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Blue Sky Law and Practice: An Overview

Ronald M. Shapiro
University of Baltimore School of Law

Alan R. Sachs
University of Baltimore School of Law

BLUE SKY LAW AND PRACTICE: AN OVERVIEW*

Ronald M. Shapiro† & Alan R. Sachs††

The securities law and regulations in effect from state to state can best be described as diverse. Compliance with these provisions requires a methodical approach involving detailed planning and control. As a practical guide to attorneys, the authors discuss the principal aspects of offering, selling and distributing securities.

INTRODUCTION

By virtue of recent enactment of the Delaware Securities Act,[1] every state (as well as Puerto Rico and the District of Columbia) has enacted laws regulating the offer, sale and distribution of securities. From this background of numerous state laws emerges the chief characteristic of state regulation—diversity.[2] Most blue sky laws[3] implement the objective of regulating the distribution process by requiring the disclosure through registration and dissemination of information respecting the securities as provided in the federal securities laws. This article will discuss state securities registration requirements and procedures and the most significant exemptions from such registration.

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† L.L.B., *cum laude*, 1967, Harvard University; Lecturer in Law, University of Baltimore School of Law, 1972—, University of Maryland School of Law, 1968—; Securities Commissioner of State of Maryland, 1972-74; Partner in Shapiro & Sachs, P.A.; Member of the Maryland Bar.

†† L.L.B., 1967, University of Maryland; Lecturer in Law, University of Baltimore School of Law, 1969—; Blue Sky Advisory Committee, 1973—; Partner in Shapiro & Sachs, P.A.; Member of the Maryland Bar.

1. Law of July 13, 1973, ch. 416, § 1, [1973] Laws of Del. ch. 208 vol. 59 (codified at DEL. CODE ANN. § 6-7301 (Supp. 1974)).
2. And not even the Canadian lawyer faces the formidable task which a lawyer in the United States undertakes when he prepares an issue of securities for nationwide distribution. The American lawyer must satisfy the federal statute and several dozen state acts—all of them varying in their procedures, their exemptions and their substantive standards—and somehow synchronize all this so that the issue may be offered simultaneously throughout the country.
   L. LOSS & E. COWETT, BLUE SKY LAW 18 (1958).
3. Certain state securities laws do not regulate the offer, process of requiring disclosure and registration; however, the terms "blue sky laws" and "state securities laws" are used interchangeably to indicate state laws which regulate the offer and sale of securities. See pp. 3-5 *infra*.

BACKGROUND OF BLUE SKY REGISTRATION

Even though a registration statement for an offering of securities may comply with the Federal Securities Act of 1933[4] (the "Act"), the offering might nevertheless be geographically restricted if certain state registration requirements are not fulfilled. Connecticut and the District of Columbia may present little problem for securities counsel since those jurisdictions do not have blue sky laws which require registration of securities offerings, but only require the registration of broker-dealers and agents.[5] New York, New Jersey, and Nevada require the registration of securities offerings but generally exempt offerings filed with the Securities and Exchange Commission (the "SEC") from state registration requirements.[6] The blue sky laws of almost all other states, however, require that a federally registered offering of securities also be registered with the state's securities department before the issuer's securities can legally be sold (or, in some states, offered) therein.[7]

This article's analysis of state securities registration of federally registered offerings is divided into three major conceptual areas: (i) the types of state registration filing procedures (i.e., coordination vs. qualification), (ii) the degrees of disclosure review of registration statements made by the states (i.e., in-depth vs. limited), and (iii) the types of qualitative analysis of offering terms to which a registration statement may be subjected (i.e., fair, just and equitable vs. disclosure). While such categorization of state securities laws is a useful tool for analysis, the very nature of state regulation—non-uniformity—means, for example, that a "fair, just and equitable" state may give a registration statement limited disclosure review, whereas a "disclosure" state might give a registration statement in-depth review. Normally, however, disclosure states can be expected to give a registration statement limited review and "fair, just and equitable" states can be expected to analyze the registration statement in-depth. Registration by coordination is always permissible in "disclosure" states, and is also quite frequently acceptable in "fair, just and equitable" states.

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4. 15 U.S.C. § 77a (1970).
5. CONN. GEN. STAT. § 36-322 (1968), *as amended*, CONN. GEN. STAT. §§ 36-322(a)(3),(9), (11)-(13) (Supp. 1974); D.C. CODE § 2-2403 (1973).
6. Nevada contains no provision for the registration of intrastate offerings. NEV. REV. STAT. § 90.140 (1963). The New Jersey statute provides that no securities may be offered or sold in the state unless exempt under the New Jersey Act or the Act or unless the security is registered under the Act, the New Jersey Real Estate Syndication Offerings Law or the New Jersey Uniform Securities Law. N.J. STAT. ANN. § 49:3-60 (1970). The New York securities law provides that the attorney general, upon application, may exempt from registration securities which have been registered with the SEC or securities which have received an exemption from the Act for reasons other than the offering being an intrastate offering to residents of New York. N.Y. GEN. BUS. LAW § 352-g (McKinney 1968). Nevertheless, real estate syndication offerings, condominium offerings, intrastate offerings and cooperative apartment offerings are subject to a registration requirement N.Y. Sec. Reg. pts. 16-19 (2 BLUE SKY L. REP. ¶¶ 35,611-17).
7. Some states permit the offer, but not the sale, of securities after a registration statement has been filed but before it has deen declared effective. *See, e.g.*, ARK. STAT. ANN. § 67-1248(b)(12) (Supp. 1973).

PRELIMINARY STEPS—THE BLUE SKY MEMORANDUM AND LEGAL INVESTMENT SURVEY

In underwritten offerings, prior to the time that the registration statement is filed with the SEC, a preliminary blue sky memorandum is prepared by underwriter's counsel for use in apprising the company, underwriters, and participating broker-dealers of the states in which the underwriter will seek to qualify the securities for sale. The preliminary memorandum also generally sets forth the states in which special problems may arise in qualifying the securities for sale. Such a memorandum contains extensive information respecting the requirements of each state in which the underwriter desires the securities qualified for sale. It frequently explains the ground rules covering timing of offers and sales, circulation of preliminary prospectuses, broker-dealer requirements, and institutions which may purchase the securities. Although not normally included in blue sky memoranda generally in use at this time, a discussion of such matters as special sales or promotional activities restricted or prohibited by state law may also be useful.

The registration statement is declared effective by the SEC usually at a time agreed on by the underwriter, company and SEC staff following the staff review process.[8] At such effective date, clearances are received from most, if not all, of the states in which the securities are to be sold, and counsel for the underwriter will advise the company, underwriter, and participating broker-dealers of those states in which the securities are qualified for sale and those in which the securities remain to be so qualified (as well as to particular qualification problems in such states). It is important to continually update the blue sky memorandum to insure that no offers or sales are made in states in which the securities have not been qualified for sale.

TYPES OF STATE REGISTRATION FILING PROCEDURES

In those states that have enacted the Uniform Securities Act in some form, securities offerings registered with the SEC also must be registered by "coordination."[9] In several states, registration material also

8. After completion of the SEC staff review process, counsel may request that effectiveness of the offering be accelerated to a specified date in order to avoid the statutory twenty day waiting period. *See generally* 15 U.S.C. § 77h (a) (1970).

9. *See, e.g.*, ALA. CODE tit. 53, § 32 (Supp. 1973); CAL. CORP. CODE § 25111 (West Supp. 1974); FLA. STAT. ANN. § 517.08 (1972); ILL. ANN. STAT. ch. 121 1/2, § 137.5A (Supp. 1974) (the Illinois provision is entitled "registration by notification" but does not differ from the typical "coordination" provision); KY. REV. STAT. § 292.360 (Supp. 1973); ME. REV. STAT. ANN. tit. 32, ch. 13, § 871 (Supp. 1973) (the Maine provision is not technically "coordination," however, it does provide that a prospectus filed under the Act is acceptable for such filing); MD. ANN. CODE art. 32A, § 21 (1971); N.M. STAT. ANN. § 48-18-19.4 (1966); ORE. REV. STAT. § 59.055 (1973) (while this provision only requires that all securities offered or sold in Oregon must be registered or exempt from registration, the Oregon Securities Commissioner, pursuant to this section, has adopted Ore. Admin. Rule 30-080 (3 BLUE SKY L. REP. ¶ 40,632-6) which provides for the coordinated registration of

may be filed in a manner equivalent to registration by "coordination," although the particular state securities law provision may describe its filing provision differently.[10]

States that do not have registration by "coordination" usually provide for registration of offerings registered with the SEC by "notification" or "qualification."[11] A statutory provision for filing by "qualification" or "notification" may require that a registration statement contain information in addition, or somewhat dissimilar, to the information required in a registration statement filed under the Act.[12]

Notwithstanding the differences in the types of provisions under which an offering filed with the SEC is filed with the states, almost every state[13] will accept a uniform application, entitled Form U-1,[14] to register securities as an alternative to the state's own registration form.

Registration on Form U-1 (or on a states's own registration form) should be accompanied by a cover letter listing all documents filed with it; a Uniform (or other) Consent to Service of Process on Form U-2;[15] a corporate, individual, or partnership acknowledgement (located on the reverse side of Form U-2); and a Uniform Corporate Resolution on Form U-2A[16] by which the issuer's board of directors authorizes the securities offering.

