

December 2019

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Recommended Citation

Ernest W. Lohf, *Regulation in Western States of Issuance of Mining Securities*, 9 Wyo. L.J. 170 (1955)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol9/iss3/3>

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REGULATION IN WESTERN STATES OF ISSUANCE OF MINING SECURITIES

BY ERNEST W. LOHF*

Romantic tales,¹ hopes that holders of today's penny stock will be among tomorrow's *nouveaux riches*, the lure of precious metals and, currently, of uranium—all contribute toward giving mining securities a distinctive aura increasing the likelihood of abuses in their issuance and sale.² Consequences to investors may range from sheepish disappointment to destitution.

Perhaps not surprisingly, therefore, the first state securities regulation³ was of mining securities and, curiously, in Nevada, which today is unique among states in having no blue sky law.⁴ In the western states today, regulation, not confined to mining securities, ranges from none in Nevada through Colorado's regulation by disclosure to more or less comprehensive superintendence of issuance and sale of securities under the traditional blue sky regulatory philosophy in Arizona, California, Montana, New Mexico, Oregon, Utah and Wyoming. Washington and Idaho regulatory systems exemplify both the disclosure and regulatory philosophies.⁵

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1. Extending from the story of Jason and the Golden Fleece in the dawn of mining adventure through the nineteenth-century yarn of Kellogg's burro as discoverer of Idaho's Bunker Hill lode, see RICKARD, A HISTORY OF AMERICAN MINING 321-322 (1932), to the contemporary saga of "Vernon Pick's \$10 Million Ordeal," see Coughlan, *Vernon Pick's \$10 Million Ordeal*, Life, Nov. 1, 1954, p. 2.
2. For a well-written account of probably the apogee of mendacity and knavery in sale and issuance of mining securities during the fabulous era of Nevada's Comstock lode, see RICKARD, *op. cit. supra* note 1, 107-110. Cf. The Denver Post, Oct. 18, 1954, p. 44, col. 5: "The stock sale surge [of uranium stocks in Utah in 1954] came in early summer. Brokerage offices at times had to lock their doors to control the flood of prospective customers. Stock issues often were oversubscribed before certificates were issued. Sales boomed to as high as three to five million shares per day."
3. Other than incidentally through public utility regulation under public service laws. See LOSS, SECURITIES REGULATION 17 (1951).
4. Before both the Rhode Island statute of 1910, R.I. Acts and Resolves 1910, c. 577, and the initial general licensing act in Kansas, Kan. Sess. Laws 1911, c. 133, a Nevada statute, Nev. Stat. 1909, c. 56, required, inter alia, issuers engaged in Nevada mining to file semiannually, for public inspection, information as to mining property and its development, use of proceeds from sale of stock, capital structure, compensation paid officers and other expenditures. The act defined "treasury stock" as shares "that have been or shall be specifically set aside to sell for money, or other valuable consideration, and the proceeds of which are to be used for the actual development of the mineral resources of any mining claim or for the purpose of making necessary improvements thereon. . . ." and declared all other shares to be "promotion stock." The statute also required stock certificates to be stamped conspicuously as either "Treasury Stock" or "Promotion Stock," as appropriate, and provided criminal penalties for violations. Two years later Nevada legislators amended (and weakened) the act, Nev. Stat. 1913, c. 202, and subsequently repealed it altogether, Nev. Stat. 1915, c. 49.
5. It is difficult, and perhaps rather useless, see Loss, *op. cit. supra* note 3, at 20, n.14, accurately to classify blue sky laws, but so far as they require registration of securities, as distinguished from policing of fraud and registration of dealers and salesmen, the customary distinction as to the philosophy underlying the regulatory system appears meaningful. Under the Colorado statute issuers may publicly offer

This paper focuses on some problems mining securities present to securities administrators attempting to secure adequate protection of investors with minimal impairment of the utility of public financing in channeling investment capital into mining enterprise. Despite the currently high interest in uranium offerings, there will be no discussion of them as such; regulatory provisions applicable to mining securities apply generally to uranium securities as well. The principal differences to be taken into account are: (1) the United States government has guaranteed the price of uranium until 1962; (2) uranium occurrences are erratic, resulting in higher exploration and development costs and increased risks; and (3) most uranium offerings are to raise funds for exploratory purposes.

securities if within twelve months preceding the selling effort they have filed a "prospectus" containing information specified in COLO. REV. STAT. (hereafter to as "COLO." Secs. 125-1-4 and 125-1-5 (1953)), provided, of course, there otherwise is compliance with the statute. Prospective purchasers can secure copies of the "prospectus" either from the state securities commission, *Id.* Sec. 125-1-10, or, within 48 hours after issuer's receipt of request therefor, directly from the issuer, *Id.* Sec. 125-1-6. The basic concept, as under the Securities Act of 1933, 48 STAT. 74 (1933), is that the law should make available to investors adequate and accurate information; given satisfactory disclosure, any and every security may be offered. In contrast, under the traditional blue sky regulatory approach, no security can be offered publicly without a permit from the securities administrator issued after findings that the issue satisfies statutory standards, usually broadly phased terms of fairness and nonfraudulency toward purchasers. Thus, the California Commissioner must find that the "proposed plan of business . . . and the proposed issuance of securities are fair, just and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities that it proposes to issue and the method to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser. . . ." CAL. CORP. CODE ANN. (hereafter referred to as "Cal.") Sec. 25507 (Supp. 1951). Other standards include, in Utah, that the enterprise must not be "based upon unsound business principles. . . ." UTAH CODE ANN. (hereafter referred to as "Utah") Sec. 66-1-11 (1953), and, in New Mexico, that it must not be "a mere scheme of the promoter or promoters to get rich quick at the expense of the purchasers of the aforesaid securities," N.M. STAT. ANN. (hereafter referred to as "N.M.") Sec. 50-1705 (1941). The practical result is that the regulatory administrator has considerable discretion to approve or disapprove any specific offering regardless of how much disclosure is made. The distinction between the regulatory and disclosure philosophies underlying the various statutes, however, in practice may become illusory. If an administrator under a disclosure statute chooses to impose conditions upon registration, an issuer about to make a public offering is in no position to challenge in the courts the administrator's authority. Administrative approval or disapproval of the offering thus loom large on the horizon of the issuer regardless of the regulatory philosophy to which a state ostensibly is committed. For discussion of whether exercise of such administrative discretion improperly has impeded mine financing, see p. 187 *infra*.

The Idaho statute, basically of the regulatory type does not apply to issuers "engaged in actual mining operations developing mining property within the state except as hereinafter provided. . . ." IDAHO CODE ANN. (hereafter referred to as "IDAHO") Sec. 26-1816 (1948). By regulation, the Idaho Commissioner of Finance, apparently without authority, has limited this exemption to "Mining associations or corporations *solely* engaged in actual mining operations in this state. . . ." (my italics). CCH BLUE SKY L. REP. Para. 15603. Statutory provisions applying to such exempted issuers, IDAHO Secs. 26-1817 to 26-1821, require principally filing of reports and copies of sales literature with the Idaho Inspector of Mines.

