SECOND THOUGHTS: REGULATION OF SECURITIES OF INTER-CITY MOTOR COMMON CARRIERS OF PROPERTY*

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I. INTRODUCTION

The trucking industry today is faced with a variety of regulatory agencies and statutes which apply to its securities issues. One of the striking and unique aspects of the overlapping schemes is the process of development. Today the principal activity is found in the Interstate Commerce Commission, but the Securities and Exchange Commission, state public utility agencies, and state Blue-Sky administrators all play a role, either of actual supervision and approval or as a threatening alternative which might have to be faced under certain conditions. Most of this structure was established long before trucking securities were being offered to the public and even before there was significant demand for capital beyond the founding family. The current necessity is to relate the regulatory patterns and practices to the development of the industry, to evaluate their effect and the future, and in this light to make the proper recommendations for adjusting regulation to growth.

II. LEGISLATIVE HISTORY

The culmination of federal interest in carrier securities may be traced to the congressional concern with railroad credit and reorganizations following World War I. This was largely a continuation of the investigation begun after the turn of the century. The consequences of government operation during the war years and the subsequent temporary depression were devastating following the unsound and control-oriented financial policies of the pre-war period. The Transportation Act of 1920 was the legislative response to existing conditions; and, as an amendment to the Interstate Commerce Act, section 20a subjected regulated railroads to Interstate Commerce

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1 21 ICC ANN REP. 24 (1907).
Commission authorization for securities issues. This act has remained the principal provision for securities regulation of interstate carriers.

The experiences of 1929 and the initial depression years required a more pervasive congressional reaction to securities practices. The Securities Act of 1933 and the Securities Exchange Act of 1934 resulted. The focus of these acts was the requirement of disclosure to the public and the prevention of fraud, and since these considerations applied to the entire business spectrum a separate, independent regulatory agency, the Securities and Exchange Commission, was established to administer the statutes. Although the purposes and practices under the SEC acts were general and investor oriented, while section 20a of the Interstate Commerce Act was specifically drawn to insure sound carrier financing and a stable capital structure for each corporate unit in the interests of reliable transportation, securities authorized by the ICC were exempted from the registration requirements of the Securities Act. The Securities Exchange Act did not provide similar exemption since there is no counterpart to its regulation of exchange trading in the ICC jurisdiction.

Trucking was a relatively new innovation in 1920. By the early 1930's it had developed into a recognizable industry. The previous decade had witnessed a classic case of complete competition in a new and growing field; there was only minimal state regulation, and entry was unhindered. There was a proliferation of so-called wildcat operators, often with only a single vehicle. And the situation became even more unmanageable in the initial depression years:

It was easy to get into the business with little or no capital because the truck manufacturers and sales agents were willing to sell equipment new or repossessed from bankrupts, with little down payments.

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6 The National Transportation Policy was explicitly formulated in the Transportation Act of 1940, ch. 722, § 1, 54 Stat. 889.
8 See for a case in point the best company history to date, of which there are only three, FILEAS, YELLOW IN MOTION 1-10 (Bur. Bus. Res., Indiana Univ., 1967).
9 And even this state effort was virtually destroyed as to interstate commerce by the Supreme Court. Buck v. Kuykendall, 267 U.S. 307, 315-316 (1925).
By 1931 many of the more important and influential operators were meeting to organize the American Trucking Associations as a national counterpart of the existing bus industry groups\textsuperscript{11} and to join them in seeking to promote uniform regulation to eliminate the ruinous competitive practices which prevailed. Existing state associations formed the nucleus of the ATA, but it had become clear that state variations were impractical to achieve the desired goals. The internal disagreement centered around the merits of seeking a new motor carrier agency as opposed to encouraging an expansion of the Interstate Commerce Commission.\textsuperscript{12}

The private promotion of the concept of federal regulation paralleled three other developments: (1) a succession of bills and hearings since 1926,\textsuperscript{13} (2) the increased concern of the ICC, and (3) the related personal pressure of Commissioner Eastman, the Chairman of the ICC and later also the Federal Coordinator of Transportation. The Commission presented its study of motor transportation to Congress in 1931 in support of its argument for expanded jurisdiction.\textsuperscript{14} The primary persuasive section of the report, "Regulation or Unrestricted Competition?",\textsuperscript{15} develops the theme of unfairness to regulated commerce. This attitude is probably characteristic of Commission biases at that time.\textsuperscript{16} The railroads were being hurt by the low marginal profit rates that trucks and buses were then maintaining in order to survive. Although conclusion thirty-six\textsuperscript{17} was that "issuance of stocks and bonds of motor vehicle companies operating in interstate commerce should be placed under the supervision of the Interstate Commerce Commission," it is an inescapable inference that securities regulation was incorporated solely as a duplication of railroad regulation without a demonstration of similar necessities. The study never mentioned truck securities (probably because there were no public companies at that time),

\begin{itemize}
\item \textsuperscript{11} The American Transit Association and the National Association of Motor Bus Operators.
\item \textsuperscript{12} \textit{Evaluation of the Motor Carrier Act}, supra note 10, at 40-41.
\item \textsuperscript{14} \textit{Coordination of Motor Transportation, Report to Senate Comm. on Int'l & Foreign Commerce}, 72d Cong., 1st Sess. (1931).
\item \textsuperscript{15} \textit{Id.} at 93-95.
\item \textsuperscript{16} ICC Chairman Eastman candidly admitted this natural result of a 45 year relationship with the railroads when he was talking with ATA members: "You may think that the ICC is old, hidebound, and railroad oriented. Maybe it is, but not to the extent that it cannot undertake a new job."
\item \textsuperscript{17} \textit{Coordination of Motor Transportation}, supra note 14, at 118.
\end{itemize}
never noted abuses as it had done with railroad history, and the only reference to any motor carrier securities was in the context of the Greyhound bus company.\textsuperscript{18} There was an admission of opposition to the proposed regulation by shippers, presumably an important segment of the “general Public” to be benefited. The reply was that “public demand should not be confused with public need or what is in the public interest.”\textsuperscript{19}