Form U-1 and most similar state registration forms require that the following exhibits (many of which are part of the federal registration statement) be filed with it:

A. One copy of the registration statement and two copies of

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federally registered offerings); TENN. CODE ANN. § 48-1608 (1964) (this section provides the form of registration statements, however, § 48-1610 provides that a prospectus filed under the Act will be accepted by the Securities Commissioner in lieu of the prospectus required to be filed under § 48-1610); VA. CODE § 13.1-509 (1973); WASH. REV CODE §§ 21.20.180-.200 (1961).

10. *See, e.g.*, ME. REV. STAT. ANN. tit. 32, ch. 13, § 871 (Supp. 1973).
11. The following states have a securities law provision for registration by notification ("N") and/or qualification ("Q"). An asterisk indicates that, while the state does not have a provision for coordination, the notification or qualification requirement is satisfied by the filing of a prospectus also filed with the SEC under the Act. ARIZ. REV. STAT. §§ 44-1892-96 (1967) (*Q); GA. CODE ANN. §§ 97-105(a), (c) (Supp. 1973) (N, Q); LA. REV. STAT. § 51: 707 (1965) (N), *as amended*, LA. REV. STAT. § 51:707 (Supp.1974); MISS. CODE ANN. § 75-71-7 (1973) (Q); N.D. CODE § 10-04-08 (1960), *as amended*, N.D. CODE § 10-04-08(2)-(4) (Supp. 1973) (Q); OHIO REV. CODE § 1707.09 (1964) (*Q); S.D. COMP. LAWS § 47-31-10 (1969) (N); VT. STAT. ANN. § 9-4208 (1971) (*Q); W.VA. CODE § 32-3-304 (Supp. 1974) (*Q).
12. *See, e.g.*, Miss. Sec. Reg. 225 (2 BLUE SKY L. REP. § 27,622), which governs the contents of prospectuses required to be filed under the Mississippi Securities Act of 1958, MISS. CODE ANN. § 75-71-1 (1973). Although somewhat similar to the information required to be included in a prospectus filed under the Act, there are additional disclosure requirements. Such disclosures required by the Mississippi statute but not required by other securities laws may be included by the practical expedient of utilizing a prospectus "sticker."
13. The exceptions are Mississippi and Rhode Island.
14. UNIFORM APPLICATION TO REGISTER SECURITIES (1 BLUE SKY L. REP. ¶ 4471).
15. UNIFORM CONSENT TO SERVICE OF PROCESS (1 BLUE SKY L. REP. ¶ 4483). Note that some states which will accept a UNIFORM APPLICATION TO REGISTER SECURITIES on Form U-1 may not accept certain other uniform forms. Counsel should examine the forms list at the beginning of each state's Blue Sky Law in the CCH BLUE SKY L. REP.
16. UNIFORM FORM OF CORPORATE RESOLUTION (1 BLUE SKY L. REP. ¶ 4484).

the most recent prospectus;
B. All underwriting documents;
C. A copy of the indenture if the registrant is offering debentures;
D. A copy of registrant's charter or partnership agreement and, if a corporation, its by-laws;
E. A copy of the opinion of counsel filed with the SEC. Typically, this is furnished by amendment immediately prior to effectiveness with the SEC;
F. A specimen stock certificate or acknowledgement of limited partnership participation or other equity participation;
G. In certain states, the registrant's most recent earnings statement; and
H. One copy of all advertising and sales literature. Advertising material may be filed with the state's securities department as soon as it is available or concurrently with the filing of Form U-1. However, special sales literature filing requirements may be applicable in certain states.[17]

In addition to the registration form and exhibits, a check to cover the filing and examination fees should be included. The "Guide" at the beginning of each state securities law in the CCH Blue Sky Law Reporter describes the manner in which each state's registration and examination fees are determined.[18]

To insure that blue sky requirements are met and that records are kept current, counsel should maintain a "control" file which contains, in respect of the offering, all communications with the personnel of each state's securities department and all copies of material filed with each department. Counsel should also utilize a checklist to keep informed of progress in qualifying the securities for sale in each state. When amendments to the registration statement, underwriting documents and sales literature are filed with a state's securities department, an additional copy of each, red-lined to indicate changes from previous filings, should also be filed to expedite the review process.

DEGREES OF REVIEW OF REGISTRATION STATEMENT

State securities departments may review a registration statement filed in the manner described in one of three ways. First, some states, notably "disclosure" states, accord limited review to an offering filed under the state registration by "coordination" (or similar) provision. Such "limited" review normally involves checking the documents filed with the registration statement as to form rather than substance. Heavy reliance is placed by these states upon the SEC disclosure review.

17. *See* pp. 10–12 *infra*.
18. Registration fees are determined in most states according to a percentage of the aggregate offering price of securities to be offered therein. A large majority of states set the registration fee at 1/10 or 1/20 of one percent of the aggregate offering price in that state and may have minimum and maximum registration fees. Additionally, some states will require a small examination fee.

Letters of comment are not issued frequently. States which give a registration statement "limited" review often will inform counsel soon after the filing that it will be declared effective immediately upon SEC effectiveness.

Second, other states, most frequently those which have adopted special regulations or guidelines respecting certain kinds of offerings or certain kinds of issuers, will give a registration statement in-depth review. Securities officials in such states will perform the same function as the SEC staff and analyze the registration statement for full and fair disclosure. Furthermore, if their state has special guidelines applicable to the particular offering, they will also closely check compliance with such guidelines or regulations. The types of guidelines and special regulations which may be applicable to an in-depth review of a registration statement are discussed more fully below.[19]

Third, a few states, which are frequently referred to as "fair, just and equitable" states because the state securities law requires the securities administrator to determine the fairness of the offering terms to investors,[20] also give most offerings in-depth review. Even these states, however, may only subject an offering to limited scrutiny if the company is seasoned or, if for some other reason, the state administrator has reason to believe that there is no need to give the registration statement in-depth review.

TYPES OF QUALITATIVE ANALYSIS OF OFFERING TERMS

The types of state qualitative analysis of the terms of registered offerings, a consideration generally foreign to the federal registration process, can be divided into three categories. First, states with "disclosure" statutes,[21] such as the Uniform Securities Act,[22] generally apply no qualitative analysis to the terms of a registered offering, but rather give it the type of review given by the staff of the SEC. That is, the securities examiner will not scrutinize the terms of the offering and question its fairness to the investor, but will only review the registration statement and determine whether or not it fully and fairly discloses all material facts.

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19. See pp. 6-7 *infra*.
20. *See, e.g.*, CAL. CORP. CODE § 25140(a) (West Supp. 1974); FLA. STAT. ANN. § 517.11 (1972); LA. REV. STAT. § 51:711 (Supp. 1974); MO. ANN. STAT. § 409.306(a)(E) (Supp. 1974); N.C. GEN. STAT. § 78-11 (1965); N.D. CODE § 10-04-08.1 (1960), *as amended*, N.D. CODE § 10-04-08.1(9) (Supp. 1973); ORE. REV. STAT. § 59.105 (1973); S.D. COMP. LAWS § 47-31-18 (1969); VT. STAT. ANN. § 9-4211 (1970); W. VA. CODE § 32-3-306 (Supp. 1974).
21. Disclosure statutes may be defined as those which require the full disclosure of certain information about the offering, the issuer, promoters and affiliates, but do not impose substantive offering terms upon issuers. Certain disclosure states, however, have adopted special regulations or policies such as those adopted by the Midwest Securities Commissioners' Association, which may limit, for example, the amount of compensation to be paid to the underwriter, prescribe a minimum capital contribution by promoters, or impose other substantive restrictions.
22. 1 BLUE SKY L. REP. ¶ 4901.

Second, a significant minority of states have "fair, just and equitable" statutes pursuant to which the securities officials will pass upon the fairness to investors of the terms of an offering. Therefore, if it is determined in a "fair, just and equitable" state that terms such as underwriter's compensation or "cheap stock"[23] are not fair to investors, the examiner may require the issuer to modify the substantive terms of the offering to conform to what the state deems to be fair levels. In contrast, a disclosure state usually requires only prospectus disclosure of the "unfair" aspect of the offering.

