DIFFICULT AREAS IN FEDERAL SECURITIES PRACTICE

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My topic, "Difficult Areas in Federal Securities Practice," is much broader than the subject matter which I will actually discuss. The reason is simply that most practitioners who are new to the Federal securities practice find the entire field, from start to finish, difficult. The S.E.C. administers seven different Congressional enactments, collectively referred to as the Federal Securities Laws. Being remedial and regulatory in nature, these laws and many of the rules promulgated under them are necessarily complex. A complete understanding of each of them, in my opinion, must be left to those attorneys whose practice consists of virtually nothing but the Federal securities laws.

Mr. Pringle and Mr. Grossman have very expertly described the "who, what, when, where and how" of registration with the Kansas Securities Commission and the S.E.C., respectively. I intend to concentrate on Sections 3 and 4 of the Securities Act of 1933, where certain exemptions from the registration process which Mr. Grossman described are found. Two of these, commonly referred to as the "intrastate" exemption and the "private offering" exemption, I would like to discuss in some detail. Section 3(b) of the 1933 Act contains the general exemptive provision for offerings of less than $300,000, under which the Commission's Regulation A was adopted. I will discuss this exemption in somewhat less detail.

I have chosen these three as "difficult areas" for several reasons. First, the statutory provisions for these exemptions are deceptively simple in appearance, and a knowledge of the law and lore which have grown up around them is a necessity to counsel in advising as to their applicability. Second, Regulation A is a valuable tool when another exemption is not available and the capital requirements of the issuer are relatively modest, and it should not be overlooked. Third, these are the exemptions most often relied upon by young growing companies whose financial condition or prospects do not warrant a firm underwriting commitment or a full registration with the S.E.C. Fourth, and perhaps most important, I have seen the problems which can be caused by reliance upon an exemption which is later found to have been inapplicable, and I can assure you that they should be avoided like the plague.

Needless to say, these exemptions can be, at the risk of being over-dramatic, fraught with dangers for the unwary. Let me warn you in advance that there are no pat answers to all questions in these matters. I will at least try to outline some of the problems with which you may be confronted.

Before getting into the substance of these provisions, it should be made clear that civil liabilities, resulting from false or misleading statements or from omissions to state material facts in the offer or sale of securities, are applicable whether or not registration is required. The same is true of the anti-fraud provisions of the Securities Act, under which the courts have liberally implied rights of action by damaged shareholders. A rather dramatic illustration of this occurred less than a year ago in an action by three mutual funds against an individual from whom they had purchased securities. The U. S. District Court found that material misrepresentations were made to the funds by the seller. It also found that the sale was exempt from registration under the Securities Act, as a private offering. In view of the false statements, and without regard to the exemption, the court ordered rescission of the sale. The defendant, in return for stock which was then worth about $65,000, was ordered to refund the purchase price -- $3,247,000. (The Value Line Fund, Inc. v. Marcus, U.S.D.C., N.Y., No. Civ. 121.97, ___ F. Supp. ___, March 31, 1965.) The existence of an exemption from registration clearly, therefore, does not insulate the seller from liability under other provisions of the Federal securities laws. While this fact may be relatively common knowledge within this room, it is not so widely known, I am afraud, by those who issue and sell securities throughout the country.

Unlike most state Blue Sky Laws, the Securities Act contains no so-called isolated transaction exemption. The purpose is served, however, by the first two clauses of Section 4. In a masterful display of word economy, these clauses provide that registration shall not be required of "transactions by any person other than an issuer, underwriter or dealer," and "transactions by an issuer not involving any public offering." Transactions by a dealer not exempted here are taken care of in a later clause of Section 4 subject to delivery of a currently effective prospectus during the early days of any distribution. The plot thickens, however, when we must determine just who is an underwriter or issuer for purposes of these provisions. The term "underwriter" is not limited to a broker or dealer who takes securities of the issuer, either as principal or agent, and distributes them to customers. Underwriters in this context, of course, are included, but the real problems arise over the so-called "statutory underwriter," who is quite often neither a broker nor a dealer. Section 2(11) of the Act, in pertinent part, defines underwriter as "any person who has purchased from an issuer with a view to the distribution of any security."

