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Court of Appeals
Division I
State of Washington
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No. ________

Case #: 1043678

In the Supreme Court of the State of Washington

Michael Mariani and
Prestige Management, LLC,

Petitioners,

v.

Department of Financial Institutions,

Respondent.

Petition for Discretionary Review

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IDENTITY OF PETITIONERS AND THE DECISION BELOW

Petitioners Michael Mariani and Prestige Management, LLC respectfully ask this Court to review the decision in *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 (Wash. Ct. App. 2025).

ISSUES PRESENTED FOR REVIEW

The Washington Securities Act ("Act") makes it unlawful for one person to offer a security to another person unless both the offeror and the security are registered, or the security is exempt from registration. RCW § 21.20.140. Under the Act, a security is expressly defined as "any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture. . . ." RCW § 21.20.005(17). Crucially, the Act exempts both sales not involving a public offering, and isolated transactions. RCW § 21.20.320.

The questions presented are:

1. Whether the court of appeals misinterpreted the Act and misapplied the *Howey* factors when it held that all deferred sales trusts, including the trust in this case, are securities.
2. Whether the court of appeals misinterpreted the Act when it held that no deferred sales trusts, including the trust in this case, are exempt from registration as non-public offerings or isolated transactions.
3. Whether the court of appeals misinterpreted the Act when it held that Mr. Mariani and Prestige Management, LLC, who had no direct involvement in the recommendation, offered unregistered securities to the Clines.

STATEMENT

In 2013, Gary and Irene Cline decided to sell their long-time vacation home to their neighbors. CP 126. To facilitate the sale, they established the Lake Cavanaugh Trust ("Trust"), a deferred sales trust, and then conveyed their vacation home to the Trust with the understanding that the Trust would, in turn, sell the home, after which they would receive the sale proceeds in installments over several years. CP 126-27, CP 128. The purpose: to reduce their overall tax burden by spreading out, over time, the recognition of the capital gain they received upon the sale of the vacation home (which had appreciated in value significantly subsequent to their purchase years before). CP 127, CP 2929. Then, in accordance with the Clines' expectations, the Trust completed the transaction by selling the home to the neighbors at the agreed-upon price, and executed a promissory note payable to the Clines, on terms (i.e., interest rate and duration) that the Clines dictated. CP 127-28.

The Clines, through their attorney, selected the Petitioners, Mr. Mariani and his accounting firm Prestige Management, LLC, as the trustees of the Trust. CP 127. Mr. Mariani and Prestige were not hired to draft the language of the Trust, or to sell the Clines' vacation home to their neighbors. *Id.* Indeed, those two things had already been planned well in advance of Petitioners' involvement. *Id.* Mr. Mariani and Prestige, instead, were hired to administer the Trust, manage its assets, and make the installment payments according to the terms the Clines had dictated. CP 129.

Four years into the implementation of the Trust, the Clines soured on the investment strategy and demanded Mr. Mariani and Prestige immediately liquidate the trust assets. CP 3296-97. After some discussion about the risks and potential tax ramifications of doing so, Mr. Mariani and Prestige did their best to comply, selling those assets which were immediately liquid. CP 3296-99, CP 1275. But, because the purpose of the Trust was to pay the Clines over a much longer period of time, some of the Trust's assets could not be sold on the spot. *Id.* Dissatisfied that they did not receive the full balance, the Clines filed a complaint with the Washington Department of Financial Institutions ("Department"), prompting the Department to open an investigation. CP 1273.

Following a three-year investigation, the Department brought charges against Mr. Mariani and Prestige in 2020, alleging that their actions, as trustee and administrator of the Trust, amounted to offers/sales of securities and fraud. CP 2107. A hearing was held in 2022. CP 10. The administrative law judge dismissed the fraud charge but affirmed the other securities-related charges. CP 28. The Department then issued its Final Order, requiring Prestige to pay a fine plus expenses. CP 3529, 3544.

Mr. Mariani and Prestige challenged the Department's Final Order in court. In January 2024, the Superior Court upheld the Order. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689, at 695. Mr. Mariani and Prestige then appealed to the Court of Appeals, Division 1. *Id.* The court of appeals affirmed, holding that (1) all deferred sales trusts, including the Trust, are securities, (2) no deferred sales trusts, including the Trust, are exempt from registration as securities under the Act, and (3) Mr. Mariani and Prestige offered the Trust to the Clines. *Id.* at 702.

The court of appeals decision is wrong, upends decades of settled expectations, and renders the private offering exemption meaningless. This Court should grant review to resolve the substantial legal and practical issues the decision has created.

ARGUMENT

The court of appeals held that all deferred sales trusts, including the Trust, are securities; none, including the Trust, are exempt from registration; and that Mr. Mariani and Prestige had offered the Trust to the Clines. That decision is flawed in its application to Mr. Mariani and Prestige, and in its sweeping overgeneralizations. By categorically declaring all deferred sales trusts to be securities, and denying any possibility of exemption, the court of appeals exceeded the text of the Act and misapplied established law.

This Court should grant review because the court of appeals decision raises serious legal and policy concerns with broad public impact. By treating all deferred sales trusts as securities, the ruling threatens to upend decades of settled expectations among estate planners, fiduciaries, and their clients. And by holding that the Petitioners offered the Trust—despite playing no direct role in its recommendation—the court of appeals misconstrued established law and set a troubling precedent.

The decision also undermines the private offering exemption by holding, through flawed reasoning, that any offering to an unsophisticated buyer is necessarily a public one. That logic injects substantial uncertainty into private transactions and risks chilling access to capital markets for individuals and small businesses.

Given the far-reaching consequences of the court of appeals decision, further review is both necessary and warranted. This Court should grant the Petition.

I. The court of appeals errored in holding that all deferred sales trusts, including the Trust, are securities as defined by the Act.

In its decision, the court of appeals held that all deferred sales trusts are securities. *Id.* at 696. It reached this sweeping conclusion based solely on the features of the Trust, without determining whether those features are also common to all other deferred sales trusts. This overgeneralization has far-reaching implications: deferred sales trusts are structurally the same as many other widely used trusts like Grantor Retained Annuity Trusts (GRATs), Spousal Access Trusts (SLATs), Charitable Remainder Annuity/Unitrusts (CRATs and CRUTs), etc. Under the court's reasoning, these trusts, too, are now securities and subject to regulation as such.

Even as applied to the Trust, the court of appeals decision lacks support in both the text of the Act and the factual record. Put simply, the court misapplied the *Howey* test, which requires both a common enterprise and an expectation of profit (among other things). There was no enterprise here—common or otherwise—and no expectation of profit. At bottom, the Trust was a tax-deferral mechanism; not an investment vehicle.

A. As to the Trust, there was no common enterprise.

The second prong of *Howey,* requiring a common enterprise, fails because no common enterprise existed among the Clines, Mr. Mariani, and Prestige. In *Edwards*, the U.S. Supreme Court further clarified *Howey,* explaining that an investment contract can be a security if the party "invests in a common enterprise *with* the expectation that they would earn a profit solely through the efforts of the promotor or a third party . . ." and ". . . when we held that 'profits' must 'come solely from the efforts of others,' we were speaking of the profits the investors seek on their investment." *S.E.C. v. Edwards*, 540 U.S. 389, 394 (2004) (emphasis added) quoting *S.E.C. v. Howey*, 328, U.S. 293, 299 (1946). *See also Hocking v. Dubois*, 85 F.2d 1449, 1455 (9th Cir. 1989) (concluding a common enterprise exists where there is a venture, business, or goal common among the parties).