A third type of analysis of terms of an offering is that which results from the existence of special state securities regulations or guidelines which are directed at certain kinds of issuers or offerings. Such guidelines or regulations have been adopted in both disclosure and "fair, just and equitable" states. The special nature of the review given offerings subject to such guidelines warrants separate treatment and is discussed below.[24]

Sound planning for a public offering requires taking into account the type of qualitative review given an offering by a particular state. The time and expense of complying with special terms and requirements should be weighed in considering the advisability of attempting to qualify the offering in any given state.[25] Counsel have been known from time to time to suffer bewilderment at the regulatory obstacles, sometimes imposed only by administrative gloss on otherwise clear statutes, strewn in the path of their offerings by state securities administrators. Prior to making a decision as to the states in which securities will be offered and sold, a preliminary inquiry letter will often elicit responses that may reveal unpublished administrative interpretations of published registration regulations.[26]

RESTRICTIONS ON UNDERWRITERS COMPENSATION

Due to the underwriting compensation limitation contained in the Rules of Fair Practice of the National Association of Securities Dealers[27] (the "NASD"), state limitations on underwriters compensation

23. See pp. 8-9 *infra*.
24. See pp. 9-10 *infra*.
25. Whether to design or change the terms of an offering to conform it to the substantive requirements of such regulations is partly a business decision which counsel should discuss carefully with the company and underwriter.
26. The staff of the Maryland Division of Securities, prior to the adoption of a private offering regulation, interpreted MD. ANN. CODE art. 32A, § 26(b)(9) (1971) (private offering exemption) to require offerees in a private placement to be "sophisticated," although neither the statutory provision nor published administrative regulations contained such a requirement. According to that administrative interpretation, offers to "unsophisticated" persons, therefore, would have required registration of the securities. *See also* note 73 *infra*.
27. NASD, Rules of Fair Practice, Review of Corporate Financing, art. III, § 1.02 (CCH NASD MANUAL ¶ 2151). While this provision requires only that underwriting compensation be fair and reasonable under the circumstances, underwriting compensation which exceeds 15% has, in recent years, generally been considered unreasonable.

are not particularly troublesome. Yet, some states are more restrictive than the NASD because they limit the aggregate amount of underwriting compensation and selling expenses to 15%. Compliance with such a limitation may be quite difficult.[28]

A further restriction on underwriters compensation is contained in the Midwest Securities Commissioners' Association's "Statement of Policy on Options and Warrants."[29] These guidelines contain provisions respecting the amount of underwriting compensation which underwriters are permitted to receive in the form of options and warrants.[30] This Midwest Guideline also contains non-assignability provisions, restrictions on the percentage of shares into which the options or warrants can be converted, time periods within which options or warrants must be exercised, and a suggested price below which warrants should not be exercised.[31]

State restrictions on underwriters compensation pose few problems for the larger companies whose offerings are underwritten by investment banking firms where the percentage of the offering price payable to the underwriters is usually between five and ten percent. Nevertheless, for the small or new company that must use the services of a local broker-dealer to underwrite its offering, the underwriting compensation limitations can, at times, present a serious problem.

"CHEAP STOCK"

"Cheap Stock" is generally understood to constitute stock that has been issued to the promoters of an enterprise at a price per share below the price per share at which the stock is offered to the public. The result of the issuance of cheap stock to promoters is that the book value of the public investor's stock is diluted.[32] The Midwest Securities Commissioners' Association's "Statement of Policy on Cheap Stock"[33] defines cheap stock as securities sold to underwriters, promoters, or insiders for an amount less than the public offering price within two years of a public offering. The guidelines provide that a company can

28. Nine states have established a combined underwriting and selling expense limitation of 15%. *See, e.g.*, CAL. ADMIN. CODE tit. 10, ch. 3, rule 260.140.20 (1 BLUE SKY L. REP. ¶ 8618). Other states requiring analogous requirements include Georgia, Hawaii, Idaho, Kentucky, Minnesota, Tennessee, Wisconsin and Alabama.
29. 1 BLUE SKY L. REP. ¶ 4796.
30. The Statement provides that the number of shares issuable upon exercise of all options or warrants may not exceed 10% of the shares to be outstanding upon completion of the offering.
31. The Guideline states that all options and warrants, other than those issued to financing institutions (including the underwriters), must be issuable at not less than the fair market value of the security.
32. For example, three individuals incorporate a business and issue 500,000 shares of stock to themselves for $100,000, resulting in a price per share of twenty cents. If the company later makes a public offering of 500,000 shares of its stock at a public offering price of $5 per share, the book value of the public investor's stock is diluted to $2.50.
33. 1 BLUE SKY L. REP. ¶ 4761.

sell cheap stock to underwriters, promoters or insiders only if it is new and in the developmental stage and only if the amount of cheap stock or other similar equity participation is justifiable based on the public offering price. Under the laws of at least four states, cheap stock cannot be sold for less than 50% of the public offering price.[34]

RESTRICTIONS FOR SPECIAL OFFERINGS

Certain types of offerings are subject to special restrictions in a number of states, particularly in states that have adopted the Midwest Securities Commissioners' Association's Guides regarding offerings by oil and gas, cattle, and real estate syndicates. For example, the Midwest Securities Commissioners' Association's "Statement of Policy Regarding Real Estate Programs"[35] contains restrictions or requirements as to, among other matters, sponsors of real estate syndications (relating to experience and net worth); suitability of investors (e.g., a $5,000 minimum investment in tax oriented offerings and presumed suitability in cases in which the investor has annual gross income of at least $20,000 and net worth of at least $20,000); reasonableness of management fees, compensation and expenses; management conflicts of interest and investment policies; special limitations for non-specified property, commonly referred to as "blind pool," programs (where less than 75% of net proceeds are allocable to a specified property or properties); the rights and obligations of participants in real estate syndications; prospectus disclosure; sales literature; and special filing and reporting requirements for the sponsors or general partners.

Filing and obtaining the effectiveness of a registration statement in more than one state may prove to be a difficult task by virtue of the non-uniformity of statutes and regulations pertaining to registration methods and the degree and type of review given to registration statements by different state administrators.[36] Hence, in the case of certain offerings subject to special regulations, such as real estate limited partnerships, oil and gas offerings, cattle programs, condominium offerings and other special offerings, guidelines restricting the amount of promoters' contributions to the enterprise, suitability requirements, and other restrictions may require tailoring the terms of

34. Ala. Sec. Reg. 12 (1 BLUE SKY L. REP. ¶ 5601); Alas. Sec. Reg. 08.160 (1 BLUE SKY L. REP. ¶ 6045); Ky. Sec. Reg. 320(1)(c)-2 (2 BLUE SKY L. REP. ¶ 20,603) (administrative guideline for applying the regulation); Mo. Sec. Rule VI-D (2 BLUE SKY L. REP. ¶ 28,606). For a further discussion of "cheap stock," see 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § § 14.10[3]-.11 (1973).

35. 1 BLUE SKY L. REP. ¶ 4761.

36. Sometimes counsel may be faced with the problem of two or more states which have regulations or administrative policies that conflict with each other. A statute in one state may impose a suitability requirement of $100,000 net worth and $100,000 annual income, whereas another state may require only $20,000 net worth and $20,000 annual income. The commonly accepted manner in which to resolve such conflicts is to prepare stickers to supplement the prospectus in states that impose disclosure requirements not required under federal law or statutes in other states where the offering is to be made.

the offering itself to such guidelines if the offering is to be made in states applying them. Furthermore, while theoretically the terms of the offering usually may be modified only in "fair, just and equitable" states, even disclosure states may follow a "fairness" approach to the terms of certain types of offerings. A typical instance is a disclosure state that may require modification of terms if it has adopted special regulations[37] or certain of the guidelines of the Midwest Securities Commissioners' Association.[38] There are many types of special regulations that may be applicable to a particular offering, and counsel must review carefully the statute and regulations in each state in which registration of the offering is contemplated to insure compliance with such regulations.

SALES AND ADVERTISING LITERATURE

Certain states require the filing, a specified number of days prior to its use, of sales and advertising literature intended to be used by the company or participating broker-dealers.[39] The breadth of the concept of "sales and advertising literature" is exemplified in Maryland Securities Rule S-8,[40] which includes in the definition seminars, film clips and recordings, as well as material generally understood to constitute advertising literature. The Maryland regulation exempts such material as prospectuses, individual letters to prospective investors (if accompanied by a prospectus), "tombstone" advertisements, reports to existing stockholders not related to a current securities offering, literature relating to securities offered in an exempt transaction or with exempt securities, and material relating to qualified employees' stock or stock option plans, and mergers, consolidations, exchange offers or reclassifications of securities. The Maryland rule requires that sales and advertising literature be filed seven days prior to its use. If a stop order or other order is not issued during the seven day period, the material may be used.

37. "Special regulation" means rules or guidelines which apply to certain types of offerings or issuers. Examples include regulations pertaining to oil and gas offerings and cattle programs, real estate limited partnerships and condominium syndications.

38. Counsel designing a public securities offering must be especially aware of the guidelines of the Midwest Securities Commissioners' Association. Twenty-four states, from all geographical parts of the country, are members of the Association. For a general discussion of the Midwest guidelines, see Van Camp, *Midwest Securities Group Sets Consistent Standards*, 170 N.Y.L.J. 44 (Dec. 10, 1973).

39. *See, e.g.*, CAL. CORP. CODE § 25300 (West Supp. 1974); D.C. CODE § 2-2407 (1973); ILL. ANN. STAT. ch. 121 1/2, § 137.9 (1960); MASS. GEN. LAWS ch. 110A, § 403 (Supp. 1973); N.D. CODE §§ 10-04-08.2 (Supp. 1973); OKLA. STAT. tit. 71, § 402 (1965); TENN. CODE ANN. § 48-1649 (1964); VT. STAT. ANN. § 9-4234 (1971); W.VA. CODE § 32-4-403 (Supp. 1974); Fla. Sec. Rule 3B-2.07 (1 BLUE SKY L. REP. ¶ 13,637); Hawaii Sec. Rule 8.1 (1 BLUE SKY L. REP. ¶ 14,846); Idaho Sec. Reg. § 30-1403(1)(2)(3) (1 BLUE SKY L. REP. ¶ 15,602); Md. Sec. Rule S-8 (2 BLUE SKY L. REP. ¶ 23,616); Minn. Sec. Reg. 5 (2 BLUE SKY L. REP. ¶ 26,605); Ohio Sec. Reg. CO-1-02(A) (2 BLUE SKY L. REP. ¶ 38,611).

40. 2 BLUE SKY L. REP. ¶ 23,616.