The enthusiasm of the ATA for expanding the ICC’s sphere of influence was understandably reversed\textsuperscript{20} by a genuine bonanza in the form of limitations on competition without the public-benefit restrictions of most statutory regulation. This was the National Industrial Recovery Act of 1933\textsuperscript{21}. Naturally the ATA spearheaded the formation of a trucking code; it “was an opportunity to get regulation self-imposed and Government enforced.”\textsuperscript{22} The code was adopted by the ATA board of directors, but most small operators did not belong to that organization and the provisions were open to the criticism of discrimination. The operation of the scheme had barely evolved when the NRA was declared unconstitutional.\textsuperscript{23}

This brief experience reduced the intra-industry opposition to regulation (among those of influence), and the choice between the ICC and a new agency had to be faced. The decision was made to attempt to amend the Interstate Commerce Act, and the ATA made its third shift in function during its then short life, from trade organization to code administrator to lobbyist.\textsuperscript{24}

The Emergency Railroad Transportation Act of 1933 provided for a Federal Coordinator of Transportation, one of whose responsibilities was to study “means of improving conditions surrounding transportation in all its forms and the preparation of plans therefore.”\textsuperscript{25} From the time of Commissioner Eastman’s appointment it

\textsuperscript{18} But in that instance it was recognized that the stock issues had been regulated by the respective states and that possibly only Greyhound’s equipment trust certificates could be profitably supervised: “Uniformity of regulation of this kind of security would be of benefit to the industry and to investors.” Id. at 27.

\textsuperscript{19} Id. at 96-97.

\textsuperscript{20} The Association actually opposed the original Rayburn bill (H.R. 6336), an immediate predecessor of the Eastman motor carrier bill (S. 1629). Regulation of Transportation Agencies, S. Doc. No. 152, 73d Cong., 2d Sess. 25 (1934).

\textsuperscript{21} Ch. 90, Stat. 195 (1933).

\textsuperscript{22} Evaluation of the Motor Carrier Act, supra note 10, at 41.

\textsuperscript{23} Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

\textsuperscript{24} One of its founders prefers the phrase “legislative committee actively seeking regulation.” Evaluation of the Motor Carrier Act, supra note 10, at 42.

\textsuperscript{25} Ch. 9 49 U.S.C. §§ 251, 254 (1952).
became inevitable that motor carrier regulation would be recommended and that it would follow the ICC's familiar railroad format. The Section of Research which was established to develop these plans was intermodal in approach. In March, 1934, the report and its recommended legislation were transmitted to the Senate, and basically the Eastman bill became the Motor Carrier Act, 1935.

This act added Part II to the Interstate Commerce Act and provided comprehensive regulation for interstate motor carriers under the ICC. Section 214 subjected securities issues of motor carriers, with some exceptions, to section 20a(2)-(11) of Part I, and it also amended the Securities Act of 1933 to exempt these securities, as well as those of the railroads. Thus by 1935 the statutes and procedures for motor carrier financing were virtually identical to those for railroads (with some provision for the smaller truck companies) despite the enormous disparity in size and the fact that there had never been what could be called a public sale.

III. THE STRUCTURE OF THE INDUSTRY

The first commercial truckers were almost invariably individual drivers, many of whom did not own their own vehicles. By the date of passage of the Motor Carrier Act this situation had not radically changed. In 1967 there remained a large number of small operators; in fact more than ninety percent of truck owners owned only one or two vehicles. But a striking change occurred in the growth of the truck fleets. In 1964 there were 436 fleets of 50 to 99 trucks each, and 363 fleets of 100 or more trucks operating as interstate for-hire carriers of property. Intercity Class I and II motor

26 Regulation, supra note 20.

29 Although trucks in all classes of service increased from 85,600 in 1914 to 3,480,939 in 1930, Coordination of Motor Transportation, 182 I.C.C. 263, 274 (1932), "the Trucking Code registrations for 1934 indicated that approximately 85% of its membership only owned one truck, and that only 1% of the industry operated more than two trucks. The average was 1.6 trucks per member." Magnuson, supra note 13, at 40. Because of claims that this 1% controlled the Code many of the driver-owner wildcats refused to join and were not considered in the 85%.

30 AUTOMOBILE MANUFACTURERS ASSOCIATION, MOTOR TRUCK FACTS 1 (1967). But virtually all of these were panel or pick-up truck owners. Id. at 40. Only 9.5% of all trucks are operated for-hire, and these are divided between local cartage, intercity common carriers, and intercity contract carriers. MOODY'S TRANSPORTATION MANUAL, Special Features Section a62 (Sept., 1987).

31 DUN & BRADSTREET, INC., MOTOR CARRIER DIRECTORY (1965). There were also 1,914 fleets of 5 to 9, 2,201 of 10 to 24, and 913 of 25 to 49. Id.
carriers of property owned a total of 160,228 power units and rented 72,292 more. In 1965 there were 1,250 motor carriers with revenues exceeding one million dollars.