We ordinarily conceive of an "issuer" as the entity creating and actually issuing securities. But, for purposes of determining whether someone is an underwriter, Section 2(11) expands the concept of issuer to include so-called "control persons" as follows: "As used in this paragraph the term 'issuer' shall include . . . any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." Without attempting discussion of the limitless situations which may be posed by this definition, I would cite a 1965 case decided by the Federal District Court in Oklahoma City. This was S.E.C. v. Bond and Share Corporation, et al., 229 F. Supp. 88, in which the Commission sought to enjoin a corporation and certain individual respondents from further offer and sale of stock in violation of the registration and anti-fraud provisions of the Federal securities laws. Certain of the individual defendants had caused large amounts of the outstanding common stock of Hydramotive Corporation, until then a dormant uranium company, to be transferred to brokers and others, without consideration. These shares were then offered and sold to public investors without having been registered with the Commission and by means of false and misleading representations. Among other things, the defendants claimed that no issuer or underwriter was involved in the transactions and that, therefore, they were exempted by Section 4. The court quite correctly ruled that there were, in fact, underwriters involved in the transactions. Citing numerous judicial authorities, and the Commission's Rule 405, the court held that "control," as used in Section 2(11), should be broadly defined to permit the effective application of the Act wherever the fact of control exists. In this case, it clearly did exist. The controlling persons, therefore, were "issuers" and the persons who took from them with a view to distribution were "underwriters." The injunction which the Commission sought was issued!

The problems of "control" persons and distributions of securities by them are, obviously, many and varied. Seminars and treatises have been devoted entirely to this subject. Of equal importance here, however, is the fact that the definition of "underwriter" may include persons who purchase from an issuer with a view to distribution, even if there is no control relationship whatever. Such persons, if they sell their holdings, do so at their peril, since, as underwriters, they are required to deliver a currently effective prospectus to purchasers, indicating, among other things, their underwriter status. While the S.E.C. may not always be on hand to enjoin sales by such underwriters, this does not mean that dissatisfied purchasers will forego the assertion of the civil liability provisions, through suits for rescission or for damages. These suits may be based solely upon the unregistered sale, and do not require proof of false or misleading statements.

Many persons request so-called "no-action" letters from the Commission in such situations. If given, such a letter is nothing more or less than an indication by the staff of the Commission, based solely upon the facts submitted by the person requesting the letter, that, in the event of sales as described, the staff would not recommend that the Commission take any action against the seller. Assuming that the facts have been fully, and truthfully, set out in the request, this letter commits the staff. Although undoubtedly persuasive, it is not binding on the Commission itself in the event of future difficulties. Further, it is not a defense against civil actions by purchasers. Many attorneys feel that such a letter would be persuasive in the defense of any such action, even though it would be only evidentiary in nature. I cannot dispute this judgment, nor can I confirm it. Obviously, it would be better for all concerned if the question never arose.

The landmark case in the "private offering" area would have to be the Supreme Court decision in S.E.C. v. Ralston Purina Co., decided in 1953, and reported at 346 U. S. 119. The Commission sought to enjoin the issuer from offering its own stock to its own employees without Securities Act registration. The issuer defended on the basis that its offer to employees was one "not involving any public offering," and that it was therefore exempt under Section 4(2). Among other things, it was contended that the offer was to key employees. However, the evidence showed that this term covered an extremely large and diverse group. The District Court in which the action was brought nevertheless found the exemption applicable and dismissed, and the Court of Appeals affirmed. The Supreme Court granted certiorari in order "to define the scope of the private offering exemption." In the course of reversing, the court stated that the applicability of the transaction exemption should turn on whether the particular class of persons affected needs the protection of the Act, and that "an offering to those who are shown to be able to fend for themselves" would probably qualify for the exemption. The court observed that an offering to executive personnel who have access to the same information which would be disclosed through a registration statement could be such an offering, but that, absent such a showing, "employees are just as much members of the investing 'public' as any of their neighbors in the community."

That this opinion was to reach far beyond the situation of an offer to employees was apparent in this statement: "Once it is seen that the exemption question turns on the knowledge of the offerees, the issuer's motives, laudable though they may be, fade into irrelevance. The focus of inquiry should be on the need of the offerees for the protections afforded by registration." Along the same lines, the fact that the issuer voluntarily provides the equivalent of the requisite information would not change the result. If it could, then the issuer would virtually have a choice between voluntary, unregulated disclosure on the one hand and registration on the other. This could effectively undermine the whole purpose and effectiveness of the registration process.

Other factors may be relevant in determining the availability of this exemption. Among these are:

1. The number of offerees -- not ultimate purchasers, but persons to whom the securities are offered. The more offerees, the less likelihood that the offering is exempt.

