

# SENATE BILL No. 1297

May 7, 2008, Introduced by Senators CLARK-COLEMAN, GLEASON, SCHAUER, JACOBS, THOMAS, SCOTT, SWITALSKI, BASHAM, PRUSI, CHERRY, OLSHOVE, ANDERSON, BRATER, CLARKE, BARCIA, WHITMER and HUNTER and referred to the Committee on Banking and Financial Institutions.

A bill to amend 1964 PA 265, entitled "Uniform securities act," by amending section 401 (MCL 451.801), as amended by 2000 PA 494.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 401. As used in this act, unless the context otherwise  
2 requires:

3           (a) "Administrator" means the office of financial and  
4 insurance services of the department of ~~consumer and industry~~  
5 ~~services~~ **LABOR AND ECONOMIC GROWTH.**

6           (b) "Affiliate" means a person that directly or indirectly  
7 through 1 or more intermediaries controls, is controlled by, or is  
8 under common control with a specified person.

9           (c) "Agent" means any individual other than a broker-dealer  
10 who represents a broker-dealer or issuer in effecting or attempting  
11 to effect purchases or sales of securities. "Agent" does not

1 include an individual who represents an issuer in (1) effecting  
2 transactions in a security exempted by section 402(a)(1), (2), (3),  
3 (4), (5), (9), or (10), (2) effecting transactions exempted by  
4 section 402(b), (3) effecting transactions in a covered security as  
5 defined in section 18(b)(3) or 18(b)(4)(D) of the securities act of  
6 1933, 15 ~~U.S.C.~~ **USC** 77r, or (4) effecting transactions with  
7 existing employees, partners, officers, or directors of the issuer  
8 or any of its subsidiaries if, in connection with all of these 4  
9 cases, no commission is paid or given directly or indirectly for  
10 soliciting any person in this state. "Agent" does not include an  
11 officer or general partner of an issuer whose securities are  
12 registered under the provisions of this act, who represents the  
13 issuer in effecting transactions in the registered securities, if  
14 no commission is paid or given directly or indirectly for  
15 soliciting any person in this state. "Agent" does not include a  
16 person acting solely as a finder and registered pursuant to this  
17 act or acting as a finder under a transaction exempt pursuant to  
18 section 402(b)(19). "Agent" does not include a person whose  
19 transactions in this state are limited to only those transactions  
20 set forth in section 15(h)(2) of the securities exchange act of  
21 1934, 15 ~~U.S.C.~~ **USC** 78o. A partner, officer, or director of a  
22 broker-dealer or issuer, or a person occupying a similar status or  
23 performing similar functions, is an agent only if he or she  
24 otherwise comes within this definition. The administrator may by  
25 rule or order exclude other persons from the definition of the word  
26 "agent".

27 (d) "Broker-dealer" means any person engaged in the business

1 of effecting transactions in securities for the account of others  
2 or for his or her own account. "Broker-dealer" does not include (1)  
3 an agent, (2) an issuer, (3) a bank, savings institution, or trust  
4 company, (4) a person who has no place of business in this state if  
5 (A) he or she effects transactions in this state exclusively with  
6 or through (i) the issuers of the securities involved in the  
7 transactions, (ii) other broker-dealers, or (iii) banks, savings  
8 institutions, trust companies, insurance companies, investment  
9 companies as defined in the investment company act of 1940, pension  
10 or profit-sharing trusts, or other financial institutions or  
11 institutional buyers, whether acting for themselves or as trustees,  
12 or (B) during any period of 12 consecutive months he or she does  
13 not direct more than 15 offers to sell or buy into this state in  
14 any manner to persons other than those specified in clause (A) of  
15 this subdivision, whether or not the offeror or any of the offerees  
16 is then present in this state, or (5) a person acting solely as a  
17 finder and registered pursuant to this act or acting as a finder  
18 under a transaction exempt pursuant to section 402(b)(19). The  
19 administrator may by rule or order exclude other persons from the  
20 definition of the word "broker-dealer".

21 (e) "Commission" means any payment in cash, securities, or  
22 goods for offering or selling, promise, or commitment to provide  
23 payment in the future for offering or selling, or any other similar  
24 payment. Commission does not include a real estate commission  
25 commensurate with fees paid in the area for similar services, paid  
26 to licensed real estate brokers solely for real estate services  
27 which have been rendered, or payment by a person to a lawyer or

1 accountant in connection with advice or recommendations made by a  
2 lawyer or accountant to the client with whom the lawyer or  
3 accountant has an established professional relationship, if  
4 disclosure of the payment and the interest of the lawyer or  
5 accountant in the transaction or in the issuer or any affiliate of  
6 the issuer, is made in writing to the client before the sale.  
7 Officers, directors, and partners of an issuer or purchaser, or  
8 persons occupying a similar status shall not be considered a finder  
9 if their contact was purely incidental and their compensation was  
10 not directly or indirectly tied to or conditioned upon involvement  
11 in securities solicitation or purchase.

