Registration Problems under the Federal Securities Act-Resales Following Rule 133 and Exchange Transactions

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REGISTRATION PROBLEMS UNDER THE FEDERAL SECURITIES ACT—RESALES FOLLOWING RULE 133 AND EXCHANGE TRANSACTIONS*

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Introduction

Comprehension of important Securities and Exchange Commission policies in supervising the securities markets requires an analysis of the perplexing interpretative problems involving resales of securities following certain transactions that are claimed to be exempt from the registration provisions of the Securities Act. In the economic climate of the past few years, characterized by a record volume of capital formation required by expanding American business and industry and a growing public demand for corporate securities as a medium for investing individual savings, new patterns of financing have emerged.1 Transactions involving mergers, consolidations and transfers of assets under Rule 1332 and exchanges of securities effected under Section 3(a)(9)3 of the Securities Act have resulted in large distributions of securities to the public without the protection afforded by the registration process.

Investigations conducted by the Commission have disclosed that considerable quantities of capital have been raised through the sale of unregistered securities in transactions where substantial doubt exists whether the exemptions from registration relied upon by the issuers were, in fact, available. In some of these cases the nature of the business transactions raises close legal questions respecting the necessity for registration. Other cases clearly involved illegal schemes to evade the registration requirements of the Securities Act. The effect, in both instances, has been to place in the channels of commerce large blocks of stocks without providing public in-

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1 The aggregate dollar amount of securities registered with the Commission under the Securities Act of 1933 in fiscal year 1956 was $13.1 billion; $14.6 billion in fiscal year 1957; and is estimated to be $16.8 billion in fiscal year 1958.

The market value of sales of securities effected on registered and exempted exchanges expressed in millions of dollars was $29,156 in calendar year 1954; in calendar year 1955 it was $39,250; in calendar year 1956 it was $36,360; in calendar year 1957 it was $33,360; and in the period January-May 1958 it was $12,805.

2 See note 28 infra for the text of this rule.

3 See note 49a infra for the provisions of this section.
vestors with adequate business and financial facts on which an informed investment judgment can be predicated.4

In view of the widespread reliance by issuers of securities and the financial community on Rule 133 and Section 3(a)(9) of the Securities Act to accomplish some business objective without registration of the securities involved, the Commission has undertaken a thorough re-examination of their application to various types of business transactions. Rule 133, commonly referred to as the “no-sale” rule, is an interpretation promulgated by the Commission that qualifies the definition of “sale” contained in Section 2(3)5 of the Securities Act. It states, in effect, that, for purposes of registration only, the issuance of securities in certain statutory reorganizations does not involve a sale.6 Section 3(a)(9) exempts from the registration requirements exchanges of securities “by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.”

The Commission is presently considering certain proposed rules, which it intends to promulgate for public comment, that will define the circumstances under which Securities Act registration of the securities to be resold to the public following these statutory reorganizations and exchanges, will be required. The purpose of this article is to analyze the legal theories pertaining to the “no-sale” rule and the exchange exemption, and to suggest the types of situations where the policy and objectives of the statute require the registration of securities issued in these transactions upon resale to the public. Definitive policies of the Commission will, of course, not be adopted until after the Commission has had the opportunity to study carefully all the public comments which might be addressed to its proposed new rules.

The “Free Stock” Contention

In its attempt to enforce the registration provisions of the Securities Act, the Commission is frequently confronted with the contention that the stock emerging out of Rule 133 or exchange transactions has been “freed” from the registration requirements. This position is based on the theory that the recipients of the stock in these transactions may resell the securities without registration in reliance upon the exemption afforded by the first clause of Section 4(1).7 This provision grants an exemption for “trans-

4 The purpose of the Securities Act of 1933 is recited in its title as follows: “To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . . .”


6 While Rule 133 is an interpretative rule defining the word “sale,” there is a natural tendency to consider it as an exemptive rule, since it relieves an issuer of securities from the necessity for filing registration statements under certain conditions.

actions by any person other than an issuer, underwriter, or dealer.” The
effect of this contention is to permit the public distribution of unregistered
securities in purported reliance upon two successive exempt transactions.
The first exemption claimed covers the issuance of securities in connection
with the particular reorganization or exchange transaction. A second ex-
emption is claimed for resales of such securities to the public on the grounds
that the seller is neither an issuer, underwriter or dealer.

Some perspective to understanding the complex legal problems created
by the “no-sale” theory and the exchange exemption will be afforded by
first discussing the term “underwriter.”

The Concept of Underwriter

The definition of “underwriter” in the Securities Act has far-reaching
implications to issuers and purchasers of securities in solving registration
problems. Either the issuer or purchaser, or both, may incur statutory lia-

ability under Section 12(1) of the Securities Act if resales of unregistered
securities are made in connection with what a court may conclude as constit-
tuting a distribution in violation of Section 5.

Notwithstanding that Sec-

The term 'underwriter' means any person who has purchased from an issuer with a view
to, or offers or sells for an issuer in connection with, the distribution of any security, or partici-

pates or has a direct or indirect participation in any such undertaking, or participates or has a
participation in the direct or indirect underwriting of any such undertaking; but such term
shall not include a person whose interest is limited to a commission from an underwriter or
dealer not in excess of the usual and customary distributors' or sellers' commission. As used in
this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or
indirectly controlling or controlled by the issuer, or any person under direct or indirect com-
mon control with the issuer.”

Any person who—

“(1) offers or sells a security in violation of section 77e of this title . . . shall be liable to
the person purchasing such security from him . . . .”

“(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any
person, directly or indirectly—

“(1) to make use of any means or instruments of transportation or communication in
interstate commerce or of the mails to sell such security through the use or medium of any
prospectus or otherwise; or

“(2) to carry or cause to be carried through the mails or in interstate commerce, by any
means or instruments of transportation, any such security for the purpose of sale or for delivery
after sale.

