{40}
this new provision provides additional coverage to those relying on the small
issuance exemption.

The more significant modification is the addition of the phrase "if the
transaction is part of a single issue."\textsuperscript{41} This effectively allows an issuer to

\begin{itemize}
\item \textsuperscript{36} The comment simply states that the Uniform Act provision is a "state counterpart" to
the federal exemption. \textit{UNIF. SEC. ACT, supra} note 2, § 202 cmt. 10.
\item \textsuperscript{37} 71 OKLA. STAT. § 1-202(11)(b), (c).
\item \textsuperscript{38} \textit{Id.} § 1-202(14).
\item \textsuperscript{39} \textit{Id.} § 401(b)(10) (repealed 2004).
\item \textsuperscript{40} \textit{Id.} § 1-301 (Supp. 2003).
\item \textsuperscript{41} \textit{Id.} § 1-202(14).
\end{itemize}
claim the exemption and measure the twenty-five-person requirement per issuance instead of per twelve-month period. As a result, under the New Act an issuer could issue securities to twenty-five persons, make another, separate issuance to twenty-five people later in the year, and claim the small issuance exemption for both issuances. The Old Act only allowed an issuer to sell to twenty-five purchasers in a twelve-month period, regardless whether the sales were part of a single issuance or separate issuances. However, this modification is only helpful to the extent that issuances are not integrated or considered part of a single step for purposes of Oklahoma law. If the Oklahoma Department of Securities determined that issuances were related, the purchasers in those transactions would count against the twenty-five-person threshold.

An additional modification to this exemption clarifies that the requirement that the issuer believe that all purchasers — other than institutional investors and federal covered investment advisers — are purchasing for investment purposes and not for resale applies only to in-state purchasers. Also, the new exemption allows commissions to be paid to a registered broker-dealer, whereas the old exemption did not generally allow commissions to be paid.

f) Existing Security Holders

The exemption that applies to transactions under an offer to existing security holders was modified to include holders of convertible securities as existing security holders and to allow for standby commissions. Unlike the

42. Compare id. § 1-202(14) (Supp. 2003), with id. § 401(B)(10) (repealed 2004).
43. Id. § 401(B)(10) (repealed 2004).
44. Under federal law, the integration issue may be automatically avoided if there is a six-month period before or after an issuance during which no offer, offer to sell, or sale of securities that is intended to be exempt under this provision occurs. UNIF. SEC. ACT, supra note 2, § 202 cmt. 15. If an issuer engages in more than one issuance in a six-month period, however, integration may occur depending upon whether: (1) the offerings are part of a single plan of financing; (2) the offerings involve issuance of the same class of securities; (3) the offerings are made at or about the same time; (4) the same type of consideration is to be received; and (5) the offerings are made for the same general purpose. 17 C.F.R. § 230.502(a) (2005) (citing SEC Rls. No. 33-6863). While the rules adopted by the Oklahoma Securities Commission do not reference the six-month grace period, they do cite the same five factors as “relevant to a determination as to whether” offerings are integrated. OKLA. ADMIN. CODE § 660:11-11-4(b), available at http://www.oscn.net (last visited Aug. 17, 2005). The rule also states that this determination is to be made on a case-by-case basis, which undermines the argument that the federal six-month rule should be followed by state authorities. Id. § 660:11-11-4(c).
46. Id. § 1-202(14)(c).
47. Id. § 401(B)(10) (repealed 2004).
similar Uniform Act provision, Oklahoma law requires a notice filing to qualify for this exemption.\(^{49}\) The exemption is only available if the administrator does not disallow the exemption within ten business days after the notice filing.\(^{50}\)

\(g\) **Rescission Offer**

Under the New Act, a purchaser, seller, or recipient of investment advice may not bring a civil action under section 1-509 if she receives a rescission offer that meets the statutory requirements.\(^{51}\) Although a similar provision existed under the Old Act,\(^{52}\) a corresponding exemption for the rescission offer, which would essentially be an offer to repurchase securities, was not available. The New Act includes an exemption to remedy this situation.\(^{53}\)

