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Douglas W. Hawes

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I. INTRODUCTION

On March 1, 1977, President Carter sent to Congress a proposal to create a new Department of Energy.[1] Under the proposed Department of Energy Organizations Act,[2] the new Department would assume the various energy-related activities of certain independent regulatory agencies and the Executive Branch. As part of this sweeping plan,

> all of the SEC's responsibility under the Public Utility Holding Company Act of 1935 for regulating the sale of securities and assets by companies in electric and gas utility holding company systems, their intrasystem transactions, and their service and management arrangements will be consolidated with related ratesetting responsibilities of the FPC, permitting better integration of all regulatory responsibilities relating to public utility holding companies.[3]

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1. President's Message to Congress Transmitting Proposed Legislation To Create the Department, 13 WEEKLY COMP. OF PRES. DOC. 267 (Mar. 7, 1977).

2. S. 826, 95th Cong., 1st Sess., (March 1, 1977); H.R. 4263, 95th Cong., 1st Sess., (March 2, 1977).

3. 41 DAILY EXEC. REP. (BNA) B-10 (Mar. 1, 1977).

The legislation, however, contemplated that the disclosure provisions would remain with the Securities and Exchange Commission.[4]

Despite support from the SEC, Congress rather early in its deliberations dropped the proposal to transfer the SEC's functions under the Public Utility Holding Company Act of 1935 (1935 Act) to the new Department. Accordingly, the President signed the Department of Energy Organization Act[5] into law on August 4, 1977, without affecting the SEC's jurisdiction under the 1935 Act. Opposition to the President's transfer proposal came primarily in the form of a letter drafted by the Subcommittee on the Public Utility Holding Company Act of the Federal Regulation of Securities Committee of the Section of Corporation, Banking and Business Law of the American Bar Association[5.1] and in testimony before the Senate Committee on Governmental Affairs by Herbert B. Cohn as a representative of eleven registered holding companies. [5.2] The ABA letter raised two fundamental objections to the transfer: (1) the SEC's principal role under the 1935 Act is the protection of investors with regard to the issuance of securities by registered holding companies, whereas the aim of the proposed Department of Energy Act is to consolidate responsibility for energy policy, and (2) the proposal would have the effect of moving investor protection regnlation from an independent agency (the SEC) to a department of the executive branch of government (the DOE) whose primary focus cannot be upon the interests of the investing public. Mr. Cohn testified that the transfer would complicate the power companies' search for new capital funds, might cause duplicate reporting requirements, and appeared unwarranted, given the nature of the SEC's functions under the 1935 Act.

For many years, the integration and rationalization of utility holding company systems has been the principal aim and occupation of the 1935 Act and of the staff of the division of the Securities and Exchange Commission administering the Act. This integration process largely was completed a few years ago and only seventeen active holding company systems now remain registered under the

4. *Id.* at B-5.

5. Department of Energy Organizations Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

5.1. Letter from Kenneth J. Bialkin, Herbert B. Cohn, and Douglas W. Hawes to Senator Abraham Ribicoff and Representative Jack Brooks (Apr. 4, 1977) (on file with the *Vanderbilt Law Review*).

5.2. S. REP. No. 164, 95th Cong., 1st Sess. 15-16 (testimony of Herbert B. Cohn).

Act.[6] Not surprisingly, long before the Carter Administration proposal, many authorities, including the Commission itself from 1968 to 1973, urged a transfer of most functions under the 1935 Act to the Federal Power Commission.[7] During the review of the Code at the American Law Institute meeting in May 1975, extensive debate was held over the holding company provisions. Nevertheless, the Institute took no position on a transfer to the FPC, even though the SEC had changed its position in March 1975 and was no longer recommending transfer,[8] and the Council of the Institute had gone on record with a similar view.[9]

One of those initially responsible for carrying out the integration work of the SEC was Joseph L. Weiner, Director of the Public Utilities Division from 1940 to 1941. During what sadly turned out to be one of his last public appearances before his death, Weiner spoke strongly against including the 1935 Act provisions in the Code. He argued that the 1935 Act was utility regulatory legislation and not securities legislation, and also feared that if it was included in the Code, the Act would be more susceptible to tinkering through amendment than it had been as separate legislation.

The arguments for transfer to the FPC, which are canvassed thoroughly by Professor Loss in the Introductory Memorandum to Tentative Draft No. 4[10] and in the Transcript of the Institute's deliberations,[11] now have been considered and rejected by Congress and need not be repeated here. The author's personal experience with the regulation of utilities by the SEC has not demonstrated the need for a transfer to either the FPC or a new Department of Energy.[12]

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6. 41 SEC ANN. REP. 141 (1975). There were 20 registered holding companies within the 17 "active" registered holding company systems. In the 17 active systems there were 71 electric and/or gas utility subsidiaries, 68 nonutility subsidiaries, and 16 inactive companies. Total assets of the active systems exceeded $38 billion as of December 31, 1974.

7. *See* ALI FED. SEC. CODE at xxviii-xxix (Tent. Draft No. 4, 1975) [hereinafter cited as TD-4] (Reporter's Introductory Memorandum). The Federal Power Commission regulates wholesale gas and electric rates under the Federal Power Act.

8. Letter from SEC Chairman Garrett to Wilfred H. Rommel (March 11, 1975) (on file with *Vanderbilt Law Review*). SEC Commissioner Philip A. Loomis, however, testified on March 31, 1977, in favor of the transfer of the 1935 Act functions to the proposed Department of Energy.

9. TD-4 at xxxii (Reporter's Introductory Memorandum).

10. *Id.* at xxviii-xxxiii. See also the following memoranda by ad hoc committees of legal experts about the proposal to transfer the 1935 Act functions to the FPC on file with the *Vanderbilt Law Review:* (a) June 3, 1965; (b) August 20, 1970; (c) October 20, 1972.

11. ALI PROCEEDINGS, *supra* note 5, at 490-507, 543-61.

12. *Id.* at 504 (remarks of Douglas Hawes). The author was chairman of a drafting group that submitted a letter on behalf of certain members of the Federal Regulation of Securities

Some regard the 1935 Act provisions that the President planned to transfer to the new Department of Energy as fossils of only historical interest. Others, however, view them as a foil to those who may attempt to recreate the utility holding company empires of the early part of the century.[12.1] The following examination of the 1935 Act provisions, in conjunction with the redraft of the Code, at least may provide a better factual base from which to view this issue.