Other states' sales literature rules, however, are quite different. California requires any advertisement published in California to be filed with the Office of the California Commissioner of Corporations at least three days prior to publication.[41] Exempt from this requirement are advertisements by licensed broker-dealers who are not effecting transactions as an underwriter and advertisements relating to securities which are exempt from registration either because the securities are exempt or because the securities are offered in an exempt transaction. Advertisements that are exempt must be approved, however, by the broker-dealer prior to their use and such approval must be evidenced by the signature or initial of an officer, partner, or other responsible official of the broker-dealer. Exempt advertisements must be retained by broker-dealers for three years in order that they may be examined, if desired, by the California Commissioner during that period.

Other differences in sales literature regulation are evidenced by the regulations of the Illinois Securities Division, which require that a copy or script of all advertising or sales literature be submitted to the Illinois Secretary of State for approval.[42] Exempt from this filing requirement are advertisements relating to an exempt security or transaction or securities registered under the Act and the registration by "coordination" provision of the Illinois securities law,[43] advertisements appearing in periodicals and newspapers with an established paid circulation, and preliminary prospectuses.

While the definition of sales and advertising literature, as stated in the Maryland regulation, is quite broad, exemptions from the definition may vary considerably from state to state and should be carefully scrutinized to insure compliance with sales and advertising literature filing requirements.

Counsel for many companies automatically file with every state securities department, with which the offering is registered, copies of brochures, sales packets, tapes, film clips, transcripts of lectures and all written, printed or visual material which is to be used in connection with an offering, even if there is no affirmative requirement that such material be filed. Often the reason for this practice is that it is easier to include such material with a registration statement or amendment thereto than to ascertain the requirements of each state and send the material only to states that require it to be filed.

Many states that require the filing of sales and advertising literature have requirements related to legends which must be imprinted thereon. The legend required by Maryland is as follows:

> This sales and advertising literature must be read in conjunction with the prospectus in order to understand fully all of the implications and risks of the offering of securities to which it

41. CAL. ADMIN. CODE tit. 10, ch. 3, § 260.300 (1 BLUE SKY L. REP. ¶ 8,637).
42. ILL. ANN. STAT. ch. 121 1/2, § 137.9 (1960).
43. *Id.* § 137.5A (Supp. 1974).

relates. A copy of the prospectus must be made available to you in connection with this offering.[44]

Note, however, that the statutory or rule provision requiring such a legend usually requires that any legend conform "substantially" to the language of the state's legend. Counsel should also be aware that, in some instances, sales literature and advertisements used by a broker-dealer must be first reviewed by the NASD.[45]

ISSUER AGENTS

The federal registration, reporting, net capital and margin requirements, and blue sky regulation affecting broker-dealers are not within the purview of this article. Nevertheless, small and start-up companies not able to acquire the services of an investment banker or local broker-dealer to underwrite an offering of its securities, may sell its securities by using its own employees or agents. Such "issuer agents" are not required to register as broker-dealers or agents in a minority of states, and they need not register under the federal securities laws. Registration, however, is required by a vast majority of states,[46] and the agents also must take a state examination which tests their knowledge of securities regulation, particularly anti-fraud rules. In some cases, states may have reciprocal examination requirements and counsel should make inquiries respecting reciprocity before subjecting agents to a battery of examinations.

RESPONDING TO COMMENTS FROM THE STATE SECURITIES EXAMINER

After counsel has sent the uniform application, consent to service of process, corporate acknowledgement, corporate resolution, exhibits, and other required documents to all states in which the securities are to be registered, he should await comments about the registration filings from the state securities agencies. The first communication from the agencies generally will be the tear-slip located at the bottom of the third page of the uniform application, or other form of receipt which is sent to blue sky counsel to apprise him that the filing has been received. The tear-slip on the uniform application informs counsel of the name of

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44. Md. Sec. Rule S-8 (2 BLUE SKY L. REP. ¶ 23,616).
45. NASD, Rules of Fair Practice, Advertising Interpretation, art. III, § 1.01 (CCH NASD MANUAL ¶ 2151).
46. The UNIFORM SECURITIES ACT § 401(c)(2) (1 BLUE SKY L. REP. ¶ 4931) expressly excludes issuers from the definition of "broker-dealer." However, the agent of an issuer may have to register as such. For a discussion of states in which issuers are required to register as broker-dealers, as well as a list of jurisdictions in which persons selling securities for an issuer must register as agents, see 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 14.20 (1973).

the securities examiner who will be responsible for reviewing the registration statement. If another form of receipt is received, there may be no identification of the securities examiner. When the examination, if any, of the registration has been completed, the examiner's response regarding the offering may be communicated to counsel in one of three ways.

First, if a problem exists that is frequently encountered, such as a deficiency in the amount of the filing fee or the absence of an exhibit, counsel will probably receive a checklist with the particular deficiency noted.

Second, it is sometimes desirable (e.g., when due to geographical distance potential mailing delays would be harmful) to receive comments from the examiner by telephone through the use of a stenographer. Counsel should not rely exclusively on this method of receiving comments, however, and should request that the examiner confirm his comments in writing as soon as possible.

Third, rather than offer detailed comments on the terms of the offering or the form of disclosure made in the registration statement, many states declare a registration statement effective, upon SEC effectiveness[47] with limited review and no substantive comments. With the exception of states that undertake an in-depth review of the registration statement or those which review the terms of the offering in light of "fair, just and equitable" or similar standards or guidelines, blue sky comments or deficiency letters are rare. When comments are issued, however, they may request that counsel modify language or substantive material in the registration statement to comport with guidelines adopted by the particular state, delete certain provisions, or add certain disclosures. Even in states in which more than a cursory review is made, the examiner frequently will request only that counsel inform him as to the manner in which the registration statement complies with a particular regulation or that certain information be supplied supplementally to aid the examiner in making a review of the offering.

If counsel believes that the examiner's comments regarding a particular matter are unreasonable or involve an incorrect interpretation of a Midwest policy statement or other regulation, he may be able to settle the dispute with a telephone call to the examiner. At times, however, and particularly where a real estate syndication or other type of offering subject to the detailed guidelines is involved, it may be impossible to comply with the requirements imposed by the examiner and the registration in that particular state may have to be withdrawn if no compromise can be reached. Counsel may wish to provide the examiner with written memoranda on various points raised in the letter of comments in order to persuade him that the registration statement should be declared effective.

After a filing, blue sky comments from those states which issue

47. This is the case in almost all Uniform Securities Act states.

them should generally be received within three weeks. If counsel has not heard from certain states, the departments of those states should be contacted, since the state may merely be late with comments, as opposed to having no comments at all. As a general rule, state securities agencies are more receptive to communications from counsel than is the SEC staff.

When the examiners in states with "fair, just and equitable" standards, and in other states in which registration statements are reviewed in depth are satisfied as to its adequacy and the date of expected SEC effectiveness draws near, counsel should telephone each state to insure that no problems with the registration statement have been found (particularly if amendments have been filed).[48] Upon SEC effectiveness, counsel should telephone states which do not provide for automatic effectiveness upon SEC effectiveness and inquire as to the status of the registration statement. If effective, confirmation via graphic scanning or collect telegram should be requested.[49]

The same essential procedures, as outlined above, should be followed when changes in the offering require the filing of a post-effective amendment. In such event, the offering must be suspended until the necessary SEC and state clearances are received.[50]

POST-EFFECTIVE BLUE SKY PROCEDURES

Most states require monthly, quarterly or annual sales reports to be filed that contain information as to the number and aggregate dollar amount of securities sold in the state during such periods. Counsel should write to each state in which the registration statement was declared effective and request information as to when such forms must be filed, and request copies of the appropriate forms for the particular offering and for future use. In many cases, the reporting requirement will be satisfied by a letter to each state's securities department informing it of the number of securities and the aggregate dollar amount sold in that state. Many states, however, require that such a letter be supplemented with the filing of a formal sales report form.

Almost all states require the company to inform the securities department of the date upon which it wishes the offering to terminate therein and the total number and aggregate dollar amount of the securities sold. As in the case of sales reports, a simple form letter might

48. An updated list of the addresses of state departments is set forth at 1 BLUE SKY L. REP. ¶ 811.

49. Note that the state of South Carolina recently announced that due to unsatisfactory service facilities, collect telegrams confirming effectiveness of registration statements will no longer be sent to applicants. Upon request, conformation will be made by air mail or collect graphic scanning. S.C. Securities Division Report, Telegraphic Service on Registration Effectiveness Curtailed (Jan.-Feb. 1974) (3 BLUE SKY L. REP. ¶ 43,670).

50. For a description of federal procedures respecting post-effective amendments to a registration statement, see 3 BLOOMENTHAL, *supra* note 46, § 7.13.

suffice for terminating an offering, but certain states require that a formal termination report form be filed. Counsel should request such reports in advance to assure compliance with each state's termination report requirements. Compliance with sales reporting requirements and termination procedures are not particularly difficult and should be satisfied within the specified time limits.

