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THE FEDERAL SECURITIES ACT
INTRA-STATE EXEMPTION—FACT OR FICTION?

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INTRODUCTION

I gather from some of the publicity that has been released relating to this meeting and my paper that I am to advise you today as to how to avoid the application of the federal securities laws. I very much regret that in all candor I can only tell you in this regard that for persons determined to use other peoples' money the federal securities laws like death and taxes are unavoidable. As most of you undoubtedly know, the adoption of the Federal Securities laws commencing in 1933 were preceded by several years' experimentation on the state level with so-called Blue Sky Laws. The federal legislation was enacted to provide a means of dealing with vices that were interstate in scope and with respect to which no individual state could adequately legislate or regulate. Congress, however, took pains not to pre-empt this field of regulation in that the Securities Act and related acts specifically provide for concurrent regulation by the federal government and the states.¹ Further, Congress expressly provided for a limited area in which state registration of securities would be exclusive. This was accomplished by the Section 3 (a) (11) exemption for so-called "intra-state" offerings.²

THE "INTRA-STATE" EXEMPTION, A MISNOMER

Characterizing the Section 3 (a) (11) exemption from registration as an intra-state exemption is an unfortunate misnomer that has caused considerable confusion. Although the purpose of such exemption is to exempt offerings that are local in character, the criterion for determining the availability of the exemption is not the lack of use of means or instrumentalities of inter-state commerce or of the mails. The exemption is available despite the fact that the offering is made in interstate commerce in the sense that the mails are the means or instrumentalities of interstate commerce are used in connection with such offering. Rather the availability of the exemption depends upon the security being a part of an issue offered exclusively to bona fide residents of the state in which the issuer is organized and doing business. Accordingly, on the one hand a Wyoming corporation, for example, would have the exemption available, assuming compliance with all the other provisions, even though securities were sold through the mails to a Wyoming resident temporarily in New York. On the other hand, the exemption would not be available if the sales were made in Wyoming by a Wyoming issuer to a resident of New York who was temporarily in Wyoming.

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1. Securities Act § 18. 15 USCA § 77r. Exchange Act § 28 (a). 15 USCA § 78bb (a).
2. Securities Act § 3 (a) (11). 15 USCA § 77c (11).

Inasmuch the exemption has generally been referred to as the intra-state exemption, for purposes of convenience this terminology will, despite the foregoing misgivings, be employed in this paper.

SCOPE OF THE EXEMPTION

Assuming the availability of the exemption, the scope of the exemption must be carefully understood at the outset. The exemption if available, is from the registration provisions of the Securities Act. It is not an exemption from those provisions dealing with fraud in the sale of securities. The exemption does not, as some practitioners seem to assume, even if available, confer exclusive jurisdiction on the Blue Sky commissioner of the appropriate state in which the offering is being made. This point is emphasized by the fact that four of the five cases,³ involving the exemption, litigated during the past three years related to offerings being made in compliance with the appropriate Blue Sky Laws. The Commission, to the extent the mails or means or instrumentalities of interstate commerce are used in connection with the offering, retains jurisdiction in the sense that it can and has instituted injunctive proceedings to restrain issuers from the making of false or misleading statements in connection with an intra-state offering.⁴ Further, the criminal and civil liability provisions of the Securities Act relating to false or misleading statements are fully applicable⁵ as are the special provisions of Section 15 of the Securities Act which permit recovery in civil actions under the Securities Act from persons controlling the issuer as well as from the issuer.⁶

WHO RELIES ON THE EXEMPTION?

The so-called intra-state exemption has been availed of primarily in four instances: First, in the area for which Congress envisioned the exemption, to wit: a local industry engaged in small scale local financing. If this is the objective and the requirements of the exemption are accepted, no particular difficulties are encountered in obtaining the exemption.

Secondly, the exemption has been used for the purpose of raising limited amounts of so-called front money preparatory to a large public financing.

