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Edward R. Hayes

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## STATE "BLUE SKY" AND FEDERAL SECURITIES LAWS

EDWARD R. HAYES\*

The subject of state and federal regulation of securities is one with which most lawyers have little familiarity. It may not have been discussed in any of their law school courses,<sup>1</sup> and their practice may have involved the organization and financing of few if any corporations. This lack of familiarity results in unawareness of the extent to which security transactions are subject to regulation, a sometimes erroneous assumption that securities may be issued lawfully by the occasional corporate (and even noncorporate)<sup>2</sup> client without necessity for complying with statutory requirements, and an overlooking of possible rights of clients who may have purchased improperly issued securities.<sup>3</sup>

A newly organized corporation seeks initial financing. An older corporation seeks funds for expansion or continuation of its activities. When will these actions require registration of a "security" with the Securities and Exchange Commission? When will it be necessary to register with a state securities department? Will both federal and state registration be required? Is it necessary to register with departments of more than one state? What does registration entail?

Before discussing these questions, a few brief comments about the history and philosophy of securities regulation, and about the place of different jurisdictions in the regulatory picture, are in order. Although there were instances of statutory regulation of security issues of

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\* Professor of Law, Drake University Law School; Visiting Professor, Vanderbilt University Law School, 1957-58.

1. Apparently, the first casebook intended for use in a basic law school corporations course which devoted much space to securities regulation was BERLE & WARREN, BUSINESS ORGANIZATION 731-860 (1948).

2. Securities laws definitions of "issuers" are not limited to corporations. Securities Act of 1933 § 2(2), (4), 48 STAT. 74, as amended, 15 U.S.C. § 77b(2), (4) (1952); TENN. CODE ANN. § 48-1602(E), (G) (Supp. 1957); UNIFORM SECURITIES ACT § 401(g), (i). Some notes issued by an individual may require registration. Securities Act of 1933 § 3(a)(3), 48 STAT. 74 (1933), 15 U.S.C. § 77c(a)(3) (1952); TENN. CODE ANN. § 48-1619(G) (Supp. 1957); UNIFORM SECURITIES ACT § 402(a)(10). In addition, where sufficient corporate securities have been distributed to an individual so that he is in control of the corporation, should he resell them or parts of them he may be an "issuer." Securities Act of 1933 § 2(11), 48 STAT. 74 (1933), 15 U.S.C. § 77b(11); LOSS, SECURITIES REGULATION. (1951).

3. LOSS & COWETT, BLUE SKY LAW 129 (1958).

specific industries, or of particular types of sales, during the nineteenth century, the use of comprehensive registration and licensing by states began around 1911.<sup>4</sup> After a Supreme Court decision in the *Blue Sky*<sup>5</sup> cases, in 1917, holding three state blue sky laws constitutional, adoption of such laws became widespread. Today they can be found in all but two states, and in Hawaii.<sup>6</sup> Until recently no two state statutes were identical, but nearly all contain some form of antifraud provisions, most have some requirement for registration of dealers and brokers, and nearly all provide for registration of securities unless some exemption is applicable. The theory of state securities registration is paternalistic—where registration is required, the administrator must act affirmatively in permitting registration, and he may refuse registration where doubtful that the purchase of the security is wise, even though full disclosure of all material facts will be made to prospective purchasers.<sup>7</sup>

The federal law, primarily for purposes of this article the Securities Act of 1933,<sup>8</sup> also has antifraud provisions, but in its registration requirements adopts a somewhat different philosophy—that of full disclosure. Its objective is furnishing the investor with adequate information upon which he can exercise his own judgment as to the soundness of the security offering.<sup>9</sup> [In contrast, under some blue sky laws the information submitted to the department in the registration application must not be disclosed to investors by the department.]<sup>10</sup>

As the federal law is applicable to transactions which take place to any extent through use of the mails or any instrumentality in interstate commerce,<sup>11</sup> it may regulate a transaction that occurs entirely within the boundaries of one state. Has the federal law pre-empted the field of security regulation, making the state laws obsolete? No, for the Securities Act of 1933 expressly provides for concurrent operation with state laws rather than federal pre-emption.<sup>12</sup> Thus, an issue of securities will require consideration of both applicable federal and state laws.

When an issue is distributed in more than one state, it may be neces-

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4. *Id.* at 3-5. Kansas has been generally credited with having passed the first blue sky law, in 1911. *Id.* at 5.

5. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917) (Ohio); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917) (South Dakota); *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568 (1917) (Michigan). Before these decisions several lower federal courts had held such laws unconstitutional but state courts were opposed to that view. LOSS & COWETT, *BLUE SKY LAW* 10-13 (1958).

6. LOSS & COWETT, *BLUE SKY LAW* 17 (1958).

7. *Id.* at 17-42.

8. 48 STAT. 74 (1933), as amended, 15 U.S.C. §§ 77a-77aa (1952).

9. LOSS & COWETT, *BLUE SKY LAW* 18 (1958); Pearce, *California Corporate Securities Law vs. Proposed Uniform Securities Law*, 9 HASTINGS L.J. 1 (1957).

