

No. 1994-126

AN ACT

HB 2075

Amending the act of December 5, 1972 (P.L.1280, No.284), entitled "An act relating to securities; prohibiting fraudulent practices in relation thereto; requiring the registration of broker-dealers, agents, investment advisers, and securities; and making uniform the law with reference thereto," adding provisions relating to limited liability companies.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 102(q) and (t) of the act of December 5, 1972 (P.L.1280, No.284), known as the Pennsylvania Securities Act of 1972, are amended to read:

Section 102. Definitions.—When used in this act, the following definitions shall be applicable, unless the context otherwise requires:

* * *

(q) "Reporting company" means any person which has been required to file, and has filed, all required periodic reports with the Securities and Exchange Commission and has filed all annual reports, if any, which it is required to file [(i)] for at least [ninety days] *twelve months* prior to the time of application of this definition for persons filing pursuant to the provisions of section 13 or 15(d) of the Securities Exchange Act of 1934[;] or [(ii) for at least one hundred eighty days prior to the time of application of this definition with respect to persons filing pursuant to] the provisions of section 30 of the Investment Company Act of 1940[, or for whom there is publicly available the information concerning such person which is specified in clauses (1) through (14) inclusive, and clause (16) of paragraph (a)(4) of Rule 15 c2-11 adopted under the Securities Exchange Act of 1934, or if the person is an insurance company the information specified in section 12(g)(2)(G)(i) of that act. Information shall also be deemed "publicly available" under this section if it has been filed in such places or with such persons as the commission may specify by regulation].

* * *

(t) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; share of beneficial interest in a business trust; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; limited partnership interest; 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; *membership interest in a limited liability company of any class or series, including any fractional or other interest in such interest, unless excluded by clause (v)*; or, in general, any interest or instrument commonly known as or having the incidents of 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. All of the foregoing are securities whether or not evidenced by written document. "Security" does not include:

(i) **[any] Any** beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business[.]; or

(ii) **[any] Any** beneficial interest in any testamentary trust[.]; or

(iii) **[any] Any** insurance or endowment policy or annuity contract under which an insurance company admitted in this State promises to pay a sum of money (whether or not based upon the investment performance of a segregated fund) either in a lump sum or periodically for life or some other specified period[.]; or

(iv) **[any] Any** certificate issued under section 809 of The Insurance Company Law of 1921, act of May 17, 1921 (P.L.682), as amended[.]; *or*

(v) *A membership interest in a limited liability company where all of the following conditions are satisfied:*

(A) *The membership interest is in a company that is not managed by managers;*

(B) *The purchaser of the membership interest enters into a written commitment to be engaged actively and directly in the management of the company; and*

(C) *The purchaser of the membership interest, in fact, does participate actively and directly in the management of the company.*

* * *

Section 2. Section 202 of the act is amended by adding a subsection to read:

Section 202. Exempt Securities.—The following securities are exempted from section 201:

* * *

(j) *Any membership interest in a limited liability company that renders one or more professional services. As used in this subsection, the term "professional services" shall have the meaning set forth in 15 Pa.C.S. § 2902 (relating to definitions).*

Section 3. Section 203(d), (i), (p) and (r) of the act, amended December 18, 1990 (P.L.755, No.190), are amended and the section is amended by adding a subsection to read:

Section 203. Exempt Transactions.—The following transactions are exempted from section 201:

* * *

(d) Any sales by an issuer to not more than twenty-five persons in this State during a period of twelve consecutive months if (i) the issuer shall obtain the written agreement of each such person not to sell the security within twelve months after the date of purchase; (ii) no public media advertisement is used or mass mailing made in connection with soliciting such sales; (iii) no cash or securities is given or paid, directly or indirectly, to any promoter as compensation in connection therewith unless such compensation is given or paid in connection with a sale made by a broker-dealer registered pursuant to section 301 and any person receiving such compensation is either such broker-dealer or an agent registered pursuant to section 301 of such broker-dealer; **[and]** (iv) the filing fee specified in section 602(b.1) is paid[.]; **and (v) the issuer has provided written notice to each such person of the right to withdraw an acceptance as provided by section 207(m)(2).** Purchasers of securities registered under this act or sold in reliance upon an exemption under this act other than this subsection (d) or subsection (f) shall not be included in computing the twenty-five persons for purposes of this exemption. A notice in the form prescribed by the commission, signed by the officers or directors of the issuer under oath and stating the name, principal business address of the issuer, proposed use of the proceeds from the sale and such facts as are necessary to establish this exemption shall be filed, together with a copy of any offering literature used in connection with such offer or sale, with the commission not later than the day on which the **[securities are first issued] issuer receives from any person an executed subscription agreement or other contract to purchase the securities being offered** or the issuer **[first]** receives consideration from any person therefor, whichever is earlier.

