

CHAPTER 302

(House Bill 571)

AN ACT concerning

Senior Investment Protection Act

FOR the purpose of prohibiting a person from using a ~~senior-specific certification or professional~~ senior or retiree credential or designation in such a way as to mislead a person in connection with the offer, sale, or purchase of ~~any security or in~~ securities, in connection with receiving certain consideration from another person for advising ~~another~~ the other person as to the value, purchase, or sale of ~~any security~~ securities, or in connection with acting as a broker-dealer, agent, investment adviser, or investment adviser representative; ~~specifying the factors that must be considered in determining whether a person is using a senior-specific certification or professional designation; establishing a rebuttable presumption that a certifying or professional designating organization is not disqualified under certain provisions of this Act under certain circumstances; providing that a certification or professional designation does not include a job title within certain organizations under certain circumstances; defining a certain term;~~ requiring the Securities Commissioner of the Securities Division, by rule or order, to define what constitutes a misleading use of a senior or retiree credential or designation for a certain purpose; providing that a violation of a certain rule or order constitutes a dishonest or unethical practice for purposes of certain provisions of law; authorizing the Commissioner, by rule or order, to provide certain exemptions from certain provisions of this Act under certain circumstances; providing that certain provisions of this Act do not limit certain powers of the Commissioner; establishing certain penalties for a willful violation of certain provisions of this Act; making certain stylistic changes; making this Act an emergency measure; and generally relating to the Senior Investment Protection Act.

BY repealing and reenacting, ~~with~~ without amendments,
Article – Corporations and Associations
Section ~~11-301 and 11-302~~ 11-302(a) and 11-412
Annotated Code of Maryland
(2007 Replacement Volume and 2008 Supplement)

BY adding to
Article – Corporations and Associations
Section 11-305
Annotated Code of Maryland
(2007 Replacement Volume and 2008 Supplement)

BY repealing and reenacting, ~~without~~ with amendments,
Article – Corporations and Associations
Section ~~11-412~~ 11-705(a)
Annotated Code of Maryland
(2007 Replacement Volume and 2008 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Corporations and Associations

~~11-301.~~

~~(A) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:~~

~~(1) Employ any device, scheme, or artifice to defraud;~~

~~(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; [or]~~

~~(3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person; OR~~

~~(4) USE A SENIOR SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING.~~

~~(B) (1) FOR PURPOSES OF SUBSECTION (A)(4) OF THIS SECTION, THE USE OF A SENIOR SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING INCLUDES:~~

~~(I) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION WITHOUT HAVING EARNED OR BEING OTHERWISE ELIGIBLE TO USE THE CERTIFICATION OR PROFESSIONAL DESIGNATION;~~

~~(II) USING A NONEXISTENT OR SELF-CONFERRED CERTIFICATION OR PROFESSIONAL DESIGNATION;~~

~~(III) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT INDICATES OR IMPLIES A LEVEL OF OCCUPATIONAL QUALIFICATION OBTAINED THROUGH EDUCATION, TRAINING, OR EXPERIENCE WITHOUT COMPLETING THE QUALIFICATION; AND~~

~~(IV) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT WAS OBTAINED FROM A DESIGNATING OR CERTIFYING ORGANIZATION THAT:~~

~~1. IS PRIMARILY ENGAGED IN THE BUSINESS OF INSTRUCTION IN SALES OR MARKETING;~~

~~2. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR ASSURING THE COMPETENCY OF THOSE WHOM IT CERTIFIES OR DESIGNATES;~~

~~3. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR MONITORING AND DISCIPLINING THOSE WHOM IT CERTIFIES OR DESIGNATES FOR IMPROPER OR UNETHICAL CONDUCT; OR~~

~~4. DOES NOT HAVE REASONABLE CONTINUING EDUCATION REQUIREMENTS FOR THOSE WHOM IT CERTIFIES OR DESIGNATES IN ORDER TO MAINTAIN THE CERTIFICATION OR PROFESSIONAL DESIGNATION.~~

~~(2) THERE IS A REBUTTABLE PRESUMPTION THAT A CERTIFYING OR PROFESSIONAL DESIGNATING ORGANIZATION IS NOT DISQUALIFIED FOR PURPOSES OF PARAGRAPH (1)(IV) OF THIS SUBSECTION IF THE ORGANIZATION IS ACCREDITED BY:~~