\(h\) **Out-of-State Purchasers**

The new exemption for out-of-state purchasers covers offers or sales of securities to nonresidents who are not present in the state if the offer or sale: (1) is made through a registered broker-dealer;\(^{54}\) (2) does not violate the laws of the jurisdiction of the recipient or purchaser; and (3) is not part of “an unlawful plan or scheme to evade” the New Act.\(^{55}\) Presumably, however, the laws of the purchaser’s state would apply to require an exemption or some type of registration.\(^{56}\)

\(i\) **Employee Benefit Plans**

Generally, an interest in a mandatory pension plan that is subject to the Employee Retirement Income Security Act of 1974 is not a security.\(^{57}\) With respect to employee benefit plan interests that are securities, however, the Old Act exempted only securities issued by certain types of employee benefit plans to employees, officers, or directors.\(^{58}\)

\(^{49}\) *Id.*

\(^{50}\) *Id.*

\(^{51}\) *Id.* § 1-510.

\(^{52}\) *Id.* § 408(F) (repealed 2004).

\(^{53}\) *Id.* § 1-202(20) (Supp. 2003).

\(^{54}\) This broker-dealer requirement appears in the New Act but was not included in the Uniform Act counterpart provision.

\(^{55}\) 71 OKLA. STAT. § 1-202(21).

\(^{56}\) Additionally, this exemption applies only to the registration requirement and does not affect the administrator’s power to investigate and bring an enforcement action under Articles 5 and 6. *See Unif. Sec. Law, supra* note 2, § 1-202 cmt. 21.

\(^{57}\) 71 OKLA. STAT. § 1-102(32)(c); *see also* Int’l Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979); Seligman, *supra* note 8, at 271.

\(^{58}\) 71 OKLA. STAT. § 401(A)(8) (repealed 2004).
The New Act broadens the scope of this exemption by not only including current employees, officers, and directors, but also former employees, officers, and directors who left their position after the offer, but before the purchase, and family members of such persons. Thus, the new exemption covers certain resales of employee benefit plan securities and not simply the initial issuance.

**j) Dividends and Tender Offers**

The New Act includes an exemption for securities received in a transaction involving a stock dividend or similar equity distribution of the distributor's securities or securities of a different issuer where the recipients do not give any other thing of value in exchange for the security. Although the 1956 Uniform Act included a similar provision, it was not included in the Old Act. Additionally, the New Act broadens the exemption that existed under the 1956 Uniform Act by specifically referencing solicitations of tenders pursuant to Rule 162 under the Securities Act, which allows for the solicitation of tenders before the effective date of a registration statement.

**B. Exemptions That Are Not Included in the New Act**

Although many of the exemptions that were available under the Old Act will continue to be available under the New Act, a number of exemptions have been restricted or altogether excluded from the New Act. The Oklahoma statute modifies exemptions that were exempted securities under the Old Act to exempt transactions under the New Act, and vice versa. This section provides an overview of some of the more widely used exemptions that will not be available under the New Act.

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59. Id. § 1-202(22) (Supp. 2003). Apparently the exemption in Oklahoma under the Old Act was an expanded version of the 1956 Act, which still required a notice filing for exempt employee benefit plan securities. Unif. Sec. Law, supra note 2, § 202 cmt. 22.

60. 71 Okla. Stat. § 1-202(22); see also Seligman, supra note 8, at 271.

61. 71 Okla. Stat. § 1-202(23).


63. 71 Okla. Stat. § 1-202(23). Rule 162 allows tenders to be solicited before the effective date of a registration statement.

64. See supra Part II.A.

65. Id.
1. Exempt Securities

a) Commercial Paper

The Old Act exempted any commercial paper that arose out of a current transaction or the proceeds of which were used for a current transaction and that evidenced an obligation to pay cash within nine months after issuance. This exemption was almost identical to the federal exemption in section 3(a)(3) of the Securities Act.

Although the New Act does not include a specific exemption for commercial paper, the definition of federal covered securities generally includes commercial paper. Consequently, the New Act includes commercial paper as a federal covered security and, although this precludes exemption for commercial paper, commercial paper transactions are only subject to notice filing requirements, meaning that full registration is not necessary under the New Act.

b) Qualified Charitable Gift Annuity Contracts

The Old Act included an exemption for charitable gift annuity contracts issued by a qualified charitable organization pursuant to the Oklahoma Charitable Gift Annuity Act. Because of the transition period under the New Act, this exemption is no longer available for issuances after July 1, 2004.