II. SUMMARY OF PRESENT LAW

The 1935 Act, like the Investment Company Act of 1940, is concerned primarily with regulation and does not emphasize disclosure, as does the Securities Act of 1933. Under the 1935 Act, unless an exemption is available,[13] all holding companies whose subsidiaries are engaged in the electric utility business or in the retail distribution of natural or manufactured gas must register.[14] Once registered, a holding company becomes subject to two principal kinds of provisions under the Act:

1. The geographical integration and corporate simplification process mandated by section 11 (and sections 6, 7, 9, and 10, which are designed to prevent new corporate or system complications and geographical dispersions through issuances or acquisitions of utility securities or assets);[15] and

2. Miscellaneous regulations of the financing and operation of the holding company system, including transactions with affiliated entities.

Committee of the ABA. Letter from Kenneth J. Bialkin, Herbert B. Cohn, and Douglas W. Hawes to Senator Abraham Ribicoff and Representative Jack Brooks (Apr. 4, 1977) (on file with the *Vanderbilt Law Review*).

12.1. In June 1977 the Comptroller of the United States submitted a report to Congress sharply critical of the SEC's enforcement of the 1934 Act, particularly its policies concerning diversification of exempt holding companies and its lack of investigative studies. COMPTROLLER GENERAL OF THE U.S., THE FORCE OF THE PUBLIC UTILITY HOLDING CO. ACT HAS BEEN GREATLY REDUCED BY CHANGES IN THE SECURITY AND EXCHANGE COMMISSION'S ENFORCEMENT POLICY (1977). For the SEC's response to the Comptroller's report, see SEC. REG. & L. REP. (BNA) at A-10 (July 6, 1977).

13. Public Utility Holding Company Act of 1935 § 3 [hereinafter cited as 1935 Act], 15 U.S.C. § 79c (1970).

14. 1935 Act § 5, 15 U.S.C. § 79e (1970).

15. For an illustration of the foil aspect of the 1935 Act, consider the application by American Electric Power Company, Inc., a registered holding company, to acquire Columbus and Southern Ohio Electric Company. The application was filed in 1968 and is still pending. 41 SEC ANN. REP. 142 (1975); *see* Shenker, *A Merger Case Tied Up 9 Years*, N.Y. Times, Jan. 23, 1977, § 3, at 1, col. 1.

The Federal Trade Commission report to Congress[16] and Congress' own investigations[17] documented widespread abuses among utility holding companies.[18] The congressionally devised cure for the pyramided, diversified, and geographically dispersed utility empires was section 11, the integration and simplification provision. That section provided for examination by the SEC of the corporate structure of each registered holding company system to determine the extent to which the corporate structure of each should be simplified, unnecessary complexities eliminated, and the business integrated. After giving notice and an opportunity for hearing, the SEC was required to take such action, with certain exceptions, as it found necessary to limit the operations of each holding company system to "a single integrated public utility system" with only "such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of [the] . . . system" and with an approved simplified capital structure.[19]

Under the 1935 Act, an integrated public utility system consists of either gas or electric utility companies. Registered holding companies usually own either integrated gas or electric systems, but generally not both.[20] Integrated electric systems consist of facilities that "are physically interconnected or capable of physical interconnection and which . . . [are] confined . . . to a single area or region, in one or more States, not so large as to impair . . . the advantages of localized management, efficient operation, and the

16. FEDERAL TRADE COMMISSION, REPORT ON UTILITY CORPORATIONS, S. DOC. No. 92, 70th Cong., 1st Sess. (1928-35).

17. H.R. REP. No. 827, 73d Cong., 2d Sess. (1933-35).

18. According to the Federal Trade Commission report, by 1932 holding companies controlled most of the country's gas and electric utilities and were expanding into many diverse fields as well. The three leading holding company empires were United Corporation, Electric Bond & Share Group, and the Insull interests. Among them, these giants controlled about 49% of the country's privately owned electric utility industry. 1 L. LOSS, SECURITIES REGULATION 131-35 (2d ed. 1961) [hereinafter cited as LOSS].

19. 1935 Act § 11(b)(1), 15 U.S.C. § 79k(b)(1) (1970).

20. *See* 1935 Act § 2(a)(29), 15 U.S.C. § 79b(a)(29) (1970); Philadelphia Co. v. SEC, 177 F.2d 720 (D.C. Cir. 1949). In 1975 the Court of Appeals for the District of Columbia affirmed without opinion the SEC's order granting Union Electric Co., an exempt holding company, permission to acquire Missouri Utilities without ordering either company to divest itself of its gas properties. Instead of ordering divestiture, the Commission took note of gas shortages and retained jurisdiction to reexamine the question at a later date. City of Cape Girardeau v. SEC, 521 F.2d 324 (D.C. Cir. 1975), *aff'g* Union Elec. Co., [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,751 (April 10, 1974). For an examination of competition questions underlying the separation of electric and gas systems, see Owen, *Monopoly Pricing in Combined Gas and Electric Utilities*, 15 ANTITRUST BULL. 713 (1970); Pace, *Relative Performance of Combination Gas-Electric Utilities*, 17 ANTITRUST BULL. 519 (1972).

effectiveness of regulation. . . ."[21] Integrated gas systems are those that are so located "that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations in a single area or region, in one or more States, not so large as to impair" the advantages set forth for integrated electric systems, but gas utilities "deriving natural gas from a common source of supply," for example, a particular pipeline, "may be deemed to be included in a single area or region."[22]

Although an integrated system must consist of either electric or gas companies, a holding company may retain an additional integrated system of either gender if it meets the so-called "ABC standards" of section 11(b)(1)(A), (B), and (C). These standards provide that the Commission must find the following:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies . . .;[23]
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country;[24] and
>
> (C) The continued combination of such systems . . . is not so large . . . as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.[25]

Nonutility businesses, on the other hand, may be retained only if they are "reasonably incidental, or economically necessary" and "not detrimental to the proper functioning of such system or systems."[26] Furthermore, section 11(b)(2) provides for the simplification of corporate structures through the elimination of unnecessary intermediate holding companies, other corporate complexities, and securities that inequitably distribute voting power.[27]

The SEC, in dozens of major proceedings pursuant to section

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21. 1935 Act § 2(a)(29)(A), 15 U.S.C. § 79b(a)(29)(A) (1970).