Under *Howey* and its progeny, the second prong is a two-step analysis. First, is there a common enterprise, and if so, is the investor seeking profit through a third party's efforts? The *Philips* statement that "a dependence by one party for his profit on the success of some other party in performing his part of the venture. . ." is consistent with *Howey* and *Edwards* in that "venture" in *Philips* is equivalent to "common enterprise" in *Howey* and *Edwards*. *State v. Philips*, 108 Wn.2d 627, 632 (1987). Put another way, like *Howey* and *Edwards*, *Philip*s requires (1) an investor seeking profit through a third party (2) of a joint venture.

Here, the court of appeals misapprehended *Howey* and *Philips* by looking only at dependence and failing to first determine if a common enterprise/joint venture existed. In finding, instead, that the second *Howey* prong was satisfied solely because the Clines depended on Mr. Binkele and Prestige for their investment profits, the court of appeals failed to do half the required analysis. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 697. If it had, it would have found the facts did not show a common enterprise existed among the Clines, Mr. Mariani, and Prestige.

First, there was no enterprise. This was an installment contract and nothing more. CP 125. The Clines were only entitled to the proceeds of the sale plus eight percent interest for the duration of the promissory note. CP 129-30. Once they conveyed their property to the Trust, they had no interest in the Trust beyond its obligation to pay them (consistent with the terms of the promissory note, which they dictated). CP 126. Under these facts, there can be no enterprise, no joint venture—only a transaction.

Second, even if the Trust could be regarded as an enterprise, it was not a *common* enterprise. Quite the opposite of commonality, as previously explained, the interests of the Clines, Mr. Mariani, and Prestige were both different and conflicting. The Clines' interest: to be paid what was due to them under the promissory note. CP 125-26. Mr. Mariani's and Prestige's interest: make profit—for themselves, not for the Clients—by generating returns exceeding what the Trust was obligated to pay the Clines. CP 129.

The court of appeals skipped this analysis and reasoned the common enterprise existed solely because the Clines were dependent on Mr. Binkele and Prestige for their profits.[1] *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 697. The evidence of that dependency, it said, centered on Mr. Binkele's investment recommendations to the Clines, their approval of them, and Prestige's implementation. *Id.* But, while it is true the Clines relied upon and approved Mr. Binkele's recommendations, these actions do not demonstrate the parties were engaged in a common enterprise.

Quite the opposite, their involvement was designed to counterbalance the *lack* of common interest inherent in the structure of deferred sales trusts. On the one side, the Clines, as creditors under the promissory note, were entitled to receive the proceeds from the sale of their vacation home, plus interest. CP 3270-71. The trust assets served as collateral for that note. CP 3284. On the other side, Mr. Mariani and Prestige, as both

[1] Mr. Binkele was the investment advisor hired by Mr. Mariani and Prestige to make investment recommendations to the Trust. CP 3136.

trustees of the Trust *and its beneficiaries*, stood to gain any remaining principal and earnings in the trust exceeding the amount owed to the Clines. CP 3270. Importantly, they owed no fiduciary duty to the Clines, who were not beneficiaries of the Trust. And because the promissory note was non-recourse, the Clines had no legal avenue to recover from Mr. Mariani and Prestige if the Trust assets proved insufficient to satisfy the note. CP 126.

Given this structure, the Clines' involvement and review of Mr. Binkele's investment recommendations made perfect sense. Left unchecked, theoretically, Mr. Mariani and Prestige could have pursued speculative investments in an effort to maximize returns and capture excess profits. And if those investments failed, the Clines would bear that loss—not them.

Conversely, it also made sense why the Clines' involvement was limited, as the court of appeals observed, to reviewing and accepting Mr. Binkele's recommendations. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 697. The Clines' interest in the Trust, after all, did not extend beyond that of a creditor. In this way, the Clines' involvement was akin to a creditor holding a security interest in a securities account. To safeguard that interest, it was entirely appropriate for them to retain a say in how the Trust's assets were invested. But, because their interest only extended to what was owed under the note, it was also entirely appropriate for them to defer to Mr. Binkele unless they believed his recommendations threatened repayment of the note.

When viewing the Clines' involvement through this lens, their involvement was not evidence of a common interest, as the court of appeals held, but a pragmatic approach to counterbalance the uncommon and competing interests.

B. *Nor was there an expectation of profit.*

Turning to the third *Howey* prong, there was no justified expectation of profit. At all times, the Clines were entitled only to the proceeds of the property sale plus eight percent interest. CP 129-30. The purpose of the eight percent interest was not to earn the Clines a profit; rather, it accounted for the Clines' lost investment opportunity had they paid the tax upfront and then invested the proceeds. Equally important here, the Clines never had an interest in the Trust, nor any right to the profits generated by it. CP 126. Their only interest was in fulfillment of the promissory note. CP 125-26.

The court of appeals, however, reasoned this third prong was satisfied because the Clines expected to receive profit from the long-term growth of the assets. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 697. That is not so. First, the Clines negotiated and chose eight percent as the interest rate when they created the Trust. CP 2893-94. And the formation documents made clear they were only entitled to the proceeds, plus interest. CP 125-26. But, even if the Clines mistakenly believed they were owed additional profits, as the court of appeals incorrectly found, their beliefs were not justified because the written documents showed just the opposite. When confronted with mistaken beliefs by a contracting party, the documents govern—not the party's beliefs. *Cf. Conran v. Seafirst Bank*, No. 40075-4-I, 1998 WL 40659, at *4-5 (Wash. Ct. App. Feb. 2, 1998).

Here, the Lake Cavanaugh Trust Agreement and promissory note made clear that once the Clines sold their appreciated property to the Trust, in return, they were to receive the proceeds of the sale plus interest, period. CP 126-27, CP 128. Indeed, Mr. Cline testified that he understood the documents and what they said. CP 2946-49. Hence, the Clines did not expect profit from the Trust.

II. The court of appeals erred in holding that all deferred sales trusts, including the Trust, are not exempt from Registration under the Act.

As with its securities holding, the court of appeals cast too wide a net when concluding that no deferred sales trust qualifies for an exemption from registration under the Act. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 701. Even assuming the Trust is a security, it would still fall within one of the Act's two exemptions: (1) sales not involving a public offering, or (2) isolated transactions. RCW § 21.20.320. Here, the court of appeals misapplied both. In assessing whether the Trust involved a public offering, it applied the wrong legal standard and relied on flawed reasoning. And in rejecting the isolated transaction exemption, the court of appeals incorrectly treated all deferred sales trusts as fungible, ignoring the individualized nature of the transaction.

A. As to the Trust, it was not a public offering.

The court of appeals concluded that the Trust was a public offering. Its reasoning followed this line: under *Ralston*, "[a]n offering to those who are shown to be able of fend for themselves is a transaction 'not involving any public offering'"; the Clines were not capable of fending for themselves; the Trust, therefore, is a public offering.[2] This is a classic fallacy of the inverse. *Ralston* does not stand for the proposition that every offering to someone who cannot fend for themselves is necessarily public. *Id.* The absence of sophistication is relevant, but it is not dispositive—and certainly not sufficient, on its own, to transform a private, individualized transaction into a public offering.

The court of appeals, instead, should have followed the long line of cases, since *Ralston*, applying its core principles. Indeed, courts across the country "have developed flexible tests for the private offering exemption, focusing on: (1) the number of offerees, (2) the sophistication of the offerees, (3) the size and manner of the offering, and (4) the relationship to the issuer. *S.E.C v. Murphy*, 626 F.2d 633, 644-45 (9th Cir. 1980). In looking only at the sophistication of the Clines, the court of appeals left its analysis unfinished.

B. And it was also an isolated, one-off, transaction.

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[2] *See S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).