The Washington statute is tripartite: (1) the "Oil and Mining Leases Act," WASH. REV. CODE (hereafter referred to as a "WASH.") c. 21.12 (1951), applicable to mining leases ("any instrument conveying title to . . . metalliferous, or non-metalliferous rights on real property, exclusive of title to the property," WASH. Sec. 21.12.010) and their public sale ("an offering of three or more leases to residents of the state," *Ibid.*); (2) the "Mining Act," *Id.* c. 21.08, applying to any "corporation engaged or proposing to engage in the metalliferous mining industry and desiring to issue or sell . . . securities issued by it, to more than twenty residents of

PROBLEMS ARISING FROM ISSUANCE OF MINING SECURITIES

One administrator summarized the evils attending issuance and sale of some mining securities as follows:

"It is a frequent occurrence in the promotion of a primary mining venture that of the money subscribed an adequate portion does not go into the property; that the issuer is overcapitalized; that the shares sold for cash are far in the minority; that excessive commissions are paid and selling costs incurred; that the shares offered represent prospective ownership and nothing more; that the assets are grossly overvalued and misrepresented; that the financing is undertaken for the profit in the financing itself; and that in the final analysis the investor assumes the entire financial risk while sharing in less than half the profits that might later accrue. As if the foregoing were not enough, we see superimposed thereon half-truths, manipulations, mismanagement, false quotations, fake balance sheets, and other complicated forms of common larceny."⁶

Except for the "complicated forms of common larceny," the above quotation mainly emphasizes facets of one major problem: assuring that publicly contributed funds enrich the mining enterprise itself, and not its promoters, and that shares sold for cash participate fairly in earnings and upon liquidation in relation to shares issued for other considerations. Additional problems arise from the geological risks involved, especially in mining for precious metals or uranium or where issuers solicit funds for developing unproven property. And securities of producing issuers present accounting problems; financial statements of such issuers mean relatively little without knowledge of their accounting policy as to depletion charges and reserves. Similarly, the mining issuer's title to its mining property is all-important; loss of a claim or lease subsequent to public sale of securities can mean collapse of the enterprise. Again, mining issuers may issue assessable shares, although today the federal securities legislation militates against that,⁷ at relatively low prices, or even "free," and after a purchaser

the state. . .," *Id.* Sec. 21.08.020; and (3) the "Securities Act," *Id.* c. 21.04, the general, regulatory-type blue sky law. The "Mining Act" and the "Oil and Mining Leases Act" embody the disclosure philosophy and require primarily of issuers the submission of a "Statutory Statement," *Id.* Secs. 21.08.020 and 21.12.030, respectively, to be "filed" by the Washington Director of Licenses, *Id.* Secs. 21.08.030 and 21.12.040, respectively, and preparation of a prospectus summarizing material facts in the Statutory Statement, *Id.* Secs. 21.08.040 and 21.12.060, respectively.

Similarly "The Securities Act of New Mexico," N.M. Laws 1955, c. 131, which will take effect June 10, 1955, ostensibly adopts a different regulatory philosophy with respect to mining securities than with respect to others. Section 4 makes unlawful selling nonexempted securities "until there shall have been filed with the Commissioner by the issuer or a registered dealer a notice of intention to sell such securities. . . ." containing information prescribed by the act. Section 9 exempts mining securities from the act, however, and prohibits their sale "unless the issuer . . . shall have received permission [under Section 9 (b)] for the sale of such . . . securities from the Commission. . . ." Under Section 9(f) such permission may be revoked on numerous grounds, including that the business is not based upon "sound principles" and that revocation "is in the interest of the public welfare. . . ."

6. 23 PROC. NAT'L ASS'N OF SECURITIES ADM'RS 33 (1940).

7. Assessability, as a practical matter, tends to destroy availability of the Regulation A exemption from registration under the Securities Act of 1933, since all leviable assessments are includible in the aggregate offering price, thereby relegating such issuers to the more stringent Regulation A-M. See Loss, *op. cit. supra* note 3, at 387-388.

parts with some of his money, the promoter of a worthless enterprise only need take full advantage of the natural tendency of his victim to try to save his "investment" by additional contributions labelled assessments.

Administrators dealing with such problems first must secure filing of information concerning mining securities and their issuers adequate for making the necessary findings upon which to base a grant or denial of a permit, or, under the disclosure theory, information making possible investors' decisions based upon all available material facts. The mining issuer must file, of course, all information the relevant blue sky law requires issuers generally to file.⁸ In addition, all western state securities administrators, sometimes under explicit statutory authority but more commonly by regulation or instructions on registration forms, require filing of further information pertaining specifically to mining issuers and mining securities. In what follows we will consider some of the further information required.^{8a}

INFORMATION REQUIRED SPECIALLY OF MINING ISSUERS

1) *Reports of mining engineers and geologists*

The opinions of geologists and mining engineers as to the possible presence of ore in paying quantities in unproven ground, or as to the amount of ore in proven ground, are not necessarily accurate, but it is hardly disputable that there is no better way of determining the geological basis upon which a mining venture rests. Of the state statutes here relevant, only the Washington Oil and Mining Leases Act⁹ in so many words prescribes that such report shall accompany a mining issuer's application for registration, and requires "a full engineering or geological report on the lease, signed by a qualified mining engineer or geologist, made within

8. *E.g.*, Utah's application form for issuers requires, inter alia, submission of (1) information identifying the issuer, its organization, business and capitalization, together with supporting documents such as articles of incorporation and by-laws; (2) information concerning the securities proposed to be issued, including kind and class, total authorized or proposed, amounts proposed to be offered in Utah and in other states, securities prior in interest or lien, whether registered with the SEC, method of sale and consideration for which to be sold, proposed price, selling commissions, nature of advertising, together with copies of the security, prospectuses and advertising matter; (3) detailed information regarding the business to which the proposed issue pertains and the use to be made of proceeds from sale of such securities; (4) detailed information as to kinds and "Actual Value" of consideration received from securities issued and outstanding to date; (5) detailed information as to officers (including General Manager), directors, trustees, and persons owning 10% or more of the issuer's securities, including salary, cash invested, kinds and amount of securities owned, estimated net worth and approximate time devoted to the company; (6) financial statements "as of date of this application," including balance sheet, profit and loss statement and statement as to issuer's capitalization or proposed capitalization; (7) copies of instruments creating a mortgage or lien covering securities proposed to be sold, together with competent appraisal of the property covered and statement of prior liens; (8) copy of proposed subscription contract; (9) references; (10) information as to action by other state securities administrators upon the proposed issue; and (11) such further information as the Commission may require.