12 (f) "Direct or indirect compensation or remuneration" means  
13 any payment, receipt or use of proceeds of an offering for the  
14 benefit of the promoter, general partners, officers or directors,  
15 or persons occupying similar positions or their affiliates, any  
16 receipt, payment, or use of securities or goods by those persons at  
17 less than the amount public investors paid for the securities or  
18 goods, or any markup charged on sale of property to the entity  
19 raising capital, any advantageous contractual relationships, any  
20 real estate commission, or other similar payments or arrangements  
21 to those persons.

22 (g) "Federally covered adviser" means a person that is  
23 registered under section 203 of the investment advisers act of  
24 1940, **15 USC 80B-3**. The term does not include a person excluded  
25 from the definition of investment adviser under subdivision (l) (1),  
26 (2), (3), (4), (5), (6), (7), (8), (9), or (11).

27 (h) "Federally covered security" means any security that is a

1 "covered security" under the securities act of 1933 or rules or  
2 regulations promulgated under that act.

3 (i) "Finder" means a person who, for consideration,  
4 participates in the offer to sell, sale, or purchase of securities  
5 or commodities by locating, introducing, or referring potential  
6 purchasers or sellers. Finder does not include a person whose  
7 actions are solely incidental to a transaction exempt pursuant to  
8 section 402(b)(19). The administrator may by rule or order exclude  
9 other persons from this definition.

10 (j) "Fraud", "deceit", and "defraud" are not limited to  
11 common-law deceit.

12 (k) "Guaranteed" means guaranteed as to payment of principal,  
13 interest, or dividends.

14 (l) "Investment adviser" means any person who, for  
15 consideration, engages in the business of advising others, either  
16 directly or through publications or writings, as to the value of  
17 securities, or as to the advisability of investing in, purchasing,  
18 or selling securities, who, for consideration and as a part of a  
19 regular business, issues or promulgates analyses or reports  
20 concerning securities, or who acts as a finder in conjunction with  
21 the offer, sale, or purchase of a security. "Investment adviser"  
22 does not include any of the following:

23 (1) A bank, savings institution, or trust company.

24 (2) A lawyer, accountant, engineer, geologist, geophysicist,  
25 or teacher whose performance of these services is solely incidental  
26 to the practice of his or her profession.

27 (3) A broker-dealer or a registered agent acting on behalf of

1 a broker-dealer whose performance of these services is solely  
2 incidental to the conduct of his or her business as a broker-dealer  
3 and who receives no special compensation for the services.

4 (4) A publisher, employee, or columnist of a newspaper, news  
5 magazine, or business or financial publication, or an owner,  
6 operator, producer, or employee of a cable, radio, or television  
7 network, station, or production facility if, in either case, the  
8 financial or business news published or disseminated is made  
9 available to the general public and the content does not consist of  
10 rendering advice on the basis of the specific investment situation  
11 of a client.

12 (5) A person who has no place of business in this state if  
13 either of the following applies:

14 (A) His or her only clients in this state are other investment  
15 advisers, federally covered advisers, broker-dealers, banks,  
16 savings institutions, trust companies, insurance companies,  
17 investment companies as defined in the investment company act of  
18 1940, pension or profit-sharing trusts the assets of which are  
19 managed by a bank or trust company or other institutional manager,  
20 or other financial institutions or institutional buyers, whether  
21 acting for themselves or as trustees.

22 (B) During any period of 12 consecutive months he or she does  
23 not have more than 5 clients in this state other than those  
24 specified in subparagraph (A).

25 (6) A person excluded from the definition of investment  
26 adviser under section 202(a)(11) of the investment advisers act of  
27 1940, 15 U.S.C.—**USC** 80b-2.

1 (7) Any other persons not within the intent of this  
2 subdivision as the administrator may by rule or order designate.

3 (8) A trustee whose custody of assets is pursuant to judicial  
4 appointment, or appointment under a trust indenture or agreement,  
5 and who does not hold himself or herself out to the general public  
6 as giving advice to others with respect to securities and who  
7 maintains close contact with the personal financial affairs of his  
8 or her clients as a part of his or her fiduciary responsibilities,  
9 or a person who gives advice only to such a trustee.

10 (9) A county treasurer acting pursuant to his or her authority  
11 under the local government investment pool act, 1985 PA 121, MCL  
12 129.141 to 129.150.

13 (10) A person who is a federally covered adviser.

14 (11) A person who is employed by or associated with an  
15 investment adviser.