* * *

[(i) Any sale of a security registered under section 5 of the Securities Act of 1933 or exempt from registration pursuant to Regulation A promulgated under section 3(b) of such act if: (i) a copy of any final prospectus or final offering circular (whether in connection with the original registration or exemption under the Securities Act of 1933 or a post-effective amendment thereto) utilized or proposed to be utilized in connection therewith is mailed to the commission within two business days after such prospectus or offering circular is filed with the Securities and Exchange Commission; (ii) the applicable filing fee specified in section 602(b.1) is paid with respect to such offering; (iii) the issuer of the security is a reporting company; and (iv) no stop order or refusal order is in effect and no public proceeding or investigation looking toward such an order is pending under the Securities Act of 1933 or this act. As a condition of the continuing effectiveness of this exemption, copies of any post-effective amendment or sticker to such prospectus or offering circular must be mailed to the commission within two business days after the same is filed with the Securities and Exchange Commission. An exemption under this section shall terminate upon the

termination of the registration statement under section 5 or the exemption from registration pursuant to Regulation A promulgated under section 3(b) of the Securities Act of 1933, except that an exemption under this section for the sale of securities of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, shall also terminate twelve months from the date the prospectus described in (i) above is filed with the commission, unless renewed for another twelve-month period by the payment of the fee specified in section 602(b.1). Any exemption in effect under this section for the sale of securities of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, as of the effective date of this amendatory act, shall also terminate twelve months from the effective date of this amendatory act, unless renewed for another twelve-month period by the payment of the fee specified in section 602(b.1). The effectiveness of an exemption or renewal of an exemption under this section for the sale of securities of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, shall not be terminated as a result of a post-effective amendment seeking to register an additional amount of securities which becomes effective under the Securities Act of 1933.]

(i.1) Any sale of an equity security (except securities of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940) if: (i) the securities are proposed to be registered under section 5 of the Securities Act of 1933 or exempted under Regulation A promulgated under section 3(b) thereof and, in fact, become registered under section 5 of the Securities Act of 1933 or exempted from registration pursuant to Regulation A promulgated under section 3(b) of such act; (ii) a copy of any final prospectus or final offering circular utilized or proposed to be utilized in connection therewith is mailed to the commission within two business days after such prospectus or offering circular is filed with the Securities and Exchange Commission; (iii) the applicable filing fee specified in section 602(b.1) is paid with respect to such offering; (iv) the issuer of the security is a reporting company; (v) no stop order or refusal order is in effect and no public proceeding or investigation looking toward such an order is pending under the Securities Act of 1933 or this act; (vi) the equity security is listed on a national securities exchange registered under the Securities Exchange Act of 1934 or quoted on the National Association of Securities Dealers Automated Quotation System; (vii) the issuer, at the time it files the notice required in clause (viii) with the commission, has not received an auditor's report for the immediately preceding fiscal year expressing substantial doubt about the issuer's ability