REGISTRATION OF PUBLIC INTRASTATE OFFERINGS

Intrastate public offerings of securities must be registered with the state securities department in which the offering will be made for review, much in the way an interstate public offering is filed with the SEC. In addition to satisfying blue sky requirements, a primary legal concern in connection with a public intrastate offering is satisfying the federal intrastate exemption requirements.[51]

The prospectus for the intrastate public offering is prepared in conformity with the appropriate state registration forms, procedures and guidelines.[52] The same disclosure and drafting principles applicable to federal registration should be followed with respect to the drafting of a registration statement for an intrastate public offering.[53] Counsel should also be particularly aware of special registration guidelines that supplement statutory and form registration requirements.[54] The disclosure requirements for intrastate public offerings in the Uniform Securities Act are typical.[55]

EXEMPTIONS FROM STATE REGISTRATION REQUIREMENTS

If counsel can opine that a proposed transaction by his client does not fall within the definition of "sale," "offer," or "offer to sell"

51. See Securities Act of 1933 § 3(a)(11), 15 U.S.C. § 77c(a)(11) (1970); SEC Rule 147, 17 C.F.R. § 230.147 (1974).
52. Disclosure techniques used in the preparation of a registration statement for an intrastate public offering are essentially the same as those used in a registration statement filed under the Act. The anti-fraud provisions in most states' securities laws are similar or identical to the anti-fraud provisions in the federal securities laws. Therefore, counsel may wish to review the federal requirements of prospectus disclosure.
53. *See, e.g.*, Md. Securities Act Release No. 15 (Nov. 8, 1973).
54. The Wisconsin Commissioner of Securities has attempted to coordinate intrastate registration of offerings in Wisconsin with the requirements of SEC Rule 147, 17 C.F.R. § 230.147 (1974). The new Wisconsin requirement provides that companies intending to utilize the exemption provided by SEC Rule 147 must meet four conditions. First, the company must file with the Wisconsin Commissioner of Securities an opinion of counsel to the effect that the offering is exempt under the Securities Act of 1933 § 3(a)(11), 15 U.S.C. § 77c(a)(11) (1970) and meets the requirements of the SEC Rule 147. Second, purchasers must sign a subscription agreement representing bona fide Wisconsin residency. Third, all certificates issued to investors must bear a legend stating that shares may not be transferred to non-residents prior to nine months following the completion of the offering in Wisconsin. Fourth, the prospectus must state that the company is a resident of Wisconsin, that 80% of the proceeds will be utilized in Wisconsin, and that 80% of the issuer's assets are located in Wisconsin. BNA SEC. REG. & L. REP. No. 247, at A-10 (1974).
55. UNIFORM SECURITIES ACT § 304 (1 BLUE SKY L. REP. ¶ 4924).

contained in a particular state securities act, then he may free his client from blue sky regulatory requirements. Although such a position does not technically involve an exemption from registration, it nevertheless provides a highly attractive route for a company, since no state securities law provision (including registration and anti-fraud provisions)[56] will be applicable to the transaction.[57] The definition of "sale" in most state securities laws is similar to the definition in the Act. The Maryland Securities Act, which is based on the Uniform Securities Act, excludes from the definition of "sale" pledges or loans; stock dividends not involving the transfer of cash from the stockholders to the issuer; any act incident to a class vote of stockholders on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or any transaction incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities.[58] Many state securities laws, like the Maryland Securities Act, exclude from the definition of "sale" a consolidation, merger, or reclassification of securities on the old SEC Rule 133[59] "no-sale" theory. While SEC Rule 133 has been rescinded and replaced by SEC Rule 145[60] which requires federal registration of transactions covered by the Rule,[61] most state securities laws have not been changed to reflect the different approach taken by SEC Rule 145 under the Act with respect to such transactions. This means that for business combinations registered with the SEC pursuant to SEC Rule 145, registration by "coordination" with agencies of states in which stockholders of the acquired corporations are domiciled may not be required.

If counsel is of the opinion that a securities offering may be excluded from the definition of "sale" in a state securities law, he should seek a "no-action" letter from the state administrator to determine if no sale is involved.

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56. Most state securities laws' anti-fraud provisions closely follow the language of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974), promulgated under the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1970), which by its terms, requires the purchase or sale of a security as a prerequisite to its applicability to a transaction. If a particular transaction or security is deemed not to be a "sale" under the federal securities laws, SEC Rule 10b-5 is not applicable. Likewise, if a state securities law excludes from the definition of "sale" certain types of securities or transactions, the anti-fraud provisions of such laws would be inapplicable.
57. Note, however, that a transaction exempt from registration because of the applicability of one of the "transactional" exemptions in federal or state securities laws nevertheless involves the "sale" of a "security" and, therefore, the anti-fraud rules of the federal or state acts would be applicable to such transactions.
58. MD. ANN. CODE art. 32A, § 25(j)(6)(c) (1971). Note, however, that in the case of a merger, consolidation, reclassification of securities or sale of corporate assets, a class vote of stockholders is required. Therefore, if a transaction is not pursuant to shareholder approval, that exemption from the definition of "sale" would be inapplicable. *See* UNIFORM SECURITIES ACT § 401(j)(6)(c), Draftsmen's Commentary (1 BLUE SKY L. REP. ¶ 4931).
59. 17 C.F.R. § 230.133 (1973).
60. *Id.* § 230.145 (1974). *See also* SEC Securities Act Release No. 5316 (Oct. 6, 1972).
61. Registration pursuant to SEC Rule 145, 17 C.F.R. § 230.145 (1974), may be effected on revised Form S-14 under the Securities Act of 1933, 15 U.S.C. § 77a (1970). Form S-14 permits the filing of a proxy statement prospectus.

As in the federal securities laws, there are a number of "securities" that, although offered and sold, are exempt from state securities registration. Such exemptions are usually premised upon extensive regulation of the particular issuers by other state, federal, or self-regulatory bodies. An important exemption is that applicable to a company whose securities are listed on a national securities exchange;[62] such an exemption is premised upon adequate self-regulation of the company by the securities industry.[63] Other typically exempt securities include those issued by state, federal and certain foreign governments; banks, savings and loan associations, trust companies, insurance companies, federal credit unions; certain utilities and common carriers; and non-profit organizations.[64] Also typically excluded are commercial paper related to a current commercial transaction and investment contracts related to particular types of employee benefit plans.[65] Each state statute should be carefully scrutinized as to the particular securities exempt from registration thereunder.

Predominant among the routes of non-registration are the so-called transactional exemptions. The transactional exemption from state registration most heavily relied upon is for a non-public distribution of securities.[66] This so-called private offering exemption probably best points out the basic characteristic of state regulation—non-conformity. Forty-nine states have "private" or "limited" private offering exemptions that can be placed in four distinct categories. First are those which are based upon the concept contained in the Uniform Securities Act private offering provision,[67] which limits the total number of permissible *offerees* of securities.[68] Second, statutes in fourteen states

62. The exemption for securities listed on a national securities exchange must be examined in each state's statute. Some state statutes exempt securities listed on some exchanges, but not on others. For example, MD. ANN. CODE art. 32A, § 26(a)(8) (1971) provides that securities are exempt from the definition of "security" if "listed or approved for listing on notice of issuance on the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange or any other Exchange which the Commissioner deems to have substantially the same standards for listing. . . ." ILL. ANN. STAT. ch. 121 1/2, § 137.3G (Supp. 1974) exempts from the definition of "security" securities listed on the same exchanges listed in the Maryland Act, but, unlike the Maryland Act, does not provide for the inclusion of additional qualifying exchanges at the discretion of the Securities Commissioner. Some states are presently considering qualified exemptions for certain National Association of Securities Dealers Automated Quotations system listed securities, as well as exchange listed securities.

63. Self-regulation by the securities exchanges is subject to the regulatory oversight of the SEC. All national securities exchanges require periodic disclosure by companies whose securities are listed thereon.

64. Except for non-profit organizations, all of the types of companies listed are strictly regulated by other federal or state agencies.

65. Counsel should note that, while many states exempt from the definition of "security" contracts related to certain employee benefit plans, such as stock option plans, the securities into which such options are convertible are not exempt from the definition.

66. *See* Securities Act of 1933 § 4(2), 15 J.S.C. § 77d(2) (1970); SEC Rule 146, 17 C.F.R. § 230.146 (1974). Unlike the exemptions provided for certain types of offerings and securities, the anti-fraud provisions of federal and state securities laws are fully applicable to issuers and underwriters involved in an exempt private offering.

67. UNIFORM SECURITIES ACT § 402(b)(9) (1 BLUE SKY L. REP. ¶ 4932).

68. Of those states which have adopted the UNIFORM SECURITIES ACT, in whole or in part, some

place restrictions upon the number of stockholders or other equity participants of entities which issue securities in reliance upon the exemption.[69] This category of exemption can be very restrictive.[70] Third, a few states limit one offering to a prescribed number of *purchasers* and a fixed maximum dollar amount.[71] Furthermore, some states have adopted approaches similar to that set forth in SEC Rule 146[72] which among other things, limits the number of purchasers, while other states follow the Uniform Securities Act approach of limiting the offering to a prescribed number of offerees. Recently the Maryland and Delaware Securities Commissioners undertook to establish a measure of uniformity in the area of private offerings by jointly adopting a new rule. The new rule is based substantially upon SEC Rule 146; utilizing the language of the federal rule and those aspects of it that are appropriate to the Maryland and Delaware Acts. For an explanation of the operation of the new rule, reference should be made to the release proposing it and the rule itself.[73] Finally, some states exempt only "isolated sales" of shares of the company that are held by the company or owner thereof.[74] In addition to the foregoing, some states require a short registration prior to the commencement of an offering made in reliance upon the exemption to determine whether the offering is fair to investors,[75] or after the offering to determine compliance with the exemption.[76] Usually such states have state registration statement review provisions in the "fair, just and equitable" category discussed above. It is hoped that, in view of the promulgation of SEC Rule 146 and the new Maryland and Delaware role, other states will take a more uniform approach to private offerings and adopt the basic principles of SEC Rule 146 as uniform criteria for state private offerings.[77]

It is also significant that many states, like the SEC, intergrate private or intrastate offerings with prior or subsequent private, intrastate, or

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of them, pursuant to statutory authority to vary the terms of the exemption, have promulgated regulations establishing more specific and objective criteria than those set forth in the uniform statute. *See, e.g.*, note 73 *infra*.