22. 1935 Act § 2(a)(29)(B), 15 U.S.C. § 79b(a)(29)(B) (1970).

23. 1935 Act § 11(b)(1)(A), 15 U.S.C. § 79k(b)(1)(A) (1970); *see* SEC v. New Eng. Elec. Sys., 384 U.S. 176 (1966) (economies are not substantial unless their loss would "cause a serious impairment of [the] system"). *See also* New Eng. Elec. Sys. v. SEC, 376 F.2d 107 (1st Cir. 1967), *rev'd on other grounds,* 390 U.S. 207 (1968), *noted in* 22 RUTGERS L. REV. 590 (1968).

24. 1935 Act § 11(b)(1)(B), 15 U.S.C. § 79k(b)(1)(B) (1970). Under the Act, whether all such states must adjoin the principal system state is unclear. The Code permits an additional system any part of wbich is in a state adjoining the principal system state. *See also* TD-4 § 1206(a)(2)(B), Comment 2; *cf.* Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936 (D.C. Cir. 1943). *vacated as moot,* 332 U.S. 788 (1947).

25. 1935 Act § 11(b)(1)(C), 15 U.S.C. § 79k(b)(1)(C) (1970).

26. *See* Annot., 16 L. Ed. 2d 1218 (1967).

27. 1935 Act § 11(b)(2), 15 U.S.C. § 79k(b)(2) (1970); *see* Leary, *"Fair and Equitable" Distribution of Voting Power Under the Public Utility Holding Company Act of 1935,* 52 MICH. L. REV. 71 (1953).

11 (enough to occupy approximately 300 staff members at the peak), required divestiture of numerous gas and electric utilities as well as nonutility enterprises. The Commission reorganized the capital structure of the holding companies and their subsidiaries so that integrated, simplified systems emerged.[28] Because of the substantial economic interests affected by these section 11 proceedings, the conflicting rights of numerous security holder groups, the novelty and complexity of the legal issues, and the taxation of litigation expenses to the companies, judicial review under section 24 was a frequent occurrence. As recently as 1976, the Supreme Court denied certiorari after the Court of Appeals for the District of Columbia Circuit had upheld the Commission's approval of the sale of certain gas properties by a predominantly electric holding company.[29]

Once through the integration wringer, a registered holding company system could settle down to SEC regulation, including review of (1) securities issuances,[30] proxy solicitations,[31] accounting practices,[32] intrasystem transactions, including intercompany loans, dividends, capital contributions, acquisitions by companies of their own securities, service company operations, and services rendered by affiliates and (2) sales and acquisitions by holding company systems of utility assets or of securities of utility companies.

Unlike the Federal Power Commission or state utility commissions, the SEC has no ratemaking authority. Moreover, the 1935 Act does not apply to two important segments of the utility industry—telephone and water companies. Thus, under the 1935 Act, the term "public utility" includes only electric and gas utilities,[33] and the term will be so used in this Article. In addition, substantial numbers of electric and gas holding companies are exempt under section 3[34] of the 1935 Act. Procedurally, the exemptions may arise in two different ways: first, by what Mr. Aaron Levy, Director of the

28. 1 Loss, *supra* note 18, at 136-37.

29. Association of Mass. Consumers v. SEC, 516 F.2d 711 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

30. 1935 Act §§ 6, 7, 15 U.S.C. §§ 79f, 79g (1970). *See also* the competitive bidding rule, 17 C.F.R. § 250.50 (1976).

31. 1935 Act §§ 11(g), 12(e), 15 U.S.C. §§ 79k(g), 79l(e) (1970).

32. 1935 Act §§ 15, 20(a), 15 U.S.C. §§ 79o, 79t(a) (1970). In practice, the SEC has deferred to the FPC on utility accounting matters.

33. 1935 Act § 2(a)(5), 15 U.S.C. § 79b(a)(5) (1970).

34. For a partial list of exempt holding companies, see SEC pamphlet, Holding Companies Claiming Exemption from the Public Utility Holding Company Act of 1935 Pursuant to Rule 2 as of July 15, 1974. There are 49 such companies listed. This list does not include those exempted by order of the Commission (approximately equal in number).

Division of Corporate Regulation,[35] refers to as "claimed exemptions" pursuant to rule 2. Although not specifically approved by the SEC, these exemptions are granted automatically upon filing of an exemption statement on Form U-3A-2. Secondly, an exemption may be authorized by order of the Commission following notice and, in many instances, public hearing.[36] Substantively, the exemptions pursuant to section 3 fall into several categories:

1. When the holding company and every public utility subsidiary are (a) predominantly intrastate in character and (b) organized in the same state.[37]

2. When the holding company itself is an operating public utility whose operations do not extend beyond the state in which it is organized and contiguous states.[38]

3. The holding company is only incidentally a holding company, being primarily engaged in another business and not deriving a material part of its income from a public utility subsidiary,[39] is temporarily a holding company (such as an institutional lender that acquires title to utility common stock which has been pledged),[40] or is a holding company only with respect to foreign public utilities.[41]

Each of the foregoing categories applies "unless and except insofar as [the Commission] finds the exemption detrimental to the public interest or the interest of investors or consumers."[42] The

35. Formerly the 1935 Act was under the jurisdiction of the Division of Public Utilities of the SEC.

36. The distinction between the two types of exemptions was illustrated in the companion cases Pacific Lighting Corp., SEC Holding Co. Act Release No. 17,855 (Jan. 11, 1973), and National Utilities & Industries Corporation, SEC Holding Co. Act Release No. 17,857 (Jan. 11, 1973). Pacific Lighting had an exemptive order that the staff sought to revoke because of Pacific Lighting's diversification program. The order could not he revoked when the Commission, one seat being vacant, split 2-2. National Utilities had a rule 2 claimed exemption that had been revoked by the Commission under rule 6 prior to the start of the proceeding. National Utilities then had applied for an exemption order. Because of a similar 2-2 split (on the same issue of diversification), the Commission was not able to issue the order. Under § 3(a)(c), however, the filing of an application in good faith exempts the applicant from the Act until the Commission has acted upon the application, and National Utilities thus also has continued to be exempt. Rule 2 exemptions appear to be a useful administrative technique for eliminating the need for a formal application procedure while preserving, under rule 6, the Commission's ability to require a formal exemption application at a later time should it become appropriate.