10. *E.g.*, IOWA CODE § 502.31 (1954).

11. Securities Act of 1933 § 5, 48 STAT. 77, 15 U.S.C. § 77e (1952).

12. Securities Act of 1933 § 18, 48 STAT. 85, 15 U.S.C. § 77r (1952).

sary to comply with blue sky laws of several states. In some states merely offering for sale, or delivery of the security, may be enough to make the law applicable. Suppose A, trying to sell stock in A Company which he is organizing, takes B on a fishing trip in Kentucky Lake; A and B are both residents of Tennessee and the corporation is or will be incorporated in Tennessee. But as they sail over the lake hunting for choice fishing spots A discusses the stock with B, and at one point which is in Tennessee, then another in Kentucky. Or suppose C and D, both Missourians, in a similar situation, on one of the famous White River floats during which they are sometimes in Missouri and sometimes in Arkansas. Even though the issue has been properly blue skyed in the state of incorporation, enough may have occurred in Kentucky [or Arkansas] to enable the buyer to rescind under the blue sky law of that state—unless it too had been complied with by the seller. A more difficult question of compliance arises when the seller is not present in the state where the buyer is located, and the seller's contacts with the state are through use of interstate mail or telephone. While the buyer may be able to rescind, in such a situation, for noncompliance with the blue sky laws of his state, is there anything the regulatory authorities of that state can do to prevent such contacts without registration with them? Despite some doubts that have been expressed, one recent decision may support the power of the state to insist on compliance even in this situation.<sup>13</sup> Whether that power can have any practical application in most of these "minimal" contact situations is another problem.<sup>14</sup>

It should be apparent that any issue of a security will require consideration of federal law and ordinarily the law of at least one state;

13. *Travelers Health Ass'n v. Virginia ex rel. State Corp. Commission*, 339 U.S. 643 (1950), *affirming* 188 Va. 877, 51 S.E.2d 263 (1949), holds that a state's blue sky law may constitutionally be applied to sales effected therein by persons not present in the state physically or through agents, but who are engaged in a continual mail solicitation of prospects within the state. The implications of the case are extensively analyzed in Loss & Cowett, *BLUE SKY LAW* 212-219 (1958) and Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209, 241-48 (1957), where it is pointed out that at least some state statutes may not be broad enough to cover such conduct. And see *With the Editors*, 71 HARV. L. REV., No. 2, pp. vii, viii (Dec. 1957), referring to reversal by the Michigan Attorney General from the position previously taken and discussed by Loss, Robinton & Sowards, *Florida's Blue Sky Law: The Lawyer's Approach*, 6 MIAMI L.Q. 525 (1952), take the position that the Florida law applies although neither issuer, dealer, nor agent are in Florida. On the other hand, Sammond, *A Study of the Wisconsin Blue Sky Law and Its Administration*, 1956 WIS. L. REV. 196, doubts that *Travelers Health* furnishes the complete answer.

14. Perhaps the state may be able to obtain an injunction against offers and sales made without compliance, though a jurisdictional problem is present. Sammond, *supra* note 13, suggests that as injunctive actions may bring unfavorable publicity if contested, the likelihood of their being contested is perhaps small. Tennessee practice apparently is to request compliance from the foreign vendor; if he does not comply the blue sky authorities in his state or the SEC are informed and requested to assist in obtaining compliance. In several instances compliance has resulted.

where the distribution of an issue is sufficiently broad, the laws of more than one, and oftentimes of many states, must be considered. The variations in state laws make legal analysis preliminary to distribution more difficult.<sup>15</sup> In recent years some laws have been revised to improve the blue skying process;<sup>16</sup> and very recently a Uniform Securities Act has been promulgated and already adopted at least to some extent in several jurisdictions.<sup>17</sup> One of the objectives of the Uniform Act is to reduce the variations between states and thus simplify the task of the attorney advising on registration matters.

The effectiveness of any security regulation statute is limited by the extent of its coverage and its exceptions. The balance of this article is primarily an analysis of the coverage and exemptions provisions of the Federal Act, the Tennessee Blue Sky Law, and the Uniform Securities Act, which will be of considerable significance to the smaller enterprises, operating in a limited area, who finance initial organization and subsequent operation through issue of securities.

#### FEDERAL LAW—THE SECURITIES ACT OF 1933

The Securities Act of 1933 applies to a sale, or an offer to sell, or a delivery of a security by any person, accomplished through use of any means or instruments of transportation or communication in interstate commerce or through use of the mails.<sup>18</sup> Most of the key terms in that statement are defined in the Act, and are defined broadly. Thus, a "sale" includes "every contract of sale or disposition of a security or interest in a security for value,"<sup>19</sup> and may include a "gift."<sup>20</sup> An "offer to sell"

15. "No two of the state acts are identical. And the amount of variation and frequently unnecessary complexity in both substance and verbiage is staggering. For example, when all the permutations are charted there are some 2800 exemptions in the forty-seven statutes." LOSS & COWETT, *BLUE SKY LAW* 18-19 (1958).