“(b) It shall be unlawful for any person, directly or indirectly—

“(1) to make use of any means or instruments of transportation or communication in
interstate commerce or of the mails to carry or transmit any prospectus relating to any security
with respect to which a registration statement has been filed under this title, unless such pro-
spectus meets the requirements of section 77j of this title; or

“(2) to carry or cause to be carried through the mails or in interstate commerce any such
tion 12 places the liability on the selling person, certain situations may rise, particularly if an agency relationship is created, where the issuer of securities may be held liable by a purchaser for sales effected by the person deemed to be an underwriter. Furthermore, if the underwriter has been held liable under Section 12(1) for violating Section 5, he, in turn, might have an action against the issuer to the extent of the recovery.\textsuperscript{11}

In the context of the Act, the term "underwriter" has a scope far broader than its common meaning in financial parlance. It is defined to include "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security . . . , or participates . . . in any such undertaking."\textsuperscript{12} As the House Committee Report stated, it not only includes the "ordinary underwriter, who for a commission promises to see that an issue is disposed of at a certain price, but also includes as an underwriter the person who purchases an issue outright with the idea of then selling that issue to the public . . . (and it is broad enough to cover those persons)\textsuperscript{13} . . . termed participants in the underwriting or outright purchase, who may or may not be formal partners to the underwriting contract . . ."\textsuperscript{14} The definition of underwriter has a direct bearing upon the exemption from registration afforded by the first and second clauses of Section 4(1) of the Act.\textsuperscript{15} As noted above, the first clause exempts "transactions by any person other than an issuer, underwriter or dealer." The second clause exempts "transactions by an issuer not involving any public offering."

The basic concept of the Securities Act is to require registration of securities offered for sale in interstate commerce by issuers, underwriters

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\textsuperscript{11} Although neither of these theories of liability is mentioned, the Commission held In the Matter of Hayes Manufacturing Corporation, 23 S.E.C. 574, 587 (1946), that the resulting possibility of contingent liability for earlier violations of the registration provisions by statutory underwriters required disclosure of the fact in the registration statement of the issuer.

\textsuperscript{12} See note 8 supra.

\textsuperscript{13} Continuity supplied.

\textsuperscript{14} H.R. Com. REP. No. 85, 73d Cong., 1st Sess. 13 (1933).

\textsuperscript{15} See note 7 supra.
or dealers unless some exemption is available. The Commission has long regarded the term "distribution," as used in defining the term "underwriter," to be essentially equivalent to the term "public offering." A "public offering" has been broadly defined by the United States Supreme Court to include transactions in which purchasers or offerees need the protection afforded by registration. Consequently, a person who buys unregistered securities from an issuer with a view to reselling them, or who participates in the transaction by which the securities move from the issuer to ultimate investors, may, unwittingly, be acting as an underwriter, in the statutory sense, if the resales are deemed to involve a public offering.

In order to carry out the registration objectives embodied in the Act, the Commission is compelled to examine the stream of transactions in which securities flow from the issuer to the ultimate purchasers. Thus, where a private sale of securities by an issuer is made to a person who intends to resell them to others, the circumstances involving the resales are included in determining whether or not the whole transaction constitutes a public offering. The Commission must view the transactions as a whole in terms of their overall purpose and effect and not be limited to a consideration of whether the individual acts comprising the whole may happen to fit within the literal language of some exemptive provisions.

A person charged with being an underwriter cannot isolate the resales which he has effected from resales made by others which, when the transaction is viewed as a whole, point to a public offering of the issuer's securi-

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10 Note that by definition a person becomes a statutory underwriter when he has the requisite intent to distribute the acquired securities or to participate in such a distribution. Therefore such a person is not even permitted to offer securities which are not registered because of the prohibition of Section 5(c) of the Act, 15 U.S.C. § 77c(c) (1954).
18 In regard to resale of an issuer's securities, the Commission has defined the term "distribution," as used in 15 U.S.C. § 77b(11) (1954), in its Rule 140, 17 C.F.R. § 230.140 (1949), to include situations where a person primarily engaged in the purchase of the securities of any one issuer sells its own securities to furnish the proceeds with which to acquire the securities of such issuer.
19 See Rule 142, 17 C.F.R. § 230.142 (1949), for the definition of "participates" and "participation" as used in Section 2(11) of the Securities Act of 1933 in relation to certain transactions. Note the inclusion in this rule of the phrase "who purchases such securities for investment and not with a view to distribution."
"Participation" in an underwriting means participation in the underwriting as such and does not include a person merely furnishing another with money to act as an underwriter. Conference Report on Securities Act, H.R. REP. No. 152, 73d Cong., 1st Sess. 24 (1933).
20 It is believed that reliance upon the exemptions afforded by Section 3(a)(9), (10) and (11) and 4(1) (first and second clauses) of the Securities Act of 1933, 15 U.S.C. §§ 77c(9), (10) and (11) and 77d(1), must be considered in the light of the definition of "underwriter" contained in Section 2(11) of the Act, 15 U.S.C. § 77b(11) (1954).
ties. This principle was recently enunciated by the Commission in its revocation proceedings against certain broker-dealers who participated in the 1955-56 convertible debenture financing of the Crowell-Collier Publishing Company. The issuer sold unregistered debentures, in reliance upon the private offering exemption, to a limited number of purchasers who represented that they had acquired the securities for investment and not for resale. However, about one-third of the original 27 purchasers signing investment letters allotted portions of their purchases to a total of 59 additional persons from whom, in turn, investment representations were obtained. In the Matter of Dempsey & Company the respondents, a registered broker-dealer and one of the original purchasers, argued that the record in the instant proceeding contained no evidence regarding the transactions by other members of the original group of purchasers of the debentures. The Commission rejected this contention. It held respondents to be statutory underwriters and that they had violated the registration provisions since they had participated, as one member of a group, in the distribution of unregistered securities. The Commission said:

... for respondents to sustain their contention that registrant was not involved in a public offering because there were only about 25 purchasers, it would be necessary for them to show that the original group to whom Elliott offered the debentures and the group to which registrant made sales did not together exceed the limitation relied upon, and this showing has not been made.

A seller, and particularly a registered broker-dealer, may not safely rely on a claim of a private offering exemption when he does not have knowledge of the identity and number of the original offerees and purchasers and of whether such purchasers intend in turn to offer and sell to others.

