February 1971

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BLUE SKY LAW—WEST VIRGINIA SECURITIES LAWS AND THE PROMOTER*

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I. INTRODUCTION

The enactment of the Federal Securities Act in 1933 was not the first time a governmental body sought to regulate the sale of securities. Practically every state, prior to 1933, had legislation aimed at protecting the public from the sale of speculative securities.1 These laws are commonly referred to as blue sky laws.2 The role of the states in this regard was not pre-empted by the federal enactment; section 18 of the Securities Act specifically provides that “[n]othing in this title shall affect the jurisdiction of the securities commission... of any state ... over any security or any person. ...” As a result, concurrent federal and state regulation of securities has continued to the present time.3 The significance of federal regulation of securities and the accompanying development of “federal corporation law” is obvious. Less apparent, or maybe simply less publicized, is the impact that state securities laws have upon corporate affairs. The impact of state securities laws is especially pronounced in their application to promoters of new ventures. The primary purpose of this paper, therefore, will be to analyze the blue sky laws of one state, West Virginia, and to consider the effect of this state’s legislation upon the typical promoter’s activities.4

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* This article represents a revised version of a paper presented in partial fulfillment of the requirements for the “Corporate Planning and Counseling” Seminar at the Law School, Harvard University, 1970.
1 The definitive work on the subject of blue sky regulation is L. Loss & E. Cowett, BLUE SKY LAW (1958) [hereinafter cited as Loss & Cowett].
2 The name, blue sky law, comes from the idea that early state regulatory schemes were designed to prevent the sale of securities “which have no more basis than so many feet of ‘blue sky’. ...” Hall v. Greiger-Jones Co., 242 U.S. 539, 550 (1917). See BALLANTINE, CORPORATIONS § 366, at 860 (rev. ed. 1946); Loss & Cowett, supra note 1, at 7 n.22.
II. FACTUAL PATTERN AND STATUTORY BACKGROUND

Unless the promoter has independent financial resources which he plans to utilize to finance his venture fully, he is immediately confronted with problems incident to obtaining “outside” capital. Many fact situations may be hypothesized which place one in this general category. Probably the most common situation is presented when either one person or a small group of people has an idea and wants to bring this idea to life through the medium of some form of business. If possible, the promoter may seek a loan from a bank or other financial institution. Often, however, the necessary security is lacking to obtain such a loan and the necessary funds must be acquired from other sources. The promoter may therefore contemplate the possibility of obtaining the necessary capital by selling shares in his business to public investors. The moment the promoter decides to “tap the capital market” by the sale of securities he confronts the restrictions of the particular state’s blue sky laws. And, unless a specific statutory exemption is available, federal requirements for the registration of securities must be met.

The West Virginia statutory enactments regulating the sale of securities within the state are generally illustrative of most blue sky laws. Unlike the federal law which has as its primary objective the prevention of fraud by requiring full disclosure of all relevant information, West Virginia statutory provisions contemplate not only full disclosure but, also, the added protection to the public of requiring

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6 It is obviously beyond the scope of this paper to analyze the major exemptions to federal regulation of securities. It should be noted, however, that the so-called private offering and the intra-state offering exemptions will have particularly important parts to play in planning a transaction of this nature.

Section 4(2) exempts “transactions by an issuer not involving any public offering.” 15 U.S.C. § 7(d) (1964). In very general terms, this exemption is available when the securities involved are offered to a limited and related group of sophisticated investors who have full access to the kind of information full registration would disclose and who take the securities for investment purposes and not distribution. See S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953); Gilligan, Will & Co. v. S.E.C., 267 F.2d 461, 466 (2d Cir. 1959), cert. denied, 361 U.S. 896; Sec. Act Rel. No. 4552 (1962); 1 L. Loss, SECURITIES REGULATION 653 (2d ed. 1961) [hereinafter cited as Loss].

Section 3(a)(11) exempts from the federal registration requirements “any security which is part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.” 15 U.S.C. § 77(c) (1964). See Sec. Act. Rel. No. 4434 (1961); Loss 391.
that the proposed securities meet certain "merit" standards before sale. In other words, the fact that the issuer fully discloses all relevant facts to the state Commissioner of Securities will not assure approval by him of the proposed offering. In deciding whether the particular security may be offered to the West Virginia public, the Commissioner may consider, among other things, whether the business or enterprise is based on sound business principles and is in "every respect equitable," and whether the sale of the particular security will be fair and equitable to the investor. The breadth of the discretion given to the Commissioner is apparent and, to the promoter, a bit frightening. If his proposed securities are denied registration, he must either challenge the Commissioner's determination by seeking judicial review, adjust his plans so as to satisfy the Commissioner, or abandon the idea altogether. The paucity of cases on the matter suggest that the first alternative is rarely adopted. For practical purposes, the promoter is left to decide between the latter two alternatives. His decision may well be dictated by the magnitude of the alterations the Commissioner requires as a condition precedent to registration.

In addition to a desire to avoid becoming embroiled in this ad-

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7 The West Virginia State Auditor has been designated as the Commissioner of Securities. W. Va. Code ch. 32, art. 1, § 1 (Michie 1966).

8 After providing for the manner of registration, W. Va. Code ch. 32, art. 1, § 6 (Michie 1966) provides that:

If, upon examination of any application, the commissioner shall find that the sale of the security referred to therein will not be fraudulent or will not work or tend to work a fraud upon the purchaser, or that the enterprise of business of the issuer is not based upon unsound business principles and that it is in every respect equitable, just and fair to the investor and after all provisions of this article have been complied with, the commissioner shall record the registration of such security in the register of securities and thereupon such security so registered may be sold by the issuer or by any registered dealer who has notified the commissioner of his intention to do so, in the manner hereinafter provided, subject, however, to the further order of the commissioner as hereinafter provided.

