

INDIANA SECRETARY OF STATE  
SECURITIES DIVISION

FILED  
SECURITIES DIVISION

SEP 17 2010

IN THE MATTER OF: )  
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ADOPTION OF OFFICIAL )  
COMMENTS UNDER THE ) 10-0294 AO  
INDIANA UNIFORM SECURITIES ACT )  
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INDIANA  
SECRETARY OF STATE

**ADMINISTRATIVE ORDER**

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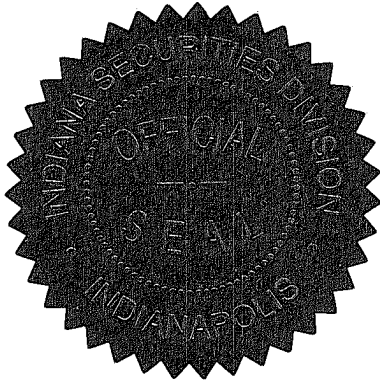
The Indiana Secretary of State and the Securities Commissioner have determined that it is appropriate and in the public interest to issue an Administrative Order regarding the Adoption of Official Comments under the Indiana Uniform Securities Act pursuant to Ind. Code § 23-19-1-5(1).

Chapter 1, section 5 of the Indiana Uniform Securities Act (“Act”) provides that comments published by the Secretary of State Indiana Uniform Securities Act Advisory Committee (“Committee”) may be consulted by the courts to determine the underlying reasons, purposes, and policies of the Act and may be used as a guide to the Act’s construction and application.

The Committee was formed by the Secretary of State in 2006 to create a draft of the Indiana Uniform Securities Act (“Act”) to present to the legislature. Committee members represented all aspects of the securities bar, including plaintiff’s counsel, defense, corporate finance, and academia. The Act passed through the Indiana General Assembly without a single dissenting vote, which can be attributed to the efforts and expertise of the Committee. Throughout the drafting process, the Committee assembled a series of Comments (attached to this Administrative Order) as guidance in interpreting and understanding the Act. The Comments are intended to have persuasive authority to help the reader understand the intent of those who created the draft. The Comments drafted by the Committee are separate from the Official Comments drafted by the National Conference of Commissioners on Uniform State Law (“NCCUSL”), which are also incorporated as a reference by Ind. Code § 23-19-1-5(2), and the statute makes it clear that the Official Comments adopted by the Committee are to take priority over the NCCUSL Comments.

IT IS THEREFORE ORDERED that the attached Official Comments have been adopted by the Indiana Uniform Securities Act Advisory Committee for the purposes of Ind. Code § 23-19-1-5(1).

DATED at Indianapolis, Indiana, this 17<sup>TH</sup> day of SEPTEMBER, 2010.



TODD ROKITA  
SECRETARY OF STATE

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a vertical line and a small hook at the top.

CHRIS NAYLOR  
SECURITIES COMMISSIONER

# OFFICIAL COMMENTS TO INDIANA UNIFORM SECURITIES ACT

## GENERAL PROVISIONS

### Official Comments

#### Protocol

1. These comments to the Indiana Uniform Securities Act are adopted pursuant to IC 23-19-1-5.
2. Throughout this article, the term “Uniform Securities Act” (“USA”) means the Uniform Securities Act as drafted and approved by the National Conference of Commissioners on Uniform State Laws at its Annual Conference Meeting July 26 – August 2, 2002.
3. The term “Indiana Uniform Securities Act” (“IUSA”) refers to this article, which contains the Indiana version of the Uniform Securities Act.
4. The term “article” is substituted for the term “act” as used in the USA.
5. Throughout these comments, the term “Securities Division” means the Securities Division of the Office of the Indiana Secretary of State.
6. Throughout these comments, the term “Commissioner” refers to the Securities Commissioner appointed by the Indiana Secretary of State.
7. Throughout these comments, the term “Predecessor Act” refers to the Indiana Securities Act (IC 23-2-1) as in effect on June 30, 2008.
8. The official comments to the USA as drafted by the National Conference of Commissioners on Uniform State Laws may be consulted except where the IUSA differs from the USA or as otherwise noted in these comments.
9. The comments address certain significant differences between the USA and the IUSA, or between the IUSA and the Predecessor Act and give the reasons therefor.
10. These comments are designated as the Official Comments to the Indiana Uniform Securities Act and may be consulted by the courts to determine the underlying reasons, purposes, and policies of this article and may be used as a guide in its construction and application.
11. Unless otherwise noted, the included sections in the IUSA are substantially similar to the USA.
12. Focus in drafting the IUSA was on uniformity where uniformity was of importance. Consequently, the sections of the IUSA concerning exemptions and registrations follow the

USA. Where uniformity was not important, the focus was on preserving the investor protections, which had been in place. Consequently, the sections of the IUSA concerning remedies and administration follow the Predecessor Act.