to continue as a going concern unless the securities being sold in reliance upon this subsection are the subject of an offering that is being underwritten on a firm commitment basis by a broker-dealer registered under section 301; and (viii) the issuer has filed a notice with the commission in the form and manner which the commission, by regulation, may prescribe. As a condition of the continuing effectiveness of this exemption, copies of any post-effective amendment or sticker to such prospectus or offering circular must be mailed to the commission within two business days after the same is filed with the Securities and Exchange Commission. An exemption under this section shall terminate upon the termination of the registration statement under section 5 or the exemption from registration pursuant to Regulation A promulgated under section 3(b) of the Securities Act of 1933. For purposes of this subsection, the commission, by regulation, may define the term "equity security." Any exemption in effect under this section as of the effective date of this subsection for the sale of securities of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, shall terminate twelve months from the date the prospectus described in clause (ii) or exemption renewal was filed with the commission under this section. For all other issuers that have an exemption in effect under this subsection as of the effective date of this subsection, the exemption for the sale of securities by those issuers shall terminate twenty-four months after the effective date of this subsection.

* * *

(p) Any offer or sale of an evidence of indebtedness of an issuer either: organized exclusively for educational, benevolent, fraternal, religious, charitable, social, athletic or reformatory purposes and not for pecuniary profit, if no part of the net earnings of the issuer inures to the benefit of any private shareholder or individual; or organized as a chamber of commerce or trade or professional association if there has been filed with the commission a notice identifying the security and the basis of its qualification under this exemption together with such further information as the commission may by regulation require, and if the commission does not by order disallow the exemption within ten days or such shorter period as it may permit. The security qualifies under this exemption[:] if: (i) the issuer and any predecessor have not defaulted within the current fiscal year and the three preceding fiscal years in any fixed interest or principal obligation; [and] (ii) the issuer complies with regulations of the commission with respect to trust indentures and the use of a prospectus; [and] (iii) the securities proposed to be sold are secured by a mortgage or deed of trust upon land and buildings, which mortgage or deed of trust is or will become a first lien at or prior to the issuance of such evidences of indebtedness, or provision satisfactory to the commission is made for escrowing the proceeds from their sale until such first lien is established, and the total amount of such securities does not

exceed seventy-five per cent of the then fair market value of the land and buildings included in such mortgage or deed of trust, less the amount of any unpaid special assessment taxes[.]; *and (iv) any person who accepts an offer to purchase securities under this subsection has received a written notice of his right to withdraw his acceptance as provided by section 207(m)(2).* This exemption shall not apply to the securities of any nonprofit organization if any promoter thereof expects or intends to make a profit directly or indirectly from any business or activity associated with the organization or operation of such nonprofit organization.

* * *

(r) Any transaction or class of transactions as to which the commission by regulation or order finds that registration is not necessary or appropriate for the protection of investors. *As a condition of the availability of an exemption granted or established under this section, the commission may require compliance with the provisions of section 207(m)(2) and the rules and regulations promulgated thereunder.*

Section 4. Sections 207(j) and (m) and 209(b) of the act, amended May 9, 1984 (P.L.235, No.52), are amended and the sections are amended by adding subsections to read:

Section 207. General Registration Provisions.—* * *

(j) Except with respect to an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, a registration by coordination is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made, or by any underwriter or broker-dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, provided that the commission has been notified of such continued offering and the period thereof. A registration by coordination for an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, is effective for one year from its effective date. Any registration by coordination which is effective for the sale of securities in this State by an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, as of the effective date of this amendatory act, shall terminate twelve months from the effective date of this amendatory act. A registration by qualification is effective for one year from its effective date. The fact that a registration statement has been effective in this State with respect to any security does not permit sales of securities of the same class by the issuer or an affiliate of the issuer if such person did not file the registration statement, unless a separate

registration statement is filed and declared effective with respect thereto, or an exemption from registration is available. A registration statement may not be withdrawn after its effective date if any of the securities registered have been sold in this State, unless permitted by regulation or order of the commission. No registration statement is effective during the time a stop order is in effect under section 208. The effectiveness of a registration statement filed by an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such terms are defined in the Investment Company Act of 1940, shall not be terminated as a result of a post-effective amendment seeking to register an additional amount of securities which becomes effective under the Securities Act of 1933.]