2. Exempt Transactions

a) Regulation D Transactions

One of the most significant changes under the New Act is that transactions that fall within certain provisions of Regulation D may no longer be exempt under the New Act and may not even receive the benefit of the notice filing provisions applicable to federal covered securities. The Old Act included a

67. Id. § 1-102(9) (Supp. 2003). The definition of federal covered security incorporates securities that are "covered securities" for purposes of section 18(b) of the Securities Act. Id. Commercial paper that is exempt pursuant to section 3(a)(3) is included in the definition of covered security. 15 U.S.C. § 77r(b)(4)(C) (2000). Accordingly, the commercial paper that would have been covered by the exemption under the Old Act is a federal covered security under the New Act.
68. 71 OKLA. STAT. § 1-302.
69. Id. § 401(a)(9) (repealed 2004).
70. See infra Part VII.
71. Section 1-201(6) is the only exemption that specifically applies to federal covered securities. As discussed in Part II.A above, this exemption essentially only covers securities listed on a national market. The securities or transactions could qualify for other exemptions.
provision that specifically exempted sales by in-state issuers that were exempt under section 4(6) of the Securities Act, or rules issued thereunder,\textsuperscript{72} or under rules 501 through 508 of Regulation D.\textsuperscript{73} Section 4(6) of the Securities Act exempts transactions that involve only accredited investors as purchasers and with respect to which (1) the aggregate price of the securities is no more than $5 million; (2) no general solicitation or advertisement is made; and (3) a notice is filed with the SEC.\textsuperscript{74} Transactions that meet the requirements of Rule 506 of Regulation D, which exempts certain transactions that involve no more than thirty-five purchasers who are all accredited investors or otherwise sophisticated purchasers, are exempt pursuant to section 4(2) of the Securities Act.\textsuperscript{75} Although these securities would not be covered by the federal covered security exemption,\textsuperscript{76} they would be considered federal covered securities and would be eligible for notice filing under the New Act.\textsuperscript{77} This is essentially the same result that would have been achieved under the Old Act.\textsuperscript{78}

Based on the definition of federal covered security, however, securities that are exempt by virtue of Rule 504 and 505 of Regulation D are not federal covered securities under the New Act, and notice filing will not necessarily be available for these securities.\textsuperscript{79}

\textit{b) Preorganization Certificate}

The Old Act exempted an offer or sale of a preorganization certificate or subscription if: (1) no commission was paid for soliciting the subscriber; (2) the issuance involved no more than ten subscribers; and (3) no subscriber made a payment.\textsuperscript{80} While the New Act does not exempt this type of transaction, this category of securities is likely to fall within another exemption, such as the small issuance exemption.\textsuperscript{81}

\footnotesize{that are not specific to federal covered securities, but this would depend upon the specific circumstances of the offering.}

\textsuperscript{72} 71 OKLA. STAT. § 401(b)(10)(B).
\textsuperscript{73} 17 C.F.R. §§ 230.501 to .508 (2005).
\textsuperscript{75} Id. § 77d(2); 17 C.F.R. § 230.506.
\textsuperscript{76} 71 OKLA. STAT. § 1-201(6) (Supp. 2003).
\textsuperscript{77} Id. §§ 1-102(9), 1-302.
\textsuperscript{78} Id. § 401(B)(10)(b)(iii) (repealed 2004) (requiring notice filing).
\textsuperscript{79} Id. § 1-102(9) (Supp. 2003); see also supra notes 11-12, 43 and accompanying text. These securities are exempt for federal purposes pursuant to section 4(6) of the Securities Act.
\textsuperscript{80} 71 OKLA. STAT. § 401(b)(11) (repealed 2004).
\textsuperscript{81} See supra notes 38-45 and accompanying text.
c) Industrial Foundation

Although it is unlikely that this provision was used extensively under the Old Act, the New Act excludes the exemption for securities of an industrial foundation that had been approved by the Oklahoma Industrial Finance Authority.82

d) Bank Securities

The Old Act included an exemption for certain transactions pursuant to an offer to existing security holders of a bank.83 This exemption, however, is no longer necessary because the New Act classifies bank securities as exempt securities.84

III. Registration

A. Federal Covered Securities Notice Filing

The New Act adds a notice filing provision that applies to securities issued by an investment company registered under the Investment Company Act of 1940 that are not otherwise exempt under the New Act.85 Securities that are covered securities pursuant to section 4(2) of the Securities Act also qualify for the notice filing provisions, but holders of these securities must file a Form D, adopted by the SEC.86

One interesting aspect of the notice provision is that failure to comply with the notice or fee requirement could result in the issuance of a stop order; however, if the deficiency is corrected, the stop order is void as of the time of issuance.87 Under the federal rules, this is not the case.