8a. Insofar as the remainder of this paper refers (or does not refer) to securities regulation in New Mexico, the reader should take into account that on June 10, 1955, a new blue sky law (see note 5 *supra*), enacted after this paper was written, will take effect in New Mexico.

9. See note 5 *supra*.

three years prior to the filing thereof. . . ."¹⁰ The California, New Mexico and Wyoming statutes, however, authorize the administrator to secure expert opinions.¹¹ The California provision is most comprehensive, authorizing the Commissioner of Corporations to "accept and act upon the opinions, appraisements, and reports of any engineers, appraisers or other experts which may be presented by the applicant . . . on any question of fact concerning or affecting the securities proposed to be issued. In lieu of, or in addition to, such opinions . . . , the commissioner may have any or all matters concerning . . . such securities investigated, appraised, passed upon, and certified to him by engineers, appraisers, or other experts selected by him."¹² The California Commissioner has implemented this provision with a regulation that applicants must furnish such reports on request; that, whenever practicable, the Commissioner first should approve the person preparing the report and that the report then should be transmitted directly to the Commissioner by the maker without his disclosing its contents to anyone else.¹³ Regulations of the New Mexico and Wyoming administrators require issuers engaged in mining to furnish "expert opinion . . . where possible."¹⁴ The New Mexico "Application for Registration of Securities" goes on to require apparently all mining issuers to furnish by exhibit a "Report as of recent date [by a] qualified mining engineer . . ." upon mining properties.

Statutes of other western states clearly would seem impliedly to authorize administrators to require similar reports.¹⁵ Three western states do so by regulation. The 1954 Colorado regulations specify such reports must include: "(1) A description of each property, including its geological features, mineralization, occurrence and disposition of ore bodies, and such other geological features or conditions of which an investor should reasonably be informed. (2) The principal mineral constituents of any ore bodies or deposits and the methods used in determining the same. (3) The results of any metallurgical, geophysical, geochemical or other tests used in determining the presence or composition of any ore deposits," together with additional data as to the issuer's title to the mining property and a surface map thereof.¹⁶ Not every mining issuer, however, need submit such reports. Issuers having filed SEC registration statements need file only a short-form "prospectus" together with a copy of the SEC registration statement, which is incorporated by reference in the "prospectus."¹⁷ Other-

10. WASH. SEC. 21.12.030.

11. CAL. SEC. 25506, N.M. SEC. 50-1704, WYO. COMP. STAT. ANN. (hereafter referred to as "Wyo." Sec. 39-1214 (1945).

12. CAL. SEC. 25506.

13. CCH BLUE SKY L. REP. Para. 8622.

14. *Id.*, at Para. 33605 and 53606, respectively.

15. The statutes generally provide for submission of specified information plus, for example, "such other information . . . as said department of finance may require." IDAHO SEC. 26-1802. Further, since such technical information is so intimately related to the value of principal assets of mining issuers, an administrator hardly could make an adequate finding that the proposed issue is "fair" to investors unless such information is available.

16. CCH BLUE SKY L. REP. Para. 9605. See also p. *infra*.

17. See Colo. Form S-1a.

wise mining issuers must submit such report "with respect to all claims acquired or to be acquired . . . which the issuer intends to explore, develop or operate with funds acquired from investors."¹⁸ Regulations of the Arizona Commission require such reports to be filed if they or excerpts therefrom are included in any selling literature.¹⁹ The Idaho regulations state: "When an engineering report has been made, attach a copy to application; when no report has been made, so state."²⁰

Similar requirements in other western states, though not specified in statute or regulation, are made clear on application forms. The Oregon form requires applicants with assets including mining property to submit "a report . . . by a registered mining engineer or geologist of recognized standing. . . ."²¹ The Montana form imposes a like requirement.²² Utah's "Instructions for Issuers" requires furnishing a "geologist's or engineer's report on all property intended to be worked as to mineralization and prospects."

When such technical reports are submitted, there remains the problem of evaluating them. The average securities administrator presumably is not a mining engineer or geologist and lacks technical competence adequately to appraise any such report submitted. Neither do limited appropriations and personnel,²³ nor relatively few applications from mining issuers in non-mining states, permit or justify having such an expert on the staff. One solution is for the administrator to require an independent examination of the mining property by an expert of his own choosing, as provided for in the California statute.²⁴ In other states this perhaps could be done under investigatory powers conferred by blue sky statutes.²⁵ Another solution is for the administrator to utilize facilities and staffs of local state schools of mines. The New Mexico administrator states: "The New Mexico School of Mines cooperates with this department to the fullest extent in making appraisals and examinations of potential properties, and I depend largely on the recommendations contained in its report in making

18. CCH BLUE SKY L. REP. para. 9605.

19. *Id.*, at Para. 6652.

20. *Id.*, at Para. 15606.

21. Form No. 1, "Registration by Qualification."

22. Mont. Form 89.

23. Thus the Idaho Commissioner states: ". . . [T]his Department has a total of only five employees, including the writer, and in addition to the administration of the Idaho 'Blue Sky' Law, it is given the responsibility and supervision of the Idaho Banking Laws, Small Loan Law, Collection Agency Law and Credit Union Law. The banking and small loan statutes require that the department make annual examinations, and . . . we do not have sufficient personnel to 'police' mining operations, even though the need may be great." Letter to the writer, March 7, 1955.

24. CAL. Sec. 25506. See p. *supra*. See also the Wyoming regulations, CCH BLUE SKY L. REP. Para. 53606, and New Mexico regulations, *id.* at Para. 34605, providing for like examinations by the administrator.

25. *E.g.*, the Arizona statute provides: "The commission . . . may at any time either prior to or subsequent to the registration of any securities . . . investigate and examine into the affairs of any person issuing . . . or intending to issue . . . securities, or into the affairs of any person when the commission has grounds to believe that such person is or may be issuing . . . securities." ARIZ. CODE ANN. (hereafter referred to as "ARIZ.") Sec. 53-1421(C) (Supp. 1952).

my decision."²⁶ Wyoming by statute extends this procedure to other state departments as well.²⁷ The procedure of the Utah Commission, however, is perhaps most representative: "It [the Commission] makes no examination of properties. If properties are found to be or believed to be mineralized by a professional geologist the Commission feels it should not superimpose its own judgment above that rendered. A geologist's report recommending development is sufficient for registration purposes."²⁸