~~(I) THE AMERICAN NATIONAL STANDARDS INSTITUTE;~~

~~(II) THE NATIONAL COMMISSION FOR CERTIFYING AGENCIES; OR~~

~~(III) 1. AN ORGANIZATION THAT IS ON THE U.S. DEPARTMENT OF EDUCATION'S LIST "ACCREDITING AGENCIES RECOGNIZED FOR TITLE IV PURPOSES"; AND~~

~~2. THE CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT APPLY PRIMARILY TO SALES OR MARKETING.~~

~~(3) IN DETERMINING WHETHER A PERSON IS USING A SENIOR SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION, THE FOLLOWING FACTORS SHALL BE CONSIDERED:~~

~~(I) USE OF THE WORDS "SENIOR", "RETIREMENT", "ELDER", OR SIMILAR WORDS, COMBINED WITH "CERTIFIED", "REGISTERED", "CHARTERED", "ADVISER", "SPECIALIST", "CONSULTANT", "PLANNER", OR~~

~~SIMILAR WORDS IN THE NAME OF THE PROFESSIONAL CERTIFICATION OR PROFESSIONAL DESIGNATION; AND~~

~~(H) THE MANNER IN WHICH THE WORDS IN ITEM (I) OF THIS PARAGRAPH ARE COMBINED.~~

~~(4) (I) IN THIS PARAGRAPH, "FEDERAL FINANCIAL SERVICES REGULATORY AGENCY" INCLUDES AN AGENCY THAT REGULATES BROKER DEALERS, INVESTMENT ADVISERS, OR INVESTMENT COMPANIES AS DEFINED UNDER THE INVESTMENT COMPANY ACT OF 1940.~~

~~(H) A CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT INCLUDE A JOB TITLE WITHIN AN ORGANIZATION THAT IS LICENSED OR REGISTERED BY A STATE OR FEDERAL FINANCIAL SERVICES REGULATORY AGENCY IF THE JOB TITLE:~~

~~1. INDICATES SENIORITY OR STANDING WITHIN THE ORGANIZATION; OR~~

~~2. SPECIFIES AN INDIVIDUAL'S AREA OF SPECIALIZATION WITHIN THE ORGANIZATION.~~

11-302.

(a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to:

- (1) Employ any device, scheme, or artifice to defraud the other person;
- (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on the other person;
- (3) Engage in dishonest or unethical practices as the Commissioner may define by rule; ~~for~~

(4) When acting as principal for the person's own account knowingly sell any security to or purchase any security from a client, or when acting in an agency capacity for a person other than such client knowingly effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which the person is acting and obtaining the consent of the client to such transaction; ~~OR~~

~~(5) USE A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING.~~

~~(b) The prohibitions of subsection (a)(4) of this section do not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction or to transactions by a federal covered adviser who is otherwise subject to the limitations on principal trades under the federal securities laws.~~

~~(c) In the solicitation of or in dealings with advisory clients, it is unlawful for any person knowingly to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.~~

~~(d) (1) The Commissioner by rule or order may require that certain information be furnished or disseminated by investment advisers as appropriate in the public interest or for the protection of investors and advisory clients.~~

~~(2) To the extent determined by the Commissioner in the Commissioner's discretion, information furnished to clients or prospective clients of an investment adviser that would be in compliance with the disclosure requirements of the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.~~

~~(e) (1) Except as permitted by rule or order of the Commissioner, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract, unless it provides in writing that:~~

~~(i) The investment adviser shall not be compensated on the basis of a share of capital gains on or capital appreciation of the funds or any portion of the funds of the client;~~

~~(ii) An assignment of the contract may not be made by the investment adviser without the consent of the other party to the contract; and~~

~~(iii) The investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.~~

~~(2) Paragraph (1)(i) of this subsection does not prohibit an investment advisory contract which provides for compensation based on the total value of a fund averaged over a definite period or as of definite dates or taken as of a definite date.~~

~~(3) "Assignment", as used in paragraph (1)(ii) of this subsection, includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of controlling block of the assignor's outstanding voting~~

~~securities by a security holder of the assignor, but, if the investment adviser is a partnership, an assignment of an investment advisory contract is not considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.~~