69. *See* 4 L. Loss, Securities Regulation 2634-41 (2d ed. Supp. 1969) (listing such states).
70. *See, e.g.*, Cal. Corp. Code § 25102(h) (West Supp. 1974) (where to qualify for the exemption there can be no more than ten shareholders of the issuing corporation). This type of restrictive provision is criticized in J. Mofsky, Blue Sky Restrictions on New Business Promotion 81 (1971).
71. *See* 4 Loss, *supra* note 69.
72. 17 C.F.R. § 230.146 (1974).
73. The release and new rule are set forth as an appendix.
74. *See* 4 Loss, *supra* note 69.
75. *See, e.g.*, Ore. Rev. Stat. § 59.105 (1973).
76. *See, e.g.*, Ill. Ann. Stat. ch. 121 1/2, § 137.4G (Supp. 1974); Md. Sec. Rule S-7 (2 Blue Sky L. Rep. ¶ 23,615).
77. States need not adopt all the technical requirements of the federal private offering rule. Adoption of standards which do not impose more stringent requirements than federal law would serve the cause of uniformity. *See, e.g.*, Md. Sec. Rule S-7 (2 Blue Sky L. Rep. ¶ 23,615).

public offerings.[78] The result of the administrative integration of securities offerings usually means that one or more of them were made in violation of the registration provisions of the state securities law, resulting in a rescission offer to all purchasers, a possibility of the issuance of a temporary or permanent injunction, and potentially non-disclosed contingent liabilities in the registration statement for a public offering into which a private offering has been integrated.[79] If an integration question arises, counsel should seek to ascertain if a proposed private offering complies with the requirements of a state's securities law by requesting a "no-action" response from the state administrator.

CONCLUSION

The chief characteristic of state securities regulation—diversity—means that counsel must strictly organize his attempts to qualify a securities offering in more than a few states. The use of careful documentation and control files which keep track of material sent to, and received from, each state's securities agency will guide counsel. Otherwise he may find himself involved in a chaotic process. Organizational preparation and controls are the keys to making blue sky compliance a methodical and manageable task.

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78. See SEC Securities Act Release No. 4552 (Nov. 6, 1962); Shapiro & Sachs, *Integration under the Securities Act: Once an Exemption, Not Always. . . .*, 31 MD. L. REV. 3 (1971), in 1972 SEC. L. REV. 202.

79. For example, when a public offering is integrated with a private offering, a securities law violation arises from the fact that the securities sold in the private offering were not in the registration statement pertaining to the public offering of which it is a part.

APPENDIX

NOTICE OF PROPOSED ADOPTION OF NEW RULE S-7 UNDER THE MARYLAND SECURITIES ACT AND NEW RULE 9(b)(9)(I) UNDER THE DELAWARE SECURITIES ACT RELATING TO EXEMPTION FROM REGISTRATION UNDER SECTION 26(b)(9) OF THE MARYLAND SECURITIES ACT AND SECTION 7309(b)(9) OF THE DELAWARE SECURITIES ACT—THE DELAWARE AND MARYLAND PRIVATE OFFERING EXEMPTIONS

Today, Maryland Securities Commissioner Ronald M. Shapiro and Delaware Securities Commissioner David K. Brewster (hereinafter collectively the "Commissioners") announced the proposed adoption of new rule S-7 under the Maryland Securities Act and new rule 9(b)(9)(I) under the Delaware Securities Act (said rules shall collectively hereinafter be referred to as the "New Rule" and said Acts shall hereinafter be referred to as the "Acts"). The proposed New Rule relates to the qualifications for the so-called private offering exemption from the registration requirement of the Acts.

Background

The registration and anti-fraud provisions of the federal and various state securities laws are designed to protect investors by requiring the issuer of securities

to "disclose" such material facts as will enable the investor to make a knowledgeable investment decision. To provide such protection, the legislatures, the United States Securities and Exchange Commission (the "SEC"), and the state securities administrators have constructed a vast and intricate disclosure system to regulate the offer, offer to sell, offer for sale or sale of securities to the public. To comply with the requirements of the various segments of this system, issuers may be called upon to expend substantial funds in connection with the planning of any interstate offering of securities.

Within this system of disclosure and its components are various "exemptions" from the registration requirements imposed by federal and state securities laws upon the offer and sale of securities. These exemptions generally may apply to the type of security offered or to the particular type of transaction employed. In such cases, the legislatures have determined that the protections afforded by registration requirements are unnecessary. Congress has expressed its reasons for establishing transactional exemptions under federal securities law:

> The [Securities] Act [of 1933] carefully exempts from its application certain types of . . . securities transactions where there is no practical need for its application or where the public benefits are too remote. [H.R.Rep. No. 85, 73rd Cong., 1st Sess. 5 (1973).]

Perhaps the most frequently exempted type of transaction under federal and state law is commonly referred to as the "private offering." Qualifying for such an exemption, however, has historically raised numerous questions as to when an offering is actually private, as opposed to public.

Under the private offering exemption of the Federal Securities Act of 1933 (the "1933 Act"), §4(2), an exemption from the registration and prospectus requirements is provided for "transactions by an issuer not involving any public offering." The scope of this exemption has been considered by the SEC and judicial decisions. The Supreme Court landmark among those decisions is *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953), in which the Court stated, among other things, that the availability of the exemption is determined by the offerees' need for the protection afforded by the registration requirements of the 1933 Act. The need for protection was viewed by the Court as being dependent upon whether offerees have "access" to the same kind of information available in a registration statment and whether they are able to "fend for themselves." Attempts to expand upon and clarify these pronouncements have resulted in confusion and uncertainty on the part of issuers. See, e.g., *SEC v. Continental Tobacco Company of South Carolina*, 463 F.2d 137 (5th Cir. 1972); *Hill York Corp. v. Freeman*, 448 F.2d 680 (5th Cir. 1971); *Strahan V. Pedroni*, 387 F.2d 730 (5th Cir. 1967); *United States v. Custer Channel Wing Corp.*, 376 F.2d 675 (4th Cir. 1967); *SEC v. Tax Service, Inc.*, 357 F.2d 143 (4th Cir. 1966).

In an effort to reduce confusion and to establish a measure of certainty in the private offering area, the SEC recently adopted Rule 146, 17 C.F.R. § 230.146 (1974). In SEC Securities Act Release No. 5487 (April 23, 1974), announcing the adoption of Rule 146, the SEC expressed two reasons for its adoption:

> First, such a rule should deter reliance on that exemption for offerings of securities to persons who are unable to fend for themselves in terms of obtaining and evaluating information about the issuer and in certain situations, of assuming the risk of investment. These persons need the protection afforded by the registration process. Second, such a rule should reduce uncertainty to the extent feasible and provide more objective standards upon which responsible businessmen may rely in raising capital in a manner that complies with the requirements of the [Securities] Act [of 1933].

Hence, in adopting Rule 146, the SEC attempted to both protect investors and provide objective standards for complying with the exemption.

Although the Maryland and Delaware Acts do not contain an exemption using the same language as that employed in Section 4(2) of the 1933 Act, they nevertheless embody a similar concept. The Acts each provide an exemption for:

> [A]ny transaction pursuant to an offer directed by the offeror to not more than twenty-five persons . . . in this state during any period of twelve consecutive months, whether or not the offeror or any of the offerees is then present in this state, if the seller reasonably believes that all the

buyers in this state, other than those designated in paragraph (8), are purchasing for investment; but the Commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, or increase or decrease the number of offerees [Delaware provides "offerings"] permitted, or waive the condition relating to their investment intent . . .]Maryland Securities Act § 26(b)(9); Delaware Securities Act § 7309(b)(9).]

The presence of such an exemption in the Acts and in the securities statutes of more than 30 other states which have adopted the Uniform Securities Act private offering provision in some form, has resulted in forcing issuers to contend with analogous exemption problems under state law as under federal law. An exemption which had in part been designed to aid the small and new business enterprise in acquiring capital by means of a small unregistered offering resulted in actually hindering its efforts. Questions arose under the exemption dealing with the actual number of persons to whom an offer was directed as well as the motives of the purchasers, *i.e.* whether the securities were acquired for "investment" purposes only or were acquired with a view to further distribution by the offeree. Other questions arose under administrative applications of state rules as to the purchasers' degree of "sophistication," "access" to information and the relationships between the issuer and purchasers.

In separate attempts to deal with these problems and to establish some certainty in relying upon their respective private offering exemptions, the Commissioners, prior to the adoption of Rule 146, adopted objective private offering rules pursuant to their respective statutory authority. In doing so, the states of Maryland and Delaware sought to modify the offeree test into the more workable "purchaser" standard. They also sought to establish other objective regulatory criteria to guide compliance with the exemption. Subsequent SEC action in the adoption of Rule 146 involved a refinement of concepts enunciated in the earlier Maryland and Delaware rules. Recognizing that Rule 146 is an improvement, in a number of respects, over their states' current rules, the Commissioners now propose to replace their respective current private offering rules and adopt the New Rule for intrastate private offerings utilizing a number of concepts employed in Rule 146. Adoption of the New Rule is also aimed at accepting compliance with Rule 146, in addition to a minimally burdensome filing requirement, as satisfying the Maryland and Delaware exemption requirements, an alternative particularly applicable to interstate private offerings.