9 See W. Va. Code ch. 32, art. 1, § 19 (Michie 1966). Quite likely, the promoters' unwillingness to challenge the Commissioner's determination may be motivated by a desire to avoid any unfavorable publicity which might result. Moreover, such challenges to administrative rulings usually involve substantial expenses and delays in time. See Bloomenthal, supra note 4, at 1484-85, n.214. In any event, one may assume that a court would be hesitant to interfere with the broad discretion delegated to the Commissioner by statute of this nature. See Hardstone Brick Co. v. Department of Commerce, 174 Minn. 200, 219 N.W. 81 (1928).

10 The Commissioner is empowered by W. Va. Code ch. 32, art. 1, § 6 (Michie 1966) "to place such conditions, limitations and restrictions on any registration as may be necessary to carry out the purposes of this chapter [governing the sale of securities]."
ministrative scheme,\textsuperscript{11} the expense incident to registering the securities is an important consideration.\textsuperscript{12} For these reasons, and others to be discussed later,\textsuperscript{13} the promoter's purposes may best be served by qualifying for some explicit statutory exemption. That is, the fact that one seeks to obtain funds from public investors does not necessarily mean he must first register these securities; he may qualify for some exemption.

III. STATUTORY EXEMPTIONS FROM SECURITIES REGULATION

The statutes of most states, including West Virginia, provide for certain exemptions from the general scheme regulating the sale of securities if the sale is to a relatively limited group of investors. So far as the promoters of a venture in West Virginia are concerned, this appears to be the only available exemption.\textsuperscript{14}

A. THE LIMITED SALE EXEMPTION

1. General Requirements

In order to qualify for the limited sale exemption in West Virginia certain requirements must be met.\textsuperscript{15} First of all, the sale of the securities must be made by a domestic corporation and the securities sold must be its securities, not those of another legal entity. Addi-

\textsuperscript{11} Cf. K. Davis, \textit{Administrative Law} \textsection{} 4.01 (1959).

\textsuperscript{12} It has been estimated that the expenses for qualifying an issue pursuant to a state's regulatory scheme may run anywhere from $200 to $3,000. Mofsky, \textit{supra}, note 4, at 276 n.8.

\textsuperscript{13} \textit{See} text accompanying notes 36-70.

\textsuperscript{14} \textit{See} W. Va. Code ch. 32, art. 1, \textsection{} 3 (Michie 1966) (exempting certain types of securities from registration requirements); W. Va. Code ch. 32, art. 1, \textsection{} 4 (Michie 1966) (excluding certain transactions from regulation).

\textsuperscript{15} The pertinent language of the statute reads as follows:

\begin{quote}
The provisions of this chapter shall not apply to any of the following transactions:

\begin{itemize}
  \item * * * * * *
\end{itemize}

(h) The sale by a domestic corporation of its securities if the aggregate number of holders of all its securities, after the securities to be issued are sold, does not exceed fifteen, and no commission, profit or other compensation is or has been paid for the sale of any securities of such corporation, and the total organization and promotion expense in connection with the issue of all securities of such corporation, exclusive of statutory fees, does not exceed three per cent of the aggregate sale price of all such securities or two hundred fifty dollars, whichever is greater.

\end{quote}

The scope of the exemption is explored in subsequent paragraphs. A point not discussed in the text deserves some mention here. Specifically, one cannot take advantage of the limited sale exemption if any commission
tionally, the total number of all security holders after the sale cannot exceed fifteen. No commission or other compensation can be paid for the sale of the securities. Finally, the total promotional and organizational expenses incident to the sale cannot exceed the greater of either three percent of the aggregate sale price of all the securities sold or two hundred fifty dollars. Certain statutory fees are not to be included when computing the total organization and promotional expenses.

2. Analysis of Requirements

Limiting the availability of the statutory exemption to domestic corporations places obvious burdens on the West Virginia promoter. Most apparent, of course, is that the promoter must in fact incorporate before he can avail himself of the limited sale exemption. For all practical purposes, this limitation precludes the promoter from raising funds in the pre-incorporation stages of the enterprise by selling or contracting to sell pre-organizational certificates or subscriptions. This is because such certificates are themselves included in the statutory definition of securities and, as such, must be approved for sale by the Commissioner. For a promoter attempting to use the limited sale exemption to avoid registration and accompanying expenses, prior incorporation is apparently the only solution.

One possible argument might be that the blue sky law restrictions were not meant to apply to the promoter's fund raising attempts prior to incorporation and prior to the sale of securities to the general public. This argument would seem to be especially convincing where the promoter raises some beginning capital from close friends or relatives to defray initial costs with the understanding that such contributors will receive stock or other securities after the corporation is formed. The counter argument to such a position would begin with the express language of the West Virginia Securities Law, including most importantly the reference to pre-organizational subscriptions or certificates in its definition of securities. Notwithstanding such

or compensation is paid for the sale of the securities involved. The result of this is that an issuer who is trying to bring the transaction within the purview of this exemption is denied the services of professionals familiar with the sale of securities. Presumably, such professionals, like investment advisors, could be instrumental in planning the offering so as to comply with not only this exemption but federal exemptions as well. At least one writer has questioned this wisdom of such a restriction. See Mofsky, supra. note 4, at 278-79.

17 Id. It is to be noted, however, that under some circumstances persons who contribute capital and who are also involved with other organizational activities of the new enterprise may be considered part of the promotional
express reference in another state's statute, the state court in Kentucky did not apply the full force of the blue sky law to these subscriptions. Pivotal in the court's determination was a finding that the statute in question, although specifically referring to such certificates, provided no method for their registration. In West Virginia, however, provision is made for such registration. Even in states where no express reference is made to pre-organizational subscriptions, courts have held them subject to state securities regulation.

Assuming the application of West Virginia law to pre-incorporation certificates, as indeed one must if the express language of the statute is followed, one might question the wisdom of subjecting these to regulation without providing for some such exemption as is available for the sale of the corporation's securities after it is formed. Even if the promoter has sufficient independent capital to meet initial expenses, it might well be that he wants the assurance from others that they will invest in the corporation before he incurs expenditures which attend the formation of the corporation. Such assurance would be effectively precluded under the West Virginia statute since the subscriber could subsequently refuse to perform a contract to buy the securities in the newly formed corporation, or, if money had already been contributed by this person, he could seek to recover the purchase price. This assumes, of course, that the promoter had not registered the pre-organizational certificates or subscriptions and thus had violated the West Virginia blue sky laws.

