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REGULATION OF MOTOR CARRIER SECURITIES

EUGENE T. LIIPFERT* and JOHN L. MECHEM**

The origins of the intercity trucking industry were humble. The development of the motor truck and of an intercity highway system which made its use in the transportation of freight practicable led many enterprising individuals to set themselves up as intercity truckers during the decade between 1925 and 1935. Capital requirements were minimal. The initial investment was frequently no more than the down payment on the motor vehicles employed. In the early stages of development, the typical motor carrier was a sole proprietorship, partnership or family-held corporation which relied for its financing on retained earnings of the business and hand-to-mouth borrowing from local banking institutions or equipment manufacturers rather than upon public financing through security issues traditionally employed in corporate finance.

Federal regulation of the intercity motor carrier industry was inaugurated by the passage of the Motor Carrier Act in 1935.1 This legislation subjected the issuance of securities by common or contract carriers by motor vehicle to the provisions of section 20a of the Interstate Commerce Act2 which had been enacted as part of the Transportation Act of 1920,3 to confer on the Interstate Commerce Commission authority over the issuance of railroad securities.4

During 1936 the Commission received only 11 applications for approval of motor carrier securities, in 1937, 36 such applications, in 1938, 41 applications, and in 1939, 35 filings.5 The paucity in number of applications filed would indicate that the vast majority of motor carriers were either within the exemption provisions6 or were not then employing financing methods which brought them within the scope of the new security regulation.

In the years following World War II the motor carrier industry experienced rapid growth of both tonnage and revenue, with attendant demand for additional capital investment in equipment and terminals which in many instances outran the sources of credit theretofore used

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5. 51 ICC ANN. REP. 37 (1937); 53 ICC ANN. REP. 99 (1939).
6. Section 214 of the Motor Carrier Act of 1935 exempted the issuance of securities where the motor carrier had, together with the proposed issue, securities of a par value not in excess of $500,000 and notes of a maturity of two years or less aggregating not more than $100,000. 49 Stat. 557 (1935), 49 U.S.C. § 314 (1952).
and the availability of retained earnings. As the financial stability and credit of the industry and its individual units improved, the carriers were able to tap new sources of credit and also to market equity securities publicly. Prior to World War II, there had been one national bus carrier and one large motor freight carrier which had established a public market for their securities. In the period since World War II, sixteen of the larger motor carriers of property have made public offerings of their securities and entered the market for equity capital. The larger motor carriers have also established formal borrowing relationships with the larger banks and with insurance companies and other institutional lenders for the placement of debt securities.

As the capital requirements of the carrier industry have grown, the impact and importance of regulation of their security issues by the Interstate Commerce Commission has grown apace. The principles applied by the Commission in the regulation of the issuance of motor carrier securities are largely those developed in connection with their earlier and continuing regulation of the issuance of railroad securities. These regulatory concepts are not in all cases apposite and their application to motor carriers has in some instances produced unfortunate results. It will be the purpose of this article to outline the scheme of regulation and the principles followed by the Interstate Commerce Commission in its administration.

The Statute

Section 214 of the Interstate Commerce Act now provides in substance that the securities of carriers by motor vehicles shall be subject to paragraphs 2 through 11 of section 20a of the Interstate Commerce Act, exempting from those provisions, however, issuance of securities by carriers whose total outstanding securities do not exceed in par value or principal amount, $1,000,000, nor to the issuance of short term notes not aggregating more than $200,000.7

Section 20a, in the paragraphs applicable to motor carriers and dealing with substantive matters, makes the issuance of securities or the assumption of a guaranty obligation in respect to any other person's securities by carriers unlawful without the prior approval of the Commission, establishes the requisite standards and findings of fact, and empowers the Commission to attach appropriate conditions to its approval orders. Exclusive jurisdiction of the subject matter is conferred upon the Commission. Any securities issued contrary to the statute are declared void, and knowing participants in such an

issue are made liable to bona fide purchasers and subject to penal sanctions.

