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Overview of Wyoming Securities Law, An

Gay George

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AN OVERVIEW OF WYOMING SECURITIES LAW

*Gay George***

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** Law clerk for the Honorable Barton R. Voigt of the Wyoming Supreme Court. B.S., California Polytechnic State University; M.B.A., University of Wyoming; J.D., University of Wyoming. This article will form the backbone of a chapter in a forthcoming multi-volume treatise on state securities laws to be published by Aspen Publishing Inc. The author wishes to thank Professor Keith Rowley, William S. Boyd School of Law, University of Nevada Las Vegas, the editor of the aforementioned treatise for initiating the project, providing guidance, and for many extremely helpful comments and citations. The author also gratefully acknowledges James Belcher, Partner, Holland & Hart, LLP, and Barb Boyer, Senior Assistant Attorney General, for their very helpful comments; my colleagues at the Wyoming Supreme Court, Staff Attorneys Dan Forgey, Lori Brand, Emily Rankin, and Cindy Lewis for their encouragement, support, and helpful comments; and LexisNexis and Westlaw for their support of this article.

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I. INTRODUCTION

Many attorneys view the securities laws as a complex and confusing web of federal and state laws to be avoided at all costs. They mistakenly believe that the securities laws apply only when stock is publicly traded on a national exchange. Because of such misconceptions, and a lack of familiarity with applicable law, lawyers working on routine business transactions frequently fail to recognize securities law implications.

These oversights may result in inadvertent securities law violations. Similarly, attorneys unfamiliar with the securities laws often overlook possible securities law claims.

Failing to recognize that a transaction implicates securities law may result in unexpected liability for both the client and for counsel.¹ The presence of a security in a transaction may trigger, among other things, security registration requirements,² broker-dealer registration requirements,³ disclosure obligations,⁴ and liability for failing to satisfy any of the foregoing or for securities fraud.⁵ For example, if counsel does not recognize that a transaction involves securities, he may fail to register the securities or fail to ensure that his client is or the subject securities are exempt from registration. If the client then sells the unregistered securities, the client may be liable for violating applicable state or federal securities laws, as may be the lawyer, if he participated in the sale. And, in any event, the lawyer may be liable for malpractice.

Lack of knowledge and misconceptions about the securities laws also cause some litigators to ignore potential securities law claims. Attorneys unfamiliar with the securities laws often overlook viable federal and state causes of action. The securities statutes were, in large part, a response to the perceived inadequacies of common law remedies.⁶ They are intended to broaden the protections granted investors under common law.⁷ As a result, a cause of action under the securities laws may well

1. See MARC I. STEINBERG, *SECURITIES REGULATION* 35 (3d ed. 1998); see, e.g., *Wartzman v. Hightower Prod. Ltd.*, 456 A.2d 82, 89 (Md. Ct. Spec. App. 1983) (law firm that failed to prepare the required disclosure documents held liable for costs).

2. See *infra* Part IV.

3. See *id.*

4. See *id.*

5. See *infra* Parts V-VIII. Civil liability may be imposed on those who violate securities law either by securities regulators or by private parties. See *infra* Parts V & VI. And, under certain circumstances that are beyond the scope of this article, securities law violators may be criminally liable. See *infra* Part II.C.

6. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (“[A]n important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry.”).

7. See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 244 n.22 (1988) (“Actions under Rule 10b-5 [an antifraud regulation] are distinct from common-law deceit and misrepresentation claims . . . and are in part designed to add to the protections provided investors by the common law. . . .” (citations omitted)); *Bateman Eichler v. Berner*, 472 U.S. 299, 310 (1985) (stating that the United States Supreme Court has “eschewed rigid common-law barriers in construing the securities laws”). For example, courts have stated repeatedly that the antifraud provisions of the securities laws are not limited to situations that would give rise to common law causes of action. See 7 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 3429 & n.79 (3d ed. 1991) (citing numerous cases in support of

afford a client a remedy where no such remedy is available under common law.

The securities laws are broadly crafted to protect investors in small local ventures, as well as investors in large multi-national corporations. The purpose of the securities laws is simple. As the Wyoming Supreme Court so aptly stated, the securities laws "have as their primary purpose the suppression of fraudulent practices and the protection of the public from their own gullibility."⁸ Courts, therefore, have construed the securities laws liberally to afford the public the greatest possible protection.⁹

In *Gaudina v. Haberman*, the Wyoming Supreme Court warned that when one "undertakes to sell an investment, he is obligated to know the law surrounding such transactions and what is and what is not a security."¹⁰ The court then noted, "Ignorance of the law is no excuse."¹¹ Consequently, lawyers cannot use their ignorance of the securities laws as a defense.

The securities laws, therefore, represent a trap for transactional lawyers and an opportunity for litigators. This article is intended to eliminate some of the mystique that surrounds the securities laws and to provide an overview of certain fundamental concepts. With increased familiarity, it is hoped that transactional lawyers will be less likely to ignore possible securities law implications, and litigators will be more likely to identify potential securities law claims.

As the title indicates, this article focuses primarily on Wyoming's securities laws.¹² Recently, state securities laws have become

the proposition that the antifraud provisions of the securities laws are not limited to situations that would give rise to common law causes of action).

8. *Gaudina v. Haberman*, 644 P.2d 159, 164 (Wyo. 1982) (citing *Lolkus v. Vander Wilt*, 141 N.W.2d 600 (Iowa 1966)).

9. *Id.* at 166 (citing, with approval, *Marshall v. Harris*, 555 P.2d 756 (Or. 1976)).

10. *Id.*

11. *Id.*

12. Readers unfamiliar with the securities laws should also consider acquainting themselves with the federal statutes and case law. Federal and state laws in the securities area often overlap. In fact, many aspects of Wyoming's securities law are drawn from or based upon federal law. A number of excellent treatises on federal securities law are available. Professor Marc Steinberg has written a helpful and easy to read desktop reference book on the securities law. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW (3d ed. 2001). Practitioners will find Professor Bloomenthal's multi-volume treatise extremely useful. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW (2d ed. 2000). The seminal treatise on securities laws is a multi-book set authored by Professors Louis Loss and Joel Seligman.

increasingly important. The federal Private Securities Litigation Reform Act of 1995,¹³ coupled with restrictive United States Supreme Court opinions issued in the mid-1990s,¹⁴ have made it more difficult for investors to bring actions under the federal securities statutes.¹⁵ As a result, many injured investors have turned to state law for relief.¹⁶ And, while subsequent federal legislation¹⁷ has “curbed both the importance of state securities registration laws and the availability of state courts as an alternative forum in which plaintiffs may pursue securities fraud claims,”¹⁸ state securities law remains an important component of investor protection.¹⁹

This article is designed to serve as an introduction for those un-

See LOSS & SELIGMAN, *supra* note 7. Many other helpful sources are available as well. See, e.g., THOMAS L. HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION (3d ed. 1995 & Supp. 2000); LARRY D. SODERQUIST, UNDERSTANDING THE SECURITIES LAWS (3d ed. 1997 & Supp. 2001).

13. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (reforming of both the 1933 Securities Act and the 1934 Securities Exchange Act, with Congress’s professed intent to curb abusive practices in private securities litigation).

14. See *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (limiting the application of section 12(a)(2) of the Securities Act of 1933 to public offerings); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (eliminating aiding and abetting liability in private actions under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder); see also *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 1277 (1991) (adopting a relatively short statute of limitations for section 10(b) and Rule 10b-5 claims).

15. See Keith A. Rowley, *The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*, 50 BAYLOR L. REV. 99, 103-06 (1998); Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions in Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489 (1995).

16. See, e.g., Joseph A. Grundfest et al., *Securities Class Action Litigation in Q1 1998: A Report to NASDAQ from the Stanford Law School Clearinghouse*, in SECURITIES LITIGATION 1998, at 69 (Practising Law Institute 1998); Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year’s Experience*, in SECURITIES LITIGATION 1997, at 955 (Practising Law Institute 1997).

17. Namely, Congress’s passage of the National Securities Market Improvement Act of 1996 (“NSMIA”), Pub. L. No. 104-290, 110 Stat. 3416 (1996) *codified at* 15 U.S.C. § 77r (Supp. V 1999) (amending the 1933 Securities Act to eliminate its provision allowing concurrent state regulation of several categories of securities offerings), and the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), Pub. L. No. 105-353, 112 Stat. 3227 (1998) *codified at* 15 U.S.C. § 77p & 77bb(f) (preempting most state courts securities class actions and empowering defendants to remove to federal court securities class actions filed in state court). See *infra* Part IV.F.3.a & b.

18. Keith A. Rowley, *They Toil Not, Neither Do They Spin: Civil Liability Under the Oregon Securities Law*, 37 WILLAMETTE L. REV. 335, 338 (2001).

19. See *id.* at 340-41; see, e.g., *A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 781 (3d Cir. 1999) (“Congress, the courts, and the SEC have made explicit that federal regulation was not designed to displace state blue sky laws.”).

familiar with Wyoming's securities law, and to provide a reference source for those who practice in this area. Part II provides an overview of Wyoming's Uniform Securities Act and describes Wyoming's administrative rulemaking and enforcement regime. Part III introduces a number of basic securities law concepts, addressing such topics as what constitutes a security and what constitutes an offer, sale, or purchase of a security. Part IV outlines registration procedures, including methods of registration and, most importantly, the exemptions from registration. Part V discusses statutory liability for failure to register a security. Part VI addresses statutory securities fraud liability. Parts VII and VIII address common law securities liability.

II. STATUTORY OVERVIEW

A. Statutory Authority

The problems that the securities laws address are not new. These problems are as timeless as the greed of sellers and the gullibility of buyers.²⁰ As with most regulatory schemes, legislators promulgated the securities laws to protect citizens from harm caused by the actions of others.²¹ Thus, the central goal of securities is to protect investors²² and maintain honest and fair markets.²³

The United States has a dual system of securities regulation.²⁴ In

20. LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1 (2d ed. 1988) ("For the problems at which modern securities regulation is directed are as old as the cupidity of sellers and the gullibility of buyers.").

21. Cf. Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1464 (1996) (discussing the impetus behind most federal regulatory programs).

22. See e.g., *Gaudina v. Haberman*, 644 P.2d 159, 165-66 (Wyo. 1982).

23. See, e.g., Securities Exchange Act of 1934 § 2; 15 U.S.C. § 78b (2000) (Section 2 of the Securities Exchange Act of 1934 expressly sets forth the legislative purpose and perceived need for securities regulation, stating, among other things, "to insure the maintenance of fair and honest markets in such transactions.").

24. See, e.g., Securities Act of 1933, § 18(c)(1), 15 U.S.C. § 77r(c)(1) (Supp. V 1999); Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a) (recognizing the concurrent jurisdiction of states); see also Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case for Reallocation of Regulatory Responsibilities*, 78 WASH. U. L.Q. 497 (2000); Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C. L. REV. 495 (1984). Despite a long history of concurrent federal and state regulation, Congress recently enacted federal legislation that exempts certain securities offerings from state law registration and reporting requirements and preempts some state law claims in class actions involving certain securities. For a discussion of the federal preemption provisions contained in the National Securities Markets Improvement Act of 1996 and the Securities Litigation Uniform Standards Act of 1998, see *infra* Part IV.F.3.a & b.

addition to the federal securities statutes,²⁵ all states, nearly a quarter century ago, have enacted some form of securities legislation.²⁶ These state securities laws are commonly referred to as “blue sky” laws.²⁷ To promote uniformity among the various states, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Securities Act of 1956 (the “Uniform Act”).²⁸ Prior to its promulgation, no two states had identical securities laws.²⁹

There are two different philosophical approaches to securities regulation. The first, adopted in federal legislation, emphasizes full disclosure. This approach assumes that if investors are given enough information, they will protect their own interests. The second, selected by states, focuses on “merit” regulation to ensure that offerings are made on terms that are fair and equitable. This assumes that investors do not have business experience, which may be necessary in intelligently choosing an investment. The Uniform Act accommodates both philosophies and allows states to adopt as much of it as each state desires.³⁰

The Wyoming Legislature adopted the Uniform Act, with relatively few modifications, during its 1965 legislative session.³¹ The Wyoming Uniform Securities Act³² (the “Wyoming Act”) requires the registration of securities and the filing of prospectuses and other selling documents, unless the securities or the transaction in which they are offered or sold are exempt from registration,³³ requires the registration of and regulates the activities of brokers, dealers, and their agents,³⁴ prohibits misrepresentations in the offer or sale of securities,³⁵ affords remedies

25. Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*

26. See 1-3A Blue Sky L. Rep. (CCH) (2001) (containing a compilation of all state securities statutes).

27. In some states, fraud became so blatant prior to the enactment of the securities laws that it was said promoters “would sell building lots in the blue sky in fee simple.” These unscrupulous promoters became known as “blue sky merchants,” and the state legislation enacted to counter such fraud became known as “blue sky” laws. Jeffrey T. Haughey & Kevin M. Veler, Empirical Research Project, *Blue Sky Laws and State Takeover Statutes: New Importance for an Old Battleground*, 7 J. CORP. L. 689, 691 n.3 (1982) (citing Mulvey, *Blue Sky Law*, 36 CANADIAN L. TIMES 37, 37 (1916)).

28. UNIF. SEC. ACT (1956) (amended 1958), 7C U.L.A. 103 (2000).

29. LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 18 (1958).

30. PETER M. FASS & DEREK A. WITTNER, BLUE SKY PRACTICE § 1:1 (2001).

31. Robert T. Robson, Jr. & Robert H. McCrary, Legislative Comments, *The Wyoming Uniform Securities Act*, 1 LAND & WATER L. REV. 271, 272 (1966).

32. WYO. STAT. ANN. §§ 17-4-101 to -132 (LexisNexis 2001).

33. See *id.* §§ 17-4-107 through 17-4-115, and 17-4-132.

34. See *id.* §§ 17-4-103 to -106.

35. See *id.* §§ 17-4-101, -102, -116, -117.

to those who are injured by securities violations,³⁶ and empowers the secretary of state to enforce the Act's provisions.³⁷

While Wyoming initially adopted nearly all of the provisions of the Uniform Act,³⁸ over the years Wyoming Act has been amended a number of times.³⁹ As a result, the Wyoming Act contains variations and omissions, and also addresses some additional matters, compared to the Uniform Act.⁴⁰

B. Interpretive Guidance

The Uniform Act includes official comments for each statutory section,⁴¹ as well as an unofficial set of section-by-section comments with significantly greater detail.⁴² To the extent that a particular provision of the Wyoming Act mirrors a provision in the Uniform Act, these official and unofficial comments offer guidance with respect to the intent and meaning of that provision.⁴³

A paucity of case law interpreting the Wyoming Act means that

36. *See id.* § 17-4-122.

37. *See id.* §§ 17-4-118 to -121.

38. The Wyoming legislature declined to adopt the provisions relating to state regulation of investment advisers. Consequently, there are no state investment adviser provisions in the Wyoming Act. *Compare* UNIF. SEC. ACT (1956) § 401 (amended 1958), 7C U.L.A. 188-90 (2000) *with* WYO. STAT. ANN. § 17-4-113 (no definition of "investment adviser" in the Wyoming Act); *Compare* UNIF. SEC. ACT (1956) § 204 (amended 1958), 7C U.L.A. 147-50 (2000) *with* WYO. STAT. ANN. § 17-4-106 (Wyoming Act deletes references to investment advisers). The Wyoming legislature also modified the definition of a "security" by deleting references to certain oil, gas, and mining interests. *Compare* UNIF. SEC. ACT (1956) § 401(l) (amended 1958), 7C U.L.A. 190 (2000) *with* WYO. STAT. ANN. § 17-4-113(xi) (Wyoming Act deletes the phrase "certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease"). For detailed analysis relating to the impact of the deletion of this reference and associated legislative intent, see Shepperd v. Boettcher & Co., 756 P.2d 182 (1988), and Jeffrey N. Luthi, Note, *Oil and Gas Leases: Should They be Considered Securities?*, 21 LAND & WATER L. REV. 99 (1986).

39. A review of the legislative history notations following each statutory section of the Wyoming Act indicates that the act has been amended at least fifteen times since its adoption. *See* WYO. STAT. ANN. § 17-4-101 to 132 (LexisNexis 2001) (amendments were made in 1969, 1973, 1975, 1980, 1981, 1985, 1986, 1990, 1991, 1993, 1994, 1995, 1997, 2000, and 2001).

40. *Compare* WYO. STAT. ANN. §§ 17-4-101 to -132 (LexisNexis 2001) *with* UNIF. SEC. ACT (1956) (amended 1958), 7C U.L.A. 109 (2000).

41. The official comments are set forth at 7C U.L.A. 102-329.

42. LOSS & COWETT, *supra* note 29, at Appendix I.

43. To the extent that the Wyoming Act has been amended often, so that a number of provisions do not have close parallels in the Uniform Act, the official and unofficial comments to the Uniform Act are less helpful to Wyoming courts and counsel.

Wyoming attorneys and judges frequently must resort to judicial opinions from other jurisdictions for guidance. Thirty-five jurisdictions have adopted securities acts based on the 1956 version of the Uniform Securities Act. As a result, there are court decisions from other states that practitioners can draw upon for interpretative purposes.⁴⁴ Where the language of the Wyoming Act is similar to the language in one of the federal securities acts, the Wyoming Supreme Court has allowed itself to be guided by federal court interpretations of the relevant provisions of federal securities law.⁴⁵ Moreover, the Wyoming Act expressly states, as a matter of policy, that the Act is to be construed so as to promote uniformity between the states and in a manner that coordinates interpretation and administration with related federal regulations.⁴⁶

In addition, with few Wyoming cases to provide guidance, the rules, regulations, policy statements, and no-action letters issued by Wyoming regulatory authorities take on added significance.

C. Rulemaking and Enforcement Authority

The Wyoming Act vests its administration, rulemaking, and enforcement in the Wyoming Secretary of State,⁴⁷ who has entrusted that authority to the Wyoming Securities Division (the Division).⁴⁸ Pursuant

44. State securities law cases, pertinent law review articles, and applicable journal commentaries are digested in *Uniforms Law Annotated*. See, e.g., 7C U.L.A. 110-30. The *Uniform Laws Annotated* digest is particularly useful because it is organized by statutory provision. Once the user locates the statutory provision in the Uniform Act that corresponds to the relevant Wyoming Act provision, she can easily survey cases in other jurisdictions that have interpreted the provision. The general case law digests published by West Publishing Co., which are organized by topic, are helpful as well.

45. See *Gaudina v. Haberman*, 644 P.2d 159, 165-66 (Wyo. 1982) (adopting the investment contract test formulated by the United States Supreme Court in the *Howey* case). A number of state courts have expressly stated that they consider federal authority persuasive when the language in the state securities statute is parallel or identical to language in the federal securities statutes. See, e.g., *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) (stating that it is "helpful, for consistency in application of the law, to be harmonious" with federal interpretations); *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1204 (Colo. 1976) (stating that federal authority is "highly persuasive").