~~(f) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client if:~~

~~(1) The Commissioner by rule prohibits custody; or~~

~~(2) In the absence of a rule, the investment adviser fails to notify the Commissioner that he has or may have custody.~~

~~(g) The Commissioner by rule or order may adopt exemptions from subsections (a)(4), and (c)(1)(i), (ii), and (iii) of this section, where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this title.~~

~~(H) (1) FOR PURPOSES OF SUBSECTION (A)(5) OF THIS SECTION, THE USE OF A SENIOR-SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION IN A WAY THAT IS MISLEADING INCLUDES:~~

~~(I) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION WITHOUT HAVING EARNED OR BEING OTHERWISE ELIGIBLE TO USE THE CERTIFICATION OR PROFESSIONAL DESIGNATION;~~

~~(II) USING A NONEXISTENT OR SELF-CONFERRED CERTIFICATION OR PROFESSIONAL DESIGNATION;~~

~~(III) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT INDICATES OR IMPLIES A LEVEL OF OCCUPATIONAL QUALIFICATION OBTAINED THROUGH EDUCATION, TRAINING, OR EXPERIENCE WITHOUT COMPLETING THE QUALIFICATION; AND~~

~~(IV) USING A CERTIFICATION OR PROFESSIONAL DESIGNATION THAT WAS OBTAINED FROM A DESIGNATING OR CERTIFYING ORGANIZATION THAT:~~

~~1. IS PRIMARILY ENGAGED IN THE BUSINESS OF INSTRUCTION IN SALES OR MARKETING;~~

~~2. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR ASSURING THE COMPETENCY OF THOSE WHOM IT CERTIFIES OR DESIGNATES;~~

~~3. DOES NOT HAVE REASONABLE STANDARDS OR PROCEDURES FOR MONITORING AND DISCIPLINING THOSE WHOM IT CERTIFIES OR DESIGNATES FOR IMPROPER OR UNETHICAL CONDUCT; OR~~

~~4. DOES NOT HAVE REASONABLE CONTINUING EDUCATION REQUIREMENTS FOR THOSE WHOM IT CERTIFIES OR DESIGNATES IN ORDER TO MAINTAIN THE CERTIFICATION OR PROFESSIONAL DESIGNATION.~~

~~(2) THERE IS A REBUTTABLE PRESUMPTION THAT A CERTIFYING OR PROFESSIONAL DESIGNATING ORGANIZATION IS NOT DISQUALIFIED FOR PURPOSES OF PARAGRAPH (1)(IV) OF THIS SUBSECTION IF THE ORGANIZATION IS ACCREDITED BY:~~

~~(I) THE AMERICAN NATIONAL STANDARDS INSTITUTE;~~

~~(II) THE NATIONAL COMMISSION FOR CERTIFYING AGENCIES; OR~~

~~(III) 1. AN ORGANIZATION THAT IS ON THE U.S. DEPARTMENT OF EDUCATION'S LIST "ACCREDITING AGENCIES RECOGNIZED FOR TITLE IV PURPOSES"; AND~~

~~2. THE CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT APPLY PRIMARILY TO SALES OR MARKETING.~~

~~(3) IN DETERMINING WHETHER A PERSON IS USING A SENIOR SPECIFIC CERTIFICATION OR PROFESSIONAL DESIGNATION, THE FOLLOWING FACTORS SHALL BE CONSIDERED:~~

~~(I) USE OF THE WORDS "SENIOR", "RETIREMENT", "ELDER", OR SIMILAR WORDS, COMBINED WITH "CERTIFIED", "REGISTERED", "CHARTERED", "ADVISER", "SPECIALIST", "CONSULTANT", "PLANNER", OR SIMILAR WORDS IN THE NAME OF THE PROFESSIONAL CERTIFICATION OR PROFESSIONAL DESIGNATION; AND~~

