

1 SENATE BILL 540

2 **52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

3 INTRODUCED BY

4 Sander Rue

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10 AN ACT

11 RELATING TO SECURITIES; AMENDING THE NEW MEXICO UNIFORM
12 SECURITIES ACT; DEFINING "CORRUPTLY"; PROHIBITING OBSTRUCTION
13 OF INSPECTIONS OR AUDITS.

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

16 SECTION 1. Section 58-13C-101 NMSA 1978 (being Laws 2009,
17 Chapter 82, Section 101) is amended to read:

18 "58-13C-101. SHORT TITLE.--~~[Sections 101 through 701 of~~
19 ~~this act]~~ Chapter 58, Article 13C NMSA 1978 may be cited as the
20 "New Mexico Uniform Securities Act"."

21 SECTION 2. Section 58-13C-102 NMSA 1978 (being Laws 2009,
22 Chapter 82, Section 102) is amended to read:

23 "58-13C-102. DEFINITIONS.--As used in the New Mexico
24 Uniform Securities Act, unless the context otherwise requires:

25 A. "agent" means an individual, other than a

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1 broker-dealer, who represents a broker-dealer in effecting or
2 attempting to effect purchases or sales of securities or
3 represents an issuer in effecting or attempting to effect
4 purchases or sales of the issuer's securities, but a partner,
5 officer or director of a broker-dealer or issuer, or an
6 individual having a similar status or performing similar
7 functions, is an agent only if the individual otherwise comes
8 within the term. "Agent" does not include an individual
9 excluded by rule adopted or order issued pursuant to the New
10 Mexico Uniform Securities Act;

11 B. "bank" means:

12 (1) a banking institution organized pursuant
13 to the laws of the United States;

14 (2) a member bank of the federal reserve
15 system;

16 (3) any other banking institution, whether
17 incorporated or not, doing business pursuant to the laws of a
18 state or of the United States, a substantial portion of the
19 business of which consists of receiving deposits or exercising
20 fiduciary powers similar to those permitted to be exercised by
21 national banks pursuant to the authority of the comptroller of
22 the currency pursuant to Section 1 of Public Law 87-722 (12
23 U.S.C. Section 92a) and that is supervised and examined by a
24 state or federal agency having supervision over banks and that
25 is not operated for the purpose of evading the New Mexico

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1 Uniform Securities Act; and

2 (4) a receiver, conservator or other
3 liquidating agent of any institution or firm included in
4 Paragraph (1), (2) or (3) of this subsection;

5 C. "broker-dealer" means a person engaged in the
6 business of effecting transactions in securities for the
7 account of others or for the person's own account. "Broker-
8 dealer" does not include:

9 (1) an agent;
10 (2) an issuer;
11 (3) a bank or savings institution described in
12 Paragraph (2) of Subsection D of this section if its activities
13 as a broker-dealer are limited to those specified in
14 Subsections 3(a)(4)(B)(i) through (vi), (viii) through (x) and
15 (xi), if limited to unsolicited transactions; 3(a)(5)(B); and
16 3(a)(5)(C) of the federal Securities Exchange Act of 1934 (15
17 U.S.C. Sections 78c(a)(4) and (5)) or a bank that satisfies the
18 conditions described in Subsection 3(a)(4)(E) of the federal
19 Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4));

20 (4) an international banking institution; or
21 (5) a person excluded by rule adopted or order
22 issued pursuant to the New Mexico Uniform Securities Act;

23 D. "corruptly" means acting with an improper
24 purpose, personally or by influencing another, including making
25 a false or misleading statement, or withholding, concealing,

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1 altering or destroying a document or other information;

2 [~~D-~~] E. "depository institution" means:

3 (1) a bank; or

4 (2) a savings institution, trust company,
5 credit union or similar institution that is organized or
6 chartered pursuant to the laws of a state or of the United
7 States, authorized to receive deposits and supervised and
8 examined by an official or agency of a state or the United
9 States if its deposits or share accounts are insured to the
10 maximum amount authorized by statute by the federal deposit
11 insurance corporation, the national credit union share
12 insurance fund or a successor authorized by federal law, or a
13 receiver, conservator or other liquidating agent of such
14 institutions or entities. "Depository institution" does not
15 include:

16 (a) an insurance company or other
17 organization primarily engaged in the business of insurance;