And regardless how accurate or excellent may be the experts reports submitted, there is the further problem of transmitting such information to the investor. Some states have given this problem formal recognition by requiring such reports to be included in prospectuses. Thus, the Utah Commission's "Securities Prospectus" instructions require filing before registration of a prospectus (to be given prospective purchasers "before each sale is completed") containing "at least one engineer's or geologist's report in sufficient detail as to acquaint prospective buyer of the mineral possibility both of the district and the particular property under consideration. Name and standing of examiner, date of examination, nature and extent of examination. Findings: (a) History of District; (b) Mineral possibilities of property; (c) Work done; (d) Buildings and machinery; (e) Summary." The Washington Mining Act and the Oil and Mining Leases Act²⁹ both require preparation of prospectuses containing the material facts in the "Statutory Statement" filed by the issuer,³⁰ but only the Oil and Mining Leases Act would seem to require an engineering or geological report to be included in the statutory statement,³¹ and on the latter Act clearly requires that "the prospectus shall be left with the prospective purchaser for examination."³² As previously noted, the "Prospectus" which issuers must file under the Colorado statute generally must include such report, but the prospective purchaser need be given a "Prospectus" only upon request.³³ Making technical reports available to the investor is one, and perhaps the best, method of acquainting him with the mineralogical foundation of a mining enterprise, but is not necessarily effective. Unless he is himself a geologist or mining engineer he often may not understand or be able to evaluate such reports. As a practical matter, it would seem securities administrators must rely greatly upon the significance of such reports seeping down to investors through independent experts, securities analysts or investment counsellors.

26. Letter to the writer, March 24, 1953.

27. Wyo. Sec. 39-1215.

28. Letter to the writer from Director, Utah Securities Comm'n, Feb. 28, 1955.

29. See note 5 *supra*.

30. WASH. Secs. 21.08.040 and 21.12.060, respectively. Section 21.08.040, however, does not make completely clear whether in all cases a prospectus containing the material facts in the statutory statement must be prepared, or whether only that if a prospectus be prepared it must contain such material facts. The exact language is: "A prospectus issued by the company or its agent or underwriter . . . shall be filed with the director before public distribution and contain a condensed summary of the material facts contained in the statutory statement. . . ."

31. WASH. Sec. 21.12.030.

32. *Id.*, at Sec. 21.12.060.

33. See note 5 *supra*.

2) *Information as to title to mining property*

Obviously an issuer's defective title to the mining property upon which its enterprise is predicated greatly enhances risks its security holders must assume. And the unhappy consequences of an issuer's losing a title squabble may, and more probably will, occur even though its title is not defective in the ordinary sense of being subject to outstanding superior claims. Where the mining property consists of leases on which rental payments are due on specified dates, any default in payments enables the landowner, by declaring a forfeiture, to pull the mineralogical rug from beneath the feet of the enterprise. This risk is especially great where the venture is dependent upon proceeds from sale of securities to finance the rental. A lagging stock sales campaign readily can result in the issuer's going out of business, regardless of its chances of success otherwise, and in substantial, if not complete, loss to investors.³⁴

Though no statute here relevant explicitly provides for submission of evidence of satisfactory title, most western administrators require such information. The California Commissioner's regulations require mining issuers to file "(a) Copies of all contracts relating to the purchase or operation of the property; (b) Satisfactory evidence of chain of title to the property described. . . ."³⁵ Colorado regulations require the "Prospectus" (except the short-term "Prospectus" incorporating an SEC registration statement) to contain "with respect to all claims acquired or to be acquired . . . which the issuer intends to explore, develop or operate with funds acquired from investors": (1) a survey certificate; (2) if the claims are unpatented, a statement regarding 'the nature, extent and validity of any adverse interest . . . known to the issuer,' and, if none be known, a statement to that effect; (3) an attorney's title opinion "relating to each claim or group of claims"; (4) copies of any "lease, option or contract of purchase . . . relating to claims leased by the issuer or which the issuer has contracted to purchase," and also, if requested, "a statement signed by the lessor . . . or vendor . . . that the lease, option or contract is presently in good standing. . . ."³⁶ Further, the mining engineer's or geologist's report submitted³⁷ must set forth, in addition to technical data, "The nature of the title under which each property is held or to be held, and if the claims are unpatented, the legal description thereof, the name or names of the owners, a statement that each claim has been properly located in accordance with applicable laws and regulations, that surface boundaries have been properly marked, that all monuments or markers are in place, that location notices have been recorded in the Recorder's Office of the county where the claims are situated, and that all assessment work required

34. The Montana administrator states this is a common problem arising in connection with applications by mining issuers for registration in that state, and that he "is . . . inclined to look with disfavor. . . ." upon such applications. Letter to the writer, March 25, 1953.

35. CCH BLUE SKY L. REP. Para. 8628.

36. *Id.*, at Para. 9605.

37. See pp. 175-176 *supra*.

by law has been done."³⁸ Under the Idaho regulations, mining issuers must "give the names of the properties, the name of the mining district, the county and state in which located, and also attach to application a certified copy of instrument showing ownership."³⁹

Utah's "Issuer's Application" requires "copies of all instruments from location notices showing claim of title with annual proofs of labor," and, in addition, the "Instructions for Issuers" requires "an Attorney's opinion as to title to all claims and leases." Montana requires a statement as to whether the issuer's property is held "in fee simple, lease, working agreement, lease and option, royalty or other manner, together with copies of any and all leases."⁴⁰ Oregon also requires copies of leases, plus information as to whether the claims have been patented, whether all taxes on patented claims have been paid, whether all assessment work legally required on unpatented claims has been performed, and whether proof of assessment work or any leases have been recorded.⁴¹ The New Mexico "Application for Registration of Securities" requires "Opinions of counsel, as to: . . . (b) Title to real estate or . . . mining rights or titles, listed as asset of issuer, or in which issuer proposes to sell interests. (c) Sufficiency of lease, or leases, when material to the issue."

Arizona, Washington and Wyoming administrators apparently have not explicitly required filing of information concerning title to mining property. If in fact none is furnished, effective regulation is significantly handicapped. In view of the fundamental importance to mining issuers of sufficient titles to mining property, it would seem that a securities administrator at least should require submission of an attorney's opinion as to title.

3) *Data regarding depletion accounting*

Although most current mining offerings are of uranium companies soliciting funds for exploratory purposes, there are a number of offerings by producing issuers. The usefulness of their financial statements clearly is lessened if they set forth no statement as to depletion accounting policy or only a bare statement of the amount of depletion charges and reserves. Ideally, such financial data will be most useful if not only depletion charges and reserves are shown but also the assumptions upon which such accounting is based, the issuer's probable future policies with respect to depletion, and if the depletion policy is shown to be correlated with available expert opinion as to the value and probable mineral content of the issuer's mining property.⁴²

38. CCH BLUE SKY L. REP. Para. 9605.

39. *Id.*, at Para. 15606.