The court of appeals concluded that Mr. Mariani and Prestige failed to prove the Trust was an isolated transaction because Mr. Binkele and Mr. Campbell had helped other clients create their own deferred sales trusts. *Mariani v. Dep't of Fin. Insts.*, 568 P.3d 689 at 701. This conclusion misapprehends deferred sales trusts by lumping all of them together as one fungible product. They are not that. To the contrary, each deferred sales trust is a customized and individualized installment contract involving a specific seller, a specific buyer, and a unique appreciated asset (such as a particular parcel of real property). CP 3305-06. The trust created in any given deferred sales trust transaction acts only as the facilitator of the particular asset being sold and for that particular seller of the asset. CP 125-26. Further, the future payments of proceeds and interest are customized to the needs of the seller and their unique tax situation. CP 126. Payment terms vary as to amounts and the length of deferral. *Id.* Thus, even at their cores, while every deferred sales trust involves the same component parts and provides the same mechanism to achieve tax deferral, no two deferred sales trust transactions are the same.[3] As such, these transactions are inherently isolated.

III. The court of appeals erred in holding that Mr. Mariani and Prestige—despite having no role in recommending the Trust—were responsible for offering it to the Clines.

Mr. Mariani and Prestige have consistently maintained that they did not offer the Trust to the Clines, as they were not directly involved in the discussions leading up to the Clines' decision to proceed. CP 03274. In fact, the record lacks any evidence of Mr. Mariani's and Prestige's direct participation.

The court of appeals, nevertheless, concluded that Mr. Mariani and Prestige offered the Trust to the Clines, relying chiefly on the actions of their attorney, Mr. Campbell. *Mariani v.*

[3] In that sense, it is instructive to compare a deferred sales trust to an individual retirement account, or IRA, or a 401(k) retirement account. Both are marketed nationwide, by likely hundreds of sponsors, to everyone. All IRAs and 401(k)s provide the same benefit of deferring taxes until withdrawals are made from the account. But, critically, each individual's IRA or 401(k) account is, by definition, unique. The same is true of every deferred sales trust. While the concept behind the use of deferred sales trusts is offered broadly, just like IRAs and 401(k)s, there is no such broad, public offering of any *particular* deferred sales trust, just as there is no public offering of any *particular* IRA or 401(k).

Dep't of Fin. Insts., 568 P.3d 689 at 702. In reaching this conclusion, the court of appeals failed to consider and apply the "substantial contribution" test established by this Court in *Haberman*. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 131 (1987). Under *Haberman*, a party sells/offers a security only if they played a substantial role in the sale/offer. *Id.*

Applying the substantial contribution test from *Haberman* to the facts in this case, it is clear that Mr. Mariani and Prestige did not offer the Trust to the Clines. Crucially, neither Mr. Mariani nor Prestige had any direct contact with the Clines before they executed the Trust. CP 3274-75. In fact, over the two-year period during which the Clines evaluated whether to proceed with the Trust, Mr. Mariani and Prestige had no involvement whatsoever. CP 2734, CP 2934-35, CP 3272. Although their names and biographical details appeared on a slide in Mr. Campbell's pitchbook as the court of appeals observed (it is common to include other businesses in pitchbooks), this alone does not constitute a substantial contribution—especially in the absence of any direct communication between Mr. Mariani and Prestige, on the one hand, and the Clines, on the other. Similarly, Mr.

Mariani's and Prestige's role in signing the trust documents as trustee does not meet the substantial contribution threshold, as they were not involved in determining the terms, drafting the documents, or delivering them to the Clines. CP 3272.

Mr. Mariani's and Prestige's actions closely parallel the actions of Perkins Coie in *Hines v. Data Line Systems*, 114 Wn.2d 127, 149-50 (1990) (holding law firm Perkins Coie was not a seller because it had neither personal contact with any of the investors nor was it involved in the solicitation process). Like Perkins Coie, Mr. Mariani and Prestige did not interact with the Clines at any point before execution. *Id.* at 149, CP 3272. And also like Perkins Coie, Mr. Mariani and Prestige did not directly participate in the process leading to execution. *Id.* at 150, CP 3272. For those reasons, the facts do not show Mr. Mariani and Prestige substantially contributed to the offer of the Trust.

IV. This Court should grant the petition because the issues involved are of substantial public interest.

The Court of appeals decision raises urgent and far-reaching legal and policy concerns that merit this Court's review. The implications of its ruling extend far beyond the parties involved, and threatens to disrupt long-standing estate planning practices, impose burdensome regulatory requirements on attorneys and trust professionals, and undermine the investment of capital by doing away with important statutory exemptions designed to allow individuals to conduct commerce without unnecessary and burdensome government regulation.

A. The Court of appeals decision upends decades of settled expectations among tax and estate planners, the fiduciary services community, and their clients.

A deferred sales trust is just like other trusts. Indeed, Deferred Sales Trusts (DSTs), GRATs, SLATs, CRATs, and CRUTs, all seek to achieve tax deferral while often investing trust property in securities like stocks and bonds. Under the Court of appeals decision, all these trusts are also now securities.

The implications are sweeping. If these trusts are securities, then attorneys must obtain securities licenses before recommending them to clients. Likewise, trust professionals would need such licenses before accepting trusteeships or administering these trusts—even if they had no role in recommending them. Failure to comply with these new obligations could expose professionals to enforcement actions, just as the Petitioners faced here.

At bottom, the court of appeals decision threatens to upend decades of settled expectations among tax and estate planners, trust companies and professionals, and their clients. It risks disrupting the estate planning and fiduciary services industries and could significantly limit the availability of these planning tools for Washingtonians.

B. The court of appeals opinion erodes the meaning and utility of the private offering exemption.

The court of appeals decision—that all offerings to unsophisticated buyers constitute public offerings—risks sweeping a wide range of legitimate private transactions into the realm of public offerings, including isolated, one-on-one transactions. It also imposes a heavy burden on issuers, effectively requiring them to conduct extensive, and subjective, due diligence on prospective investors to determine whether an exemption applies. Under this framework, it is difficult to see what remains of the private offering exemption at all.

Indeed, the decision is likely to inject significant uncertainty into the private offering landscape. It will increase compliance costs, deter innovation, and cut off individuals and small businesses from access to capital and investment opportunities—

simply because they lack the resources to navigate full registration. Additionally, the ruling creates a divergence between the Act and the Securities Act of 1933, upon which it is based. This Court should grant the Petition and reverse.

CONCLUSION

This petition for discretionary review should be granted.

We certify that this Motion is in 14-point Times New Roman font and contains 4720 words, in compliance with Rules of Appellate Procedure, 18.17(b).

Dated: July 7, 2025, and respectfully submitted.

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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MARIANI and PRESTIGE MANAGEMENT LLC, Appellants, v. DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondent.	No. 87072-6-I DIVISION ONE PUBLISHED OPINION

SMITH, J. — Gary and Irene Cline owned real estate in Washington which they had decided to sell. To increase the proceeds of the sale of that real estate and to defer taxes, the Clines invested in a deferred sales trust. Michael Mariani and Prestige Management, LLC, helped establish that trust and served as trustees for the account. Following review of the trust, the Department of Financial Institutions determined that the deferred sales trust and accompanying promissory note were securities not properly registered as such. The Department similarly determined that Mariani was not registered as a securities salesperson or broker-dealer. The Department ordered a fine as well as costs and fees. Mariani and Prestige petitioned for review of the order in superior court. The trial court affirmed the findings of the Department in their entirety. Mariani and Prestige appeal, asserting that the Department erred in determining that the deferred sales trust constitutes a security, that Mariani offered or sold a security, and that no exemption for registration exists. Finding no error, we affirm.