(j.1) Except for a registration by coordination for an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, a registration by coordination is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made, or by any underwriter or broker-dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, provided that the commission has been notified of such continued offering and the period thereof. A registration by coordination for an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, is effective for the period beginning with its effective date and ending sixty days after the registrant's fiscal year end for the year in which the filing under section 205 became effective. A registration by coordination for a unit investment trust, as such a person is classified in the Investment Company Act of 1940, is effective for the period beginning with its effective date in this State and ending one year after the date the registration statement for the same securities became effective with the Securities and Exchange Commission. A registration by qualification is effective for one year from its effective date. The fact that a registration statement has been effective in this State with respect to any security does not permit sales of securities of the same class by the issuer or an affiliate of the issuer if such person did not file the registration statement, unless a separate registration statement is filed and declared effective with respect thereto, or an exemption from registration is available. A registration statement may not be withdrawn after its effective date if any of the securities registered have been sold in this State, unless permitted by regulation or order of the commission. No registration statement is effective during the time a stop order is in effect under section 208. The effectiveness of a registration statement filed by an open-end or closed-end investment company, face amount certificate company or unit

investment trust, as such terms are defined in the Investment Company Act of 1940, shall not be terminated as a result of a post-effective amendment seeking to register an additional amount of securities which becomes effective under the Securities Act of 1933. A registration statement for the sale of securities in this State by an open-end or closed-end investment company, face amount certificate company or unit investment trust that is effective under section 205 or 206 as of the effective date of this subsection shall terminate twelve months from the date the registration statement became effective.

* * *

(m) (1) Except where such securities are registered under section 5 of the Securities Act of 1933, each person who accepts an offer to purchase securities registered by qualification directly from an issuer or an affiliate of an issuer shall have the right to withdraw his acceptance without incurring any liability to the seller, underwriter (if any) or any other person, within two business days after he receives a prospectus relating to the offering (which is not materially different from the final prospectus relating to such offering) and a notice explaining the provisions of this subsection. As used herein, the term "final prospectus" shall mean the document prepared in accordance with such regulations as the commission may provide, to be used by the seller in connection with an offering of securities in this State after the registration of such securities has become effective under this act.

(2) Each person who accepts an offer to purchase securities exempted from registration by section 203(d)[, (f),] *and* (p) [or (r),] directly from an issuer or affiliate of an issuer shall [have the right] *receive a written notice in such form as the commission, by rule, may prescribe informing such person of his right under this subsection* to withdraw his acceptance without incurring any liability to the seller, underwriter (if any) or any other person, within two business days from the date of receipt by the issuer of his written binding contract of purchase or, in the case of a transaction in which there is no written binding contract of purchase, within two business days after he makes the initial payment for the securities being offered.

(n) *For purposes of coordinating the provisions of this act with uniform procedures to facilitate electronic filings of registration statements by means of a securities registration depository, the commission, by regulation, may adopt appropriate procedures or forms or waive or modify any provision of section 205 or 206 or this section.*

Section 209. Books, Records and Accounts.—* * *

(b) Every open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, filing under section [203(i), 205 or 206 and every issuer registering securities for sale in this State under section 206 shall file an annual report with the commission, no earlier than three hundred sixty-five days and no later than four hundred twenty days from the effective date of the registration, exemption or

exemption renewal, setting forth the total amount of securities sold in this State during the effective period of the registration statement, exemption or exemption renewal.] 205 or 206 shall file reports with the commission at such times and in such manner as the commission, by rule, may prescribe which, at a minimum, set forth the total amount of securities sold in this State during the effective period of the registration statement.

(c) Except open-end and closed-end investment companies, face amount certificate companies and unit investment trusts, as such persons are classified in the Investment Company Act of 1940, every issuer registering securities for sale in this State under section 206 shall file an annual report with the commission, no earlier than three hundred sixty-five days and no later than four hundred twenty days from the effective date of the registration, setting forth the total amount of securities sold in this State during the effective period of the registration statement.

Section 5. The act is amended by adding a section to read:

Section 210. Retroactive Registration of Certain Securities.—The commission, by regulation, may establish procedures whereby an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, which, during the effective period of registration under section 205 or 206, sold securities in this State in excess of the aggregate amount of securities registered for sale in this State under section 205 or 206 may apply to the commission to register such securities retroactive to the date of the initial registration. An application for retroactive registration of such securities shall not be granted if, at the time the application is filed, a civil, criminal or administrative proceeding is pending alleging violations of section 201 for the sale of such securities in this State, or such securities were sold more than twenty-four months prior to the date the application was filed with the commission. An application under this section shall not be granted unless the applicable oversale assessment prescribed by section 602.1(d) has been paid.