37. 1935 Act § 3(a)(1), 15 U.S.C. § 79c(a)(1) (1970); 17 C.F.R. § 250.2(a)(1) (1976).

38. 1935 Act § 3(a)(2), 15 U.S.C. § 79c(a)(2) (1970); 17 C.F.R. § 250.2(a)(2) (1976).

39. 1935 Act § 3(a)(3), 15 U.S.C. § 79c(a)(3) (1970).

40. 1935 Act § 3(a)(4), 15 U.S.C. § 79c(a)(4) (1970); 17 C.F.R. § 250.3 (1976).

41. 1935 Act § 3(a)(5), 15 U.S.C. § 79c(a)(5) (1970).

42. 1935 Act § 3(a), 15 U.S.C. § 79c(a) (1970).

scope of the Commission's power under the "unless and except" clause has been construed to give the Commission considerable discretion. For example, the Commission has held that under this clause it could condition the grant of an exemption to an otherwise qualified applicant on the applicant's compliance with the corporate simplification provisions of section 11(b)(2) requiring elimination of minority stock interests in a public utility subsidiary.[43] On the other hand, although the Commission split 2-2 on the extent to which diversification should be permitted,[44] the Commission disagreed with the 1972 staff proposal that section 3(a)(1) intrastate exemptions be denied to holding companies unless they complied with the section 11(b)(1) requirement that registered holding companies not engage in unrelated businesses. Accordingly, the "unless and except" clause appears to mean that although meeting the statutory criteria for exemption does not entitle the applicant to an automatic exemption, a holding company need not meet all the integration standards of section 11 to obtain an exemption. Between these two extremes there are few guidelines. Recently the Commission revoked the rule 2 claimed exemption of Lykes Bros., Inc., a diversified company that acquired a public utility, thus apparently signaling a new attempt to resolve the diversification issue.[45]

An exempt holding company is free from all of the regulation applicable to registered holding companies. Nevertheless, an important watchdog provision of the 1935 Act, section 9(a)(2), applies to "any person," thus encompassing both registered and exempt holding companies as well as any other person. Section 9(a)(2) prohibits the acquisition of five percent or more of the voting securities of a public utility by persons that already own five percent or more of the voting securities of another public utility unless the SEC has given prior approval. Thus, under present law, a company may buy five percent or more of the voting securities of one public utility without SEC approval,[46] but if the acquisition results in the owner-

43. Eastern Gas & Fuel Assoc., 30 S.E.C. 834, 848 (1950). The Commission has been constructive and even creative in requiring the elimination of minority interests by holding companies seeking exemption. Thus in Washington Gas Light Co., 44 S.E.C. 515 (1971), the Commission by order exempted Washington from all the provisions of the 1935 Act that apply to registered holding companies except § 11(b)(2). Although the company was required to eliminate the twenty percent minority interest in a public utility it had acquired, the § 11(e) procedure that permits court enforcement of the elimination of the minority became available. *See* note 89 *infra.*

44. *See* note 36 *supra.*

45. Lykes Bros., Inc., thereafter filed on application for an exemption under § 3(a). SEC Holding Co. Act Release No. 19,959 (Mar. 25, 1977).

46. *See* United Gas Corp. v. Pennzoil Co., 248 F. Supp. 449 (S.D.N.Y.), *aff'd per*

ship of five percent or more of more than one public utility (*i.e.* two "bites"), prior approval is required. Since the proposed Code adopts a "one bite" theory, this provision will be examined in more detail below. Of course, acquisition of more than ten percent of the voting securities of even one public utility makes the acquiring company a holding company that must register unless an exemption is available.[47]

III. Proposed Code Part XII and Related Provisions

The Code provisions proposed as successors to the 1935 Act reflect more substantive change than was contemplated at the outset.[48] Nonetheless, except in certain limited aspects, the changes do not alter either the basic regulatory scheme or the likely practical effect of regulation under the Code.

As the cross reference table of Tentative Draft No. 4[49] demonstrates, large segments of the 1935 Act are not needed in Part XII because they are covered elsewhere in the Code. Indeed, virtually all of the last half of the 1935 Act (sections 14 to 33) is absent from Part XII, including: periodic reporting,[50] accounting,[51] liability for misleading statements,[52] the short-swing profits prohibition and related reporting requirements for officers and directors (equivalents of 1934 Act, section 16),[53] the Commission's regulatory, investigative, hearing, and enforcement powers,[54] the effect of noncompliance with the statute on the validity of contracts,[55] the liability of controlling persons,[56] miscellaneous provisions contained in each of the securities acts,[57] and the requirement of a one-time study of public utilities and investment companies.[58] Earlier sections of the 1935 Act that do not appear in Part XII are section 1, the Preamble;

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curiam, 354 F.2d 1002 (2d Cir. 1965).

47. 1935 Act § 2, 15 U.S.C. § 79b (1970).

48. TD-4 at xxxii (Reporter's Introductory Memorandum).

49. TD-4 at 89-93. *See also* Cross Reference Index, 30 Vand. L. Rev. 627 (1977).

50. 1935 Act § 14, 15 U.S.C. § 79n (1970); *see* ALI Fed. Sec. Code § 601(f)-(g) (Reporter's Revision of Text of Tent. Drafts Nos. 1-3 1974) [hereinafter cited as RD 1-3].

51. 1935 Act § 15, 15 U.S.C. § 79o (1970); *see* RD 1-3 §§ 1503, 1505.

52. 1935 Act § 16, 15 U.S.C. § 79p (1970); *see* RD 1-3 §§ 1404, 1417(d)-(e).

53. 1935 Act § 17, 15 U.S.C. § 79q (1970); *see* RD 1-3 §§ 604(a)-(d), 1413.

54. 1935 Act §§ 18-20, 25, 29, 15 U.S.C. §§ 79r-79t, 79y, 79z-3 (1970).

55. 1935 Act § 26, 15 U.S.C. § 79z (1970); *see* RD 1-3 §§ 1417, 1420.

56. 1935 Act § 27, 15 U.S.C. § 79z-1 (1970); *see* RD 1-3 § 1704.

57. 1935 Act §§ 21-23, 28, 31-33, 15 U.S.C. §§ 79, 79u-79w, 79z-2, z-5 to -6 (1970).