The governing statutory language on the question of civil actions pertaining to sales or contracts for sale made in violation of the blue sky laws is as follows:

Every sale or contract for sale made in violation of any of the...
A plausible rationale for according different treatment for pre-incorporation subscriptions (no exemption) and securities ultimately issued by the corporation (limited sale exemption) is that possible fraudulent activities may be more easily discovered if there exists some recognizable legal entity as opposed to a “fast moving” promoter who is soliciting funds for the corporation he is “going” to form. This was apparently the attitude of one court when it observed that “[t]here is more reason for the application of this [blue sky]...
law to unorganized business concerns that to those having a recognized legal entity. To apply blue sky regulation to pre-incorporation solicitation of capital is one thing; to apply completely different standards to pre- and post-incorporation financing is another thing altogether. It is this latter interpretation which appears to be required by the West Virginia statute.

In order to comply with the limited sale provision, the promoter must not only incorporate before soliciting funds from public investors; he must do so in West Virginia. This result obtains because the exemption is limited to domestic corporations. This means that the promoter who seeks the benefits of the exemption cannot concomitantly take advantage of the more liberal laws of another state, such as Delaware. If the need or convenience of incorporating in another state is more compelling than the need to tap the capital market in West Virginia, the promoter simply does not sell any of the corporation’s securities in West Virginia.

Having complied with the incorporation requirements, the promoter must plan very carefully the ultimate disposition of the company’s securities. The exemption is lost if the total number of security holders, after the sale, exceeds fifteen. A literal reading of the statutory language indicates that this requirement is satisfied if the limitation on the number of stockholders is observed immediately after the sale of all the securities to be issued. The extent to which this limitation survives the time period beyond that of the sale of the last security to the fifteenth person is uncertain. If the language is construed so as to require compliance with this limitation on number of stockholders for an extended period of time, the exemption would be virtually read out of the statute. This is because such a reading would place the promoter in the position of insuring every purchaser’s state of mind who participates in the initial transaction. In other words, the purchaser who ultimately disposes of his securities to several other people could destroy the exempted classification of the initial sale by the corporation. The same thing could happen if one of the first investors died and his estate, including the securities,


24 The exemption is available for "[t]he sale by a domestic corporation of its securities if the aggregate number of holders of all its securities, after the securities to be issued are sold, does not exceed fifteen . . . " W. VA. CODE ch. 32, art. 1, § 4(h) (Michie 1966) (emphasis added).

25 Cf., Loss, supra, note 6, at 604-05. Here, Professor Loss discusses an analogous situation concerning the intra-state offering exemption to the Federal Securities Act.
were distributed to several beneficiaries. In either of these instances the total number of stockholders of the corporation might exceed fifteen.26

It seems clear that something less than perpetual compliance with the restriction on the number of security holders is demanded. How much less, however, presents some troublesome problems. If, for example, the promoter and the purchaser of a large number of securities had always anticipated that the security holder would begin selling off his shares to others after the initial sale by the corporation to fifteen or fewer persons, there is little doubt that a court would find noncompliance with the limited sale exemption. The secondary sales would be viewed as simply integrated steps in the same transaction. Or, if a proper showing were made, the person making the secondary sales could be considered an agent of the issuer. On the other hand, the promoter, who acts in good faith and who exercises due care in selecting persons to buy the securities only for investment purposes should not be held accountable, civilly or criminally, if the ultimate number of security holders exceeds fifteen. Since the purchaser who subsequently disposes of his securities may violate some provision of the blue sky law himself,27 it seems that a construc-

26 In order to explain more fully this problem assume the following factual situation. X, the issuer, relying on the limited sale exemption, sells its securities to fifteen persons, including A and B. B, who owns ten shares in X, thereafter sells five of his shares to P. As a result, X now has sixteen shareholders. Now suppose the value of X's securities subsequently decreases and any of its security holders would be more anxious to recover the initial price they had paid for the shares of stock. If B were to bring an action against X to recover the full purchase price of his remaining five shares, it is at least arguable that he should be entitled to recovery. A technical reading of section 18 of the securities law would dictate this conclusion. See note 22 supra. But, it seems that a strong case could be made for X in this situation since B was responsible for X's violation and X could therefore advance an argument analogous to the "clean hands" doctrine of equity.

If P in this hypothetical situation were to bring an action against X, it seems clear that he could not recover. This is because section 18 concerning the voidability of illegal sales under the West Virginia blue sky law requires privity of contract. In other words, the issuer X, as a seller, is liable to its buyers, not to its buyers' buyer. If, however, it were shown that B was merely acting as an agent for X, the necessary link between X and P would be present. Similarly, an action by A against X to recover the initial price of his shares might well be sustained. The fact that X's violation is innocent is immaterial under section 18 of the West Virginia securities law. The same would be true in actions by the remaining shareholders of X for the purchase price they had paid for their shares.

27 Most likely, the only available exemption for secondary sales by the owner of securities issued to him by a promotional company is that relating to so-called isolated transactions. In order to qualify for this exemption, the sale by the owner must not be "made in the course of repeated and successive transactions of a like character by such owner." W. VA. CODE
tion of the statute that exculpates the promoter should have as its predicate more rigorous enforcement of the state’s securities laws as they relate to secondary sales of securities.  

