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THE SECURITIES ACT OF 1933: "PRIVATE" OR "PUBLIC" OFFERING

By IRVING M. MEHLER *of the Colorado and New York Bars*

The question relating to the sale of securities to a given number of persons in interstate commerce by the incipient corporation as well as by the corporation of repute and long standing has in a great many instances placed the attorney and the client on the horns of a dilemma. On the one hand we find the corporation in dire need of immediate capital, and on the other hand we find the attorney unable to state precisely the number of persons who may be approached to purchase stock in the corporation without violating the provisions of the Securities Act of 1933 [1] pertaining to the registration of securities.

It is basic that a corporation seeking to raise a sum in excess of $300,000.00 through a public offering of securities in interstate commerce must file a registration statement with the Securities and Exchange Commission. Should the corporation find that its financial straits could be alleviated with an amount less than $300,000.00, it could seek an exemption from registration under the Revised Regulation A [2] upon compliance with the provisions of that regulation. In any event, whether the corporation is seeking a sum in excess of $300,000.00 from the public or whether it is seeking an amount under $300,000.00, compliance with the Act or the regulation, as the case may be, becomes mandatory.

In view of the fact that in the particular instance under discussion the financial needs of the corporation are pressing and a "public offering" under both the Act and the regulation is time consuming, it is the aim of this paper to explore the question of how many persons may be approached to buy stock in a corporation without the transaction being considered a "public offering" and therefore exempt from registration. Or to put the question in another way: When is a sale of the securities of a corporation in interstate commerce to a given number of persons considered a "private offering" and therefore exempt from registration?

I. DEFINITIONS

Before attempting to solve the ultimate problem, it may aid considerably to note how all-embracing some of the following basic working terms are under the Securities Act of 1933:

> (1) The term "security" means any note stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for

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[1] 48 Stat. 74 (1933), 15 U.S.C. Sec. 77c.

[2] 15 U.S.C. Sec. 77c(b) (1953).

a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a goverment or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale," "sell," "offer to sell," or "offer for sale" shall include every contract of sale or disposition of, attempt to offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the

> trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.
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> * * *
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> (7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

II. OFFERINGS

(a) *The Nature of a "Public Offering"*

In speaking of a "public offering," the statute refers to transactions which are exempted from registration under the Act in the following manner:

> The provisions of section 77e of this title shall not apply to any of the following transactions: (1) . . . transactions by an issuer not involving any public offering . . .[3]

The paucity of language and the failure of the statute to even hint at what might constitute a "public offering" has proven to be a source of no uncertain concern to both the lawyer and the client. The courts, too, have been plagued no end in determining the legislative intent pertaining to when a "public offering" shall be deemed to exist; in which event compliance with the statute and its registration aspects become mandatory. A resort to the legislative history of the section aids little in clarifying the congressional intent except as may be gleaned from the House Committee's reference to this exemption as permitting "an issuer to make a specific or an isolated sale of its securities to a particular person."[4]

(b) *Administrative Interpretation*

During the early history of the Act, much confusion arose as to the precise meaning of the second clause of Section 4(1) of the Securities Act which exempts "transaction by an issuer not in-

[3] 15 U.S.C. Sec. 77d (1951).

[4] H. R. Rep. No. 85, 73d Cong. 1st Sess. (1933) 15-16.

volving any public offering." Not only was it brought to the attention of the Commission that small issuers were resorting to so-called "private financing" which in many instances was probably in circumvention of the law, but in addition that large issuers were also resorting to this device to the detriment of the public based on their failure to disclose pertinent information relating to the company.

In view of the dearth of either administrative or judicial interpretation at that time of what constituted a "transaction by an issuer not involving any public offering," the Commission through its General Counsel issued an administrative opinion[5] setting forth the various factors which must be considered in determining the availability of this statutory exemption. It also made clear that the determination of what constitutes a "public offering" is essentially a question of fact, in which all surrounding circumstances are to be taken into account. In the opinion, the Commission set forth the following four principal factors for guidance: (1) The number of offerees and their relationship to each other and to the issuer; (2) the number of units offered; (3) the size of the offering; and (4) the manner of offering.