Thirdly, the exemption has been relied upon by issuers who are either uninformed or poorly advised in situations in which the exemption is clearly unavailable. As the Tenth Circuit has said in one such situation: "This naive argument could not appeal even to the most credulous."⁷

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3. SEC v. Hillsborough Investment Corp., CCH Fed. Securities LR ¶ 90,904 (DCNH Dec. 11, 1958); SEC v. American Founders Life Ins. Co. of Denver, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958); Stadia Oil & Uranium Co. v. Wheelis, 251 F.2d 269 (10th Cir. 1957); SES v. Truckee Showboat, Inc. CCH Fed. Securities LR ¶ 90,846 (DC SD Calif. Nov. 22, 1957).
 4. SEC v. American Founders Life Ins. Co. of Denver, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958).
 5. *Ibid.* Securities Act §§ 12(2), 17. 15 USCA §§ 771(a), 77q.
 6. Securities Act § 15. 15 USCA § 77o.
 7. Stadia Oil & Uranium Co. v. Wheelis, 251 F.2d 269, 274 (10th Cir. 1957).

In many instances the exemption is the result of hindsight upon the part of an issuer caught in the act by the Securities and Exchange Commission. It is amazing in this regard as to the misconceptions concerning the exemption and its availability that are encountered. In some instances it is assumed, for example, that there is an exemption because the offering was for less than \$300,000.⁸ In other instances the exemption has been claimed by issuers organized under the law of Nevada, for example, who sell securities exclusively to residents of Utah.⁹ In many other instances reliance is placed on the fact that all of the sales were made in a single state, and in other instances issuers have claimed the exemption based on the issuance of all the shares in the names of resident nominees acting for non-resident purchasers.¹⁰ In many of the foregoing situations, such issuers relied on counsel and unfortunately counsel in many instances appear to have relied on hearsay versions of the appropriate law. It is astounding to me that counsel who in their ordinary general practice will carefully research the law in connection with the problems that are presented to them, when confronted with a problem in a specialized area, such as Federal Securities Laws, rely on what they have heard as to the availability of the exemption rather than careful lawyer-like research and investigation.

Until five years ago the foregoing would have exhausted the area in which the Section 3(a) (11) exemption was being relied upon by issuers. However, imaginative minds found a way to utilize the intra-state exemption for comparatively large securities offerings by applying techniques developed in other fields of merchandising to the sale of securities. Essentially such mass merchandising of securities encompassed the following: (1) Liberal credit—the purchase of securities upon payment of 25% down and the balance in twelve easy installments; (2) the employment of large sales forces consisting primarily of untrained and inexperienced personnel; (3) turning salesmen over rapidly as they exhausted their leads; (4) the payment of liberal sales commissions made possible by use of the so-called “front-end load”—that is, deducting the sales commission for the entire subscription agreement from the down-payment and (5) use of hard-sell techniques neatly packaged in the form of the “sales kit.” The results of this approach were undoubtedly astounding to the more conservative and reputable securities dealers — (1) A new market (investor) for securities was developed; (2) large sums were raised or committed, and (3) the burdensome S. E. C. requirements apparently were avoided. The latter consideration was an extremely important one for few, if any, of these promotions could have succeeded if subjected to the scrutiny and

8. Such issuers generally have confused the intra-state exemption with the Regulation A conditional exemption from registration which among other things requires the filing of an offering circular and notification. 17 Code Fed. Reg. §§ 230.251, 203.253, 230.256.

9. *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 274 (10th Cir. 1957).

10. *SEC v. Hillsborough Investment Corp.*, CCH Fed. Securities LR ¶ 90, 904 (DCNH Dec. 11, 1958).

requirements of the S. E. C. The Commission belatedly reacted to this type of financing by obtaining at least one injunction and establishing some important laws in this area,¹¹ and by issuing numerous "office injunctions" against many other issuers.

REQUIREMENTS OF THE EXEMPTION

The Residence Requirement

Since I have been requested to speak on the extent to which Wyoming corporations can avoid compliance with the registration requirements of the Securities Act of 1933, I will now direct my attention to the requirements of the intra-state exemption and the many pitfalls to be avoided. I trust that in pointing out such pitfalls I can bring home an awareness of the fact that ordinarily the exemption can be safely relied upon only in connection with local financing of local enterprise and then only in the event the issuer accepts the limitations of the exemption and exercises care so as to remain within such limitations.