FACTS

Deferred Sales Trust

A deferred sales trust (DST) is a tax-deferral concept created by Todd Campbell.[1] The concept relies on Section 453 of the Internal Revenue Code and a private letter ruling from the Internal Revenue Service. The letter ruling provides that income on an “installment sale” is not considered earned on an asset until the seller actually receives payment. By deferring the receipt of the purchase payment, the seller may defer paying taxes on any gain. This particularly appeals to owners whose property has dramatically appreciated in value since the original purchase. Without the use of a DST, the owners face substantial tax liability given the capital gains triggered by the sale of the property.

In a standard DST, the seller wants to sell an asset that has substantially appreciated in value but defer taxation on the gains from that sale. The structure used in a DST, including whether or not to utilize a promissory note, varies by transaction. The attorney for the seller is responsible for advising the client on how the specific DST is structured and drafting the necessary documents.

A DST involving a promissory note requires that the seller’s attorney create a trust, which acquires the appreciated asset from the seller, and a

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[1] The parties stipulated to the facts about the basics of a DST and the creation of the Lake Cavanaugh Trust.

promissory note from the trust in favor of the seller. The note obligates the trust to pay the seller the specified sales price, simply at a later time. The seller's attorney then works with the seller to determine when and how they would like to be repaid. Unless and until the seller actually receives payment from the trust, the seller need not pay any tax.

Once the appreciated property is transferred to the specifically-created trust, the trust often sells the property to a third-party buyer for cash. The third-party buyer may purchase the asset in a lump sum or in installments, the latter of which will fund the trust over time. Either way, the trust will invest the proceeds of the sale, seeking a return on the investment designed to: (1) meet its particular obligations under the promissory note to pay the seller the agreed upon sales price plus a set interest rate, and (2) build additional returns on the invested sale proceeds. The trust must retain the amounts earmarked for payment of the promissory note.

<u>Lake Cavanaugh Trust</u>

In 2013, Gary and Irene Cline decided to sell their vacation property (Lake Cavanaugh Property). The Lake Cavanaugh Property had substantially appreciated in value since the Clines bought the property in the 1970s. Originally purchased for $15,000, the Lake Cavanaugh Property was now worth over $200,000. Concerned with the amount of tax they would have to pay upon sale, the Clines learned about DSTs through their financial advisor. Their financial advisor referred them to Bob Binkele, who, in turn, referred them to Campbell. The Clines then retained Campbell as their attorney. In accordance with his normal practice, Campbell prepared the documents necessary to create a trust (Lake Cavanaugh Trust) to acquire the Lake Cavanaugh Property.

In August 2013, Campbell procured Michael Mariani and Prestige, LLC,[2] an accountant and accounting firm respectively, to establish and act as trustee to the Lake Cavanaugh Trust. Campbell served as Prestige's attorney. After engaging Prestige, Campbell sent the Clines drafts of several documents necessary both to complete the sale of the Lake Cavanaugh Property and to transfer the assets to the trust. This included draft promissory notes. Campbell ultimately sent the Clines five different draft promissory notes over the following six months. Each defined the amount of the principle and provided that interest would accrue at a rate of eight percent. In addition to the multiple drafts, Campbell sent the Clines a variety of e-mails concerning the status of the promissory note. The Clines did not sign any of the draft promissory notes or provide a payment schedule.

Nevertheless, the Clines sold the Lake Cavanaugh Property to the Lake Cavanaugh Trust. In October 2013, Prestige sold the property to third-party buyers. The buyers provided a $50,000 down payment with an additional $188,000 to be paid in installments. The proceeds of that sale were deposited with the Lake Cavanaugh Trust as they were received. Mariani, as an individual, had no direct communication with the Clines until after the Lake Cavanaugh Property sold.

[2] As Mariani acted in his role as an accountant for Prestige, we refer to them collectively as "Prestige."

Once the proceeds from the property funded the trust, Prestige retained Binkele to provide the Lake Cavanaugh Trust with investment recommendations. As trustee, Prestige was required to preserve the trust's assets while also hoping to make more money than the promissory note required the trust to pay the Clines. Although the parties did not formally execute a promissory note, all acted as if one existed.

<u>Administrative Review</u>

In 2017, the Cline's insurance agent reviewed their holdings and expressed concern about the DST structure and lack of promissory note. In response, the Clines requested that Prestige liquidate the holdings of the Lake Cavanaugh Trust and distribute the proceeds. The Clines then brought a complaint to the Department. The Department opened an investigation in July 2017.

Following the Department's investigation, it issued a statement of charges concluding that the Lake Cavanaugh DST constituted the offer and/or sale of a security rather than a trust. The Department similarly concluded that Prestige sold unregistered securities, that Mariani offered and sold securities without registering as a securities broker, and that the operation of the trust constituted fraud. Mariani, Prestige, and Binkele appealed these charges.

The Washington State Office of Administrative Hearings held an administrative hearing in May 2022 to address the appeal. Following the hearing, the administrative law judge, acting as a reviewing hearing officer, issued an initial order, which affirmed the securities allegations but dismissed the fraud allegation. Both parties petitioned for review of the initial order. The Department then issued a final order, again affirming that the DST arrangement with the Clines constituted an offer and sale of a security, that Prestige ordered and sold unregistered securities, and that Mariani offered and sold securities without being registered as a securities salesperson or broker-dealer. The Department also rejected Prestige's claims that the securities were exempt from registration. The Department ordered Prestige to pay a $20,000 fine, as well as costs, fees, and other expenses adding up to $15,000.

Superior Court

Following the final order, Prestige petitioned for judicial review. The superior court affirmed the Department's final order. Prestige timely appealed to this court.

ANALYSIS

Standard of Review

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of final agency action. RCW 34.05.510. Under the APA, we "look to the administrative record, not the superior court's findings or conclusions, when conducting judicial review of an agency decision." *Rios-Garcia v. Dep't of Soc. & Health Servs.*, 18 Wn. App. 2d 660, 667, 493 P.3d 143 (2021). We determine the validity of an agency's final order by applying the standards of review provided in RCW 34.05.570 to the agency action at the time it was taken. RCW 34.05.570(1)(b). We may reverse a final order only if the appellant establishes that the order is invalid because the order or statute upon which the order is based is unconstitutional; the order is outside the authority of the agency; the agency has engaged in an unlawful procedure or decision-making process; the agency has erroneously interpreted or applied the law; the order is not supported by substantial evidence when viewed in the light of the whole record; the agency has not decided all issues requiring resolution; the order is inconsistent with another agency rule; or the order is arbitrary or capricious. RCW 34.05.570(3)(a)-(f), -(h)-(i).

Under RCW 34.05.570(3)(d), we may reverse an agency order if it is based on an error of law. We review such errors of law de novo. *Southwick, Inc. v. State*, 191 Wn.2d 689, 695, 426 P.3d 693 (2018); *Ames v. Dep't of Health, Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). "However, we give substantial weight to an agency's interpretation of the law it administers, especially when the issue falls within the agency's expertise." *Southwick*, 191 Wn.2d at 696. Agency findings of fact not assigned error are verities on appeal. *Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 384, 495 P.3d 778 (2021).

Security

Prestige asserts that the Department erred in finding that the DST mechanism at issue constitutes a security under RCW 21.20.005(17).

The Securities Act of Washington (Act), chapter 21.20 RCW, is primarily designed to protect investors from fraudulent and speculative schemes. *Helenius v. Chelius*, 131 Wn. App. 421, 432, 120 P.3d 954 (2005). Courts construe the Act broadly to best effectuate this intent. *Helenius*, 131 Wn. App. at 432.

The Act broadly defines a "security" as

> any note; stock, treasury stock; bond; debenture; evidence of indebtedness . . . preorganization certificate or subscription; transferable share; investment contract; investment of money . . . in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture.

RCW 21.20.005(17)(a).

The United States Supreme Court emphasizes the broad definition, declaring that the general definition of a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Sec. & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946). Washington courts apply the test outlined in *Howey* to determine whether a transaction constitutes a security. *Cellular Engineering, Ltd. v. O'Neill*, 118 Wn.2d 16, 25-26, 820 P.2d 941 (1991).