(1) *The Number of Offerees and their Relationship to Each Other and to the Issuer.*

At the outset it should be remembered that there is no precise number of offerees which may be used as an overall guide in determining when a "public offering" exists. It is also important to note that the word "offerees" is not confined to the number of actual buyers, but rather the number of persons to whom the security in question is offered. Succintly stated, any attempt to dispose of a security would be regarded as an offer within the purview of the first principal factor. Preliminary conversations or negotiations may be considered attempts at disposition if a substantial number of prospective purchasers are dealt with. In such case, the offering might be considered a "public offering" with the statutory prerequisite of registration coming into play.[6]

The question then arises as to what constitutes a substantial number of offerees. Actually, there is no mathematical formula precise enough to answer this particular question. But the basis on which the offerees are selected is a factor of major significance in determining whether a "public offering" exists or not. Consequently, an offering to a given number of persons recruited at random from the general populace on the basis that they are possible purchasers may be considered a "public offering," even though an offering to a much larger group of persons who are all the members of a particular class, i.e., employees of a large concern, might be considered a "private offering." On the other hand, there are instances where an offering confined to a particular group and of-

[5] Sec. Act. Rel. 285 (1935).
[6] 15 U.S.C. Sec. 77d (1951).

fered to a sufficiently large number of persons may nevertheless be considered a "public offering."

The relationship between the issuer and the prospective purchasers is also a matter to be given due weight. Concretely, an offering to persons of a group who should have special knowledge of the issuer is less likely to be a "public offering" than is an offering to the members of a class of the same size who do not possess this advantage. In a case where a group of important executive officers would have a close relationship to the issuer which ordinary employees would not enjoy, the factor of relationship would be particularly important in offerings to employees.

(2) *The Number of Units Offered*

In regard to the denominations of the units, the offering of an unsubstantial number of units might presumably be an indication that no "public offering" would be involved. On the other hand, the offering of many units in small denominations might indicate that the issuer recognizes the probability of a distribution of the security to the public at large. At this time, it would be well to again stress the fact that the purpose of the exemption of non-public offerings would appear to have been to make registration unnecessary in those relatively few cases where an issuer desires to consummate a transaction or a few transactions and where the transaction or transactions are of such a nature that the securities in question are not likely to come into the hands of the public at large.

(3) *The Size of the Offering*

A perusal of the language of the statute[7] reveals that the exemption pertains to "transactions by an issuer not involving any public offering." Apropos the wording of this part of the statute, it would be well to consider not merely the immediate particular transactions between the issuer and the initial offerees, but also the likelihood of a later public offering of all or part of the securities sold. It would therefore appear to follow that the statutory exemption was intended to apply mainly to small offerings, which in their very nature are less likely to be offered to the general public than would be large offerings.

(4) *The Manner of Offering*

In view of the fact that the purpose of the exemption of non-public offering is limited in the main to instances wherein the issuer has in mind to consummate a few transactions with specific offerees, it would appear that those transactions which are negotiated by direct contact between the issuer and the initial purchaser are less likely to be considered "public offerings" than those brought about through the utilization of those means normally used for purposes of public sale and distribution.

It should further be kept in mind that any dealer who might

[7] 15 U.S.C. Sec. 77d (1951).

subsequently purchase securities from an initial purchaser would be required to satisfy himself that the initial purchaser had not purchased with a view to distribution. If the initial purchaser had bought with the intent to distribute, he would be considered an underwriter, and sales by a dealer of securities bought by him from such an initial purchaser, would, as a general rule, not be exempt until at least a year after the purchase of the securities by the dealer. The sale of unregistered securities to a limited number of initial purchasers, therefore leads to a practical situation in which such initial purchasers may have difficulty in disposing of the securities purchased by them. Of course, ultimately each case is to be decided on its own facts and no magical formula may be availed of to fit each and every conceivable situation in order to determine whether the situation is one involving a "public offering" or a "private offering."