46. WYO. STAT. ANN. § 17-4-127 (LexisNexis 2001).

47. *Id.* §§ 17-4-118(a) & 17-4-124(a), (c).

48. The address, telephone number, e-mail address, and Internet address for the Wyoming Securities Division is: Secretary of State, Securities Division, State Capitol Building, Room 109, 200 W. 24th Street, Cheyenne, Wyoming 82002-0020; Telephone: (307) 777-7370; E-mail securities@state.wy.us; URL: <http://soswy.state.wy.us/securities/securiti.htm>. Contact information for the Wyoming Securities Division and a list of the Division's staff members, together with each staff member's contact information, is available at 1 Blue Sky L. Rep. (CCH) ¶ 2001 (2001) (listing contact information for securities administrators in every state).

to this authority, the Wyoming Securities Division has promulgated numerous regulations.⁴⁹ Among other things, these regulations define terms used in the Wyoming Act.⁵⁰ Additionally, the Securities Division has issued regulations relating to broker-dealer and agent registration and conduct,⁵¹ securities registration,⁵² exemptions from securities registration,⁵³ notice filings,⁵⁴ and procedures for Securities Division hearings and proceedings.⁵⁵

The Wyoming Secretary of State may issue, or refuse to issue, "no-action" letters, similar to those issued by the staff of the U.S. Securities and Exchange Commission.⁵⁶ Through its no-action letter process, the Wyoming Secretary of State responds to requests for a determination of whether contemplated conduct is in compliance with Wyoming Securities laws. The secretary issues a response, based upon "the assumption that all material presented is true and correct, and all statements were made in good faith," with the proviso that, "[i]f the facts and circumstances of the actual transaction are materially different than the information submitted to this office, there is no assurance that this confirma-

49. These regulations are available on-line on the Wyoming Secretary of State's website at http://soswy.state.wy.us/cgi-win/sscgi_1.exe, in the agency box select "All Agencies," in the program box select "All Programs," in the rules box select "Current Rules," and then click "Submit."

50. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 2 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶¶ 66,402 to 66,420 (2001); see also WYO. STAT. ANN. § 17-4-113 (LexisNexis 2001).

51. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. chs. 4 & 5; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,421 to 66,431.

52. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,434 to 66,438A.

53. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,432 to 66,433.

54. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 9; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,456 to 66,458.

55. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 8; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,439 to 66,455I.

56. The SEC staff responds to private requests for indications of whether contemplated conduct related to Regulation D offerings, resales of stock, or proxy statements, etc., are in compliance with statutory rules and regulations. See HAZEN, *supra* note 12, § 1.4. If it is, the SEC staff issues a no-action letter (i.e., the conduct appears to be in compliance so no action will be taken against it), or refuses to issue such a letter. If the staff refuses to approve a no-action request, the affected parties generally will not engage in the contemplated conduct. See STEINBERG, *supra* note 1, § 3.10(B). If a no-action letter is issued, it does not ensure that the SEC will not challenge the conduct. *Id.* It must be remembered that these letters are staff interpretations, rather than formal SEC decisions. As such, they do not bind either party or create protectable expectations in third parties. See HAZEN, *supra*.

tion will apply.”⁵⁷ Wyoming no-action letters are available on Lexis.⁵⁸

To aid enforcement, the Wyoming Act authorizes the secretary of state to investigate past and imminent violations, subpoena witnesses, compel testimony, and require document production.⁵⁹ In addition, the Wyoming Act grants the secretary of state the power to take administrative action⁶⁰ and to issue administrative orders.⁶¹ For violations of the Act, the secretary of state, by order, may levy civil penalties, assess costs, require restitution, force rescission, or impose other conditions.⁶² All administrative hearings and proceedings must comply with the Wyoming Administrative Procedure Act⁶³ and the rules of procedure promulgated under the Wyoming Uniform Securities Act.⁶⁴ Final orders issued by the secretary of state are subject to judicial review.⁶⁵

Any person who willfully violates any provision of the Wyoming Act, or who willfully violates any rule or order under the Act, upon conviction, shall be fined not more than five thousand dollars or imprisoned

57. Pennsylvania Higher Education Assistance/Agency Student Loan Adjustable Rate Tender Revenue Bonds, 1987 Series A, 1987 Wy. No-Act. LEXIS 5 (Dec. 30, 1987); Wisconsin School Districts 1988 Temporary Borrowing Program Certificate of Participation, Series A, 1988 Wy. No-Act. LEXIS 11 (Apr. 26, 1988).

58. After signing on to LEXIS, 1) click on “Area of Law by Topic,” 2) click on “Securities,” 3) click on “Multi-Source Groups,” 4) click on “State,” 5) click on “WY Securities Cases and Administrative Decisions,” and finally 6) in the “Enter Search Terms, natural language” box, type in “no action letters” and press “Enter.”

59. WYO. STAT. ANN. § 17-4-119 (LexisNexis 2001).

60. *Id.* § 17-4-106(a) (granting power to “deny, suspend, make conditional or probationary or revoke any” broker-dealer registration); *id.* § 17-4-112(a) (granting power to deny, revoke, or suspend effectiveness of any registration statement); *id.* § 17-4-114(c) (granting power to deny or revoke any exemption with respect to a specific transaction or security).

61. WYO. STAT. ANN. §§ 17-4-106(a), -112(a), -114(c), -124 (LexisNexis 2001); *see, e.g.*, Petition for Order to Cease and Desist and Impose Sanctions for Violations of Wyoming’s Uniform Securities Act, National Business Solutions, LLC and Rick Koerber, Order 00-04, Nov. 21, 2000; Settlement Agreement, Charter Investment Group, Inc., Order 00-03, Jan. 30, 2001; Final Order, The Investment Center, Inc., Exam. 99-07, May 30, 2000 (all available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002)).

62. WYO. STAT. ANN. § 17-4-124(f) (LexisNexis 2001).

63. *Id.* §§ 16-3-101 to 16-3-115.

64. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 8 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶¶ 66,439 to 66,455I (2001).

65. WYO. STAT. ANN. § 17-4-123(a) (setting forth the procedural requirements). A person aggrieved by a final order of the secretary of state must file in a district court within sixty days after entry of the order. A written petition must ask for the order to be modified or set aside. The judgment of the district court is final, but subject to review by the Wyoming Supreme Court. *Id.*

for more than three years, or both.⁶⁶ The secretary of state may refer evidence concerning Wyoming Act violations to the attorney general, who may institute appropriate criminal proceedings.⁶⁷ The secretary of state also may bring a civil action to enjoin violations or insure compliance.⁶⁸

III. ESSENTIAL CONCEPTS

For the Wyoming Act to apply to a transaction, the transaction must involve (1) an offer or sale (2) of a security, (3) occurring in, or having a connection to, Wyoming, (4) that—but only if the question at hand is whether the security must be registered under Wyoming law—is not subject to federal preemption.⁶⁹

A. What is a “Security?”

The Wyoming Act defines “security” as

any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract;⁷⁰ voting trust certifi-

66. *Id.* § 17-4-121(a).

A defendant may avoid imprisonment for violating an administrative rule or order by proving that she had no knowledge of the rule or order. *Id.*

In order to be criminally liable for violating section 17-4-116, a defendant must act both willingly and with knowledge that he is making a statement that is false and misleading in any material respect. *Id.* Section 17-4-116 provides:

It is unlawful for any person to make or cause to be made, in any document filed with the secretary of state or in any proceeding under this act [§§ 17-4-101 through 17-4-129], any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

Id. § 17-4-116.

67. *Id.* § 17-4-121(b). It also is customary for state securities administrators to share information related to possible criminal violations with county attorneys, other state securities administrators, or the U.S. Attorneys’ Office, when appropriate.

68. WYO. STAT. ANN. § 17-4-120 (LexisNexis 2001). As will be discussed at greater length below, the Wyoming Act also empowers private parties to bring suit for violations of the Act. *Id.* § 17-4-122(b); *see infra* Part VI.

69. *See generally* PETER M. FASS & DEREK A. WITTNER, BLUE SKY PRACTICE § 1:1 (2001).

70. “Investment contract,” as used in WYO. STAT. ANN. § 17-4-113(a)(xi) (LexisNexis 2001), means either “[an] investment in a common enterprise with the expectation of profit to be derived substantially through the efforts of a third party or the promoter,” or “[t]he investment of money or money’s worth, including goods furnished and/or services performed, in the risk capital of a venture with the expectation of some

cate; certificate of deposit for a security or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period.⁷¹

benefit to the investor where the investor has no direct control over the investment or policy decisions of the venture." WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 2, § 6 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

The first alternative, commonly referred to as "the *Howey* test," comes from the United States Supreme Court's decision in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). In *Howey*, the Court considered whether an interest in a Florida orange grove constituted an investment contract, and therefore, a security under federal law. The Court stated that investment contract "means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 298-99. Over the years, the final prong of the *Howey* test has been "softened," so that it is no longer necessary to show that the buyer's profit expectation derives "solely from the efforts of the promoter or a third party." It is now generally accepted that a transaction or device will be deemed an investment contract under *Howey* as long as the buyer's profit expectation derives primarily from the efforts of the promoter or a third party. See, e.g., *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975); *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1338 (9th Cir. 1994). The *Howey* test governs whether a transaction or device is an investment contract for purposes of federal securities law, and has been embraced by a majority of states for making the same determination under their own securities statutes. See Thomas E. Geyer et al., *Civil Liability and Remedies in Ohio Securities Transactions*, 70 U. CIN. L. REV. n.38 (forthcoming 2002) (collecting cases).

The second alternative, commonly referred to as the "risk capital" test, grew out of the California Supreme Court's decision in *Silver Hills Country Club v. Sobieski*, 361 P.2d 906 (Cal. 1961), and has been recognized by a number of state's courts and legislatures as an alternative to the *Howey* test. See Geyer, *supra*, at n.39 (collecting cases and statutes). The "risk capital" test

requires a consideration of the following factors: (1) whether funds are being raised for a business venture or enterprise; (2) whether the transaction is offered indiscriminately to the public at large; (3) whether the investors are substantially powerless to effect the success of the enterprise; and (4) whether the investors' money is substantially at risk because it is inadequately secured.

Moreland v. Department of Corps., 239 Cal. Rptr. 558, 566 (Cal. Dist. Ct. App. 1987, review denied).

71. WYO. STAT. ANN. § 17-4-113(a)(xi) (LexisNexis 2001). The Wyoming Act's definition of security is similar to those contained in Section 2 of the 1933 Securities Act, 15 U.S.C. § 77b(a)(1) (Supp. V 1999), and Section 3(a)(10) of the 1934 Securities Exchange Act, 15 U.S.C. § 78c(a)(10) (1994). See Keith A. Rowley, *Muddy Waters*,

In determining whether an investment constitutes a security, courts look beyond the form of the transaction to the substance and economic reality of the transaction.⁷² As a result, interests in general partnerships,⁷³ limited liability companies⁷⁴ and even limited liability partnerships⁷⁵ may be deemed securities.

In *Gaudina v. Haberman*,⁷⁶ the Wyoming Supreme Court noted that Congress defined the term "security" broadly, and that the United States Supreme Court construes the definition liberally in order to protect the public from speculative or fraudulent schemes of promoters.⁷⁷ The Wyoming Supreme Court stated:

[T]he reach of the [Securities] Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security.'"⁷⁸

The Wyoming Supreme Court has found that investment documents described as "inter vivos trusts," were securities because there were purchased by investors who expected to receive profits solely from the efforts of a promoter or third party.⁷⁹ The court also concluded that the sale of fractional working interests in oil and gas leases, where the operator had exclusive control over the drilling operations, could constitute a security under the Wyoming Act, subject to the circumstances of the individual transactions.⁸⁰ The secretary of state has found that a lac-

Blue Skies: Civil Liability Under the Mississippi Securities Act, 70 MISS. L.J. 683, 688-89 n.19 (2000), for a brief discussion of the two federal statutory definitions.

72. See *Gaudina v. Haberman*, 644 P.2d 159, 165 (Wyo. 1982) (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

73. See, e.g., *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981).

74. See Elaine A. Welle, *Limited Liability Company Interests As Securities: An Analysis of Federal and State Actions Against Limited Liability Companies Under the Securities Laws*, 73 DENV. U. L. REV. 425 (1996) (collecting both federal and state actions).

75. See Elaine A. Welle, *When Are Limited Liability Partnership Interests Securities?*, 27 J. CORP. L. 63 (2001) (collecting state actions).

76. 644 P.2d 159 (Wyo. 1982).

77. *Id.* at 165.

78. *Id.* (citations omitted).

79. *Id.* at 166.

80. *Shepperd v. Boettcher & Co.*, 756 P.2d 182, 183 (Wyo. 1988) (answer to certified question).

tic culture growing program that provided for the investment of funds to purchase “activator kits” to be utilized in the production of a cosmetic ingredient involved a common enterprise with the expectation that profits would result from the effort of others, and was, therefore, an investment contract requiring registration under the Wyoming Act.⁸¹

B. *What is a “Sale” or “Offer to Sell” Securities?*

A “sale” of securities includes all contracts of sale, contracts to sell, and dispositions of securities or interests in securities for value.⁸² An “offer” of securities involves all attempts to offer or dispose of a security or any interest in securities for value, any solicitation of an offer to buy a security, or the offer of an interest in securities for value.⁸³ A gift of assessable stock is even considered an offer or sale in Wyoming.⁸⁴ In addition:

Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer,⁸⁵ as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.⁸⁶

C. *When Does an Offer, Sale, or Purchase Occur in Wyoming?*

An offer to sell occurs in Wyoming when it is made in Wyo-

81. Blue Sky L. Dec. (CCH) ¶ 72,237 (1984-85). The secretary of state issued a Cease and Desist Order against the offerors of the lactic culture growing program. *Id.*

82. WYO. STAT. ANN. § 17-4-113(a)(ix)(A) (LexisNexis 2001). The words purchase and sale include the exchange of shares in a merger. *Knauf v. Utah Constr. & Mining Co.*, 277 F. Supp. 564, 578 (D. Wyo. 1967).

83. WYO. STAT. ANN. § 17-4-113(a)(ix)(B) (LexisNexis 2001).

84. *Id.* § 17-4-113(a)(ix)(D).

85. An “issuer” is

any person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting trust certificates, or collateral trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted management, unit type, ... the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued.

WYO. STAT. ANN. § 17-4-113(a)(vi) (LexisNexis 2001).

86. *Id.* § 17-4-113(a)(ix)(E).

ming, and an offer to buy occurs when it is made and accepted in Wyoming.⁸⁷ An offer to buy or sell in Wyoming occurs whether or not either party is present in the state, when the offer originates in Wyoming or is directed by the offeror to and is received in Wyoming.⁸⁸

D. Statutory Pre-Suit Rescission Offers

A person may not pursue a civil suit against a seller if more than two years has elapsed since the buyer entered into the contract of sale.⁸⁹ A buyer of securities may not sue a seller in Wyoming if the buyer receives a qualifying written rescission offer before suit, while the buyer still owns the security, and the buyer failed to accept the offer within thirty days of receiving it.⁹⁰ The seller must refund the consideration paid for the security, plus six percent interest per year from the date of payment, less the amount of any income received on the security.⁹¹ If the buyer does not own the security at the time such an offer is made, the buyer must reject the offer within thirty days of receiving it or lose the right to sue.⁹²

IV. SECURITIES REGISTRATION: PROCEDURE

A. Methods of Registration

An important decision faced by Wyoming practitioners is deciding when an offer or sale of securities must be registered in the state. It is unlawful for any person in Wyoming to offer or sell any security unless it is registered in Wyoming, is exempted under Section 17-4-114 of the Wyoming Act, or is a federally covered security.⁹³ The Wyoming Act allows for securities to be registered by coordination,⁹⁴ notification,⁹⁵ or qualification.⁹⁶ Registration remains effective for one year, except in specified situations, and must be renewed annually.⁹⁷

87. *Id.* § 17-4-126(a)(i), (ii).

88. *Id.* § 17-4-126(c)(i), (ii).

89. *Id.* § 17-4-122(e).

90. *Id.* § 17-4-122(e)(i).

91. *Id.*

92. *Id.* § 17-4-122(e)(ii).

93. *Id.* § 17-4-107 (a)(i)-(iii).

94. *Id.* § 17-4-109.

95. *Id.* § 17-4-108.

96. *Id.* § 17-4-110.

97. *Id.* § 17-4-111(j).

1. General Registration Requirements

Registration is the system that assures full disclosure is made to the public about securities to be offered or sold in Wyoming.⁹⁸ A registration statement may be filed by an issuer or any other person on whose behalf an offer is to be made,⁹⁹ as well as by a registered broker-dealer.¹⁰⁰ Filing fees are required.¹⁰¹ Every registration statement must state the amount of securities to be offered in Wyoming, indicate the states where a registration statement or similar document in connection with the offering has been or is to be filed, and specify any adverse order, judgment, or decree that has been entered in connection with the offering (by any regulatory authority in each state, any court, or the exchange commission), identifying the state where any action has been taken.¹⁰²

a. Pre-effective Filing Information

Any offer required to be filed with the secretary of state but not yet effective, may be withdrawn from registration, but the secretary of state will retain \$100 of the filing fee.¹⁰³ The application may be deemed abandoned if it has been on file for one year without becoming effective. If an extension request is not received, or if the secretary of state notifies an applicant and receives no response, the offer will be deemed abandoned and the secretary of state will retain the entire filing fee.¹⁰⁴

98. Wyoming Secretary of State, Securities Division, "Registration," available at <http://soswy.state.wy.us/securit/register.htm> (last modified June 11, 2001).

99. WYO. STAT. ANN. § 17-4-111(a) (LexisNexis 2001). This subsection contains provisions that are applicable to all three types of registration. The reference to "any other person on whose behalf the offering is to be made," applies to nonissuer distributions. This makes it possible for a local broker-dealer to file a registration statement independently of the issuer and underwriters, especially in coordination cases. The issuer and underwriters are not able to veto the making of an offering and the establishment of a market in a state in which they choose not to register. UNIF. SEC. ACT § 305 cmt (1956) (amended 1958), 7C U.L.A. 179 (2000).

100. WYO. STAT. ANN. § 17-4-111(a) (LexisNexis 2001).

101. Filing fees are 1/50 of 1% (0.0002) of the total dollar offering amount, which shall not be less than \$200 nor more than \$600 when filing an initial registration statement. *Id.* § 17-4-111(b). If a registration statement is withdrawn before the effective date or a pre-effective stop order is entered, the secretary of state shall retain \$100 of the fee. *Id.*

102. *Id.* § 17-4-111(c)(i)-(iii).