16. *E.g.*, Tennessee, whose original 1913 Act, TENN. CODE ANN. §§ 45-1901 to -1916 (1956), was repealed in 1955 and completely rewritten. The new law, as further amended in 1957, appears as TENN. CODE ANN. §§ 48-1601 to -1648 (Supp. 1957).

17. The Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in August, 1956, and several weeks later by the National Association of Securities Administrators. LOSS & COWETT, *BLUE SKY LAW* (1958). The Act, with official and draftsmen's commentary, appears in LOSS & COWETT, *op. cit. supra* at 244-420; without draftsmen's commentary, in 9C UNIFORM LAWS ANN. 86. Loss and Cowett state that as of early 1958 the Act was adopted, in something like its complete form, in Hawaii, Kansas and Virginia (Virginia using an early draft of the Act); and to some extent in Colorado, Georgia, Missouri, Montana, New Mexico, Oregon and Texas. See LOSS & COWETT, *op. cit. supra*, at 421-431; *The Business Lawyer Bull.*, Dec. 1957 p. 2. See also Meer, *The Texas Securities Act—1957 Model: Facelift or Forward Look*, 36 TEXAS L. REV. 429 (1958).

18. Securities Act of 1933 §§ 5, 12, 17, 48 STAT. 74, 77, 84, as amended, 15 U.S.C. §§ 77e, 1, q (1952); *Shaw v. United States*, 131 F.2d 476 (9th Cir. 1942).

19. Securities Act of 1933 § 2(3), 48 STAT. 74, (later amended by 68 STAT. 683 (1954)), 15 U.S.C.A. § 77b(3) (Supp. 1957).

20. Section 2(3) also provides: "any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be

includes "every attempt to offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."<sup>21</sup> "Delivery" is not defined, and is of primary significance in making the Act applicable to transactions where the sale was effected in such a manner that otherwise it would not apply.<sup>22</sup> The definition of "security" enumerates many kinds of instruments that are included, as well as "any interest or instrument commonly known as a 'security,'"<sup>23</sup> and many unusual types of transactions have been held to involve securities.<sup>24</sup>

Almost all transactions covered by the Act are subject to its criminal and civil fraud provisions.<sup>25</sup> However, the section 5 prohibition against sale or offering to sell without preregistration and use of an accompanying prospectus is subject to a number of exemptions (some relating to types of securities, some to types of transactions). Among the more important of these for the small firm are those for "intrastate issues" and "private offerings." In addition, the SEC may allow a "small issue" to be made utilizing a simplified registration procedure. Before further examination of these three "exemptions" one other point should be noted. The Act has very little application to sales of

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conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value." Some of the cases holding a transaction to be a sale include: *United States v. Wernes*, 157 F.2d 797 (7th Cir. 1946) (exchanging one security for another); *Llanos v. United States*, 206 F.2d 852 (9th Cir. 1953), *cert. denied*, 346 U.S. 923 (1954) (issuing promissory note in exchange for personal loan); *SEC v. Associated Gas & Elec. Co.*, 99 F.2d 795 (2d Cir. 1938) (changing terms of an outstanding security held to be a "sale" under the similar definition in the Public Utility Holding Company Act). "Sale" will not usually include a pledge or loan of a security. *Loss, SECURITIES REGULATION* 333-34 (1951). The SEC has ruled that issues of stock in connection with mergers or consolidations, or reclassification of securities authorized by shareholders pursuant to statute or charter authority, are not sales. *SEC Rule 133, Loss, op. cit. supra*, at 334; see also *National Supply Co. v. Leland Stanford Junior University*, 134 F.2d 689 (9th Cir. 1943), *cert. denied*, 320 U.S. 773 (1943).

21. Securities Act of 1933 § 2(3), 48 STAT. 74 (later amended by 68 STAT. 683 (1954)), 15 U.S.C.A. § 77b(3) (Supp. 1957); *Loss, SECURITIES REGULATION* 340 (1951, Supp. 1955).

22. Securities Act of 1933 §§ 5, 12, 17, 48 STAT. 74, 77, 84, 15 U.S.C. §§ 77e, l, q (1952); *Blackwell v. Bentsen*, 203 F.2d 690 (5th Cir.), *cert. granted*, 346 U.S. 908 (1953); *cert. dismissed*, 347 U.S. 925 (1954); *Moore v. Gorman*, 75 F. Supp. 453 (S.D.N.Y. 1948); *Gross v. Independence Shares Corp.*, 36 F. Supp. 541 (E.D.Pa. 1941); *Crosby v. Weil*, 382 Ill. 538, 48 N.E.2d 386 (1943).

23. Securities Act of 1933 § 2(1), 48 STAT. 74, 15 U.S.C. § 77b(1) (1952).

24. A classic case is *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) (vendor sold narrow portions of citrus acreage in Florida, such as a row of ten trees and the strip of land they were on, usually contracting to service the trees and market the fruit for purchaser). See also *SEC v. Crude Oil Corp. of America*, 93 F.2d 844 (7th Cir. 1937) (ostensibly contracts for sale of barrels of oil, vendor having power to further resell the same oil and remit net proceeds, and first buyers found not to be people contemplating taking actual delivery of oil); *SEC v. Payne*, 35 F. Supp. 873 (S.D.N.Y. 1940) (contract for sale of silver foxes, vendor to care for them); *Loss, SECURITIES REGULATION* 301 (1951).