58. 1935 Act § 30, 15 U.S.C. § 79z-4 (1970). This study led ultimately to the adoption of the Investment Company Act of 1940. *See* Securities Exchange Commission, Report on Investment Trusts and Investment Companies, H.R. Doc. No. 567, 76th Cong., 3d Sess. (1940).

section 2, Definitions (which is moved to Part II); section 8, Certain Acquisitions Requiring State Approval (moved to Code section 1603); and procedural parts of other sections.

Remaining are eleven sections covering exemptions, registrations, sales of securities, acquisitions, integration (old section 11), intercompany transactions, dividends and repurchases, sales of utility securities and assets, affiliation of officers and directors, service and related contracts, and political activities.

A number of important areas of the 1935 Act's coverage are modified in Part XII of the Code, including the following: removal of the "free first bite;"[59] changes in the exemptive authority of the Commission;[60] changes in the restrictions regarding affiliations of directors and officers;[61] improvements in the provision pertaining to lobbying;[62] an invitation to the Commission to give different weight to state approval of issues of securities;[63] standardization of the considerations to be utilized by the Commission in rulemaking and administrative adjudications;[64] and other changes codifying existing interpretation and practice.[65]

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59. TD-4 § 1205(a).

60. RD 1-3 § 302; TD-4 § 1205.

61. TD-4 § 1210.

62. TD-4 § 1212(b).

63. TD-4 §§ 1204(d), 1603(f).

64. The change, dictated by the general style of the Code, proposes one standard in § 1502(b), as opposed to the varying provisions of each securities act. *See, e.g.,* 1935 Act § 12b, 15 U.S.C. § 791 (1970).

65. Examples of the changes in interpretation and practice include:

1. Under the 1935 Act, the effect of a pledge of securities was unclear. Section 2(a)(23) defined a "sale" as including a pledge, but the definition of a "purchase" or "acquisition" under § 2(a)(22) did not refer to a pledge. On the other hand, rule 3(b)(1)-(2) purported to exempt a bank (but not an insurance company) from § 9(a)(2) with respect to an acquisition of securities as collateral. Thus an insurance company that took public utility securities as collateral for a loan was unclear whether it had to obtain prior approval from the SEC under § 9(a)(2). *See* SEC No-Action Letter, Colonial Gas Energy Sys. (publicly available Mar. 7, 1974). The Code clears up this ambiguity by defining "purchase" and "acquisition" as correlatives of "sale" and "sell," thus making pledge an acquisition. At the same time the Code broadens the exemption contained in rule 3(b)(1)-(2) to include insurance companies and elevates the exemption from a rule to the Code in § 1205(d). A parallel change has been made in the definitions of "electric company" (§ 230(a)) and "gas company" (§ 235(a)).

The Reporter, Professor Loss, preferred to leave the analogous problem of preferred stock voting provisions, which may be activated by the omission of dividends, to Commission rule. *See* TD-4 § 1201(a), Comment 4.

2. A small but vexing ambiguity in the definition of "electric company," interpreted in SEC Holding Co. Act Release No. 17,843 (1973) to prohibit the exemption of a company that sold no electric energy but to permit the granting of an order to one that sold a small amount of energy, is clarified in § 230(b)(1) by adding to the language "by reason of the small amount of electric energy sold" the phrase "or revenues received from the business of an electric company."

A. *Demise of the "Free First Bite"*

As noted earlier in this Article, the 1935 Act permits the acquisition by any person of a public utility without obtaining SEC approval under section 9(a)(2) if that person does not already own five percent or more of the voting securities of another public utility. Professor Loss indicates in his comment to section 1205(a)(1)(B) that the free first bite has been eliminated in reaction to a case arising from the acquisition by Pennzoil of United Gas, a public utility. Since Pennzoil did not meet any of the section 3(a) exemption standards, it was required to undergo a section 11 integration proceeding and suffer ultimate divestiture of the object of the acquisition—United Gas. This result could have been avoided had the

3. The principal exemptive provision, § 1201(a)(1) (formerly 1935 Act § 3(a)(1)), the intrastate exemption, has been changed to make explicit what always has been implied, namely, that the holding company's income from subsidiaries that are not public utilities need not derive from operations in the state. *See* Eastern Gas & Fuel Assoc., 30 S.E.C. 834, 848-49 (1950).

4. One problem not resolved by the Code but left for treatment by rule is the meaning of the term "primarily" as it is used in the exemption for holding companies that are primarily utility companies whose operations are confined to a single state and contiguous states. Some of the new electric generating capacity in the United States is being constructed by consortia of electric utilities. The ownership by such utilities of more than five percent of a joint generating company requires an exemption if such utilities are to avoid the full panoply of regulation as registered holding companies. The staff generally has taken the view that whether the sponsoring utility is primarily an operating company or primarily a holding company depends on the relationship between the gross revenues of the sponsor and the gross revenues of the joint generating company. Under this "gross to gross" test, the gross revenues of the sponsor must be more than two-thirds of the gross revenues of the sponsor and all of its subsidiaries (including 10% subsidiaries). When a sponsor owns 10% of a very large joint generating facility, the sponsor may not be able to satisfy this test. This question could be handled by an expansion of rule 2(a)(2) and the use of a different test based not on gross revenues of the joint company but on the sponsor's proportionate share. *Cf.* Accounting Principles Board Opinion No. 18, 4 AICPA PROFESSIONAL STANDARDS AC ¶ 5131 (1975). By the time the Code reaches Congress, however, this type of joint generating company might be an important enough feature of the utility landscape to require specific treatment under the exemption section of the Code.