The regulated motor carriers have shown continuous growth not only by companies but also in industry importance. This growth has been both a response to expanded shipping activity and a reflection of competitive aggressiveness. In 1940 gross operating revenue from transportation of goods was 867 million dollars. This represented 17.74 percent of the total gross operating revenue of all regulated goods carriers (railroads, motor carriers, water carriers, pipelines, and airways). In 1950 the respective figures were 3.7 billion dollars and 29.44 percent; in 1960, 7.2 billion dollars and 42.47 percent; and in 1965, 10.1 billion dollars and 47.90 percent to make trucking the largest revenue-producing property transportation industry, surpassing railroads. The magnitude of this growth is more emphasized by the fact that these motor carrier figures are based on only one-third of all motor carrier services. This expansion in trucking is also evident in terms of ton-mile distribution among the different modes of inter-city freight carriage. Motor trucks went from 10 percent and railroads from 61 percent in 1940 to 22.5 and 43 percent, respectively, in 1965; the only other mode showing a larger increase in percentage was airways which grew from .002 percent to .12 percent during the twenty-five year period.

Under the authority of section 204(b) of the Interstate Commerce Act, Part II (the Motor Carrier Act), the Commission has promulgated regulations classifying motor carriers of property (which are in themselves already distinguished from carriers of passengers). The first division of the classification recognizes four categories of operators which are relevant here for purposes of clarification: (1) common carrier of property, (2) contract carrier of property, (3) private carrier of property, and (4) exempt carrier. The second division distinguishes the type of carrier service: (1) regular route, (2) irregular route or (3) local cartage. And the third division...

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32 AUTOMOBILE MANUFACTURERS ASSOCIATION, supra note 30, at 41.
35 Id. at 7. All ICC regulated motor carriers of property account for only about 36% of the total intercity ton-miles of all trucks (136.1 billion vs. 234.7 billion for all other motor carriers), based on estimated 1965 figures.
36 Id. at 8.
37 Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937). See for summary, 1 FED. CARR. REP. ¶ 63.
identifies the type of commodities transported by the carrier (e.g., general freight, household goods, heavy machinery, etc.). Both common and contract carriers operate for compensation from the shippers, as distinguished from private carriers which are best described as "kept" carriers operating for their owners. Common carriers offer their services to the general public, while contract carriers are available only under agreements with a limited number of persons. Common carriers are also known as for-hire carriers.

The factors influencing these classifications have been appreciated by the financial community:

It has been the popular belief that truck transportation in the United States enjoys such commonality that it may justifiably be referred to as the "Motor Carrier industry." This is not necessarily the case. Wide differences in economic interests, size, markets, types of carriage etc., together with limited statistics on each, make a single industry classification highly unrealistic. We thus maintain that the publicly regulated, for-hire carriers should be treated as an industry unto itself, excluding many other types of motor carriage.

The problems and history of passenger carriers are obviously distinct from those of property carriers, and thus motor common carriers of property in the inter-city trade constitute the "backbone of the nation's truck transportation system."

The industry can be further dissected according to quantitative importance, and the ICC has attempted to do this. There have been three classes established, both for statistical convenience and substantive variations (e.g., Class III motor carriers are not required to follow the prescribed Uniform System of Accounts or to file periodic reports other than annually). Until 1950 carriers with gross revenues in excess of 100,000 dollars were considered in Class I; in 1950 the amount was increased to 200,000 dollars; and since 1957 Class I has been comprised of carriers doing a gross business of more than 1 million dollars. Class II now is composed of the 200,000 to 1 million dollar range, and Class III consists of all the ICC regulated carriers with less than 200,000 dollars in annual revenues. Although Classes I and II encompass only 1,389 and 2,769 carriers, respectively, as opposed to the 11,238 in Class III, the former are by far the

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40 Id.
most significant in terms of securities regulation. Included in Classes I and II are about 700 local cartage firms which handle interstate shipments, thus leaving 3,165 inter-city motor common carriers of property which are potential issuers of securities.

There will undoubtedly continue to be gains in the number of sizable carrier companies, and existing large carriers will expand. This growth should be expected over the long run from internal success in fulfillment of the competitive advantage vis-à-vis railroads and water carriers, but more noticeably the following is anticipated:

the acquisition trend will accelerate as the stronger companies continue to expand and include the smaller marginal operations. ... The last thirty years will become known as 'The Age of Growth'—the next ten years, 'The Age of Consolidation.'

The acquisition trend is impossible to overlook, as are its natural consequences of increased demands for capital. Several factors have contributed to the current situation, most of them capable of being summarized in the context of a maturing industry. The need to modernize equipment is compelling, both as to rolling stock and facilities such as terminals and storage. There is a drastic need to attract sparse executive talent. The businesses have now reached a second generation level, and larger operations, combined with more sophisticated business problems, require competent management. The importance of the managerial quotient is highlighted by the abnormally narrow profit margins which the entire industry experiences. There is a definite relationship between size and the