103. *Id.* § 17-4-111(b); WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 4(a)(i) (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

104. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 4(a)(2).

b. Post-Filing Requirements

Registration filings that have been declared effective must renew registration within sixty days following the anniversary date of effectiveness by: (1) requesting renewal in writing and identifying the Wyoming registration file number; (2) including the fee required by section 17-4-111(b) of the Wyoming Act; and (3) filing any amendments to keep the registration material current.¹⁰⁵ The filing party can cancel a registration by notifying the secretary of state in writing, or the secretary of state can administratively revoke a registration within sixty days following the registration's anniversary date if (1) no renewal is effected, or (2) the secretary of state does not receive a cancellation letter.¹⁰⁶

2. Registration by Coordination

If a registration statement has been filed under the 1933 Securities Act, or a filing has been made pursuant to section 3(b)¹⁰⁷ or 3(c)¹⁰⁸ of the 1933 Act, in connection with the same offering, the security can be registered in Wyoming by coordination.¹⁰⁹ Securities registered by coordination must use the electronic filing format, or submit a fully executed Uniform Application to Register Securities, Form U-1.¹¹⁰ The secretary of state does not require filing of a registration statement or that other offering documents be filed.¹¹¹ Registration by coordination is accom-

105. *Id.* § 5(a)(i)-(iii).

106. *Id.* § 5(b), (c).

107. Section 3(b) of the 1933 Securities Act empowers the SEC to exempt securities from registration "if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering"; provided that, "no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$5,000,000." 15 U.S.C. § 77(c) (Supp. V 1999).

108. Section 3(c) empowers the SEC to exempt from registration

any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 if it finds, having regard to the purposes of that Act, that the enforcement of this Act with respect to such securities is not necessary in the public interest and for the protection of investors.

Id. § 77(c).

109. WYO. STAT. ANN. § 17-4-109(a) (LexisNexis 2001). *See also Registration*, available at <http://soswy.state.wy.us/securiti/register.htm> (last modified June 11, 2001).

110. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 1, available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

111. WYO. STAT. ANN. § 17-4-109(d); WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 1; Wyoming Secretary of State, Securities Division, "Coordination," available at <http://soswy.state.wy.us/securiti/register.htm> (last modified

plished through “notice” filing in Wyoming. The offering can be approved, pending SEC effectiveness, and the secretary of state need not review it.¹¹² The registration statement becomes effective automatically at the moment the federal registration statement becomes effective.¹¹³

The secretary of state must be promptly informed of the date and time when federal registration becomes effective and the content of a price amendment, if there is one, and a post-effective amendment must be promptly filed containing the information and documents in the price amendment.¹¹⁴ If the secretary of state fails to receive notification of the effective date of federal registration, or fails to receive the post-effective amendment, the secretary of state may enter a stop order, without notice or a hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance is made.¹¹⁵

3. Registration by Notification

Any security whose issuer or predecessor has been in continuous operation for at least five years, or any security registered for nonissuer¹¹⁶ distribution can be registered by notification.¹¹⁷ Securities in

June 11, 2001).

112. Wyoming Secretary of State, Securities Division, “Coordination,” available at <http://soswy.state.wy.us/securiti/register.htm> (last modified June 11, 2001).

113. WYO. STAT. ANN. § 17-4-109(d) (LexisNexis 2001).

114. *Id.* “‘Price amendment’ means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.” *Id.*

115. *Id.* The registrant must be promptly informed of such action taken by the secretary of state. If the registrant shows compliance with the requirements with regard to notice and the post effective amendment, the stop order is void as of the time of its entry. *Id.*

116. “‘Nonissuer’ means not directly or indirectly for the benefit of the issuer.” *Id.* § 17-4-113(a)(vii).

117. *Id.* § 17-4-108(a)(i), (ii).

If an issuer has been in continuous operation for five years, securities can be registered by notification under section 108(a)(i) if:

- (A) there has been no default during the current fiscal year or within the three (3) preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer (or any predecessor) with a fixed maturity or a fixed interest or dividend provision, and (B) the issuer and any predecessors during the past three (3) fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, (I) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal at least five percent (5%) of the amount of such outstanding securities (as measured by the maximum offering price or the market price on a

Wyoming can be registered by notification, whether or not they are eligible for registration by coordination.¹¹⁸ When a security is eligible for registration by notification as well as by coordination, the registrant has discretion in deciding which procedure to use.¹¹⁹

A registration statement must be filed, which, among other things, must supply a statement demonstrating the issuer's eligibility, name, address, and form of organization, and a description of the security being offered.¹²⁰ The registration statement must be accompanied by

day, selected by the registrant, within thirty (30) days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within ninety (90) days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price), or (II) which, if the issuer and any predecessors have not had any security of the type specified in clause (I) outstanding for three (3) full fiscal years, equal to at least five percent (5%) of the amount (as measured in clause (I)) of all securities which will be outstanding if all the securities being offered or proposed to be offered (whether or not they are proposed to be registered or offered in this state) are issued.

Id. § 17-4-108(a)(i). Registration by notification of a security is registered for nonissuer distribution under section 108(a)(ii) if:

(A) any security of the same class has ever been registered under this act [§§ 17-4-01 through 17-4-129] or a predecessor act, or (B) the security being registered was originally issued pursuant to an exemption under this act or a predecessor act.

§ 17-4-108(a)(ii).

118. *Id.* §17-4-108(a).

119. A deciding factor in deciding whether to file by notification or registration could center on at what time the registration becomes effective. For notification, this is at 1:00 p.m. the second full business day after the filing of the registration statement or last amendment. WYO. STAT. ANN. § 17-4-108(c) (LexisNexis 2001). To register by coordination, a registration must have been filed under the 1933 Securities Act, and it becomes automatically effective in Wyoming at the time the federal registration becomes effective, if no stop order or proceeding is pending and the registration statement has been on file with the Wyoming Secretary of State for at least ten days, and a statement of the maximum and minimum proposed offering prices and the maximum discounts and commissions has been filed with the secretary of state for two full business days. *Id.* § 17-4-109(c)(i)-(iii).

120. The registration statement must contain:

- (i) A statement demonstrating eligibility for registration by notification;
- (ii) With respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state (or foreign jurisdiction) and the date of its organization; and the general character and location of its business;
- (iii) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and a statement of his reasons for making the offering;
- (iv) A description of the security being registered;
- (v) The information and documents specified in W.S. 17-4-110(b)(viii), (x), and (xii); and

the information specified in Wyoming Statutes section 17-4-111(c), and a consent to service of process is under Wyoming Statutes section 17-4-126(g).¹²¹ If no stop order is in effect, registration by notification becomes automatically effective at one o'clock standard time in the afternoon of the second full business day after the filing of the registration statement or the last amendment, or at an earlier time if the secretary of state determines.¹²²

4. Registration by Qualification

Wyoming's most rigorous registration process is registration by qualification, and because of this, a detailed review of the registration procedure is given.¹²³ Registrations by qualification receive complete merit review to ensure there has been full and fair disclosure.¹²⁴ Any security that is exempt from federal securities regulation, or one that does not file and receive an effective status with the SEC, can be registered by qualification.¹²⁵ The secretary of state requires that certain information be provided, which must be accompanied by specified documents.¹²⁶ The secretary of state may, by rule or order, require that a prospectus containing any designated part of its information be sent, or given, to each person to whom an offer is made.¹²⁷

(vi) In the case of any registration under W.S. 17-4-108(a)(ii) which does not also satisfy the conditions of W.S. 17-4-108(a)(i) a balance sheet of the issuer as of a date within four (4) months prior to the filing of the registration statement, and a summary of earnings for each of the two (2) fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than two (2) years.

Id. § 17-4-108(b)(i)-(vi).

121. *Id.* § 17-4-108(b).

122. *Id.* § 17-4-108(c).

123. This section is modeled on Schedule A of the 1933 Securities Act, 15 U.S.C. § 77aa (Supp. V 1999). The registration form is SEC Form S-1, which is used by a number of states.

124. Wyoming Secretary of State, Securities Division, "Qualification," available at <http://soswy.state.wy.us/securiti/register.htm> (last modified June 11, 2001).

125. *Id.* The following must be filed with the secretary of state in a registration by qualification: The Uniform Application to Register Securities, Form U-1; the Uniform Consent to Service of Process, Form U-2; the Uniform Resolution to Issue Securities, Form U-21; a fee of not less than \$200 or in excess of \$600; a registration statement containing the information in WYO. STAT. ANN. § 17-4-110(b), except (1) a copy of an earning computation or similar document, and (2) the advertising material filed with the SEC or the National Association of Securities Dealers (NASD). *Id.*

126. WYO. STAT. ANN. § 17-4-110(b) (LexisNexis 2001).

127. *Id.* § 17-4-110(d). The prospectus may be required when the offer is made before or concurrently with (1) the first written offer made; (2) the confirmation of any sale made by or for the account of any such person; (3) payment pursuant to any such a

The following discussion concerns the information that must be included in the registration statement. This information pertains to issuers; significant subsidiaries; directors and officers of the issuer; promoters; and to owners of ten percent or more of any outstanding shares of any class of equity of the issuer. The following also discusses when a registration statement must specify a firm's capitalization and long-term debt; what information needs to be included regarding the kind, amount, and price of the securities, as well as what information must be supplied regarding cash proceeds of the offering and expenses; stock options; management or material contracts made or to be made; and what sales and advertisement literature must be supplied to the secretary of state.

For issuers or significant subsidiaries, the registration statement must: (1) Include their name, address, and general form of organization; (2) specify the state or foreign jurisdiction and the date of its organization; (3) indicate the general character and location of the business; (4) describe physical properties and equipment; and (5) supply a statement of the competitive conditions in the business or industry in which it is, or will be, engaged.¹²⁸ For each director and officer of the issuer, or anyone performing similar functions, the registration statement must also: (1) Indicate their name, address, and primary occupation for the past five years; (2) state the number of securities held by the issuer on a specified date within thirty days of filing the registration statement; (3) indicate the number of securities covered by the registration statement to which he has indicated his intent to subscribe; and (4) provide a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years, or proposed to be effected.¹²⁹

If directors and officers of the issuer or anyone performing similar functions received remuneration, the registration statement must specify the amount paid to them during the past twelve months, and estimate the amount to be received in the following twelve months, whether paid directly or indirectly by the issuer (together with all predecessors, parents, subsidiaries, and affiliates) to all those persons in the aggregate.¹³⁰

For every promoter, if the issuer was organized within the past three years, the registration must indicate his name, address, and princi-

sale; or (4) delivery of the security pursuant to any such sale, whichever happens first. § 17-4-110(d)(i)-(iv).

128. *Id.* § 17-4-110(b)(i).

129. *Id.* § 17-4-110(b)(ii).

130. *Id.* § 17-4-110(b)(iii).

pal occupation for the past five years; the amount of issuer securities held by him;¹³¹ the amount of securities covered by the registration statement that he has indicated an intention to subscribe; and a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected.¹³² The registration statement must also specify any amount paid to a promoter within that period or intended to be paid, and the consideration of any such payment.¹³³

If a person owns ten percent or more of the outstanding shares of any class of the issuer's equity securities, all of the information required of directors and officers of the issuer must be supplied about that shareholder in the registration statement, except the person need not specify his occupation for the previous five years.¹³⁴ In a nonissuer distribution, any person on whose behalf any part of the offering is to be made must: (1) Supply his name and address; (2) indicate the amount of securities of the issuer held by him at the date of filing the registration statement; (3) provide a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and (4) supply a statement of the reasons for making the offering.¹³⁵

If the issuer has issued or is obligated to issue any securities in the last two years, the issuer must specify in the registration statement the firm's capitalization and long-term debt, on both a current and *pro forma* basis, and the same information for any significant subsidiary. A description must be given for each security outstanding, being registered, or being offered. A statement needs to list the amount and kind of consideration received, be it cash, physical assets, services, patents, goodwill, or anything else.¹³⁶

An issuer must also specify the kind and amount of securities to be offered; the anticipated offering price or method to compute the offering price; any variation therefrom if the offering is to be made to any person or class of persons other than underwriters, defining the person or class of persons. If consideration for the offering is to be other than cash, the consideration must be specified, as well as the estimated aggregate

131. The securities held at a specified date within thirty days of the filing of the registration statement. *Id.* § 17-4-110(b)(ii).

132. *Id.*

133. *Id.* § 17-4-110(b)(v).

134. *Id.* § 17-4-110(b)(iv).

135. *Id.* § 17-4-110(b)(vi).

136. *Id.* § 17-4-110(b)(vii).

underwriting and selling discounts of commissions and finders' fees expected to be paid (itemizing separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering). If the selling discounts or commissions are variable, Wyoming requires that the basis for their determination be specified, indicating maximum and minimum amounts. The issuer must also specify estimated selling expenses, including legal, engineering, and accountant fees, and include each underwriter's name and address. Anyone receiving a finders' fee must be identified by name and address. A copy of any underwriters' or selling groups' agreement must be supplied, or a proposed form if it is yet to be determined, along with a description of the distribution plan of any securities which are to be offered by someone other than an underwriter.¹³⁷

The issuer must estimate and specify the cash proceeds expected from the offering, the amount to be used for each purpose, the order of priority of the purposes, the amounts of any funds to be raised from other sources to meet the purposes, and the sources of funds if they are to be used to obtain any property, including goodwill, other than that used in the ordinary course of business. The names and addresses of the vendors must be supplied as well as the purchase price. If any person received a commission in such an acquisition, the person's name and the amount of the commission must be specified. Any other expense made in connection with the acquisition must be specified, including the cost to finance the acquisition.¹³⁸

The issuer must include in the registration statement a description of any stock options or other security options outstanding or to be created in connection with the offering. The issuer must indicate the amount of any such options held by any director or officer of the issuer, any person owning ten percent or more of outstanding shares, every promoter, any person on whose behalf any part of the offering is made in a nonissuer distribution, any person or class of persons other than underwriters to whom an offering is to be made, and any person holding ten percent or more in aggregate of any such options.¹³⁹

The issuer must supply the dates of, parties to, and concisely state the general effect of all management or material contracts made or to be made outside the ordinary course of business, if they are to be performed at or after filing, or were made within the past two years. A copy of the contract must be supplied, and any pending litigation must be in-

137. *Id.* § 17-4-110(b)(viii).

138. *Id.* § 17-4-110(b)(ix).

139. *Id.* § 17-4-110(b)(x).

licated, as well as any proceeding to which the issuer is a party and which will materially affect the business or its assets.¹⁴⁰

An issuer must also provide the secretary of state with a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended to be used in connection with the offering.¹⁴¹ A copy of the security or specimen must be supplied, as well as a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents currently in effect, and a copy of any indenture or other instrument covering the security registered.¹⁴² If an attorney has rendered an opinion as to the legality of the security being registered, a signed or conformed copy must be included with the registration statement that states whether the security when sold will be legally issued, fully paid, and nonassessable, and if a debt security, a binding obligation of the issuer.¹⁴³ If an engineer, accountant, or appraiser prepares a certified report or valuation, other than a public and official document or statement, which is used in connection with the registration, his written consent is required.¹⁴⁴ A balance sheet of the issuer as of a date within four (4) months prior to the filing of the registration statement, a profit-and-loss statement, and an analysis of surplus for each of the three fiscal years preceding the balance sheet must be provided.¹⁴⁵

The secretary of state may utilize policy statements of the North American Securities Administrators Association as disclosure standards in reviewing registration statements or prospectuses for entities engaged in: oil and gas programs; real estate investment trusts; cattle feeding programs; real estate programs; preferred stock, debentures, and notes; commodity pool programs; and equipment programs.¹⁴⁶

B. Shelf Registration

Shelf registration is allowed by policy in Wyoming, provided the registrant makes clear that the offering is being made pursuant to SEC Rule 415.¹⁴⁷ Shelf registration allows a registration statement to be filed

140. *Id.* § 17-4-110(b)(xi).

141. *Id.* § 17-4-110(b)(xii).

142. *Id.* § 17-4-110(b)(xiii).

143. *Id.* § 17-4-110(b)(xiv). If the opinion letter is in a foreign language, an English translation is required. *Id.*

144. *Id.* § 17-4-110(b)(xv).

145. *Id.* § 17-4-110(b)(xvi).

146. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 2(f) (2002), available at http://soswy.state.wy.us/cgi-win/sségi_1.exe (last visited Apr. 1, 2002).

147. 3A Blue Sky L. Rep. (CCH) ¶ 66,462 (2001); 17 C.F.R. 230.415 (2001).

with the secretary of state, when the actual offering will be made at a later date.¹⁴⁸ The Wyoming Act does not provide rules regarding shelf registration, but the secretary of state requires that shelf registrants file annual and final sales reports.¹⁴⁹

C. Clearing House Registration

A clearing corporation,¹⁵⁰ other than a registered clearing agency,¹⁵¹ cannot transact business in this state, including the clearance and settlement of securities, commercial paper and bank certificates of deposit unless it is a registered clearing corporation.¹⁵² The director of the Wyoming Department of Audit or his designee inspects and examines every registered clearing corporation during each calendar year following Wyoming Statutes section 13-3-702(a).¹⁵³

148. HAZEN, *supra* note 12, § 3.8.

149. WYO. STAT. ANN § 17-4-114(a)(ii) (LexisNexis 2001).

150. A clearing corporation is:

(A) A person that is registered as a "clearing agency" under the federal securities laws;

(B) A federal reserve bank; or

(C) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

Id. § 34.1-8-102(a)(v)(A)-(C).

151. A clearing agency limits its business to activities that are regulated by the United States SEC. *Id.* § 17-4-130(a).

152. *Id.* § 17-4-130(a).

153. *Id.* § 17-4-130(d). Section 702(a) states:

Every bank is subject to the inspection of the state banking commissioner. The state banking commissioner or a duly appointed examiner shall visit and examine each bank as often as the commissioner deems necessary and at least as frequently as required by the federal deposit insurance corporation, with or without previous notice to the officers of or anyone interested in the bank. The state banking commissioner or duly appointed examiner shall make a complete and careful examination of the condition and resources of the bank, the mode of managing bank affairs and conducting its business, the action of bank officers and directors in the investment and disposition of bank funds, the safety and prudence of bank management, the security afforded to those by whom bank engagements are held, whether the requirements of this act are being complied with and such other matters as the state banking commissioner may prescribe. If the state banking commissioner examines a bank more than twice in any calendar year, the bank shall pay to the state banking commissioner an additional fee of fifty (\$50.00) per examiner per day and actual expenses of each examiner.