Settling on the ultimate number of stockholders as a criterion to test the availability of the exemption is itself subject to question. Admittedly, this criterion does have some advantage over other standards, such as number of offerees for the initial sale, in that it is seemingly easier to administer. The Commissioner can simply count the number of ultimate purchasers after the sale. But, as indicated above, this too could become a difficult task, depending upon the extent to which the requirements of the exemption survive the initial sale. Moreover, couching the exemption in terms of ultimate security holders can be viewed as conceptually inconsistent with the purposes of the security law. Since the exemption is dependent upon the number of ultimate purchasers and not the number of offerees, the promoter who wishes to sell securities in his new corporation can simply offer them to hundreds of people. If the business of the corporation is based upon unsound principles so that the purchase of the securities would be a “bad” investment, those persons who in fact purchase the securities are by hypothesis the very people who need

ch. 32, art. 1, § 4(b) (Michie 1966). Consider in this regard an action by P against B in the fact situation presented in note 26 supra. The leading case on the question of what amounts to an isolated transaction under state securities law is Kneeland v. Emerton, 280 Mass. 371, 183 N.E. 155 (1932). The court observed that two sales of securities “made one after the other within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that the sales promote the same aim and are not so detached and separated as to form no part of a single plan, would be ‘repeated and successive transactions.’ ” Id. at 389, 183 N.E. at 163. See generally Annot., 1 A.L.R.3d 614 (1965). An excellent article on this general topic of nonissuer transactions appears in Note, Regulation of Non-Issuer Transactions Under Federal and State Securities Regulation Laws, 78 HARV. L. REV. 1635 (1964).

28 One writer who is quite familiar with state securities regulation intimates that nonissuer sales of securities are seldom policed by state securities administrators. Bloomenthal, supra, note 4, at 1483.

29 The paucity of cases on the subject suggests that either those using this exemption are most careful in doing so or that the Commissioner is not likely to police this particular area so as to determine whether the requirements of the limited sale exemption are met. But, regardless of the Commissioner’s position, which may well be dictated by the practicalities of the situation, a court in a civil action will have to apply the explicit terms of the statute.

30 There is some possible limitation, albeit indirect, placed upon the number of persons who may be solicited by one seeking to sell stock in a corporation. Specifically, the limited sale exemption is lost if the expenses incident to such sales exceed the greater of three per cent of the aggregate sale price of all the securities involved in the sale or two hundred fifty dollars. W. VA. CODE ch. 32, art. 1, § 4(h) (last clause) (Michie 1966).
the protection of a blue sky law. In such a situation, the ultimate security holders represent the few out of hundreds of offerees gullible enough to buy.

For the honest promoter, the security holder limitation on the exemption will often present a situation which is inconsistent with his reason for setting up his own business. That is to say, the promoter will generally want to control the corporation he is forming. Limiting the exemption to fifteen ultimate security holders means that a relatively sizable amount of capital must be contributed by a few persons. Since the promoters and original incorporators will be included in the ultimate number of security holders, the number of capital contributing persons may be limited to as few as eight to ten people. Typically these relatively few large investors will demand control of the new enterprise. It is thus readily apparent that "the problem of balance of control is a major obstacle in the financing of new business through the private offering of equity securities." 2

If one accepts the general proposition that a state’s securities laws should make some provision for exempting so-called limited offering or limited sale transactions from regulation, one must then deal with the scope of such exemption. One of the first aspects of the limited sale exemption in West Virginia that should be considered in this regard is the use of the ultimate number of security holders as the main criteria for determining the availability of the exemption. More recent studies of blue sky laws suggest that the standard should be one relating to the number of offerees and not the number of ultimate purchasers. 3

In this respect, Professor Mofsky suggests that the identity of the offerees is a more important consideration than simply the number of offerees. 4

It is clear that the West Virginia exemption, as presently constituted, is quite limited. Those promoters who find these limitations unacceptable may seek to avoid them by making a public offering of the corporation's securities. 5

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31 Mofsky, supra, note 4, at 281 n.22.
32 Id. at 282.
33 This is the criteria utilized by the Uniform Securities Act. UNIFORM SECURITIES ACT § 402(b)(9). See Loss & Cowett, supra, note 1, at 236.
34 Mofsky, supra, note 4, at 232. Indeed, Professor Mofsky suggests that there should be no limitation on the number of offerees for purposes of a limited offering exemption so long as such offerees are financially sophisticated. Id.
35 The advantages of a public offering over the limited sale exemption are obvious. There will be no limitation on the number of ultimate stock-
IV. PROMOTERS AND PUBLIC OFFERINGS

A. THE STATUTORY FRAMEWORK

In every state which utilizes the so-called merit approach to securities regulation, the administrator normally has great discretion in approving securities sought to be registered under the state's securities laws. This is the result of the broad terms usually employed as statutory standards for full registration. In West Virginia, for example, the Commissioner can deny the issuer's registration application if a finding is made that the sale will "tend to work a fraud" on the purchaser of such security or that the sale of such security would not be "just" and "fair" to the investor. In order to accomplish the purposes of these statutes, the administrator normally has the power to place limitations and conditions on any registration. Through use of this administrative option, state securities administrators have created what one author has called a separate body of state corporate law for promoters. The remainder of this paper will deal with this new body of law governing the activities of promoters in West Virginia.

B. PROMOTER'S INVESTMENT REQUIREMENT

Pursuant to statutory authorization, in 1964, the West Virginia Commissioner of Securities promulgated general rules governing the regulation and supervision of the sale of securities. One such rule

 holders; compensation may be paid to investment brokers and the like to effectuate the sales; and, there would be no restrictions on the place of incorporating the enterprise. But, as will be seen shortly, the promoters' ability to tap the capital market is still severely restricted by West Virginia's securities laws even though the decision to make a public offering.

36 In general, the merit approach contemplates that the securities have to meet certain standards prior to registration and sale of the securities. The primary rationale for this approach is that public investors in general cannot be adequately protected simply by requiring the issuer of the securities to disclose all relevant facts to such investors. In other words, it is argued that investors lack the training or intelligence to assimilate and effectively utilize the facts presented in a prospectus which is quite often lengthy and complex. See Hueni, Application of Merit Requirements in State Securities Regulation, 15 WAYNE L. REV. 1417, 1418-19 (1969). Cf., SEC, Disclosure to Investors of Federal Administrative Policies Under the '33 and '34 Acts—The Wheat Report 87-88 (1969).

