

1 **14-4301. Offer or sale of unregistered securities; essential elements.**

2 For you to find the defendant guilty of the [offer to sell][or][sale of]¹ unregistered securities
3 [as charged in Count _____]², the State must prove to your satisfaction beyond a reasonable
4 doubt each of the following elements of the crime:

5 1. The defendant [offered to sell] [or] [sold]¹ a security;³

6 2. The security was required by the New Mexico Uniform Securities Act to be
7 registered with the State of New Mexico prior to the [sale] [or] [offer for sale];^{1,4}

8 3. The security was not registered as required under the New Mexico Uniform
9 Securities Act;

10 4. This happened in New Mexico on or about the _____ day of
11 _____, _____.⁵

12 **USE NOTES**

13 1. Use only the applicable alternatives.

14 2. Insert the Count Number if more than one count is charged.

15 3. UJI 14-4310 NMRA, the definition of “security”, must also be given immediately
16 after this instruction.

17 4. If the defendant claims that the security was exempt and there is a factual basis for
18 this claim, UJI 14-4320 NMRA must be given. If the defendant claims that the sales transaction
19 or offer to sell transaction was exempt and there is a factual basis for this claim, UJI 14-4321
20 NMRA must be given.

21 5. UJI 14-141 NMRA, General criminal intent, must also be given with this
22 instruction.

1 [Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009,
2 effective for all cases filed or pending on or after December 31, 2021.]

3 **Committee commentary.** — Criminal Intent.

4 [The] “[T]he sale of unregistered securities is not a specific intent crime.” *State v. Sheets*[~~7~~], 1980-
5 NMCA-041, ¶ 42, 94 N.M. 356, [365,] 610 P.2d 760 [~~(Ct. App. 1980), cert. denied~~], *cert. denied*,
6 94 N.M. 675, 615 P.2d 992 (1980). UJI 14-141, general criminal intent, must be given with this
7 instruction. Security - Question of Fact - Question of Law
8 The question of what constitutes a [“]security[”] is a mixed question of law and fact. *See* Modern
9 Federal Jury Instructions, Section 57.10; *United States v. Austin*[~~7~~], 462 F.2d 724 (10th Cir. 1972);
10 [and] *Roe v. United States*[~~7~~], 287 F.2d 435 (5th Cir. 1961) [~~(cert den.)~~], *cert. denied*, 368 U.S. 824[~~7~~;
11 ~~82 S. Ct. 43, 7 L. Ed. 2d 29~~] (1961). There are numerous cases which state that the question of
12 whether a specific instrument is a security is a matter of fact for the jury to determine.

13 Almost all cases stating that the question of what is a security is a matter of fact for the jury involve
14 the sale of an [“]investment contract[”].” *See* [~~for example~~], *e.g.*, *State v. Shade*[~~7~~], 1986-NMCA-
15 072, 104 N.M. 710, 726 P.2d 864[~~(Ct. App. 1986) (cert. quashed)~~], *cert. quashed*, 104 N.M. 702,
16 726 P.2d 856 (1986) (sale of time-share memberships - relying on *Roe* [~~v. United States, supra~~],
17 287 F.2d 435, held question whether a time-share contract was an investment contract was question
18 of fact); *Roe* [~~v. United States, supra~~], 287 F.2d 435 (sale of mineral lease - question whether the
19 mineral lease was sale of real property or an investment contract was question of fact for the jury);
20 *Ahrens v. American-Canadian Beaver Co., Inc.*[~~7~~], 428 F.2d 926 (10th Cir. 1970) (sale of beaver
21 contracts by owner of beaver farm - held not error to submit to jury question of whether a beaver
22 contract was an investment contract); *United States v. Johnson*[~~7~~], 718 F.2d 1317 (5th Cir. 1983)
23 (sale of gold certificate contract purporting to assign quantity of gold); *Hentzner v. Alaska*[~~7~~], 613

1 P.2d 821 (Alaska 1980) (payment to defendant to find gold - question whether investment contract
2 was question of fact for the jury).

3 All other cases stating that the question of whether the instrument was a security is a question of
4 fact also involve the sale of some other novel type security. *See* ~~[:]~~ *People v. Figueroa* ~~[, 224 Cal.~~
5 ~~Rptr 719, 41 Cal.3rd 714]~~, 715 P.2d 680 (Cal. ~~[:]~~ 1986) (sale of promissory note); *Miller v.*
6 ~~[Florida,] *State*, 285 So.2d 41 (Fla. ~~[:]~~ 1973)~~ (sale of joint venture in Bogota, Columbia - question
7 of whether personal loan or an investment in a joint venture question for jury).