Howey sets forth the elements needed to show the existence of a security as (1) an investment of money, (2) a common enterprise, and (3) an expectation of profits deriving primarily from the efforts of the promoter or a third party. 328 U.S. at 301; *Cellular*, 118 Wn.2d at 25-26.

The parties dispute the Department's application of the *Howey* test to the facts at issue. Because the DST is a common enterprise with an expectation of profits resulting from third-party efforts, we conclude that the Department correctly determined it to be a security.

1. Existence of an Investment

Under *Howey*, the first element required is an investment of money. 328 U.S. at 301. Prestige concedes that this first element is met.

2. Common Enterprise

Prestige asserts, however, that the Department erred in finding that the Clines entered into a “common enterprise” with Prestige. Because the Clines were dependent on Binkele and Prestige for their profits, the investment venture constitutes a common enterprise.

The second element in the *Howey* test considers whether the investment venture is a common enterprise. 328 U.S. at 301; *McClellan v. Sundholm*, 89 Wn.2d 527, 532, 574 P.2d 371 (1978). Under Washington law, a common enterprise involves “ ‘dependence by one party for [their] profit on the success of some other party in performing [their] part of the venture.’ ” *State v. Philips*, 108 Wn.2d 627, 632, 741 P.2d 24 (1987) (quoting *McClellan*, 89 Wn.2d at 532). In *Howey*, for example, out-of-state investors contributed money to a large citrus fruit enterprise in Florida. 328 U.S. at 299-300. The investors purchased the tracts of land but did not farm the land themselves. Instead, the enterprise hired labor and made all the necessary management and fruit-growing decisions. *Howey*, 328 U.S. at 295-96. The Supreme Court determined that the relationship between the investors and the enterprise satisfied the common enterprise prong because management by the service company was essential if the investors were to expect any return on their investment. *Howey*, 328 U.S. at 300.

Here, because the Clines were similarly dependent on Binkele to recommend the appropriate investments and on Prestige to make those investments if they were to expect any return, the facts satisfy the common enterprise prong.

As evidenced by the risk tolerance questionnaire Prestige provided the Clines, the Clines' investment knowledge fit somewhere between "limited" and "good." Binkele, in contrast, testified to his 30 years of experience in the securities industry. Binkele then used this knowledge and experience to recommend funds that met the Clines' investment objectives. The Clines followed his advice every time. Even Mariani, who spent his career in the financial industry, testified that he trusted and relied on Binkele's investment advice. Therefore, in Prestige's own terms, Binkele provided the expertise and knowledge considered by everyone involved. That alone displays that the Clines' profits were dependent on Binkele's efforts.

Prestige suggests that because the Clines were careful investors and shared no common goal with Prestige, they were not sufficiently dependent on Binkele or Prestige. We disagree.

First, although the record does display that the Clines were careful investors, being a careful investor does not undermine reliance on an expert with 30 years of experience. In fact, being a careful investor often means relying on someone else who knows more. Gary Cline's deposition provided a number of examples of this reliance. And, as noted, even Mariani testified to relying on Binkele. Dependence is not negated simply by a party having a "limited to good" understanding of investing.

Additionally, under Washington law, an investor need not expect profits *solely* from the efforts of a promoter or third party. *Philips*, 108 Wn.2d at 635. "Rather, the test is whether the efforts of [the other] were the undeniably significant ones that affected the success or failure of the enterprise." *Philips*, 108 Wn.2d at 635. The Clines testified to following Binkele's recommendations at all times. Therefore, Binkele's efforts were undeniably significant ones that affected the success or failure of the enterprise.

As to the question of a common goal, Prestige points to non-binding Ninth Circuit case law stating that a common enterprise requires a goal "common to the investor and the seller, promoter or some third party."[3] This involves an "interdependence of fortunes" between a knowledgeable group and another that lacks that knowledge. Prestige asserts that no such interdependence exists here because the Clines were only interested in tax-deferral, Prestige was only interested in asset growth, and the Clines did not invest directly in Prestige. We again disagree.

The fact that the Clines did not invest directly in Prestige is irrelevant. Both parties engaged in the trust. The case law Prestige cites does not require any further connection. Next, the Clines repeatedly noted that asset growth, rather than simply regular income, was a primary goal for the DST. This is found

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[3] *Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989).

in their answers to the risk tolerance questionnaire, which indicated an interest in long-term growth, as well as Gary Clines' testimony that growth of the funds was one of two reasons for entering into the DST at all. Asset growth, Prestige concedes, is similarly Prestige's primary goal because the firm only makes money if the investments return more than the principle and the eight percent interest owed to the Clines. Sufficient overlap exists here establish a common goal.

Because the Clines were dependent on Binkele and Prestige for their profits, the Department did not err in concluding that the investment venture is a common enterprise.

3. Expectation of Profits

Prestige also asserts that the court erred in concluding that the Clines had an expectation of profits from the efforts of the trustee. The Department contends that the Clines understood and expected that the investment of the proceeds of the Lake Cavanaugh Property sale would result in long term growth of the assets. We agree with the Department.

The last element under the *Howey* test considers whether the investor expects that profits will be gained from the efforts of some other party. *McClellan*, 89 Wn.2d at 532. Again, the profits need not come solely from the efforts of others. *Philips*, 108 Wn.2d at 635. The test is whether the other's efforts were undeniably significant. *Philips*, 108 Wn.2d at 635. And "there is no reason to distinguish between promises of fixed returns and promises of variable returns for purposes of the [*Howey*] test. . . . In both cases, the investing public is attracted by representations of investment income." *Sec. & Exch. Comm'n v. Edwards*, 540 U.S. 389, 390, 124 S. Ct. 892, 157 L. Ed. 2d 813 (2004).

Here, Prestige and Mariani appointed Binkele to invest the funds for growth. In the stipulated findings of fact, the parties agree that if the trustee is able to generate more money from the trust assets than is necessary to pay the principle and the interest owed on the promissory note, the trustee retains the excess. This is the incentive to act as a trustee in the first place, as well as the incentive to invest well. The interest owed on the promissory note, however, is also profit for the Clines.

The draft versions of the promissory note, which the parties treat as final, promise the Clines an interest rate of up to eight percent per year. This is an eight percent profit on top of the principle owed. And that interest results from Binkele and Prestige's undeniably significant efforts in recommending appropriate investments and in making those investments. The more money in the trust, the more valuable the interest. The fact that the interest is a variable return is irrelevant for the purposes of the *Howey* test.

Also, the Clines demonstrated their expectation in profits from Prestige's efforts in requesting an early withdrawal to fund their trip to Europe. In requesting the early withdrawal, the Clines noted the $14,800 in interest the Lake Cavanaugh Trust had accumulated the previous two years. They clearly considered this accumulated interest to be their money, and sought access to it accordingly. If the Clines had had no expectation of profits from Prestige's investments, they would have looked to only the principal amount.

Prestige contends that the Clines did not have an expectation of profits derived from the efforts of a third party because the Clines primarily controlled the business venture and therefore could not have been a passive dependent participant. But we again disagree because the record demonstrates that the Clines retained no control over the trust.

The agreement and declaration of the trust provides that the trust gives the trustee complete authority to carry out the purpose of the trust. Therefore, as trustee, Prestige gained complete authority. The statement of additional disclosures then provides, "I understand that, following the transfer of assets into the trust, I will no longer own the assets and investment decisions regarding those assets will be a matter between the trust and the company they choose for services." This shifts all decisions concerning the trust to Prestige, Mariani, and Binkele. And lastly, Mariani explicitly explained the Clines' lack of control in an e-mail to Gary Cline, stating "[y]ou are apparently missing something very basic about this transaction that I have tried to explain over and over again. We cannot follow your instructions. . . . You cannot control the funds. You cannot instruct us on what to do."[4] This evidence undermines Prestige's argument that the Clines demonstrated control by signing off their approval on every transaction. Clearly, the Clines' approval did not actually affect the actions taken.