Reviewing briefly, the exemption is available for any security which is part of an issue offered or sold only to residents of the single state where the issuer is a resident and doing business. Accordingly, an issuer must concern itself with both its residence and the residence of the offerees which in all instances must coincide in order for the exemption to be available. Section 3(a) (11) expressly provides that a corporation for this purpose is a resident of the state in which it is organized.¹² The question frequently arises as to whom is a resident of a particular state and in this regard it is believed that the usual constitutional concepts pertaining to domicile would be controlling and that a person for this purpose could have only one residence.¹³ In particular a difficult question is presented in determining the residence of service personnel inasmuch as it is extremely difficult for service personnel to legally acquire a residence other than their residence upon entering service.^{13a} The temptation, of course, is great for issuers offering securities in Colorado, for example, to offer them to personnel at Lowry Air Base and those offering securities in Wyoming to offer such securities to personnel at Warren Air Force Base. Issuers relying on the intra-state exemption would be well advised to avoid the offer or sale of securities to service personnel.

Doing Business

The issuer must not only be a resident of the single appropriate state but must also be doing business in that state. Accordingly, a corporation organized under the laws of Delaware and doing business exclusively in the state of Wyoming could not avail itself of the exemption either by

11. SEC v. American Founders Life Ins. Co. of Denver, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958).

12. Securities Act § 3(a) (11). 15 USCA § 77c(a) (11).

13. Loss, Securities Regulation, 379n 252 (1951).

13a. 46 ALR.2d 1237.

offering the securities exclusively to residents of Delaware or exclusively to residents of Wyoming. On the one hand with respect to the offering made to the Delaware resident, the exemption would not be available inasmuch as the corporation is not doing business in Delaware. On the other hand, the offering to Wyoming residents would not be within the limitations of the exemption in that while the corporation is doing business in Wyoming it is not organized under the laws of Wyoming.

Although the Commission's staff has informally suggested at various times that the "doing business requirement" is synonymous with principal place of business, both the term "doing business" and "principal place of business" appear to be words of art with somewhat different connotations.¹⁴ In any event the commission's staff will undoubtedly question the availability of the exemption if substantially all of the proceeds are to be used in a state other than the state in which the securities are offered. A federal district court has held the exemption unavailable to a California corporation offering securities exclusively to California residents for the purpose of raising funds to purchase an hotel in Nevada despite the fact that the corporation also owned a pharmaceutical business in California. The Court relied upon the fact that the pharmaceutical business was completely unrelated to the proposed business and had total assets of less than \$13,000.¹⁵ It also seems apparent that if the issuers only business in the single appropriate state is the sale of securities that the exemption would be unavailable.

*Offering Exclusively to Residents of the
Single Appropriate State*

In order for the exemption to be available the issue must be offered and sold to bona fide residents of the single appropriate state. Accordingly, if the issue were offered to non-residents, but sold exclusively to residents, the exemption would still be unavailable in that offers as well as sales must be made exclusively to bona fide residents.¹⁶ The Commission has always taken the position that a single offer or a single sale to a non-resident destroys the availability of the exemption for the entire offering, including the sale of shares to bona fide residents. This position appears to be firmly grounded in the statutory language of the exemption and was recently sustained by the First Circuit Court of Appeals.¹⁷ Accordingly, it is impossible to determine whether or not the exemption is available until the offering is completed in that the subsequent sale or offer to a non-resident will retroactively destroy the availability of the exemption for prior offers and sales to residents. It is also apparent that

14. Loss, Securities Regulation, 163 (1955 Supp.)

15. SEC v. Truckee Showboat, Inc., CH Fed. Securities LR ¶ 90,846 (DC SD Calif. Nov. 22, 1957).

16. Ned J. Bowman Co., CCH Fed. Securities LR ¶ 76,701, Exchange Act Release 6257 (1960).

17. Hillsborough Investment Corp. v. SEC, CCH Fed. Securities LR ¶ 90,954, 1st Cir. April 8, 1960).

once a sale or offer is made to a non-resident it will be extremely difficult to obtain the exemption for future offerings by the same issuer.¹⁸
Securities Must Be in Hands of Resident Investors at