In the circumstances of the Crowell-Collier case the Commission decided that the principal broker-dealer firms involved had acquired the debentures with a view to, and had participated in a distribution. The converse of taking securities "with a view to distribution" is "purchasing for investment and not for resale." Thus, where a purchase of securities is made

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24 Apparently the phrase "purchase (take, acquire, etc.) for investment," as related to the Securities Act of 1933, had its origin in an interpretative inquiry to the Chief of the Securities Division, Federal Trade Commission, in October, 1933, in which it was stated that a person would take shares "solely for an investment and not for the purpose of resale." The reply of the Division stated, in part: "And since the agreement . . . to purchase all shares of the new issue not taken up by the old stockholders is for the purpose of investment and not for resale . . . it is apparently not to be considered an underwriter."
from an issuer by a person, or a small group, who takes the securities for investment, it is probable that a public offering is not involved, and that registration is not required.26

The application of the expression "purchasing for investment" must be ascertained by reference to the intention of the purchaser at the time of acquisition. A person's intent can ordinarily be discovered only by weighing objective evidentiary factors and not by relying on self-serving statements—such as are usually contained in so-called "investment letters"—that a particular purchase was made for investment. One of the most significant, although not necessarily conclusive, of the relevant evidentiary factors to be considered in determining investment intent is the length of time elapsing between the acquisition and resale of the securities. The longer the period of retention, the stronger might be the inference that the securities had been purchased for investment. Where, however, resales are proposed after short retention periods, a heavy burden is placed upon the purchaser to establish that when the securities were acquired, a premeditated plan to participate in a distribution did not exist.27

The concept of taking for investment does not, of course, preclude for all time the right of a purchaser to resell the securities without becoming an underwriter. The obligations of a statutory underwriter should not be imposed on ordinary investors for whose protection and benefit the Securities Act was enacted and is administered. The registration provisions of the Act are applicable only to public offerings of securities and not to trading transactions. If, at the time of acquisition, a purchaser did not intend to resell or participate in an undertaking to distribute the security under circumstances amounting to a public offering, resales would constitute trading transactions.

A recent administrative decision of the Commission illustrates the type of case where the existence of a premeditated plan to make a distribution negated the representation of taking for investment. A limited number of large purchasers acquired subordinated debentures and common stock in a


27 See Opinion of General Counsel, Securities Act Release No. 1862 (1938). Although this opinion relates to Rule 142, which in effect excludes the so-called "old-fashioned" underwriter from the statutory definition of an underwriter, the considerations relating to purchases for "investment" should be the same in all situations.

Another evidentiary factor indicated in Release No. 1862, which deserves to be mentioned, relates to the character of the purchaser's business. The opinion stated that "in the case of a securities dealer or an investment banking house, the nature of the business ordinarily carried on would create an extremely strong presumption of purchase for resale." In order to overcome this presumption "it would be necessary to establish by the clearest kind of evidence that the scope and character of the person's business were consistent with the purchase of large blocks of securities for investment rather than with a view to distribution."
company organized to engage in a speculative venture. The securities had been purchased with the intent to hold them until the business would become established. Since the purchasers had the preconceived intention, at the time of acquisition, to liquidate their holdings when this point in the development of the company would be reached, the Commission determined that registration would be required prior to any public offering.

Another significant ruling by the Commission interpreting the phrase "with a view to distribution" involved a sale by a controlling person of a large block of common stock in an unseasoned, highly speculative oil venture to a single purchaser in a private transaction. Some months later, the financial condition of the purchaser became critical and it desired to make a public offering of its holdings. Although the purchaser represented that the company was unwilling to register the securities to be sold, the Commission denied a request for assurance that it would not take action if the securities were sold without registration. The Commission was not persuaded that the purchaser had not acquired the securities with a view to their distribution. The speculative character of the securities, the nature of the purchaser's business and its precarious financial condition at the time of acquisition were relevant objective facts that negated investment intent.

In its release describing the convertible debenture financing of the Crowell-Collier Publishing Company, the Commission pointed out the dangers of making or relying on vague representations of investment intent by persons who do not have a clear understanding of the meaning of that term under the Securities Act. An exemption for an alleged private offering originally made to a restricted group of persons may be destroyed and the original purchasers may be transformed into statutory underwriters where the participations are subdivided or resold to others. In part, the Commission commented as follows:

An issuer may not establish a claim to an exemption under Section 4(1) merely by collecting so-called "investment representations" from a limited group of purchasers if in fact a distribution by such persons occurs. Counsel and their issuer and underwriter clients cannot base a claim to exemption from registration under the Securities Act upon the mere acceptance at face value of representations by purchasers that they take for investment and disclaim responsibility for investigation and consideration of all relevant facts and circumstances pertinent to a determination that the transactions do not involve a public offering. A representation by a purchaser that he is taking for "investment" when in fact he concurrently is dividing a participation among others or reselling a portion of a commitment to others is worthless. Issuers, underwriters or counsel cannot claim that a transaction does not involve a public offering if they do not know the identity and num-

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ber of initial offerees or purchasers or whether such purchasers offer and sell to others.

**Rule 133**

During the course of the Commission's administration of the securities statutes a vast volume of unregistered securities have been issued in connection with corporate reorganizations. Under Rule 133 securities issued in mergers, consolidations, recapitalizations and transfers of assets effected pursuant to state statutes providing that a favorable vote by a majority of stockholders will bind all stockholders (with appraisal rights for dissenters) are not subject to the registration provisions. On the other hand, voluntary exchanges made by a person or corporation to the individual public security holders of another company are subject to registration. Voluntary exchanges, however, have constituted only a small fraction of the total offerings registered under the Securities Act, and are insignificant in relation to the total amount of securities involved in corporate acquisitions and mergers.

From the present time back to the enactment of the Securities Act contrariety of opinion among practitioners, regulators and other students of the securities laws has existed as to the soundness of the legal theory of Rule 133 relieving securities issued in these types of statutory corporate reorganizations from the registration requirements. As mentioned above, 28 29 30 Note that where no remuneration is paid to solicitors in voluntary exchange transactions which are entirely intracorporate in nature, such as reclassifications or reincorporations, the exemption afforded by Section 3(a) (9) would be available.