18 (b) a Morris plan bank; or

19 (c) an industrial loan company that is
20 not an "insured depository institution" as defined in Section
21 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C.
22 1813(c)(2), or any successor federal statute;

23 [~~E-~~] F. "director" means the director of the
24 securities division of the regulation and licensing department;

25 [~~F-~~] G. "division" means the securities division of

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1 the regulation and licensing department, which for purposes of
2 administering the provisions of the New Mexico Uniform
3 Securities Act and conducting investigations of violations of
4 that act shall be considered a law enforcement agency;

5 ~~[G.]~~ H. "federal covered investment adviser" means
6 a person registered pursuant to the federal Investment Advisers
7 Act of 1940;

8 ~~[H.]~~ I. "federal covered security" means a security
9 that is, or upon completion of a transaction will be, a covered
10 security pursuant to Section 18(b) of the federal Securities
11 Act of 1933 (15 U.S.C. Section 77r(b)) or rules or regulations
12 adopted pursuant to that section;

13 ~~[I.]~~ J. "filing" means the receipt pursuant to the
14 New Mexico Uniform Securities Act of a record by the director,
15 or a designee of the director, in a form and format designated
16 by the director;

17 ~~[J.]~~ K. "fraud", "deceit" and "defraud" are not
18 limited to common law deceit;

19 ~~[K.]~~ L. "guaranteed" means guaranteed as to payment
20 of all principal and all interest;

21 ~~[L.]~~ M. "institutional investor" means any of the
22 following, whether acting for itself or for others in a
23 fiduciary capacity:

24 (1) a depository institution or international
25 banking institution;

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- 1 (2) an insurance company;
- 2 (3) a separate account of an insurance
- 3 company;
- 4 (4) an investment company as defined in the
- 5 federal Investment Company Act of 1940;
- 6 (5) a broker-dealer registered pursuant to the
- 7 federal Securities Exchange Act of 1934;
- 8 (6) an employee pension, profit-sharing or
- 9 benefit plan if the plan has total assets in excess of ten
- 10 million dollars (\$10,000,000) or its investment decisions are
- 11 made by a named fiduciary, as defined in the federal Employee
- 12 Retirement Income Security Act of 1974, that is a broker-dealer
- 13 registered pursuant to the federal Securities Exchange Act of
- 14 1934, an investment adviser registered or exempt from
- 15 registration pursuant to the federal Investment Advisers Act of
- 16 1940, an investment adviser registered pursuant to the New
- 17 Mexico Uniform Securities Act, a depository institution or an
- 18 insurance company;
- 19 (7) a plan established and maintained by a
- 20 state, a political subdivision of a state or an agency or
- 21 instrumentality of a state or a political subdivision of a
- 22 state for the benefit of its employees, if the plan has total
- 23 assets in excess of ten million dollars (\$10,000,000) or its
- 24 investment decisions are made by a duly designated public
- 25 official or by a named fiduciary, as defined in the federal

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1 Employee Retirement Income Security Act of 1974, that is a
2 broker-dealer registered pursuant to the federal Securities
3 Exchange Act of 1934, an investment adviser registered or
4 exempt from registration pursuant to the federal Investment
5 Advisers Act of 1940, an investment adviser registered pursuant
6 to the New Mexico Uniform Securities Act, a depository
7 institution or an insurance company;

8 (8) a trust, if it has total assets in excess
9 of ten million dollars (\$10,000,000), its trustee is a
10 depository institution and its participants are exclusively
11 plans of the types identified in Paragraph (6) or (7) of this
12 subsection, regardless of the size of their assets, except a
13 trust that includes as participants self-directed individual
14 retirement accounts or similar self-directed plans;

15 (9) an organization described in Section
16 501(c)(3) of the federal Internal Revenue Code of 1986 (26
17 U.S.C. Section 501(c)(3)), corporation, Massachusetts trust or
18 similar business trust, limited liability company or
19 partnership, not formed for the specific purpose of acquiring
20 the securities offered, with total assets in excess of ten
21 million dollars (\$10,000,000);

22 (10) a small business investment company
23 licensed by the small business administration pursuant to
24 Section 301(c) of the federal Small Business Investment Act of
25 1958 (15 U.S.C. Section 681(c)) with total assets in excess of

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1 ten million dollars (\$10,000,000);

2 (11) a private business development company as
3 defined in Section 202(a)(22) of the federal Investment
4 Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with
5 total assets in excess of ten million dollars (\$10,000,000);