B. Registration

In addition to notice filing for certain federal covered securities, securities may be registered by one of two methods. The first is registration by coordination, which applies when a federal registration statement has been filed pursuant to the Securities Act.88 The registration by coordination provision of the New Act is essentially unchanged from the Old Act, although

82. 71 OKLA. STAT. § 401(B)(14).
83. Id. § 401(B)(18).
84. Id. § 1-201(3) (Supp. 2003).
85. Id. § 1-302(A).
86. Id. § 1-302(C).
87. Id. § 1-302(D).
88. Id. § 1-303.
the waiting period has been extended from ten days under the Old Act to twenty days under the New Act.\textsuperscript{89}

The second method of registration is registration by qualification.\textsuperscript{90} This method generally is used only where no other method is available because it is more cumbersome and requires significant filings at the state level.\textsuperscript{91} The primary change to this provision in the New Act is that the registration now becomes effective thirty days after filing if the administrator has not issued a stop order or an order postponing effectiveness.\textsuperscript{92} Under the Old Act, the registration would not have become effective until the administrator issued an order.\textsuperscript{93}

C. Stop Orders

The grounds and procedures for issuing a stop order are generally unchanged.\textsuperscript{94} The New Act requires the administrator to publish standards that give notice of conduct that “will work or tend to work a fraud upon purchasers” and that would cause the offering to be made “with unreasonable amounts of underwriters’ and sellers’ discounts, commissions, or other compensation” or unreasonable amounts of compensation to an officer, director, employee, contractor, or agent, each of which would provide grounds for a stop order.\textsuperscript{95} This provision only requires, however, that the administrator act “to the extent practicable”\textsuperscript{96} and, to date, the administrator has not published any guidance in this area.

\textsuperscript{89} Id. § 1-303(C)(2).
\textsuperscript{90} Id. § 1-304.
\textsuperscript{91} UNIF. SEC. ACT, supra note 2, § 304 cmt. 1.
\textsuperscript{92} 71 OKLA. STAT. § 1-304(C).
\textsuperscript{93} Id. § 304(C) (repealed 2004).
\textsuperscript{94} Id. § 1-306 (Supp. 2003).
\textsuperscript{95} Id. § 1-306(A)(7)(a)-(b). In addition to the grounds for stop orders included in the Uniform Act counterpart provision, the New Act includes a provision giving the administrator the ability to issue a stop order if the offering will result in "unreasonable amounts or kinds of options, profits, compensation, or remuneration paid directly or indirectly to any officer, director, employee, contractor or agent." Id. § 1-306(A)(7)(b). This is not a change from the Old Act; however, the inclusion of any version of subsection (A)(7) has drawn criticism. UNIF. SEC. ACT, supra note 2, § 306 cmt. 8 (citing 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 111-24 (3d ed. rev. 1998) and stating that the suggestion that administrators provide guidance was intended to address criticism of the provision).
\textsuperscript{96} 71 OKLA. STAT. § 1-306(B).
IV. Broker-Dealers, Investment Advisers, Agents, and Investment Adviser Representatives

Article IV of the New Act addresses the registration of broker-dealers, agents, investment advisers, investment adviser representatives, and federal covered investment advisers.97 These provisions have been substantially revised to take into account the National Securities Markets Improvement Act of 1996 (NSMIA) and changes in administrative processes in the industry.98

A. Broker-Dealers

A broker-dealer is defined as "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account."99 The general rule is that a broker-dealer must register under the New Act unless there is an exemption.100

1. New Exemptions

The New Act has added several exemptions for broker-dealers that expand the activities in which an out-of-state broker-dealer can engage without registering under the New Act. The Oklahoma legislature added section 1-401(B)(1)(d) to title 71 to allow out-of-state broker-dealers to transact business with federal covered investment advisers in Oklahoma, as long as the federal covered investment adviser has investments under management in excess of $100 million.101 In addition, the New Act allows out-of-state investment advisers to continue broker-customer relationships when the customer is temporarily in the state.102