**WHAT ARE SECURITIES?**

Section 20a is applicable to "any share of capital stock or any bond or other evidence of interest in or indebtedness of a carrier." While all types of stocks and bonds are expressly covered, it was left to the Commission to determine what is embraced within the term "other evidences of interest in or indebtedness of a carrier." The Commission early determined that the phrase comprehended such securities as were then in vogue in railroad financial circles. Bonds, promissory notes and equipment trust certificates were evidences of indebtedness, but the trust indenture, mortgages and trust agreements that accompanied them were not, and the Commission ruled in a long line of cases that it had no jurisdiction over the issuance of the latter. By an extension of this reasoning it also determined that credit or loan agreements, leases and conditional sales contracts were not evidences of indebtedness.8

In 1939 the Commission extensively reviewed the matter and reaffirmed its position that section 20a coverage of security-type instruments was to be construed restrictively:

The *ejusdem generis* rule of construction is that where a statute enumerates several classes of things and immediately following and classed with such enumeration the clause embraces "other" things, the word "other" will generally be read as "other similar," so that things therein comprised may be read as *ejusdem generis* with, and not of a quality different from, those specifically enumerated.... Considering the provisions of Section 20a as a whole... it appears that the provisions were intended to apply to instruments negotiable or quasi-negotiable in character, such as are issued for the purpose of railroad financing....

The negotiability of a particular instrument is not alone determinative of the applicability of section 20a. Rather it is necessary to look to see if the instrument is a permanent evidence of indebtedness which can be traded, pledged or otherwise disposed of in the money market.

The cases dealing with the issuance of capital stock turn more on questions of what constitutes "issuance" than they do upon what constitutes "capital stock." Common and preferred stock are, of course, clearly within the terms of section 20a, and cannot be issued or reissued from the treasury without prior approval of the Commission.

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unless the carrier qualifies under the exemption provisions of section 214. Motor carriers may, however, issue stock purchase warrants which merely represent a transferable right granted to stockholders to purchase additional shares of stock within a given time at a stated price, although the ultimate issue of the stock itself would require prior Commission approval. By the same token, options may be granted to acquire the stock of a carrier without prior Commission approval. Stock splits and stock dividends constitute issues of securities which require prior Commission approval.

The Exemption Provisions

Section 214 originally provided that carrier issues were exempt "where par value of the securities to be issued, together with the par value of the securities then outstanding" did not exceed $500,000, and further provided that in the case of no par stock, "the par value . . . shall be the fair market value as of the date of their issue." A number of carriers were able to come within the exemption by holding the par value and number of shares to nominal amounts, while their uncaptioned surplus represented all but a small fraction of their net worth. This left the carrier free to issue long term debt securities without Commission approval up virtually to the exemption limit of $500,000. Section 214 was amended in 1952 to increase the exemption to $1,000,000. In 1957 section 214 was again amended to provide that "in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is greater." With this enactment it was no longer possible to issue capital stock with abnormally low par value and thereby come within the exemption provisions of section 214.

The exemption provisions of section 214 permit the issuance of notes of maturity of two years or less and aggregating not more than $200,000. These short term notes could, of course, also fall within the definition of securities subject to the $1,000,000 exemption. The language might be construed to permit a carrier to issue $200,000 in short term notes and then utilize the $1,000,000 exemption in order...
to issue additional short term notes so long as the additional short term notes did not, together with capital stock and long term notes, exceed $1,000,000. The Commission ruled, however, that the $200,000 exemption is not available to create a cumulative exemption of $1,200,000. If the carrier has $1,000,000 in capital stock and long term debt outstanding, it can issue an additional $200,000 in short term notes. If, on the other hand, it has more than $200,000 in short term notes outstanding, they can be exempt only if those notes, taken together with the capital stock and long term indebtedness, does not exceed $1,000,000. In short, the carrier may utilize either of the exemptions, but not both, to issue short term notes.

It is not possible to estimate the proportion of total motor carrier financing which actually is subject to the Commission's jurisdiction. There are more than 17,000 individual motor carriers, many of them with capitalization small enough to come within the exemption provisions of section 214. Conditional sale contracts and chattel mortgages have been almost universally employed by small and large motor carriers alike in equipment financing. In many cases non-carrier corporations have been formed which are affiliates or subsidiaries of the carrier companies to hold the terminals and operating equipment of the carrier.