13. Unless otherwise stated, previous legal interpretations under the Predecessor Act remain in effect.

#### **IC 23-19-1-1**

1. The short title for the IUSA was included for convenience of reference. The Predecessor Act had no “short title.”
2. The reference to 2002, the year that the Uniform Securities Act was drafted, has been removed from IC 23-19-1-1 of this article.

#### **IC 23-19-1-2**

1. The following definitions from the Predecessor Act are not included in the IUSA because the terms are not used in the IUSA:
  - a. “Accredited investor”
  - b. “Affiliated”
  - c. “Transferable share”
  - d. “Qualified transfer agent”
  - e. “Viatical settlement contract” The IUSA does not contain a definition of “viatical settlement contract” but includes these contracts under the definition of securities as an “investment contract.” This has always been the law in Indiana. *See Poyser v. Flora* 780 N.E.2d 1191 (Ind. Ct. App. 2003).
2. IC 23-19-1-2(10) replaces the USA definition of “fraud” (and affiliated terms) with the definition of that term as contained in the Predecessor Act. This change was made for the sake of clarity and continuity, in that this definition has been the subject of a number of judicial decisions which will continue to be available as precedent.
3. IC 23-19-1-2(28)(E) states that an interest in a limited partnership or an interest in a limited liability company is included within the definition of a “security” as an investment contract. The Predecessor Act, in IC 23-2-1-1(k)(3), provided that an interest in a limited liability company or limited liability partnership is not a “security” if the person claiming that the interest is not a security can prove that all of the members of the limited liability company or limited liability partnership are actively engaged in the management of the limited liability company or limited liability partnership. Essentially, under the Predecessor Act, the test created in *SEC v. Howey* 328 U.S. 293 (1946) (followed in Indiana *Poyser v. Flora* 780

N.E.2d 1191) was applied to determine whether these interests are investment contracts. In applying IC 23-19-1-2(28)(E), with respect to determining whether an interest in a limited liability company or an interest in a limited liability partnership is a “security”, it is not the intention of the drafters to change the application of the *Howey* analysis, but for the sake of uniformity, the language from the USA was preserved.

### **IC 23-19-1-3**

1. IC 23-19-1-3 incorporates and expands the federal laws referenced in IC 23-2-1-1(j) of the Predecessor Act to include additional federal legislation enacted since the last update of the Predecessor Act.

### **IC 23-19-1-4**

1. IC 23-19-1-4 was added to this article to incorporate references to state law under IC 23-2-1-21 of the Predecessor Act, and it may be used for future references to any other Indiana statutes.

### **IC 23-19-2-1**

1. Subsection 201(7) of the USA concerning securities issued by non-profit organizations has been removed because of Indiana’s long-standing practice and strong policy preference to require securities of non-profit organizations, which consist primarily of church bonds and church extension funds, be registered by qualification. These types of offerings have, unfortunately, been the subject of abuse. See *SEC v. Church Extension of the Church of God, Inc.*, 2005 U.S. Dist. LEXIS 34510 (S.D. Indiana 2005) (A jury found securities fraud in the offering of securities purportedly to finance the construction and expansion of local churches where the issuer concealed its insolvency and ultimately defaulted on more than \$80 million owed to public note holders). While the USA language provides three options for review of these securities, one of which was the option of registering these securities by qualification, the committee viewed the easiest approach to accomplishing the goal of registration of these securities would be to remove the exemption entirely.
2. The exemption concerning promissory notes, drafts, bills of exchange, or banker’s acceptance evidencing an obligation to pay cash within nine (9) months of issuance and in denominations of at least fifty thousand dollars (\$50,000) under IC 23-2-1-2(a)(6) of the Predecessor Act has not been included in the IUSA since these securities under some circumstances are federal covered securities under Section 18(b)(4)(C) of the Securities Act of 1933 in which event their offer and sale would not require registration per IC 23-19-3-1.
3. The exemption concerning employee stock purchase, savings, pension, or similar benefit plans under IC 23-2-1-2(a)(7) of the Predecessor Act has been moved to IC 23-19-2-2(21)

concerning Exempt Transactions where it better fits in as much as it is the nature of the transaction in which they are sold and not by the nature of the security itself, which causes them to be exempt.

4. The exemption concerning industrial development bonds under IC 23-2-1-2(a)(9) of the Predecessor Act has been removed since the Internal Revenue Code has been changed to remove the referenced section therefore rendering the exemption obsolete.
5. The exemption concerning the secondary market for guaranteed student loans under IC 23-2-1-2(a)(10) of the Predecessor Act has been updated and included in IC 23-19-2-1(9) of the IUSA. All references are to the most recent version of the Internal Revenue Code.
6. The exemption concerning qualified bonds under IC 23-2-1-2(a)(12) of the Predecessor Act has been removed due to limited applicability. It was not included in the USA.