More significantly, because of compliance confusion attributable to the lack of conformity among the various states among themselves and the SEC respecting the conditions of a private offering exemption, the Commissioners, serving two contiguous states, propose to adopt jointly the same rule. The Commissioners hope their joint action will not only contribute to federal and state uniformity respecting Maryland and Delaware private offerings, but also will serve as an example to spur conformity in state securities regulation in other areas where confusion and complexity abound.

Application of the New Rule

The Commissioners intend that the New Rule should serve as a "safe harbor" for private offerings by issuers. By taking the route established in the New Rule, an issuer will enjoy the benefit of a presumption that its offering will not be labeled "public" and, thus, violate the registration requirements of the Acts. The certainty available under the Rule for an intrastate offering in Maryland or Delaware is, however, contingent upon compliance with all of its provisions (which are not as numerous as those imposed by Rule 146). Further, as in the case of Rule 146, even technical compliance with the New Rule will not preserve an exemption under circumstances where the issuer or its representatives are engaged in a scheme to avoid registration. If the issuer seeks a private offering on a basis other than set forth in the New Rule, then such issuer must make application to the respective Commissioner under either section 26(b)(9) of the Maryland Act or section 7309(b)(9) of the Delaware Act, as the case may be, for withdrawal or further conditioning of the exemption.

The rule is not applicable to non-issuer offerings. Such offerings must comply with the statutory provisions of section 26(b)(9) of the Maryland Securities Act and section 7309(b)(9) of the Delaware Securities Act as such provisions have been

interpreted and applied in the past, or seek to qualify for an exemption under other provisions of the Acts.

The essential conditions required to be met for intrastate private offerings are similar to the primary conditions of the present version of the Maryland and Delaware rules. These conditions, which have been recast in the terminology of Rule 146, relate to limitations on the manner of offerings, the nature of the offerees, the number of the purchasers, and the filing of a simple informational form. The Commissioners view these conditions not only as a source of protecting the investing public, but also as objective standards to guide the legitimate raising of capital without registration.

The New Rule is based substantially upon Rule 146. Language previously utilized in the respective Maryland and Delaware rules has given way to language adopted by the SEC in Rule 146. Those aspects of Rule 146 that are appropriate to the Maryland and Delaware Acts are employed by the Commissioners. Rule 146 provisions deemed by the Commissioners as not applicable or not appropriately suited to the states' regulatory schemes, are not included in the New Rule. Although the New Rule may omit certain provisions of Rule 146, its provisions do not conflict with the federal rule. Hence, the New Rule is a substantial embodiment of major conditions of Rule 146, excepting those respecting the furnishing of information and business combinations. The New Rule is divided into the following sections:

A. definitions;
B. conditions to be met;
C. limitations on manner of offering;
D. nature of offerees;
E. number of purchasers;
F. limitations on disposition;
G. filing of Forms D-1 in Maryland and Delaware;
H. SEC Rule 146 compliance—exemption by coordination;
I. federally registered offerings.

In applying specific provisions of the New Rule that are based upon Rule 146, reference should be made to SEC Securities Act Release No. 5487 (April 23, 1974) for an explanation of them. (See those portions of the SEC Release summarizing: definitions; conditions to be met; limitations on manner of offering; nature of offerees; number of purchasers; and limitations on disposition.) As a further aid to applying the New Rule, the following differences between it and Rule 146 should be noted.

Definitions—Related Persons. Although not defined in Rule 146, the Commissioners include a definition of "related persons" in the New Rule. The concept includes the officers and directors, or general and managing partners, of the issuer, their spouses, parents, brothers, sisters and children. This definition is utilized to implement a new provision added to the paragraph "Number of Purchasers." In that paragraph, certain purchasers are excluded from the thirty-five purchaser count. By excluding persons "related" to the issuer from the ultimate purchaser count (and keeping in mind the New Rule's inapplicability to avoidance schemes), the Commissioners do not create a conflict between state and federal regulation but only liberalize the exemption for intrastate offerings.

Limitations on Manner of Offering. The prohibition against solicitation or advertising in the form of a written communication includes an exception different from that found in Rule 146. Rule 146 contains a separate paragraph captioned "Access to or Furnishing of Information." That section enumerates various methods of affording the offeree access to the same kind of information that is required by Schedule A under the 1933 Act. (The federal access requirement is qualified by "reasonableness" and "expense" to the issuer.) The Rule 146 methods of satisfying the access requirements involve standards to be followed by issuers subject to the reporting requirements of the Securities Exchange Act of 1934 and those that are not.

As noted above, failure to meet those standards would not render an offering necessarily public, but would, however, lose the presumption created by Rule 146. The Commissioners view the access requirements of Rule 146 as unnecessarily burdensome for *intrastate private offerings* in light of the disclosure and anti-fraud provisions of the Acts. In attempting to satisfy the federal access requirements, an

issuer's efforts may be comparable to that of registering the offering. The Commissioners feel that an expense equivalent to that of a registered offering is undesirable in a private intrastate undertaking. The access requirements of Rule 146 may deter use of the private offering exemption in intrastate private offerings which frequently involve more limited fund raising objectives than interstate private offerings. In the context of an intrastate offering and recognizing the responsibilities of issuers under the anti-fraud provisions of the Acts, the Commissioners will not pose such informational requirements as a condition of a private offering exemption on an intrastate basis.

The Commissioners recognize, however, that some measure of specified access is necessary in any private offering. Therefore, the New Rule incorporates the requirement that any "written communication" contain "an undertaking to provide [upon request] such information concerning the issuer as would be required to be provided in accordance with [section 7303 of the Delaware Act or section 13 of the Maryland Act]," the anti-fraud provisions of the Acts. No standard method of disclosure is adopted. Counsel should, however, understand that the burden of satisfying this requirement is upon the issuer and, thus, should keep in mind the anti-fraud provisions of the Acts.

Business Combinations. Both the Delaware and Maryland Acts substantially provide that the terms "sale," "sell," "offer" and "offer to sell" do not include any act incident to a vote by stockholders (pursuant to the certificate of incorporation or the applicable corporation statute) on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation. Although the exact language in the two Acts may differ, the concept is the same. The provision embodies the traditional "no-sale theory". For a discussion of the "no-sale theory," its origin and rationale, see 1 L. Loss, *Securities Regulation* 518-24 (1961).

Since any transaction pursuant to this provision would not necessitate registration, there being no offer or sale of a security, it follows, *a fortiori*, that there would be no need to comply with a private offering rule. Therefore, that paragraph of Rule 146 pertaining to "Business Combinations" is inapplicable to Delaware and Maryland intrastate private offerings. The Commissioners note, however, that a transaction failing to meet the requirements of the "no-sale" provision will bring into play state registration and exemption requirements, including the proposed New Rule.

Filing of Form. In the case of all offerings seeking to qualify under the New Rule where the amount sought to be raised exceeds $50,000, the information required by a Form (known as Form D-1 in Maryland and Delaware) to be established by the Commissioners must be filed not later than twenty days after completion of the offering or within six months of the commencement of the offering whichever shall occur first. The filing requirement serves to regulate offerings in excess of $50,000 with respect to number of purchaser abuses, and also provides (based upon past experience) the Commissioners with an invaluable investigative and analytical tool. This filing provision applies even when the issuer relies upon paragraph (h) (see "SEC Rule 146—Exemption by Coordination" *infra*) of the New Rule. Furthermore, the requirement applies to all offerings under [section 26(b)(9) of the Maryland Act or section 7309(b)(9) of the Delaware Act], whether or not in reliance upon the New Rule.

SEC Rule 146—Exemption by Coordination. By virtue of Rule 146's stricter requirements, and the Commissioners' desire to promote uniformity in interstate private offerings of securities, any offering that complies with the conditions required to be met under Rule 146 will be deemed to be in compliance with the New Rule. This provision is qualified, however, by the requirement contained in Form D-1 which provides that the issuer represent that it is in compliance with Rule 146. Hence, the New Rule embodies an exemption by coordination requirement similar to the registration by coordination provisions adopted in most versions of the Uniform Securities Act.

Federally Registered Offerings. The New Rule is inapplicable to any offering registered under the 1933 Act, or with respect to any security for which the documents required by any regulation promulgated by the SEC under section 3(b) or 3(c) of the 1933 Act have been filed. The Commissioners intend, by this provision, to emphasize the spirit and purpose of a private offering exemption, that

an exemption is not available if the offering must be registered or similarly filed with the SEC. For example, if the issuer is required to file with the SEC either a registration statement or a Regulation A filing for a "small offering," the private offering exemption is not available despite the fact that the conditions of the New Rule may appear satisfied within Maryland or Delaware, as the case may be.

Conclusion

The Commissioners look to the proposed New Rule as establishing a measure of certainty with respect to intrastate private offerings so as to create a "safe harbor" for such undertakings. The Commissioners also view the New Rule as an improvement over their present rules, both in substance, textual presentation and with respect to promoting uniformity. Adoption of the New Rule will result in uniform private offering requirements under federal law and the law of two neighboring states, Maryland and Delaware. The Commissioners hope that their mutual adoption of the New Rule will serve to encourage other states to consider the importance of uniformity in the private offering area.