25. Securities Act of 1933 §§ 12, 17, 48 STAT. 84, 15 U.S.C. §§ 77 l (civil), q (criminal) (1952).

securities that have already passed through the stage of initial distribution.<sup>26</sup>

*Intrastate Issues.* A security is exempt from federal registration and prospectus requirements if "part of an issue offered and sold only to persons resident within a single state or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory."<sup>27</sup> The place of the offer or sale would appear not to be important. But, even if all *purchasers* are residents, the exemption as to all can be destroyed if any part of the issue was *offered* to a non-resident. The availability of this exemption is also lost if the securities are sold to residents of the state where the principal corporate activities are found, when the business has been incorporated in another state—for example, a Delaware corporation with its principal office in Tennessee, selling all its stock to Tennessee residents. The right to this exemption may easily and inadvertently be lost.<sup>28</sup>

*Private Offering.* A transaction by an issuer not involving any "public offering" is exempt from federal registration and prospectus requirements.<sup>29</sup> The term "public offering" is not defined. Several factors which have been pointed out as relevant include: the number of offerees, their relation to each other and to the issuer, the number of units offered, and the manner of offering.<sup>30</sup> A test applied by the Supreme Court, construing this exemption, is whether the "particular class of persons [offerees or vendees] affected need[s] the protection of the Act."<sup>31</sup> Following this test, the Court held to be "public" an

26. The registration and prospectus provisions of the Act do not apply to transactions by any person other than an issuer, underwriter or dealer, and do not apply to transactions by a dealer (or underwriter no longer acting as such in respect to the security involved) occurring more than one year after initial public distribution, except as to unsold securities allotted to the dealer in the initial distribution. Securities Act of 1933 § 4(1), 48 STAT. 77 (later amended by 48 STAT. 906 (1934) ), 15 U.S.C. § 77d(1) (1952). See Orrick, *Some Interpretative Problems Respecting the Registration Requirements under the Securities Act*, 13 THE BUSINESS LAWYER 369 (1958).

27. Securities Act of 1933 § 3(a)(11), 48 STAT. 75, as amended, 15 U.S.C. § 77c(a)(11) (1952).

28. Coll, *Corporate Financing and the Federal Securities Laws*, 6 MERCER L. REV. 264 (1955); Newton, *Problems in General Practice Under the Federal Securities Act*, 18 MONTANA L. REV. 33 (1956). Newton refers to a company which incurred a contingent civil liability of \$900,000 because of sales of a few shares to nonresidents; the potential liability precluded obtaining much needed financial assistance from lending agencies. See also Mulford, *Private Placements and Intrastate Offerings of Securities*, 13 THE BUSINESS LAWYER 297 (1958).

29. Securities Act of 1933 § 4(1), 48 STAT. 77, as amended, 15 U.S.C. § 77d (1) (1952).

30. LOSS, SECURITIES REGULATION 394 (1951); Coll, *supra* note 28; Mehler, *The Securities Act of 1933: "Private" or "Public" Offering*, 32 DICTA 359 (1955); Mulford, *supra* note 28; Newton, *supra* note 28.

31. SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

offer made only to certain of issuer's employees;<sup>32</sup> other courts have treated an offer to all present stockholders as "public."<sup>33</sup> While the availability or nonavailability of this exemption will often be clear, in some border-line instances there will be uncertainty.

*Small Issues.* For many businesses this will be the applicable "exemption." Under it:

The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted . . . ; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$300,000.<sup>34</sup>

Pursuant to the quoted subsection, the SEC has adopted what is known as Regulation A.<sup>35</sup> The effect of the Regulation is not to exempt any security from registration but to permit use of a simplified, or "Regulation A" registration for certain issues.<sup>36</sup> As the Regulation has been revised and modified over the years, registration under it has become more complex.<sup>37</sup>

Regulation A procedure may be available if the aggregate offering price of the proposed offering and of any other securities sold by the issuer, any affiliate or predecessor, within one year prior to the commencement of the proposed offering, do not exceed \$300,000. In computing the aggregate issuing price, securities sold during the year which should have been registered but were not must be included, but securities properly exempt under *other* [not small issue] provisions of the Act need not be included. Securities issued or to be issued to promoters for property or services must be included where the issuer is newly organized or still substantially in the promotional stage. And if securities have been offered or sold during the year on behalf of an affiliate, their aggregate offering price must not have exceeded \$100,000.

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32. SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (a large number of employees could purchase the stock).

33. SEC v. Sunbeam Gold Mines Co., 95 F.2d 699 (9th Cir. 1938) (530 stockholders in two related companies involved).

34. Securities Act of 1933 § 3(b), 48 STAT. 75 (later amended by 59 STAT. 167 (1945)), 15 U.S.C. § 77c(b) (1952).

35. 17 C.F.R. §§ 230.251-230.262 (Supp. 1957), 21 Fed. Reg. 5739 (1956).