6 (12) a federal covered investment adviser
7 acting for its own account;

8 (13) a "qualified institutional buyer", as
9 defined in Rule 144A(a)(i)(1), other than Rule 144A(a)(1)(H),
10 adopted pursuant to the federal Securities Act of 1933 (17
11 C.F.R. 230.144A);

12 (14) a "major U.S. institutional investor" as
13 defined in Rule 15a-6(b)(4)(i)(17 C.F.R. 240.15a-6) adopted
14 pursuant to the federal Securities Exchange Act of 1934;

15 (15) any other person, other than an
16 individual, of institutional character with total assets in
17 excess of ten million dollars (\$10,000,000) not organized for
18 the specific purpose of evading the New Mexico Uniform
19 Securities Act; or

20 (16) any other person specified by rule
21 adopted or order issued pursuant to the New Mexico Uniform
22 Securities Act;

23 [~~M-~~] N. "insurance company" means a company
24 organized as an insurance company whose primary business is
25 writing insurance or reinsuring risks underwritten by insurance

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1 companies and that is subject to supervision by the insurance
2 commissioner or a similar official or agency of a state;

3 ~~[N-]~~ O. "insured" means insured as to payment of
4 all principal and all interest;

5 ~~[O-]~~ P. "international banking institution" means
6 an international financial institution of which the United
7 States is a member and whose securities are exempt from
8 registration pursuant to the federal Securities Act of 1933;

9 ~~[P-]~~ Q. "investment adviser" means a person that,
10 for compensation, engages in the business of advising others,
11 either directly or through publications or writings, as to the
12 value of securities or the advisability of investing in,
13 purchasing or selling securities or that, for compensation and
14 as a part of a regular business, issues or promulgates analyses
15 or reports concerning securities. "Investment adviser"
16 includes a financial planner or other person that, as an
17 integral component of other financially related services,
18 provides investment advice to others for compensation as part
19 of a business or that holds itself out as providing investment
20 advice to others for compensation. "Investment adviser" does
21 not include:

22 (1) an investment adviser representative;
23 (2) a lawyer, accountant, engineer or teacher
24 whose performance of investment advice is solely incidental to
25 the practice of the person's profession;

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1 (3) a broker-dealer or its agents whose
2 performance of investment advice is solely incidental to the
3 conduct of business as a broker-dealer and that does not
4 receive special compensation for the investment advice;

5 (4) a publisher, employee or columnist of a
6 bona fide newspaper, news magazine or business or financial
7 publication of general and regular circulation or an owner
8 operator, producer or employee of a cable, radio or television
9 network, station or production facility, if, in either case:

10 (a) the financial or business news or
11 advice is contained in a publication or broadcast disseminated
12 to the general public; and

13 (b) the content does not consist of
14 rendering advice on the basis of the specific investment
15 situation of each client;

16 (5) a federal covered investment adviser;

17 (6) a bank or a savings institution described
18 in Paragraph (2) of Subsection [D] E of this section; or

19 (7) any other person excluded by rule adopted
20 or order issued pursuant to the New Mexico Uniform Securities
21 Act;

22 [~~Q-~~] R. "investment adviser representative" means
23 an individual employed by or associated with an investment
24 adviser or federal covered investment adviser and who makes any
25 recommendations or otherwise gives investment advice regarding

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1 securities, manages accounts or portfolios of clients,
2 determines which recommendation or advice regarding securities
3 should be given, provides investment advice or holds herself or
4 himself out as providing investment advice, receives
5 compensation to solicit, offer or negotiate for the sale of or
6 for selling investment advice or supervises employees who
7 perform any of the foregoing. "Investment adviser
8 representative" does not include an individual who:

9 (1) performs only clerical or ministerial
10 acts;

11 (2) is an agent whose performance of
12 investment advice is solely incidental to the individual acting
13 as an agent and who does not receive special compensation for
14 investment advisory services;

15 (3) is employed by or associated with a
16 federal covered investment adviser, unless the individual has a
17 place of business in New Mexico, as "place of business" is
18 defined by rule adopted pursuant to Section 203A of the federal
19 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a) and
20 is:

21 (a) an investment adviser
22 representative, as "investment adviser representative" is
23 defined by rule adopted pursuant to Section 203A of the federal
24 Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a); or