2. Their relationship to the issuer and to each other. If the offerees are a group of persons knowledgeable in the enterprise in which the issuer intends to engage or are closely related to the issuer or its personnel, the offering is more likely to be exempt than if they are completely unrelated in knowledge and experience.

3. The number of units offered. A $500,000 offering would be far less suspect if it consisted of five $100,000 units than if 500,000 $1 units were offered. This is an extreme example, of course, but it points up the difference between the classical "private placement," where the securities are placed with institutional investors, and a true public offering to whomever is willing to buy.

4. The size of the offering. An offering of large dimensions under this exemption is dangerous unless it is clearly of the "private placement" variety.

5. The manner of the offering. As early as 1935, the General Counsel of the Commission stated that the purpose of the exemption of non-public offerings is largely limited to those cases where the issuer desires to consummate a few transactions with particular persons. He concluded, and this is still the Commission's position, that transactions which come about through direct negotiation by the issuer are much more likely to be non-public than those effected through the machinery of public distribution, such as the employment of salesmen or the broad solicitation of offers by several promoters of the enterprise.

Any one of these factors may, taken alone or together with any other, destroy the exemption. Necessarily then, the existence of the private offering exemption must be determined, by counsel, the issuer and the Commission, on an ad hoc basis. As I have noted, the existence of an underwriter, whether or not known to the issuer, and a later distribution to public investors, could destroy the exemption as to all.

One further reference to the recent rescission case (The Value Line Fund, Inc., v. Marcus, supra), which I mentioned before, is appropriate at this point. The mutual fund plaintiffs there joined as a party defendant a brokerage firm which acted as a conduit for the individual seller. They asked rescission from this firm as well, claiming that the firm was an underwriter, and therefore that the transaction was not exempt. The court found that the sale by the conduit broker did not involve a distribution. It noted that the term distribution is substantially equivalent to the term public offering in Section 4, and that the mutual fund plaintiffs were sophisticated institutional investors, able to fend for themselves. Since there was no public offering, the firm did not take the securities with a view to distribution and was not an underwriter under Section 2(11). Plaintiffs recovered only against the individual seller. There was no allegation that the brokerage firm made, or knew of, the false statements which resulted in the primary recovery.

As I have mentioned, the "private offering" exemption was designed to be, and is, just what it says it is. It has been, and will continue to be, narrowly construed with the burden of proof always resting with the one claiming the exemption.

Counsel should be fully aware of these concepts, and with the consequences which can result if the exemption is later held unavailable. Armed with this knowledge, clients may be fully advised of the dangers involved, so that they may be weighed against the advantages.

The other exemption which I have described as deceptively simple, and therefore widely misunderstood, is the so-called "intrastate" exemption found in Section 3(a)(11). While many large offerings have been made in purported reliance upon this exemption, its legislative history and the decided cases make it clear that it is designed to apply only to local financing which may practicably be entirely consummated within the "home" state of the issuer.

If the intrastate offering is shown to be a part of a single plan of financing, the remainder of which involves offers or sales to non-residents, the exemption will not be available. If a prior, or subsequent, offering involving the same class of securities is relatively close in point of time, is made for the same general purposes, or is of the same class of securities, the two may be subject to the doctrine of integration and may be treated as part of a single issue. These and other criteria may be applied singly or in conjunction in making the determination.

The issuer, if a corporation, must be incorporated and doing business in the state where the offering is to take place. While the issuer need not be doing business exclusively within the state, it is clear that the securities offered may not represent an interest in a business which is predominantly out-of-state. In this connection, counsel should become acquainted with S.E.C. v. Truckee Showboat, Inc., decided in 1957 in United States District Court in California, and reported at 157 F. Supp. 824. This case involved a California corporation selling only to California residents. However, the proceeds of the offering were to be used to purchase a Nevada hotel. The exemption was not available.

Similarly, an offering by a Kansas corporation, solely to Kansas residents, to finance an oil and gas exploration program on an Oklahoma lease, would not be exempt under Section 3(a)(11). When I had occasion to explain this concept to some Oklahoma oil men recently, their reaction was first one of surprise and then of disbelief. I would hope that your clients will be fully advised in this particular, before the fact.

Taking both the "single issue" and the "doing business" concepts together, it is clear that the exemption should not be relied upon for each of a series of corporations from different states where there is, in fact and purpose, a single business venture. This would be the case whether or not merger or consolidation of the various entities is planned at some later date.