37 Loss & Cowett, supra, note 1, at 67-83.
38 W. VA. CODE ch. 32, art. 1, § 6 (Michie 1966).
39 E.g., Id.
40 Bloomenthal, supra, note 4, at 1462-63. Here Professor Bloomenthal summarizes the corporate law of promoters that is typically taught in law schools and then compares this with the corporate law developed by the blue sky commissioners.
41 W. VA. CODE ch. 32, art. 1, § 21 (Michie 1966).
deals with the promoter's investment in the issuer of the securities and certain presumptions which obtain, depending upon the amount of such investment. Generally speaking, promoters are required to contribute in cash or other tangible property an amount equal to at least ten percent of the total equity investment which will result from the proposed sale of all the securities. Any investments less than this by the promoters will result in the presumption that the sale will be unfair and thus detrimental to the interests of prospective investors.

The traditional rationale for this investment requirement is that such a restriction will produce more careful expenditures of the funds of the corporation. Whether or not one accepts the logic behind this reasoning, it is clear that the investment requirement limits the availability of the capital markets to those who can make a sizeable contribution.

In order to achieve the required promoter investment, a limited sale of securities to the parties who would qualify as promoters may

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42 W. Va. Sec. Regs. § 3.01 (1964) reads as follows:

The offering or proposed offering of securities of an issuer which is in the promotional, exploratory or development stage and in respect of which the fair value of such issuer is less than 10% of the total equity investment which would result from the sale of all of the securities which are the subject of the offering or proposed offering, shall be presumed to be “unfair”, “detrimental to the interests of investors or prospective investors” of the issuer and to “tend to work a fraud upon the purchaser.”

(1) For the purpose of this rule, the term “fair value of the equity investment of the promoters” shall mean the total of all sums contributed to the issuer in cash together with the reasonable value (as determined by the Commissioner after appraisal by a qualified independent appraiser selected by the Commissioner) of all tangible assets contributed to the issuer by the promoters.

(2) For the purpose of this rule, the term “total equity investment” shall mean the total of (a) the par or stated value of all equity securities offered or proposed to be offered, and (b) the amount of any surplus of any kind which will exist upon successful completion of the offering, regardless of description and whether or not restricted.

From the outset, it is readily apparent that this particular regulation applies only to issuers which are in the “promotional, exploratory or development stage.” Yet, neither the regulations nor the statutory provisions define a “promotional” company. Presumably, however, one may imagine that this classification is intended to apply to a company which does not have a significant record of earnings or operations prior to the date of the proposed public offering. This is basically the position taken by the Midwest Securities Commissioners Association. See *Statement of Policy on Promoters Investment*, 1 C.C.H. BLUE SKY L. REP. ¶ 4771 (1968).

be considered by the corporation prior to application for a public offering.

Besides those previously discussed in connection with the limited sale exemption, there are other problems which could result from using this approach. The obvious one would be that those persons who invest in the enterprise prior to the application for a public offering may not be considered promoters of the enterprise.44

The term “promoter” is defined in the regulations so as to exclude persons who receive securities solely in exchange for property.45 Thus, the total equity investment by initial contributors to the corporation could exceed ten percent of the amount to be obtained from the public offering, but the application for such offering could still be denied because of the “promoters” equity investment requirement. However, this might be a situation where the presumption of unfairness in the regulation should be considered rebutted.46 On the other hand, strict adherence to the rationale for the investment requirement would dictate a contrary conclusion.47 Yet, this problem can possibly be avoided if each of the initial investors performs some service incident to the founding and organizing of the business or enterprise of the issuer.48

The performance of some organizational services by the initial investors may become important in another context, although one which is intimately related to the equity investment requirement for promoters. The situation is presented when one may need to satisfy the equity investment requirements by obtaining funds from other individuals prior to the incorporation of the enterprise. As was previously noted, this kind of activity by the promoter can give rise to problems concerning the sale of pre-incorporation certificates or subscriptions. But, an issue not previously dealt with is whether those persons who contribute capital or other tangible assets to the enterprise in its beginning stages can be considered promoters. In other words, it appears that a distinction must be made between a situation where a promoter or promoters sell pre-incorporation securities to

44 In other words, “promoters” are required to make the specified investment. If one is not considered to be a promoter, a fortiori he could not be included for purpose of computing the promoters total equity investment.
46 This assumes of course that the presumption of unfairness is rebuttable.
47 See note 43 supra.
48 The reason for this of course is that such a person would presumably then be considered a promoter. W. Va. Sec. Regs. § 2 (19) (1964).
investors and one where a group of individuals unite for a common business purpose, some contributing more tangible assets than others.

This distinction was the principal issue in a 1952 California case. The plaintiff in that case sought to recover the purchase price he had paid for stock in a failing corporation. The theory of the plaintiff's case was that the defendants had violated California's blue sky law. Specifically, the plaintiff predicated his claim upon the failure of the defendants to register the securities involved at the time they were sold to him. But factual findings of the trial court indicated that, instead of occupying the status of a pure investor in the enterprise, the plaintiff had participated with the defendants in organizing the enterprise. In reversing a lower appellate court decision, the California Supreme Court held that such factual findings prevented the plaintiff's recovery. This was so even though the idea for the enterprise had originated with the defendants. When all the facts were considered, the court concluded that the plaintiff and defendants stood on equal footing as entrepreneurs. "Consequently there appeared to the court to be no more reason for the defendants to reimburse the plaintiff than the other way around."

A West Virginia promoter who cannot individually comply with the equity investment requirement must either obtain such amount from other persons or abandon his plan to seek funds from a public offering in West Virginia. If the first alternative is adopted, steps must be taken to assure that those persons making capital contributions to the beginning enterprise perform some organizational services so they too will be considered promoters of the business. Otherwise, it may be that their contributions will not be included in the computation to determine whether "promoters" have invested the required amount. Moreover, the performance of some organizational services by initial investors can be particularly important if these persons make capital contributions to the enterprise prior to its incorporation. Absent such activities, the promoter may be guilty of a blue sky violation for selling unregistered securities, viz, pre-incorporation certificates of subscriptions.