#### **IC 23-19-2-2**

1. The “manual exemption” under IC 23-2-1-2(b)(3) of the Predecessor Act has been updated to follow the format of the USA in IC 23-19-2-2(2). The requirement for a qualified transfer agent has been removed as there are so few entities that provide a service as a qualified transfer agent, and therefore using a qualified transfer agent would be cost prohibitive to some issuers. The USA and IUSA also remove the option, formerly under IC 23-2-1-2(b)(3)(C)(iii), of filing the required information with the Securities Division. This change has negligible impact due to the small amount of filings that the Securities Division has historically received.
2. The IUSA adds an exemption under IC 23-19-2-2(5), for nonissuer transactions in securities that have been given one of the four highest ratings by a national rating organization and provide a fixed interest rate or fixed dividend.
3. The IUSA adds an exemption under IC 23-19-2-2(8), which exempts transactions by federal covered investment advisers. Federal covered investment advisers were created by the National Securities Markets Improvement Act of 1996 and are regulated exclusively at the federal level by the Securities and Exchange Commission.
4. The IUSA adds IC 23-19-2-2(9) to cover exchanges of securities that may not meet the requirements for the merger exemption or the judicially approved share exchange. The Commissioner may, after a fairness hearing, allow an exemption for the transaction.
5. IC 23-19-2-2(14) contains the private offering exemption, which replaces IC 23-2-1-2(b)(10) of the Predecessor Act. The new private offering exemption essentially retains the self-executing portion of IC 23-2-1-2(b)(10)(G) of the Predecessor Act, although the requirements have been simplified. The new private offering exemption requires that there be no more than twenty-five (25) purchasers in the state, no general solicitation or advertising, and no commission paid to an unregistered broker-dealer or agent. The previous requirements were based solely on number or character of investors or offering price. The

provisions of IC 23-2-1-2(b)(10) that were not self-executing have been removed, as redundant with Regulation D (17 CFR 230.501 *et seq.*) and the corresponding IULOE provisions in the Indiana Administrative Code at 710 IAC 1-13-6.

#### **IC 23-19-3-2**

1. IC 23-19-3-2 provides an effective period of one (1) year for closed-end mutual funds and unit investment trusts, which is a change from the current two (2) year effective period. Given the almost universal nature of a one (1) year effective period, Indiana's two (2) year period actually caused more confusion than it was worth.
2. All annual report requirements for open-end mutual funds and filings of Form D for Rule 506 offerings are the same as under the Predecessor Act.

#### **IC 23-19-3-3**

1. IC 23-19-3-3(c)(2) sets the time limit for review before a registration becomes automatically effective. The section provides that after a registration has been on file with the Securities Division for twenty (20) days it will become automatically effective, provided the SEC has granted effectiveness. This is a change from the Predecessor Act, which required that a registration be on file for only ten (10) days. However, the section also provides that the Commissioner may shorten the time for automatic effectiveness by rule or order.

#### **IC 23-19-3-4**

1. The IUSA no longer requires the condensed financial statements for registration by qualification, required by the Predecessor Act under IC 23-2-1-5(b)(1)(L). Previously a security registered by qualification was required to include condensed versions of the balance sheet, interim balance sheet, and statements of income and changes in financial position in the prospectus and the full versions in the documents sent to the Securities Division. Under the IUSA, the full versions must be included in the registration statement, and the requirement for the condensed version is removed.
2. IC 23-19-3-4(d) of the IUSA allows the Commissioner to delay effectiveness for a registration by qualification for ninety (90) days if the application is not complete in a material respect and an additional thirty (30) days if the Commissioner finds it appropriate so long as prompt notice is given to the issuer.
3. IC 23-2-1-5.5 of the Predecessor Act, which provided for the Small Corporate Offerings Registration Form, has been removed. The Commissioner may permit small corporate offering registrations through the Form U-7 by rule or regulation. The provision has not been frequently used by issuers.

### **IC 23-19-3-5**

1. Similar to IC 23-2-1-6(k) of the Predecessor Act, IC 23-19-3-5(f) of the IUSA allows the Commissioner by rule to require escrow or impoundment of proceeds if a minimum offering amount is not met. The Commissioner may also establish the conditions for the escrow or impoundment and determine how they are to be released.
2. Under IC 23-19-3-5(g), the Commissioner may require that a specific form of subscription agreement be used and that the agreement be filed or kept by the issuer for a set period of time not to exceed five (5) years. The Predecessor Act did not have a similar provision.
3. The effective period for a registration under IC 23-19-3-5(h), either by coordination or qualification, has been reduced from two (2) years to one (1) year. Since the IUSA does not provide for a renewal process for securities registrations, any continuous offering, such as a real estate investment trust or equipment program, must be reregistered every year. The one-year effective period is in line with the majority of states, and the two (2) year effective period caused confusion for issuers registering in Indiana. IC 23-19-3-5(d) states that records filed within the previous five (5) years can be incorporated by reference.
4. Under the Predecessor Act, the fee for all posteffective amendments that required an order of the Commissioner was twenty-five dollars (\$25). Under IC 23-19-3-5(j), only posteffective amendments that change the amount of securities sold require a filing charge, and all other posteffective amendments do not carry a filing fee. The fee for posteffective amendments is the greater of one hundred dollars (\$100) or the difference between the amount of the registration fee paid and the amount that would have been paid had all securities to be offered been registered originally.