Under the exemption, it is required that all offers and sales be made to "persons resident" within a single jurisdiction. This has been construed as being virtually synonymous with domicile, which immediately points up a problem existing throughout the law as to transients, and especially as to military personnel. The mere obtaining of representations of residency and agreements not to re-sell to non-residents should not be relied upon, especially where the purchaser is not personally known to the salesman. Since salesmen generally are paid commissions based on sales volume, strict supervision is an absolute necessity. Even then, if the exemption is later found not to have been available, all the supervision in the world won't restore it.

It is established law that the exemption is available only if the entire offering has "come to rest" in the hands of residents prior to any offering or sale to a non-resident. If part of the offering is sold to a resident who took with a view to resale or distribution, he would be an underwriter, and any sale to a non-resident by him or on his behalf would destroy the exemption as to the entire offering. If the complex question of whether the offering has "come to rest" may be answered in the affirmative, then interstate trading may be accomplished by or for the resident purchasers. However, and this is only one of many examples which could be given, resales to non-residents in a short time would militate against an affirmative answer and, therefore, against the exemption.

This exemption, like all others, will be strictly construed _against_ the person claiming it, and the burden of affirmatively showing its applicability is likewise on the claimant. The _de minimus_ doctrine has no application here, and a single _offer or sale_ to a non-resident will destroy the exemption -- as to all purchasers, not only as to non-residents. Of course, if the exemption is not available, all the securities have been sold in violation of the Securities Act, thereby giving rise to the civil liability provisions which I have mentioned, in addition to the Commission's power to seek injunctive relief.

Other problems of extreme concern to management, and to counsel, may arise from the use of this exemption. For instance, if a capitalization program to be accomplished _intrastate_ was too conservative for the near-term needs of the business, or if it simply did not sell, the issuer may determine that an _interstate_ offering is the only feasible approach to raising the needed capital. Whether the subsequent offering is registered or accomplished through a Regulation A exemption, disclosure of the previous offering will be required in the prospectus or offering circular. If, because of the application of the single issue concept, or for any other reason, it is determined that the exemption was not available, disclosure will then be required of the probable Securities Act violation, and of the issuer's contingent liability for rescission or damages in the event of suits by purchasers in the earlier offering. In these circumstances, which are by no means rare, the issuer may determine that to avoid having to defend a spate of suits, which these disclosures could precipitate, the subsequent offering should also contain an offer of rescission to all investors under the prior offering. If the company has not done well, for instance, this could be disastrous, and could result in its having substantially less, rather than more, capital when the dust has settled. Obviously, such a result should be avoided if at all possible. I believe that it can be, by careful planning ahead of time, and by the use of procedures similar to those described by Mr. Grossman before _any_ offering is made. Of the issuers who have found themselves in this virtually helpless position, some have received inadequate advice initially. Most, however, had very cleverly decided that they could take care of this themselves, without "wasting" any money on attorneys' fees. Needless to say, they found that they had been "penny wise and pound foolish."

In summary, there are serious questions raised if a purported intrastate offering goes beyond strictly local financing by local industries, carried out through local investment. It is almost inconceivable, for instance, that a large offering of unseasoned, low priced securities to several thousand persons could come to rest only in the hands of residents.

The Regulation A exemption under Section 3(b) was designed as a simplified clearance process for interstate offerings of $300,000 or less. Small companies and those with modest capital requirements and their counsel should very definitely become knowledgeable in this area. Although it comes under the exemptive provisions of the Securities Act, Regulation A is sometimes described as a small-scale registration. This is basically an accurate description, since the rules which comprise Regulation A parallel the requirements for full registration. There are differences, however. Some of these are merely differences in terminology, but others are substantive.

For instance, Regulation A is not available to fractional undivided oil or gas interests, or similar mineral interests. A completely separate exemptive provision provides procedures required for the exemption of these interests. Strangely enough, this is entitled Regulation B. I will not be able to discuss this Regulation in detail, except to say that it is limited to offerings of not more than $100,000. Regulation A is also unavailable for offerings of securities by investment companies, as defined by the Investment Company Act of 1940.