(c) *Judicial Interpretation*

Although the interpretation by the Commission as to what constitutes a "public offering" is entitled to great weight,[8] it was for the courts to have the final word as to whether a transaction was to be considered either a "private" or a "public" offering. As we move into the judicial sphere of operations we note that the first case of importance to come before the courts to decide whether a transaction was a "private offering" and therefore exempt from registration under the Act was the case of *Securities and Exchange Commission v. The Sunbeam Gold Mines Co. et al.*[9] In that case the defendant Sunbeam Gold Mines Co., a Nevada corporation, with stockholders in various states of the union, entered into an agreement with another company, the Golden West Consolidated Mines, to purchase all the assets of the latter, subject to the approval of the stockholders of both companies. While the agreement was pending this approval, the defendant company issued through the mails a number of letters—530, to be exact. Of the 530 recipients, 115 were stockholders of the defendant Sunbeam Company; 207 were stockholders of the Golden West Mines; and 208 were stockholders of both companies. These 530 persons were scattered through various states. The letters solicited pledge loan agreements from the stockholders for the purposes of completing the purchase by the Sunbeam Company of the assets of the Golden West Mines and of raising enough money to register a contemplated new issue of stock with the Securities and Exchange Commission. On the basis of these facts, the Commission brought this suit under Section 20(a) of the Act[10] authorizing injunctions against issuance of securities in violation of the Act.

Although the court below, in denying an interlocutory injunction, held that the shareholder's loan receipt was a security within

[8] Campbell v. Degethner, 97 F. Supp. 975, 977 (1951).
[9] 95 F. 2d 699 (C.C.A. Wash.) 1938.
[10] 15 U.S.C. Sec. 77t(a).

the meaning of the Act and that its distribution through the mails over state lines did make it subject to the required registration proceedings, it nevertheless held that such a distribution to stockholders did not involve a "public offering." The language of its conclusion of law is:

> The transactions by the defendants herein, being solely with stockholders of Sunbeam Gold Mines Co. and Golden West Consolidated Mines, all of said stockholders being stockholders of respondent company through merger of said corporations, do not, irrespective of the number of said stockholders, involve a public offering within the meaning of Sec. 4(1) of the Securities Act of 1933, as amended; and the plaintiff's application for preliminary injunction is therefore denied.

On appeal to the Circuit Court of Appeals of the Ninth Circuit, the Appellate Court reversed the lower court and held that the offering of securities was a "public offering" and hence not within the exception to the requirements of the Securities Act of 1933. In coming to this conclusion that the offering involved herein was a public one, the court proceeded to trace the legislative history of the section. In one of the House Reports [11] the court restated the language of the House, to-wit:

> Sales of stock to stockholders become subject to the Act unless the stockholders are so small in number that the sale to them does not constitute a public offering.

In further tracing the legislative history of the section pertaining to "public offerings," the court went on to say:

> Again, in 1934, when the Securities Act was amended, 15 U.S.C.A. Sec. 77b et seq. and notes, a proposal to exempt from registration securities offered by an issuer to its employees was rejected by the Committee of Conference of the two Houses. In this connection, the Managers on the part of the House stated: "The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R. Rep. No. 1838, 73d Cong., 2d Sess., p. 41.
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> These Reports clearly demonstrate that the Congress did not intend the term "public offering" to mean an offering to any and all members of the public who cared to avail themselves of the offer, and that an offering to stockholders, other than a very small number, was a public offering.

[11] H. R. Rep. No. 152, 73d Cong. 1st Sess. (1933) 25.