28 17 C.F.R. § 230.133 (Supp. 1958) reads as follows:

"For purposes only of Section 5 of the Act, no 'sale,' 'offer,' 'offer to sell,' or 'offer for sale' shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in control, as defined in Section 368(c) of the Internal Revenue Code of 1954, of such other person, under such circumstances that the vote of a required favorable majority (a) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (b) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings."

29 Note that where no remuneration is paid to solicitors in voluntary exchange transactions which are entirely intracorporate in nature, such as reclassifications or reincorporations, the exemption afforded by Section 3(a) (9) would be available.

30 The legal theory is criticized by Louis Loss, former Associate General Counsel of the Securities and Exchange Commission, as "unforgivably formalistic." Loss, Securities Regulation 336 (1951). Also see Field, Some Practical Aspects of a Merger, 60 Harv. L. Rev. 111-12, 1092 (1947), where the author refers to a passage contained in H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) to the effect that the exemption afforded to judicially supervised reorganizations is not broad enough to include reorganizations without such supervision and concludes that the Commission's interpretation "ignores the substance of the transaction."

31 Page 2 supra.
the rule qualifies the definition of "sale" contained in the Securities Act by stating that, for purposes of registration, the issuance of securities in such reorganizations does not involve a sale.\textsuperscript{32} The legal theory supporting this "no sale" interpretation is that the securities transactions that accomplish the reorganization occur solely by operation of law through the exercise by stockholders of their franchise to vote as members of a corporate body.\textsuperscript{33} The voting rights of stockholders to accept or reject, as a class, a proposed reorganization plan are created, and the procedures to consummate the transactions are governed, exclusively by the laws of the interested states. Proponents of the validity of the theory underlying the rule assert that the exercise of voting rights by stockholders, acting as a class to exchange or alter their securities, does not have the same legal effect as that of making a choice as an individual to accept or reject a security offered in exchange for another security.\textsuperscript{33a} The exchange or alteration occurs, not because the

\textsuperscript{32} Rule 133 was promulgated in 1951. It was amended to its present form in 1954 to reflect a change in the Internal Revenue Code. The "no-sale" theory was originally adopted as a note to Rule 5 of registration Form E-1 by Securities Act Release No. 493 in 1935. The form was discontinued in 1947; however, the "rule" was considered to be "interpretive" rather than "substantive" and was administratively adhered to by the Commission until its formal adoption.

\textsuperscript{33} A thorough exposition of the theory is treated of in Brief of S.E.C., National Supply Co. v. Leland Stanford, Jr. University, 134 F.2d 689 (9th Cir. 1943), cert. denied, 320 U.S. 773 (1943). In this case, the plaintiff, a stockholder of one of two corporations involved in a consolidation, sought to recover from the successor corporation on the ground of allegedly misleading solicitation material and unfairness in the terms of the consolidation, and also on the ground that the Securities Act had been violated by reason of failure to register the stock of the consolidated company. The Commission's brief as amicus curiae stated, in part:

"But consolidations such as the one involved in this case and mergers under related provisions of law are not comparable to the various exchange situations just discussed. In such consolidations and mergers the alteration of the stockholder's security occurs not because he consents to an exchange, but because the corporation by authorized corporate action converts his security from one form to another. That is to say (as indicated by the Note to Rule 5), there is no sale where (1) the vote of the stockholders is effective (subject to directors' action and other statutory requirements) as corporate action and (2) this action binds all stockholders, assenters, dissenters, and non-voters alike (subject only to appraisal rights of dissenters). The essence of the Commission's construction, as expressed in the Note, is that in such cases a proposed corporate act is submitted to stockholders to be accepted or rejected by them as a class, in their capacity as members of the corporate body. Even though the stockholder may participate in the vote which results in changing his rights as a stockholder, his action in so doing is the action of a member of the corporation exercising his franchise, rather than the action of a security-holder choosing to accept an offer of exchange made to him as an individual; and obversely, the solicitation of his vote is nothing more than a request for the exercise of his franchise as a member of the corporation, not an offer of exchange or sale of new securities to him as an individual. He is functioning precisely as he would be if he were voting on a charter amendment which would, for example, change the corporate purposes. The fact that his rights will be changed if the consolidation or merger is effected is a mere incident of the corporate action in which he is participating."

\textsuperscript{33a} See Securities and Exchange Corporation, Report on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, August 7, 1941, which stated in part:

"Sections 2(3) and 3(a)(9) of the act make it clear that an offer of a security in exchange
stockholder consents, but because of the corporate action authorized by a specified majority of the interests affected. They conclude that the prime element of a contract of sale, namely, mutual assent between the corporation and the individual stockholders, are lacking.  

In October, 1956, the Commission itself struck at the validity of this legal theory. It published for public comment a proposed rule which would have redefined the terms “offer,” “offer to sell” and “offer for sale” to include the solicitation of a vote, consent or authorization of stockholders of a corporation in favor of mergers, consolidations, reclassifications of securities and transfers of assets. The proposed new rule would also have provided that a “sale” was deemed to occur when the approval of stockholders to the transaction was obtained.

After considering the public comments, both written and oral, on the proposed new rule, the Commission announced that it would defer adoption of the contemplated revision to Rule 133 pending further examination of the complex Securities Act problems created by statutory reorganizations. This study has continued to the present time, both within the Commission and among members of the securities bar. At the moment of preparing this article, the Commission had not yet announced any new proposals dealing with resales of securities issued in transactions encompassed under Rule 133. However, clarification of the application of the Securities Act registration provisions to statutory reorganizations, and particularly to resales of the securities issued in these transactions, may be expected momentarily.

The basic legal theory supporting the proposed rescission of the present Rule 133 is that Section 2(3) of the Act defines the word “sale,” in terms broader than its commercial or common law contractual meaning, to include every disposition of a security for value. Since a disposition of a new security for value occurs in many of these reorganizations to at least some for another is a ‘sale’ when each offeree may accept or reject the offer individually. When, on the other hand, as in mergers, consolidations, and certain reorganizations, the offerees are asked to accept the new security as a group and not individually, the act is not specific. The Commission has interpreted the act as not requiring registration in such situations. It did not reach this result because of any belief that registration would be inappropriate where securities are issued in such exchanges. Moreover, the interpretation was arrived at in spite of the fact that it narrowed the Commission’s jurisdiction over many corporate transactions of vital significance to security holders. The Commission felt that the language and structure of the act pointed to this result.”