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42 American Trucking Trends, supra note 34, at 13.
43 For purposes of securities regulation the relevant segment of the industry may therefore be considered as Class I and II intercity common carriers of general freight. This is the group of carriers generally analyzed by investment specialists. See, e.g., Wedel, Financial Aspects of the Motor Carrier Industry, Motor Carrier Forum 1 (1963); Pierce, Banker's Analysis of the Motor Carrier Industry for 1966 (1967).
A further subdivision excluding all but the regular-route trucking lines would not sacrifice the accuracy of examining new developments related to growth. This was the industry definition used by Hutton, supra note 39.
44 Hutton, supra note 39, Summary.
45 The Regular Common Carrier Conference sponsored by the ATA has for several years prepared extensive statistical studies of the public carriers in worksheet form so that other carriers may compare themselves. Included in the annual publication is an "Acquisition Check List" of all the considerations that are normally relevant in chronological order.
46 Net profit as a % of gross revenue ranged from an average of 1.9% in the New England Region (with 131 common carriers in Classes I and II carrying general commodities) to a high of 3.8% in the Southwestern Region (49 carriers) for the year
ability to compensate a professional management without eliminating the interests of the founders. A further consideration encouraging carrier combinations has been the advantage of integrating with more profitable long-haul runs and the resulting gain in value of operating rights over their potential utilization with a small company. A definite influence has been the desire to have access to public capital and insurance company financing. This is also related to executive recruitment since the reward of an equity interest in the carrier is more alluring and measurable when a public market has been established. Finally, perhaps the most recent development favoring consolidation has come from the ICC itself in the form of Commissioner Tierney's announcement at the 1965 industry convention that the old value-of-service rate-making theory was being discarded in favor of cost oriented rates; only the larger carriers will be able to supply the necessary cost data.

IV. FINANCING THE INDUSTRY

Because of the industry's history of smallness, with recent growth by consolidation, and also undoubtedly due to the presence of the ICC virtually from the beginning of the growth period, motor carrier balance sheets have remained rather simple. The tendency has been for carriers of all sizes to invest approximately half their assets in carrier operating property. Similarly, almost half of total liabilities and net worth consists of reserves and capital. Most of the long-term debt consists of equipment obligations. These figures may be summarily stated in terms of a ratio of total debt to net worth which in 1966 was 1.36 for all the carriers in our relevant categories and 1.03 for the publicly held companies. The conclusions to be drawn are that not only do publicly owned carriers demand new

1966. For the total of 1,225 carriers of this type in the country the average figure was 2.8%. Pierce, supra note 43, at 8-9.

47 "Without question the most important single factor in evaluating the prospects for a motor carrier is the competence and depth of management." Blyth & Co., Inc., MOTOR CARRIER COMMON STOCKS 2 (1965). For related conclusions see Hutton, supra note 39, at 15.

48 See Hutton, supra note 39, at 8.


50 For the 1,225 Class I and II common carriers of general freight in 1966, the range by size groupings of reserves and capital as a % of total liabilities and net worth was from approximately 38% to 45% with an overall average of 44.2%. This may be compared to the composite figures for the publicly owned carriers (excluding non-carrier holding companies) with 49%. Id. at 16-18.

51 Id. at 8-18. There is almost no preferred stock or debentures.
equity capital beyond that generated internally and retained as surplus, but they are using this source of funds to replace a dependence on funded debt and credit, thus giving them more financial flexibility. This policy has produced obvious advantages\textsuperscript{52} which more carriers should be expected to seek in the future.

The development of publicly held motor carriers has been a recently accelerating phenomenon. A prominent industry official noted in 1963 that a "'growth mark' for many a trucking company is its advent into public ownership of its capital stock, as contrasted with the sole proprietorship, partnership, or family-held company which even today are common among motor carriers."\textsuperscript{63} It wasn't until 1939 that the first public offering was made, and there was only one other before 1950. Since then there have been forty other carriers selling securities in a public offering, some on several occasions.\textsuperscript{64} Not all of these distributions consisted of common shares; there were two issues of convertible preferred, one of convertible debentures, one of convertible subordinated debentures, one debenture issue, and one sale of a special class of common stock.\textsuperscript{65} Similarly, not all of the sales involved a prospectus since none is required by the ICC. It is perhaps revealing that of forty-two original issue underwritings, in only four did the underwriter's compensation consist of any warrants or options. Thus, although the acceptability of motor carriers to investors is increasing and the record of post-issue success has been good,\textsuperscript{56} the financial community seems to remain somewhat wary. But there does seem to be some trend for the underwriter's compensation related to offering price to be declining from well over 10 percent to the range of 7.5 to 9.5 percent.

\textsuperscript{52} Despite the higher proportions of capital in the publicly held companies, \textit{supra} note 50, their 8.1\% composite net profit as a \% of capital was higher than any other size or regional grouping of carriers. \textit{Id.} It is of course possible that there is some relationship between these companies' ability to attract public investor interest and their ability to achieve high rates of return on investment.

\textsuperscript{53} George H. Minnick, Comptroller, American Trucking Associations, Inc.


\textsuperscript{55} Regular Common Carrier Conference, \textit{MOTOR CARRIER FINANCING}, Part II, Schedule 8 (1967).

\textsuperscript{56} Of a total of 65 public offerings there was a gain realized in the market price (as of March 31, 1967) over the adjusted offering price as to all but 17. Of these 17, 4 experienced losses of less than 10\%. \textit{Id.}
Not all the underwritings which have taken place are raising new capital for the carriers involved. Many of these are only secondary distributions by the founders or their families, and perhaps a majority of the new carrier issues have been coupled with a secondary issue. This has been attributed to the limited supply of outstanding stock, the lack of a past market interest, and the ease and tradition of debt financing.