D. Multijurisdictional Disclosure System—Unnecessary in Wyoming

In order to make cross-border offerings by some Canadian issuers easier, the SEC developed rules, called the Multijurisdictional Disclosure System (MJDS), to facilitate such offerings. The MJDS permits issuers to make public offerings and tender offers in the United States and Canada using disclosure documents prepared with regard to home country requirements.¹⁵⁴ Wyoming currently exempts Canadian securities, making this system unnecessary.¹⁵⁵

E. Small Corporate Offering Registration

If the securities offering does not exceed one million dollars, it is exempt pursuant to the 1933 Securities Act, Rule 504 of Regulation D,¹⁵⁶ or does not exceed five million dollars pursuant to Regulation A of the Securities Act,¹⁵⁷ the securities may be registered under Small Corporate Offering Registration (SCOR).¹⁵⁸ The offering price for common stock must be one dollar or more per share. If the offering is \$1,000,000 or less, the secretary of state requires that the company prepare and file specified balance and income statements that will be included in registration statements or prospectuses.¹⁵⁹ If the SCOR offering is being registered under the Securities Act, Regulation A, or is being registered by qualification, an audited balance sheet must be included in the issuer's registration statement or prospectus.¹⁶⁰ The secretary of state

WYO. STAT. ANN § 13-3-702(a) (LexisNexis 2001).

154. 1 Blue Sky L. Rep. (CCH) ¶ 6371 (2001).

155. See *infra* Part IV.G.1.d.

156. 17 C.F.R. § 230.504 (2001).

157. 17 C.F.R. § 230.251-263.

158. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 3 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,436, § 3. Petroleum exploration or production companies are not permitted to make SCOR offerings. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 7, § 3(b)(iv); 3A Blue Sky L. Rep. (CCH) ¶¶ 66,436, § 3(b)(iv). Disclosure is made using Form U-7, which can be downloaded from the secretary of state's web site.

159. *Id.* § 3(f)(ii).

160. *Id.* § 3(f)(iii). The audited balance sheet is required to be prepared as of the end of the most recent fiscal year, or as of a date within 135 days if the issuer has existed for less than one fiscal year. Issuers need to prepare an audited statement of income, cash flows, changes in stockholders' equity for each of two fiscal years preceding the date of the audited balance sheet. *Id.* § 3(f)(iii)(A). Issuers must also provide unaudited interim statements. *Id.* § 3(f)(iii)(B).

recommends that issuers consider a private offering¹⁶¹ before going to the expense and effort of a SCOR offering.¹⁶²

F. Exemptions from Registration

Securities that are being offered or sold in Wyoming must be registered unless the security or transaction is exempt as a covered security.¹⁶³ In any proceeding, the person claiming the exemption bears the burden of proof.¹⁶⁴

1. Exempt Securities

Wyoming exempts securities issued or guaranteed by the United States, any state in the United States, any political subdivision, or agency, corporation, or instrumentality of the United States or of any state.¹⁶⁵ Any security issued or guaranteed by Canada or any Canadian province is exempt, as well any security issued by any political subdivision, or any agency, corporation, or other instrumentality of Canada or of a Canadian province. Securities issued by any foreign government that has diplomatic relations with the United States are exempt, if the security is recognized as a valid obligation by the issuer or guarantor.¹⁶⁶

Section 17-4-114 also exempts securities issued by (1) a state or national bank authorized to do business in Wyoming; (2) a federal savings and loan association, or any building and loan or similar association organized under any state law and authorized to do business in Wyoming; (3) a federal credit union; (4) any credit union, industrial loan association, or similar association organized and supervised under Wyoming law; (5) any railroad, other common carrier, public utility, or public utility holding company;¹⁶⁷ (6) a security listed on the New York

161. Private offerings, those sold to a limited number of people, are exempt from registration. Wyoming Secretary of State, Securities Division, "Exemptions," available at <http://soswy.state.wy.us/securedoc/exempt.htm> (last modified June 11, 2000).

162. Wyoming Secretary of State, Securities Division, "SCOR (Small Corporate Offering Registration)," available at <http://soswy.state.wy.us/securedoc/register.htm> (last visited Feb. 26, 2002).

163. WYO. STAT. ANN. § 17-4-107(a)(i)-(iii) (LexisNexis 2001).

164. *Id.* § 17-4-114(d).

165. *Id.* § 17-4-114(a)(i).

166. *Id.* § 17-4-114(a)(ii).

167. Any security that is issued or guaranteed by a railroad, common carrier, public utility or holding company is exempt if it is:

(A) Subject to the jurisdiction of the interstate commerce commission;

(B) A registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act;

Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers Automated Quotation National Market System, the Chicago board options, or any exchange or national quotation designated by the secretary of state,¹⁶⁸ as well as (a) any other security of the same issuer that is of senior or essentially equal rank, (b) any security called for by subscription rights or warrants so listed or approved, and (c) any warrant or right to purchase or subscribe to any of the foregoing;¹⁶⁹ (7) securities issued by any religious, educational, benevolent,

(C) Regulated in respect of its rates and charges by a governmental authority of the United States or any state; or

(D) Regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province.

Id. §§ 17-4-114(a)(vi)(A)-(D).

168. In 1994, by administrative order, the secretary of state exempted securities listed or approved for listing on the Philadelphia Stock Exchange and the Pacific Stock Exchange. 3A Blue Sky L. Rep. (CCH) ¶¶ 66,465 & 66,466 (2001).

169. WYO. STAT. ANN. § 17-4-114(a)(vii). Any security that meets all of the following conditions is also exempt:

(A) If the issuer is not organized under the laws of the United States or a state, it has appointed a duly authorized agent in the United States for service of process and has set forth the name and address of such agent in its prospectus;

(B) A class of the issuer's securities shall be registered under Section 12 of the Securities Exchange Act of 1934 and has been so registered for three (3) years immediately preceding the offering date;

(C) Neither the issuer nor a significant subsidiary has had a material default during the lesser of the last seven (7) years or the issuer's existence in the payment of principal, interest, dividend or sinking fund installment on preferred stock or indebtedness or rentals under leases with terms of three (3) years or more. A "material default" is a failure to pay, the effect of which is to cause indebtedness to become due prior to its stated maturity or to cause termination or reentry under a lease prior to its stated expiration, if the indebtedness or the rental obligation for the unexpired term exceeds five percent (5%) of the issuer's (and its consolidated subsidiaries) total assets, or if the arrearage in required dividend payments on preferred stock is not satisfied within thirty (30) days;

(D) The issuer has had consolidated net income (before extraordinary items and the cumulative effect of accounting changes) of at least one million dollars (\$1,000,000.00) in four (4) of its last five (5) fiscal years, including its last fiscal year. In the case of interest-bearing debt securities, such net income for the issuer's last fiscal year before depreciation and taxes, shall be one and one-half (1½) times the issuer's annual interest expense, giving effect to the proposed offering and the intended use of proceeds. "Last fiscal year" means the most recent fiscal year for which audited financial statements are available, provided that such statements cover a fiscal period ended not more than fifteen (15) months from the commencement of the offering;

(E) If the offering is of stock or shares (other than preferred stock or shares), the securities are owned beneficially or of record, on any date within six (6)

charitable, fraternal, social, athletic or reformatory non-profit organization, or by a chamber or commerce or a trade or professional association; (8) any commercial paper that arises out of a current transaction or the proceeds of which have been or are to be used for current transactions that evidences an obligation to pay cash within nine months from the date of issue, any renewal of such paper that is likewise limited, or any guarantee of such paper or of any such renewal;¹⁷⁰ (9) any investment contract issued in connection with an employee stock purchase, savings, pension, profit sharing, or similar benefit plan if the administrator is notified in writing thirty days before the plan's inception; (10) any security of an investment company registered under the Investment Company Act of 1940;¹⁷¹ or (11) any security of any cooperative incorporated or organized under law of Wyoming or another state and qualified with the secretary of state to do business in Wyoming.¹⁷² As of May 2001, securities offered by a cooperative are exempt if: "(1) [N]o commission or other remuneration is paid, the security is necessary or incidental to es-

months prior to the commencement of the offering, by at least one thousand two hundred (1,200) persons, and on that date there are at least seven hundred fifty thousand (750,000) of the shares outstanding with an aggregate market value, based on the average bid price, of at least three million seven hundred fifty thousand dollars (\$3,750,000.00). In determining the number of persons who are beneficial owners of the stock or shares of an issuer, the issuer or broker-dealer may rely in good faith upon written information furnished by the record owners;

(F) If the offering is of stock or shares (other than preferred stock or shares) and except as otherwise required by law, the securities have voting rights at least equal to the securities of each of the issuer's outstanding classes of stock or shares (other than preferred stock or shares), with respect to the number of votes per share and the right to vote on the same general corporate decisions;

(G) For good cause after hearing as held in accord with rules and regulations adopted in accord with the Wyoming Administrative Procedure Act and W.S. 17-4-124 the secretary of state may suspend applicability of any exemption provided in this section.

WYO. STAT. ANN. § 17-4-114(a)(vii)(A)-(G) (LexisNexis 2001).

170. *Id.* § 17-4-114(a)(ix).

171. Any security of an investment company registered under the 1940 Investment Company Act is exempt provided:

(A) The issuer of an open-end management company that offers or sells shares in Wyoming files a notice to claim this exemption and pays an annual fee of one hundred dollars (\$100.00) within sixty (60) days of the company's fiscal year end; and

(B) The sponsor of a unit investment trust that sponsors a unit investment trust that offers or sells shares in Wyoming files a notice to claim this exemption and pays a fee of one hundred dollars (\$100.00).

Id. § 17-4-114(a)(xi)(A), (B).

172. *Id.* § 17-4-114(a)(xii).

establishing membership in the cooperative association, and the security is nontransferable; or (2) a notice filing is made at least 30 days before the security is offered for sale."¹⁷³

2. Exempt Transactions

Section 17-4-114 exempts certain transactions from registration. These include (1) any isolated nonissuer transaction whether effected through a broker-dealer or not;¹⁷⁴ (2) any nonissuer distribution of an outstanding security;¹⁷⁵ (3) any nonissuer transaction effected by or through a registered broker-dealer pursuant to an order or offer to buy that is unsolicited; (4) transactions among underwriters, or any transaction between an issuer or other person on whose behalf an offer is made and an underwriter; (5) any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage; (6) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator; (7) any transaction made by a bona fide pledgee who is not trying to evade the Act; (8) any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, as well as any pension or profit sharing trust, or other financial institution or institutional buyer, or to a broker-dealer whether the purchaser is acting for himself or in some fiduciary capacity; (9) any transaction pursuant to an offer to not more than fifteen people in Wyoming during any period of twelve consecutive months, whether or not the offeror or any offerees are present in Wyoming;¹⁷⁶ (10) any sale or offer of a pre-organization

173. 1 Blue Sky L. Rep. (CCH) ¶¶ 6221 & 6725 (2001).

174. An isolated nonissuer transaction means a single transaction involving one buyer and one seller. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 2(a) (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,433.

175. Any nonissuer distribution of an outstanding security is exempt if:

(A) A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen (18) 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 a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three (3) preceding fiscal years, or during the existence of the issuer and any predecessors if less than three (3) years, in the payment of principal, interest, or dividends on the security.

WYO. STAT. ANN. § 17-4-114(b)(ii)(A), (B) (LexisNexis 2001).

176. This is exempt if:

(A) [T]he seller reasonably believes that all the buyers in this state (other than those designated in number eight above), are purchasing for investment

certificate or subscription;¹⁷⁷ (11) any transaction regarding an offer to existing security holders of the issuer, including those who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants that are exercisable within not more than ninety days of their issuance;¹⁷⁸ (12) an offer, but not a sale of security for which registration statements have been filed in Wyoming and under the Securities Act of 1933 if no stop order or refusal is in effect and no public proceeding or examination looking toward such an order is pending; (13) any offer, but not a sale, made for the sole purpose of assessing potential interest in receiving a prospectus or its equivalent; and (14) any offer, but not a sale, made on or through the Internet or common carrier electronic system.¹⁷⁹ The secretary of state may deny or revoke any exemption found in Wyoming Statutes sections 17-4-114(a)(ix), (x) or 17-

and (B) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this state (other than those designated in number eight above); but, upon application of the offeror and payment of a filing fee of two hundred dollars (\$200.00), the secretary of state may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, or increase or decrease the number of offerees permitted, or waive the conditions in clauses (A) and (B) without the substitution of a limitation on remuneration.

Id. § 17-4-114(b)(ix).

177. Any offer or sale of a preorganization certificate or subscription is exempt if:

(A) [N]o commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (B) the number of subscribers does not exceed fifteen (15) and (C) no payment is made by any subscriber.

Id. § 17-4-114(b)(x)(A)-(C).

178. This type of transaction is exempt if:

(A) [N]o commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this state, or (B) the issuer first files a notice specifying the terms of the offer and the secretary of state does not by order disallow the exemption within the next five (5) full business days.

Id. § 17-4-114(b)(xi)(A), (B).

179. An offer made on the Internet or through a common carrier electronic system is exempt providing:

(A) The offer indicates, directly or indirectly, that the security is not being offered to residents of Wyoming;
 (B) The offer is not specifically directed to any person in Wyoming by, or on behalf of, the issuer or the security; and
 (C) No sales of the issuer's security are made in Wyoming as a result of the offer until such time as the security being offered has been registered under this chapter and a final prospectus or form U-7 is delivered to the offeree prior to such sale.

Id. § 17-4-114(b)(xiv).

4-114(b)(i)-(xv) with respect to a specific security or transaction.¹⁸⁰ Such an order requires appropriate prior notice to all interested persons, an opportunity for a hearing, and written findings of fact and conclusions of law,¹⁸¹ except that the secretary of state may by order summarily deny or revoke any specified exemptions until there has been a final determination of any proceeding.¹⁸²

3. Other Exemptions

a. National Securities Markets Improvement Act of 1996

The 1996 National Securities Markets Improvement Act (NSMIA) created a new classification of instruments called "covered securities." Section 18(b)(2) of the 1933 Securities Act defines "covered security" to include any "security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940."¹⁸³ Also included as covered securities are securities traded on national securities exchanges.¹⁸⁴ The NSMIA preempts state securities registration laws with respect to covered securities, for which states are restricted to receiving notice filings.¹⁸⁵

Before July 1, 1997, Wyoming exempted investment companies from registration requirements pursuant to Wyoming Statutes section 17-4-114(a)(xi).¹⁸⁶ After enactment of the NSMIA, and Wyoming Statute section 17-4-132(a), investment companies now make notice filings in accordance with rules established by the Securities Division.¹⁸⁷ Notice

180. *Id.* § 17-4-114(c).

181. *Id.*

182. If the secretary of state enters a summary order, the secretary must promptly notify all interested parties, giving reasons for the order. If a written request is made for a hearing, it will be set for within fifteen days of receipt of the written request. If a hearing is requested or ordered, the secretary of state after notice and opportunity for hearing to all interested persons, may modify, vacate, or extend the order until its final determination. If a hearing is not requested or ordered by the administrator, the order remains in effect until it is modified or vacated by the secretary of state. An order may not operate retroactively, and a person will not be considered to have violated WYO. STAT. ANN. §§ 17-4-107 or 17-4-115 if an offer or sale is made after the entry of an order if he can prove he did not know, and in the exercise of reasonable care, could not have known of the order. *See id.*

183. 15 U.S.C. § 77r(b)(2) (Supp. V 1999).

184. *Id.* § 77r(b)(1).

185. *Id.* § 77r(b)(2); *see* Wyoming Secretary of State, Securities Division, "Notice Filings for Covered Securities," available at <http://soswy.state.wy.us/securit/notice.htm> (last modified June 11, 2001).

186. Investment Companies, available at <http://soswy.state.wy.us/securit/notice.htm> (last modified June 11, 2001).

187. "Notice Filings for Covered Securities," *supra* note 185; *see* WYO. ADMIN.

filings are made on Form NF or on a Notice of Investment Company Exemption Form for open-end investment companies offering federal covered securities.¹⁸⁸ The filings are made at the trust or fund level, and not at the portfolio level, and are renewed every other year.¹⁸⁹ Registration forms, amendments, sales literature, prospectus, consent to service, or annual forms are not required.¹⁹⁰ Filings are effective on receipt, or if an issuer requests, concurrent with SEC effectiveness.¹⁹¹

i. Regulation D, Rule 506 Filings

Offerings made pursuant to federal Regulation D, Rule 506¹⁹² are covered securities under the NSMIA,¹⁹³ and issuers are required to make notice filing with the secretary of state.¹⁹⁴ Issuers file a Form D, Form U-2 (consent to service of process),¹⁹⁵ and remit the fee to the secretary of state, no later than fifteen days after the first sale has occurred in the State. No other documents need to be filed unless requested, in writing, by the secretary of state.¹⁹⁶ Offers under Rule 506 can no longer be filed pursuant to Wyoming's Uniform Limited Offering Exemption.¹⁹⁷

ii. Other Covered Securities

Other covered securities under the NSMIA include accredited inves-

CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 9, § 1 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,456 (2001).

188. "Notice Filings for Covered Securities," *supra* note 185. The Notice of Investment Company Exemption Form can be downloaded from the secretary of state's web site.

189. *Id.* The filing fee for initial filing and renewals is \$200. *Id.*

190. *Id.*

191. *Id.*

192. 17 C.F.R. § 230.506 (2001).

193. Wyoming Secretary of State, Securities Division, "Regulation D, 506 Filings," available at <http://soswy.state.wy.us/secureiti/notice.htm> (last modified June 11, 2001). Rule 506 offerings may be made to no more than thirty-five buyers. If the purchaser is not an accredited investor, he must have knowledge and experience in financial and business matters so that he is capable of evaluating the merits and risks of the investment. 17 C.F.R. § 230.506.

194. See WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 9, § 2 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,457 (2001).

195. These forms can be downloaded from the secretary of state's web site.

196. *Notice Filings for Covered Securities*, available at <http://soswy.state.wy.us/secureiti/-notice.htm> (last modified June 11 2001). The filing fee is \$200. *Id.*

197. *Id.*

tors.¹⁹⁸ Also included are national offerings available on certain securities exchanges as well as certain securities that are exempt under the Securities Act.¹⁹⁹ Wyoming requires notice filings only for investment companies and Rule 506 offerings.²⁰⁰

b. Securities Litigation Uniform Standards Act of 1998

Former President Clinton signed into law the Securities Litigation Uniform Standards Act of 1998 (SLUSA) on November 3, 1998. SLUSA amended the 1933 Securities Act and 1934 Securities Exchange Act to restrict securities class action suits under state law.²⁰¹ Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA)²⁰² to combat “abusive” practices related to private securities class action litigation, and identified the following as some of these practices:

(1) [T]he routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of clients whom they purportedly represent.²⁰³

PSLRA amended the substantive and procedural provisions of

198. The Securities Division has adopted the definition of “accredited investor” set forth in 17 C.F.R. § 230.501(a) (2001). *See* WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 2, § 1; 3A Blue Sky L. Rep. (CCH) ¶ 66,402. The issuer may only sell securities to those persons the issuer believes to be accredited investors purchasing for investment and not for resale. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 9, § 3(a)(i), (iii); 3A Blue Sky L. Rep. (CCH) ¶ 66,458, § 3(a)(i), (iii).