An illuminating exposition of the rationale of the non-applicability of the registration provisions to these types of reorganizations is found in SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, Pt.VII 249 (1938).

of the stockholders of the constituent companies, the Commission believed that the statute could properly be construed as conferring jurisdiction to require registration of the securities issued in these transactions. Under other statutes administered by the Commission, a sale of securities is deemed to have been made in these types of transactions. The proposal to interpret the word "sale" as applying to statutory reorganizations for registration purposes under the Securities Act would have eliminated an apparent illogical inconsistency with these other statutes.

Notwithstanding the fact that a sale of securities does take place, at least for some purposes, in consummating Rule 133 transactions, real difficulties arise in attempting to give substance in these transactions to the apparent intent and purpose of the registration requirement of the Act as limited by Section 4 relating to exempt transactions. On the basis of the exhaustive analysis that the Commission has been making of the types of situations specified in Rule 133 and the manner in which it would appear that the registration provisions would apply to such transactions and the activities of the persons involved, in the event that the transactions were treated as involving sales to stockholders for purposes of registration, the following conclusions are suggested: (1) Rule 133 represents a reasonable interpretation of the Securities Act in respect to the inapplicability of the registration provisions to statutory mergers, consolidations, reclassifications and transfers of assets; (2) the interpretation of "sale" to these types of transactions, which is supported by 24 years of administration as well as judicial sanction in the Leland Stanford case, is not inconsistent with the broad purposes of the Act as derived from its structure and history; (3) the prohibitions of Section 5 relating to the time and circumstances under which a security may be offered, sold, or delivered after sale would not operate effectively or reasonably in such transactions; and (4) the formulation of registration procedures to accommodate the problems peculiar to the types of cases arising under Rule 133 would seriously strain the substantive and procedural structure of the Act.

The study being made by the Commission suggests the following additional conclusions: (5) the transactions covered by Rule 133 involve investment decisions that are expressed by voting or giving a proxy at a corporate meeting and the offers to stockholders to alter their rights are effected by the submission of proposals for their votes or by the solicitation of proxies; (6) controls for the purpose of providing disclosure to investors in these types of transactions should appropriately take the form of regu-

40 See note 33 supra.
lating the process of voting and proxy solicitation; and (7) the existing and proven procedures for proxy regulation should be extended by legislation to cover such corporate reorganizations in cases where sufficient public interest is involved.

The determination of the Commission in 1956 to re-examine the soundness of Rule 133 was caused principally by the occurrence of widespread redistribution to the public, without affording prospective investors the benefits of registration statement disclosures, of securities issued in Rule 133 transactions. Since, under the rule, the issuance of securities in such transactions does not involve a "sale" within the meaning of Section 2(3), an acquisition of such securities is not a "purchase" within the meaning of Section 2(11). Consequently, the registration provisions are normally inapplicable to redistribution of such securities. The "no-sale" theory is patently unsound as a general proposition for all purposes of the Securities Act. It should not foreclose the application of the civil liability and anti-fraud provisions to Rule 133 transactions even though the registration provisions are inapplicable. Furthermore, it should not be applied to thwart the primary objective of the statute—namely, requiring full disclosure in distributions to the public of newly issued securities. If a person acquiring securities in a Rule 133 transaction were deemed to have "purchased" such securities from an issuer and, accordingly, may be held to be a statutory underwriter if he participates in their subsequent distribution, the policy and purpose of the Act would be furthered.

Of course, not every stockholder acquiring securities in a Rule 133 transaction and intending to resell them would be deemed a statutory underwriter. Isolated sales by small security holders would not ordinarily constitute a distribution. Such persons would not be considered underwriters in view of the definition, which applies to those who have purchased from an issuer with a view to distribution or participate in such an undertaking.

The Commission should enunciate the principle that the acquisition of

41 68 Stat. 686, 15 U.S.C. § 77l(2) (1954), amending 48 Stat. 84 (1933), which provides in effect a remedy to a purchaser of a security to recover the consideration paid for such security against any person who offers or sells such security by the use of jurisdictional means when sold by the use of untrue statements of material facts or omissions to state.

42 68 Stat. 686, 15 U.S.C. § 77q(a) (1954), amending 48 Stat. 84 (1933) which prescribes in effect that it is unlawful for any person in the sale of any securities by the use of jurisdictional means to employ any device, to make any untrue statement of a material fact or omission to state, or to engage in any course of conduct which would operate as a fraud upon the purchaser.

43 In Schillner v. H. Vaughan Clarke Co., 134 F.2d 875, 878 (2d Cir. 1943), the Court of Appeals relied upon the phrase "unless the context otherwise requires" to justify the conclusion that the word "sale" in Section 2(3) has a broader meaning for purposes of Section 12(2) than for purposes of Section 5, where this result seemed necessary to accomplish the objective of the Act, and consequently the Court held that the transaction there in question was a "sale" for purposes of Section 12(2) although conceding that it was not a sale for purposes of Section 5.
a security by a stockholder in a Rule 133 transaction does not clothe the security with an exempt status for purposes of subsequent transactions to which the registration provisions would otherwise be applicable. It should then define by rule the circumstances under which distributions of the securities by such stockholders may not be effected without compliance with the provisions of Section 5 of the Act. Care should be used to avoid unnecessary interference with legitimate trading transactions. To state the proposition in general terms, registration should be required for resales of blocks of securities of substantial size which are received by persons who, by reason of their relationship with the constituent companies, may reasonably be deemed to be making a distribution for the issuer.

This policy can be effected by adoption of a rule which should define the term underwriter to include (1) any constituent corporation, other than an issuer, and any person controlling, controlled by or under common control with such constituent corporation who acquired securities in a Rule 133 transaction with a view to their distribution, or (2) any person who pursuant to any contract arrangement or understanding with the issuer (or any person who controls, is controlled by or is under common control with the issuer) directly or indirectly purchases from or sells for stockholders who acquired securities in a Rule 133 transaction under circumstances involving a distribution. For purposes of the rule, the term “distribution” should be defined to exclude certain public offerings of securities not exceeding a specified size, which are resold after Rule 133 transaction by or on behalf of a person deemed to be an underwriter under the proposed rule. The size limitation should distinguish between transactions of a trading character and transactions that have the attributes of a distribution.