40. Mont. Form 89.

41. Ore. Form No. 1, "Registration by Qualification."

42. Aside from problems which may exist under particular corporation statutes with respect to lawful payment of dividends if the mining issuer has no depletion policy, see DODD & BAKER, CASES AND MATERIALS ON CORPORATIONS 1051-52 (2d ed. 1951), effective securities regulation would seem to demand that mining issuers have an acceptable depletion accounting system and make the resulting information avail-

State securities administrators, however, have established no formal requirements going as far as just suggested, except perhaps by implication in requirements, such as on the Arizona form, that financial statements "shall be prepared in accordance with generally accepted accounting principles and certified. . . ."43 The Montana statute expressly authorizes the Commission to prescribe accounting practice,44 but there is no indication he has used this power to require depletion accounting by mining issuers. The New Mexico form requires, however, that the issuer's profit and loss statement "shall show what the practice of the issuer has been . . . to to . . . depletion . . . charges. . . ."45 A California regulation requires financial statements to show depletion reserves "separately in conjunction with the proper asset account. . . ."46 The Oregon form specifically requires depreciation reserves to be deducted from assets, but does not mention depletion reserves, although it does require "a detailed analysis of said financial statement, explaining each item in a comprehensive manner."47 Statutes, regulations and forms of other western states are silent as to depletion accounting.

ASSURING ADEQUATE WORKING CAPITAL AND PROTECTING PUBLICLY INVESTED CASH

Although assuring adequate working capital and protecting cash investment would appear to be separate problems deserving of separate discussion, they are intimately related and space limitations prevent separate treatment here. These problems present, *inter alia*, the following aspects: (1) preventing excessive distribution costs of public issuance of securities and unreasonable dissipation of funds acquired from the distribution, (2) preventing securities issued to promoters for intangibles from competing in the public market with the unsold portion of the issue during its primary distribution, and (3) assuring that such promotional securities do not participate unfairly in earnings and upon liquidation in relation to shares issued for cash or its equivalent.

1) *Restrictions upon use of publicly contributed funds*

a) *Restricting distribution costs.* All western state administrators require the issuer to disclose underwriting and selling commissions and similar costs of public financing. And, if the administrator deems such costs excessive, he presumably can deny registration for failure of the issue to meet statutory standards of fairness to investors.⁴⁸ Most administrators,

able to investors. Not to do so perhaps is to mislead investors by not apprising them that their investment gradually is being liquidated through dividend payments; in any event, the investor can ascertain the extent to which such liquidation is occurring only through depletion charges.

43. Ariz. form for "Registration of Securities by Qualification."

44. MONT. REV. CODES ANN. (hereafter referred to as "MONT.") Sec. 66-2017 (1947).

45. N.M. Form 1, "Application for Registration of Securities."

46. CCH BLUE SKY L. REP. Para. 8621.

47. Ore. Form No. 1, "Registration by Qualification."

48. Except, of course, where the disclosure theory prevails (Colorado, Idaho and Washington; see note 5 *supra*).

however, have not indicated explicitly precisely when such cost becomes excessive. An exception is the Utah Commission, whose "Instructions for Issuers" states: "The company will not be permitted to spend more than 12½% of the proceeds from the offering." The Utah administrator has clarified this instruction by stating it applies only to commissions paid; other expenses of distribution are outside the limitation.⁴⁹

Also of interest is a provision of the Washington Mining Act that a corporation subject thereto "shall devote at least sixty-five per cent of the proceeds of the offering sold in the state to the actual exploration, development, and equipment of its mining property. . . ."⁵⁰ The Act appears ambiguous, however, in that "proceeds" could mean either gross or net proceeds of the distribution. If the former, the statute may to some extent limit distribution expenses, depending upon the extent to which the issuer otherwise used proceeds from the offering for purposes not specified in the provision, but it would seem, in any event, that the provision could not be too effective since the most avaricious underwriter seldom takes more than twenty-five per cent in commissions and \$25,000 in expenses. If "proceeds" refers to net proceeds, then, of course, the provision would not affect distribution expenses.

b) *Impoundment provisions and other restrictions upon use of funds.*

Statutes of three western states provide for impoundment of funds received from sale of securities. Thus, the Arizona statute provides that if the securities are "of a speculative nature the commission may by order impose reasonable restrictions and conditions upon the use and disbursement of funds to be derived from the sale of such securities, including the impoundment of such funds in a depository satisfactory to the Commission, subject . . . to release from impound as the Commission may deem necessary. For purpose of this subsection an issue of a speculative nature means one in which the business or earnings of the issuer is based upon future developments and potentials rather than on current tangible assets."⁵¹ The Arizona administrator states that this provision and a similar escrow provision are usually applied with respect to mining issuers.⁵²

The California and Oregon statutes contain similar impoundment provisions.⁵³ Under the California regulations, all new companies must impound "an amount which may be deemed necessary to initially finance the proposed enterprise. . . ." and similar requirements may be imposed on companies proposing to expand or those in poor financial condition trying

49. Letter from Director, Utah Securities Comm'n, to Prof. Harold S. Bloomenthal; Univ. of Wyo., Nov. 19, 1954.

50. WASH. Sec. 21.08.080.

51. ARIZ. Sec. 53-1421 (I).

52. Letter to the writer, March 25, 1953. The statutory provisions are ARIZ. Sec. 53-1421 (G) and (H).

53. CAL. Sec. 25508, ORE. REV. STAT. (hereafter referred to as "ORE.") Sec. 59.190 (1953).

to raise more working capital. Generally six months are allowed to raise the amount of the impound.⁵⁴

Also remarkable here is the Washington statute's sixty-five per cent provision noted in the foregoing discussion of distribution costs.⁵⁵ Though the sixty-five per cent figure would already seem to be quite low, the statute further provides that the Director of Licenses may relax the requirement "in exceptional cases in which it is demonstrated that the nature of the enterprise requires it. . . ."⁵⁶

Further restrictions upon use of funds are illustrated by Utah's "Special Terms for Pre-Incorporations" which provides: "a. That all money raised from the sale of securities (less commission allowed) will be escrowed in a bank, under an agreement that funds will be released only upon authority of this Commission and . . . not . . . until incorporation is effected and then only to the corporation; that if the full amount is not raised, the money will be refunded to the stock purchaser. . . . f. Before any money may be spent, it must have approval of the Commission, and if for properties, a geologist's report acceptable to the Commission will first be furnished."

2) *Escrow of promotional and other securities*

All the western state statutes here relevant contain escrow provisions with the exception of statutes of Colorado, Idaho, Montana and Wyoming.⁵⁷ The Idaho Commissioner's regulations, however, contain such provision,⁵⁸ and it is the practice of the Montana administrator to require escrow of promotional stock in certain cases.⁵⁹ In general, the escrow provisions prevent competition for public funds between promotional securities and unsold treasury securities of the issuer and also deal with the problem of achieving fair participation in earnings and upon liquidation by securities sold for cash or its equivalent. The salient aspects of such provisions are summarized below.