5. A problem that arose from an unsuccessful takeover bid by Eastern Gas & Fuel Associates for Brockton Taunton Gas Company, and that gave rise to rule 51, has been covered neatly in § 293(h)(2). *See* Brockton Taunton Gas v. SEC, 396 F.2d 717 (1st Cir. 1968). In that takeover attempt, Eastern had entered into an agreement with a "straw trust" to acquire shares of Brockton Taunton common stock, subject to SEC approval. In response, the Commission promulgated rule 51 to prohibit such preliminary agreements unless certain conditions are satisfied. Section 293(h) provides that "sale" or "offer" (and correlatively under § 283 "purchase" or "acquisition") for purposes of Part XII "does not include a contract to sell that (A) is conditioned upon an order of approval and (B) is not in confiict with any rule that may be in effect as of the date of the contract." The Code formulation invites the adoption of a new rule 51 but would operate satisfactorily in the absence of such a rule.

one free bite not been permitted under the 1935 Act.[66]

Perhaps an unintended effect of the proposed Code provision is that it precludes acquisitions of public utilities without prior SEC approval, even when the acquiring party meets the prima facie standards of section 3(a). The serious problems of the utility industry in recent years have led to the formation of holding companies with utility companies as subsidiaries. Through this device, the enterprises can engage in businesses from which registered holding companies would be precluded under section 11 and that, under the regulatory policies of most states, could not be carried on directly or through a subsidiary of a public utility. Although this diversification has been criticized by the staff of the Commission and others,[67] the change in the acquisition requirement does not appear to be empirically justifiable when it goes beyond prohibiting acquisitions that do not meet the objective standards for exemption under proposed section 1201(a)(1)-(5).[68]

Section 9(a)(2) always has provided a measure of comfort to public utility managements by requiring prior Commission approval of a tender offer if either (a) the offeror already owned five percent or more of another public utility,[69] or (b) the target enterprise was comprised of two or more public utilities. The proposed change will provide a significant disincentive for such offers by requiring that all tender offers for public utilities must follow the SEC approval procedure under section 1205.

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66. Pennzoil Co., 43 S.E.C. 709 (1968); United Gas Corp. v. Pennzoil, 248 F. Supp. 449 (S.D.N.Y. 1965), *aff'd per curiam*, 354 F.2d 1002 (2d Cir. 1965); Pennzoil Co., SEC Holding Co. Act Release Nos. 15,963, 15,980, 16,014 (1968).

67. NATIONAL ASSOCIATION OF REOULATORY UTILITY COMMISSIONERS, 1972 REPORT OF THE AD HOC COMMITTEE ON NON-UTILITY INVESTMENTS—DIVERSIFICATION BY UTILITY COMPANIES. The study concluded that diversification by utilities should be controlled and limited to situations where the nonutility operations are (1) functionally related, (2) related to housing as in the *Michigan Consolidated* case, *see* note 74 *infra*, or (3) small and justified by special circumstances. In all cases, such activities should be segregated from utility operations. *Id.* at 33-34.

68. The author raised this question at the Institute Proceedings. ALI PROCEEDINGS, *supra* note 5, 518-19. In response to a subsequent letter from the Reporter, the author suggested that § 1205(a)(1)(B) be changed to read:

> (B) for a company not within clause (A) to acquire, directly or indirectly, a security of a utility company if the acquisition would make it a holding company not meeting the standards of Section 1201(a)(1)-(5).

Letter from Douglas Hawes to Louis Loss (August 13, 1975) (on file with the *Vanderbilt Law Review*).

69. *See* Brockton Taunton Gas Co. v. SEC, 396 F.2d 717 (1st Cir. 1968). *See also* Comment, 21 CASE W. RES. L. REV. 812 (1970); Comment, 71 COLUM. L. REV. 434 (1971); Comment, 26 RUTGERS L. REV. 156 (1972).

B. *The Commission's Exemptive Authority*

(1) General Exemptive Power

Section 302 of the proposed Code, as it appears in Reporter's Revision of Tentative Drafts 1 through 3, provides that

> The Commission, by rule or order, may exempt, conditionally or unconditionally, any person, security, or transaction, or any class of persons, securities, or transactions, from any or all of the provisions of this Code or rules thereunder.[70]

When the Reporter's Revision was published in October 1974 Professor Loss anticipated that some exemptions from section 302(a) might be indicated in drafting later parts of the Code, particularly highly policy-oriented provisions.[71] In the discussion at the Institute, Joseph Weiner and Milton Cohen both questioned the advisability of permitting the Commission to grant exemptions from so fundamental a provision as section 1206,[72] the successor to section 11. Professor Loss agreed and stated his intention to amend section 302(a) by removing from the Commission the power to grant total exemption from this provision.[73] Although the logic of this proposed change seems sound, the admission of exceptions to section 302 presents a difficult question: What constitutes a fundamental legislative doctrine with which the Commission should not be permitted to tamper? Certainly, if exceptions are to be made, the successor to section 11 is an appropriate candidate.

(2) Exemptions for Certain Acquisitions of Nonutility Securities

In the late 1960's certain public utilities, concerned by housing shortages and the deterioration of sections of their urban service territories, proposed to provide financing for urban housing under the National Housing Act. One such utility, Michigan Consolidated Gas Company (Michigan), was part of a registered holding company system. Under sections 9 and 10 of the 1935 Act, Michigan could not provide financing without SEC approval, which was initially granted but later denied.[74] Under section 1205(e) of the Code, the Commission may exempt from section 1205(a)(1)(A) an acquisition

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70. RD 1-3 § 302(a).

71. RD 1-3, § 302(a), Note 1.

72. ALI PROCEEDINGS, *supra* note 5, at 494 (remarks of Joseph Weiner), 498 (remarks of Milton Cohen).

73. *Id.* at 498-99, 545-46.

74. Michigan Consol. Gas Co., SEC Holding Co. Act Release Nos. 16,331 (1969), 16,763 (1970), *aff'd*, 444 F.2d 913 (D.C. Cir. 1971) (providing financing for housing was not "incidental" nor functionally related to the utility business).

of a business or security for an important social purpose "that promotes a national interest recognized by the Congress."[75]

In the *Michigan* case, one Commissioner stated that the SEC had the exemptive power to approve such housing-related investments by registered holding companies. Arguably, the total exemptive power provided the Commission by section 302(a) makes the section 1205(e) provision unnecessary. As noted above, however, Professor Loss has indicated a disposition to limit the Commission's exemptive power under section 302(a) in regard to former section 11 matters. Such a limitation thus would eliminate any contentions that the section 1205(a)(1)(A) provision is redundant. Whether the Commission should be put in the position of having to balance the social purpose of housing against the public interest it is charged by the 1935 Act to protect is a serious question.[76]

C. *Affiliations of Officers and Directors*

Section 17(c) was designed to preclude commercial and investment bankers from serving as officers or directors of registered holding companies or their subsidiaries, except to the extent permitted by SEC rules. Rule 70, as promulgated by the Commission, defines "investment banker" to include a "dealer" as the term is used in the 1933 Act, which includes a broker. Thus rule 70 appears to be broader than the 1935 Act intended, since the draftsman could have used the broader terms "broker" or "dealer" already defined in the 1933 Act but chose instead to use the narrower term "investment banker." From this premise, the Code has included a definition of "investment banker" as either a person who, as part of a regular business, underwrites securities or as a person who, during the last twelve months, has underwritten a distribution pursuant to sections 1204 or 1209 of Part XII.[77] Brokers or dealers who do not underwrite thus will be permitted to serve as officers or directors.[78]

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75. TD-4 § 1205(e).