2. Modified Exemptions

The Old Act allowed an out-of-state broker-dealer to engage in transactions with up to fifteen Oklahoma residents in any twelve-month period without

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97. This section focuses on exemptions that were not available under the Old Act and certain modifications to exemptions contained in the Old Act and the Uniform Act. This section does not address every change to the Old Act respecting the regulation of broker-dealers, agents, investment advisers, and investment adviser representatives.
98. Seligman, supra note 8, at 243.
99. 71 OKLA. STAT. § 1-102(4). The term does not include an agent, an issuer, banks, or saving institutions performing certain unsolicited services. Id.
100. Id. § 1-401(A).
101. Id. § 1-401(B)(1)(d).
102. Id. § 1-401(B)(1)(e)-(f).
having to register.\textsuperscript{103} The New Act, however, limits this exemption to three such transactions in any twelve-month period.\textsuperscript{104}

\textbf{B. Agents}

An agent is defined as "an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities."\textsuperscript{105} Like broker-dealers, agents must register under the New Act unless a specific exemption applies.\textsuperscript{106}

1. \textit{New Exemptions}

The New Act adds an exemption for agents who represent a registered or exempt broker-dealer in transactions for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of \$100 million.\textsuperscript{107} This provision "was added to provide relief in situations where an agent is accepting orders from a sophisticated financial professional who is making the investment decisions for his or her customers."\textsuperscript{108}

The New Act also grants exemptions for agents who represent issuers.\textsuperscript{109} Specifically, an individual who represents an issuer in purchasing the issuer's own securities is exempt from registration, as is an individual who represents an issuer and restricts her participation to performing ministerial or clerical work.\textsuperscript{110}

2. \textit{Significant Oklahoma Modifications to the Uniform Act}

Section 1-402(B)(3) of the New Act exempts an individual from registering as an agent if they are representing

an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries \textit{to existing employees, partners, members or directors of the issuer or the issuer's parent or any of the issuer's subsidiaries}, and who is not compensated in connection with the individual's participation by the payment of commissions or other

\textsuperscript{103} Id. § 201(A)(2)(c) (repealed 2004).
\textsuperscript{104} Id. § 1-401(B)(1)(g) (Supp. 2003).
\textsuperscript{105} Id. § 1-102(2).
\textsuperscript{106} Id. § 1-402(A).
\textsuperscript{107} Id. § 1-402(B)(6).
\textsuperscript{108} Seligman, \textit{supra} note 8, at 278.
\textsuperscript{109} 71 OKLA. STAT. § 1-402(B)(3).
\textsuperscript{110} Id. § 1-402(B)(7)-(8).
remuneration based, directly or indirectly, on transactions in those securities.\textsuperscript{111}

The Oklahoma exemption for agents representing an issuer’s sale of its own securities is much more limited than the corresponding provision in the Uniform Act because the Uniform Act does not limit the exemption to sales "to existing employees, partners, members or directors of the issuer or the issuer’s parent or any of the issuer’s subsidiaries."\textsuperscript{112} In contrast, the Old Act provided for this exemption in nearly the same language.\textsuperscript{113}

The New Act also differs from the Uniform Act in that it allows an agent to work for more than one broker-dealer at a time, unless a rule or order is adopted to the contrary.\textsuperscript{114} Under the Uniform Act, an agent may not work for more than one broker-dealer at a time unless a rule or order specifically allows it.\textsuperscript{115}

C. Investment Advisers

An investment adviser is either a person who is compensated for (1) "advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities"; or (2) issuing "analyses or reports concerning securities."\textsuperscript{116} Investment advisers must register under the New Act unless they qualify for an exemption.\textsuperscript{117}

There are very few substantive changes to the exemptions for investment advisers. One of the added exemptions, however, exempts an out-of-state investment adviser from registering in Oklahoma if: (1) her only clients in the state are clients whose principal residence is not Oklahoma; and (2) the investment adviser is registered in the client's state of residence.\textsuperscript{118} Like the new exemptions for broker-dealers, the purpose behind this exemption is to facilitate continued relationships between investment advisers and their clients.\textsuperscript{119}