Securities subject to escrow. The more customary statutory language is that of the Utah provision that securities issued for "any patent right, copyright, trade-mark, process, lease, formula or good will, or for promotion fees or expenses, or for other intangible assets . . ." are subject to escrow.⁶⁰ Language in the Oregon statute is identical.⁶¹ The Idaho

54. CCH BLUE SKY L. REP. Para. 8619.

55. See p. 180 *supra*.

56. WASH. Sec. 21.08.080.

57. See ARIZ. Sec. 53-1421 (G) and (H), CAL. Sec. 25508, N.M. Sec. 50-1704, ORE. Sec. 59.190 (1953), UTAH Sec. 61-1-23, WASH. Sec. 21.08.090.

58. CCH BLUE SKY L. REP. Para. 15610.

59. The Montana Commissioner writes: "One of the problems we are confronted with, is to prevent promoters who have issued large blocks of stock for considerations other than cash or labor, from selling such stock before the treasury stock is disposed of. In such cases it is the policy of this department to require that such promotional stock be escrowed during the time when treasury stock is being sold in order to realize funds for the development of the project." Letter to the writer, March 25, 1953.

60. UTAH Sec. 66-1-23.

61. ORE. Sec. 59.190.

regulations adopt the same language and add "organization or incorporation securities."⁶² The New Mexico statute similarly specifies securities "issued or to be issued in payment of . . . patents, formulae, good will, promotion or intangible assets . . ." but includes also securities "issued or to be issued in payment of property."⁶³ Language of the California statute is very general: "The commissioner may impose conditions requiring the deposit in escrow of securities. . ."⁶⁴ California regulations implement this provision and define securities issued for services, for intangibles whose value is not established to the satisfaction of the Commissioned, or for a consideration "substantially lower than the consideration for which shares are sold for principal financing purposes. . ." as "promotional" securities subject to special requirements including that they be escrowed.⁶⁵ The Arizona statute also is of broad application with "all treasury stock of the issuer or other securities issued and thereafter acquired by the issuer. . ."⁶⁶ subject to escrow, in addition to securities issued for intangibles and upon organization.⁶⁷ Though the Montana statute has no escrow provision, the Montana Commissioner writes he usually requires escrow of "promotional stock" such as that issued for "considerations other than cash or labor. . ."⁶⁸ Under the Washington Mining Act, "All promotion stock . . . shall . . . be pooled. . ."⁶⁹ Neither the Washington Securities Act nor the Oil and Mining Leases Act, however, have escrow provisions.

When escrow will be required. Escrow may be discretionary with the administrator. That would seem to be true under the Arizona, California, Oregon and Utah statutes⁷⁰ and obviously must be true in Montana. The California regulations indicate, however, that escrow will be required in all cases of issues involving the "promotional" securities defined therein.⁷¹ The Idaho regulations similarly seem to require in all cases that the securities enumerated must be escrowed.⁷² Escrow of the appropriate securities apparently is mandatory upon the administrator under the New Mexico and Washington statutes.⁷³

Duration of escrow. In Arizona, California, Montana, Oregon and Washington the administrator has discretion to determine duration of the escrow.⁷⁴ The Montana Commissioner apparently requires escrow only

62. CCH BLUE SKY L. REP. Para. 15160.

63. N.M. Sec. 50-1704.

64. CAL. Sec. 25508.

65. CCH BLUE SKY L. REP. Para. 8618.

66. ARIZ. Sec. 5314-21 (H).

67. *Id.* Sec. 5314-21 (G).

68. Letter to the writer, March 25, 1953.

69. WASH. Sec. 21.08.090.

70. ARIZ. Sec. 5314-21 (G) and (H), CAL. Sec. 25508, ORE. Sec. 59.190, UTAH Sec. 66-1-23.

71. CCH BLUE SKY L. REP. Para. 8618.

72. *Id.*, at Para. 15610.

73. N.M. Sec. 50-1704, WASH. Sec. 21.08.090.

74. ARIZ. Sec. 5314-21 (G) and (H), CAL. Sec. 25508, ORE. Sec. 59.190, WASH. Sec. 21.08.090. Montana has no statutory provision. The Arizona administrator writes: Escrow "is not subject to termination upon conclusion of the offering. The escrow continues thereafter until a showing is made that it is no longer necessary for the protection of the stockholders. Such showing is not conditioned upon declaration of a dividend." Letter to the writer, March 25, 1953.

during progress of the primary offering.⁷⁵ The New Mexico statute establishes a similar requirement.⁷⁶ Under the Utah statute no escrowed securities can be withdrawn until "all other stockholders who have paid for their stock in cash shall have been paid a dividend or dividends aggregating not less than fifteen per cent of the cash price for which the stock was issued, shown to the satisfaction of the Commission to have been actually earned on the investment in any common stock so held. . . ."⁷⁷ Idaho regulations make a similar requirement except that the earned dividends need aggregate only six per cent of the investment.⁷⁸

Waiver of right to dividends. Only the California Commissioner, under authorization in the California statute,⁷⁹ explicitly has required that escrowed securities must be subject to waiver of dividend rights in favor of other shareholders, and the requirement is a stiff one; holders of escrowed securities of wasting asset organizations may participate in dividend only after holders of securities sold for cash have received return in full of the purchase price.⁸⁰

Waiver of assets upon liquidation. The California statute authorizes the Commission to require holders of escrow securities to waive their right to participate in assets upon liquidation of the issuer,⁸¹ and the California regulations make provision accordingly.⁸² The Arizona and Utah statutes make such waiver mandatory upon liquidation during the escrow period,⁸³ as do regulations of the Idaho Commissioner,⁸⁴ and holders of escrowed securities may participate in assets only after holders of other securities have been paid in full. Though most other administrators probably have power to require such waiver, they have made no explicit requirements to that effect.

Other problems. The Idaho regulations require escrow agreements to contain the following provision: "If operating expenses exceed the revenue derived from the sale of unissued or treasury stock, all such excess expenses together with any further necessary funds to be used for development and underwriting purposes, shall be ratably assumed and paid by the stockholders whose stock is held in escrow."⁸⁵ The question immediately arises whether escrow stockholders in effect guarantee development of the mining property. In this connection the Idaho Commissioner has stated: ". . . [T]hese [escrow provisions in the regulations] were formulated in the past and have not been practiced recently. . . . No one can in effect guarantee development of mining property. . . ."⁸⁶

75. Letter to the writer, March 25, 1953

76. N.M. Sec. 50.1704.

77. UTAH Sec. 66-1-23.

78. CCH BLUE SKY L. REP. Para. 15610.

79. CAL. Sec. 25508.

80. CCH BLUE SKY L. REP. Para. 8618.

81. CAL. Sec. 25508.

82. CCH BLUE SKY L. REP. Para. 8618.

83. ARIZ. Sec. 5314-21 (G), UTAH Sec. 66-1-23.

84. CCH BLUE SKY L. REP. Para. 15610.

85. *Ibid.*

86. Letter to the writer, March 7, 1955.

Under the California regulations, the "promotional" securities subject to escrow are subject also to further restrictions. The Commissioner will restrict their issuance "to such quantity as will tend to establish an ultimate equality of participation between shares sold for cash, or its equivalent, and promotional shares." Further, they in no case are to exceed fifty per cent of shares authorized, and are to be issuable only on a progressive basis when and as non-"promotional" securities are issued. Nor can their voting rights exceed those of other shares.⁸⁷

If securities in escrow are sold or contracted to be sold before they are released or without a permit from the administrator, questions arise as to civil consequences of violation of the statute. For discussion of these questions, see page 186 *infra*.