Generally speaking, the exemption is not available if the issuer or any of its affiliates or predecessors, within the preceding five years, have been subject to a stop order proceeding under the 1933 Act or to a suspension proceeding under Regulation A, have been convicted of a crime involving the purchase or sale of securities, are subject to any temporary or permanent injunction in connection with the purchase or sale of securities, or are subject to a Post Office fraud order. Similarly, the exemption is not available to the issuer if any of its directors, officers or principal security holders, or its underwriter or any of its principals have been guilty of certain conduct, as described in the Regulation. It may be seen, therefore, that the basic 1933 Act theory of allowing the public offering of virtually any security, limited only by the requirements of full disclosure, is not fully applicable under Regulation A. This is quite proper. This is an exemption, and as such is a privilege granted by the Congress, subject to whatever rules and regulations the Commission makes in limitation of it, in the public interest and for the protection of investors. Denial of the exemption in the cases mentioned does not foreclose the issuer from publicly offering its securities. It merely means that he must use the full registration process in order to do so. In cases where there is a recent history of offenses under the securities laws, criminal conduct involving securities, or postal fraud, it is clearly in the public interest for the issuer to be required to adhere to the more stringent requirements of the registration process.

Under Regulation A, the issuer files a notification, rather than a registration statement, as is the case in a majority of full registrations. The basic disclosure document here is denominated an offering circular, instead of the prospectus required in registration. The notification required is certainly less complex than a registration statement, and the requirements stated in the rules for the offering circular are less comprehensive than those for a prospectus. You should be aware, however, that the basic concept of full and complete disclosure is just as applicable here as in any other offering. If the circumstances require it, therefore, the offering circular may differ from a prospectus, for all intents and purposes, in name only.

The filing of this notification and offering circular, together with whatever exhibits are required, is made with the Regional Office of the Commission for the region in which the issuer's principal business operations are conducted or are proposed to be conducted, rather than in the Washington, D. C. Headquarters Office as in the case of registration. It must be filed at least 10 days prior to any offering of securities. In all fairness, I must admit that the 10-day period is a bit misleading. An issuer is not safe in beginning any offering, even if it is ready, prior to receiving and complying with the comment letter from the Regional Office. While it is clearly within its rights to begin selling after 10 days, if there is any material inaccuracy in the offering circular, the issuer might well be met by a suspension order from the Commission. This is clearly not a result which the issuer, or counsel, would desire to risk. Processing is generally completed in relatively short order. Assuming full disclosure of all material facts, and no omissions of any material information, the offering may be commenced and completed without regulatory problems.

Upon completion of the offering, the issuer must file Form 2-A, which is basically a report of sales under the offering. If the offering is continued over a long period of time, these reports must be made each six months.

The $300,000 limitation on offerings under this exemption includes the aggregate offering price of all of the securities of the issuer, its predecessors and its affiliates, which are included in this offering, which have been sold pursuant to an exemption under Section 3(b) which commenced within one year prior to this offering, and which have been sold in violation of the registration provisions of the Securities Act within one year prior to the proposed offering. These additions, of course, prevent an issuer from making a virtually continuous offering of securities through a series of Regulation A filings when full registration would have otherwise been required. They also prevent the use of this exemption when substantial amounts of securities have recently been sold in violation of the Securities Act.

The issuer is required to file with the Regional Office copies of all sales material to be used in connection with the offering, at least five working days before it is to be used. This includes copies of any advertisement to be published, the script of any radio or television broadcast to be made, and every letter, circular or other written communication proposed to be provided to more than 10 persons. This is, of course, in addition to the offering circular, which must be provided to every person to whom the securities are offered.

Aside from the fact that the filing is made with the Regional Office, rather than the Headquarters Office of the Commission, one of the most distinct differences between the requirements of Regulation A and those for registration has been that under Regulation A the financial statements of the issuer need not be certified by an independent public accountant. This advantage, a matter of pure economics to a company which has not previously had its books and records audited, has been partially ameliorated in recent years. This has been occasioned by several of the States, Kansas and Oklahoma among others, requiring any company registering securities for offer and sale within their boundaries to furnish certified financial statements. The issuer, therefore, must either have an independent audit performed, or he must offer his securities only in the states which do not make this requirement. Most issuers can't pick and choose states when they are making a public offering. If they must be offered in states where this is required, this particular portion of Regulation A has been of little value to the issuer.

There are undoubtedly many sound practical and administrative reasons for not requiring a full audit in all cases. As a former corporate treasurer, however, I have often been surprised, and sometimes appalled, at the differences between my preliminary figures and those which appear following an audit. In this context, therefore, I could never question the propriety of requiring audited financial statements. On the other hand, I am hardly in a position to question the administrative determination of either the Commission or any state that such statements should not be required in all cases.