Section 6. Section 602(b.1)(i) and (iv) of the act, added December 18, 1990 (P.L.755, No.190), are amended to read:

Section 602. Fees.—* * *

(b.1) Filing fees for sales of securities:

[(i) Exemption filings under section 203(i), except as provided in subclause (iv)	\$100]
(i) Exemption filings under section 203(i)	\$250

* * *

(iv) In the case of registration statement filings under section 205 or 206 [or exemption filings under section 203(i)] by an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940.

Based upon the maximum aggregate offering price at which such securities are to be offered

in this State during the effective period of the registration, [**exemption or renewal of the exemption,**] the fee for (A) \$4,000,000 or less, 1/20 of 1% with a minimum fee of \$350; (B) more than \$4,000,000 but less than \$100,000,000, \$3,000; (C) \$100,000,000 or more, \$3,500; except that, in the case of a registration statement in which the issuer, pursuant to its articles of incorporation or other governing instruments, is restricted to holding exclusively debt securities of other persons having fixed final maturity dates occurring within 200 days from the initial effective date of the registration statement for the issuer's securities filed under the Securities Act of 1933, the maximum fee payable under the above schedule shall not exceed \$1,500.

If an open-end or closed-end investment company, face amount certificate company or unit investment trust, as such persons are classified in the Investment Company Act of 1940, which has an effective registration under section 205 or 206 elects to convert to an exemption under section 203(i) without extending the effective period of the exemption under section 203(i) beyond the date upon which the registration under section 205 or 206 would have otherwise terminated, there shall be no additional filing fee required.

* * *

Section 7. Section 602.1(d) of the act, added May 4, 1993 (P.L.4, No.4), is amended and the section is amended by adding a subsection to read:

Section 602.1. Assessments.—* * *

(d) *Each application filed with the commission under section 210 by an open-end or closed-end investment company, face amount certificate company or unit investment trust, as those persons are classified in the Investment Company Act of 1940, to register securities sold in this State in excess of the aggregate amount of securities registered under section 205 or 206 shall include the payment of an oversale assessment which shall be three times an amount which equals the difference between the registration fee that would have been payable under section 602(b.1) based upon the total amount of securities sold in this State and the total registration fees previously paid to the commission with respect to such registration, but in no case shall the oversale assessment be less than three hundred fifty dollars (\$350) or be more than three thousand dollars (\$3,000).*

(e) Moneys payable for assessments established by this section shall be collected by the commission and deposited into the General Fund and shall be credited to the appropriation of the commission for the fiscal year received. These moneys are intended to meet the expenses of *the commission*

in administering the provisions of this act, including any or all of the following activities:

(1) expenses, including personnel, operating and fixed assets costs, relating to the registration of broker-dealers, agents, investment advisers and associated persons under section 301 and the conduct of examinations of broker-dealers and investment advisers registered under section 301 and other compliance-related activities of the commission;

(2) nonpersonnel expenses related to establishing and maintaining an entrepreneur education program to educate small business persons in this Commonwealth as to the issuance of securities as a means of raising capital;

(3) nonpersonnel expenses related to establishing and maintaining a securities fraud awareness program to educate public investors in this Commonwealth about fraudulent and manipulative securities practices; ~~[and]~~

(4) nonpersonnel expenses related to conducting enforcement-related activities of the commission[.]; *and thereafter,*

(5) *other expenses of the commission necessary to implement the provisions of this act.*

Section 8. This act shall take effect as follows:

(1) The amendment or addition of sections 210 and 602.1 shall take effect July 1, 1994, or immediately, whichever is later.

(2) This section shall take effect immediately.

(3) The remainder of this act shall take effect in 90 days.

APPROVED—The 7th day of December, A.D. 1994.

ROBERT P. CASEY