This approach to the problem created by distributions of securities arising out of Rule 133 transactions has been suggested by several recent cases. These decisions reemphasized the interpretation that the “no-sale”
rule does not have the effect of "freeing" the securities from the registration requirements, where the Rule 133 transaction was merely a maneuver to effect a public distribution of securities. The articulation of this sound proposition has been of material assistance in stopping attempts to use the rule as a loop-hole to avoid registration. Adoption by the Commission of a rule defining who is an underwriter and what constitutes a distribution in connection with resales of securities issued in Rule 133 transactions would further clarify the impact of the registration provisions and strengthen disclosure objectives of the Act.

Convertible Securities

From time to time, resort to convertible securities becomes a popular medium with both issuers and purchasers, respectively, for capital formation and investment. Since 1933 there appears to have been four periods during which market conditions caused a substantial increase in the volume of convertible securities registered with the Commission, namely, 1936-37, 1945-46, 1951-52 and 1955-56. Although comparable data respecting the

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44a Last fall the Commission rendered a further important interpretation under Rule 133 in a case not involving any of the aspects of fraud, such as were involved in the Micro-Moisture and Great Sweet Grass cases. (Securities Act Release No. 3846, October 10, 1957.) In a proposed merger transaction involving the Schering Corporation, a substantial stockholder of the merging company contemplated selling the shares to be received upon consummation of the merger. The Commission decided that while registration would not be required for the issuance of shares of the surviving company to the security holders of the merging company, the substantial stockholder would be a statutory underwriter if he effected a public distribution of the shares received. Following the receipt of this interpretation, a registration statement was filed to cover the shares to be issued in the merger transactions.

Implicit in this interpretation was the Commission's view that although no sale was deemed to be involved in the transaction of exchange, a sale was involved as to the stockholder who was acquiring with a view to reselling the securities; that is, the concept of "no sale" goes no further than the immediate reorganization exchange. This interpretation does not purport to state that every stockholder who contemplates selling the shares to be received in a reorganization will thereby become an underwriter. It is consistent with the concept that an ordinary investor who acquires securities with a view to resale does not become an underwriter merely because at some future time he disposes of his investment.

46 During the first three years of the Act, the number of convertible issues registered was negligible. In the 1936-37 bulge, approximately 60-80 per cent of the registered convertibles were convertible stock issues. In the 1945-46 period, over 90 per cent of such issues were convertible stock issues. In 1951, stock issues predominated, while in 1952, convertibles were about equally divided between stock and debt issues. In the 1955-56 period, on the other hand, about 60-70 per cent of the registered convertible issues were debt issues.
volume of privately-placed convertible issues is unavailable, it is probable
that market conditions would have caused the same pattern for private
placements that was experienced in connection with registered convertible
issues.

Issuers use convertible securities in preference to other financing media
for two principal reasons. First, the convertible security is viewed as an
indirect method of raising equity capital at a price more favorable than
could be obtained by selling common stock at the current market price.
Where an issuer seeking equity capital believes that the market price of its
common stock is selling below its actual value, or the price it is expected to
attain, he will sell a preferred or debt security convertible into common at
a somewhat higher price. When the common reaches that price, the expec-
tation is that the security will be converted. In effect, the issuer will have
obtained its capital for a smaller number of common shares taken at a
higher unit price than would have occurred if the common had been original-
lly sold. Second, the convertible feature is used to "sweeten" the senior
security in order to facilitate its sale or to compensate for other unattrac-
tive features—such as a subordinated position or a weak asset or earnings
coverage.\footnote{\textit{Pilcher, Raising Capital with Convertible Securities} 57–95 (1955).}

From the viewpoint of the investor it has been stated that "... a really
successful investment operation in the convertible field does not cover a
long period of time. Hence such issues should be bought with the possibility
of long term holding in mind but with the hope that the potential profit will
be realized fairly soon."\footnote{\textit{Graham and Dodd, Security Analysis} 528 (3d ed. 1951).}
Once the market price of the underlying security rises appreciably above the conversion price, the market price of the con-
vertible will fluctuate, both up and down, with the underlying security. The
holder of the convertible is exposed to all the risks of a common stockholder
even though he has paid a premium for a senior position in order to avoid
such risks. If the underlying security rises, investment analysts say that
he should probably sell because the yield becomes unattractive. He should
not convert because he thereby abandons the senior position upon which
the choice of purchasing a convertible was promised. In the opinion of ex-
erts, convertibles should not be purchased as a long-term investment, nor
with a view to converting and holding the common. Rather, they should be
purchased with a view to relatively short-term profit realized from their sale
to someone who wants the underlying security. "The real advantage (of a
convertible privilege) consists, therefore, only of the opportunity to make
a profit through the sale of the convertible security at the right time."\footnote{\textit{Graham and Dodd, op. cit. supra} note 47, at 533.}
The Commission has been concerned by the problem of whether the purchasers of a convertible security in a private placement (for which a second clause 4(1) exemption is claimed)\textsuperscript{49} may sell without registration the underlying common stock received upon conversion of the convertible security. In view of the inherent characteristics possessed by convertible securities, it would appear that an issuer assumes a heavy, if not impossible, burden of proving that the entire transaction will not involve a public offering of the underlying securities.

In the typical case involving a private placement of convertible securities, the intention of the purchaser, upon acquisition of the convertible security, is to resell the convertible or underlying security at a profit, if and when the relationship between the market price of that security and the conversion price makes that possible. An issuer must be presumed to understand that this is the intention of the purchaser, for, otherwise, the conversion privilege would not serve its intended purpose. At the time of acquisition, the purchaser usually represents to the issuer that he is taking the convertible security for investment and has no present intention of reselling. This representation, however, does not extend to the underlying security. The purchaser of the convertible security is, in fact, the instrumentality through which a public distribution of the underlying security is achieved. He actually performs an underwriting function of participating in its distribution and, therefore, falls within the statutory definition of underwriter.