The Commission may order a temporary suspension of any Regulation A exemption if it has reason to believe that: For whatever cause, the exemption is not available to the issuer; the terms and conditions of Regulation A have not been complied with; the notification, offering circular or sales literature contains false or misleading statements, or omits to state material facts; that the offering would violate the anti-fraud provisions of the 1933 Act if allowed to continue. There are other specified bases in the Regulation for such an action, but these are the primary ones. Upon the entry of a suspension order, the issuer and any other person on whose behalf the notification was filed is notified and is given opportunity to request a hearing on the matters which are the basis of the order. If no hearing is requested, and the Commission does not order one on its own motion, the order becomes permanent on the thirtieth day after its entry. If a hearing is requested, or otherwise ordered, the Commission will, upon consideration of the entire record, either vacate the order or enter a permanent suspension order. As I have noted, the existence of such an order operates as a bar to further use of Regulation A by the issuer, its principals and by the underwriter and its principals, for a period of five years.

Rule 252 under Regulation A allows the Commission to lift this bar upon a showing of good cause as to any person or firm affected by it. This power is not exercised lightly. Since the person subject to the bar may have had no part in the activity or circumstance which brought about the suspension, however, it is employed to prevent obvious injustices. One example might be a situation where a Regulation A offering was being made by two principal underwriters, one of which engaged in fraudulent selling practices which resulted in a suspension order. If neither the remaining underwriter nor the issuer knew or could have known about these practices, and in no way participated in any such activity, there is little reason to maintain a bar against either of them. In such a case, upon application and a proper showing, the Commission may lift the bar.

It is my understanding that there have been efforts over the years to devise language which would result in the bar never being imposed upon innocent parties under Regulation A. The structure of the Regulation, however, makes this extremely difficult, and the Rule 252 procedure seems to be generally satisfactory to those concerned.

In connection with Regulation A, there is no filing or registration fee. As you may know, the filing fees payable in a full registration have been raised from ten cents per $1,000 to twenty cents per $1,000, effective 15 days ago. At the same time, the minimum fee was increased from $25 to $100. If Regulation A had nothing else, therefore, it has this not insubstantial economic factor to recommend it.

This discussion has necessarily been rather sketchy. I hope, nevertheless, that it will be helpful when you have occasion to consider for a client the possible avenues of financing.

In the interest of time, I have passed over the other Section 3 exemptions, as well as the so-called "broker's exemption" in Section 4 and the highly complex rules which deal with it. The broker's exemption is not available to the selling customer, and he must find his exemption elsewhere. When it is found, it generally falls in the "private offering" area which I have discussed. Many of the problems under this exemption concern "control" persons. As I have said, these problems are legion, and do not lend themselves to cursory discussion.

I have tried to indicate here, basically, that the Securities Act exemptions should never be taken for granted. I do not necessarily refer here to Regulation A, as filings under that exemption are at least examined by the staff of the Commission's Regional Office. On the other hand, the "private offering" and "intrastate" exemptions are not the subject of any filing with the Commission. No exemption from remedial legislation should ever be taken for granted. Of course, there are many, many offerings each year which are made under perfectly valid exemptions. However, as I have also tried to point out, circumstances which may be beyond the knowledge or control of the issuer may vitiate an otherwise valid exemption.

As I have possibly said too often today, the courts and the Commission will continue to interpret <u>all</u> exemptions strictly, resolving any uncertainties against those claiming them. I believe that attorneys would be wise to employ the same rationale in advising clients as to the availability of the exemptions. Registration with the Commission is, of course, not as simple as doing nothing at all. However, in the event of uncertainties concerning an exemption, registration is considerably less burdensome than defending myriad law suits for rescission or damages. Further, if the amount of the offering is less than $300,000, a Regulation A exemption may be obtained with less effort, and less cost, through one of our Regional Offices.

One commentator recently said that in discussing Securities Act exemptions with clients, counsel must necessarily sound like an oracle of doom. If, after being fully informed as to the possible dangers involved, the client insists upon proceeding under an exemption, counsel is then somewhat confined. There are some things, however, on which he should insist. The subscription agreement under which the securities are to be sold should contain as many safeguards as possible, including really meaningful investment or residency representations by the purchaser. Residence of offerees should, if at all possible, be verified by the issuer in intrastate offerings, and this should be done <u>prior to any offer</u>, and <u>not</u> merely after a sale. The client's selling enthusiasm, as expressed in the offering circular, should be tempered by counsel. This should be accomplished <u>before</u> any filing is made. Grossly outlandish statements in a prospectus or offering circular may result in an out-of-hand denial in the case of state registrations or a prompt suspension order in the case of a Regulation A filing, rather than the traditional "comment letter."

Having done all this, to the best of his ability, counsel may lean back and fervently keep his fingers crossed.