> Cases are cited by the appellees in which are given interpretations of the word "public" in regulatory statutes. None is shown to have the legislative history of the Securities Act and none applies the rule of strict construction of the instant exception to the general policy of the legislation required by the Supreme Court.
>
> We therefore hold that an offering of securities under the Securities Act of 1933 may be a public offering though confined to stockholders of an offering company, a fortiori where the offerees include the stockholders of another company, though seeking to become stockholders of the offeror.[12]

In this case, the court also pointed out that an issuer of corporate stock who pleads the exemption from registration requirments afforded to transactions not involving any "public offering," has the burden of proving that a "public offering" was not involved. The issuer in this case had clearly failed to establish his burden of proof.

In 1943, another case of importance pertaining to the question of a "public offering" came before the same Appellate Court.[13] In this case, the appellant, who was President of the Merger Mines Corporation, lent to the said corporation 772,541 shares of stock of the said corporation, which were to be used to satisfy the company's stock liability to certain other companies and also its liability to other creditors. It was understood that the articles of incorporation would be amended so as to increase the stock authorization by a million shares, and that the stock would be returned to appellant out of the "new issue of stock."

Acting as amicus curiae, the Securities and Exchange Commission filed a brief addressed solely to the proposition that the court below erred when it decreed that the stock to be offered to appellant and to the 1100 other stockholders of the company need not be registered with any governmental regulatory body. It was argued that, although Section 3(a) (10) of the Securities Act of 1933, as amended,[14] exempts any security that was issued in exchange for outstanding securities or other interests where the terms of issuance and exchange are approved by a court or other proper governmental authority after a prescribed hearing; that in the present case the court found that no such hearing had been held. The court went on to say:

> The hearing must be one "at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear." No one contends that the requirements for such a hearing have been met in the case at bar; for the section provides that the hearing

[12] 95 F. 2d 699, 702 (C.C.A. Wash.) 1938.
[13] 137 F. 2d 335 (C.C.A. Wash.) 1943.
[14] 15 U.S.C. Sec. 77c(a)(10) (1933).

> shall be specifically upon the "fairness" of the "terms and conditions" that are "approved" by the court or other authority.

The Commission then argued that the proposed stock issue did not come within the exemptions of Sec. 4(1) of the Act,[15] which reads as follows:

> Section 4. The provisions of section 5 (making unlawful the failure to register) shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

The Commission also urged that the foregoing provision did not exempt the proposed offering of the company's stock to the 1100 stockholders and cited the *Sunbeam Gold Mines* case in support of its contention.

The Commission further argued that Sec. 4(1) did not exempt any public offering by appellant of the stock acquired by him for resale, for in that event appellant would come within the definition of "underwriter" in Sec. 2(11) of the statute,[16] the pertinent part of that section reading as follows:

> The term "underwriter" means 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 . . .
>
> The court then went on to say:
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> As the amicus curiae brief points out, the appellant Pearson will probably reoffer to the public at least a part of the shares that they acquire from the company. Accordingly, registration would have to be effected by the appellant corporation before the shares could be reoffered by Pearson.
>
> Furthermore, there is no need for the decree in this case to contain any reference to registration in connec-

[15] 15 U.S.C. Sec. 77d(1) (1933).
[16] 15 U.S.C. Sec. 77b(11) (1933).

tion with Pearson's allotment of the stock. If they take the shares with the view to investment, the exemption will apply by operation of law. If, on the other hand, they acquire the shares with a view to reselling them to the public, section 4(1) will have to be enforced regardless of any attempted exemption set out in the decree.