36. A description of the usual registration procedure for nonexempt securities may be found in LOSS, SECURITIES REGULATION 166 *et seq.* (1951). Thirty-two different items are required by statute to be included in the registration statement. See Securities Act of 1933, § 7 sched. A, 48 STAT. 88, 15 U.S.C.A. § 77aa (1951).

37. Other discussions of current (after August 1, 1956) and past Regulation A registration procedure may be found in: Bennett, *Financing Speculative Corporations Under Regulation "A" of the Federal Securities Act of 1933*, 5 UTAH L. REV. 44 (1956); Coll, *supra* note 28; Glavin & Purcell, *Securities Offerings and Regulation A—Requirements and Risks*, 13 THE BUSINESS LAWYER 303 (1958); Krakover & Mehler, *State and Federal Securities Surveillance: Some Attendant Problems*, 27 ROCKY MT. L. REV. 496 (1955); Newton, *supra* note 28. See also Meeker, *Current Trends in the Federal Securities Law*, 12 THE RECORD 347 (1957).



Regulation A procedure may not be used for certain types of securities. And certain "improper" conduct in previous securities transactions, by the issuer, by related organizations, or by associated individuals, is disqualifying; but the SEC may waive the disqualifying conduct if it determines, on good cause shown, that denial of use of Regulation A procedure is not necessary or appropriate in the public interest or for the protection of investors.<sup>38</sup>

Regulation A filing, at present, requires submission of a notification of the proposed offering, in quadruplicate, to the appropriate regional office of the SEC, at least ten days prior to the initial offering date.<sup>39</sup> Nonexempt registration, by contrast, must be filed at the Washington office, and is effective twenty days after filing—it may also involve more detailed information. While prospectuses are not required under Regulation A, an offering circular must be furnished unless the issue is \$50,000 or less and the issuer a "seasoned" company.<sup>40</sup> Copies of the offering circular and other promotional material that will be used must be filed.<sup>41</sup> In addition, the issuer must submit semiannual reports as to sales made under this registration and the use of the proceeds derived from those sales.<sup>42</sup>

*Other Exemptions of Significance.* Among the remaining exemptions, those which may be of some significance include: issues by banks; short term notes (defined as those with a maturity of not more than nine months arising out of current transactions); and securities exchanged by the issuer with existing security holders exclusively, where no commission was given for soliciting the exchange.<sup>43</sup>

#### A STATE BLUE SKY LAW—THE TENNESSEE SECURITIES LAW OF 1955

Tennessee's first blue sky law, adopted in 1913, was substantially modelled after the original Kansas statute.<sup>44</sup> In 1955 that law was repealed and a completely rewritten and a modernized version was adopted.<sup>45</sup> Many of its features are similar to those found in blue sky

38. 17 C.F.R. § 230.252 (Supp. 1957).

39. 17 C.F.R. §§ 230.255-256. (Supp. 1957).

40. 17 C.F.R. § 230.256 (Supp. 1957). A "seasoned" company is one which has had a net income from its intended type of operation during one of the last two fiscal years, or, if incorporated or organized during the last year has had a net income from operations.

41. At least five days prior to use advertisements or articles proposed to be published in newspapers, magazines or periodicals must be filed; also the script of every radio or television broadcast; and every letter or circular intended to be sent to more than ten persons. 17 C.F.R. § 230.258 (Supp. 1957).

42. Once the registration is closed out or withdrawn a final report should be made. 17 C.F.R. § 230.260 (Supp. 1957).

43. Securities Act of 1933 §§ 3(a)(2), (3), (9), 48 STAT. 75, as amended, 15 U.S.C. §§ 77c(a), (2), (3), (9) (1952).

44. TENN. CODE ANN. §§ 45-1901 to -1916 (1956); McFerrin, *Blue Sky Laws of the Southeastern States*, 17 So. ECON. J. 302 (1951).

45. The law, as further amended in 1957, is now TENN. CODE ANN. §§ 48-1601, -1648 (Supp. 1957). It is also discussed briefly in O'Neal, *Business Associations—1957 Tennessee Survey*, 10 VAND. L. REV. 992-93 (1957).

laws of a number of other states, and much that is said in describing it will be applicable to acts of other states.

The Tennessee Blue Sky Law applies to a sale of, or an offer to sell, a security, any part of which was accomplished in Tennessee.<sup>46</sup> As under the Federal Act, definitions are broadly drawn. Those of "sale," "offer to sell" and "security" appear to be cut from the federal pattern and retailored primarily to make clear several points that were not in the federal definitions and resulted in controversy.<sup>47</sup>

Previously it was pointed out herein that sales of parts of an issue of securities in several states may require compliance with the Blue Sky Law of each state. The statement above that the Tennessee law applies to a sale, any part of which was accomplished in Tennessee, raises the question whether one sale may involve compliance with the securities laws of several states. While no case has so held, several cases have utilized different factual points in the sale process as a base on which to rest state jurisdiction, and consequently the laws of several states may apply to one transaction.<sup>48</sup> For example, jurisdiction has been recognized in one state where an offer was made,<sup>49</sup> in one where acceptance occurred,<sup>50</sup> and in another where delivery was effected.<sup>51</sup>

As under the Federal Act, the civil and criminal fraud provisions apply even though the security or transaction involved is exempted from registration and qualification.<sup>52</sup> It is perhaps in the exemption aspect that state blue sky laws differ most widely from each other, although certain types of exemptions are fairly common.