Of course going public is not the only reason for a carrier to issue securities. Many of the acquisitions which have occurred have involved exchanges of shares or purchases of assets in exchange for the acquiring company's stock. On occasion there has been private placement with institutional investors, but this has been largely confined to debt issues. There is a marked tendency for equipment to be leased in preference to purchases with the proceeds of debt funding. That debt which is incurred is tending toward revolving credit agreements.

The popularity of debt in the industry may be traced to several sources. The most obvious reasons are the self-liquidating aspects of revenue equipment assets which comprise one-half of a carrier's investment, the liberal credit terms because of the tremendous health of the industry and resale value of the pledged property, and the abnormally heavy cash flow. The prospect for the immediate future is for longer-term investments to be made the source of funds. New terminal construction is becoming a major item in corporate budgets, and this is "a worthy and logical candidate for longer-term, institutional type money." This opportunity is being seized upon by some insurance companies which look for real property and a long and strong earnings record as bases for their trucking investments. Although institutional debt and equity should in large measure be competitive, there are some complementary aspects, most notably that mortgage loans have been restricted to two-thirds of

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57 E.g., Merchants Fast Motor Lines, 400,000 shares (1960); Gateway Transportation Co., Inc., 167,600 shares (1965).
58 Gateway Transportation Co., Inc., 50,000 shares for the company and 150,000 shares secondary (1962).
60 Wedel, supra note 43.
61 Holding (Vice President, Equitable Life), Remarks before Trucking Industry Forum (1963).
the underlying property's value which leaves a financing margin not easily filled with other debt. It is true that in recent years incorporated trucking companies have developed the requisite earnings records to attract bond or debenture funds, but the fact of narrow profit margins favors equity from the issuer's standpoint to maintain flexibility and avoid fixed charges. One final point supporting the expectation of continued new public distribution of common shares is the need to provide a continued equity base for favorable debt ratios.

V. THE STATUTORY SCHEMES OF REGULATION

A. The Interstate Commerce Act.

The burden of regulating securities issues has been delegated to the Interstate Commerce Commission by section 214 of the Motor Carrier Act of 1935. This section incorporates the provisions of section 20a(2)-(11) of Part I of the Interstate Commerce Act as the statutory standard for Part II as well. Thus a carrier is prohibited from issuing any of its securities or from assuming any obligation or liability “in respect of the securities of any other person,” unless the Commission approves. This approval is to be given only after the Commission has investigated the proposed purposes and uses of the issue and proceeds and specifically finds that: (a) there is a lawful object according to the carrier's corporate purposes, that the proposition is “compatible with the public interest,” that the object is “necessary or appropriate for or consistent with” the carrier's service to the public as a common carrier, and that the carrier's ability to perform that service will not be impaired by the object, and (b) that the issue is “reasonably necessary and appropriate” to achieve the approved object. It is obvious both from the language of the subsection and the cases decided by the Commission that the decision is based on a double consideration of the desirability of the issue's purpose and whether this is a wise method for achieving that purpose. Both of these aspects are weighed in the light of whether there is some transportation advantage to be expected, not simply whether the issue would benefit the issuer (although benefit to the issuer is also a prerequisite). The burden to establish these factors favorably

64 “[S]hare of capital stock or any bond or other evidence of interest in or indebtedness.” 49 U.S.C. § 20a(2) (1964).
65 “[A]s lessor, lessee, guarantor, indorser, surety, or otherwise.” Id.
66 Id.
is upon the carrier applicant which is seeking an order approving the proposal.

In making its determinations the Commission has large discretionary powers under section 20a(3) to modify the proposal of the applicant, to grant it only in part, to apply conditions to its approval, or to grant or deny the application totally. Furthermore, an initial order of the Commission is not final since it may make supplemental orders, subject to the standards of subsection 20a(2), altering the provisions of the previous orders and affecting the disposition of the securities involved or of the proceeds.

For securities subject to this procedure the Commission's jurisdiction is "exclusive and plenary." Thus no other authorities, state or federal, may regulate the issuance or distribution of these securities. The assumption is that the substantive authority of the Commission is sufficient to eliminate a parallel jurisdiction in the SEC, despite a difference in emphasis. But the elimination of state power is somewhat different. The compromise reached to avoid state interference with a coordinated national transportation system, while recognizing legitimate state interests and responsibilities, is that upon receipt of an application the Commission notifies the governor of each state in which the carrier operates to allow the appropriate state officials to present their arguments, at a hearing if the Commission so decides.

If a carrier security is within the Commission's jurisdiction and is issued without authorization or contrary to the terms of the Commission's order, it is void. But if a security is issued according to the terms of an authorization, it is a valid security even though the order was obtained by faulty procedure. A bona fide purchaser of a void security may maintain an action for damages regardless of privity against the issuing carrier and its directors, officers, attorneys and other agents who participated in any of the relevant actions, all of whom are jointly and severally liable. If the holder of a void security,

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67 A prospective issuer commences the Commission's investigation by presenting an application following Form BF-6. 49 C.F.R. 1115.1 (1968).
70 Id. at 20a(6). For a hearing there must be good cause shown and the Commission must deem it desirable. The governor is expected to reply within 15 days if the state intends to make representations. 49 C.F.R. § 1115.3 (1969).
whether or not he was a bona fide purchaser, acquired the security directly from the issuer, he may at his option rescind. But the statute also provides criminal penalties for knowingly participating in or consenting to the issue or sale of securities, or the disposition of proceeds, contrary to the Commission’s order(s).\footnote{71}

