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

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

1. The defendant [~~(offered to sell)~~[1] ~~(or) (sold)~~] [offered to sell] [or] [sold][1] a security[3];

2. The security was required by the [~~state securities law~~] New Mexico Uniform Securities Act to be registered with the State of New Mexico prior to the [~~(sale)~~[1] ~~(or) (offer for sale)~~[4]] [sale] [or] [offer for sale][1, 4];

3. The security was not registered as required [~~by the state securities law~~] under the New Mexico Uniform Securities Act;

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

[As amended by Supreme Court Order No. 21-8300-009, effective December 31, 2021.]

USE NOTES

1. Use only the applicable alternatives.

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

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

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

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

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

Committee commentary. — Criminal Intent.

The sale of unregistered securities is not a specific intent crime. *State v. Sheets,* 94 N.M. 356, 365, 610 P.2d 760 (Ct. App. 1980), cert. denied 94 N.M. 675, 615 P.2d 992 (1980). UJI 14-141, general criminal intent, must be given with this instruction. Security - Question of Fact - Question of Law

The question of what constitutes a "security" is a mixed question of law and fact. *See* Modern Federal Jury Instructions, Section 57.10; *United States v. Austin,* 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961) (cert den. 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29) (1961). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine.

Almost all cases stating that the question of what is a security is a matter of fact for the jury involve the sale of an "investment contract". *See* for example: *State v. Shade,* 104 N.M. 710, 726 P.2d 864 (Ct.App. 1986) (cert. quashed) (sale of time-share memberships - relying on *Roe v. United States,* supra, held question whether a time-share contract was an investment contract was question of fact); *Roe v. United States*, supra; (sale of mineral lease - question whether the mineral lease was sale of real property or an investment contract was question of fact for the jury); *Ahrens v. American-Canadian Beaver Co., Inc.,* 428 F.2d 926 (10th Cir. 1970) (sale of beaver contracts by owner of beaver farm - held not error to submit to jury question of whether a beaver contract was an investment contract); *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983) (sale of gold

certificate contract purporting to assign quantity of gold); *Hentzner v. Alaska,* 613 P.2d 821 (Alaska 1980) (payment to defendant to find gold - question whether investment contract was question of fact for the jury).

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

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

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

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

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

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

The Supreme Court rejected the so-called "sale of business" doctrine. (*See*, however, committee commentary to UJI 14-4312.) The Supreme Court distinguished *Forman, Marine Bank and Tcherepnin* stating that:

these cases, like the other cases on which respondents rely, involved unusual instruments that did not fit squarely within one of the enumerated specific kinds of securities listed in the definition. Tcherepnin involved withdrawable capital shares in a state savings and loan association, and Weaver involved a certificate of deposit and a privately negotiated profit sharing agreement.

* * *

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

* * *

As Professor Loss explains, "It is one thing to say that the typical cooperative apartment dweller has bought a home, not a security; or that not every installment purchase 'note' is a security; or that a person who charges a restaurant meal by signing his credit card slip is not selling a security even though his signature is an 'evidence of indebtedness.' But stock (except for the residential wrinkle) is so quintessentially a security as to foreclose further analysis."