The text of the New Rule is attached hereto, or available from the offices of either of the Commissioners. The Commissioners are hereby requesting written comments on the New Rule beginning as of the date of this release and through November 20, 1974. The effective date of the New Rule, and revisions thereto if any, shall be announced in a subsequent joint release promulgated by the Commissioners. It is presently contemplated that the New Rule will be made effective on a prospective basis. However until such time as the Rule becomes effective, the Commissioners intend to waive the conditions of their present rules in circumstances where compliance with Rule 146 is relied upon as a source for the federal private offering exemption. In order for a waiver of such conditions to be granted by the Commissioners, they will have to receive an opinion of counsel or other evidence of compliance with Rule 146 in addition to the filing of the appropriate state form.

RONALD M. SHAPIRO,
MARYLAND SECURITIES COMMISSIONER
DAVID K. BREWSTER,
DELAWARE SECURITIES COMMISSIONER

PRIVATE OFFERING EXEMPTION

A. Definitions. The following definitions shall apply for purposes of this rule.
   (1) Offeree Representative. "Offeree representative" means any person or persons, each of whom the issuer and any person acting on its behalf, after making reasonable inquiry, have reasonable grounds to believe and believe satisfies all of the following conditions:
      (a) is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of the equity interest in the issuer, except where the offeree is:
         (1) related to such person by blood, marriage or adoption, no more remotely than as first cousin;
         (2) any trust or estate in which such person or any persons related to him as specified in subdivision (1) or (3) collectively have 100 percent of the beneficial interest (excluding contingent interests) or of which any such person serves as trustee, executor, or in any similar capacity; or
         (3) any corporation or other organization in which such person or any persons related to him as specified in subdivision (1) or (2) collectively are the beneficial owners of 100 percent of the equity securities (excluding directors' qualifying shares) or equity interest;
      (b) has such knowledge and experience in financial and business matters that he, either alone, or together with other offeree representatives or the offeree, is capable of evaluating the merits and risks of the prospective investment;
      (c) is acknowledged by the offeree, in writing, during the course of the transaction, to be his offeree representative in connection with evaluating the merits and risks of the prospective investment; and
      (d) discloses to the offeree, in writing, prior to the acknowledgement specified in subdivision (c), any material relationship between such

person or its affiliates and the issuer or its affiliates, which then exists or is mutually understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1: Persons acting as offeree representatives should consider the applicability of the registration and anti-fraud provisions relating to brokers and dealers under sections [13 and 15 of the Maryland Act or 7303 and 7313 of the Delaware Act].

NOTE 2: The acknowledgement required by subdivision (c) and the disclosure required by subdivision (d) must be made with specific reference to each prospective investment. Advance blanket acknowledgement, such as for "all securities transactions" or "all private placements," is not sufficient.

NOTE 3: Disclosure of any material relationships between the offeree representative or its affiliates and the issuer or its affiliates does not relieve the offeree representative of its obligation to act in the interest of the offeree.

(2) Issuer. The definition of "issuer" in section [7302(1)(g) of the Delaware Act or 25(g) of the Maryland Act] applies. Notwithstanding that definition, in the case of a proceeding under the Bankruptcy Act, the trustee, receiver, or debtor in possession is deemed to be the issuer in an offering for purposes of a plan of reorganization or arrangement, if the securities offered are to be issued pursuant to the plan, whether or not other like securities are offered under the plan in exchange for securities of, or claims against, the debtor.

(3) Affiliate. "Affiliate" of a person means a person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with such person.

(4) Material. "Material" when used to modify "relationship" means any relationship that a reasonable investor might consider important in the making of the decision whether to acknowledge a person as his offeree representative.

(5) Related Person. "Related person" means the officers and directors, or general and managing partners, of the issuer, their spouses, parents, brothers, sisters and children.

B. Conditions To Be Met. Transactions by an issuer involving the offer, offer to sell, offer for sale or sale of securities of the issuer that are part of an offering that is made in accordance with all the conditions of this rule are deemed to be transactions exempt under section [7309(b)(9) of the Delaware Act and 26(b)(9) of the Maryland Act].

(1) For purposes of this rule only, an offering is deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemptions provided by section [26(a) of the Maryland Act and 7309(a) of the Delaware Act] or pursuant to a registration statement filed under the Act, that take place prior to the six-month period immediately preceding or after the six-month period immediately following any offers, offers for sale or sales pursuant to this rule. However, during neither of said six-month periods any offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule may be made.

NOTE 1: In the event that securities of the same or similar class as those offered pursuant to the rule are offered, offered for sale or sold less than six months prior to or subsequent to any offer, offer for sale or sale pursuant to the rule, offers to sell, offers for sale or sales may be deemed to be "integrated" with the offering as that concept exists under existing law.

C. Limitations on Manner of Offering. Neither the issuer nor any person acting on its behalf may offer, offer to sell, offer for sale, or sell the securities by means of any form of general solicitation or general advertising, including but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any

newspaper, magazine or similar medium or broadcast over television or radio;

(2) Any seminar or meeting, except, that if subparagraph D(1) is satisfied as to each person invited to or attending such seminar or meeting, and, as to persons qualifying only under subdivision (D)(1)(b), those persons are accompanied by their offeree representative(s), then the seminar or meeting shall be deemed not to be a form of general solicitation or general advertising; and

(3) Any letter, circular, notice or written communication, except that if subparagraph D(1) is satisfied as to each person to whom the communication is directed and the communication contains an undertaking to provide such information concerning the issuer as would be required to be provided in accordance with [section 13 of the Maryland Act or section 7303 of the Delaware Act] on request, such communication is deemed not to be a form of general solicitation or general advertising.

D. Nature of Offerees. The offeree must be a related person, or the issuer and any person acting on its behalf who offer, offer to sell, offer for sale or sell the securities shall have reasonable grounds to believe and shall believe:

(1) immediately prior to making any offer, either:

a. that the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

b. that the offeree is a person who is able to bear the economic risk of the investment; and

(2) immediately prior to making any sale, after making reasonable inquiry, either:

a. that the offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

b. that the offeree and his offeree representative(s) together have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment and that the offeree is able to bear the economic risk of the investment.

E. Number of Purchasers.

(1) There may be no more than 35 purchasers of the securities of the issuer from the issuer in any offering pursuant to the rule.

NOTE: See subparagraph B(1) and the note thereto as to what may or may not constitute an offering pursuant to the rule.

(2) For purposes of computing the number of purchasers for subparagraph E(1) only:

a. the following purchasers shall be excluded:

(1) any relative or spouse of a purchaser and any relative of such spouse, who has the same home as such purchaser; and

(2) any trust or estate in which a purchaser or any of the persons related to him as specified in subdivision E(2) (a)(1) or (3) collectively have 100 percent of the beneficial interest (excluding contingent interest);

(3) any corporation or other organization of which a purchaser or any of the persons related to him as specified in subdivision G(2) (a)(1) or (2) collectively are the beneficial owners of all the equity securities (excluding directors' qualifying shares) or equity interest; and

(4) any person who purchases or agrees in writing to purchase for cash in a single payment or installments securities of the issuer in the aggregate amount of $150,000 or more.

NOTE: The issuer would have to satisfy all the other provisions of the rule with respect to the purchasers specified in subdivision E(2)(a).

(5) any related person of the issuer.

b. there shall be counted as one purchaser any corporation, partnership, association, joint stock company, trust or unincorporated organization except that if the entity was organized for the specific purpose of acquiring the securities offered, each beneficial owner of equity interests or equity securities in that entity shall count as a separate purchaser.

E. Limitations on Disposition. The issuer and any person acting on its behalf shall

exercise reasonable care to assure that the purchasers of the securities in the offering are not taking with a view to distribute the securities. Reasonable care includes, but is not limited necessarily to, the following:

(1) making reasonable inquiry to determine if the purchaser is acquiring the securities for his own account or on behalf of other persons;

(2) placing a legend on the certificate or other document evidencing the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities;

(3) issuing stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, making a notation in the appropriate records of the issuer; and

(4) obtaining from the purchaser a signed written agreement that the securities will not be sold without registration under the Act or exemption therefrom.

G. Filing of Form [D-1]. Where the amount of the offering exceeds $50,000, the information required by [Form D-1] shall be filed with the [Maryland Division of Securities or the Delaware Department of Justice] not later than twenty days after completion of the offering, or within six months of the commencement of the offering, whichever occurs first. However, all offerings regardless of amount shall comply with all other requirements of this rule. This paragraph applies even when the issuer relies upon paragraph H of this rule. Furthermore, this requirement applies to all offerings under section [26(b)(9) or 7309(b)(9)], whether in reliance upon this rule or not.

H. SEC Rule 146—Exemption by Coordination. Any offering that complies with the conditions required to be met under SEC Rule 146 under the Securities Act of 1933 are deemed to be in compliance with this rule, upon receipt by the [Maryland Division of Securities or the Delaware Department of Justice] of the issuer's representation in Form D-1 that the issuer has complied with the conditions of SEC Rule 146.

NOTE: The applicability of the requirements of paragraph G to this paragraph H.

I. Inapplicability to Offerings Federally Registered. No exemption from registration is available under this rule with respect to any security being offered for which a registration statement has been filed under the Securities Act of 1933, nor with respect to any security for which the documents required by any regulation promulgated by the Securities and Exchange Commission under section 3(b) or 3(c) of that Act.