Completion of Ultimate Distribution

In order for the exemption to be available the offering must not only be made exclusively to bona fide residents of the single appropriate state, but such persons must have acquired the security for investment and not with the view toward distribution to non-residents. An issuer cannot escape responsibility in this area despite the fact it requires knowledge on his part of someone else's state of mind.¹⁹ The securities must be found at the time of completion of the ultimate distribution only in the hands of resident investors.²⁰ This is an extremely important consideration in those instances in which the securities are being offered by an underwriter and the underwriter intends to make a secondary market in the security upon completion of the offering. In all probability, if the underwriter succeeds in making a secondary market, there will shortly be resales by the original purchasers to non-residents and the underwriter will have succeeded by such trading activities in destroying the availability of the exemption. Needless to say, in this connection, the exemption cannot be availed of by using resident nominees or resident agents who are in fact acquiring the securities for non-residents.²¹ In view of the foregoing, issuers relying on the exemption should obtain a representation that the shares are being acquired for investment and not for distribution and should place orders with the transfer agent prohibiting the transfer of such shares to non-residents. In order for the investment representations to be meaningful, they should be part of a document fully explaining what constitutes holding for investment in that the Commission has held that investment letters or restrictions signed by persons having no understanding of such representation are meaningless.²² This, perhaps, can be best accomplished by setting forth appropriate excerpts from Commission decisions. A preferable procedure would be to contractually provide that the shares are not assignable or transferable to non-residents for a specified period, e.g., eighteen months. However, if this procedure is adopted the restrictions should appear on the stock certificates.²³

18. *Ibid.*

19. *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2nd Cir. 1959).

20. *Hillsborough Investment Corp. v. SEC*, CCH Fed. Securities LR ¶90,964 (1st Cir. April 8, 1960); *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269 (10th Cir. 1957); *Brooklyn Manhattan Transportation*, 1 S.E.C. 157 (1935); *Securities Act Release 1459* (1937).

21. *SEC v. Hillsborough Investment Corp.*, CCH Fed. Securities LR ¶ 90,904 (DCNH Dec. 11, 1958).

22. *The Crowell-Collier Publishing Co.*, CCH Fed. Securities LR ¶ 76,539, *Securities Act Release 3825* (1957).

23. *The Whitehall Corp.*, CCH Fed. Securities LR ¶ 76,573, *Exchange Act Release 5667* (1958); *SEC v. American Founders Life Ins. Co. of Denver*, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958).

BURDEN OF PROOF

An issuer relying on the exemption has the burden of establishing the availability of the exemption.²⁴ Such burden must be carried with respect to the residence of the offerees and purchasers of the security. As a very minimum it appears to require affirmative evidence of the fact that the securities were offered and sold only to residents of the single appropriate state. Issuers accordingly would be well advised to have all purchasers sign a subscription or order blank in which they represent that they are bona fide residents of the single appropriate state and set forth their mailing address as being in the single appropriate state. This type of documentary evidence would not, of course, be conclusive but presumably would be sufficient to carry the burden of going forward with the evidence on this particular issue. In one interesting case before the Commission involving the question of burden of proof, the commission's staff only proved that the issuer issued subscription agreements and certificates to residents of a single appropriate state. The Commission construed the subscription agreements and certificates as containing no restrictions on assignments relying on local state law for this purpose. The staff did not prove that such subscription agreements had been assigned to non-residents, but, nonetheless, the Commission held the exemption was unavailable because the respondent had not carried the burden of establishing that no such assignment or offer to assign had been made.²⁵

THE INTEGRATION PROBLEM

I have suggested enough of the pitfalls so that persons intending to engage in the type of local financing contemplated by Section 3(a)(11) can, with careful planning and draftmanship, comply with all of the prerequisites of the exemption. For issuers intending to rely on the intra-state exemption solely for the purpose of raising preliminary monies and who contemplate ultimately an interstate offering, one additional serious pitfall must be dealt with and regardless of what is done in this area no absolute assurance can be given as to the availability of the exemption. As already noted, in order for the exemption to be available, the issue must be offered exclusively to bona fide residents of the single appropriate state. In the event the issuer contemplates a future offering of securities, this poses a question as to what constitutes a single issue of securities. Issuers relying on the intra-state exemption in this context may find the Commission taking the position that the preliminary offering of securities and the subsequent interstate offering of securities are to be deemed integrated and viewed as constituting one single issue in which event the subsequent sale to non-residents, as already noted, will destroy the avail-

24. *The Whitehall Corp.*, CCH Fed. Securities LR ¶ 76,573, Exchange Act Release 5667 (1958). See also *SEC v. Ralston Purnia Company*, 346 U.S. 119 (1953).