16 (m) "Investment adviser representative" means a partner,  
17 officer, or director, or a person occupying a similar status or  
18 performing similar functions, or other individual except a clerical  
19 or ministerial employee or other employee or associate designated  
20 by the administrator by rule or order as within the intent of this  
21 subsection, who is employed by or associated with either of the  
22 following:

23 (1) An investment adviser that is registered or required to be  
24 registered under this act and who does any of the following:

25 (i) Makes any recommendations or otherwise renders advice  
26 regarding securities.

27 (ii) Manages accounts or portfolios of clients.

1           (iii) Determines which recommendation or advice regarding  
2 securities should be given.

3           (iv) Solicits, offers, or negotiates for the sale of or sells  
4 investment advisory services.

5           (v) Supervises employees who perform any of the activities  
6 described in subparagraph (i), (ii), (iii), or (iv).

7           (2) A federally covered adviser that is subject to section  
8 203A ~~of title II~~ of the investment advisers act of 1940, 15 U.S.C.  
9 **USC** 80b-3a, and is designated by the administrator by rule or  
10 order.

11           (n) "Investment advisers act of 1940" means the investment  
12 advisers act of 1940, title II of chapter 686, ~~54 Stat. 847,~~ 15  
13 ~~U.S.C. USC~~ 80b-1 to 80b-21.

14           (o) "Investment company act of 1940" means the investment  
15 company act of 1940, title I of chapter 686, ~~54 Stat. 789,~~ 15  
16 ~~U.S.C. USC~~ 80a-1 to ~~80a-3 and 80a-4 to~~ 80a-64.

17           (p) "Issuer" means any person who issues or proposes to issue  
18 any security, except that:

19           (1) For certificates of deposit, voting-trust certificates or  
20 collateral-trust certificates, or with respect to certificates of  
21 interest or shares in an unincorporated investment trust not having  
22 a board of directors, or persons performing similar functions or of  
23 the fixed, restricted management or unit type, the term "issuer"  
24 means the person or persons performing the acts and assuming the  
25 duties of depositor or manager pursuant to the provisions of the  
26 trust or other agreement or instrument under which the security is  
27 issued.



1           (2) For certificates of interest or participation in oil, gas,  
2 or mining titles or leases, or in payments out of production under  
3 titles or leases, the term "issuer" means the owner of the oil,  
4 gas, or mining titles or leases or payments out of production or  
5 any fractional part thereof who creates and sells certificates of  
6 interest or participation therein.

7           (q) "Nonissuer" means not directly or indirectly for the  
8 benefit of the issuer. A sale of securities shall be considered to  
9 be indirectly for the benefit of the issuer if all of the following  
10 conditions are met:

11           (1) The sale is directly or indirectly made for the benefit of  
12 a director or executive officer of the issuer, or a person  
13 occupying a similar status or performing similar functions, or a  
14 beneficial owner of 10% or more of any class of equity securities  
15 of the issuer.

16           (2) The sale, together with all sales made in this state by or  
17 for the benefit of the issuer during the 6-month period immediately  
18 before the date of the sale, otherwise than pursuant to a  
19 registration statement or exemption order under this act, exceeds  
20 1% of the outstanding securities of the class of securities being  
21 sold.

22           (3) The securities are not of a class that has been designated  
23 by the administrator as eligible for trading in this state.

24           (r) "Notice filing" means the documents filed with the  
25 administrator under section 202a or 308, or both, as applicable.

26           (s) "Person" means an individual, a corporation, a  
27 partnership, an association, a joint-stock company, a trust where

1 the interests of the beneficiaries are evidenced by a security, an  
2 unincorporated organization, a government, or a political  
3 subdivision of a government.

4 (t) "Promoter" means a person who, acting alone or in  
5 conjunction with 1 or more persons, directly or indirectly takes  
6 the initiative in founding and organizing the business or  
7 enterprise of an issuer; or a person who, in connection with the  
8 founding or organizing of the business or enterprise of an issuer,  
9 directly or indirectly receives in consideration of services or  
10 property, 10% or more of the proceeds from the sale of any class of  
11 securities or 10% or more of the equity interest in the issuer  
12 after the offering is complete. However, a person who receives such  
13 an amount of securities or proceeds either solely as underwriting  
14 commissions pursuant to an offering of securities registered under  
15 this act or solely in consideration of property or legal or  
16 accounting services shall not be considered a promoter within the  
17 meaning of this subsection if the person does not otherwise take  
18 part in founding and organizing the enterprise.

19 (u) "Public utility holding company act of 1935" means the  
20 public utility holding company act of 1935, ~~title I of chapter 687,~~  
21 ~~49 Stat. 838~~ **15 USC 79 TO 79Z-6.**

22 (v) (1) "Sale" or "sell" includes every contract of sale of,  
23 contract to sell, or disposition of a security or interest in a  
24 security for value.