~~(II) THE MANNER IN WHICH THE WORDS IN ITEM (I) OF THIS PARAGRAPH ARE COMBINED.~~

~~(4) (I) IN THIS PARAGRAPH, "FEDERAL FINANCIAL SERVICES REGULATORY AGENCY" INCLUDES AN AGENCY THAT REGULATES~~

~~BROKER-DEALERS, INVESTMENT ADVISERS, OR INVESTMENT COMPANIES AS DEFINED UNDER THE INVESTMENT COMPANY ACT OF 1940.~~

~~(H) A CERTIFICATION OR PROFESSIONAL DESIGNATION DOES NOT INCLUDE A JOB TITLE WITHIN AN ORGANIZATION THAT IS LICENSED OR REGISTERED BY A STATE OR FEDERAL FINANCIAL SERVICES REGULATORY AGENCY IF THE JOB TITLE:~~

~~1. INDICATES SENIORITY OR STANDING WITHIN THE ORGANIZATION; OR~~

~~2. SPECIFIES AN INDIVIDUAL'S AREA OF SPECIALIZATION WITHIN THE ORGANIZATION.~~

11-305.

(A) IT IS UNLAWFUL FOR ANY PERSON TO USE A SENIOR OR RETIREE CREDENTIAL OR DESIGNATION IN A WAY THAT IS OR WOULD BE MISLEADING IN CONNECTION WITH:

(1) THE OFFER, SALE, OR PURCHASE OF SECURITIES;

(2) RECEIVING, DIRECTLY OR INDIRECTLY, ANY CONSIDERATION FROM ANOTHER PERSON FOR ADVISING THE OTHER PERSON AS TO THE VALUE OF SECURITIES OR THEIR PURCHASE OR SALE; OR

(3) ACTING AS A BROKER-DEALER, AGENT, INVESTMENT ADVISER, OR INVESTMENT ADVISER REPRESENTATIVE.

(B) THE COMMISSIONER BY RULE OR ORDER SHALL DEFINE WHAT CONSTITUTES A MISLEADING USE OF A SENIOR OR RETIREE CREDENTIAL OR DESIGNATION FOR PURPOSES OF SUBSECTION (A) OF THIS SECTION.

(C) A VIOLATION OF A RULE OR ORDER ADOPTED UNDER SUBSECTION (B) OF THIS SECTION ALSO CONSTITUTES A DISHONEST OR UNETHICAL PRACTICE FOR PURPOSES OF § 11-302(A)(3) OF THIS SUBTITLE AND § 11-412(A)(7) OF THIS TITLE.

(D) THE COMMISSIONER BY RULE OR ORDER MAY PROVIDE EXEMPTIONS FROM SUBSECTIONS (A) AND (C) OF THIS SECTION, WHERE SUCH EXEMPTIONS ARE CONSISTENT WITH THE PUBLIC INTEREST AND WITHIN THE PURPOSES FAIRLY INTENDED BY THE POLICY AND PROVISIONS OF THIS TITLE.

(E) THIS SECTION DOES NOT LIMIT ANY POWERS OF THE COMMISSIONER GRANTED UNDER THIS TITLE.

11-412.

(a) The Commissioner by order may deny, suspend, or revoke any registration if the Commissioner finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:

(1) Has filed an application for registration which, as of its effective date or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(2) Has willfully violated or willfully failed to comply with any provisions of this title, a predecessor act, or any rule or order under this title or a predecessor act;

(3) Has been convicted, within the last 10 years, of a felony, or of an offense that:

(i) Involves the taking of a false oath, the making of a false report, bribery, perjury, burglary, or attempt or conspiracy to commit any of those offenses;

(ii) Arises out of the conduct of business as, or employment by or association with, a broker-dealer, municipal or government securities broker or dealer, investment adviser, bank, savings institution, trust company, credit union, savings and loan association, insurance company or insurance producer, fiduciary, investment company, accountant, or real estate agent or broker, or any entity or person required to be registered under the Commodity Exchange Act; or

(iii) Involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, or an attempt or conspiracy to commit any of those offenses;

(4) Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practices involving any aspect of the securities or investment advisory or any other financial services business;

(5) Is the subject of an order of the Commissioner denying, suspending, or revoking registration as a broker-dealer, agent, investment adviser, or investment adviser representative;

(6) Is the subject of an order entered within the past five years by the securities administrator or any other financial services regulator of any state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, investment adviser, investment adviser representative, or agent or the substantial equivalent of those terms as defined in this title, or any other financial services license or registration, or is the subject of an order by the Commodity Futures Trading Commission denying, suspending, or revoking registration under the Commodity Exchange Act, or is suspended or expelled from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934 either by action of a national securities exchange or national securities association, the effect of which action has not been stayed by appeal or otherwise, or by order of the Securities and Exchange Commission, or is the subject of a United States post office fraud order, but:

(i) The Commissioner may not institute a revocation or suspension proceeding under this item (6) more than one year from the date of the order or action relied on; and

(ii) The Commissioner may not enter an order under this item (6) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section;

(7) Has engaged in dishonest or unethical practices in the securities or investment advisory or any other financial services business;

(8) Is insolvent, either in the sense that the person's liabilities exceed assets or in the sense that the person cannot meet obligations as they mature, but the Commissioner may not enter an order against a broker-dealer or investment adviser under this item (8) without a finding of insolvency as to the broker-dealer or investment adviser;

(9) Is not qualified on the basis of factors such as training, experience, and knowledge of the securities or investment advisory or any other financial services business, except as otherwise provided in subsection (c) of this section;

(10) Has failed reasonably to supervise the broker-dealer's agents, if the person is a broker-dealer, or the investment adviser's representatives, if the person is an investment adviser; or

(11) Has failed to pay the proper fee, but the Commissioner may enter only a denial order under this item (11), and the Commissioner shall vacate the order when the deficiency is corrected.

(b) (1) In this subsection, “final administrative order” does not include an order that is stayed or subject to further review or appeal.

(2) If an applicant for initial registration discloses the existence of a final judicial or administrative order to the Commissioner before the effective date of the initial registration, the Commissioner may not institute a suspension or revocation proceeding based solely on the judicial or administrative order unless the proceeding is initiated within 90 days immediately following the effective date of the applicant’s initial registration.

(c) The following provisions govern the application of subsection (a)(9) of this section:

(1) The Commissioner may not enter an order against a broker–dealer on the basis of the lack of qualification of any person other than that broker–dealer if the broker–dealer is an individual, or an agent of the broker–dealer;

(2) The Commissioner may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than that investment adviser if the investment adviser is an individual, or an investment adviser representative of the investment adviser;

(3) The Commissioner may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both;

(4) The Commissioner shall consider that an agent who will work under the supervision of a registered broker–dealer need not have the same qualifications as a broker–dealer and that an investment adviser representative who will work under the supervision of a registered investment adviser need not have the same qualifications as an investment adviser;

(5) The Commissioner shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker–dealer or agent. When the Commissioner finds that an applicant for initial or renewal registration as a broker–dealer is not qualified as an investment adviser, the Commissioner by order may condition the applicant’s registration as a broker–dealer upon the broker–dealer not transacting business in this State as an investment adviser; and

(6) The Commissioner by rule may provide for an examination, which may be written, oral, or both, to be taken by any class of or all applicants. The Commissioner by rule or order may waive the examination requirement as to a person or class of persons if the Commissioner determines that the examination is not necessary or appropriate in the public interest or for the protection of investors.

11-705.

(a) (1) Any person who willfully violates any provision of this title, except § 11-303 OR § 11-305 of this title or who willfully violates any rule or order under this title EXCEPT A RULE OR ORDER UNDER § 11-305 OF THIS TITLE, or who willfully violates § 11-303 of this title knowing the statement made to be false or misleading in any material respect, on conviction is subject to a fine not exceeding \$50,000 or imprisonment not exceeding [three] 3 years or both.

(2) ANY PERSON WHO WILLFULLY VIOLATES § 11-305 OF THIS TITLE OR WHO WILLFULLY VIOLATES A RULE OR ORDER UNDER § 11-305 OF THIS TITLE, ON CONVICTION IS SUBJECT TO A FINE NOT EXCEEDING \$100,000 OR IMPRISONMENT NOT EXCEEDING 5 YEARS OR BOTH.

[(2)] (3) A person may not be imprisoned for the violation of any rule or order if [he] THE PERSON proves that [he] THE PERSON had no knowledge of the rule or order.

[(3)] (4) An indictment or information may not be returned under this title more than [five] 5 years after the alleged violation.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act ~~shall take effect October 1, 2009~~ is an emergency measure, is necessary for the immediate preservation of the public health or safety, has been passed by a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, and shall take effect from the date it is enacted.

Approved by the Governor, May 7, 2009.