ADMINISTRATION OF THE STATUTES AND OTHER PROBLEMS ARISING THEREUNDER

How regulation of mining securities works out in practice is naturally of no little interest. That subject is not, however, particularly amenable to illumination through review and analysis of court decisions. Disputes arising under blue sky laws which attain that measure of immortality resulting from recordation in judicial reports are the exception; most of them live on only in the memories of participants after terminating in unrecorded negotiations. This but emphasizes that the more informal working of an administrative process is of its essence and basic to its salutary operation. Thus, the Utah Commission, in fulfilling its statutory obligation to make an annual report to the governor,⁸⁸ reported: "Investigations and informal hearings by the staff before request for formal hearings, have been held. This has resulted in clearing differences, eliminating the necessity of hearings before the Commission. It has also avoided considerable expense to the department and to the parties concerned."⁸⁹

A number of cases involving mining securities have arisen, however, mainly in California and in connection with construction of the statutory terms "security" and "sale." Thus, an interest in a mining lease evidenced by a certificate representing a 1/3,000 interest in the corpus of a trust operating the mining property has been held to constitute a "security" under the California statute,⁹⁰ as have certificates evidencing an undivided interest in a mining partnership,⁹¹ and contracts evidencing cash purchase of 1/20 interests in the production of mining claims after payment of operating expenses.⁹² The California courts also have held the following not to be "securities": a lease of mining equipment from which profits could result only through operation by the lessee;⁹³ an instrument showing direct

87. CCH BLUE SKY L. REP. Para. 8618.

88. UTAH Sec. 61-1-2.

89. 32 UTAH SECURITIES COMM'N ANNUAL REP. 2 (1952).

90. *Agnew v. Daugherty*, 189 Cal. 446, 209 Pac. 34 (1922).

91. *People v. Reese*, 136 Cal. App. 657, 29 P.2d 450 (1934).

92. *People v. Claggett*, 130 Cal. App. 141, 19 P.2d 805 (1933).

93. *People v. Steele*, 2 Cal. App.2d 370, 36 P.2d 40 (1934).

sale of a specified number of tons of gold ore located at a designated (but nonexistent) mine and guaranteeing a return to the purchaser of double the purchase price;⁹⁴ and an assignment of a sixty per cent ownership interest in a mining lease.⁹⁵ The California Attorney-General has given opinions that transfer for cash of ownership interests in a lease of mining property in order to form a partnership for developing a mine constituted a "security,"⁹⁶ and that the same is true where partners each contract to contribute services to develop a mine in return for a share of profits.⁹⁷ Similarly Oregon courts have held "units of interest" in a partnership promoted by the inventor of an electrical gadget to extract gold from the waters of Mono Lake in California to constitute a "security."⁹⁸ The ultimate question in all these partnership cases (assuming the interests are publicly offered) is, of course, whether the purchaser of the interest becomes a general partner, or whether he acquires only a limited partnership interest analogous to that of a shareholder.

Questions have also arisen as to whether gifts to the public of assessable stock constitute a "sale" within the meaning of the statute. The problem apparently first arose in California, and in 1933, the California Attorney-General answered the question in the affirmative.⁹⁹ Two days later, in the first reported administrative decision under the federal Securities Act of 1933,¹⁰⁰ the FTC held to the same effect.¹⁰¹ In 1935, the Utah Supreme Court disagreed, however, on the ground that a mere expectation by the issuer of future benefit from assessments shareholders who were under no legal obligation to pay is insufficient to make the disposition for "value" and therefore a "sale" under the Act.¹⁰² In 1937, the Washington Attorney-General came to the same conclusion.¹⁰³ The California view clearly would seem to be the better one. The customary definition of "sale" in terms of the disposition, or attempt to dispose of, a security for value would appear applicable upon looking at the substance of such transactions. The issuer who mails assessable shares to the public without having secured previously anything in exchange therefor, whatever else he may be trying to do, does not intend to give anything away, except perhaps a handsomely embossed piece of paper. In any realistic sense, he is attempting to get something in exchange, and thus would seem to be *attempting* to dispose of a security

94. *People v. Anderson*, 35 Cal. App.2d 23, 94 P.2d 627 (1939).

95. *Maguire v. Lees*, 74 Cal. App.2d 697, 169 P.2d 411 (1946). In this case, the ultimate ground of decision seems, however, to have been procedural, for the court apparently decided the question had not been raised properly on appeal and was not before the court.

96. Op. of the Cal. Att'y-Gen., August 11, 1934, CCH BLUE SKY L. REP. Para. 1665.03.

97. Op. of the Cal. Att'y-Gen., Jan. 30, 1935, *Ibid.*

98. *State v. Whiteaker*, 118 Ore. 656, 247 Pac. 1077 (1926).

99. Op. of the Cal. Att'y-Gen., Nov. 28, 1933, CCH BLUE SKY L. REP. Para. 1785. A month later the Iowa Attorney-General promulgated a similar opinion. Op. of the Iowa Att'y-Gen., Dec. 30, 1933, *Ibid.*

100. 48 STAT. 74 (1933).

101. *Gold Producers, Inc.*, 1 SEC 1 (1933).

102. *Andrews v. Chase*, 89 Utah 51, 49 P.2d 938 (1935), *rehearing denied*, 89 Utah 73, 57 P.2d 702 (1936).