The court concluded its decision with the following language:

> The decree of the court below should be modified so as to eleminate any reference to exemption from registration "with any governmental regulatory body . . ."[17]

That same year, 1943, another case of significance was brought for decision before the Federal Court. That case was *Corporation Trust Co. v. Logan.*[18] In that case, the facts disclosed that certain persons as owners of 373,791 shares of Class B stock of Missouri-Kansas Pipe Line Company, a Delaware corporation (herein called "Mokan"), entered into a Voting Trust Agreement dated April 12, 1943. On July 22, 1943, the shares of stock were delivered for deposit with the Industrial Trust Company of Wilmington, the agent named in the agreement. Instruction letters and signed stock powers were deposited along with the shares. After copies of the trust agreement were filed at the offices of Mokan and Industrial Trust Company, the latter as agent issued temporary Voting Trust Certificates for delivery to the depositing stockholders in exchange for their shares in Mokan. There was no understanding between the stockholders for a registration statement or any attempt to comply with the Securities Act of 1933. The defendants thereafter tendered their temporary Voting Trust Certificates and asked the Court to decree that their original issuance was illegal.

The essence of their cross claim, as amended, was that there was a total failure to comply with the Federal Securities Act of 1933 [19] in connection with the creation of the Voting Trust Agreement. And since the issuance of Voting Trust Certificates under that agreement was in violation of law, the exchange of securities thereunder should be rescinded and set aside.

The Court held that the Voting Trust Agreement for the issuance of Voting Trust Certificates in exchange for the stock of the corporation which had an authorized capitalization of 5,000,000 shares, of which about 800,000 shares were outstanding among 3,500 holders, contemplated the issuance of "securities" in connection with a "public offering" within the Act. In rendering its decision, the Court used the following language:

> It is clear that the case at bar comes within the first classification of Sec. 12 which relates to unlawful sales

[17] Merger Mines Corporation et al. v. Grismer, 137 F. 2d 335, 341, 342 (C.C.A. Wash.) 1943.

[18] 52 F. Supp. 999 (1943).

[19] 15 U.S.C. Sec. 77a *et seq.* (1933).

> of securities for which no registration statement has been filed. Under that section, the remedy afforded is the right to sue, either in law or in equity, "to recover the consideration paid for such security . . ." As the Voting Trust Certificate is, under the statute, the security, the consideration paid in exchange therefor can only be the Mokan stock, and it is this stock which defendants seek to have restored to them upon the tender of their trust certificates. I conclude the statute authorizes the relief prayed for here.

The next case of importance to come before the Federal Court was the case of *Campbell v. Degenther*.[20] This too was an action under the Securities Act of 1933[21] to recover the consideration paid for undivided interests in oil well drilling operations. The facts disclose that the defendant was engaged in the drilling for oil and gas in the State of Michigan. To finance the projects, undivided interests in the leases which he held were sold to various persons, among whom were the plaintiffs.

The business venture was not advertised nor was any other means employed to disseminate the information to the general public. The parties became acquainted through mutual business associates and the investments of the plaintiffs with the defendant produced commercially productive wells in some instances.

The problem that came about in this case arose out of the investments made by the plaintiffs with the defendant in the drilling of Howard Well No. 1. There were 32 shares sold in said well at a cost of $127.40 per share. Each of the plaintiffs purchased one share or a one thirty-second interest. The well was drilled in as a dry hole.

Plaintiffs contend that prior to the sale of said interests there was no registration statement in effect nor any prospectus issued as required by Section 5 of the Securities Act.[22]

By the terms of the Securities Act, plaintiffs ask to recover the consideration paid for said security, with interest thereon from April 9, 1948, less the amount of income received thereon, upon tender of such security.

The Court held that each of the plaintiffs was not entitled to recover the amount paid for the undivided one thirty-second interest in Howard Well No. 1. In summing up its decision, The Court stated the following:

> The defendant has satisfied the required burden of proof to establish himself as exempt from the provisions of the Securities Act of 1933. By reason of the small number of participants in the venture and their familiar-

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[20] 97 F. Supp. 975 (1951).
[21] 15 U.S.C. Sec. 77a *et seq.*
[22] 15 U.S.C. Sec. 77(e) (1951).

ity with each other, I cannot translate the security transactions into a public offering.