Loan or credit agreements are not considered evidences of indebtedness and are being more frequently employed by motor carriers. Typically, these loan agreements provide for a line of credit to a carrier in which the bank or other lender undertakes to lend to the borrowing carrier up to an agreed amount, and the carrier agrees to borrow in accordance with its requirements, making periodic payments on principal and interest.\textsuperscript{17} It is thus safe to assume that a large part of motor carrier debt financing now outstanding and being incurred is arranged either by exempt carriers or through security devices not covered by section 20a.

\textbf{Statutory Background}

Congress enacted section 20a in 1920 after a series of investigations instituted by the Commission at the behest of Congress had revealed widespread abuses in the issuance of railroad securities.\textsuperscript{18} The legislative recommendations of the Commission indicate that reg-

\textsuperscript{17} Capital Transit Co., 40 M.C.C. 17, 20 (1944).
\textsuperscript{18} Wabash Pittsburgh Terminal Ry., 48 I.C.C. 96 (1917); Pere Marquette R.R., 44 I.C.C. 1 (1917); Chicago, R.I. & Pac. Ry., 36 I.C.C. 43 (1915); Louisville & Nashville R.R., 31 I.C.C. 261 (1914), supplemented, 33 I.C.C. 168 (1915), supplemented, 49 I.C.C. 320 (1918); New York Central & H. R.R., 30 I.C.C. 147 (1914); St. Paul & Puget Sound Accounts, 29 I.C.C. 508 (1914); St. Louis & San Francisco R.R., 29 I.C.C. 139 (1914); New England Investigation, 27 I.C.C. 560 (1913); Consolidations and Combinations of Carriers, 12 I.C.C. 277 (1907).
ulation was needed to emancipate the railroads from financial dictation and to prevent this vital public service industry from being a "football of speculation." Railroads had been "bankrupted or saddled with almost overwhelming burdens of indebtedness, which have not improved the service rendered and have on the whole had the effect of increasing charges for service."\textsuperscript{19}

Legislation designed to correct these abuses was, as might be expected, oriented toward prevention of issuance of railroad securities for purposes not related to the rendition of railroad service, and assurance through regulation that railroad issues were proportionate to the underlying assets employed in rendering that service. Protection of the railroad security investor, while a concomitant of the regulatory scheme devised, was not perhaps the primary motivating consideration. The public interest was thought to lie chiefly in protection of the railroads from improvident investments and the issuance of burdensome or watered security obligations not backed up by railroad operating assets. Section 20a required the Commission to pass upon the appropriateness and soundness from a standpoint of the public interest in adequate railroad service, of each proposed railroad security, in sharp contrast with the disclosure type of regulation of security issues provided under the Securities Act of 1933.\textsuperscript{20} The development of regulatory policy with respect to railroad securities pursued the same orientation, and that policy has been carried forward in the regulation of motor carrier securities although the financial history of the two industries has been essentially dissimilar.

The controlling statutory standards are set forth in paragraph (2) of section 20a. The Commission must find that the issue is for a lawful corporate object or purpose and reasonably necessary and appropriate for the purpose. The issue must be compatible with the public interest, and either necessary for, appropriate for, or consistent with, the proper performance of the carrier's service. Finally, it must not impair the carrier's ability to perform that service.\textsuperscript{21} The involved syntax of the legislative draftsman serves effectively to conceal rather than reveal legislative intent, and it remained for the Commission to pronounce standards and policies for security issues.

\begin{itemize}
\item \textsuperscript{19} 33 I.C.C. Ann. Rep. 4, 5 (1919).
\item \textsuperscript{20} 48 Stat. 74 (1933), 15 U.S.C. § 77(a) (1952).
\item \textsuperscript{21} "The Commission shall make such order only if it finds that such issue or assumptions: (a) is for lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." 41 Stat. 494 (1920), 49 U.S.C. § 20(a) (2) (1952).
\end{itemize}
The concept of "capitalizable assets" encompasses most of the Commission's regulatory policy with respect to security issues and is the chief means by which it implements paragraph (2) of section 20a. Whenever it is proposed to increase a carrier's capitalization by the issuance of stock, bonds or other securities, an examination must first be made to determine whether there exist, or would exist after the issue, sufficient assets of the sort which the Commission regards as "capitalizable" to support the aggregate resulting capitalization of the carrier. Carrier assets may be recorded in carrier accounts and balance sheets in full compliance with the Commission's accounting regulations under section 220 of the Interstate Commerce Act, and nevertheless be disallowed as part of the assets which the carrier may capitalize. The Commission employs its capitalizable assets rule as a winnowing process to separate from the carrier balance sheet for capitalization purposes that part of carrier assets which are in fact used in providing carrier service.