25 (2) "Offer" or "offer to sell" includes every attempt or offer  
26 to dispose of, or solicitation of an offer to buy, a security or  
27 interest in a security for value.

1 (3) Any security given or delivered with, or as a bonus on  
2 account of, any purchase of securities or any other thing is  
3 considered to constitute part of the subject of the purchase and to  
4 have been offered and sold for value.

5 (4) A purported gift of assessable stock is considered to  
6 involve an offer and sale.

7 (5) Every sale or offer of a warrant or right to purchase or  
8 subscribe to another security of the same or another issuer, as  
9 well as every sale or offer of a security which gives the holder a  
10 present or future right or privilege to convert into another  
11 security of the same or another issuer, is considered to include an  
12 offer of the other security.

13 (6) The terms defined in this subdivision do not include:

14 (A) Any stock dividend, whether the corporation distributing  
15 the dividend is the issuer of the stock or not, if nothing of value  
16 is given by stockholders for the dividend other than the surrender  
17 of a right to a cash or property dividend when each stockholder may  
18 elect to take the dividend in cash or property or in stock.

19 (B) Any act incident to a judicially approved reorganization  
20 in which a security is issued in exchange for 1 or more outstanding  
21 securities, claims, or property interests, or partly in exchange  
22 and partly for cash.

23 (w) "Securities act of 1933" means the securities act of 1933,  
24 ~~title I of chapter 38, 48 Stat. 74, 15 U.S.C. USC 77a to 77r and~~  
25 ~~77s to 77aa.~~

26 (x) "Securities exchange act of 1934" means the securities  
27 exchange act of 1934, ~~chapter 404, 48 Stat. 881-15 USC 78A TO 78MM.~~

1 (y) "Securities investor protection act of 1970" means the  
2 securities investor protection act of 1970, ~~Public Law 91-598, 84~~  
3 ~~Stat. 1636-15~~ **USC 78AAA TO 78III**.

4 (z) "Security" means any note; stock; treasury stock; bond;  
5 debenture; evidence of indebtedness; certificate of interest or  
6 participation in any profit-sharing agreement; collateral-trust  
7 certificate; preorganization certificate or subscription;  
8 transferable share; investment contract; **VARIABLE ANNUITY CONTRACT**;  
9 voting-trust certificate; certificate of deposit for a security;  
10 certificate of interest or participation in an oil, gas, or mining  
11 title or lease or in payments out of production under such a title  
12 or lease; or, in general, any interest or instrument commonly known  
13 as a "security", or any certificate of interest or participation  
14 in, temporary or interim certificate for, receipt for, guarantee  
15 of, or warrant or right to subscribe to or purchase, any of the  
16 foregoing. "Security" includes any contractual or quasi contractual  
17 arrangement pursuant to which: (1) a person furnishes capital,  
18 other than services, to an issuer; (2) a portion of that capital is  
19 subjected to the risks of the issuer's enterprise; (3) the  
20 furnishing of that capital is induced by the representations of an  
21 issuer, promoter, or their affiliates which give rise to a  
22 reasonable understanding that a valuable tangible benefit will  
23 accrue to the person furnishing the capital as a result of the  
24 operation of the enterprise; (4) the person furnishing the capital  
25 does not intend to be actively involved in the management of the  
26 enterprise in a meaningful way; and (5) a promoter or its  
27 affiliates anticipate, at the time the capital is furnished, that

1 financial gain may be realized as a result thereof. "Security" does  
2 not include an insurance or endowment policy or annuity contract  
3 under which an insurance company promises to pay **A FIXED SUM OF**  
4 money either in a lump sum or periodically for life or some other  
5 specified period or a commodity contract. The administrator may  
6 exclude by rule or by order other transactions or agreements from  
7 the definition of the word "security".

8 (aa) "Small business investment act of 1958" means the small  
9 business investment act of 1958, ~~Public Law 85-699, 72 Stat. 689~~ **15**  
10 **USC 661 TO 697G.**

11 (bb) "State" means any state, territory, or possession of the  
12 United States, the District of Columbia, and Puerto Rico.

13 **(CC) "VARIABLE ANNUITY CONTRACT" MEANS AN INSURANCE OR**  
14 **ENDOWMENT POLICY OR ANNUITY CONTRACT UNDER WHICH AN INSURANCE**  
15 **COMPANY PROMISES TO PAY A VARIABLE SUM OF MONEY, BASED ON**  
16 **INVESTMENT EXPERIENCE, EITHER IN A LUMP SUM OR PERIODICALLY FOR**  
17 **LIFE OR SOME OTHER SPECIFIED PERIOD.**