8 In *SEC v. C. M. Joiner Corp.* ~~[:]~~, 320 U.S. 344 ~~[, 64 S. Ct. 120, 88 L.Ed 88]~~ (1943), the United
9 States Supreme Court held that:

10 In the Securities Act the term ~~[“]‘security[“]’~~ was defined to include by name or description many
11 documents in which there is common trading for speculation or investment. Some, such as notes,
12 bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning.
13 Others are of more variable character and were necessarily designated by more descriptive terms,
14 such as ~~[“]‘transferable share[“],’ ‘investment contract[“],’~~ and ~~[“]‘in general any interest or~~
15 ~~instrument commonly known as a security[“].’~~ We cannot read out of the statute these general
16 descriptive designations merely because more specific ones have been used to reach some kinds
17 of documents. Instruments may be included within any of these definitions, as a matter of law, if
18 on their face they answer to the name or description. However, the reach of the Act does not stop
19 with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear
20 to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in
21 terms of courses of dealing which establish their character in commerce as ~~[“]‘investment~~
22 ~~contracts[“],’~~ or as ~~[“]‘any interest or instrument commonly known as a [“]‘[“]security[“].’[“]’~~
23 ~~[(Emphasis added.)]~~

1 Even though an instrument may be called by a name which is commonly considered to be a type
2 of security, the instrument may not be a security if the ["context otherwise requires["].” In
3 *Marine Bank v. Weaver*[,], 455 U.S. 551[, 71 L. Ed. 2d 409, 102 S. Ct. 1220] (1982), the United
4 States Supreme Court held that a non-publicly traded certificate of deposit of a financial institution
5 was not a security. The [~~court~~] Court said that profit alone is not enough.

6 In *United Housing Foundation, Inc. v. Forman* [*et al.*], 421 U.S. 837[, 95 S. Ct. 2051, 44 L. Ed.
7 2d 621] (1975), the [~~court~~] Court held that even though the instruments involved were called shares
8 of ["stock["],” they were not securities as they did not confer rights to receive dividends
9 contingent upon an apportionment of profits. The [~~United Housing~~] United Housing case involved
10 a massive non-profit housing cooperative constructed and financed under New [~~York's~~] York's
11 Private Housing Finance Law to provide low income housing. Tenants were required to purchase
12 18 shares of ["stock["]” for each room of an apartment at \$25.00 per share (\$1,800 for [4] a four-
13 room apartment). The shares could not be pledged, encumbered or bequeathed (except to surviving
14 spouse). Shareholders had no voter rights. When the shares were sold to a new tenant, the seller
15 could not receive more than \$25.00 per share plus a fraction of the mortgage then paid off. No
16 dividends were to be paid. The [~~court~~] Court held that the shares were not purchased for profit, but
17 to participate in the project and were therefore not ["securities["].”

18 In *Landreth v. Landreth Timber Co.*[,], 471 U.S. 681[, 105 S. Ct. 2297, 85 L. Ed. 2d 692] (1985),
19 the Supreme Court rejected the argument that the *Forman*[,], *Marine Bank*, [~~and~~] and *Tcherepnin*
20 *v. Knight*[,], 389 U.S. 332[, 88 S. Ct. 548, 19 L. Ed. 2d 564] (1967), cases mandated a case by case
21 determination as to whether the economic realities call for an application of the federal securities
22 act, holding that if the instrument involved is ["traditional stock["]” there is no need to look
23 beyond the characteristics of the instrument. Landreth involved the sale of 100% of the stock of a

1 business. The Supreme Court rejected the so-called ["sale of business"] doctrine. (~~See~~ See,
2 however, committee commentary to UJI 14-4312.) The Supreme Court distinguished *Forman*,
3 *Marine Bank*, ~~and~~ *Tcherepnin* stating that:
4 these cases, like the other cases on which respondents rely, involved unusual instruments that did
5 not fit squarely within one of the enumerated specific kinds of securities listed in the definition.
6 ~~Tcherepnin~~ *Tcherepnin* involved withdrawable capital shares in a state savings and loan
7 association, and ~~Weaver~~ *Weaver* involved a certificate of deposit and a privately negotiated profit
8 sharing agreement.

9 * * *

10 . . . Nor does ~~Forman~~ *Forman* require a different result. Respondents are correct that in *Forman*
11 we eschewed a ["literal"] approach that would involve the Acts' coverage simply because
12 the instrument carried the label ["stock."] ~~Forman~~ *Forman* does not, however, eliminate the
13 ~~Court's~~ Court's ability to hold an instrument is covered when its characteristics bear out the label.

14 * * *

15 As Professor Loss explains, ["It is one thing to say that the typical cooperative apartment dweller
16 has bought a home, not a security; or that not every installment purchase ['note'] is a security;
17 or that a person who charges a restaurant meal by signing [his] [a] credit card slip is not selling a
18 security even though [his] [the] signature is an ['evidence of indebtedness.'] But stock (except
19 for the residential wrinkle) is so quintessentially a security as to foreclose further analysis."]
20 471 U.S. at 689 n.4, 691, 693.

21 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]