25. *The Whitehall Corp.*, CCH Fed. Securities LR ¶ 76,573, Exchange Act Release 5667 (1958). Compare *Repass v. Rees*, CCH Fed. Securities LR ¶ 90,929 (DC Colo. June 2, 1959).

ability of the exemption for the prior intra-state offering. We are in an area in which there are no absolute guides but only general criteria that the Commission has applied in the past in determining whether or not offerings are to be deemed integrated and part of a same single issue. These criteria include:²⁶

1. Has a substantial period of time elapsed between the offerings?
2. Are the methods of distribution and the terms of the offering substantially the same?
3. Do the offerings appear to be part of a single plan of financing?
4. Are the securities being offered substantially identical?
5. Are the securities being offered to the same class of people?

Ideally to avoid integration a substantial period of time should elapse between the offerings, the method of distribution and terms of offering should be different; the securities offered should be substantially different²⁷ and the securities offered in the preliminary financing should be to a group, such as promoters, officers or directors of the Company, readily distinguishable from the general public.²⁸ However, in practice the issuer more likely will rely on the presence of only some of these factors; in particular, reliance may be placed on the fact that the Commission has indicated in the past that it will not deem as integrated and part of the same single issue the offering of substantially different securities.²⁹ There is some indication in recent cases that the Commission may regard two different securities, particularly if there are not substantial differences in their incidents, as integrated under certain circumstances.³⁰ Subject to the foregoing, one approach to this problem is to use one type of security; for example, a common stock, in the preliminary intra-state offering, and to use another type of security, for example, a preferred stock, in the subsequent interstate offering. Or a variation of this approach involves issuing promisory notes in the preliminary offering and subsequently offering common stock. In some instances, the promisory notes may be convertible into common stock after a registration statement covering the shares underlying this conversion privilege as well as the shares of common stock to be offered publicly has been filed and has

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26. The criteria discussed have evolved in cases and opinions arising in varied contexts, but primarily for the purpose of determining the \$300,000.00 limitation under the earlier versions of Regulation A (Unity Gold Corp., 3 SEC 618 (1938) and in determining whether the § 3(a)(9) (15 USCA 77c(a)(9)) exemption relating to securities exchanged exclusively with existing securities holders is applicable. Securities Act Release 2029 (1939).
 27. Liss, Securities Regulation, 364, 386, 400 (1951); Securities Act Release 2029 (1939).
 28. Under prior versions of Regulation A there had been a long standing administrative construction that shares issued to promoters, and officers were not part of the same issue as the securities offered to the public. It has been suggested that for purposes of determining the availability of the intra-state exemption that the situation probably is otherwise Loss, Securities Regulation, 376n 247 (1951). See also People Securities Co., CCH Fed. Securities LR ¶ 76,687, Exchange Act Release 6176 (1960).
 29. Securities Act Release 2029 (1939).
 30. Hillsborough v. SEC, CCH Fed. Securities LR ¶ 90,954 (1st Cir. April 8, 1960).

become effective. I have discussed this type of approach elsewhere and refer you to these sources if you have occasion to be concerned with the technical basis of this approach and the technique of carrying it into effect.³¹

LARGE SCALE FINANCING AND THE INTRA-STATE EXEMPTION

I reach the limits within which one may safely rely on the intra-state exemption having considered local financing of local industry and preliminary financing for a corporation which intends ultimately to file a registration statement with the Securities and Exchange Commission covering a public interstate offering of securities. However, for those who are determined to rely on the intra-state exemption for substantial public offerings of securities I have a few additional words of caution. First, do not use time payment contracts or subscriptions. But, if you must, be certain that the contract constitutes a firm commitment on the part of the purchaser. If the contract or subscription, as many used in the past, provides for a guaranteed surrender value or otherwise permit the purchaser to avoid completing payments, it constitutes, in effect, a series of options and each separate payment constitutes a separate sale. Accordingly, if any subscriber becomes a non-resident before completing payments, as is almost inevitable, the issuer will unwittingly have made sales to non-residents.³² Similarly, provide in the event a subscriber becomes a non-resident prior to delivery of his stock certificate that the contract is completely and mutually rescinded. Although on weaker grounds in this area, it is the position of the Commission's staff that a delivery of a certificate after sale constitutes a sale for purposes of determining the availability of the intra-state exemption.³³

Second, do not use a front-end load. But, if you must be sure the Prospectus fully explains all the ramifications of this method of deducting commissions.