199. *Notice Filings for Covered Securities, available at <http://soswy.state.wy.us/Securiti/notice.htm>* (last modified June 11, 2001).

200. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 9, §§ 1-2; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,456 to 66,457.

201. H.R. CONF. REP. NO. 105-803 (2d Sess. 1998).

202. Pub. L. No. 104-67, 109 Stat. 737 (1995).

203. H.R. CONF. REP. NO. 104-369, at 31-32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730.

the federal securities laws to address these abusive practices.²⁰⁴ In response, these suits were brought under state rather than federal law, where many of the PSLRA requirements did not apply. While PSLRA was meant to discourage meritless suits, the number actually increased. SLUSA prohibits class claims for covered securities in state courts that (1) seek damages on behalf of more than fifty persons, or (2) involve a plaintiff asserting claims on a representative basis.²⁰⁵ Practitioners should note that the Act of 1998 does not prohibit a single plaintiff, or a group of plaintiffs numbering fifty or less, from filing a claim under state statutes or the common law.

c. Put Options and Letters of Credit

If put options²⁰⁶ or letters of credit²⁰⁷ are attached to an exempt issue of securities, and have no value apart from the exempt issue, they are exempt. However, they must be considered integral parts of the security and require no separate registration or exemption.²⁰⁸

204. See 15 U.S.C. §§ 77z-1, 77z-2, 78u-4, 78u-5 (Supp. V 1999); 18 U.S.C. § 1964(c) (Supp. V 1999).

205. 144 CONG. REC. H10771-02, *H10772 (1998). A covered class action is defined as:

[A]ny single lawsuit in which—(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

Id.

206. A put option is: "One under which buyer of the option may demand payment by the writer of a fixed price (the 'striking' price) upon delivery by the buyer of a specified number of shares of stock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

207. A letter of credit is: "An engagement by a bank or other person made at the request of a customer that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." *Id.* at 903-04.

208. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 1(a) (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,432 (2001). The fee to file an exemption in Wyoming is \$200. 3A Blue Sky Law Rep. (CCH) 57,054.

d. Qualified Institutional Buyers

The secretary of state confirmed in a ruling that qualified institutional buyers, as defined in Rule 144A of the 1933 Securities Act, are exempt in Wyoming.²⁰⁹ Rule 144A defines a qualified institutional buyer as: "Any [entity], acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity."²¹⁰ Included in this definition are: (1) insurance companies as defined in section 2(13) of the Securities Act, (2) investment companies registered under the 1940 Investment Company Act; (3) any small business investment company licensed by the U.S. Small Business Administration; (4) any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its subdivisions for employee benefits; (5) any employee benefit plan coming within the meaning of Title I or the Employee Retirement Income Security Act of 1974; (6) any trust fund whose trustee is a bank or trust company; any organization described in section 501(c)(3) of the Internal revenue Code; (7) any investment advisor registered under the Investment Adviser Act; (8) any entity if all equity owners are qualified institutional buyers, acting for their own accounts or those of other qualified institutional buyers; and (9) any bank as defined in section 3(a)(2) of the Securities Act.²¹¹

e. Solicitation of Interest

Offers, but not sales, of securities may be made by issuers in Wyoming in order to determine investor interest in the securities.²¹² Offers are exempt from registration if the offeror files a Solicitation of Interest form²¹³ and other required information, ten business days before conducting the solicitation of interest.²¹⁴ Amendments must be filed five days prior to solicitation offers. The issuer may not accept money or commitments to purchase securities during the solicitation of interest

209. 3A Blue Sky L. Rep. (CCH) ¶ 66,464.

210. 17 C.F.R. § 230.144A (2001).

211. *Id.*

212. WYO. STAT. ANN. § 17-4-114(b)(xiii) (LexisNexis 2001) exempts offers (not sales) of securities for the purpose of getting an indication of those interested in receiving a prospectus. *Id.*

213. This form is available on the Secretary of State's website under "Securities."

214. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 2(f)(i)(A) (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,433, § 2(f)(i)(A) & (B) (2001).

period and all solicitations must stop after securities registration begins.²¹⁵

f. Regulation D, Rule 505 Offerings

If offerings are made pursuant to federal Regulation D, Rule 505²¹⁶ of the Securities Act, they are exempt if specified conditions are complied with.²¹⁷ Rule 505 filings are allowed by Wyoming Securities Rule Chapter 6, Section 2(c) and WYO. STAT. ANN. § 17-4-114(b)(ix). Rule 505 offerings claim Wyoming's Uniform Limited Offering Exemption (ULOE) by filing Form D with the secretary of state no later than fifteen days (previously ten days) after: (1) the first sale of securities in Wyoming that comes from an ULOE, or (2) the receipt of a completed subscription agreement by a Wyoming investor that comes out of a ULOE offer. If an issuer is selling its own securities, a director or an officer must register as an agent of the issuer.²¹⁸ The notice must contain an original signature on the State undertaking page of Form D.²¹⁹

g. Standard Manual Exemption

Any "publication in wide use that is periodically updated" and contains information specified by law, is a recognized securities manual for the purpose of claiming an exemption under WYO. STAT. ANN. § 17-4-114(b)(ii).²²⁰ These periodicals include Moody's, Standard & Poor's, Fitch's, and Value Line.²²¹

G. Registration of Broker-Dealers and Agents

In addition to requiring securities to be registered in Wyoming,

215. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 2(h); 3A Blue Sky L. Rep. (CCH) ¶ 66,433, § 2(h).

216. 17 C.F.R. § 230.505 (2001).

217. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 2(c); 3A Blue Sky L. Rep. (CCH) ¶ 66,433, § 2(c). The filing fee for a Rule 505 exemption is \$200. 3A Blue Sky L. Rep. (CCH) 57,054. Exemptions, available at <http://soswy.state.wy.us/secruti/exempt.htm> (last modified June 11, 2001). Form D and Form U-2 can be downloaded from the Secretary of State's web site.

218. The director or officer must file Form U-4 and pay a \$35 fee. Wyoming Secretary of State, Securities Division, Federal Reg D Rule 505 Offerings, available at <http://soswy.state.wy.us/secruti/exempt.htm> (last modified June 11, 2000). The form is available on the secretary of state's web site.

219. Wyoming Secretary of State, Securities Division, Federal Reg D Rule 505, available at <http://soswy.state.wy.us/secruti/exempt.htm> (last modified June 11, 2000).

220. 3A Blue Sky L. Rep. ¶¶ 66, 114 & 66,433.

221. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 6, § 2(b); 3A Blue Sky L. Rep. (CCH) ¶ 66,433, § 2(b).

broker-dealers and agents must also be registered in the State.²²²

(a) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this act [§§ 17-4-101 through 17-4-129].

(b) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he is not associated with a particular broker-dealer registered under this act or a particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the secretary of state.

(c) Every registration expires one (1) year from its effective date unless renewed.²²³

The following discusses the definition of broker-dealers and agents and describes the procedures for their registration.

1. Broker-Dealers

A broker-dealer "means any person engaged in the business of effecting transactions in securities for the account of others or for his own account."²²⁴ This definition does not include (1) an agent, (2) an issuer, (3) a bank, savings institution, or trust company, engaging in securities transactions limited to trust or banking functions and not with the general public, (4) a person who has no place of business in this

222. A defendant, not registered as an agent in Wyoming and acting unlawfully in the sale of non-exempted securities, is automatically civilly liable, whether or not he knows of the falsity of the statement made. *Gaudina v. Haberman*, 644 P.2d 159, 168 (Wyo. 1982).

223. WYO. STAT. ANN. § 17-4-103(a)-(c) (LexisNexis 2001).

224. *Id.* § 17-4-113(a)(iii).

State,²²⁵ or (5) a Canadian resident who has no office or other physical presence in this state.²²⁶

a. Initial Registration

Applicants must file an amended page two, item number two of Form BD with the Central Registration Depository (CRD)²²⁷ reflecting the applicant's intent to register in Wyoming.²²⁸ Payment of the registration fee is made through the applicant's CRD account to the secretary of state.²²⁹ Applicants file a completed Form BD together with a consent to service of process pursuant to Wyoming Statutes section 17-4-126(g), with the secretary of state, which contains original notarized signatures, the most recent audited financial statements, and a current unaudited financial statement within ninety days of the application date.²³⁰ The secretary of state may require an applicant for initial registration to publish an announcement of the application in one or more specified news-

225. A person who has no place of business in Wyoming will not be considered a broker dealer if:

- (I) He effects transactions in this state exclusively with or through (1) the issuers of the securities involved in the transactions, (2) other broker-dealers or (3) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or
- (II) During any period of twelve (12) consecutive months he does not direct more than fifteen (15) offers to sell or buy into this state in any manner to persons other than those specified in subdivision (I) of this subparagraph, whether or not the offeror or any of the offerees is then present in this state.

Id. § 17-4-113(a)(iii)(D)(I), (II).

226. *Id.* § 17-4-113(a)(iii)(A)-(E).

227. "CRD shall mean the NASAA/NASD [North American Securities Administrators Association/National Association of Securities Dealers] Central Registration Depository, including but not limited to, its policies, memoranda, forms, codes and systems." WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 2, § 2 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); see also "Central Registration Depository," 1 Blue Sky L. Rep. (CCH) ¶ 6531 (2001).

228. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 4, § 1(a); 3A Blue Sky L. Rep. (CCH) ¶¶ 66,421, § 1(a) & 66,463. The applicant must insure that the appropriate registration fee is paid from the applicant's CRD account to the Secretary of State. When an application for a broker-dealer or an agent is withdrawn or denied, the secretary of state retains the entire fee. WYO. STAT. ANN. § 17-4-104(b) (LEXISNEXIS 2001). The Secretary of State may also require that registered broker-dealers and agents post surety bonds. *Id.* § 17-4-104(c).

229. The fee for initial or renewal registration for a broker-dealer is \$200. WYO. STAT. ANN. § 17-4-104(b) (LexisNexis 2001).

230. *Id.* § 17-4-104(a).

papers in the state.²³¹ The registration becomes effective, if no denial order is in effect and no proceeding is pending under WYO. STAT. ANN. § 17-4-106, at noon of the thirtieth day after an application is filed.²³² The registration takes effect from its date of approval until December 31, unless the applicant withdraws it or the secretary of state revokes it.²³³ Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer, or director, or a person occupying a similar status or performing similar functions.²³⁴

b. Renewal Registration

Broker-dealers renew their registrations and pay a renewal fee through the CRD according to its instructions in November and December of each year. A renewed registration is effective from January 1 to December 31 of any year unless the broker-dealer terminates it or the secretary of state revokes it.²³⁵

c. Broker-Dealer Violations and Unethical Practices

The secretary of state mandates an affidavit of compliance prior to registration, and in addition may require written documents concerning broker-dealer violations of securities laws, criminal statutes, and rules of fair practice. Examples of unethical practices include recommending unsuitable securities for clients, unjustifiably delaying delivery of securities, and failing to adequately supervise agents.²³⁶

d. Canadian Broker-Dealers

Canadian broker-dealers are excluded from registration if they (1) are not physically present in Wyoming, (2) are members of a self-regulatory or the Canadian Stock Exchange and maintain their memberships in good standing, (3) refrain from violating the Wyoming fraudulent practices provisions, and (4) effect or attempt to effect transactions with (a) Canadians who are residing temporarily in Wyoming and the

231. *Id.*; see also WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 4, §§ 1-3, available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

232. WYO. STAT. ANN. § 17-4-104(a) (LexisNexis 2001).

233. *Id.*

234. *Id.*

235. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 4, § 4 (2002), available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002); 3A Blue Sky L. Rep. (CCH) ¶¶ 66,424 & 66,463 (2001).

236. WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 4, §§ 2(a), 6; 3A Blue Sky L. Rep. (CCH) ¶¶ 66,422 & 66,425A.

Canadian broker-dealer had a previous bona fide business relationship with the Canadian client, or (b) Canadians present in Wyoming if transactions are exclusively in Canadian self-directed tax advantaged retirement plans that the person holds or contributes to. Offers or sales of securities offered by such a Canadian broker-dealer are exempt from state registration and advertising requirements.²³⁷

2. Agents

An agent is:

[A]ny individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents (A) an issuer in (I) effecting transactions in a security exempted by W.S. 17-4-114(a)(i), (ii), (iii), (ix) or (x), (II) effecting transactions exempted by W.S. 17-4-114(b), (III) effecting transactions in a covered security as described in section 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933, or (IV) effecting transactions with existing employees, partners or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state; or (B) a broker-dealer in effecting transactions in this state limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934. A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.²³⁸

237. WYO. STAT. ANN. § 17-4-113(a)(iii)(E)(I-IV) (LexisNexis 2001).

238. WYO. STAT. ANN. § 17-4-113(a)(ii) (LexisNexis 2001). The terms "agent," "salesman," and "salesperson" are generally used interchangeably in various blue sky laws. In Wyoming, licenses are usually issued to only salespersons or agents of licensed broker-dealers, investment advisers, or issuers or owners of registered securities. In order to register as a salesperson or agent, an application on a prescribed form and a registration fee are required. Where an applicant for a Wyoming salesman's license had conducted unethical or dishonest practices within the securities industry and did not make a complete disclosure of this conduct on his application, the secretary of state could have issued a cease and desist order, but instead issued an Order to Show Cause and held a hearing to impress upon the applicant the necessity of complying with the Wyoming securities Laws. *In re Norton*, Blue Sky. L. Dec. (CCH) ¶ 71,884 (1982-84). The secretary of state may deny any application if it is in the public interest. Where an applicant had been convicted in the past ten years for felonious stabbing, cutting, and wounding another individual, was sufficient ground to deny the request for agent registration. *In re Jack Bennett Sheline, Jr.*, Blue Sky L. Dec. (CCH) ¶ 72,065 (1984-85).

This definition has been expanded to include: “(1) [I]ndividuals representing issuers that effect transactions in covered securities; and (2) individuals representing broker-dealers that effect *de minimis* transactions by associated persons in accordance with Section 15(h)(2) of the Securities Act of 1934.”²³⁹

Securities agents who apply for initial registration file a Form U-4 with the CRD. Initial fees and renewal fees are paid through the CRD according to its instructions in November and December of any given year.²⁴⁰ Agent registration is not automatically approved. The agent must first pass the Uniform Securities Agent State Law Exam, Series 63, or the Uniform Combined Law Exam, Series 66.²⁴¹

a. Broker-Dealer Agents

i. Registration

Broker-dealer agents are registered on a yearly basis. Applications are effective upon approval and are good through December 31 of any given year, unless the agent withdraws it or the secretary of state revokes it.²⁴²

ii. Renewal

Registration renewal occurs each year in November and December through the CRD. Broker-dealer agents pay their renewal fee through

239. 3A Blue Sky L. Rep. (CCH) 57,059 (2001). Agent applicants must file Form U-4 through the CRD. 3A Blue Sky L. Rep. (CCH) ¶ 66,463 (2001). Applicants must pass the Uniform Securities Agent State Law Exam, Series 63, or the new Uniform Combined State law exam, Series 66. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 5, § 1(d) (2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,426, § 1(d). The Secretary of State may require agents to submit an affidavit of compliance with the Wyoming Securities Act, and they may be asked to answer questions under oath or provide copies of any securities law violation. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 5, § 2(a) (2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,427, § 2(a). Agents must observe high ethical standards. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 5, § 6 (2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,431. If any changes occur, agents must amend their Form U-4 applications no later than thirty days after changes occur. WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 5, § 3(d) (2002); 3A Blue Sky L. Rep. (CCH) ¶ 66,428, § 3(d).

240. 3A Blue Sky L. Rep. (CCH) ¶¶ 66,426, 66,428 & 66,463. Initial or renewal registration fees for agents are \$35. WYO. STAT. ANN. § 17-4-104(b) (LEXISNEXIS 2001); 3A Blue Sky L. Rep. (CCH) ¶ 66,104.

241. 3A Blue Sky L. Rep. (CCH) ¶¶ 66,426 & 66,463.

242. 3A Blue Sky L. Rep. (CCH) ¶ 66,427; *see also* WYO. ADMIN. CODE, SEC’Y OF STATE, SEC. DIV. RULES & REGS. ch. 5, §§ 2, 3, 4, & 6 (2002), *available at* http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

the CRD, and renewals become effective on January 1, remaining so through December 31 unless it is terminated by the agent, his employer, or the secretary of state.²⁴³

b. Issuer's Agents

i. *Effective Registration*

An issuer's-agent²⁴⁴ registration may be made effective by the secretary of state (1) if there is an effective registration statement and only during the time the agent's securities are being sold under the statement; (2) from the effective date of the registration statement for a period of one year and sixty days, unless it is renewed; or (3) for the exclusive purpose of selling the issuer's securities.²⁴⁵

ii. *Renewal*

Issuer's-agent registrations are renewed sixty days after the anniversary date of a presently effective registration. Renewal fees must be paid to the secretary of state unless the issuer withdraws the agent's registration, securities are no longer offered by the issuer, or the secretary of state revokes the agent's registration.²⁴⁶

iii. *Termination*

Registration can be ended by issuer's-agents by writing to the secretary of state and indicating their intention to terminate. Employing issuers may file a similar letter for the same purpose.²⁴⁷

H. *Advisory Activities*

It is unlawful for any person in Wyoming to give advice to another regarding the value of the securities or their purchase or sale, in exchange for consideration received primarily for this advice.²⁴⁸ The Wyoming Act prohibits a person from employing any device, scheme, or

243. 3A Blue Sky L. Rep. (CCH) ¶ 66,428.

244. An issuer's agent(s) is defined as "those persons transacting business in securities on behalf of an issuer. Issuer's agents are restricted to transacting business in the securities of an issuer for which they are affiliated." WYO. ADMIN. CODE, SEC'Y OF STATE, SEC. DIV. RULES & REGS. ch. 2, § 7, available at http://soswy.state.wy.us/cgi-win/sscgi_1.exe (last visited Apr. 1, 2002).

245. 3A Blue Sky L. Rep. (CCH) ¶ 66,427.

246. *Id.* ¶ 66,428.

247. *Id.* ¶ 66,429.

248. WYO. STAT. ANN. §17-4-102(a) (LexisNexis 2001).

artifice to defraud another person with regard to any advice given, or to engage in any act, practice, or course of business that operates or would operate a fraud or deceit upon the other person.²⁴⁹

I. Investment Advisor Registration

There are no investment advisor provisions in the Wyoming Act.