### **IC 23-19-3-6**

1. The IUSA is not adopting the review standard of “fair, just, and equitable” contained in the USA Section 306(a)(7)(C). The IUSA maintains the same review standard as under the Predecessor Act of “will work or tend to work a fraud upon purchasers, or would so operate.”
2. IC 23-19-3-6(d) allows the Commissioner to summarily revoke, suspend, or deny the effectiveness of a registration statement. The Predecessor Act allowed the Commissioner to summarily suspend or postpone effectiveness. The same notification standards apply to a summary revocation, suspension, or denial as applied to a summary suspension under the Predecessor Act.



### **IC 23-19-4-1**

1. IC 23-19-4-1 addresses the registration of broker-dealers only. In contrast, the Predecessor Act under IC 23-2-1-8 contained the registration provisions for broker-dealers, agents, and investment advisers.
2. IC 23-19-4-1(b) contains exemptions from registration for broker-dealers. The Predecessor Act did not contain any exemptions but instead excluded certain entities from the definition of broker-dealer. The difference is significant in that those exempt from the registration provisions of the article remain subject to the anti-fraud sections.
3. The Predecessor Act had no provision to allow for a broker-dealer to transact business with a pre-existing client, who was temporarily in the state without registering, while the IUSA does provide an exemption.
4. IC 23-19-4-1(c) has no counterpart in the Predecessor Act. It prohibits a broker-dealer or issuer (although they may petition for a waiver) from registering as an agent any individual who is currently barred from registration, or who has had his or her registration suspended or revoked, by another regulatory body.
5. IC 23-19-4-1(d) provides a safe harbor for foreign broker-dealers and their agents who perform transactions in Indiana under certain limited conditions. Previously this situation was addressed only by Administrative Order.

### **IC 23-19-4-2**

1. IC 23-19-4-2 sets forth the requirements for agent registration, as well as exemptions from registration. Similar to IC 23-19-4-1, the Predecessor Act utilized exclusions while the IUSA utilizes exemptions.
2. The exemption provisions of IC 23-19-4-2(b) seek to clarify the transactions in which an individual would not need to register as an agent. These would include the offer or sale of certain exempt securities, or representing an exempt broker.
3. IC 23-19-4-2(c) retains the meaning of IC 23-2-1-9(b) of the Predecessor Act, which describes registration effective and termination dates for agents. An agent's registration is terminated on December 31 of each year and when he or she is no longer associated with a broker-dealer or issuer.
4. IC 23-19-4-2(e) has no equivalent provision in the Predecessor Act. The Indiana Administrative Code under 710 IAC 1-15-1 allowed dual registration only where both broker-dealers (or issuers) agreed to the dual registration in writing. The IUSA prohibits all dual registration except where the broker-dealers (or issuers) are affiliated or the Commissioner allows it by rule or order.

### **IC 23-19-4-3**

1. IC 23-19-4-3(b) provides a de minimis exemption for investment advisers without a place of business in Indiana and not more than five (5) Indiana-resident clients in the previous twelve (12) months. In determining the five (5) clients, federal covered investment advisers, Indiana registered investment advisers, Indiana registered broker-dealers, and institutional investors are not included. This exemption differs from the Predecessor at IC 23-2-1-8(c)(3), which contained an exemption for investment advisers with fewer than six (6) clients in Indiana. Under the Predecessor Act, the exemption was available to investment advisers with a place of business in Indiana.

### **IC 23-19-4-4**

1. IC 23-19-4-4(d) gives the Commissioner power to adopt a rule or order that would prohibit investment adviser representatives from being registered with more than one investment adviser at a time. Neither the Predecessor Act nor the rules adopted under it prohibit an investment adviser representative from registering with multiple investment advisers.
2. IC 23-19-4-4(e) prohibits an investment adviser (although a federal covered investment adviser may petition for a waiver) from registering any individual who is currently barred from registration, or who has had their registration suspended or revoked, by another regulatory body. The Predecessor Act did not contain a similar provision.
3. If a person is compensated by referral fee and is a registered investment adviser representative with a registered investment adviser, federal covered investment adviser, or registered broker-dealer, then IC 23-19-4-4(f) does not require the payer of the referral fee to employ that person. The Predecessor Act did not contain a similar provision.

### **IC 23-19-4-5**

1. Under IC 23-2-1-8(g) of the Predecessor Act, the Commissioner could by rule or order require a notice filing for federal covered investment advisers. The Commissioner exercised that authority with Administrative Order 97-0223 AO. The IUSA accomplishes the same purpose by statute instead of by Administrative Order.