76. The current interest in energy conservation may provide a further test of the existing statute and regulations under proposals to have public utilities finance insulation in the names of customers. *See* Rosenberg, *Conservation Investments by Gas Utilities as a Gas Supply Option*, PUB. UTIL. FORTNIGHTLY, Jan. 20, 1977, at 13. Present SEC regulations provide an exemption from § 9 for acquisition of any evidence of indebtedness executed by customers for the purchase of any gas or electric appliance (rule 48), but would not exempt indebtedness for insulation.

77. TD-4 § 249.

78. ALI PROCEEDINGS, *supra* note 5, at 513-14. Section 1210(b) has been added to disqualify any person who within 12 months after he ceased to be an officer or director of a registered holding company or its subsidiary from serving as an underwriter of a registered holding company or its subsidiary.

A group of utility lawyers sought to eliminate the prohibition on a person serving as an outside director of a bank from also serving as a director of a registered holding company or any of its subsidiaries. This proposal failed to receive the endorsement of the advisory group and was not included in the Code. The Reporter nevertheless does mention in a comment that the Commission could exempt such nonofficer directors of banks by rule.[79]

D. Lobbying by Professionals

Section 12(i) of the 1935 Act prohibits any person employed or retained by a registered holding company or subsidiary from presenting, advocating, or opposing any matter affecting the company before Congress, the SEC, or the FPC without filing a form detailing the basis of such employment or retainer, including compensation.[80] As Professor Loss stated during the Institute's discussion of this provision, lawyers resent the characterization of their normal professional functions as lobbying. Accordingly, the Code exempts from the lobbying provision professional conduct by lawyers, as well as by accountants and other experts and professionals.[81] The failure of present and past Commission and staff members to object to this change confirms the view that the 1935 Act's provision is unnecessarily broad and that the change effectuated by the Code is warranted. While the Reporter would have preferred to eliminate the lobbying provision entirely from the Code in favor of a federal lobbying statute, he found that the existing statutes deal inadequately with the problem.[82]

E. Relation to State Law

Presently, section 6 deals with the issuance of securities and specifies when Commission clearance is necessary, while section 7 prescribes the substantive standards for approval. In the proposed Code, these two provisions have been collapsed into section 1204. The distinction between "declarations" and "applications," which does not appear to have been observed in practice (most filings

79. TD-4 at 121-22, Comment 5. *See also* ALI PROCEEDINGS, *supra* note 5, at 515-16 (remarks of Herbert B. Cohn).

80. 17 C.F.R. § 250.71 (1976).

81. TD-4 § 1212(c). *See also* Gregory & Strickland, *Hugo Black's Congressional Investigation of Lobbying and the Public Utilities Holding Company Act: A Historical View of the Power Trust, New Deal Politics, and Regulatory Propaganda*, 29 OKLA. L. REV. 543 (1976).

82. *See* TD-4 § 1212, Comment 1, citing 2 U.S.C. §§ 261-70 (1970), Federal Corrupt Practices Act, 2 U.S.C. §§ 431-54 (1970), 18 U.S.C. § 610 (1970); ALI PROCEEDINGS, *supra* note 5, at 517-18.

being entitled "Application-Declaration"), has been abandoned in favor of the term "application." The only casualty of the integration and simplification of sections 6 and 7, for which great concern was shown at the Institute, was the elimination of the provision of section 6(b), which states that when the sale of a security by a subsidiary of a registered holding company has been approved by a state commission, the Commission shall grant an exemption upon such terms and conditions as it deems appropriate.[83] In practice the Commission on occasion has imposed conditions embodying the kind of standards set forth in section 7, but recognized that Congress did intend to accommodate state regulation and give considerable weight to the action of a state commission. After some discussion in the Institute, Professor Loss expressed a willingness to modify Code section 1603(f)(2)[84] to provide that when a state commission has acted, the SEC will "give appropriate weight" to the state approval in setting its own terms and conditions. Whether this exegesis should suffice or whether the Code should be interpreted to give the Commission broader latitude than is granted by the present statute is open to question.

The other changes wrought by the consolidation of the two present sections result in a very satisfactory simplification without material change in substance. The structure of section 1204 is as follows: subsection (a), as proposed, makes it unlawful, unless an application has been granted under that section, to sell a security of a registered holding company or a subsidiary; subsection (b), under certain circumstances, exempts commercial paper in an amount not exceeding five percent of debt plus equity capital; subsection (c) establishes the procedure for an application; subsection (d) sets the standards (basically unchanged from section 7(c)(2), (d)); subsection (e) provides exemptions from the standards in certain cases—especially common stock of holding companies, which typically could not meet the standards in (d), and is also virtually unchanged from section 7(c)(1); and subsection (f) deals with the alteration of rights of security holders.[85]

F. Interpretation and Practice

Section 1205 combines present sections 9 and 10. The most

83. ALI PROCEEDINGS, *supra* note 5, at 509-10 (remarks of Herbert Cohn).

84. TD-4 § 1603(f)(2).

85. Professor Loss makes clear in Comment 2 to § 1204 that the references to alteration of rights of security holders is not intended to impinge on tbe definitions of "offer" and "sale" within § 293(a)-(b). *See* McGuigan & Aiken, 9 REV. OF SEC. REG. 935 (1976).

notable change in section 1205 is the elimination of the free "first bite" that already has been discussed above. A new subsection, 1205(a)(2), codifies a long-standing administrative construction that was questioned recently but upheld in *Association of Massachusetts Consumers v. SEC.*[86] The new provision provides that when an acquisition of a security of a utility company occurs substantially concurrently with a business combination in which securities are part or all of the consideration, the acquisition will be treated as an acquisition of assets rather than of securities for purposes of the new test under section 1205. Another addition to the acquisition provisions, acquisitions of securities for the purpose of promoting a national interest recognized by Congress,[87] also has been discussed above.