50 "Whether the three men, as among themselves, be termed partners, joint venturers, or co-promoters [sic] of a corporation ... it is obvious that the trial court was justified in concluding that they stood on an equal footing as entrepreneurs." Id. at 597, 248 P.2d at 419-20.
51 Loss, supra note 6, at 460.
52 This may be the result anyway if a West Virginia court would not accept the general approach enunciated by the court in Holmberg v. Marsden, 39 Cal. 2d 592, 248 P.2d 417 (1952).
C. LIMITATIONS ON ISSUANCE OF PROMOTIONAL STOCK

It is natural to assume that promoters who are contemplating a public offering will be most interested in what their position in the company will be after the offering is effected. Generally speaking, promoters will want to assure themselves a controlling position in the newly formed corporation as well as a fair share of its future profits. Elementary principles of corporation law dictate that the promoters must be substantial shareholders in the corporation to accomplish their ends. This presents the issue of the price to be paid to the corporation to obtain its stock. Assuming such persons cannot obtain the needed amount of stock at the price it will be offered to the public, one possible approach would be to have the corporation issue stock to them for lesser consideration. Other reasons normally given for the issuance of this so called "cheap" or "promotional stock" include: to compensate promoters for organizing the company and for certain other intangibles; to reward a small group of investors for early participation in the financing of the enterprise; to attract technical personnel and capable management; and to compensate those persons who will market the issue.

The issuance of such securities by a new corporation which is preparing for a public offering may be restricted, or, in some instances, completely precluded by regulations adopted by state securities administrators. Although the rationale for this kind of administrative regulation is seldom detailed, it may be assumed that the objective of such rules is to prevent the unreasonable dilution of the per share equity of those persons who purchase in the public offering. This objective may be accomplished by a variety of techniques. More common approaches include (1) a percentage limitation on the amount that promotional stock can bear to the stock ultimately to be outstanding, and (2) direct restrictions on the dilution of the book value of the public investor's stock. The latter technique is seemingly more consistent with the basic objective involved since it deals specifically with the problem of value and not simply the number amount of outstanding shares. Implicit in either approach, however, is the notion that within certain defined limits the issuance of promotional stock is entirely justified.

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53 See Heuni, supra note 43, at 1424; Mofsky, supra note 4, at 286-87.
54 E.g., Fla. Reg. 330-1.08, 1 C.C.H. BLUE SKY L. REP. ¶ 13,608; Ky. Reg. k, 2, id. at ¶ 20,601; Wash. Reg. 11, id. at ¶ 50,611.
In contrast to this, the West Virginia regulations indicate a more restrictive approach to the issuance of promotional stock. Indeed, one can reasonably conclude that for all practical purposes the West Virginia rule precludes the use of such stock. The applicable regulation provides that "[t]he sale of securities to underwriters or promoters at prices below the public offering price, at a time in close proximity to the public offering date, is looked upon with great disfavor and will be considered as a basis for denial of an application for registration except in unusual circumstances." In addition to problems which result from the restrictive nature of the regulation, the use of such phrases as "looked upon with great disfavor" and "except in unusual circumstances" make planning in this area practically impossible. On balance, it appears that the promoters cannot expect approval of their registration application if they have received any amount of promotional stock.

The functional effect of the regulation is to limit the price and the number of the publicly offered shares. At the same time, the regulation affects the amount of corporate participation that can be enjoyed by promoters who have a set amount to contribute to the company. Suppose, for example, that the promoters have $20,000 to invest in the company and are seeking to raise an additional $80,000 from the public offering. If the public offering price is $100 per share, the maximum number of shares the promoters may hold is 200, leaving a total of 800 shares in the hands of public investors. It can hardly be said that the promoters will occupy a controlling position in the corporation. Using the same per share price, the only way the promoters can enhance their own position is to offer fewer shares to the public. This obviously results in a corresponding decrease in the amount of capital the corporation will obtain. Similarly, a lowering of the public offering price will necessarily result in a proportional decrease in the size of the public investment.

At least some of the promoter's problems in this respect may be eliminated by using both of the above approaches. This is to say, the promoters may consider a plan whereby the per share price of stock is reduced, while the number of shares to be offered to the public is increased. As a general rule, a small investor will not be particularly interested in controlling the corporation. And, if a greater number of shares is offered to the public there is more of a chance that the shares can be diffused among a large number of

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unrelated investors. In such a situation, the promoters may be able to retain control of the corporation with less than a majority of all outstanding shares.

One final point must be made before leaving the subject of promotional stock. Section 7 of the West Virginia regulations precludes the issuance of cheap stock to "promoters." Presumably, therefore, such stock could be issued to non-promoters. This is a position an initial investor may be capable of occupying, provided he does not perform some organizational services.\(^57\) Nor would it be unusual for persons who assist in the early financing of the enterprise to insist upon receiving some shares at a price below the public offering price. But as previously noted, it may be very important for these persons who make initial contributions to be considered promoters of the enterprise. Among other things, this may be necessary to satisfy the equity investment requirement. Thus, in some circumstances, the equity investment requirement may be satisfied but in doing so the prohibition against promotional stock may be violated. Unless one can be a promoter for one purpose and not for another, the entrepreneur with limited funds may be faced with two irreconcilable positions. If the entrepreneur can satisfy the equity investment requirement without relying upon the contribution of a few initial investors, his problem is somewhat simplified—whether the initial investors are promoters within the purview of section 7.

D. STOCK OPTIONS AND WARRANTS

The promoters whose participation and chances for controlling the corporation are restricted by the prohibition against promotional stock may consider other ways to accomplish their desired ends. One solution may include the issuance of stock purchase options or warrants to insiders of the new corporation. Again, the promoters are confronted by blue sky laws which severely restrict the use of these developmental devices by a corporation in the developmental stage.

Stock options or warrants, which generally entitled their holders to purchase shares of the corporation for a specified term at a stated price, are governed in West Virginia by section 6 of the regulations.\(^58\) The general effect of this regulation is to restrict the issuance of options or warrants to situations where all security holders are entitled to receive them on a pro rata basis and on uniform terms. According

\(^{57}\) See text at note 44 infra.
to the regulation, distribution of these rights upon nonuniform terms and unequal basis is "looked upon with great disfavor." Even so, the language of the regulation indicates that under some circumstances, options or warrants may be issued to a limited group, such as promoters.