Third, do not offer the security at increasing prices. The Commission's staff take a dim view of such offerings. But, if you must, be sure to fully disclose the fact that there is no market in the security, the arbitrary nature

31. Bloomenthal, "Securities Regulation of Oil and Gas and Mineral Transactions," 3 Rocky Mountain Mineral Law Institute 71, 90 (1957); "Mining Companies," American Law of Mining, ch. IV (1960).

32. SEC v. American Founders Life Ins. Co. of Denver, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958).

33. The Commission asserted this position in the American Founders case, supra note 32. However, the Court found it unnecessary to pass on this issue. Inasmuch as Section 2(3) 15 USCA 77b(3) does not expressly define sale to include "delivery after sale" and Section 5 (15 USCA 77e) expressly differentiates between a "sale" and "delivery after sale" there is some basis for arguing that delivery after sale is not a sale for purposes of Section 3(a)(11). However, in the context of Section 12(2) (15 USCA 771(2)), which provides for recovery for misrepresentations made in the sale of a security, the Second Circuit Court held that a sale includes a delivery after sale. The Court relied on the fact that the Section 2(3) definition of "sale" expressly is applicable only if the context does not otherwise require. Schillner v. Vaughan Clarke & Co., 134 F.2d 875 (2nd Cir. 1943). Further Section 2(3) defines "sale" to include, etc., and hence is not necessarily all inclusive.

of the increase, the lack of any relationship to market, book, or other value and the fact that subscribers will ordinarily be unable to dispose of the shares at the increased price.

Fourth, be mindful of the fact that the issuer is still subject to the fraud provisions of the Securities Act. Fraud under the Securities Act goes much beyond common law deceit and encompasses any material misrepresentation or misleading statement.³⁴ Accordingly, the Prospectus should be prepared with the same degree of care and the same disclosures should be made as is necessary in the event of registration. Clearance by the state Blue Sky Commissioners provides no absolution in this area; the use of a prospectus fraudulent by the standards of the Securities and Exchange Commission on occasion has been permitted by various state commissions.³⁵

Fifth, caution the client against the use of sales kits that feature optimistic opinions and predictions as contrasted to factual statements. In particular avoid stressing the accomplishments of successful and well established companies. The charts frequently used in the sale of insurance company stocks based on the performance of several well established companies are generally regarded by the Commission as misleading in at least two respects: (a) Such performance has no relationship to what can be expected of a new inexperienced company; (b) Some of the charts are misleading because they fail to take into consideration a number of financial factors that substantially qualify the basis for the purported comparisons.³⁶

Sixth, build a proper documentary record to enable the issuer to carry the burden of proof.

Seventh, be prepared for the investigation that may follow, as the Chairman of the Commission has expressed the view that the exemption seldom, if ever, can be complied with except in connection with small scale local financing.³⁷

UNRESOLVED AREAS

A number of unresolved areas remain including the following:

- (1) What constitutes "doing business." This problem has already been briefly alluded to.
- (2) May secondary distributions be made to residents of the single appropriate state by controlling persons who are non-residents?³⁸

34. Loss, Securities Regulation 812-823 (1951).

35. Some of the misrepresentations involved in the American Founders case, *supra* note 32 were included in the material filed by the Company with the Colorado Division of Securities.

36. SEC v. American Founders Life Ins. Co. of Denver, CCH Fed. Securities LR ¶ 90,861 (DC Colo. May 21, 1958).

37. Gadsby, "The Securities and Exchange Commission and the Financing of Small Business," XIV *The Business Lawyer* 144, 146, 147 (1958). See also Securities Act Release 1459 (1937).

38. This would seem to depend upon whether the controlling person is an "issuer"

(3) Is the exemption available if a non-resident underwriter is employed in connection with an offering made exclusively to residents of the single appropriate state?³⁹ Does the result depend upon whether the underwriter acts as agent or principal?⁴⁰

(4) Is the exemption available to multiple corporations under common control each organized and doing business in a different state and each confining its offering to the single appropriate state.⁴¹