### **IC 23-19-4-6**

1. IC 23-19-4-6 allows the Securities Division a forty-five day window for review of applications, whereas the Predecessor Act only allowed thirty days. If the Securities Division requires additional time, an Order of Postponement may be entered.
2. IC 23-19-4-6(e) specifically states that a rule or order issued under the Act must not be inconsistent with the National Securities Markets Improvement Act of 1996 (“NSMIA”). NSMIA widely amended assorted provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940, which resulted in the preemption of state law

in the areas of federal covered securities and federal covered investment advisers. Where there has been no preemption or other effect on state law, consistency with NSMIA is not required.

#### **IC 23-19-4-7**

1. The IUSA includes both broker-dealers and investment advisers within the same section for changes in circumstances, such as successions, change in organization form, or change in control. Under the Predecessor Act, changes in circumstances for broker-dealers and investment advisers were left up to rule. The Commissioner adopted rules (710 IAC 1-14-7 and 710 IAC 1-16-23) that required broker-dealers and investment advisers to notify the Securities Division of changes in circumstances. The requirements for change in circumstance under the IUSA are similar to the rules under the Predecessor Act.

#### **IC 23-19-4-8**

1. IC 23-19-4-8 allows an agent or investment adviser representative to file a notice with the Securities Division that his or her employment with a particular broker-dealer or investment adviser has been terminated, if the agent or investment adviser representative learns that the broker-dealer or investment adviser has not done so. Under the Predecessor Act, the agent or investment adviser representative did not have authority to file his or her own notice of termination.
2. IC 23-19-4-8(b) allows the Securities Division to grant a thirty (30) day temporary registration of an individual applicant with a disciplinary disclosure on his or her CRD history within the previous twelve (12) months, which gives the Securities Division the opportunity for a more in-depth review of that person.
3. The Commissioner may extend the temporary registration under IC 23-19-4-8(d), which is a change from the Predecessor Act. The extension of time on a temporary registration allows the Commissioner additional time to review the qualifications of applicants.

#### **IC 23-19-4-9**

1. IC 23-19-4-9 allows the Securities Division sixty (60) days to review a request for withdrawal of registration compared to the Predecessor Act's thirty (30) days in IC 23-2-1-9(d).

#### **IC 23-19-4-10**

1. IC 23-19-4-10 sets forth the filing fees, which remain the same as those of the Predecessor Act in IC 23-2-1-9.
2. Section 410(e) of the USA, concerning federal covered investment advisers, was not included in the IUSA, since Indiana does not charge a fee for notice filing.

### **IC 23-19-4-11**

1. The Predecessor Act, under 23-2-1-10(d), did not specifically address post-registration filing requirements for broker-dealers but did give the Commissioner the ability to adopt rules, and 710 IAC 1-14-4, which includes reports on financial condition for broker-dealers, and 710 IAC 1-16-19, which includes financial statements and reporting requirements for investment advisers, were adopted. The IUSA specifically addresses post-registration filings by leaving the requirements to rulemaking in IC 23-19-4-11(b).
2. IC 23-19-4-11(e) gives the Commissioner the power to adopt rules requiring continuing education for broker-dealer agents or investment adviser representatives. This is analogous to IC 23-2-1-15(g) in the Predecessor Act, giving the Commissioner authority to adopt rules and orders to prescribe the qualifications of broker-dealers, agents and investment advisers. Such rules were enacted in the administrative code at 710 IAC 1-15-2, 710 IAC 1-16-13 and in administrative orders 95-0051 AO and 99-0307 AO. However, they did not address the issue of continuing education. The NASD has a requirement for its members to take part in continuing education programs at certain intervals, and the IUSA allows Indiana to mirror that requirement.
3. IC 23-19-4-11(i) retains the Commissioner's authority to require compliance reports from twenty-five percent (25%) of registered broker-dealers. The language is unchanged from IC 23-2-1-10(g) of the Predecessor Act.

### **IC 23-19-4-12**

1. IC 23-19-4-12 is similar to the Predecessor Act's IC 23-2-1-11, setting forth conditions under which registrations of broker-dealers, agents, investment advisers and investment adviser representatives may be revoked, denied, suspended, restricted or otherwise limited. IC 23-19-4-12(b) and (c) are distinguished by subsection (b) providing disciplinary penalties against the license of a registrant while subsection (c) provides disciplinary penalties against the registrant himself or herself.
2. IC 23-19-4-12(b)(1) differs significantly from the Predecessor Act's provisions in IC 23-2-1-11. The IUSA limits the time that the Securities Division may suspend or revoke a registrant based on another jurisdiction's order to within one (1) year after the order was issued. The Predecessor Act's language permitted Securities Division action up to five (5) years after an order against a registrant was entered by another jurisdiction.
3. IC 23-19-4-12(d)(8) describes the violation for the registrant to deny the Securities Division access to perform an audit under IC 23-19-4-11. This parallels the administrative rule found in 710 IAC 1-21-12.
4. IC 23-19-4-12(d)(13) caps the amount of time the Securities Division can take into account an applicant's prior history of unethical behavior at ten (10) years. The Predecessor Act had no equivalent provision.