The Code preserves section 10(e), which states that the Commission may condition its approval of the acquisition of another company's securities on a fair offer to buy other securities of that company. Considering that this provision was drafted twenty years before *Perlman v. Feldmann,*[88] it would have been almost a sacrilege to eliminate it in the modernization process.[89] Section 1205(g)(1)(C) also preserves, for the moment, the antitrust standard of section 10(b), requiring the Commission to find that an acquisition would not tend to create undue interlocking relations or undue concentration of control of utility companies. In recent years, the conflict between the securities laws and the antitrust laws has been the subject of a number of important judicial decisions and administrative constructions.[90] Prior to the consciousness-raising effect of this

86. 516 F.2d 711 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976).

87. *See* note 68 *supra* and accompanying text.

88. 219 F.2d 173 (2d Cir.), *cert. denied,* 349 U.S. 952 (1955).

89. *See* North Penn Gas Co., SEC Holding Co. Act Release No. 19,254 (Nov. 20, 1975) (acquiring company agreed to purchase minority shares in acquired public utility within two years—equivalent to conditional § 10(b) approval); TD-4, 1205(h)(2).

90. *See, e.g.,* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975); Silver v. New York Stock Exch., Inc., 373 U.S. 341 (1963). In Gulf States Util. Co. v. FPC, 411 U.S. 747, *rehearing denied,* 412 U.S. 944 (1973), the Supreme Court affirmed the view of the court of appeals that the Federal Power Act required consideration of antitrust issues in the context of the authorization of a securities offering under § 204. The Supreme Court did not question the other conclusion of the lower court that the SEC's decision not to consider antitrust issues under §§ 6 and 7 of the 1935 Act was proper:

> Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anticompetitive grounds. . . . The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia,* to direct utilities to interconnect on reasonable terms, or to prohibit a utility *from* discrimi-

type of litigation, however, the SEC paid relatively little heed to the antitrust provisions in section 10.[91] The Reporter plans ultimately to deal with antitrust questions in section 1602(c), although it may be desirable not to alter section 1205(b).

G. *Agency Review Standards*

One noteworthy change of style in the Code is the substitution in section 1502(b) of a single formulation of the standard by which Commission rules and orders are to be governed for the more than a dozen different provisions found in the 1935 Act. Section 1502(b) requires that Commission action be

> necessary or appropriate in the public interest or for the protection of investors (as well as consumers with respect to a person subject to Part XII and related provisions) in connection with carrying out the purposes fairly intended by the policy and provisions of this Code . . . .[92]

Historically, situations in which the Commission gave weight to the slight differences in the formulations were rare. Accordingly, this change properly can be considered one of style, albeit the Reporter has felt obliged in limited instances to perpetuate elements of such standards in the substantive provisions.[93]

IV. Conclusion

Prior to the Carter Administration's energy reorganization proposal, the 1935 Act was not a prime focus of either the SEC or the securities bar. The concept of a Department of Energy raised fundamental questions concerning the submergence of independent agency functions in a department of the Executive Branch. Especially since the SEC's 1935 Act functions were not transferred, Part XII of the Code deserves attention as a thoughtful restatement of the provisions of the 1935 Act not related to disclosure. The transmutation of these provisions in the Code provides a clear and convincing illustration of the meritorious nature of the whole codification effort. The Code provisions are about half the length of the 1935 Act that they will replace. The overall scheme is simplified and will be more understandable to the nonspecialist. A num-

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nating in rates and facilities against its municipal customers. . . .
City of Lafayette v. SEC, 454 F.2d 941, 955-56 (D.C. Cir. 1971).

91. Northeast Util., SEC Holding Co. Act Release No. 15,825 (Aug. 18, 1967); Eastern Gas & Fuel Assoc., SEC Holding Co. Act Release No. 15,887 (Nov. 3, 1967), *aff'd sub. nom.* Brockton Taunton Gas Co. v. SEC, 396 F.2d 717 (1st Cir. 1968); SEC v. New Eng. Elec. Sys., 384 U.S. 176, 183-85 (1966); Loss *supra* note 18, at 3155-56.

92. RD 1-3 § 1502(b).

93. *See* TD-4 at xxxiii-xxxv (Reporter's Introductory Memorandum); TD-4 §§ 1204(d)(3), 1205(c)(2)-(3), 1206(a)(3).

ber of sensible administrative constructions that were not apparent from the statute have been codified and excess verbiage has been eliminated.

Understandably, the small, specialized 1935 Act bar is satisfied with some of the changes, unhappy with others, and disappointed that still other changes were not made. The most fundamental change to which objection was raised is the delegation to the Commission of power under section 302 to exempt registered holding company systems from compliance with the successor provision to section 11. Professor Loss already has accepted the idea that section 302 should be changed to eliminate that possibility.

The Code leaves to case-law development an issue on which the Commission was unable to act because of an unprecedented (to the memory of old-timers) 2-2 split: the extent to which exempt holding companies may diversify. Nevertheless, the Commission's full authority to deal with the problem[94] is preserved. The proposed removal of the one free bite exception to the requirement of prior SEC approval under section 9(a)(2) will, if adopted, give the Commission an opportunity to develop guidelines. This rather drastic change lacks empirical support and should be revised to the extent that it exceeds the *Pennzoil* case in precluding the formation of holding companies without prior SEC approval even when the objective criteria for exemption are met.

While one can nitpick and even quarrel substantively in one or two areas of these Code provisions, one certainly cannot examine them without acknowledging the scholarship the Reporter applies to each area of the Code. The 1935 Act provisions are a backwater in the dynamic stream of securities law—a backwater in which Professor Loss disclaims expertise. Nevertheless, the excellence of the remodelling belies that claim and demonstrates the breadth of the Reporter's contribution.

Certainly the regulation of public utility holding companies in both their incipient and full-blown form is necessary to continue the benefits derived by the public and to prevent a recrudescence of the excesses of the 1920's in this vital area of our economy. Some features of the statute may be regarded as fossil—of interest primarily to historians—but by and large these provisions should serve as a foil for generations to come. The scope of the discussion in this Article is perhaps the best evidence that the duties of the SEC under the 1935 Act are largely financially oriented and regulatory

94. *See* TD-4 § 1201(a), Comment 3(b).

in nature, and thus did not really appear to fit within the objectives or framework of the Administration's energy reorganization proposal. Nevertheless, the modernization effected by the Code should simplify the tasks of both the Commission and the bar.