Where the proceeds of a security issue are to be used for initial acquisition, additions or betterments of carrier property, the new assets are ordinarily "capitalizable" and capitalizable assets are increased by the same or a greater amount than capitalization. However, where stock or debt securities are to be issued for less specific purposes, such as reimbursement of the carrier treasury for expenditures already made or stock dividends are to be declared, examination of the carrier balance sheet must be made to determine whether capitalizable assets are sufficient in total to support the capitalization of the carrier including existing capitalization and the proposed additional capitalization. Application of the principle serves a dual function. It assures that the proceeds of security issues will be devoted to approved carrier purposes and that carrier capitalization will be backed up by assets devoted by the carrier to the public service.

The capitalizable asset principle originated in two early Commission cases where railroads sought to declare stock dividends from existing surplus. In Delaware, Lackawanna & W. R.R., the Commission held that the carrier could capitalize only those assets permanently employed in providing carrier service, and declined to permit capitalization of certain investments in companies whose properties were leased to the carrier in perpetuity on the ground that the investments were unnecessary for any carrier purpose in view of the perpetual leases. It also introduced the concept of permanency of investment by refusing to recognize as capitalizable other investments.

23. 67 I.C.C. 426 (1921).
in non-carrier companies which it regarded as "shifting" or "flexible."

The Commission specifically formulated its "capitalizable asset" rule in *Louisville & N. R.R.*

We should authorize the capitalization of those assets of the carrier only which have been provided and which are intended for continuing productive use in the service of transportation. Such assets will be hereinafter referred to as "capitalizable assets."

It then proceeded to an account-by-account analysis of the carrier's balance sheet, determining as it went which assets were and which were not capitalizable. This process of defining capitalizable assets has continued in a host of cases which followed.

**WHAT ASSETS ARE CAPITALIZABLE**

Carrier-owned tangible assets, such as terminals and revenue equipment employed in providing transportation service, loom large on any carrier balance sheet and from the first the Commission has recognized them as capitalizable at their depreciated value. Security issues for the purpose of acquiring or improving carrier operating property or of capitalizing property already acquired constitute a large majority of all issues by both motor carriers and railroads.

Their capitalization presents problems only when they are acquired as part of a distinct motor carrier operating unit. The motor carrier industry has been characterized in recent years by a growing tendency to consolidate a number of the more than 17,000 motor carriers into larger units through purchase, merger or other forms of acquisition. The valuation of the tangible assets transferred in these acquisitions becomes a serious problem for the acquiring carrier because the Commission insists that they be recorded on its books not at the price paid by that carrier, but rather at the original cost of the assets when first devoted to the carrier service. This vestige of rate base and valuation concepts is contrary to the generally accepted accounting concept that assets should be recorded at the cost of the accounting carrier and has meant that carriers who expand their operations by acquisitions have their capitalizable asset base seriously and unrealistically deflated. The combined effect of inflation in carrier property values and depreciation charges maximized to minimize income tax is to produce net book values for property of selling carriers substantially below current market values with the result that acquisition prices are usually well above the recorded book values. The excess of the acquiring carrier's cost over the selling carrier's original cost, though

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24. 76 I.C.C. 718 (1923).
in no sense an intangible, is required to be written off, usually against surplus, as part of so-called intangibles in merger and acquisition cases, and it becomes impossible to finance this incremental value through the issuance of securities.

The assets sought to be capitalized need not in all cases be owned directly by the carrier so long as the investment involved is relatively permanent in nature. Improvements of the carrier’s long term leasehold interest in carrier property is a proper subject for capitalization. Permanent investment in the capital stock of carrier and carrier-purposed subsidiaries may also be considered in determining the extent of permissible capitalization where the investment amounts to control of the carrier affiliate. The investment must, however, be represented by securities of the subsidiary or affiliate and mere open account advances will not be recognized for capitalization. The affiliate, if not a carrier, is required to be engaged in activities essential to, or at least highly convenient for, the rendition of the carrier’s transportation service. Carrier security issues designed to provide capital for related but not directly connected business activities of the affiliate have been denied on the ground that insufficient carrier purpose had been shown.