5. In a change from the USA, IC 23-19-4-12(d)(15) has been added to the IUSA to allow the Commissioner to deny the registration of an individual who is listed on the most recent tax warrant list of the Indiana Department of Revenue. This is a carryover provision from the Predecessor Act's IC 23-2-1-11(a)(16).
6. IC 23-19-4-12(e) gives the Commissioner the ability to require an applicant to take an examination if they have not been registered in Indiana within the preceding two years. Previously this language was found in the Indiana Administrative Code, 710 IAC 1-15-2.
7. IC 23-19-4-12(i) prevents the Commissioner from taking an action after one year has passed from the date the material facts became known to the Commissioner. The Predecessor Act did not contain a similar provision.
8. IC 23-19-4-12(k) parallels the language in the Predecessor Act under IC 23-2-1-11(a) and is intended to provide a private cause of action for a violation of any of IC 23-19-4-12.

#### **IC 23-19-5-1**

1. Comment #7 under Section 501 of the Official Comments to the USA drafted by NCCUSL does not apply. The IUSA has maintained Indiana's private cause of action under the fraud provisions of the IUSA.

#### **IC 23-19-5-2**

1. IC 23-19-5-2(b) prohibits the Commissioner from defining fraudulent practices for supervised persons of federal covered investment advisers as defined in Rule 203A promulgated under the Investment Advisers Act of 1940.

#### **IC 23-19-5-3**

1. IC 23-19-5-3 describes the burden of proof in both civil/administrative proceedings and criminal proceedings. The burden is the same as the Predecessor Act, both in the burden itself and the party who carries it.
2. The Indiana Supreme Court, in *Price v. State*, (1980) Ind., 274 Ind. 479, 412 N.E.2d 783, held that there is no constitutional impediment to a statute imposing the burden of proof upon a defendant on an issue if the issue is not an element of the crime. This subsection provides that a defendant in a proceeding brought under this chapter, whether civil, criminal or administrative, has the burden of going forward with evidence of any exemptions, exceptions, preemptions, or exclusions that would go to show that no violation of the Act occurred. The proper standard to apply to the burden of proof is found in *Larry Burgin, Nancy S. Burgin v. State*, 431 N.E.2d 864, 1982 Ind. App. LEXIS 1090. The court in that case found that the defendant in an action must satisfy the burden of persuasion by a preponderance of the evidence, as well as the burden of going forward, explained as the burden of producing evidence of a particular fact in issue.

#### **IC 23-19-5-4**

1. IC 23-19-5-4 gives the Commissioner the power to require investment advisers to file marketing literature with the Securities Division. The Indiana Administrative Code, in 710 IAC 1-16-14-11, required that all marketing literature be kept by registered investment advisers in their offices, however the Securities Division did not require them to be filed. The Predecessor Act did not address advertising by broker-dealers.

#### **IC 23-19-5-5**

1. IC 23-19-5-5 prohibits the filing of false or misleading statements with the Commissioner and is found in the Predecessor Act in IC 23-2-1-13.

#### **IC 23-19-5-6**

1. IC 23-19-5-6 states that neither the filing of a registration statement nor an effective registration constitutes a finding that a document is true, complete, and not misleading. This provision mirrors IC 23-2-1-14 of the Predecessor Act.

#### **IC 23-19-5-7**

1. IC 23-19-5-7 grants qualified immunity to registered entities or individuals who might otherwise be liable to another person (broker-dealer, investment adviser, agent, investment adviser representative, federal covered investment) for defamation based on information required to be disclosed to the Securities Division, SEC, or other regulatory body. However, the person loses the immunity if they knew or should have known the statement or statements were false. The Predecessor Act did not have a similar provision.

#### **IC 23-19-5-8**

1. IC 23-19-5-8 adopts the same criminality standard of knowing violation of the law as the Predecessor Act in IC 23-2-1-18.1, which is the current state of Indiana law.
2. IC 23-19-5-8(c) has been substantially altered from the USA to incorporate some of the language from IC 23-2-1-15(h) of the Predecessor Act, which requires prosecuting attorneys and the Attorney General to assist the Commissioner in prosecuting violations of the Act.

#### **IC 23-19-5-9**

1. IC 23-19-5-9 concerns civil liability for violation of the Act. It has been altered from the USA as discussed in the comments below.
  - a. IC 23-19-5-9(a) was changed from the USA language to include elements from the Predecessor Act (IC 23-2-1-19(a)). These elements contain the idea that a seller who did not know of the violation, and, in the exercise of reasonable care, could not have known of the violation, is not liable to the buyer. Language was removed that required false or

misleading statements by the seller to be proven before the buyer could be awarded restitution or recover damages. It remains a defense for the seller to prove that the buyer knew of the violation and therefore was a knowing participant.