\textsuperscript{111} Id. § 1-402(B)(3) (emphasis added).
\textsuperscript{112} UNIF. SEC. ACT, supra note 2, § 402(B)(3).
\textsuperscript{113} 71 OKLA. STAT. § 201(A)(3)(d) (repealed 2004).
\textsuperscript{114} Id. § 1-402(E) (Supp. 2003).
\textsuperscript{115} UNIF. SEC. ACT, supra note 2, § 402(e).
\textsuperscript{116} 71 OKLA. STAT. § 1-102(17); see id. § 1-102(17)(a)-(f) for exclusions from this general definition.
\textsuperscript{117} Id. § 1-403(A).
\textsuperscript{118} Id. § 1-403(B)(2)(c).
\textsuperscript{119} Seligman, supra note 8, at 276.
D. Investment Adviser Representatives

An investment adviser representative is

an individual employed by or associated with an investment adviser or federal covered investment adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform the foregoing.\(^\text{120}\)

Like broker-dealers, agents, and investment advisers, an investment adviser representative must register under the New Act unless an exemption applies.\(^\text{121}\)

The New Act handles the exemptions for investment adviser representatives differently than the Old Act. Instead of listing specific exemptions, the New Act exempts representatives from registration if the investment adviser that they are “employed by or associated with” is exempt from registration.\(^\text{122}\)

Investment adviser representatives are not exempt, however, if they (1) have a place of business in the state, or (2) do not qualify as a “supervised person” as that term is defined in section 202(a)(25) of the Investment Advisers Act of 1940.\(^\text{123}\) This carve-out from the general exemption for investment adviser representatives is not contained in the Uniform Act.\(^\text{124}\)

V. Registration of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives

A. General Registration

Section 1-406 of the New Act addresses the registration of broker-dealers, agents, investment advisers, and investment adviser representatives.\(^\text{125}\) Like the Old Act, section 1-406 does not specify the information that is required for

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120. 71 OKLA. STAT. § 1-102(18).
121. Id. § 1-404(A).
122. Id. § 1-404(B).
124. UNIF. SEC. ACT, supra note 2, § 404(b).
125. 71 OKLA. STAT. § 1-406.
Instead, the administrator is authorized to accept standardized forms to encourage uniformity among the states.\textsuperscript{127}

\textbf{B. Notice Filings}

In lieu of the registration required in section 1-405, federal covered investment advisers transacting business in Oklahoma must file: (1) a notice with the commission containing the records filed by such adviser with the SEC; (2) a consent to service of process; and (3) the fee specified in section 1-612 of the New Act.\textsuperscript{128} However, a federal covered investment adviser does not have to make such a notice filing if the adviser does not have a place of business in Oklahoma, and (1) only has clients that are federal covered investment advisers, registered investment advisers, registered broker-dealers, institutional investors, or bona fide preexisting clients whose principal residences are outside of Oklahoma; or (2) has no more than five resident clients, excluding those clients listed in (1) above.\textsuperscript{129}

\textbf{C. Postregistration Requirements}

The postregistration requirements for broker-dealers and investment advisers have been modified to comply with the NSMIA.\textsuperscript{130} “Under NSMIA, states may not impose such requirements on covered broker-dealers and investment advisers greater than those specified in Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Advisers Act of 1940.”\textsuperscript{131}

In addition to the changes made to conform with the NSMIA, the following provisions were added to the postregistration requirements: (1) section 1-410(G) authorizes a rule or order to require continuing education for investment adviser representatives and agents;\textsuperscript{132} and (2) section 1-410(E) prohibits agents from having custody of customer funds or securities unless they are under the supervision of a broker-dealer, and prohibits investment adviser representatives from having custody of funds or securities of a customer unless they are under the supervision of an investment adviser.\textsuperscript{133}

\textsuperscript{126} Id. § 202 (repealed 2004).
\textsuperscript{127} Id.
\textsuperscript{128} Id. § 1-405(C) (Supp. 2003). The notice filing required by section 1-405 is similar to that required by section 202.1 of the Old Act. See id. § 202.1 (repealed 2004).
\textsuperscript{129} Id. § 1-405(B) (Supp. 2003).
\textsuperscript{130} Seligman, supra note 8, at 281.
\textsuperscript{131} Id.
\textsuperscript{132} 71 OKLA. STAT. § 1-410(G).
\textsuperscript{133} Id. § 1-410(E).
VI. Fraud and Liabilities

The provisions relating to fraud and liabilities, which are contained in Article V of the New Act, are almost identical to the Old Act. The New Act, however, added a few new provisions and substantially modified the statute of limitations for civil liability.