25 (b) not a supervised person as

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1 "supervised person" is defined in Section 202(a)(25) of the
2 federal Investment Advisers Act of 1940 (15 U.S.C. Section
3 80b-2(a)(25)); or

4 (4) is excluded by rule adopted or order
5 issued pursuant to the New Mexico Uniform Securities Act;

6 ~~[R-]~~ S. "issuer" means a person that issues or
7 proposes to issue a security, subject to the following:

8 (1) the issuer of a voting trust certificate,
9 collateral trust certificate, certificate of deposit for a
10 security or share in an investment company without a board of
11 directors or individuals performing similar functions is the
12 person performing the acts and assuming the duties of depositor
13 or manager pursuant to the trust or other agreement or
14 instrument under which the security is issued;

15 (2) the issuer of an equipment trust
16 certificate or similar security serving the same purpose is the
17 person by which the property is or will be used or to which the
18 property or equipment is or will be leased or conditionally
19 sold or that is otherwise contractually responsible for
20 assuring payment of the certificate; and

21 (3) the issuer of a fractional undivided
22 interest in an oil, gas or other mineral lease or in payments
23 out of production pursuant to a lease, right or royalty is the
24 owner of an interest in the lease or in payments out of
25 production pursuant to a lease, right or royalty, whether whole

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1 or fractional, that creates fractional interests for the
2 purpose of sale;

3 ~~[S-]~~ T. "legal rate of interest" means the rate of
4 interest set by Subsection A of Section 56-8-4 NMSA 1978 or its
5 successor statutes;

6 ~~[F-]~~ U. "nonissuer transaction" or "nonissuer
7 distribution" means a transaction or distribution not directly
8 or indirectly for the benefit of the issuer;

9 ~~[H-]~~ V. "offer to purchase" includes an attempt or
10 offer to obtain, or solicitation of an offer to sell, a
11 security or interest in a security for value. "Offer to
12 purchase" does not include a tender offer that is subject to
13 Section 14(d) of the federal Securities Exchange Act of 1934
14 (15 U.S.C. 78n(d));

15 ~~[V-]~~ W. "person" means an individual; corporation;
16 business trust; estate; trust; partnership; limited liability
17 company; association; joint venture; government; governmental
18 subdivision, agency or instrumentality; public corporation; or
19 any other legal or commercial entity;

20 ~~[W-]~~ X. "place of business" of a broker-dealer, an
21 investment adviser or a federal covered investment adviser
22 means:

23 (1) an office at which the broker-dealer,
24 investment adviser or federal covered investment adviser
25 regularly provides brokerage or investment advice or solicits,

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1 meets with or otherwise communicates with customers or clients;
2 or

3 (2) a location that is held out to the general
4 public as a location at which the broker-dealer, investment
5 adviser or federal covered investment adviser provides
6 brokerage or investment advice or solicits, meets with or
7 otherwise communicates with customers or clients;

8 ~~[X.]~~ Y. "predecessor act" means the New Mexico
9 Securities Act of 1986;

10 ~~[Y.]~~ Z. "price amendment" means the amendment to a
11 registration statement filed pursuant to the federal Securities
12 Act of 1933 or, if an amendment is not filed, the prospectus or
13 prospectus supplement filed pursuant to that act that includes
14 a statement of the offering price, underwriting and selling
15 discounts or commissions, amount of proceeds, conversion rates,
16 call prices and other matters dependent upon the offering
17 price;

18 ~~[Z.]~~ AA. "principal place of business" of a broker-
19 dealer, investment adviser or federal covered investment
20 adviser means the executive office of the broker-dealer,
21 investment adviser or federal covered investment adviser from
22 which the officers, partners or managers of the broker-dealer,
23 investment adviser or federal covered investment adviser
24 direct, control and coordinate the activities of the broker-
25 dealer, investment adviser or federal covered investment

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1 adviser;

2 ~~[AA.]~~ BB. "record", except in the phrases "of
3 record", "official record" and "public record", means
4 information that is inscribed on a tangible medium or that is
5 stored in an electronic or other medium and is retrievable in
6 perceivable form;

7 ~~[BB.]~~ CC. "sale" includes every contract of sale,
8 contract to sell or disposition of a security or interest in a
9 security for value, and "offer to sell" includes every attempt
10 or offer to dispose of, or solicitation of an offer to
11 purchase, a security or interest in a security for value. Both
12 terms include:

13 (1) a security given or delivered with, or as
14 a bonus on account of, a purchase of securities or any other
15 thing constituting part of the subject of the purchase and
16 having been offered and sold for value;

17 (2) a gift of assessable stock involving an
18 offer and sale; and

19 (3) a sale or offer of a warrant or right to
20 purchase or subscribe to another security of the same or
21 another issuer and a sale or offer of a security that gives the
22 holder a present or future right or privilege to convert the
23 security into another security of the same or another issuer,
24 including an offer of the other security;

25 ~~[GG.]~~ DD. "securities and exchange commission"

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1 means the United States securities and exchange commission;

2 ~~DD.~~ EE. "security" means a note; stock; treasury
3 stock; security future; bond; debenture; evidence of
4 indebtedness; certificate of interest or participation in a
5 profit-sharing agreement; collateral trust certificate;
6 preorganization certificate or subscription; transferable
7 share; investment contract; voting trust certificate;
8 certificate of deposit for a security; fractional undivided
9 interest in oil, gas or other mineral rights; put, call,
10 straddle, option or privilege on a security, certificate of
11 deposit or group or index of securities, including an interest
12 therein or based on the value thereof; put, call, straddle,
13 option or privilege entered into on a national securities
14 exchange relating to foreign currency; or, in general, an
15 interest or instrument commonly known as a "security"; or a
16 certificate of interest or participation in, temporary or
17 interim certificate for, receipt for, guarantee of or warrant
18 or right to subscribe to or purchase any of the foregoing.

19 "Security":

20 (1) includes both a certificated and an
21 uncertificated security;

22 (2) does not include an insurance or endowment
23 policy or annuity contract pursuant to which an insurance
24 company promises to pay a fixed or variable sum of money either
25 in a lump sum or periodically for life or other specified

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1 period;

2 (3) does not include an interest in a
3 contributory or noncontributory pension or welfare plan subject
4 to the federal Employee Retirement Income Security Act of 1974;

5 (4) does not include landowner royalties in
6 the production of oil, gas or other minerals created through
7 the execution of a lease of the lessor's mineral interest;

8 (5) includes an investment in a common
9 enterprise with the expectation of profits to be derived
10 primarily from the efforts of a person other than the investor.
11 As used in this paragraph, "common enterprise" means an
12 enterprise in which the fortunes of the investor are interwoven
13 with those of either the person offering the investment, a
14 third party or other investors;

15 (6) includes any interest in a limited
16 partnership or a limited liability company; and

17 (7) includes as an investment contract an
18 investment in a viatical settlement or similar agreement;

19 ~~[EE.]~~ FF. "self-regulatory organization" means a
20 national securities exchange registered pursuant to the federal
21 Securities Exchange Act of 1934, a national securities
22 association of broker-dealers registered pursuant to that act,
23 a clearing agency registered pursuant to that act or the
24 municipal securities rulemaking board established pursuant to
25 that act;

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1 ~~[FF.]~~ GG. "sign" means, with present intent to
2 authenticate or adopt a record:
3 (1) to execute or adopt a tangible symbol; or
4 (2) to attach or logically associate with the
5 record an electronic symbol, sound or process;

6 ~~[GG.]~~ HH. "state" means a state of the United
7 States, the District of Columbia, Puerto Rico, the United
8 States Virgin Islands or any territory or insular possession
9 subject to the jurisdiction of the United States; and

10 ~~[HH.]~~ II. "underwriter" means any person who has
11 purchased from an issuer with the intent to offer or sell a
12 security or to distribute any security; who participates or has
13 a direct or indirect participation in any undertaking; or who
14 participates or has a participation in the direct or indirect
15 underwriting of any undertaking. "Underwriter" does not
16 include a person whose interest is limited to a commission from
17 an underwriter or dealer not in excess of the usual and
18 customary distributors' or sellers' commission. As used in
19 this subsection, "issuer" includes any person directly or
20 indirectly controlling or controlled by the issuer; or any
21 person under direct or indirect common control with the
22 issuer."

23 **SECTION 3.** A new section of the New Mexico Uniform
24 Securities Act is enacted to read:

25 "[NEW MATERIAL] OBSTRUCTION OF INSPECTION OR AUDIT.--It is
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1 unlawful for any person to corruptly obstruct any inspection or
2 audit conducted pursuant to Subsection D of Section 58-13C-411
3 NMSA 1978."

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