[4] At oral argument, the parties disagreed as to the timing and circumstance of this e-mail.

The Department did not err in determining that the eight percent interest on the promissory note constitutes an expectation of profits gained from the efforts of Binkele and Prestige.

4. Promissory Note

Prestige then claims that the Department erred in relying on the existence of a promissory note in concluding that the DST met the definition of security under RCW 21.20.005(17). Because the question of whether an investment venture constitutes a security requires consideration of the entire scheme, the Department did not err in considering the promissory note.

In determining whether an investment venture constitutes a security, the court looks to the entire investment scheme. *Cellular*, 118 Wn.2d at 25. "Thus, the issue is not whether the [a]greements are securities, but whether the scheme of which the [a]greements are a part constitutes the sale or offer for sale of securities." *Cellular*, 118 Wn.2d at 25.

Prestige contends that the Department did not allege that the promissory note prepared for the Lake Cavanaugh Trust constituted a security. Instead, the Department specifically charged that the transaction as a whole – which includes but is not limited to the promissory note – constitutes the security at issue. This, Prestige asserts, confuses two different legal standards because determining whether a promissory note constitutes a security requires analysis under *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990), not *Howey*. Prestige argues that without performing a *Reves* analysis, the

Department cannot rely on the existence of a promissory note in determining the application of the *Howey* factors.

But Prestige ignores both that the Department acknowledged but disregarded a *Reves* analysis and properly adopted the *Howey* test as enumerated in *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991), to analyze the promissory note.

In its final order, the Department specifically noted that "while the *Reves* test does exist, the Washington State Supreme Court has previously allowed the *Howey* test to be applied to promissory notes." Under *Saas*, a promissory note can be characterized as a security where the note involves an investment of money in a common enterprise where the investor expects to gain profits from the efforts of a third party. 118 Wn.2d at 44. The Department followed that analysis and determined that the promissory note did constitute a security. Therefore, as a part of the overall scheme, the promissory note is relevant to the determination of whether the DST as a whole constitutes a security.

The Department appropriately considered the promissory note in determining whether the DST constituted a security.

<u>Offering or Sale of Security</u>

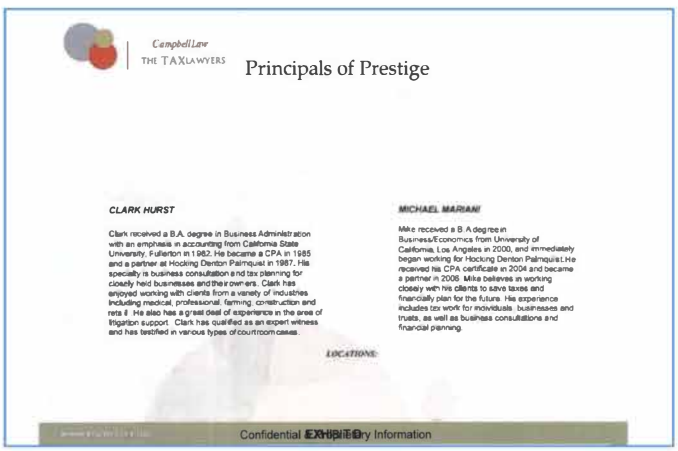
Prestige next contends that the Department erred in finding that Mariani offered or sold a security because no evidence exists that Mariani, as an individual, made an offer or sale of anything to the Clines. Because Campbell acted in his capacity as Prestige's attorney in offering the Clines the DST, substantial evidence supports the finding that Prestige and Mariani offered a security.

Substantial evidence is evidence " 'sufficient to persuade a rational, fair-minded person that the finding is true.' " *Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 916, 401 P.3d 381 (2017) (quoting *Cantu v. Dep't of Lab. & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012)). An " 'offer' or 'offer of sale' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." RCW 21.20.005(14).

Prestige asserts that no evidence whatsoever exists to show that Mariani made an offer of sale of anything to the Clines. To the contrary, Prestige claims that substantial evidence shows that Mariani had no involvement with the Clines while they considered entering into a DST, instead only communicating after the fact. But this claim disregards that Mariani is a member of Prestige and that Prestige acted through Campbell.

Both parties stipulate that Campbell acted as Prestige's attorney. In addition, Campbell provided the Clines with a disclosure and wavier of conflict of interest, stating that "[t]he purpose of [the disclosure] is to: (1) make it clear that you are aware that I may be providing information and resources to you and/or your professional advisor(s) but that I will be representing Prestige in this transaction as I have represented them in similar transactions over the years." The disclosure continued on to discuss potential adversarial interests between the Clines and clients of "ours," referencing Campbell and Prestige as one entity. As one entity, any action Campbell took, he took on behalf of Prestige.

Indeed, Prestige was directly involved in marketing the DST to the Clines from the very beginning. Campbell provided the Clines with a PowerPoint presentation explaining the DST in July 2013. The PowerPoint was titled: "Deferred Sales Trust ("DST") Prestige Investment Management, LLC." In listing the "steps" that one can take to enter into a DST, the presentation began with "the ("Seller") can enter into an arrangement with Prestige Investment Management, LLC ("Prestige")." The presentation even included an image and biographical information about Mariani and indicated he was a principal of Prestige.[5]



In addition, Holly Mack-Kretzler, a financial legal examiner supervisor at the Department, testified that the sale of a security would involve the funding of the trust and completion of the paperwork, "[s]o people who are touching that completion of paperwork are going to be involved in the sale." Again, this court gives agency interpretation significant weight here, and the record displays ample evidence of Prestige's involvement with the completion of paperwork.

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[5] We have redacted the images and listed locations to protect the individuals' privacy.

Given the extent of the evidence that Prestige and Mariani were involved in the original marketing efforts, the negotiation of the DST, and the execution of the documents, substantial evidence supports the finding that Prestige and Mariani offered and sold securities through Campbell.

Registration Exemption

Prestige asserts that the Department erred in determining no registration exemption exists because the DST is an isolated transaction and a sale not involving a public offering. We conclude that the Department did not err because the DST fails to satisfy the exemption requirements.

RCW 21.20.140 provides two exemptions from security registration: (1) the isolated transaction exemption and (2) the sale not involving a public offering exemption. The petitioners bear the burden of establishing that they are entitled to an exemption. RCW 21.20.540.

1. Isolated Transaction

Prestige claims that the DST is an isolated transaction and is therefore exempt from securities registration. We disagree.

Any isolated transaction is exempt from the registration and notification requirements under RCW 21.20.320(1). But, under WAC 460-44A-050(1)(d), to qualify for the isolated transaction exemption, a petitioner must establish that their sale of a security "is one of not more than three such transactions inside or outside this state during the prior twenty-four months."

Prestige contends that this DST is an isolated transaction because the Lake Cavanaugh DST could not have been offered or marketed to anyone other than the Clines. If it is not an isolated transaction, Prestige continues, every IRA, 401(k), and other tax-deferral strategies would similarly constitute non-exempt securities. But whether this determination will impact a variety of other financial entities is not the applicable test. Rather, the question is simply whether Prestige can establish that this security is one of not more than three such transactions, across the country, in the last two years. Prestige cannot. Binkele testified as to dealing with hundreds of DST transactions. Campbell admitted his involvement in thousands. And Prestige does not provide any evidence that they have not offered a DST to less than three others in the past two years. Because Prestige carries the burden and fails to demonstrate that the DST is an isolated transaction, the Department did not err in determining the exemption does not apply.