At most, the transactions herein conducted were a close-knit arrangement among friends and acquaintances on a purely personal basis, without any systematic scheme or promotion program for sale of said securities to the general public or any select group sufficient in size to fall within the province of a public offering.

Another case of importance came before the United States District Court for the District of Nevada during the early part of 1953. That was the case of *Securities and Exchange Commission v. Searchlight Consolidated Mining & Milling Co.*[23] The facts in that case disclosed that the defendants had been selling securities, namely, shares of the common capital stock, 10¢ par value, of defendant, Searchlight Consolidated Mining & Milling Co.; and in the sales of such securities had been directly and indirectly using the mails and means and instruments of transportation and communication in interstate commerce. And at no time had a registration statement with respect to such securities been in effect with the Securities and Exchange Commission.

One of the specifications in the motion to dismiss raised by the defendants was that solicitation by the defendants was confined to existing stockholders, and that such stockholders were not to be considered as members of the public.

The Court made short shrift of this contention by the defendants and held that the offering of securities was a "public offering" and therefore not within exemptions to the provisions of the Act requiring disclosure of information even though solicitation was confined to existing stockholders. Again, the *Sunbeam Gold Mines* case was cited by the Court in support of its holding.

Despite the adjudications of the Federal Courts on the question of "private" or "public" offering, no tangible criteria evolved as a guide of reliability from these decisions. No specific formulae were set forth by any of the judicial tribunals before whom such cases were brought for adjudication.

Finally, on June 8, 1953, the leading case on the subject of "public offering" was decided by the Supreme Court of the United States. That case was *Securities and Exchange Commission v. Ralston Purina Co.*[24] The facts in that case disclosed that Ralston Purina sold nearly $2,000,000.00 of stock to employees of the company residing in many different states without registering with the Securities and Exchange Commission. In so doing, it had made use of the mails. The Ralston Company contended that the shares were sold only to key personnel in keeping with its policy of encouraging its employees to become stockholders of the corporation.

[23] 112 F. Supp. 726 (1953).
[24] 346 U.S. 981 (1953).

Both the District Court[25] and the Circuit Court[26] held that the offering was a "private offering" and within the exemption of the Act.[27]

The Supreme Court reversed the lower courts and held that the issue was not a "private offering" within the exemption of the Act. In its decision, the Supreme Court said that some employee offerings may be exempt. For example, an offering limited to executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of a registration statement, would come within the exemption. The number of persons to whom the offer is made does not determine whether the offering is "public" or "private." The Supreme Court laid down four criteria to determine whether the offering is "private" or "public". If the offering comes within these criteria, it is a "private offering" and not a "public offering." The criteria are:

(1) That the offering is limited to a special class and not to the public generally;

(2) That the purchasers of the shares intend to take the shares for investment and not for resale;

(3) That the purchasers have access to the kind of information which a registration statement would disclose;

(4) Whether there is a need of the offerees as a class for protection afforded by registration.

In its decision, the Supreme Court of the United States held that the Ralston Purina Co. failed to prove that its offering to employees came within the criteria establishing a private offering. The offering was not limited to key personnel but was made available to any one of its 7,000 employees. The exemption, the Court said, does not deprive corporate employees from the safeguards of the Act. A thorny problem had at last received a final adjudication.

III. CONCLUSION

In answer to the original query, it may now be stated that whether or not a proposed offering or sale of securities of a corporation in interstate commerce is "private" or "public" ultimately depends upon whether the issuer can sustain the burden of proving facts sufficient to make the offering a "private offering" within the tests of the *Ralston Purina* case as laid down by the Supreme Court of the United States. It is hoped that the decision in this case and the criteria enumerated by the highest court of the land will prove a beacon of light for future guidance to both Bench and Bar in resolving the time honored question of "private" or "public" offering.

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[25] 102 F. Supp. 964 (1952).

[26] 200 F. 2d 85 (8th Cir. 1952).

[27] 15 U.S.C. Sec. 77d(1) (1951).