103. Op. of the Wash. Att'y-Gen., April 22, 1937, CCH BLUE SKY L. REP. Para. 1785.

for "value." Whether he is successful would seem immaterial.¹⁰⁴

The construction of the term "sale" also arose under the New Mexico statute in connection with a transfer to trustees of a common-law trust of an undivided interest in minerals in the grantor's land, whereby the trustees received a right to mine the minerals for 21 years and the grantor received in exchange a certificate of participation in the corpus. The New Mexico court came to the obvious conclusion that there was a "sale" of the certificate under the statute.¹⁰⁵

Questions also have arisen as to civil consequences of violations of escrow provisions in the statutes. Even though promotional stock be escrowed, promoters on occasion may sell or contract to sell such stock before it has been released or without a permit from the administrator. California allows the purchaser not in *pari delicto* to recover from promoters the purchase price of escrowed stock sold in violation of permit.¹⁰⁶ One Washington purchaser, however, did not attempt to rescind, but tried to enforce an option to buy promotion stock pooled but not released by the administrator. The Washington court found him to be in *pari delicto* and refused enforcement, even though the option was not exercisable until after the stock had been released by the administrator.¹⁰⁷ The court commented: "To hold otherwise would be to subvert the entire purpose . . . of the Act which seeks to prevent the sale of promotion stock before its release, and would permit, through the medium of so-called 'option' contracts, the transfer of and speculation in any or all such stock long before its release by the director of licenses."¹⁰⁸ However, considering that a fundamental objective of escrow provisions is to insure adequate working capital for the issuer, by preventing during the primary distribution private sales of securities by promoters, a different result might be in order. Though concededly the transaction is "illegal," granting enforcement in at least some cases would further augmentation of the issuer's working capital if the purchase price were required to inure to the benefit of the enterprise and not of the promoter. On the basis of reasoning like that the underlying the *Kardon*¹⁰⁹ doctrine, the issuer could be deemed to have a cause of action against the promoter to recover any proceeds already paid or, if the plaintiff-purchaser had not himself performed at the time of his suit, the court could require further performance be rendered to the issuer. By his illegal conduct, the promoter should be deemed to have forfeited his promotion stock to the issuer, so that the sale should be treated in effect as one of treasury stock. That one party acting illegally would benefit from his bargain can be justified as the price in such cases for implementing the fundamental policy of escrow provisions and perhaps also by recognizing that, in any practical sense, one wrongdoer (the promoter) probably would benefit anyway if

104. See Loss, *op. cit. supra* note 3, at 332.

105. Marney v. Home Royalty Ass'n, 34 N.M. 632, 286 Pac. 979 (1930).

106. Taormina v. Antelope Mining Corp., 110 Cal. App.2d 373, 242 P.2d 665 (1952).

107. Hederman v. George, 35 Wash.2d 357, 212 P.2d 841 (1949).

108. *Id.*, at 362, 212 P.2d at 842.

109. Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D. Pa. 1946)

"enforcement" were not granted, since enforcement most likely would be sought when breach of the initial bargain had become advantageous to the promoter.

Other broader questions involving fundamental policy also have arisen. There is some indication that administration of blue sky laws, though not necessarily in western states, improperly has impeded mine financing, especially by mining issuers entering the public market for securities for the first time. Reports and addresses before annual conventions of the National Association of Securities Administrators calling for the various administrators to "look with sympathy and understanding. . . ." upon miners and mining issues at least have intimated that blue sky officials may be excessively rigorous in scrutinizing proposed mining issues.¹¹⁰ It is difficult, of course, to ascertain the extent to which such administrative action has occurred, if in fact it has. But the critic might point out that mining securities are relatively easily utilized in victimizing investors, and because on occasion such victimization has occurred with spectacular results, the entire mining industry has received an undeserved black eye, with the unfortunate result that administrators inadequately discriminate between honest mining ventures and slick promotional schemes. If that criticism is valid, the problem offers one simple solution. Perhaps the mining industry could do its bit to cure whatever black eye it may have received from renegades within or without its ranks by educating administrators to make a clearer distinction between the honest and fairly conceived mining enterprises and those offering the investor nothing but a chance to lose. Securities administrators of some mining states have attempted to do something of that sort in addresses before conventions of the National Association of Securities Administrators.¹¹¹

CONCLUSION

Effective regulation of mining securities undoubtedly demands special provisions not applicable to securities generally to deal with problems

110. Richardson, *Exploitation of Mineral Resources Requires Venture Capital*, 28 Proc. NAT'L ASS'N OF SECURITIES ADM'RS 146, 150 (1945). Richardson (a Colorado commissioner) expressed similar sentiments in other addresses before such conventions: 26 *id.* 40-43 (1943), 27 *id.* 104-108 (1944). See also 15 *id.* 236, 238 (1932) ("The restrictions and inhibitions imposed by law have dulled his [the prospector's] zest"), and 23 *id.* 29 (1940) ("at the present time it is impossible for a responsible person to secure development capital for new mining operations without subjecting himself to hazards which even I would not care to take"). Similar views have been expressed with respect to speculative securities in general: ". . . frequently . . . , consciously or unconsciously, the [speculative security] offering is suspect from the beginning, as are all who have anything to do with it. . . . I do not wish to be understood as speaking for the type of security that is marketed at a cheap price in order to catch the suckers or for the thousands of promotional schemes that verge pretty closely on fraud. But it can be observed that there is frequently an unjustified attitude of administrative suspicion and disapproval of a security which, either because the enterprise is new or because of some other clearly discernible reason, is not among the tried and true. The result is sometimes the imposing of every possible technical objection in the way of such an offering." 35 *id.* 119-120 (1952).

111. See the addresses referred to in note 110 *supra*.

peculiar to mining securities, their issuance and sale. The form in which such requirements are established would seem immaterial; whether they are dignified by enactment in a special statute or regulation or appear only on application forms has no necessary relation to achieving any regulatory goal.

The diversity of regulatory philosophy characterizing western state statutes regulating mining securities is remarkable. The Colorado statute basically is founded entirely upon the disclosure philosophy; Idaho legislators adopted the disclosure theory with respect to issuers engaged in domestic mining and the regulatory approach with respect to others; the Washington statutes were drafted to regulate by disclosure issuers of mining leases and corporate issuers engaged in metalliferous mining and to relegate other mining issuers to a regulatory-type blue sky law; other western state legislation utilizes the regulatory theory with respect to all issuers.¹¹²

Adoption by state legislators of the disclosure approach with respect to mining securities to a relatively greater extent than with respect to others has at least theoretical justification. Mining securities inherently tend to involve greater investment risks than do most others, and every administrator, even in regulatory states, faces a fundamental problem of securing adequate disclosure of facts from which such risks can be ascertained, both by the administrator himself and by the investor. Both effective regulation and intelligent investment decisions demand comparison, to whatever extent possible, of degrees of risk involved in various mining securities, and in mining securities and other securities. But more important, since mining investments admittedly tend to be more speculative than do many others, application of standards of "fairness" of a regulatory-type statute more easily can result in administrative paternalism impeding both financing of mining enterprise and free choice by investors among all, including speculative, investment alternatives. Greater emphasis by legislators upon the disclosure approach to regulation of mining securities is, therefore, at least understandable.

Regardless of any theoretical desirability of the disclosure philosophy, however, regulation in fact tends to exemplify the regulatory approach even under a disclosure statute. An administrator under such statute has considerable *de facto* power not only to require additional disclosure but also to impose as he sees fit conditions upon registration. Issuers about to make a public offering are in no position, of course, to challenge in the courts such administrator's authority.

112. See note 5 *supra*.