A. Qualified Immunity

The New Act provides protection to broker-dealers and investment advisers against defamation claims based on information filed with the SEC, a state administrator, or self-regulatory organization, as long as the statement was not known to be false or was not made with reckless disregard for the truth. The Oklahoma legislature passed this immunity in response to concerns that broker-dealers and investment advisers have been deterred from making full disclosure of problems with departing employees because of the threat of a defamation lawsuit.

B. Civil Liability

The New Act extends civil liability for violation of the act to a managing partner, executive officer, or director of a person held civilly liable, unless the individual can prove that he did not know, and in the exercise of reasonable care, could not have known of the unlawful conduct. Under the New Act, such persons are jointly and severally liable even if they did not know of the fraudulent conduct.

In addition to extending liability, the New Act significantly revised the statute of limitations for bringing civil actions based on violation of the Act. The new statute of limitations for violation of the securities registration requirements of section 1-301 is one year, whereas under the Old Act, the corresponding statute of limitations was three years. The statute of limitations for civil actions based on an untrue statement or failure to disclose material information regarding a transaction involving the purchase or sale of securities is the earlier of two years after discovery of the violation or five years after the transaction.

134. Seligman, supra note 8, at 285.
135. 71 OKLA. STAT. § 1-507.
136. Seligman, supra note 8, at 287.
137. 71 OKLA. STAT. § 1-509(G)(2).
138. Id.
139. Id. § 1-509(J).
140. Id. § 1-510(J)(1). This is a statute of repose and equitable tolling of the limitations period is not intended. Seligman, supra note 8, at 290.
141. 71 OKLA. STAT. § 408(F) (repealed 2004).
years after such violation.142 This change to the Oklahoma Act conforms state law with the federal statute of limitations for such actions.143

VII. Transition

The transition provisions of the New Act are fairly straightforward. The Old Act will govern any action or proceeding that is pending as of July 1, 2004 or that may be instituted based on conduct that occurred before the "effective date."144 The New Act places an outside limitations period of five years after the effective date on civil actions to enforce liability under the Old Act.145 Additionally, the New Act does not affect registrations, orders, interpretative opinions, no-action letters, and similar items that were issued under the Old Act.146 Finally, if an offering was made in good faith before the effective date, the Old Act will exclusively govern any offer or sale made pursuant to that offering and before July 1, 2005.147

Although the provisions are fairly straightforward, the application can be confusing in certain situations. For example, any exemption that depends upon a condition existing (or not existing) for a specified period of time could effectively delay the availability of an exemption under the New Act. For example, under the Old Act, an issuer could sell to no more than twenty-five purchasers within a twelve-month period under the small issuance exemption.148 Under the New Act, however, the twenty-five-person limit is determined per issuance.149 Accordingly, if the small issuance exemption was relied upon for an offering that began on April 1, 2004 and in which the issuer sold to fifteen purchasers, under the Old Act, the issuer would not be able to rely upon the small issuance exemption to sell to more than ten purchasers until after April 1, 2005. Otherwise, the exemption for the initial offering, which began April 1, 2004, would be invalid. This is simply one illustration of the logistical implications of the transition provisions and the differences between the Old Act and the New Act.

142. Id. § 1-510(J)(2) (Supp. 2003).
144. 71 OKLA. STAT. § 1-701(A).
145. Id.
146. Id. § 1-701(B).
147. Id. § 1-701(C).
148. Id. § 401(B)(10) (repealed 2004).
149. Id. § 1-202(14) (Supp. 2003).

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VIII. Conclusion

The Old Act was based on a uniform act that was nearly fifty years old and had become outdated. The New Act attempts to accommodate the vast number of developments in the securities industry in the past half-century. While there is still room for improvement, the New Act is a step toward more modernized and workable securities regulation in Oklahoma.