The issuer relies upon Section 3(a)(9) to exempt from registration the securities issued in the conversion transaction and the continuing offer of the underlying securities prior to conversion.\textsuperscript{49a} The security holders who convert and sell, as well as the issuer, rely upon the first clause of Section 4(1)\textsuperscript{50} as well as upon Section 3(a)(9) to exempt the resale transactions. In the effort to break up the transaction into its component parts, each purporting to possess its own exemption, the substance of the entire transaction by which the convertible and the underlying security are issued and sold and the underlying security is ultimately distributed to the public is ignored.

The argument supporting the exemption for resales of the underlying security is essentially threefold: First, under the “package” theory an offer-

\textsuperscript{49}“Transactions by an issuer not involving any public offering.”


“Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

“... 

“(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;”

\textsuperscript{50}“Transactions by any person other than an issuer, underwriter, or dealer.”
ing of a security immediately convertible into another security involves a simultaneous offer of both securities. From this proposition it is concluded that the underlying security is purchased with the convertible security. Since the purchaser would be entitled to resell the convertible security under the exemption afforded for transactions not involving an issuer, underwriter or dealer (first clause of Section 4(1)) on the supposition that a person acquiring a security in a private transaction (second clause of Section 4(1)) is not an underwriter, it is argued that resales of the underlying security are similarly exempt. Second, Section 3(a)(9) operates to exempt not only the issuance of securities in the conversion transaction but also resales of the underlying security, since a transaction under Section 3(a)(9) creates an exempt security, at least for resales by a non-controlling person. Third, difficult practical problems would be created by making a security holder, who may ordinarily not be deemed to be an underwriter before the conversion, an underwriter after he converts.

1. Support for the “package” theory is found in the negative implication contained in the last sentence of Section 2(3) to the effect that the issue or transfer of a conversion privilege which cannot be exercised until some future date “shall not be deemed to be an offer or sale of” the underlying security. Conversely, it is argued by implication that there must be an offer and sale of the underlying security if the conversion right is immediately exercisable. It is well settled, however, that the holder of a debt security convertible into stock is not, in law or in equity, a stockholder, and has none of the rights of a stockholder prior to conversion. This proposition was established in *Pratt v. American Bell Telephone Co.*,51 where a convertible noteholder claimed the equitable right to participate in a rights offering of new common stock. The court said:51a

During the time the notes were running he was in no sense a stockholder; nor do we find, upon the facts, that he was an equitable stockholder. He had no vested right or title in any particular stock. His rights and interest as a stockholder of the corporation were postponed to the time when he made his option and demanded his stock. Pending this time, the contract gave him the right to payment of the coupons attached to the note and nothing more. Whether he ever would acquire interest in the stock of the company under his contract was conditional, and depended upon the event of his option, and until that was exercised, he had no claim to any stock of the company.

This case was cited for the above propositions as late as October, 1956.52

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51 141 Mass. 225, 5 N.E. 307 (1886).
51a Id. at 230, 5 N.E. at 311.
The last sentence of Section 2(3) refers only to the timing of registration, not to whether registration is required. Although registration is necessary both for the convertible security being sold and the underlying security being offered where the conversion privilege is immediately exercisable, it does not follow that a sale of the underlying security has been made when a purchaser acquires the convertible security. The conversion privilege simply embodies a call upon another security. The legal and economic position of the purchaser, as a senior security holder, is not changed until he exercises his conversion right.

2. Reliance is also placed upon Section 3(a)(9) to exempt not only the transaction of conversion but also the resale of the underlying security. The contention is made that a transaction falling within Section 3(a)(9) creates a security which, except for sales by a controlling person, is permanently exempt from the provisions of Section 5. The Commission, however, has consistently rejected this broad construction of the section, basing its interpretation upon the legislative history.

Section 3 deals with exempted securities, but in the original Act the substance of Section 3(a)(9) was contained in Section 4(3) as an exempt transaction. In the 1934 amendment to the Act, Section 4(3) was transferred to Sections 3(a)(9) and 3(a)(10) for the purpose of permitting dealers to trade in securities issued in exchange transactions during the one-year period following their issuance. The exemption in the third clause of Section 4(1) as it then read would not have been available to dealers by a literal reading, since the exchange would involve a public offering by an issuer for which the Section 3(a)(9) exemption was available but, no registration being in effect, Section 5 would have precluded trading by dealers for one year. The Federal Trade Commission, early in the administration of the Act, recognized the absurdity of this result and concluded that the limitation upon the dealer's exemption presupposes that the issuer is

53 See H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) at page 12, where it is said: "This paragraph also exempts from the concept of 'sale' the giving to a holder of a security, at the time of the sale of such security to the holder, a right either to conversion or a warrant to subscribe, where neither of these rights is immediately exercisable. This makes it unnecessary to register such a security prior to the time that it is offered to the public, although the conversion right or the right to subscribe must be registered. When the actual securities to which these rights appertain are offered to the public, the bill requires registration as of that time. This permits the holder of any such right of conversion or warrant to subscribe to judge whether upon all the facts it is advisable for him to exercise his rights."


55 By amendment in 1954 the dealer's exemption was reduced to 40 days. 68 Stat. 684.

56 48 Stat. 906 (1933), 15 U.S.C. § 77d(1) (third clause) (1954), reads as follows:

"The provisions of section 77e of this title shall not apply to any of the following transactions:

..., or transactions by a dealer (including an underwriter no longer acting as an under-
required to register the new offering. The transfer of Section 4(3) to Sections 3(a)(9) and 3(a)(10) was designed solely for the purpose of codifying this interpretation.\(^{57}\)

Accordingly, by a release issued in 1936,\(^ {58}\) the Commission concluded that Section 3(a)(9) was intended to be a transaction exemption and not a security exemption, that its transfer to Section 3 was intended only to meet the problem of dealer's transactions, and that there was nothing in the intrinsic nature of the securities exempted by Section 3(a)(9) which justified their permanent exemption from registration. Since the 1934 amendment was not intended to alter the fundamental policies of Section 2(11) concerning distributions by underwriters, it is clear that a controlling stockholder of an issuer, who receives securities in an exempt exchange transaction, may not distribute the securities without registration. In *Thompson Ross Securities Co.*,\(^ {59}\) respondent argued that the securities it distributed were exempted securities under Section 3(a)(9) being issued in exchange for other securities in a stock split. The Commission rejected this contention, stating:\(^ {59a}\)