There is an exception for short-term notes which mature in less than two years from the date of issuance, provided these notes and all outstanding short-term notes aggregate less than five percent of the value of all outstanding carrier securities. In such a case the formal authorization and application need not be complied with, but the issuer must submit a notification form.\footnote{72} Section 214 modifies these provisions in a special proviso; instead of an exception in procedure, there is a complete exemption from the Commission’s jurisdiction of short-term motor carrier notes which aggregate less than 200,000 dollars (when aggregated with all outstanding notes of two years maturity or less), regardless of the percent of outstanding securities. So the notification procedures only apply to short-term note issues which aggregate to more than 200,000 dollars but less than five percent of all outstanding securities; and those short-term note issues aggregating both over 200,000 dollars and more than five percent must be approved by Commission order.\footnote{73}

The other exemption in section 214’s first proviso is for securities of any variety when they aggregate (together with outstanding securities) less than one million dollars measured by principal amount or value.\footnote{74} Value in the case of no-par capital stock is determined by fair market value on the date of issuance, and in the case of par stock value is the greater of par or fair market on the date it is issued.\footnote{75} The consequence of these exemptions in section 214 is that the exempted securities are not issued “subject to the provisions of section 20a of the Interstate Commerce Act . . . ”\footnote{76} One of the

\footnote{72} Id. at section 20a(9); 49 C.F.R. § 56.5 (1967).
\footnote{73} But see note 74 infra.
\footnote{74} Short-term notes in excess of $200,000 can be exempted under the $1,000,000 provision, but the cumulative amount cannot exceed $1,000,000. If there are other securities outstanding or to be simultaneously issued which equal or exceed $1,000,000, then a short-term issue may qualify under the $200,000 exemption for a maximum combined amount of $1,200,000 without a Commission order.
\footnote{75} A short-term issue within the $1,000,000 aggregate exemption of § 214 is not covered by § 20a(9).
\footnote{76} The importance of this will be noted infra, in connection with § 3(a)(6) of the Securities Act.
ridiculous results of this structure for exemptions is that once the minimum capitalization is exceeded all the issues of a carrier, even the smallest note, must be formally approved by a Commission order.

The effect of this statutory delegation to the ICC is not limited to the issues of carriers; a noncarrier holding company which controls a carrier may become subject to the ICC's regulation just as is its subsidiary. A noncarrier may acquire control of two or more carriers, or if already controlling at least one carrier then the noncarrier may acquire control of an additional one, only with Commission approval and authorization. When the Commission gives such authorization it may provide in its order that the controlling noncarrier shall be considered a carrier for, among other purposes, the application of sections 214 and 20a(2)-(11). The standard for authorizing issues of securities of such a controlling person vary in effect on the issuer from those applied to an operating carrier: the Commission is to authorize the issue if it is consistent with each controlled carrier's service to the public, if it will not impair the carrier's ability to perform its service, and if it is "otherwise consistent with the public interest." It has been held by the Commission that this finding specified in section 5(3) is the only one which is necessary and was intended as a substitute for the normal standard of section 20a(2). Holding companies which acquired control of their carrier subsidiaries before the effective date of the Motor Carrier Act in 1935 are not subject to securities regulation by the Commission, and they may not voluntarily submit to ICC jurisdiction (without a subsequent section 5(2) application to acquire additional control) since the Commission has no power to so extend it. But a holding company may indirectly acquire control within the meaning of section 5(2), and thus come within the ICC's section 5(3) discretion, if one of its controlled subordinate companies itself acquires control holdings of another carrier.

78 E.g., reports and accounts.
80 Id.
82 Roush—Control—Southern Cal. Freight Lines, 80 M.C.C. 573 (1959). This is obvious from the statute which gives this discretion to the Commission to be exercised only in the §5(2) order.
83 Chesapeake & O. Ry. Purchase, 261 I.C.C. 239, 262 (1945). Louisville & Jeffer-
B. The Securities Act of 1933

The Securities Act of 1933 requires registration with the Securities and Exchange Commission of an issue which is to be offered for public distribution. A prospectus which contains the registration statement information is required for each sale. By supervising the information contained in these prospectuses the SEC is able to assure the investor of a reliable and thorough source of facts about the issuer upon which to base his investment decisions. The authority of the agency is in theory strictly procedural. It consists of overseeing adequate disclosure by the issuer and assuring full compliance with the standards established by the statute and the rules promulgated thereunder.

An exemption from the registration and prospectus provisions of the act is stated in section 3(a)(6) for "any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended . . . ." As has already been noted, this does not exempt those securities which are expressly exempted from section 20a by the minimum amount proviso of section 214. But to prevent confusion and hardship for the smaller companies which would come within the ICC exemptions, the Securities Act expressly allows common carriers which are required to follow the ICC accounting and record-keeping practices to use those records for the purposes of the SEC statements and forms wherever the two standards would conflict.