V. SECURITIES REGISTRATION LIABILITY

A. Potentially Liable Parties

The Wyoming Act states that any person who willfully violates any provision of the Act including its registration provisions, or who willfully violates any rule or order under the Act, may be convicted.²⁵⁰ The Act does not limit the power of the secretary of state to punish any person for any conduct that constitutes a securities crime by statute or at common law.²⁵¹ Liability attaches "by operation of law" and a cause of action arises against all those who participate in the sale of any nonexempt, unregistered security.²⁵²

B. Defenses to Administrative Liability

There are no defenses in Wyoming for failing to register a security, unless it is exempt or preempted under federal law.²⁵³ Any person effecting transactions in securities in Wyoming is expected to have knowledge of registration requirements, and there is a duty in this state not to assist in unlawful sales.²⁵⁴

C. Administrative Remedies

Under section 17-4-106, the secretary of state may take action against any registration or registered person. The secretary of state may by order deny, suspend, make conditional or probationary, revoke any registration, impose a civil penalty, order restitution to investors, censure or reprimand, require remedial training, impose special reporting requirements, or impose other conditions that he deems to be in the public interest. The secretary may also take action if he finds that the applicant or registrant or, in the case of a broker-dealer, any partner, officer or

249. *Id.* § 17-4-102(a)(i), (ii).

250. *Id.* § 17-4-121(a).

251. *Id.* § 17-4-121(c).

252. *Gaudina v. Haberman*, 644 P.2d 159, 168 (Wyo. 1982).

253. *Id.*; WYO. STAT. ANN. § 17-4-107(a)(ii), (iii) (LexisNexis 2001).

254. *Gaudina*, 644 P.2d at 168.

director, any person occupying a similar status or performing similar functions, or any person directly controlling the broker-dealer has (1) filed an application for registration that as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect, or contained any statement that was false or misleading with respect to any material fact; (2) has willfully violated or willfully failed to comply with any provision of the Wyoming Act; (3) has been convicted within the last ten years of any misdemeanor involving a security or any aspect of the securities business, or any felony; (4) is temporarily or permanently enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business; (5) is subject to an order of the secretary of state denying, suspending, or revoking registration as a broker-dealer or agent; (6) is subject to an order entered in the previous five years by the securities administrator of any other state or by the SEC denying or revoking registration as a broker-dealer, agent, investment adviser, or the substantial equivalent of those terms as defined in the Act, or is subject of an order of the SEC commission suspending or expelling him from a national securities exchange or national securities association registered under the Exchange Act of 1934, or is subject to a U.S. post office fraud order;²⁵⁵ (7) has engaged in dishonest or unethical practices in the securities business; (8) is insolvent;²⁵⁶ or (9) is not qualified on the basis of such factors as training, experience, and knowledge of the securities business.²⁵⁷ The secretary of state may also order, deny suspend or revoke any registration if he finds the order in the public interest, and the applicant or registrant has failed to reasonably supervise his agents if he is a broker-dealer or has failed to pay

255. The secretary of state may not institute a revocation or suspension proceeding under number (6) above more than one year from the date of the order relied on; and he may not enter an order under number (6) above on the basis of an order under another state act unless that order was based on facts that would currently constitute a ground for an order under this section. WYO. STAT. ANN. § 17-4-106(a)(ii)(F)(I), (II) (LexisNexis 2001).

256. Insolvency meaning that his liabilities exceed his assets or that a person cannot meet his obligations as they mature. The secretary of state may not enter an order against a broker-dealer without a finding of insolvency as to the broker-dealer. *Id.* § 17-4-106(a)(ii)(H).

257. The secretary of state may not enter an order against a broker-dealer for any person other than the broker-dealer if he is an individual, or an agent of a broker-dealer. The secretary of state may not enter an order based only on lack of experience if the applicant or registrant is qualified by knowledge, training, or both. The secretary shall consider that an agent who will work under the supervision of a broker-dealer need not have the same qualifications as a broker-dealer. Finally, the secretary may by rule provide for an examination, which may be written, oral, or both, to be taken by any class of or all applicants, provide that a fee be paid to take the examination. *Id.* § 17-4-106(d)(i)-(iv).

proper filing fee.²⁵⁸ However, the secretary of state may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when the registration became effective unless the proceeding is held within the next thirty days.²⁵⁹ No order may be entered for any of the above without appropriate notice to the applicant or registrant, an opportunity for hearing, and written findings of fact and conclusions of law.²⁶⁰

VI. STATUTORY SECURITIES FRAUD—CIVIL LIABILITY

A. *Overview of Securities Fraud Statutes*

Wyoming prohibits fraudulent practices in the offer, sale, or purchase of securities, and also prohibits fraudulent practices in advisory activities regarding securities.²⁶¹ Civil liability for violating the Wyoming Act is found in Wyoming Statutes section 17-4-122.

B. *Potentially Liable Parties*

In Wyoming it is unlawful for any person connected with an offer, sale, or purchase of a security directly or indirectly:

- (i) To employ any device, scheme, or artifice to defraud;²⁶²
- (ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

258. The secretary of state may enter only a denial order, and he shall vacate any such order when the deficiency has been corrected. *Id.* § 17-4-106(b)(ii)(B).

259. *Id.* § 17-4-106(c).

260. *Id.* § 17-4-106(h)(i)-(iii). Appropriate notice must also be given to the employer or prospective employer if the applicant or registrant is an agent. *Id.* § 17-4-106(h)(i).

261. *Id.* §§ 17-4-101(a)(i)-(iii) & -102(a)(i)-(ii).

262. “‘Fraud,’ ‘deceit,’ and ‘defraud’ are not limited to common-law deceit.” *Id.* § 17-4-113(a)(iv). Common law actions for fraud in Wyoming requires that the plaintiff prove by clear and convincing evidence the defendant made a false representation intended to induce action by the plaintiff, the plaintiff believed the representation to be true, and the plaintiff relied on the false representation and suffered damages. *Sundown, Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 330 (Wyo. 2000).

- (iii) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.²⁶³

It is unlawful for a person who receives consideration from another primarily for advising the person, whether by the issuance of analyses, reports, or otherwise, as to the value of securities or their purchase or sale:

- (i) To employ any device, scheme, or artifice to defraud
- (ii) the other person; or
- (iii) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person.²⁶⁴

It is also unlawful for a person to file or cause to be filed with the secretary of state or in any proceeding under the Wyoming Act any document that contains a statement that is false or misleading in any material fact at the time and in light of the circumstances under which it was made.²⁶⁵

The Wyoming Act states that "any person" may be liable. "Person" is defined as, "an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or political subdivision of a government."²⁶⁶

C. *Private Fraud Liability*

1. Standing

Section 17-4-122(a)(ii) applies only to buyers.²⁶⁷ Individuals

263. *Id.* § 17-4-101(a)(i)-(iii) (LexisNexis 2001). Exempted trust companies were not exempt from the antifraud provisions of section 17-4-101, or from the civil liabilities imposed by section 17-4-122 prior to 1975. *Gaudina v. Haberman*, 644 P.2d 159, 167 (Wyo. 1982).

264. WYO. STAT. ANN. § 17-4-102(a)(i)-(ii) (LexisNexis 2001).

265. *Id.* § 17-4-116.

266. *Id.* § 17-4-113(a)(viii).

267. "Any person who offers and sells a security . . . is liable to the person buying the security from him," as long as the transaction or instrument is considered a "security" under Wyoming statutes. *Id.* § 17-4-122(a)(ii). A seller is also civilly liable under section 17-4-122(a)(i) if he sells a security before receiving approval by the secretary of

who have not bought a security from a seller lack standing to sue.

2. Primary Fraud Liability

Under the Wyoming Act, any person who offers or sells a security will be civilly liable if the offer or sale is made by means of fraud.²⁶⁸ In *Gaudina v. Haberman*,²⁶⁹ the trial court concluded that in connection with the sale of securities, the defendant, "made untrue statements of material facts, although he did not know they were untrue at the time, but he did fail to state material facts with reference to the sale of the securities so as to make the totality of the statements made at that time misleading to the plaintiffs."²⁷⁰ On appeal, the Wyoming Supreme Court held that when a person undertakes to sell an investment, he is obligated to know the law surrounding such transactions, and to know what is and is not a "security." Further, the court found ignorance of the law to be no excuse, because it would be impossible to administer the Securities Act if ignorance of its requirements and surrounding case law were a defense.²⁷¹

a. Misrepresentation/Omission

Any person making a false representation or omission with regard to an offer or sale of a security who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person who

state of its sales literature, if such approval is required. Civil liability also arises under section 17-4-103(a) if a broker-dealer or agent is not registered in this state; under section 17-4-107 if securities are unregistered and they are not exempt or preempted by federal law; under section 17-4-117(b) if one makes or causes to be made to any prospective purchaser, customer or client any representation that is not true, incomplete, or misleading; under 17-4-110(d), if the secretary by rule or order requires information designated in the prospectus to be given to each person to whom an offer is made and the rule or order is not complied with; under section 17-4-111(g) if the secretary of state by rule or order requires for registration by qualification or coordination that there be impounding or the establishment of escrow, and this is not complied with; and under 17-4-111(h) if the secretary by rule or order requires that a condition for registration by qualification or coordination is that the securities be sold only on a specified form of subscription or contract and this is not complied with.

268. Since 1947 federal courts have recognized an investor's private right of action when there is a misrepresentation or omission of a material fact under sections 10(b) or Rule 10b-5 of the Securities Act and the Exchange Act respectively. *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1947). Wyoming has recognized this right since 1956. *Robson*, *supra* note 31; WYO. STAT. ANN. § 17-4-122.

269. 644 P.2d 159, 164 (Wyo. 1982).

270. *Id.* at 166.

271. *Id.*

buys the security from him.²⁷² Under the Wyoming Act, a buyer need not prove that a seller knew the falsity of any misrepresentations in order to bring an action. In addition, those engaged in effecting securities transactions are expected to know the State's registration requirements, and they have a duty not to aid in unlawful sales. If they do, civil liability follows as a matter of course.²⁷³

b. Reliance

Section 17-4-122 does not require that a buyer show reliance on a seller's misrepresentation or omission in order to bring a civil suit.

c. Materiality

In order for there to be a cause of action under section 17-4-122, an offeror or seller of a security must make a misrepresentation of a material fact or fail to state a material fact that misleads a buyer. A material fact or omission is one which, in the light of the circumstances under which they are made, misleads a buyer, and the buyer is unaware of the misrepresentation or omission.²⁷⁴

d. No Scienter Required

In order to give rise to a civil action for damages under the 1934 Securities Exchange Act and Rule 10b-5, there must be a mental state of intent to deceive, defraud, or manipulate (scienter).²⁷⁵ The Wyoming Act omits mention of scienter in order to bring a civil action. Under Wyoming Statutes section 17-4-122(a)(ii), if a person offers or sells a security using a false statement, misleads, or makes an omission that is unknown to the buyer, the offeror or seller is liable.

e. No Duty Required

Section 17-4-122(a)(2) does not require a seller to have a duty to disclose to a purchaser as a prerequisite for seller or offeror liability for an omission of a material fact, unlike Rule 10b-5, where nondisclosure is only actionable if there is a duty to disclose.²⁷⁶

272. WYO. STAT. ANN. § 17-4-122(ii) (LexisNexis 2001).

273. *Gaudina*, 644 P.2d at 168.

274. WYO. STAT. ANN. § 17-4-122(a)(ii) (LexisNexis 2001).

275. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *see also* Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1994 & Supp. V 1999).

276. Under Rule 10b-5 of the 1934 Securities Act, several factors are used to evaluate whether there is a duty to disclose. These include: (1) The parties relationship, (2) each parties access to information (3) the defendant's benefit from the relationship, (4)

3. Defenses to Primary Fraud Liability

a. Limitations

A person must bring a section 17-4-122 violation within two years after signing a contract.²⁷⁷ A person may not sue under this section:

- (i) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent (6%) per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty (30) days of its receipt; or
- (ii) If the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty (30) days of its receipt.²⁷⁸

b. Plaintiff's Knowledge

Under section 17-4-122(a)(ii), if a plaintiff has knowledge of a falsity or omission, the offeror or seller will not be liable.²⁷⁹

c. Defendant's Due Diligence or Lack of Knowledge

If a defendant can show under section 17-4-122(a)(ii) that he did not know of a material misrepresentation or omission, and in the exercise of reasonable care could not have known of the falsity or omission, he is not liable. Any person who sells a security has the burden of proving this.²⁸⁰ A person who sells an investment is obligated to know the law surrounding the transaction.²⁸¹

whether the defendant is aware that plaintiff relied on defendant when making an investment decision, and (5) whether the defendant initiated the transaction. *Paracor Fin., Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996).

277. WYO. STAT. ANN. § 17-4-122(e) (LexisNexis 2001).

278. *Id.* § 17-4-122(e)(i), (ii).

279. *Id.* § 17-4-122(a)(ii). "Any person who offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact . . . (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know . . . is liable . . ." *Id.*

280. *Gaudina v. Haberman*, 644 P.2d 159, 168 (Wyo. 1982).

281. *Id.* at 166. It would be impossible to administer the State's securities act if

4. Secondary Fraud Liability

a. Control Person Liability

In addition to primary seller liability, the Wyoming Securities Act also holds secondary control persons liable:

Every person who directly or indirectly controls a seller liable under subsection (a) of this section, every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, . . . unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.²⁸²

b. Liability for "Materially Aiding" a Primary Violator

Section 17-4-122(b) also states that: "[E]very employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller . . ." ²⁸³ An example of materially aiding would be preparing a document for a primary violator that contains an omission or material misrepresentation.²⁸⁴

ignorance as a defense was allowed. *Id.*

282. WYO. STAT. ANN. § 17-4-122(b) (LexisNexis 2001).

283. The United States Court of Appeals for the Tenth Circuit reversed the Wyoming District Court and found that there was insufficient evidence to support a conviction for aiding and abetting in a scheme to defraud investors. *United States v. Hanson*, 41 F.3d 580 (10th Cir. 1994). The court articulated the that aiding and abetting liability under 18 U.S.C. § 2 requires:

(1) that the defendant associated himself with a criminal venture; (2) that the defendant participated in the venture as something she wished to bring about; (3) that the defendant sought by his actions to make it succeed; and (4) that the proof establishes the commission of the offenses by someone and the aiding and abetting by the defendant so charged.

Id. at 582 (citations omitted). The court noted that "[a] defendant may not stumble into aiding and abetting liability by inadvertently helping another in a criminal scheme unknown to the defendant . . ." *Id.* A "defendant must willfully associate [himself] with the criminal venture and want to make it succeed through some action on [his] part." *Id.* at 582-83 (internal quotations and citations omitted). The court held that there was no evidence that indicated the defendant knew or intended to aid and abet in a scheme to defraud investors. *Id.* at 583.

284. *Felts v. National Accounting Sys. Ass'n., Inc.*, 469 F. Supp 54, 65 (N.D. Miss.

c. Defenses to Secondary Fraud Liability

Under section 17-4-122(b), there is a "good faith" defense. If the nonseller or control person can show that he did not know, and even with the exercise of reasonable care could not have known of the facts where liability could exist, he cannot be held liable.²⁸⁵

5. Remedies

A buyer who is defrauded in the purchase of a security is able to sue at law or equity for the recovery of monetary damages.²⁸⁶ Section 17-4-122 provides for the recovery of monetary damages to a defrauded buyer of securities in Wyoming.²⁸⁷ Secondary liability under section 17-4-122(b) presumes a primary violation of the statute. Therefore, a successful buyer should have the same remedies against a secondary violator as against a primary violator.

a. Statutory Rescission

A buyer who still retains the securities may rescind the transaction, and upon tender of the securities is entitled to recovery. Recovery consists of what was paid for the securities, plus interest from the date of payment, less any income received on the security, costs, and reasonable attorney fees.²⁸⁸ Tender may be made at any time before entry of judgment.²⁸⁹

1978). The 1934 Securities Act does not contain a material aiding provision. In a 1994 decision, the United States Supreme Court held that there is no private cause of action for violating a section 10(b) or Rule 10b-5 of the 1933 and 1934 Securities Acts respectively, when aiding and abetting is involved. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994).

285. WYO. STAT. ANN. § 122(a)(ii) (LexisNexis 2001).

286. *Id.* § 17-4-122(a)(ii).

287. Section 17-4-122 states that those liable include:

Every person who directly or indirectly controls a seller liable under subsection (a) of this section, every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally, to the same extent as the seller

Id. § 17-4-122(b).

288. *Id.* § 17-4-122(a)(ii).

289. *Id.* § 17-4-122(c).

b. Statutory Damages

A buyer who is defrauded is able to sue at law or at equity to recover the consideration paid for the security, plus interest at a rate of six percent (6%) per year from the date of payment.²⁹⁰ This amount would decrease by the amount of any income received on the security if tendered, or for damages if the security is no longer owned.²⁹¹

c. Exemplary Damages

The Wyoming Act does not provide for exemplary damages.

d. Attorneys' Fees and Costs

A successful buyer is entitled to costs and reasonable attorneys' fees pursuant to section 17-4-122(a)(ii).

e. Prejudgment Interest

Section 17-4-122(a)(ii) awards to a buyer prejudgment interest of six percent per year from the date of payment who holds the security at the time a suit is brought. If the buyer no longer owns the security, he is entitled to damages that would be recoverable upon a tender of the security less the value of the security when the owner disposed of it, and interest at six percent per year from the date of disposition.

f. Equitable Relief

The Wyoming Secretary of State may seek injunctive relief if any act or practice of the Wyoming securities laws are violated. No such remedy is available to an individual person.²⁹²

290. *Id.* § 17-4-122(a)(ii).

291. *Id.*

292. Section 17-4-120 reads:

Whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this act . . . or any rule or order hereunder, he may in his discretion bring an action in the Wyoming district court to enjoin the acts or practices and to enforce compliance with his act or any rule or order hereunder.

Id. § 17-4-120.

D. Administrative Fraud Liability

1. Responsibility for Fraud Liability

The secretary of state is allowed under the Wyoming Act to make public or private investigations, within or outside of the state, to determine if there is a violation of Wyoming securities laws, or if there is about to be a violation.²⁹³ The secretary of state may amend and rescind rules, forms, and orders as necessary to carry out the provisions of the Wyoming act, including rules and forms governing registration statements, applications, and reports defining any terms.²⁹⁴ No rule, form, or order may be made, amended, or rescinded unless the secretary of state finds it is in the public interest or for the protection of investors, and such rules, forms, or orders must be consistent with the purpose and provisions of the Wyoming Act.²⁹⁵

2. Enjoining Violations

If the secretary of state suspects that any person has engaged or is about to engage in an act or practice that violates any provision of the Wyoming securities statutes, the secretary of state can bring an action in a Wyoming district court to enjoin the actions or practices, or to enforce compliance with Wyoming laws.²⁹⁶

3. Penalties

For any violation of the Wyoming Act, the secretary of state may, by order, impose a civil penalty, assess costs, require restitution to investors, or impose other conditions on a registrant or a registered person that the secretary of state deems to be in the public interest. In addition to any civil or criminal penalty provided under the Act, any person, whether registered or not, who willfully violates the Act may be assessed civil penalties and be required to pay restitution and costs. The violator may be required to rescind the transaction or transactions, and pay costs if the secretary of state finds it to be in the public interest.²⁹⁷ Civil penal-

293. *Id.* § 17-4-119(a)(i).