2. <u>Sale Not Involving a Public Offering</u>

Prestige also claims that the DST is exempt from registration as a sale not involving a public offer. We disagree.

Sales not involving a public offering are similarly exempt from the registration and notification requirements of RCW 21.20.320. This exemption is interpreted in a manner consistent with the corresponding exemption in federal securities law. WAC 460-44A-050(2). The issuer of the security has the burden to prove that the sale was a private offering. RCW 21.20.540; *Sec. & Exch. Comm'n. v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S. Ct. 981, 97 L. Ed. 1494 (1953).

Under federal securities law, “since exempt transactions are those as to which ‘there is no practical need for . . . (the bill’s) application,’ the applicability of [the exemption] should turn on whether the particular class of persons affected need the protection of the Act.” *Ralston*, 346 U.S. at 125. Therefore, “[a]n offering to those who are shown to be able to fend for themselves is a transaction ‘not involving any public offering.” *Ralston*, 346 U.S. at 125.

Here, the Clines have not been shown to be able to fend for themselves. Rather, the record repeatedly shows that the Clines did not have a strong understanding of how the DST works or of investment practices. First, the Clines never signed the promissory note requiring Prestige to return the principle. In fact, Mariani noted this vulnerability, informing the Clines that “negotiating the promissory note is in your best interest, not ours. As it stands, there’s no written agreement that even shows an amount of money that is due to you.” Although the parties all acted as though the promissory note was signed and effective, the Clines’ failure to actually bind Prestige displays their lack of understanding.

Next, both Mariani’s e-mail to the Clines and their attempt to withdraw funds for their Europe trip demonstrate that they were unaware just how much control they were releasing to Prestige. The Clines clearly thought of the money as their own, to withdraw and adjust as they saw fit. This again shows lack of understanding and inability to fend for themselves. Finally, the Clines’ risk tolerance questionnaire, noting their limited understanding of investment practices, emphasizes their vulnerability. This DST is certainly not something they could have achieved on their own.

Because a transaction not involving a public offering is a transaction aimed at parties who are shown to be able to fend for themselves, the Department did not err in determining that this transaction does not fit within the exemption.

Offerees

Lastly, Prestige asserts that the Department erred in finding that the Clines were offerees and, in turn, construing RCW 21.20.005 as focusing "the inquiry . . . on the need of the offerees for the protections afforded by registration." We disagree.

Returning to its earlier argument, Prestige contends that the evidence does not support the conclusion that the Clines were offerees because no evidence supports the conclusion that Prestige or Mariani offered the Clines anything. But substantial evidence supports the conclusion that Prestige and Mariani offered the Clines the security through Campbell. This renders the Clines offerees. And because the Clines are offerees, they are afforded the protections of security registration.

We affirm.

Smith, J.

WE CONCUR:

Díaz, J.

Colum, J.

Appendix B

FILED
6/6/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL MARIANI and PRESTIGE MANAGEMENT LLC, Appellants, v. DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondent.	No. 87072-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Michael Mariani and Prestige Management LLC, moved for reconsideration of the published opinion filed on May 5, 2025. The panel considered the motion pursuant to RAP 12.4 and determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

Appendix C

West's Revised Code of Washington Annotated
Title 21. Securities and Investments
Chapter 21.20. Securities Act of Washington (Refs & Annos)
Exempt Transactions

West's RCWA 21.20.320

21.20.320. Exempt transactions

Currentness

The following transactions are exempt from RCW 21.20.040 through 21.20.300 and 21.20.327 except as expressly provided:

(1) Any isolated transaction, or sales not involving a public offering, whether effected through a broker-dealer or not; or any transaction effected in accordance with any rule by the director establishing a nonpublic offering exemption pursuant to this subsection where registration is not necessary or appropriate in the public interest or for the protection of investors.

(2) Any nonissuer transaction by a registered salesperson of a registered broker-dealer, and any resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940 pursuant to any rule adopted by the director.

(3) Any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy; but the director may by rule require that the customer acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each such form be preserved by the broker-dealer for a specified period.

(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters.

(5) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit. A bond or other evidence of indebtedness is not offered and sold as a unit if the transaction involves:

(a) A partial interest in one or more bonds or other evidences of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels; or

(b) One of multiple bonds or other evidences of indebtedness secured by one or more real or chattel mortgages or deeds of trust, or agreements for the sale of real estate or chattels, sold to more than one purchaser as part of a single plan of financing; or

(c) A security including an investment contract other than the bond or other evidence of indebtedness.

(6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator.

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(7) Any transaction executed by a bona fide pledgee without any purpose of evading this chapter.

(8) Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity.

(9) Any transaction effected in accordance with the terms and conditions of any rule adopted by the director if:

(a) The aggregate offering amount does not exceed five million dollars; and

(b) The director finds that registration is not necessary in the public interest and for the protection of investors.

(10) Any offer or sale of a preorganization certificate or subscription if (a) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (b) the number of subscribers does not exceed ten, and (c) no payment is made by any subscriber.

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than ninety days of their issuance, if (a) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this state, or (b) the issuer first files a notice specifying the terms of the offer and the director does not by order disallow the exemption within the next five full business days.

(12) Any offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act.

(13) The issuance of any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the distribution other than the surrender of a right to a cash dividend where the stockholder can elect to take a dividend in cash or stock.

(14) Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi reorganization, stock split, reverse stock split, merger, consolidation, or sale of assets.

(15) The offer or sale by a registered broker-dealer, or a person exempted from the registration requirements pursuant to RCW 21.20.040, acting either as principal or agent, of securities previously sold and distributed to the public: PROVIDED, That:

(a) Such securities are sold at prices reasonably related to the current market price thereof at the time of sale, and, if such broker-dealer is acting as agent, the commission collected by such broker-dealer on account of the sale thereof is not in excess of usual and customary commissions collected with respect to securities and transactions having comparable characteristics;

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(b) Such securities do not constitute the whole or a part of an unsold allotment to or subscription or participation by such broker-dealer as an underwriter of such securities or as a participant in the distribution of such securities by the issuer, by an underwriter or by a person or group of persons in substantial control of the issuer or of the outstanding securities of the class being distributed; and

(c) The security has been lawfully sold and distributed in this state or any other state of the United States under this or any act regulating the sale of such securities.

(16) Any transaction by a mutual or cooperative association meeting the requirements of (a) and (b) of this subsection:

(a) The transaction:

(i) Does not involve advertising or public solicitation; or

(ii) Involves advertising or public solicitation, and:

(A) The association first files a notice of claim of exemption on a form prescribed by the director specifying the terms of the offer and the director does not by order deny the exemption within the next ten full business days; or

(B) The association is an employee cooperative and identifies itself as an employee cooperative in advertising or public solicitation.

(b) The transaction involves an instrument or interest, that:

(i)(A) Qualifies its holder to be a member or patron of the association;

(B) Represents a contribution of capital to the association by a person who is or intends to become a member or patron of the association;

(C) Represents a patronage dividend or other patronage allocation; or

(D) Represents the terms or conditions by which a member or patron purchases, sells, or markets products, commodities, or services from, to, or through the association; and

(ii) Is nontransferable except in the case of death, operation of law, bona fide transfer for security purposes only to the association, a bank, or other financial institution, intrafamily transfer, transfer to an existing member or person who will become a member, or transfer by gift to any person organized and operated as a nonprofit organization as defined in RCW 84.36.800(4) that also possesses a current tax exempt status under the laws of the United States, and, in the case of an instrument, so states conspicuously on its face.

(17) Any transaction effected in accordance with any rule adopted by the director establishing a limited offering exemption which furthers objectives of compatibility with federal exemptions and uniformity among the states, provided that in adopting any such rule the director may require that no commission or other remuneration be paid or given to any person, directly or indirectly, for effecting sales unless the person is registered under this chapter as a broker-dealer or salesperson.