On its face it would seem ridiculous for the Interstate Commerce Act to exempt small issues of small companies from the expenses and complications of its procedures only to subject them to the less familiar Securities and Exchange Commission and the likelihood of substantially increased costs. But there are other exemp-

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86 Text accompanying notes 73-76, supra.
88 For an outline of SEC-related expenses of a distribution, most of which are not necessarily incurred with an ICC approved issue, see Wheat and Blackstone, Guideposts for a First Public Offering, 15 Bus. LAW. 539 (1960).
tions in the 1933 Act which substantially alleviate the problem except for the largest issues within the ICC exemption, and for those the policy of not allowing distribution of significant amounts of securities without disclosure may logically prevail. If the issue is to be sold to a limited number of purchasers for investment then it should be within the section 4(2) exemption for transactions not involving a public offering. Or even if sales are to be made to a larger segment of the public but the purchasers (and offerees) are all residents of the state of the issuer's incorporation and business, then section 3(a)(11) should protect the distribution as intrastate. And even if neither of these exceptions applies, the shorter and simpler procedures of Regulation A will apply to an issue of less than 300,000 dollars if there are no others (except exempt ones) within twelve months.\(^8\)

But all securities issues, except those not involving a public offering, and including those exempted because they are regulated by the ICC, are potential sources of civil liability under section 12(2). This anti-fraud provision attacks both untrue and misleading statements and omissions. Section 15 extends this liability to controlling persons of issuers which are liable under section 12. Perhaps because of these threats most recent ICC-approved public issues have been accompanied by unrequired prospectuses which follow the SEC pattern and contain rather thorough disclosures.\(^9\)

C. State Blue-Sky Laws

Every state except Delaware now has a regulatory statute for securities transactions within the state. These laws are popularly known as blue-sky provisions. Of the regulatory approaches usually found in a state statute, two are applicable to trucking issues: (1) anti-fraud powers to investigate and seek injunctions, and (2) registration of securities before sale and compliance with statutory standards. In all but six\(^9\) of the states with blue-sky laws, registration statements must be filed with the state administrator, and affirmative approval must be obtained. Nevada limits the scope of its regulation

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\(^9\) Another explanation is that underwriters have become accustomed to this form of operation and do not alter their procedures for the occasional trucking sale. A third factor is the habits of financial analysts who are the principal users of a prospectus and have come to depend on information in this format; thus the prospectus, despite its ponderous nature, may be a valuable indirect selling tool.

\(^9\) Maine, Massachusetts, New Hampshire, New York, Pennsylvania and Rhode Island.
to completely intrastate offerings, while New Jersey has an exemption for any transaction already within the jurisdiction of the SEC.\textsuperscript{92} The rigors of the legislation and the enforcement vary considerably between states, subject to some degree of increasing uniformity with acceptance of the Uniform Securities Act.\textsuperscript{93} The Uniform Act also has introduced a simplifying technique of registration by “coordination” for issues which are simultaneously registered with the SEC, allowing the same papers to be filed for both federal and state purposes with automatic state effectiveness following federal approval, unless there is a specific state objection.\textsuperscript{94}

As previously noted, section 20a(7) of the Interstate Commerce Act precludes the application of any of these state regulations to securities when issued by a carrier with ICC authorizations. However, the Securities Act of 1933 does not pre-empt state jurisdiction and is intended to supplement it. So a carrier which issues securities under an ICC exemption, or is involved in a transaction which the ICC does not consider to be a security but other agencies do, may have to contend with state blue-sky requirements and possibly also have to register with the SEC.\textsuperscript{95}

D. State Economic Regulatory Laws

There are twenty-eight states with some form of public utility laws regulating securities issues of motor carriers in a substantive way\textsuperscript{96} analogous to the role of the ICC, just as the state blue-sky laws are related in function to the SEC. Twenty-two states have no specific statutory reference to securities, but in many of these the general powers of the regulatory boards may implicitly confer such discretion.

Of the twenty-eight, two are limited to motor buses and therefore have no relation to motor common carriers of property.\textsuperscript{97} Sim-
ilarly, others are applicable only to street railways or passenger carriers. And two other states do not normally require approval. Of the remaining twenty-two the provisions are varied. A common exemption is found for debt of less than twelve-month maturity, and other types of exemptions are found in several states. Other than these exemptions, all the statutes subject issues of stocks, bonds, notes, and other evidences of indebtedness to approval. Some statutes use more general language to be sufficiently inclusive, while others go beyond the categories just mentioned and specify other types of issues to be covered.


SECOND THOUGHTS

The penalties involved for failure to comply with the statutes include voiding of securities,\textsuperscript{105} fines for the carrier,\textsuperscript{106} and fines and imprisonment for the officers, directors, and agents of the company.\textsuperscript{107}

Just as with the state blue-sky laws, a carrier whose issues are authorized by the Interstate Commerce Commission does not have to seek administrative approval by the states of its incorporation or operation.\textsuperscript{108}

E. The Securities Exchange Act of 1934

The preceding considerations of the statutory schemes of regulation were primarily concerned with attempts to deal with the process of issuance of securities by a carrier. But once this has been accomplished, regardless of the method, a carrier has other potential securities regulation problems. Foremost among these for a publicly held motor carrier is the SEC and its supervision of the 1934 Act.

The justification for this regulation is that the carrier has created an after-market, or at least it has made one possible.

Of the four purposes underlying the act (continuing disclosure, fraud and manipulation prevention, regulation of credit, and regulation of markets) only the attempts to force disclosure and to maintain orderly securities markets are directly related to the inconveniences which public motor carriers are forced to bear. The disclosure policies, while undoubtedly valuable and commendable, seem to be largely an unnecessary duplication. In partial recognition of this problem, the statute in section 13(b) and the SEC in Rule 13b-1(b) allow carriers which are subject to the ICC accounting and


record-keeping requirements\textsuperscript{109} to file duplicate copies of the ICC reports with the SEC and the exchange(s) in lieu of overlapping reports demanded by sections 12 and 13.