294. *Id.* § 17-4-124(a).

295. *Id.* § 17-4-124(b).

296. *Id.* § 17-4-120.

297. *Id.* § 17-4-124(f). In determining the amount of any civil penalty to be imposed for violation of the Wyoming Act, the secretary of state shall consider:

(A) The circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation;

(B) The scope of the violation, including the number of persons affected by

ties levied by the secretary of state shall not exceed \$250 for each violation per person, or \$10,000 in a single proceeding against any one person.²⁹⁸ In addition to any administrative assessment, penalty, remedy, or sanction the secretary of state imposes, the actual cost of any examination or investigation made by the secretary of state may be charged to the party or parties subject to the investigation or examination.²⁹⁹

4. Judicial Review of Secretary of State Orders

Any final order of the secretary of state may be reviewed in a Wyoming district court by filing in the court, within sixty days after the entry of an order, a written petition praying that the order be modified or set aside in whole or in part.³⁰⁰ The court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order in whole or part. The secretary of state's findings of fact are conclusive, if supported by competent material and substantial evidence. The judgment of the district court is final, but subject to review by the Wyoming Supreme Court.³⁰¹

VII. COMMON LAW CLAIMS: PRIMARY LIABILITY

A. *Fraud*

1. Elements of a Claim

a. Fraud/Fraudulent Misrepresentation

Fraud or fraudulent misrepresentation (fraud) arises in Wyoming when there is (1) a false representation intended to induce action by a party, (2) the party reasonably believed the representation to be true, and

the conduct constituting the violations;

(C) The level of restitution or compensation that the violator has made;

(D) Past and concurrent conduct of the violator that has given rise to any sanction or judgment imposed by, or plea or settlement with, the secretary of state or any state securities administrator, any court of competent jurisdiction, the Securities and Exchange Commission, any other federal or state agency or any self-regulatory organization; and

(E) Any other factor the secretary of state finds appropriate in the public interest or for the protection of investors and within the purposes fairly intended by the policy and provisions of the Wyoming Securities Act.

Id. § 17-4-124(f)(i)(A)-(E).

298. *Id.* § 17-4-124(f)(ii).

299. *Id.* § 17-4-124(f)(iii).

300. *Id.* § 17-4-123(a). A copy of the written petition is to be served on the secretary of state, and the secretary shall certify and file in court a copy of the filing and evidence on which the order was entered. *Id.*

301. *Id.*

(3) the party relied on the false representation and suffered damages.³⁰² A party alleging a claim of fraud must state it with particularity, and must establish it by clear, unequivocal, and convincing evidence; fraud is never presumed.³⁰³ One is not liable for fraud if, at the time made, such representations are made in good faith.³⁰⁴ Nor will fraud be imputed to a party when the facts and circumstances from which it arises are equally consistent with honesty and sincere intention.³⁰⁵ However, fraud can be committed by silence in addition to affirmative misrepresentations and "the former is at times the equivalent of the latter."³⁰⁶ The Wyoming Supreme Court has held that any active conduct or words that tend to produce an erroneous impression may amount to fraud, and half the truth may, in effect, be a lie.³⁰⁷ The court further stated that:

If in addition to the party's silence there is any statement, even any word or act on his part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent.³⁰⁸

An expression of an opinion is generally not held to be the representation of a fact in Wyoming.³⁰⁹ In order to be actionable, a false representation must relate to a matter of fact rather than to an opinion.³¹⁰ The distinction between fact and opinion is not always definite and will depend on the circumstances of each case.³¹¹

302. *United States v. Schwab*, 88 F. Supp. 2d 1275, 1277 (D. Wyo. 2000); *Sundown, Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 330 (Wyo. 2000); *Snyder v. Lovercheck*, 992 P.2d 1079, 1084 n.1 (Wyo. 1999); *Marchant v. Cook*, 967 P.2d 551, 554 (Wyo. 1998).

303. *Duffy v. Brown*, 708 P.2d 433, 437 (Wyo. 1985); *Lavoie v. Safecare Health Serv., Inc.*, 840 P.2d 239, 252 (Wyo. 1992). Wyoming recognizes constructive fraud, which consists "of all acts, omissions, and concealments involving breaches of a legal or equitable duty resulting in damage to another, and exists where such conduct, although not actually fraudulent, ought to be so treated when it has the same consequence and legal effects." *In re Borton's Estate*, 393 P.2d 808, 812 (Wyo. 1964).

304. *Walter v. Moore*, 700 P.2d 1219, 1223 (Wyo. 1985).

305. *Johnson v. Soulis*, 542 P.2d 867, 874 (Wyo. 1975).

306. *Steadman v. Topham*, 338 P.2d 820, 827 (Wyo. 1959).

307. *Meeker v. Lanham*, 604 P.2d 556, 558 (Wyo. 1979).

308. *Id.* at 559.

309. *Davis v. Schiess*, 417 P.2d 19, 21 (Wyo. 1966).

310. *Twing v. Schott*, 338 P.2d 839, 843 (Wyo. 1959).

311. *Id.*

b. Materiality

To establish actionable fraud, one of the necessary elements is that a fact that has been represented or concealed is material.³¹² A material fact has been defined in Wyoming "as one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties."³¹³ It is one on which the outcome of the litigation depends.³¹⁴

c. Scierter

Jurisdictions differ regarding whether it is necessary to prove that a representation is knowingly false. In most American jurisdictions and English courts it is settled that scierter must be established.³¹⁵ In Wyoming, scierter in this context means that the person making a representation, at the time it is made, knows that the representation is false.³¹⁶

d. Reliance

In a fraud cause of action it is essential that the buyer show reasonable reliance upon the alleged misrepresentation.³¹⁷ Reliance is reasonable when false representations have occurred prior to the execution of a contract that is sought to be avoided or for which damages are sought to be recovered.³¹⁸ If a party acts solely on his own investigation, there is no reliance.³¹⁹

e. Duty to Disclose; Fraudulent Nondisclosure

Before a fraudulent or negligent nondisclosure can be considered, a buyer must show that the offeror/seller had a duty to disclose information.³²⁰ Whether there is a duty to disclose is a matter of law for a court to decide.³²¹ Such a duty may arise by contract, statute, common

312. *McCamon v. Darnall Realty*, 444 P.2d 623, 625 (Wyo. 1968).

313. *Garner v. Hickman*, 709 P.2d 407, 410 (Wyo. 1985).

314. *Johnson v. Soulis*, 542 P.2d 867, 872 (Wyo. 1975).

315. *Rocky Mountain Helicopters, Inc. v. Air Freight, Inc.*, 773 P.2d 911, 917 (Wyo. 1989) (quoting 37 AM. JUR. 2D *Fraud and Deceit* § 197 (1968)).

316. *Id.*

317. *Reconstruction Fin. Corp. v. First Nat'l Bank of Cody*, 17 F.R.D. 397, 407 (D. Wyo. 1955).

318. *Shutdown Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 331 (Wyo. 2000).

319. *Id.*

320. *Id.*

321. *Hamilton v. Natrona County Education Ass'n*, 901 P.2d 381, 384 (Wyo. 1995) (quoting *Goodrich v. Seamands*, 870 P.2d 1061, 1064 (Wyo. 1994)).

law, or when the parties have a relationship, usually when there is a confidential or fiduciary relationship between the parties.³²² When there is no duty to speak, if a party does speak, he must speak the truth and make full and fair disclosure.³²³

B. Negligence

1. Elements of a Claim

a. Negligent Misrepresentation

This cause of action arises in commercial settings. Negligent misrepresentation is established when:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.³²⁴

The differences between negligent misrepresentation and fraud are the state of mind of the person supplying the information and the standard of proof a plaintiff must meet. Intent to induce reliance, which is an element of fraud, is not an element of negligent misrepresentation. If a party fails to exercise reasonable care in obtaining or conveying information, this could give rise to a claim of negligent misrepresentation, but not fraud.³²⁵ Fraud must be shown by clear and convincing evidence, whereas a negligent misrepresentation can be established by a preponderance of the evidence.³²⁶

b. Negligent Nondisclosure

The Wyoming Supreme Court's first opportunity to determine whether it would allow a negligent nondisclosure cause of action pursu-

322. *Verschoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293, 1299 (Wyo. 1995); *Hamilton*, 901 P.2d at 384.

323. *Meeker v. Lanham*, 604 P.2d 556, 558 (Wyo. 1979) (quoting *Twing v. Schott*, 904 P.2d 798,802 (Wyo. 1995)).

324. *Dewey v. Wentland*, 38 P.3d 402, 410 (Wyo. 2002) (quoting *Richey v. Patrick*, 904 P.2d 798,802 (Wyo. 1995)).

325. *Verschoor*, 907 P.2d at 1299.

326. *Id.*

ant to the Restatement (Second) of Torts section 551³²⁷ was in *Richey v. Patrick*.³²⁸ The Court declined to make that determination, concluding that even if it accepted the Restatement, the party's claim would fail.³²⁹ The Court re-examined the issue in *Givens v. Fowler*,³³⁰ but again declined to make a determination for the same reason it gave in *Richey*.³³¹ In a recent case, *Dewey v. Wentland*, a negligent nondisclosure claim was raised, but the Wyoming Supreme Court declined to consider it be-

327. Under section 551, a claim for negligent nondisclosure results where:

1. One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

a. matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

b. matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

c. subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

d. the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him, and

e. facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

RESTATEMENT (SECOND) OF TORTS § 551 (1977).

328. 904 P.2d 798, 802 (1995). This case involved the use of an "as is" clause in a contract for sale. The issue was whether the clause protected the seller from claims of negligent nondisclosure, which had not been addressed by Wyoming courts. The Supreme Court of Wyoming in its analysis discussed approaches taken by Ohio and Wisconsin courts. In *Kaye v. Buehrle*, 457 N.E.2d 373, 375-76 (Ohio Ct. App. 1983), the Ohio appellate court found that an "as is" clause, in conjunction with a right to inspect clause, placed any risk on the buyer. Relying on RESTATEMENT (SECOND) TORTS, § 551 cmt. j, which states: "[i]f the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure," the Ohio appellate court went on to state that this applies only to negligent nondisclosure and in a case of an actual misrepresentation or fraud, an "as is" clause would not relieve the seller of liability. The Wisconsin court reached the same result. The Wyoming Supreme Court concluded that the Ohio case was persuasive and held that absent an allegation of fraud, an "as is" clause bars a claim for nondisclosure. *Richey*, 904 P.2d at 803.

329. *Richey*, 904 P.2d at 803.

330. 984 P.2d 1092, 1097 (Wyo. 1999).

331. *Id.*

cause no cogent argument had been presented.³³² Although the Court noted in *Richey* that the majority of jurisdictions have either accepted section 551 or cited it with approval, there currently is no cause of action for negligent nondisclosure in Wyoming.³³³

c. Proximate Cause

“Proximate cause is the concept ‘that an accident or injury must be the natural and probable consequence of the act of negligence.’” There are generally two aspects comprising proximate cause: (1) factual causation and (2) legal causation.³³⁴ Factual causation refers to the act and the injury being related, and legal causation refers to foreseeability.³³⁵ The ultimate test for proximate cause is foreseeability of the injury. The specific injury need not be foreseen; it is enough if a reasonably prudent person would foresee that the same general type of injury would be likely.³³⁶ Proximate cause is normally a question of fact unless the evidence is such that reasonable minds could not disagree.³³⁷

2. Defenses for Fraud and Negligence

a. Limitations

The limitations period for bringing a fraud claim in Wyoming is four years.³³⁸ A cause of action does not accrue until the fraud is discovered, and it survives the death of a person accused of fraud.³³⁹ Fraud is discovered at the time fraud was known or could have been discovered with reasonable diligence; it does not require the complaining party to have actual notice of the fraud.³⁴⁰

332. *Dewey*, 38 P.3d at 413.

333. *Sundown Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 332 (Wyo. 2000).

334. *Allmaras v. Mudge*, 820 P.2d 533, 541 (Wyo. 1991).

335. *Id.*

336. *Id.* at 452; *see also* *Buckley v. Bell*, 703 P.2d 1089, 1092 (Wyo. 1985) (quoting *Lemos v. Madden*, 200 P.791 (Wyo. 1921)) (If the conduct is “that cause which in natural and continuous sequence, unbroken by a sufficient intervening cause produces the injury, without which the result would not have occurred,” it is a proximate cause). “Proximate cause is explained as ‘the accident or injury must be the natural and probable consequence of the act of negligence.’” *Turcq v. Shanahan*, 950 P.2d 47, 51 (Wyo. 1997) (ultimate test of proximate cause is foreseeability).

337. *Century Ready Mix Co. v. Campbell County Sch. Dist.*, 816 P.2d 795, 802 (Wyo. 1991) (citing *Stephenson v. Pacific Power & Light Co.*, 779 P.2d 1169, 1178 (Wyo. 1989)).

338. WYO. STAT. ANN. § 1-3-105(a)(iv)(D) (LexisNexis 2001).

339. *Taylor v. Estate of Taylor*, 719 P.2d 234, 237 (Wyo. 1986).

340. *Mason v. Laramie Rivers Co.*, 490 P.2d 1062, 1064 (Wyo. 1971).

The limitations period for negligence claims is also four years.³⁴¹ A cause of action arises and the four-year period begins to run from the date of injury. Because Wyoming is a discovery state, the limitations period is triggered when a party knows or has reason to know that a cause of action exists.³⁴²

b. Plaintiff's Sophistication or Knowledge

Whether a party is sophisticated or knowledgeable generally arises in contract situations. When the parties are sophisticated business people, and they enter into an unambiguous contract, a court will assume they understand the language of the contract.³⁴³ The interpretation of an unambiguous contract is a question of law. When interpreting a contract, a court must determine the intent of the parties, and the inquiry centers on whether the contract is clear and unambiguous, and then intent is determined from the words of the agreement, as expressed in the four corners of the document.³⁴⁴ The Wyoming Supreme Court has stated that, "[c]ommon sense and good faith are leading precepts of contract construction, and the interpretation and construction of contracts is a matter of law for the courts."³⁴⁵

A party is not liable for fraud without knowledge, intentional concealment, or misrepresentation. Accordingly, a party cannot be guilty of fraudulently or intentionally concealing or misrepresenting facts if the party is not aware of the facts. If a sophisticated seller of investments is dealing with a sophisticated buyer, and is unaware of certain facts, this may be a defense. However, the seller may be held to have a higher duty to discern facts so as not to mislead an investor. Whether a duty exists and the scope of such duty are questions of law for a court.³⁴⁶ The Wyoming Supreme Court has indicated that

one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to

341. WYO. STAT. ANN. § 1-3-105(a)(iv)(c) (LexisNexis 2001).

342. *Amoco Prod. Co. v. EM Nominee Partnership Co.*, 2 P.3d 534, 542 (Wyo. 2000).

343. *Williams Gas Processing-Wamsutter Co. v. Union Pac. Resources Co.*, 25 P.3d 1064, 1069 (Wyo. 2001).

344. *Id.* at 1071.

345. *Id.*

346. *Kobos v. Everts*, 768 P.2d 534, 541 (Wyo. 1989).

which the information was to be put and intended to supply it for that purpose.³⁴⁷

c. Intervening Cause

Before a plaintiff can recover damages based on a negligence claim, he must establish that the defendant's act or omission proximately caused the plaintiff's injury and losses. An intervening cause is one that comes into being after a defendant's negligent act has occurred, and if it is not a foreseeable event, it insulates a defendant from liability.³⁴⁸ An event is foreseeable if it is a probable consequence of the defendant's act or is a normal response to the stimulus created by the act or event.³⁴⁹

d. Estoppel

Estoppel is invoked to prevent actual or constructive fraud, and is applied to promote justice.³⁵⁰ Estoppel is an affirmative defense that must be pled.³⁵¹ "Equitable estoppel precludes a party who knows the truth from denying the assertion of any material fact with which he induced another to change his position where such other person is ignorant of the facts, had a right to rely upon the assertions, and suffers an injury."³⁵²

e. Laches

"The defense of laches 'is a form of equitable estoppel based on a[n] unreasonable delay by a party in asserting a right.'"³⁵³ Its applicability depends upon the circumstances of each case, and it too is an affirmative defense that must be pled.³⁵⁴ The burden of proof is on the party asserting it, and the proof offered must be certain in every particu-

347. *Verschoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 97 P.2d 1292, 1300 (Wyo. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977)).

348. *Buckley v. Bell*, 703 P.2d 1089, 1092 (Wyo. 1985); *Kopriva v. Union Pac. R.R.*, 592 P.2d 711, 713 (Wyo. 1979); *Gilliland v. Rhoads*, 539 P.2d 1221, 1231 (Wyo. 1975); *Fagan v. Summers*, 498 P.2d 1227, 1229 n.1 (Wyo. 1982).

349. *Buckley*, 703 P.2d at 1092.

350. *Garlach v. Tuttle*, 705 P.2d 828, 829 (Wyo. 1985).

351. *Sannerud v. Brantz*, 928 P.2d 477, 482 (Wyo. 1996) (Sannerud's failure to timely plead the defense of estoppel was the reason the court did not consider it as a defense.).

352. *Roth v. First Sec. Bank of Rock Springs, Wyo.*, 684 P.2d 93, 96 (Wyo. 1984) (quoting 28 AM. JUR. 2D *Estoppel and Waiver* § 27 (1999)).

353. *Goshen Irr. Dist. v. Wyoming State Bd. of Control*, 926 P.2d 943, 949 (Wyo. 1996) (quoting *Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292, 1297 (Wyo. 1991)).

354. *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1024-25 (Wyo. 1989).

lar with nothing left to inference.³⁵⁵ A party asserting the doctrine in Wyoming must demonstrate that he relied upon a person's actions, changed his position based on the reliance, and this resulted in prejudice or disadvantage to him.³⁵⁶ "Unless the delay has worked injury, prejudice, or disadvantage to the defendants or others adversely interested, it is not of itself laches."³⁵⁷ Further,

[t]he length of time during which the party neglects the assertion of his rights which must pass in order to show laches varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.³⁵⁸

The passage of time will not, itself, support application of the doctrine; the delay must have resulted in prejudice to the party asserting the defense.³⁵⁹

f. Ratification

The Wyoming Supreme Court defines ratification as "[t]he subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him, while purporting to act as his agent. . . ."³⁶⁰ The party alleging ratification bears the burden of proof.³⁶¹ Included in this burden is the need to demonstrate that a principal had full and complete knowledge of the material facts of the transaction, and that the principal intended to ratify an agent's acts.³⁶² Three parties are involved in agency situations: The principal, the agent, and a third party. An agent is in a fiduciary position with the principal and acts on the principal's behalf.³⁶³ Courts in Wyoming tend to protect the interests of third parties if the party can demonstrate that the

355. *Murphy v. Stevens*, 645 P.2d 82, 91 (Wyo. 1982).