Only one Tennessee exemption, for preincorporation subscriptions,<sup>53</sup> is of significance to most small businesses, and it is subject to important limitations. The exemption is available to a corporation which either is incorporated in Tennessee or domesticated there [apparently per-

46. "It shall be unlawful to sell any securities within this state, except those exempt under § 48-1619 or those sold in transactions exempt under § 48-1632, unless such securities have been registered as provided in §§ 48-1608—48-1614." TENN. CODE ANN. § 48-1607 (Supp. 1957). As § 48-1644, referring to fraudulent practices, applies to offers to sell or buy as well as to sales, it would seem that offers may be made before registration has been accomplished but that the sales cannot be completed until afterwards.

47. TENN. CODE ANN. §§ 48-1602(F), (H), (J) (Supp. 1957). In defining "security" Tennessee added "whiskey warehouse receipts," which had been treated as "investment contracts" under the federal law, in *Penfield Co. of California v. SEC*, 143 F.2d 746 (9th Cir. 1944), *cert. denied*, 323 U.S. 768 (1944). Also added was: an interest in real estate other than real estate in Tennessee or within twenty-five miles of the state's boundary line.

48. LOSS & COWETT, *BLUE SKY LAW* 180-229 (1958); Robinton & Sowards, *Florida's Blue Sky Law: The Lawyer's Approach*, 6 MIAMI L. Q. 525 (1952).

49. *Doherty v. Bartlett*, 81 F.2d 920 (1st Cir. 1936).

50. *People ex rel. Brundage v. Hill Top Metals Mining Co.*, 300 Ill. 564, 133 N.E. 303 (1921). (Criminal action for violation of Illinois law; court held sale was made in Kansas, where accepted by vendor, although solicited by vendor's agent in Illinois; so no violation).

51. *Robins v. Pacific Eastern Corp.*, 8 Cal. 2d 241, 65 P.2d 42 (1937).

52. TENN. CODE ANN. § 48-1644 (Supp. 1957).

53. TENN. CODE ANN. § 48-1632(G) (Supp. 1957).

mitting incorporation in Delaware], as to subscriptions for or sales of shares of its capital stock issued prior to or in connection with its incorporation. But, the number of subscriptions or sales may not exceed thirty, and the amount raised thereby must not exceed \$100,000. No commission or other remuneration may be given directly or indirectly in connection with such subscription or sale. Approximately twenty-eight states have a somewhat similar exemption, but the provisions are highly diverse.<sup>54</sup> A common element is the bar on commissions. Some limit the exemption to issuers incorporated in the state; the number of sales or the amount of money may be limited; there may be restrictions as to time between subscription and incorporation;<sup>55</sup> and in Iowa not only is the number of purchasers limited but all must sign the articles of incorporation.<sup>56</sup>

Apart from the provision just noted, there is no "private offering" exemption in Tennessee, although some states do provide for exemptions where the number of offerees, or purchasers, is limited.<sup>57</sup> Where the issuer is already incorporated and operating, Tennessee may allow an exemption if the issue is listed on certain major stock exchanges<sup>58</sup> or, if previously distributed, when sold by a regular dealer.<sup>59</sup> In addition, an exemption applies when new securities are sold to or exchanged with existing security holders of the issuer and no commission is involved.<sup>60</sup> Certain seasoned securities may be resold without registration.<sup>61</sup> There is also an exemption for commercial paper of not more than twelve months maturity from date of issue.<sup>62</sup>

Registration of securities under the Tennessee Law is a fairly simple procedure—in fact, probably more simplified than under the laws of many other states. Registration is by "notification" and requires the filing of a simple form notifying of the intent to sell, which identifies the issuer, the issue and the amount thereof; states the public offering price, the amount being offered in the state, and the amount of the filing fee; lists the name of the registered dealer filing the notice, if any; and states the effective date of registration under the Federal

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54. LOSS & COWETT, BLUE SKY LAW 374-75 (1958).

55. *Ibid.*

56. IOWA CODE § 502.5(9) (1954).

57. LOSS & COWETT, BLUE SKY LAW 368-74 (1958).

58. TENN. CODE ANN. § 48-1619(F) (Supp. 1957). The enumerated exchanges are: New York, Midwest, and American. The Commissioner may by written order add other stock exchanges. He may remove apparently only exchanges he has added. He may also withdraw the exemption, for cause, as to individual securities listed on an approved exchange.

59. TENN. CODE ANN. § 48-1632(F) (Supp. 1957). The exemption may be revoked as to individual securities.

60. TENN. CODE ANN. § 48-1632(B) (Supp. 1957).

61. TENN. CODE ANN. § 48-1619(H) (Supp. 1957) (securities other than common stock, publicly distributed for at least five years, on which no default has occurred in the five years immediately preceding the sale).