Although the use of phrases like "looked upon with great disfavor" make it very difficult to ascertain when the limited use of options or warrants is justified, certain matters are set forth in the regulations that are to be considered in this connection. But, a statement that certain factors will be considered is not of itself much assistance to one considering the issuance of options to a limited group. In order to plan this transaction intelligently one must know not only the matters that will be considered by the Commissioner but also the criteria that will be employed in his consideration. And such standards are not specified in the regulations. Accordingly, the attorney for the promoters planning the public offering must look elsewhere for guidelines.

The starting point for an inquiry of this nature is to ascertain the theory underlying the regulation which restricts the use of stock purchase options and warrants. Generally speaking, these restrictions are predicated upon the same principle as the provisions concerning the issuance of promotional stock, viz the prevention of the dilution of the per share equity of public investors. Because of the nature of options and warrants, this theory must be refined so as to encompass the potential dilution of the equity of the existing and future shareholders of the corporation.

Implicit in this theory is the notion that any factors which are to be considered in this context must relate to some kind of comparative analysis. When one is asked to consider the number of warrants or options sought to be issued, this consideration will involve a comparison of that number with the amount of stock which will be outstanding after the proposed offering is effected. Those states with stated rules in this regard generally limit options or warrants to a

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59 Id.
60 These matters include (1) the number of warrants or options sought to be issued; (2) the consideration paid for the warrants or options; (3) their exercise price and whether or not they are assignable; (4) the term in which they are exercisable and; (5) the step-up rate in the exercise price. Id. For a more detailed analysis of this subject, see Calvin, A History of State Securities Regulation of Options and Warrants, 17 Bus. Law. 610 (1962).
number that does not exceed ten percent of the amount of stock that will be offered to public investors.  

Similarly, when one is asked to consider the exercisable price of the options, this will entail its comparison with the price public investors are initially required to pay to obtain similar shares in the corporation. Since restrictions on options and warrants are also designed to protect future investors, something more is needed than a fixed amount for the exercise price. This then is the reason that the West Virginia regulation provides that the "step-up" rate will be considered. In general terms, the "step-up" rate refers to the stated increase in the price the holder of an option or warrant must pay to exercise it. More specific state regulations provide that the options or warrants are to be exercisable at a price not less than the initial public offering price, with an annual step-up rate ranging from five to ten percent.  

Thus it becomes apparent that the promoters' problems will not be eliminated by the use of options or warrants. Because of the limitations on number and exercise price, the promoter finds himself in substantially the same position as he would have been had he chosen promotional stock. Without adequate capital to contribute to the corporation, he is precluded from greater participation in its affairs.

E. NON-VOTING SECURITIES

General statutes governing corporations permit the issuance of different types of securities. Thus, within certain limits, a corporation normally may issue various classes of stock, such as common and preferred, and different kinds of debt securities, including, for example, mortgage bonds and debentures. Taken together, the various types of securities issued by a corporation constitute its capital structure. And, in corporate enterprises, it is the corporate capital structure through which the allocation of the risk of loss, the power of control, and the participation in the proceeds of business activity is effected. Consequently, the promoters of a new corporation may consider manipulating its capital structure so as to accomplish their purposes, including, of course, their desire to maintain a controlling position

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62 Mofsky, supra note 4, at 286-87.
63 These states have generally adopted the statement of policy issued by the Midwest Securities Commissioners Association in 1961. See 1 C.C.H. BLUE SKY L. REP. § 4577-79 (1968).
64 See D. HERWITZ, BUSINESS PLANNING 44-49 (1966).
after the public offering is completed. By fixing the terms of the securities, particularly the stock of the corporation, one familiar only with the state's general corporate statutes may conclude that a substantial amount of control may be reserved to promoters. For example, one might suggest that the promoters can achieve this result by planning the public offering so that at least part of it entails the sale of non-voting securities, such as a class of non-voting common stock. But, it is in this connection that one confronts one of the more salient examples of the new corporate law made applicable to promoters by the adoption of state securities regulations.

This relatively new area of blue sky law concerns the type of security that may be the subject of a public offering when the issuer is in the promotional or developmental stage. In some instances, these regulations take the form of direct restrictions on the issuance of non-voting securities, whether common or preferred stock. Other state regulatory rules, including West Virginia's, indirectly affect the issuance of non-voting stock by a new corporation. This indirect limitation is the result of certain conditions which are imposed on these securities when they are issued.

According to the West Virginia regulation, a proposed offering of non-voting equity securities by an issuer in the promotional stage is presumptively "unfair". One can avoid this presumption, however, by providing that the holders of the non-voting securities as a class have a right to elect a majority of the board of directors in the event the issuer fails to pay dividends on the non-voting securities. This right is to become operative when the dividends have not been paid for six calendar quarters. Failure to pay dividends to these shareholders for any six quarters is sufficient; the quarters need not be consecutive.

The functional effect of this regulation governing the issuance of non-voting stock is to require the inclusion of a contingent voting provision. Experience with such provisions involving preferred stock suggests that many complications may result, some of which may be avoided by careful draftsmanship. One who simply provides for the contingency itself, i.e., default in dividend payments for six


\[66\] This is because the regulation in question must be satisfied at the time of the proposed public offering. Therefore, provision must be made for the contingent voting right in the stock certificate itself, see D. Herwitz, Business Planning 291 (1966).
calendar quarters, has not dealt with one of the more troublesome problems involved. That is, one must also deal with the circumstances under which a default is cured and the voting power of the non-voting stock is terminated.67 The need for careful draftsmanship in this regard is illustrated by a Delaware case decided in 1944.68

In this case the terms of the contingent voting provision were as follows:69

If at any time the corporation shall be in default in respect to the declaration and payment of dividends in the amount of two years' dividends on the preferred stock, then the holders of a majority of the preferred shall have an election to exercise the sole right to vote for the election of directors and for all other purposes, to the exclusion of any such right on the part of the holders of the common stock until the corporation shall have declared and paid for a period of a full year a 6% dividend on the preferred stock, when the right to vote for the election of directors, and for all other purposes, shall revert to the holders of the common stock.