356. *Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000).

357. *Murphy*, 645 P.2d at 91 (quoting *Hartnett v. Jones*, 629 P.2d 1357, 1364 (Wyo. 1981)).

358. *Anderson v. Wyoming Dev. Co.*, 154 P.2d 318, 346 (Wyo. 1944) (quoting *Halstead v. Grinnan*, 152 U.S. 412 (1894)).

359. *Beadle v. Daniels*, 362 P.2d 128, 131 (Wyo. 1961).

360. *Farmers' State Bank of Riverton v. Haun*, 222 P. 45, 51 (Wyo. 1924).

361. *Kover v. Hufsmith*, 496 P.2d 908, 910 (Wyo. 1972).

362. *Colorado Nat'l Bank v. Miles*, 711 P.2d 390, 394 (Wyo. 1985).

363. *Martinez v. Assocs. Fin. Serv.*, 891 P.2d 785, 789 (Wyo. 1995).

principal had the intent of ratifying an agent's act.³⁶⁴ Ratification of a previously unauthorized act occurs when there is silence, acquiescence, or a failure to repudiate, and also results from taking and retaining benefits from the act.³⁶⁵ Ratification also occurs as a result of a party's actions under the circumstances of a case.³⁶⁶

g. *Unclean Hands/In Pari Delicto*

"Unclean hands" is an equitable doctrine. One of the basic tenets of equity is that a party claiming an equitable remedy does so with clean hands.³⁶⁷ "He who comes into equity must come with clean hands."³⁶⁸ Unclean hands may be invoked only to prevent affirmative equitable relief, not for a remedy at law (damages).³⁶⁹ A trial court's decisions on equity issues are factual determinations, and the Wyoming Supreme Court will not disturb a judge's findings of facts unless they are clearly erroneous.³⁷⁰ However, courts generally do not favor the doctrine of unclean hands.³⁷¹ "Relief may be given to a less than angelic plaintiff while at the same time fashioning a recovery which accounts for the asserted wrong."³⁷²

In pari delicto, parties being equally at fault, is also recognized in Wyoming, generally when parties are acting as joint tortfeasors and there is a question of indemnity. "When two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable . . ."³⁷³ If two parties are joint tortfeasors or are *in pari delicto*, where each party contributes to cause an injury, no right of indemnity exists in either party.³⁷⁴

364. *Wells v. Bd. of Trustees of Laramie City Sch. Dist. No. 1*, 3 P.3d 861, 865-66 (Wyo. 2000).

365. *Id.*

366. *Adams v. KVWO, Inc.*, 570 P.2d 458, 462 (Wyo. 1977).

367. *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 959 (Wyo. 1999).

368. *Dutch Maid Bakeries, Inc. v. Schleicher*, 131 P.2d 630, 634 (Wyo. 1942); *Harsha v. Anastos*, 693 P.2d 760, 762 (Wyo.1985); *Lewis v. State Bd. of Control*, 699 P.2d 822, 827 (Wyo. 1985).

369. *Fremont Homes*, 974 P.2d at 959.

370. *Roussalis v. Apollo Elec. Co.*, 979 P.2d 493, 496 (Wyo. 1999).

371. *Id.*

372. *Id.*

373. *Schneider Nat'l Inc. v. Holland Hitch Co.*, 843 P.2d 561, 574 (Wyo. 1992) (quoting *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 154 (Mass. 1873)).

374. *Convoy Co. & Truck Ins. Exch. v. Dana*, 359 P.2d 885, 887 (Wyo. 1961).

h. Waiver

Waiver is the intentional relinquishment of a known right that must be manifested in an unequivocal manner.³⁷⁵ The elements of waiver include: (1) an existing right; (2) knowledge of the right; and (3) intent to relinquish the right.³⁷⁶ Passage of time does not constitute waiver, and it cannot be implied from conduct that may or may not have shown intent.³⁷⁷ Waiver is an affirmative defense that must be pled, and the party asserting it has the burden of proof.³⁷⁸ The primary difference between waiver and laches is that laches requires a showing of prejudice; waiver does not.³⁷⁹

i. Disclaimer

Disclaimers in a contract will insulate the disclaiming party from liability in Wyoming. In a case of first impression, the issue being whether in a contract for sale an "as is" clause protected the seller from claims of negligent nondisclosure, the Wyoming Supreme Court held that it did.³⁸⁰ Even though Wyoming has not recognized a cause of action for negligent nondisclosure, the court stated that assuming Wyoming would adopt such a cause of action, an as is clause in contract, coupled with the right to inspect clause, protected vendors from claims of negligent nondisclosure.³⁸¹ This applies only to negligent nondisclosure.³⁸² If actual misrepresentation or fraud is present, an "as is" clause will not relieve the seller of liability.³⁸³

3. Common Law Remedies

a. Rescission

The general rule recognized in Wyoming is that an injured party may rescind a contract where there has been a material breach.³⁸⁴ When a

375. *Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292, 1297 (Wyo. 1991); *Ranger Ins. Co. v. Cates*, 501 P.2d 1255, 1259 (Wyo. 1972).

376. *Jackson Bank v. Homar*, 837 P.2d 1081, 1086 (Wyo. 1992); *Ramirez v. Metropolitan Life Ins. Co.*, 580 P.2d 1136, 1138 (Wyo. 1978).

377. *Murphy v. Stevens*, 645 P.2d 82, 93 (Wyo. 1982).

378. *Id.*

379. *Id.*

380. *Richey v. Patrick*, 904 P.2d 798, 803 (1995) ("absent an allegation of fraud, an 'as is' clause bars a claim for negligent nondisclosure").

381. *Id.* at 798.

382. *Id.* at 803.

383. *Id.*

384. *Cady v. Slingerland*, 514 P.2d 1147, 1150 (Wyo. 1973).

contract is rescinded it is nullified and the parties are restored to the status quo, placing them in the positions they would have been in but for the contract.³⁸⁵ Rescission developed in England as an equitable remedy that was granted to a party that had been fraudulently induced to enter into a contract.³⁸⁶ The equitable conception of fraud was never defined clearly, but like most equitable doctrines, its invocation was predicated on notions of fair play and good faith. Wyoming, over time, has attempted to articulate distinct rules governing the employment of rescission as a remedy for fraudulently inducing the execution of a contract. A claimant must demonstrate that: (1) false representations of material fact were made, (2) the party relied on the representations, and (3) such reliance was to his detriment. The claimant bears the burden of proof.³⁸⁷

b. Actual Damages

In contract cases, recovery is generally limited to actual damages for breach of contract to make a party whole.³⁸⁸ "As a general rule, damages for breach of contract are limited to the pecuniary loss sustained."³⁸⁹ When fraud is involved after a contract between the parties has been entered into, the proper remedy is breach of contract.³⁹⁰ The damages recoverable for a negligent misrepresentation are those that will compensate the plaintiff for his actual pecuniary loss of which the misrepresentation is the legal cause.³⁹¹

c. Exemplary Damages

In order to justify exemplary or punitive damages, an act must have been committed with evil intent and purpose to injure, or the act must be done with fraud, malice, or through gross negligence.³⁹² Exemplary damages cannot be recovered where there are no actual damages, if the act complained of is punishable as a crime, or when one acts in good faith under a reasonable, though mistaken, belief that he has a right to act.³⁹³ Exemplary damages are not ordinarily recoverable in actions for breach of contract. However, if fraud occurs because of false representations or conduct taking place prior to the execution of a contract, exem-

385. Hagar v. Mobley, 638 P.2d 127, 132 (Wyo. 1981).

386. *Id.*

387. *Id.*

388. Waters v. Trenckmann, 503 P.2d 1187, 1189 (Wyo. 1973).

389. *Id.* at 1188-89.

390. *Id.* at 1189-90.

391. Verschoor v. Mountain West Farm Bureau Mut. Ins. Co., 907 P.2d 1293, 1301 (Wyo. 1995) (citing RESTATEMENT (SECOND) TORTS § 552B(1) (1977)).

392. Cosgriff Bros. v. Miller, 68 P. 206, 213 (Wyo. 1902).

393. *Id.*

plary damages may be considered if the conduct of a party amounted to aggravation, outrage, malice, or willful and wanton misconduct.³⁹⁴ Exemplary damages should not be awarded except in extreme cases, where the malicious intention to willfully injure is clearly shown and proven to the satisfaction of a jury by a preponderance of the evidence.³⁹⁵

d. Attorneys' Fees and Costs

The well-settled rule in Wyoming is that attorneys' fees are not recoverable in the absence of specific statutory or contractual authority.³⁹⁶ An exception to this rule, articulated in section 914 of the Restatement (Second) Torts, occurs when a plaintiff is required to protect his interest by bringing an action as the result of another's wrongdoing. Wyoming has adopted section 914, which states:

(1) The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.

(2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.³⁹⁷

e. Prejudgment Interest

Wyoming statutes provide for interest on judgments but do not specifically address awards of prejudgment interest.³⁹⁸ However, prejudgment interest has been recognized as appropriate in certain cases dealing with rescission of contracts.³⁹⁹ The Wyoming Supreme Court has approved awarding prejudgment interest on liquidated sums in breach of contract actions where the amount due is easily determined by simple mathematical calculation.⁴⁰⁰ Interest is usually computed from the time

394. *Waters*, 503 P.2d at 1189-90.

395. *Cosgriff Brothers*, 68 P. at 213.

396. *Snyder v. Lovercheck*, 992 P.2d 1079, 1091 (Wyo. 1999).

397. RESTATEMENT (SECOND) OF TORTS § 914 (1977).

398. WYO. STAT. ANN. § 1-16-102 (LexisNexis 2001); *Millheiser v. Wallace*, 21 P.3d 752, 755 (Wyo. 2001).

399. *See Racicky v. Simon*, 831 P.2d 241, 244 (Wyo. 1992).

400. *United Pac. Ins. Co. v. Martin & Luther Gen. Contractors Inc.*, 455 P.2d 664, 677 (Wyo. 1969); *Laramie Rivers Co. v. Pioneer Canal Co.*, 565 P.2d 1241, 1245 (Wyo. 1977).

notice is given of the claim.⁴⁰¹ The equitable remedy of restitution is generally employed when a contract is rescinded in an attempt to return the parties to the status quo.⁴⁰² Prejudgment interest is one element a court is to consider in determining appropriate restitution.⁴⁰³

Wyoming has also allowed awards of prejudgment interest when there has been a finding of unjust enrichment.⁴⁰⁴ The Wyoming Supreme Court articulated a two-part test in determining whether prejudgment interest is recoverable under the unjust enrichment doctrine. First, "interest is recoverable on liquidated but not on unliquidated claims and that a claim is considered liquidated when it is readily computable by simple mathematical computations." Second, the "debtor must receive notice of the amount due before interest starts to run."⁴⁰⁵

f. Equitable Remedies

i. Restitution

If a party avoids a contract because of lack of capacity, mistake, misrepresentation, duress, undue influence, or abuse of a fiduciary relationship, he is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.⁴⁰⁶ "In an action of restitution in which the benefit received was money, the measure of recovery for this benefit is the amount of money received."⁴⁰⁷

ii. Unjust Enrichment

Four elements must be proved by one seeking damages on a claim of unjust enrichment:

- (1) Valuable services were rendered, or materials furnished;
- (2) to the party to be charged;
- (3) which services or materials were accepted, used and enjoyed by the party, and
- (4) under such circumstances which reasonably notified the party to be charged that the plaintiff, in

401. *Risler & McMurry Co. v. Atlantic Richfield Co.*, 559 P.2d 25, 34 (Wyo. 1977).

402. *Millheiser*, 21 P.3d at 756.

403. *Id.*

404. *Bowles & Co. v. Sunrise Home Ctr. Inc.*, 847 P.2d 1002, 1004 (Wyo. 1993).

405. *Id.* at 1005-06 (quoting *State v. BHP Petroleum Co.*, 804 P.2d 671, 673 (Wyo. 1991)).

406. *Millheiser*, 21 P.3d at 756; RESTATEMENT (SECOND) OF TORTS § 376 (1981).

407. RESTATEMENT (SECOND) OF TORTS § 150; *Millheiser*, 21 P.3d at 756.

rendering such services or furnishing such materials, expected to be paid by the party to be charged. Without such payment, the party would be unjustly enriched.⁴⁰⁸

Wyoming will not recognize an action for unjust enrichment if it would, directly or indirectly, frustrate law or public policy.⁴⁰⁹

VIII. COMMON LAW CLAIMS: SECONDARY LIABILITY

A. Agent Liability

Traditional agency principles apply in Wyoming to hold firms liable for the illegal acts of their broker-dealers and agents in the sale of securities. A legal entity such as a broker-dealer, when acting through its agents and within the scope of their authority, is acting for the organization.⁴¹⁰ Under the doctrines of *respondeat superior* or apparent authority, an organization is liable for the tortious conduct of its officers, agents, or employees performing duties within their actual or apparent scope of employment. The determination of the scope of employment or the standard under which it is determined is a question of law.⁴¹¹

The Wyoming Supreme Court has held that the application of the apparent agency rule is appropriate in a negligence action.⁴¹² In *Sharsmith v. Hill*, the Court approved section 267 of the *Restatement (Second) of Agency*, which states:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.⁴¹³

When a principal holds out an agent as possessing the authority to bind him, or when the principal allows the agent to claim such authority, apparent authority is created.⁴¹⁴ "To bind the principal under a theory

408. *Bowles*, 847 P.2d at 1004.

409. *R.O. Corp. v. John H. Bell Iron Mountain Ranch Co.*, 781 P.2d 910, 913 (Wyo. 1989).

410. *Hamilton v. Natrona County Educ. Ass'n*, 901 P.2d 381, 386 (Wyo. 1995).

411. *Hamilton*, 901 P.2d at 1004.

412. *Sharsmith v. Hill*, 764 P.2d 667, 672 (Wyo. 1988).

413. *RESTATEMENT (SECOND) OF AGENCY* § 267 (1958); *Sharsmith*, 764 P.2d at 672.

414. *Cargill, Inc. v. Mountain Cement Co.*, 891 P.2d 57, 62 (Wyo. 1995).

of apparent authority, a third party must establish personal knowledge of, and reliance on, the apparent authority of the agent."⁴¹⁵ To recover on an apparent agency theory, a third party must establish two facts: (1) The principal must be responsible for the appearance of authority in the agent to conduct the transaction in question, and (2) the third party reasonably relied on the agent's representations.⁴¹⁶

B. *Principal Liability/Respondeat Superior*

The doctrine of *respondeat superior* holds an employer liable for a tort committed by an employee if the employee is acting within the scope of his employment.⁴¹⁷ An employee is acting within the scope of his employment if, at the time the negligent act occurs, (1) the employee was engaged in part by a purpose to serve the employer; (2) the act was done with the intent to perform it as a part of or incident to a service on account of which the employee is employed; and (3) the act was performed to further the business interests of the employer in some way.⁴¹⁸ "An employee 'will be held to be within the scope of his employment when the employee is engaged in an activity which has a multiple purpose, and it is sufficient that one of the purposes is employment-related.'"⁴¹⁹ Under *respondeat superior*, an employer will be liable for the negligence of an employee if the negligence proximately caused an injury.⁴²⁰

C. *Conspiracy*

Under Wyoming law, a civil conspiracy can be demonstrated by direct or circumstantial evidence of an agreement or understanding between or amongst the parties to the conspiracy.⁴²¹ There must be evidence of "concerted action" for a court to find that a civil conspiracy exists.⁴²² When a civil conspiracy has been shown, a plaintiff is allowed to recover all proximately caused damages against the conspirators.⁴²³

415. *Id.*

416. *Id.*

417. *Ecklund v. PRI Envtl., Inc.*, 25 P.3d 511, 515 (Wyo. 2001); *Hamilton v. Natrona County Educ. Ass'n*, 901 P.2d 381, 385 (Wyo. 1995); *Miller v. Reiman-Wuerth Co.*, 598 P.2d 20, 20-23 (Wyo. 1979); *Combined Ins. Co. of Am. v. Sinclair*, 584 P.2d 1034, 1041 (Wyo. 1978).

418. *Ecklund*, 25 P.3d at 515.

419. *Id.* (quoting *Combined Insurance*, 584 P.2d at 1041).

420. *Id.* This can be inferred from *Stephenson v. Pacific Power & Light Co.*, 779 P.2d 1169, 1178-79 (Wyo. 1989).

421. *Jurkovich v. Estate of Tomlinson*, 843 P.2d 1166, 1172 (Wyo. 1992); *see also* 16 AM.JUR. 2D *Conspiracy* § 68 (1998).

422. *Kaiser v. Farnsworth Drilling Co.*, 851 P.2d 1292, 1295 (Wyo. 1993).

423. *Barnhart Drilling Co. v. Petroleum Fin. Inc.*, 807 P.2d 411, 415 (Wyo. 1991).

IX. CONCLUSION

It is important for Wyoming practitioners to understand that the word "security" applies to more than just publicly traded stocks on national exchanges. Investments in business enterprises such as limited liability partnerships or limited liability companies may constitute securities in Wyoming. The Wyoming Supreme Court has found that "inter vivos trusts" were securities because the investors expected profits to come solely from the efforts of a promoter or third party, and that a fractional working interest in oil and gas leases could constitute securities, subject to the circumstances of individual sale transactions.⁴²⁴

Practitioners need to look at the economic reality and substance of a transaction rather than simply its form when determining whether a security is present, and thus whether it may need registration. Practitioners must also keep in mind that there may be attendant broker-dealer registration requirements or disclosure obligations depending on the type of security involved. It is also important to remember that ignorance of the securities laws is not a defense.

Wyoming securities laws have as their primary purpose the suppression of fraudulent practices in order to protect the investing public. Increased familiarity with the Wyoming Securities Act will allow practitioners to more easily identify potential security law claims. For clients aggrieved by improprieties in security dealings, practitioners may find Wyoming law preferable to federal securities law because it has become increasingly more difficult to bring actions under the federal securities statutes. The Wyoming Uniform Securities Act, Wyoming common law, and other statutory provisions can provide adequate relief for investors in this state who have been defrauded in the purchase or sale of securities. While state and federal securities laws may, at first glance, appear to be a complex and confusing maze of rules and regulations, with a methodical approach, they need not be a labyrinth from which there is no return.

424. *Gaudina v. Haberman*, 644 P.2d 159, 166 (Wyo. 1982); *Shepperd v. Boettcher & Co.*, 756 P.2d 182, 183-184 (Wyo 1988) (answer to certified question).