The Commission early recognized the carrier’s need for working capital in order to provide transportation service and has permitted the use of proceeds from security issues for this purpose. In determining the amount properly capitalizable, however, it has not employed the customary definition of working capital as the excess of current assets over current liabilities. Apparently the Commission is influenced again by concepts of valuation for rate base purposes which have no real application in motor carrier cases where rates are regulated on an operating ratio theory. It permits the capitalization as working capital, only what it determines to be a reasonable amount of cash, materials and supplies, and prepayments. Reasonableness of the amount is usually judged on the basis of the cash, materials and supplies, and prepayments historically used by the carrier, though

27. In Louisville & N. R.R., 76 M.C.C. 718 (1923), the Commission announced its policy with respect to investments in affiliates to be: "(T)hat ordinarily a carrier may properly capitalize investments in the stock of another corporation where, and only where, the latter is the owner of operated railroad property and the carrier’s holdings are sufficient and essential to give it control of that corporation and it appears that such control will probably be permanent."


on occasions consideration has been given to prospective increased working capital needs by reason of increased business volume. Particularly in the motor carrier field where working capital requirements are large in relation to fixed plant investment and where the growth of gross revenues has been rapid, the application of the historical test of working capital requirements often means that the carrier is never able to maintain adequate working capital through security issues. The Commission has from time to time indicated a rule of thumb that the carrier should have cash equal to from one to two month's operating expenses.\textsuperscript{32} A more realistic approach would be to gear allowable working capital to the volume of business done, fixing the amount as a percentage of current gross revenues and permitting it to increase as the factor which occasions the need increases, as distinguished from the historical approach which inevitably results in a working capital lag in a fast growing industry.

Assets owned directly by the carrier and not used for carrier purposes are excluded from the capitalizable asset base. Again, the theory is not that such assets have no commercial value, but rather they are excluded because they are not employed for a carrier purpose.\textsuperscript{33} However, where the carrier acquires property for ultimate use in carrier service, it may be permitted to capitalize the asset prior to the time it is actually used for carrier purposes.

The Commission refuses to permit the capitalization of intangibles created through the purchase of the good will, earning power or certificate of another carrier,\textsuperscript{34} frequently citing in justification the provisions of section 216(h) of the Interstate Commerce Act requiring that they not be given consideration as elements of value in motor carrier rate proceedings.\textsuperscript{35} When stock is issued by a carrier in an acquisition case, the carrier is required to record the issue in its capital stock and premium account at the value of the net tangible assets as shown by the books of the acquired carrier, although the actual market value of the stock issued may be much higher. The requirement effects not only a write-off of the true intangibles but also non-recognition for capitalization purposes of the difference between the acquired carrier's depreciated cost and the fair market value of the tangible assets acquired. This policy is another manifestation of the Commission's abhorrence of intangible assets being shown on carrier balance sheets, reflected also in the condition uniformly imposed in section 5 acquisition proceedings requiring that intangibles be written

\textsuperscript{32} See, e.g., Consolidated Freightways, Inc., \textit{supra} note 30.

\textsuperscript{33} Chesapeake & O. Ry., 254 I.C.C. 653, 660, 661 (1943); Oahu Ry., 86 I.C.C. 137, 140 (1923).

\textsuperscript{34} C. A. Garrett Lines, Inc., 58 M.C.C. 757, 774 (1953); Transport Co., 36 M.C.C. at 91 (1940).

off either immediately or by amortization over a period of years against surplus. In this respect the Commission’s policy is in conflict with generally accepted accounting principles applied in non-regulated businesses. 

**Measure of Capitalization**

Having measured the capitalizable assets available, the Commission next turns its attention to existing capitalization to determine the surplus of capitalizable assets which may support the proposed issue. Current liabilities are disregarded as elements of capitalization, just as the counter-balancing current receivables on the asset side are ignored in computing capitalizable assets. The current portion of funded debt is, however, regarded as part of the carrier’s capitalization.