Registrant's argument that the shares which it distributed were exempted under Section 3(a)(9) rests upon two assumptions: (1) that the securities were "exchanged" within the meaning of that section, and (2) that shares issued in "exchange" for outstanding securities under Section 3(a)(9) are forever exempted from registration. Assuming *arguendo* that the first assumption is valid, it is, nevertheless, clear that the argument must fall, because the second assumption is untenable. Unlike securities which fall within Section 3(a)(2) to 3(a)(8), inclusive, of the Act, there is nothing in the intrinsic nature of securities falling within Section 3(a)(9) which justifies their permanent exemption from registration. The basis of the ex-

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\(^{57}\) The report of the Managers on the Part of the House (H.R. REP. No. 1838, 73d Cong., 1st Sess. 40 (1933)) stated with regard to this matter: "The amendments adding new sections 3(a)(9), 3(a)(10) and 3(a)(11) are based upon sections 4(3) and 5(c) of the original act, which are proposed to be repealed. By placing these exemptions under section 3 it is made clear that securities entitled to exemption on original issuance retain their exemption; if the issuer is not obligated to register in order to make the original distribution, dealers within a year are subject to no restriction against dealing in the securities. The result is in line with the Commission's interpretation of the act as it stood before, but the amendment removes all doubt as to its correctness. Section 3(a)(9), which is based upon the first clause of old section 4(3), contains slight verbal changes of a clarifying nature, affirming the Commission's interpretation that the type of commission or other remuneration, the payment of which will remove the exemption is that paid for soliciting an exchange. The changes to this amendment made in conference are intended only to clarify its meaning."

\(^{58}\) Securities Act Release No. 646 (Class C) 1936.

\(^{59}\) 6 S.E.C. 1111 (1940).

\(^{59a}\) *Id.* at 1118.
emtion under Section 3(a)(9) is merely the circumstances surrounding the issuance of securities. The sale to the public of a large block of securities previously exempted from registration when they were exchanged for other securities possesses all the dangers attendant upon a new offering of securities to the public by the issuer. Section 3(a)(9) does not, therefore, permanently exempt securities offered in a transaction of exchange.

The position of the Commission that Section 3(a)(9) was in reality a transaction exemption was again reaffirmed in the 1941 amendment program. It proposed, with the acquiescence of the industry, that Section 3(a)(9), together with certain other subsections of Section 3, be transferred to Section 4 as transaction exemptions.60

Finally, in its release on the Crowell-Collier financing,61 the Commission stated that although Section 3(a)(9) might provide an exemption for the transaction of conversion “it could not afford any exemption with respect to sales of the common stock following conversion” and that “Any other construction of Section 3(a)(9) would encourage wide-scale evasion of the registration and prospectus provisions of the statute by the simple expedient of so-called private sales of convertible securities looking to the public distribution of the underlying security on conversion.”

3. If the exemption afforded by Section 3(a)(9) is not deemed to carry over to a subsequent distribution of securities issued on conversion, absent a control situation, it is argued that many practical difficulties arise. For example, problems would be encountered in ascertaining from numerous purchasers their intentions as to when and over what periods of time their sales activities would occur. There would be difficulties in securing from them the information required to be included in a prospectus concerning underwriting and offering data. Problems of when to file a registration statement and how to keep a prospectus up to date would arise. The necessity of complying with the prospectus requirements would limit the freedom of action of purchasers and place them in a position of assuming an underwriter’s liability under the Act in a situation where they have traditionally regarded themselves simply as “investors.”

Many of these alleged difficulties for the issuer are created by the fact

60 SEC, REPORT ON PROPOSALS FOR AMENDMENTS TO THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934, August 7, 1941 (House Committee print, 77th Cong., 1st Sess. (1941)), stated at page 24:

“The Act exempts certain securities not because of their inherent attributes but because of the circumstances surrounding their issuance. These exemptions are contained in sections 3(a)(1), 3(a)(9), 3(a)(10), 3(a)(11) and 3(b) of the Act. Since these are in reality transaction exemptions rather than security exemptions, the Commission proposes, and representatives of the securities industry agree, that they should be redesignated as transaction exemptions and transferred to section 4.”

61 See note 27 supra.
that privately-placed issues are often sold to a large number of purchasers. Such unwieldy groups strain the concept of transactions not involving any public offering. In any event, economics minimize the problem. The critical factor in converting and reselling is market price. Self-interest of the purchasers would suggest that the distribution of the convertible or the underlying security be accomplished in an orderly method. Since profits would be prejudiced by indiscriminate sales, the purchasing group would probably collaborate in organizing its distribution. The difficulties of complying with the registration requirements enumerated in these cases are not dissimilar to the problems confronting underwriters generally when a distribution is deferred.

To conclude this discussion of the private placement of convertible securities, it is believed that the scope and purpose of the first and second clauses of Section 4(1) and Section 2(11) are applicable to the resales of either the convertible or underlying security and that registration might be required prior to their distribution. In enunciating a policy to govern the registration requirements in these transactions, the Commission would unquestionably consider excluding certain situations and persons where it appears that a large block of securities will not be distributed to the public. The problems involved in obtaining registration of securities distributed to the public following exchange transactions are similar to resales of securities issued in Rule 133 cases and indicate that a similar approach might be adopted.

Conclusion

The Securities and Exchange Commission assumes important responsibilities for preserving public investor confidence in the processes of capital formation. Essential to the maintenance of free and unmanipulated securities markets is the requirement that public investors should be able to make informed investment decisions based upon full disclosure of all pertinent business and financial facts regarding securities which are offered to the public. In recent years, the Commission has observed a growing tendency in the financial community of utilizing Rule 133 and the exchange exemption to effect widespread distributions of unregistered securities.

It seems essential, therefore, that the Commission further clarify its policy respecting the circumstances under which resales of securities issued in these transactions must be registered. This policy should be predicated upon the formulation of rules defining who is deemed to be an underwriter and what constitutes a distribution, for purposes of compliance with the registration provisions, where such resales are affected.