(5) Is the exemption available to a subsidiary of a non-resident parent?⁴²

Although conceptual difficulties of considerable magnitude are involved, the Commission in most of these areas can be expected to move toward constructions making the exemption unavailable. When faced with large scale avoidance of the registration requirements, the Commission is likely to react with new concepts designed to close the net although it is difficult to predict the precise content of such concepts.⁴³

for purposes of Section 3(a)(11). A controlling person is defined by the last sentence of Section 2(11) (15 USCA 77b(11)) as an "issuer" for the purpose of defining an underwriter. A controlling person is not defined as an issuer for any other purpose under the Act. Accordingly, it would appear that the exemption would be available even if the persons acquiring shares acquire them for distribution and hence are underwriters provided such shares are not acquired for distribution to non-residents and at the completion of the ultimate distribution are in hands only of resident investors. The shares, however, must have been acquired by the controlling person under such circumstances that they did not become integrated with a contemporaneous intra-state offering. See note 28. Query: the result if the issuer had made a prior interstate offering which was registered. Can the intra-state exemption be used subsequently for a secondary distribution? If divorced in time and circumstances from the prior offering it has been suggested that the exemption is available for the secondary distribution if the issuer, the controlling persons and all the purchasers are residents of the single, appropriate state. *Loss, Securities Regulation* 376n 247 (1951). This conclusion has to overcome certain conceptual difficulties, but, if reached, conceptually it's hard to distinguish a secondary distribution by a non-resident controlling person.

39. *Cf., People Securities Co., CCH Fed. Securities LR ¶ 76,687, Securities Exchange Act Release 6176 (1960).*

40. If the underwriter acts as principal the sale of the securities to the underwriter may be construed as a sale to a non-resident. The problem would then be one of integration. See note 28. However, Section 2(3) expressly provides that "unless the context otherwise requires" the term "sale" does not include agreements between the issuer and the underwriter. Query, whether this is a situation in which the context otherwise requires. If the underwriter acts as agent for the seller it seems apparent that there has been no sale to the non-resident underwriter.

41. There appears to be no basis to deny the exemption in these situations for this fact alone except possibly some broad notion that what cannot be done directly cannot be done indirectly. This notion would be particularly applicable if it could be shown that there was a preconceived plan to ultimately merge all of the corporations. *Cf., Great Sweet Grass Oils Ltd., Exchange Act Release 5483 (1957) aff'd. Great Sweet Grass Oils Ltd. v. SEC, CCH Fed. Securities LR ¶¶ 76,516, 90,865 (CADC 1958).* In any event the controlling persons obviously must in some instances be non-residents and it would be necessary to avoid integration of the shares issued to them. See note 28.

42. This is really a variation of the integration problem. The securities issued to the parent must not be integrated with the public offering. See note 28.

43. The experience with the Commission under Rule 133 is a good example of how the Commission may move to close gaps in the registration requirements despite conceptual difficulties. *Great Sweet Grass Oils Ltd., Exchange Act Release 5483 (1957); 17 Code Fed. Reg. § 230.133.*

The Commission has also moved on the legislative front by requesting Congress to enact legislation that would authorize the Commission to impose by rule terms and conditions upon the availability of the intra-state exemption.⁴⁴ In such event the purpose of the exemption to permit small scale local financing with a minimum of federal regulation, would be substantially impaired.⁴⁵ Securities regulation must constantly seek a balance between the investor's need for protection and industries need for financing without the imposition of unreasonable delays and unnecessary requirements. The Commission has adequate authority under the present laws to police intra-state offerings to the extent such policing is necessary.⁴⁶ The situation the Commission now seeks to correct by legislation is largely the result of the Commission's belated and inadequate enforcement of its existing authority.

In conclusion I pose the title of this paper as a Query: The Intra-State Exemption from The Federal Securities Act—Intra-State Exemption—Fact or Fiction?

44. S.E. 1178 and S. 3769, 86th Cong. 2nd Sess.

45. The experience under Regulation A is some indication of what can be expected in this regard. As the result of administrative experience and predilection, the requirements under Regulation A now are substantially as burdensome as in the case of registration and in many respects Regulation A is a trap for the unwary. The author has expounded on this elsewhere. See ch. 5 of Title "Mining Companies" of American Law of Property (1960).

46. This has been amply illustrated in the few cases in which the Commission has moved against offerings made in reliance on the exemption. See cases cited in note 3. The Commission undoubtedly would find it helpful from a policing standpoint to require all issuers relying on Section 3(a) (11) to file a notification of such intention and to file all sales literature. However, the Commission is seeking authority that goes much beyond such requirements. Further, by working out appropriate procedures for cooperation with Blue-Sky Commissioners, this information is presently available to the Commission in most instances.