Although the Commission holds that conditional sales contracts and chattel mortgages are not securities subject to section 20a, the debt represented by them is included along with all other types of funded, long term indebtedness as part of capitalization. To these are added the par or stated value of the outstanding capital stock and the premium on that stock to arrive at total capitalization. This total capitalization, including existing and proposed issues, is then compared with the available capitalizable assets in order to determine whether the proposed issue is adequately supported thereby.

**Controlling Persons**

Under section 5 (3) and section 214 of the Interstate Commerce Act the Commission has the power to subject any person, authorized by it to acquire control of any carrier or two or more carriers, to the security provisions of section 20a. The statutory standard applicable in such cases is different, however, from that applicable to carriers. It need only be shown that the security issues of a controlling person will be consistent with the proper performance by the controlled carrier of its service to the public and with the public interest, and will not impair the controlled carrier’s ability to perform its service. The controlling person may issue its securities without showing a carrier purpose so long as the issue does not interfere with or impair the controlled carrier’s ability to perform its carrier service. The Commission has in a number of cases permitted controlling persons to issue securities for a variety of non-carrier purposes.

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37. AMERICAN INSTITUTE OF ACCOUNTS, ACCOUNTING RESEARCH BULLETIN No. 43, RESTATEMENT AND REVISION OF ACCOUNTING RESEARCH BULLETINS, Ch. 5.
It may be seriously questioned whether the financial stability of carrier companies is fostered by adherence to the philosophy that they should engage in carrier business and nothing else. Soundly conceived diversification in other fields may actually strengthen and support the carrier's ability to render transportation service by increasing the attractiveness of its securities to investors. Carriers must seek capital funds in competition with non-regulated businesses, and unless the carrier is able to hold out a prospect of stable earnings made more likely by diversified enterprise, investors can be expected to prefer businesses not dependent for earnings on a single line of business. The lesson of the demise of the interurban street railways with the coming of the automobile in the early 20's has, with other comparable experiences, occasioned a justified wariness on the part of investors of single-purpose business unable to follow shifting economic trends. The controlling person standard of section 5(3) permits the Commission to recognize these considerations and allow sound diversification in the carrier field, relaxing the harsh test of carrier purpose for security issues. The frenzied speculation in rail securities which influenced the philosophy of the statute and the Commission's regulation is a thing of the past, and ritualistic adherence to the cant of this philosophy when changed conditions have caused it to lose its significance can only mean that carrier securities will be less attractive to investors and the interest rates which carriers must pay, higher.

PROCEDURE

Regulations of the Commission establish the form and content of applications for security issues under section 20a for both railroad and motor carrier securities.40 Detailed information is required with respect to the carrier corporation or other entity, its financial statements, the purposes, terms and conditions of the proposed security, the underwriting arrangements and the empowering corporate action. Applications are processed by the Commission's Bureau of Finance, usually without hearing, although in controversial cases or where the issue is an incident of a section 5 case the Commission may hold hearings. Where no hearing is held, Division Four of the Commission, composed of three commissioners, issues a report and order approving, modifying or denying the proposed issue.

The Commission frequently employs the power provided for in paragraph (3) of section 20a to approve in part, modify, or condition its approval of a security issue, for the purpose of requiring modifications of proposed issues where it appears that the terms and conditions of the issue may be onerous to the carrier or are contrary for one reason or another to established policy. Thus interest rates deemed

40. 49 C.F.R. § 56 (1949).
excessive have been disapproved. Restrictions upon voting rights, particularly of common stock, are regarded as contrary to public policy, and the Commission has by express condition required them to be eliminated. Conditions are also frequently imposed to assure that the proceeds of authorized issues will be employed by the carrier for approved capital purposes.