62. TENN. CODE ANN. § 48-1619(G) (Supp. 1957).

Securities Act, if any.<sup>63</sup> In addition, a prospectus must be filed. Although the contents of the prospectus are spelled out in the statute, the prospectus requirement may be satisfied either by filing the prospectus used under the Federal Securities Act, any printed prospectus containing the statutorily required information, or a form (completed) furnished by the Commission.<sup>64</sup>

Where an issuer is selling its own securities, unless the securities or the transaction are exempt, the issuer is a dealer, and must register as such.<sup>65</sup> Any employee or personnel of issuer, other than partners or executive officers who act as salesmen of the securities, must also register.<sup>66</sup> Such registrations are not required where the issuer sells through someone registered as a dealer.<sup>67</sup>

#### UNIFORM SECURITIES ACT

In the short time since this Act was approved, it has been adopted, in varying degrees, by several states.<sup>68</sup> The Act is unique for a uniform act in that it has been deliberately drafted so that states that presently follow one philosophy as to the proper type of regulation may use certain sections which a state with a different philosophy might ignore.<sup>69</sup> The principal discussion of the Act to date has been by the drafters,<sup>70</sup> although one state securities Administrator has voiced considerable objection to it.<sup>71</sup> If the Act is widely adopted, and the adopting states accept the sections which reflect their present statutory philosophy, nearly all sections will be adopted in most states with perhaps but slight modifications. The task of the attorney seeking to qualify an issue in many states will be simplified.<sup>72</sup>

The definitions in the Act of "sale," "offer to sell" and "securities" resemble closely those presently used in the Federal Act and the Ten-

63. TENN. CODE ANN. § 48-1608 (Supp. 1957).

64. TENN. CODE ANN. §§ 48-1608, -1610 (Supp. 1957).

65. TENN. CODE ANN. §§ 48-1602(C), -1623, -1624 (Supp. 1957).

66. TENN. CODE ANN. §§ 48-1602(C), -1623, -1625 (Supp. 1957).

67. TENN. CODE ANN. § 48-1602(C) (Supp. 1957).

68. See note 17 *supra*.

69. UNIFORM SECURITIES ACT, official comment to title: LOSS & COWETT, BLUE SKY LAW 249 (1958).

70. LOSS & COWETT, BLUE SKY LAW 249-431 (1958).

71. Pearce, *California Corporate Securities Law vs. Proposed Uniform Securities Law*, 9 HASTING L.J. 1 (1957).

72. As Pearce points out, if adoption is only partial, greater diversity may result. *Id.* at 2. One wonders whether Tennessee, which only recently completely rewrote its securities laws, will readily adopt the Uniform Act soon. From a conversation with the director of Tennessee's Blue Sky Division, I gained the impression that he thought the present system of registration preferable in some respects to the several systems provided in the Uniform Act. Meer suggests some reasons why the Texas legislature, revising in 1957 the securities laws it had rewritten in 1955, chose to adopt only a few sections of the Uniform Act rather than the whole Act. Meer, *supra* note 17.

nessee Securities Law.<sup>73</sup> An attempt to deal with the problems of transactions crossing state lines is made.<sup>74</sup> In doing so, the Act requires registration, in the case of a seller, when an offer to *sell* is made, or an offer to *buy* is made and accepted, in the jurisdiction. Also, in the case of a buyer registration is necessary when an offer to *buy* is made, or an offer to *sell* is made and accepted, in the jurisdiction. As the Act treats an offer as *made* in a state if it originates there or is directed to there, more than one statute may apply to a given transaction. However, delivery alone would appear to be insufficient for application of a state's law.

Several exemptions provided in the Uniform Act are significant. In the case of preorganization activities,<sup>75</sup> the limitations resemble those found in the Tennessee law as to absence of commission; the number of subscribers is more limited—to ten, but the draftsman's commentary points out that this can be varied if the adopting state chooses; and there is no limitation as to the state of incorporation or domestication. But the effect of the exemption is only to eliminate need for registration prior to organization—unless another exemption is available, a security must be registered before it can be issued to the preincorporation subscriber. For this reason the exemption for "private offerings"<sup>76</sup> may be of greater importance. This permits offers to not more than ten persons in the state during a twelve month period, regardless of location of offeror and offeree at time of offer, where the seller reasonably believes the buyer is purchasing for investment and no commission is involved. Again there is no requirement that the issuer be incorporated or domesticated in the state. The state securities administrator may change the number of offerees and otherwise modify the exemption, in appropriate circumstances. A number of states have exemptions for "private offerings." In contrast to the exemption for preincorporation activities, intended to enable a new enterprise to obtain the minimum number of subscriptions required by a corporation law, and which would apply even though there was a publicly advertised offering of preorganization subscriptions, the Uniform Act's "private offering" exemption is intended to enable the small corporation to raise additional capital from friends, associates, or relatives without registering and without inadvertently violating the law through ignorance.