Credits

[2006 c 220 § 1, eff. June 7, 2006; 1998 c 15 § 14; 1989 c 307 § 34. Prior: 1987 c 457 § 13; 1987 c 421 § 9; 1986 c 90 § 1; 1981 c 272 § 6; 1979 ex.s. c 68 § 21; 1977 ex.s. c 172 § 2; 1975 1st ex.s. c 84 § 17; 1974 ex.s. c 77 § 6; 1972 ex.s. c 79 § 1; 1961 c 37 § 8; 1959 c 282 § 32.]

OFFICIAL NOTES

Legislative finding--1989 c 307: See note following RCW 23.86.007.

Application--1989 c 307: See RCW 23.86.900.

Effective date--Application--1987 c 421: “Sections 1 through 8 of this act shall take effect January 1, 1988. The director of licensing may take whatever action is necessary to implement this act on its effective date. This act applies to any person, individual, corporation, partnership, or association whether or not in existence on or prior to January 1, 1988.” [1987 c 421 § 12.]

Effective date--1986 c 90: “This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1986.” [1986 c 90 § 3.]

Effective date--1974 ex.s. c 77: See note following RCW 21.20.040.

Notes of Decisions (6)

West's RCWA 21.20.320, WA ST 21.20.320
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West's Revised Code of Washington Annotated
Title 21. Securities and Investments
Chapter 21.20. Securities Act of Washington (Refs & Annos)
Definitions

West's RCWA 21.20.005

21.20.005. Definitions

Currentness

The definitions set forth in this section shall apply throughout this chapter, unless the context otherwise requires:

(1) “Broker-dealer” means any person engaged in the business of effecting transactions in securities for the account of others or for that person's own account. “Broker-dealer” does not include (a) a salesperson, issuer, bank, savings institution, or trust company, (b) a person who has no place of business in this state if the person effects transactions in this state exclusively with or through the issuers of the securities involved in the transactions, other broker-dealers, or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the investment company act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (c) a person who has no place of business in this state if during any period of twelve consecutive months that person does not direct more than fifteen offers to sell or to buy into or make more than five sales in this state in any manner to persons other than those specified in (b) of this subsection.

(2) “Customer” means a person other than a broker-dealer or investment adviser.

(3) “Director” means the director of financial institutions of this state.

(4) “Federal covered adviser” means any person registered as an investment adviser under section 203 of the investment advisers act of 1940.

(5) “Federal covered security” means any security defined as a covered security in the securities act of 1933.

(6) “Full business day” means all calendar days, excluding therefrom Saturdays, Sundays, and all legal holidays, as defined by statute.

(7) “Guaranteed” means guaranteed as to payment of principal, interest, or dividends.

(8) “Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. “Investment adviser” also includes financial planners and other persons who, as an integral component of other

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financially related services, (a) provide the foregoing investment advisory services to others for compensation as part of a business or (b) hold themselves out as providing the foregoing investment advisory services to others for compensation. Investment adviser shall also include any person who holds himself or herself out as a financial planner.

“Investment adviser” does not include (a) a bank, savings institution, or trust company, (b) a lawyer, accountant, certified public accountant licensed under chapter 18.04 RCW, engineer, or teacher whose performance of these services is solely incidental to the practice of his or her profession, (c) a broker-dealer or its salesperson whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for them, (d) a publisher of any bona fide newspaper, news magazine, news column, newsletter, or business or financial publication or service, whether communicated in hard copy form, by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client, (e) a radio or television station, (f) a person whose advice, analyses, or reports relate only to securities exempted by RCW 21.20.310(1), (g) an investment adviser representative, or (h) such other persons not within the intent of this paragraph as the director may by rule or order designate.

(9) “Investment adviser representative” means any partner, officer, director, or a person occupying similar status or performing similar functions, or other individual, who is employed by or associated with an investment adviser, and who does any of the following:

(a) Makes any recommendations or otherwise renders advice regarding securities;

(b) Manages accounts or portfolios of clients;

(c) Determines which recommendation or advice regarding securities should be given;

(d) Solicits, offers, or negotiates for the sale of or sells investment advisory services; or

(e) Supervises employees who perform any of the functions under (a) through (d) of this subsection.

(10) “Issuer” means any person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type; the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued.

(11) “Nonissuer” means not directly or indirectly for the benefit of the issuer.

(12) “Person” means an individual, a corporation, a partnership, a limited liability company, a limited liability partnership, an association, a joint-stock company, a trust where the interest of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(13) “Relatives,” as used in RCW 21.20.310(11) includes:

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(a) A member's spouse;

(b) Parents of the member or the member's spouse;

(c) Grandparents of the member or the member's spouse;

(d) Natural or adopted children of the member or the member's spouse;

(e) Aunts and uncles of the member or the member's spouse; and

(f) First cousins of the member or the member's spouse.

(14) “Sale” or “sell” includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. “Offer” or “offer to sell” includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value. A purported gift of assessable stock is considered to involve an offer and sale. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

(15) “Salesperson” means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities. “Salesperson” does not include an individual who represents an issuer in (a) effecting a transaction in a security exempted by RCW 21.20.310 (1), (2), (3), (4), (9), (10), (11), (12), or (13), (b) effecting transactions exempted by RCW 21.20.320 unless otherwise expressly required by the terms of the exemption, or (c) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state.

(16) “Securities act of 1933,” “securities exchange act of 1934,” “public utility holding company act of 1935,” “investment company act of 1940,” and “investment advisers act of 1940” means the federal statutes of those names as amended before or after June 10, 1959.

(17)(a) “Security” means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture; voting-trust certificate; certificate of deposit for a security; fractional undivided interest in an oil, gas, or mineral lease or in payments out of production under a lease, right, or royalty; charitable gift annuity; any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof; or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or

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participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this subsection. This subsection applies whether or not the security is evidenced by a written document.

(b) "Security" does not include: (i) Any insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period; or (ii) an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974.

(18) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico.

Credits

[2011 c 336 § 594, eff. July 22, 2011; 2002 c 65 § 1; 1998 c 15 § 1; 1994 c 256 § 3. Prior: 1993 c 472 § 14; 1993 c 470 § 4; 1989 c 391 § 1; 1979 ex.s. c 68 § 1; 1979 c 130 § 3; 1977 ex.s. c 188 § 1; 1975 1st ex.s. c 84 § 1; 1967 c 199 § 1; 1961 c 37 § 1; 1959 c 282 § 60.]

OFFICIAL NOTES

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Findings--Construction--1994 c 256: See RCW 43.320.007.

Effective date--1993 c 472: See RCW 43.320.900.

Severability--1979 c 130: See note following RCW 28B.10.485.

Notes of Decisions (102)

West's RCWA 21.20.005, WA ST 21.20.005
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West's Revised Code of Washington Annotated
Title 21. Securities and Investments
Chapter 21.20. Securities Act of Washington (Refs & Annos)
Registration of Securities

West's RCWA 21.20.140

21.20.140. Unlawful to offer or sell unregistered securities--Exceptions

Currentness

It is unlawful for any person to offer or sell any security in this state unless: (1) The security is registered by coordination or qualification under this chapter; (2) the security or transaction is exempted under RCW 21.20.310, 21.20.320, or 21.20.880; or (3) the security is a federal covered security, and, if required, the filing is made and a fee is paid in accordance with RCW 21.20.327.

Credits

[2016 c 61 § 4, eff. June 9, 2016; 1998 c 15 § 11; 1975 1st ex.s. c 84 § 10; 1959 c 282 § 14.]

Notes of Decisions (5)

West's RCWA 21.20.140, WA ST 21.20.140
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