**JURISDICTIONAL PROBLEMS**

The Securities and Exchange Commission and state authorities have also been empowered to control the issuance of securities, and in two landmark Supreme Court cases, the particular sphere of Interstate Commerce Commission jurisdiction has been spelled out. In the *Breswick* case, Alleghany Corporation, a non-carrier, had acquired control of the New York Central System which was an integrated group of carrier companies. No prior approval of the Interstate Commerce Commission had been sought on the theory that acquisition of control of a group of carriers already under common control did not require approval under section 5 of the Interstate Commerce Act. The securities of Alleghany Corporation remained subject to the jurisdiction of the Securities and Exchange Commission under the Investment Company Act of 1940 in the absence of an order under section 5(3) by the Commission subjecting its securities to section 20a. In an effort to bring its securities under Interstate Commerce Commission jurisdiction as a controlling person, Alleghany caused

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43. Consolidated Freightways, Inc., 282 I.C.C. 616 (1952) (Proceeds to be placed in special account, no withdrawals until property ready for delivery, disbursement reports to be filed within 10 days, and no rents to be paid subsidiary terminal company until advance repaid); Consolidated Freightways, Inc., 282 I.C.C. 236 (1951) (Proceeds not to be paid as dividends); Pacific Intermountain Express Co., 267 I.C.C. 722 (1948) (Stock not to be issued until equipment ready for delivery); Iowa Elec. Light & Power Co., 247 I.C.C. 17, 23 (1941) (Dividends not to exceed $365,000 per year until $5,500,000 of intangibles are charged off; note that this company is a “controlling person” of a railroad); Chesapeake & O. Ry., 180 I.C.C. 699 (1932) (Cash deficit required funds be applied to operations and proceeds not to be applied against funded debt without prior approval); Missouri Pacific R.R., 170 I.C.C. 358, 362 (1931) (“Applicant shall set aside $16,267,136, shall hold in a separate fund the amount so set aside, and shall not expend any part of the proceeds so held in this fund until it has shown to our satisfaction that it has made expenditures for additions and betterments during the year 1931 equal to such proceeds to be expended.”); Southern Pac. R.R., 154 I.C.C. 48 (1929) (Proceeds to be placed in special fund until expenditure purposes cleared by the Commission); New York, Chicago & St. L. R.R., 138 I.C.C. 310 (1928) (Proceeds to be deposited in special account and spent solely for additions and betterments which shall not thereafter be capitalized); Erie R.R., 124 I.C.C. 545 (1927) ($1,500,000 of proceeds may be expended on current vouchers on showing of cash shortage to Commission; balances to be deposited in special account to be spent only on approval by the Commission); Atlantic Coast Line R.R., 117 I.C.C. 487 (1926).
New York Central to seek by a section 5 application, approval of the merger of two minor affiliated companies in the New York Central System. The Supreme Court reversed the district court and in effect affirmed the holding of the Commission that it had the power in deciding the section 5 merger application to make an order under section 5(3) subjecting the securities of Alleghany to section 20a, thus excluding Securities and Exchange Commission jurisdiction.

Paragraph (7) of section 20a confers exclusive and plenary power upon ICC in dealing with carrier security issues. Many states have statutes which provide for regulation of securities by carriers operating in intrastate commerce within the state. The state may also have a so-called dissent statute which provides for dissenting stockholders in mergers or consolidations to demand appraisal of their shares and payment for them in cash rather than in stock of the new or surviving company. The exclusiveness of ICC regulation of securities has been recognized as excluding the power of the states to regulate by requiring prior approval of issues. It remained, however, for the Supreme Court in the Schwabacher case to decide that the Commission's order approving the terms and conditions and passing on their fairness to stockholders in section 5 cases, overrides state statutes providing remedies for stockholders aggrieved by carrier reorganization proposals.

CONCLUSION

The regulation of motor carrier securities has taken on increasing importance as the industry has grown and matured. As individual carrier units have increased in size and geographical scope, the motor carriers have of necessity sought capital funds in the money market in competition with other business enterprise. A financially strong and serviceable motor carrier industry can only be assured if the individual units are able to meet their growing capital requirements effectively. Present regulatory policy is strongly influenced by concepts developed for control of railroad securities and has often failed to keep pace with or to recognize the specific requirements of the motor carriers. Within the present statutory framework, the Commission could revise its policies to accord more closely with these requirements, recognizing more fully modern accounting concepts and the virtues of diversification. Effective regulatory control of motor carrier securities in the interest of the investors and of the public generally in a sound, adequate and financially stable motor carrier transportation service, can be achieved without hamstringing the motor carrier's ability to compete effectively for capital investment.

§ 80(a)-1 (1952).
47. See, e.g., CALIF. PUB. UTIL. CODE ANN. § 816-30 (Deering 1951).