The commercial paper exemption conforms to federal rather than

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73. UNIFORM SECURITIES ACT §§ 401 (j), (l); LOSS & COWETT, BLUE SKY LAW 343-48, 349-52 (1958).

74. UNIFORM SECURITIES ACT § 414; LOSS & COWETT, BLUE SKY LAW 401-09, 224-29 (1958).

75. UNIFORM SECURITIES ACT § 401(b) (10); LOSS & COWETT, BLUE SKY LAW 374-75 (1958).

76. UNIFORM SECURITIES ACT § 402(b) (9); LOSS & COWETT, BLUE SKY LAW 368-74 (1958).

Tennessee law, by using the nine months to maturity limitation, and in addition specifically permits renewal.<sup>77</sup> Exemptions are also provided for stock listed on certain stock exchanges,<sup>78</sup> securities of certain governmentally regulated types of business,<sup>79</sup> and to some offers (not sales) made during the period between filing of registration statements under both federal and state laws but before the effective date under the federal law and qualification under the state.<sup>80</sup> An important aspect of the Uniform Act is the power given the state administrator to order denial or revocation of many exemptions for a specific security or transaction.<sup>81</sup>

The Uniform Act differs from Tennessee's law in not requiring the issuer also to register as a dealer when it sells its own nonexempt securities in a nonexempt transaction.<sup>82</sup> However, the Act does require a partner, officer or director or any other person not a dealer who represents the issuer in effecting or attempting to effect purchases or sales (other than with existing employees, partners or directors of issuer) to register as an "agent."<sup>83</sup>

#### CONCLUSION

Because of the numerous diversities of language in state blue sky laws and differences in administrative interpretations and practice where similar language is found, Loss and Cowett suggest that

except for purely local issues, the practice of blue sky law has become a highly specialized art. Only those lawyers who devote a substantial amount of their practice to blue sky matters develop the expertness necessary to bring order out of the statutory and administrative morass. The general practitioner would be a brave man indeed who tried on his own to "blue sky" an issue in a substantial number of states so that it could be offered everywhere concurrently with the effectiveness of the SEC registration statement.<sup>84</sup>

77. UNIFORM SECURITIES ACT, § 402(a) (10); LOSS & COWETT, BLUE SKY LAW 360-61 (1958).

78. UNIFORM SECURITIES ACT, § 402(a) (8); LOSS & COWETT, BLUE SKY LAW 359-60 (1958). The Act lists the same three exchanges as does Tennessee, see note 58 *supra*, and can be altered by each legislature to include others.

79. UNIFORM SECURITIES ACT §§ 402(a) (3) (banks), (4) (building and loan associations), (5) (insurance companies) (6) (credit unions), (7) (railroads, other common carriers, and public utilities); LOSS & COWETT, BLUE SKY LAW 354-59 (1958). Most of these are commonly exempted under existing blue sky laws, including Tennessee's.

80. UNIFORM SECURITIES ACT § 402(b) (12); LOSS & COWETT, BLUE SKY LAW 377-79 (1958). Although the section is headed "Offers during SEC Waiting Period," it applies as long as no stop order or refusal order is in effect or no public proceeding or examination looking toward such order is pending, under either the state or the federal law.

81. UNIFORM SECURITIES ACT § 402(c); LOSS & COWETT, BLUE SKY LAW 379-80 (1958).

82. UNIFORM SECURITIES ACT §§ 201, 401(c); LOSS & COWETT, BLUE SKY LAW 256-57, 335-37 (1958).

83. UNIFORM SECURITIES ACT §§ 201-02, 401(b); LOSS & COWETT, BLUE SKY LAW 256-60, 332-35 (1958).

84. LOSS & COWETT, BLUE SKY LAW 44 (1958). While discussing the Tennessee

But problems of qualifying securities, under either federal or state law, are not confined to issues being distributed widely through the United States, and may crop up in the practice of any attorney assisting in the organization, incorporation or financing of a client's business.<sup>85</sup> There may be no necessity for qualifying securities of the closely-held family-owned corporation, for example; but, if some of the family-owners reside in another state at the time they acquire their stock, the law of the other state may contain a qualification requirement, and the federal intrastate exemption may be gone leaving only the uncertainties of the "private offering" provision.

The general practitioner needs to be alert to the possibility that both federal and state qualification of securities may be necessary any time a corporation is organized, or undertakes additional financing.

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blue sky law with the director of the state's blue sky division, I noticed several references to one Nashville law firm as expert in qualifying securities.

85. Problems may arise in very unexpected areas. A recent article, Feldman & Rothschild, *Executive Compensation and Federal Securities Acts*, 55 MICH. L. REV. 1115 (1957), begins with this statement: "Far more often than generally realized, plans or arrangements providing supplemental compensation or incentives for executives involve problems under the Securities Act of 1933 and the Securities Exchange Act of 1934." The authors point out that there is a question whether the plan itself must be registered and a prospectus supplied each employee, though no securities are to be issued until a later time; and also that the problems may arise in case of any company of any size, even though its stock is closely held. Similar problems may arise under state laws as well.