The facts of the case revealed that prior to 1942 there had been a substantial default in the payment of dividends to preferred shareholders. As a result, they assumed the voting power provided for in the contingent voting provision. In 1942, a six percent dividend was paid, but this still left two years of unpaid dividends. This presented the issue of whether the right to vote had reverted to the common stockholders. The minority of the court reasoned that the provision relating to the full year dividend payment was controlling and that the common stockholders were entitled to have the voting power returned. But the majority held that the two year default provision governed the situation. Accordingly, the preferred shareholders retained control of the corporation until the cumulative amount of dividends in arrears had been paid.70

67 This assumes, of course, that the default can, in fact, be cured by the subsequent payment of dividends. Although the applicable West Virginia regulation deals only with what happens when there has been a default in dividends for six calendar quarters, there is no reason why the parties involved could not provide that the voting power of the non-voting stock is terminated after the default has been cured.


69 Id. at 359, 38 A.2d at 745.

70 This is apparently the result that would be dictated by W. Va. Sec. Regs. § 3.04, i.e., dividend defaults are cumulative and the total amount in arrears must be paid before the default is cured. Otherwise, payments of dividends for one calendar quarter would be sufficient. That is, the regulation
In addition to drafting problems, the ambiguous nature of this regulation leaves many other questions unanswered. For example, the regulation deals only with the payment of dividends, but does not specify what amount must be paid. It seems certain that a provision calling for only token dividend payments would not satisfy the requirement involved. What is required, however, is uncertain. In fact, one could read the regulation as requiring payment in dividends of all amounts legally available for such purposes. If this were so, the normal directorial discretion in this regard would be virtually eliminated. In any event, it is certain that the existence of such ambiguities presents serious planning problems.

In the final analysis, the decision concerning the issuance of non-voting securities will be based upon a variety of factors. In the first place, one must consider whether such non-voting securities will be marketable. Moreover, one must analyze the future needs of the enterprise. That is to say, the regulation with its dividend requirements appears to offer little assistance to the typical beginning corporation, where most of the earnings in excess of compensation to the employees of the company are expected to be plowed back into the business.

IV. CONCLUSION

The promoters' control and future participation in the rewards of a beginning enterprise are substantially restricted if a decision is made to finance the business by making a public offering of its securities. West Virginia statutory rules and accompanying regulations require a sizable initial investment by the promoters, preclude the issuance of promotional stock, and severely restrict the issuance to promoters of stock purchase options and warrants. Additionally, substantial restrictions are placed on the use of non-voting securities. The problems which result from the restrictive nature of the statutory provisions and regulations are often compounded by the ambiguities involved in determining the scope of such provisions. Indeed, noted

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provides that the requisite number of defaults to trigger the voting power for non-voting securities need not be consecutive. W. Va. Sec. Regs. § 3.04 (1) (1964). Conversely, it seems that the total amount of dividends in arrears must be paid before such power is terminated. Indeed, noted

The author is not familiar with the "actual" blue sky law practice in West Virginia. All that has been considered in this paper is that which one can find in the applicable written statutory and regulatory provisions. Hence, some of the ambiguities one experiences from this approach may be imaginary, since an unwritten rule may be in operation which deals with the particular problem. Even so, this raises the question of the wisdom of relying on unwritten rules in an area where planning is particularly important.
scholars in the area have characterized the field of blue sky laws as a "statutory and administrative morass." 72

The primary justification for these restrictions on promoters' activities is that blue sky regulations are needed to protect unsophisticated public investors. Those arguing in favor of the application of so-called merit standards point out that something more than simply an anti-fraud approach to the regulation of securities is needed. In other words, they argue that a qualitative determination must be made when deciding which securities are to be sold to the investment public. But the more state administrators seek to "protect" the public by imposing pervasive restrictions on the sale of securities in a promotional company, the greater will be the corresponding impact on entrepreneur activities. As one author has stated, "the comprehensive regulation of promoters both as to their right to tap capital markets and the terms upon which they may tap capital markets must have some impact on entrepreneurship." 73

One can see emerging two competing goals, both of which are crucial to a particular state's economic prosperity. On the one hand is the desire to provide adequate protection for all investors; on the other is the need to provide an attractive climate in which new ideas and new businesses may flourish. Consistent with the latter theme is the observation made by a Presidential Commission, which urged that "[w]e . . . give attention to policies favoring a high degree of risk and growth potential." 74 The ideal situation therefore would involve a careful balancing of the burdens and costs of registration vis-à-vis the protection needs of public investors. Unfortunately one senses that such a balancing process was not part of some determinations to impose what are often severe restrictions on promoters' activities. More often than not this may result from insufficient information on the part of an administrator or legislator. In any event, the result may be that a state's public investors are protected against a few unscrupulous promoters but are denied the benefits of the activities of many honest entrepreneurs who either abandon their ideas or go to other less restrictive states to seek public financing.

Finally, the purpose of this paper has been simply to highlight some of the problems a promoter faces when confronted with a single

72 Loss & Cowett, supra, note 1, at 44.
73 Bloomenthal, supra, note 4, at 1478.
74 President's Commission on National Goals, Goals for Americans 10 (1960).
state’s securities laws. It does not take much imagination to appre-
ciate how very complicated the task becomes when the proposed
offering is to be “qualified” in many states, all with varying degrees
of regulation. More recently, a substantial number of states have
taken steps to provide more uniformity in the regulation of securities
on the state level. The most notable example, of course, is the enact-
ment by approximately twenty-seven states of the Uniform Securities
Act. Whether or not one believes that West Virginia should enact
this kind of legislation, it is suggested that any state could profit
from the consideration of such a proposal. By doing this, legislators
would have the occasion to focus upon the existing problems. This
must be the first step.