- b. IC 23-19-5-9(b) was changed from the USA language in a manner similar to subsection (a). In this section purchasers are afforded the same protection enjoyed under the Predecessor Act at IC 23-2-1-19(b). Specifically, if a purchaser did not know of the violation, and in the exercise of reasonable care could not have known of the violation, then the purchaser is not liable to the seller.
  - c. Section 509(d) of the USA, which addressed violations by unregistered broker-dealers and agents, was not included in the IUSA as violations of this nature were addressed by subsections (a) and (b) of IC 23-19-5-9.
  - d. Section 509(f) of the USA, liability for investment advice given fraudulently, has been included in the IUSA, as a specific provision for this was unnecessary given that fraud is a violation regardless of circumstances.
2. IC 23-19-5-9(c) establishes civil liability for investment advisers and investment adviser representatives as they do not sell to their clients, only render advice. The Predecessor Act does not have a similar provision. IC 23-19-5-9(c) is not limited, however, to those persons who are registered (or required to be registered) as investment advisers and investment adviser representatives by the IUSA; all that is required for civil liability under IC 23-19-5-9(c) is that they be “acting as” such types of persons. Compare IC 23-19-5-2(a), which makes unlawful certain acts by any person in connection with certain advisory activities.
  3. Discovery under IC 23-19-5-9(g) constitutes actual discovery.

#### **IC 23-19-5-10**

1. IC 23-19-5-10 does not permit an individual to maintain an action under IC 23-19-5-9 if the seller who would be liable in such an action offers rescission according to terms as described in the Section. This echoes the Predecessor Act’s IC 23-2-1-19(g)(1).

#### **IC 23-19-6-1**

1. IC 23-19-6-1, unless otherwise noted, is substantially similar to IC 23-2-1-15 of the Predecessor Act.
2. IC 23-19-6-1(a) is comprised in its entirety of language from the Predecessor Act to reflect the Securities Division structure in place at the time of enactment of this chapter. There is no intention within this article to change said structure.
3. IC 23-19-6-1(b) was added to reflect the Securities Division structure in place at the time of enactment of this chapter. There is no intention within this article to change said structure.

4. The investor education fund language of the USA was stricken in its entirety as investor education is funded by the Securities Division enforcement account, as set forth in IC 23-19-6-1(f).
5. IC 23-19-6-1(f) was amended from Section 601(f) of the USA to allow for use of enforcement account funds for the purpose of facilitating the promotion of investor education and financial literacy, which is one of the primary duties and responsibilities of the Securities Division.
6. IC 23-19-6-1(g) was added to the IUSA, as such language appeared in the Predecessor Act, to formalize the relationship between the Securities Division and the Attorney General for purposes of this article.
7. IC 23-19-6-1(h) was added to the IUSA, as such language appeared in the Predecessor Act, to provide limitations on the liability the Secretary of State and Securities Division personnel may face in connection with the performance of their respective duties.
8. IC 23-19-6-1(i) was added to the IUSA to set forth the police and law enforcement powers which Securities Division personnel possess in carrying out their duties under this chapter. This language was carried forward from the Predecessor Act.
9. IC 23-19-6-1(j) was added to the IUSA to set forth the construction of this article and to outline the powers granted to and the responsibilities placed upon the Secretary of State, the Securities Division, and the Commissioner in carrying out the administration of this article.
10. IC 23-19-6-1(k) was added to the IUSA to incorporate IC 23-2-1-16(l) of the Predecessor Act to allow copies of statements and documents filed with the Secretary of State to be admissible in actions under this article as would originals of said statements and documents.
11. IC 23-19-6-1(l) was added to the IUSA to bring this chapter in line with the Predecessor Act. The Indiana Administrative Orders and Procedures Act does not apply to proceedings under this article.
12. This article repealed IC 23-2-1-15(b)(2) of the Predecessor Act, as there no longer exists a state personnel board to review Securities Division personnel dismissals.
13. IC 23-19-6-1(c) and (d) address the unlawful use of information obtained by the Securities Division and privilege provisions set forth in IC 23-2-1-15(k) of the Predecessor Act.

#### **IC 23-19-6-2**

1. IC 23-19-6-2(b) was amended from Section 602(b) of the USA to incorporate IC 23-2-1-16(h) of the Predecessor Act to outline the ability of and the manner in which the Commissioner may conduct depositions.



2. IC 23-19-6-2(c)(6) was amended from Section 602(c)(6) of the USA to create the structure of civil penalties that may be assessed by courts for noncompliance with actions, proceedings, or investigations under this article. It was the intention of the Securities Division to specify which court(s) may enforce subpoenas issued under this chapter, and a specific dollar amount was added to the IUSA for penalties for violations of those subpoenas.
3. IC 23-19-6-2(e) is substantially similar to IC 23-2-1-16(g) of the Predecessor Act, with the exception of the deletion of the Predecessor Act references to a “hearing officer appointed by the commissioner.”
4. IC 23-19-6-2(f) replaces IC 23-2-1-16.5 of the Predecessor Act, allowing the Commissioner to assist the securities regulator of another state or foreign jurisdiction regardless of whether the alleged violation would be a violation of this chapter.
5. IC 23-19-6-2(g) was added to incorporate IC 23-2-1-16(k) of the Predecessor Act. This subsection allows the Commissioner to create a due diligence certificate indicating whether the security, issuer, broker-dealer, investment advisor, or agent was in compliance with the requirements of this chapter. Additionally, this provision allows the Securities Division, in any action based upon or arising out of or under this chapter, to submit this due diligence certificate as prima facie evidence of compliance or noncompliance with this chapter. There is no such provision in the USA.
6. IC 23-19-6-2(h) was added to this chapter to incorporate IC 23-2-1-16(i) of the Predecessor Act to allow for the payment of witness fees to those witnesses who appear before of the Commissioner or a hearing officer appointed by the Commissioner by order. There is no such provision in the USA.

### **IC 23-19-6-3**

1. IC 23-19-6-3(b)(2)(A) and (b)(2)(B) were amended from Section 603(b)(2)(A) and (b)(2)(B) of the USA to remove the reference to the Commissioner and the possibility of the Commissioner being appointed as a receiver or conservator under this chapter. These modifications reflect the Securities Division’s concern for the limited resources of the Commissioner and belief that the services of a receiver or conservator are better performed by an independent party.
2. IC 23-19-6-3(e) was added to the IUSA to ensure that civil penalties collected by the Securities Division under this chapter are deposited in the Securities Division enforcement account created in IC 23-19-6-1.

### **IC 23-19-6-4**

1. IC 23-19-6-4(a)(1) was replaced in its entirety by language from IC 23-2-1-17.1(a) of the Predecessor Act in order to preserve the administrative powers vested in the Commissioner by the Predecessor Act.

2. IC 23-19-6-4(b) and (c) were amended from Section 604(b) and (c) of the USA to reflect the intention of the Securities Division to maintain the time frame set forth for hearing requests as specified in the Predecessor Act.
3. IC 23-19-6-4(d) was amended from Section 604(d) of the USA to create a structure for administrative penalties that may be assessed under this article, and to ensure that said penalties are deposited in the Securities Division enforcement account created in IC 23-19-6-1.
4. IC 23-19-6-4(g) was amended from Section 604(g) of the USA to create a structure for civil penalties that may be assessed by courts for noncompliance with actions, proceedings, or investigations under this article.
5. IC 23-19-6-4(h) was added to the IUSA to reflect the continuing cooperative efforts undertaken by the Securities Division and the Indiana Department of Insurance to protect Indiana investors.

#### **IC 23-19-6-5**

1. IC 23-19-6-5(b) was amended from Section 605(b) of the USA to remove superfluous language from the USA regarding uniformity among the states. Uniformity is sufficiently addressed in IC 23-19-6-8.
2. IC 23-19-6-5(e) was amended from Section 605(e) of the USA to add a reasonableness standard, to conform to the overall structure of this article.
3. IC 23-19-6-5(a) and (b) are similar to IC 23-2-1-15(f) of the Predecessor Act, with the exception that the Commissioner's power to, by rule or order, exempt a security, transaction or offer from registration requirements is addressed in IC 23-19-2-3.

#### **IC 23-19-6-7**

1. IC 23-19-6-7(b)(2) adds the requirement, "and approved by the commissioner," for certain records to be deemed nonpublic and not available for public examination. This continues the policy that the Commissioner has discretion over what is and what is not public information.

#### **IC 23-19-6-9**

1. IC 23-19-6-9 replaced Section 609 of the USA with the provisions of the Predecessor Act that governed judicial review of actions undertaken under this chapter. The USA presumed that such review was governed by the state administrative procedures act. Pursuant to IC 23-19-6-1(j), however, the Indiana Administrative Orders and Procedures Act does not apply to proceedings under this article except under limited circumstances and accordingly the IUSA carries forward the standards for judicial review that were present in the Predecessor Act.

### **IC 23-19-6-10**

1. IC 23-19-6-10(d)(1) was amended from Section 610(d)(1) of the USA to cover acceptances that are received by an offeror who is temporarily away from the offeror's principal place of business but still located in Indiana.
2. IC 23-19-6-10(d)(3) was added to give the Securities Division jurisdiction over (and to cover for the purposes of the private civil remedy provisions of the IUSA) all offers made to Indiana residents whether they are present in the state at the time of the offer or not.

### **IC 23-19-6-11**

1. IC 23-19-6-11 was amended from Section 611 of the USA to provide for service of process upon the Secretary of State, rather than the administrator/commissioner as set forth in the USA. This is in accordance with the structure of the Predecessor Act.
2. IC 23-19-6-11(a) was amended from Section 611(a) of the USA to require "irrevocable" consents to service of process ("revocable" consents are required by the USA) to conform to the service of process requirements of the Predecessor Act. This section was further modified to allow for service on the Secretary of State for criminal proceedings.