Of course to some extent it may be necessary for a carrier to submit its information to these separate bodies because of their different functions. This is particularly reasonable when a carrier has taken the affirmative step of listing its shares on a securities exchange. For it to encourage a public market and achieve the prestige and benefit (both commercial and to facilitate future issues) of such an association it should be required to submit to the same burdens as other corporations. However, the 1964 amendments to the Act have brought virtually all of the publicly held motor carriers within the registration requirements, whether or not they are traded on an exchange;\textsuperscript{110} and by being registered the company is subject to sections 14 and 16 and the Rules thereunder which directly affect the internal operations of the corporation and the activities of its insiders. Perhaps this is desirable, but it contradicts the regulatory scheme established by the Interstate Commerce Act in the interests of uniformity and central regulation of the transportation industry which was confirmed in the 1933 Act exemption. Although the 1933 and 1934 Acts were considered almost contemporaneously and there was no original exemption in the latter, the scope of the act was not such at that time (in fact there were no listed or even public motor carriers) as to offer a serious threat. Later, when the first carriers did list, the balanced policy considerations were sufficient to avoid amending the statute. But there is no indication that the effect of the 1964 amendments was ever considered in the light of the motor carrier industry.

F. The Investment Company Act of 1940\textsuperscript{111}

It has been previously noted\textsuperscript{112} that holding companies which are not themselves carriers may nonetheless become subject to the securities regulation of the ICC by that Commission's order under section 5(3) of the Interstate Commerce Act. It should go without

\textsuperscript{110} 15 U.S.C. § 781 (1964). The completeness of this section's coverage is obvious from the fact that all the public motor carriers have more than $1,000,000 in total assets; and the 500 minimum shareholder test is in effect no limitation since the smallest number of shares any public motor carrier has publicly offered is 35,000 (Be-Mac Transport, 1962). Underwriters usually recommend an issue in the neighborhood of 300,000 shares. MOTOR CARRIER FINANCING, supra note 55, Part I, at 11-21.
\textsuperscript{112} Text accompanying notes 77-82 supra.
saying that a holding company which does operate as a common carrier is also regulated, but without the need for a special order.\footnote{113}

The Investment Company Act does not have as its purpose the regulation of normal holding companies or operating companies. Thus most carrier companies would be excluded by the general definition of the act since majority owned subsidiaries which are not investment companies do not issue "investment securities" to the parent within the terms of the act,\footnote{114} and more than forty percent of a parent's assets must consist of "investment securities" for it to be an investment company.\footnote{115} But even if a motor carrier or its parent would not be excluded by these terms, if it is subject to ICC regulation it is exempted by "definition."\footnote{116}

VI. THE INTERPLAY OF REGULATION

It should by now be obvious that the several aspects of the regulatory scheme may coexist in reference to any one company's security affairs; in some situations one aspect or statute will assume exclusive authority, and in others several will be concurrent. These complications create problems for the administrators in determining their jurisdiction and for the issuing carriers and their controlling persons in planning their activities.

A. The Intrastate Company

The important point to remember in considering intrastate situations is that the relevant commerce is not the same for the ICC and SEC jurisdictional facts. It is perfectly possible for a company to be interstate as to either agency and intrastate as to the other. This is because the Interstate Commerce Act is related to the extent of the carrier's transportation activities,\footnote{117} while the Securities Act is re-

\footnote{113} In fact, many carriers are now establishing or acquiring subsidiaries to own terminals and equipment which are leased to the parent. See Roush-Control-Southern Cal. Freight Lines, 80 M.C.C. 573 (1959).

\footnote{114} Section 3(a), 15 U.S.C. § 80a-3(a) (1958).

\footnote{115} Id. at § 80a-3(a)(3).

\footnote{116} Id. at § 80a-3(c)(9). Under § 7 of S. 1181 and H.R. 2481 which were introduced as SEC sponsored amendments in the 86th Congress, this subsection would have been amended to eliminate from the exception ICC regulated companies which (A) the ICC "finds and by order declares to be primarily engaged, directly or indirectly, in the business of investing, reinvesting, owning, holding, or trading in securities; or (B) whose entire outstanding stock is owned or controlled by (such) a company. . . ." This bill was never passed because the House added a controversial but unrelated provision and the amended version died in the Senate.

lated to the interstate movement of the offer, sale, or distribution of the securities.118

The expansive nature of the interstate commerce concept found in the Interstate Commerce Act119 has been illustrated by the decisions of the Commission. They have taken quite seriously the language that implies a participation in interstate commerce by a carrier moving goods which travel between states, even though the particular carrier never crosses a state line.120 The Commission is authorized121 to issue a certificate of exemption to an intrastate motor carrier whose unregulated incidental operation in interstate commerce would not disrupt the uniformity of regulation of other motor carriers. Unfortunately, this power is an all or nothing exemption which the Commission jealously guards.122 But in 1967 a Commission-sponsored bill was introduced in Congress to allow the ICC to exempt from the requirements of Part II, or any provision thereof, such service and transportation as the Commission would determine to be of such nature, character, or quantity as to not substantially impair effective regulation of transportation under Part II.123

Few intercity motor common carriers of general freight are likely to be completely intrastate. Those which are intrastate necessarily are limited both in size and in access to financing. These companies would almost invariably come within the intrastate offering exemption of the Securities Act since there would normally be little appeal to out-of-state investors for a public issue. Thus the intrastate motor carrier is usually responsible only to its state public utilities commission and to its blue-sky administrator.

The intrastate company which is found by the Commission to operate in interstate commerce, and is not exempted from ICC regulation by order, will be regulated under section 214 just as are genuinely interstate motor common carriers.124

120 Compare Rush Common Carrier Application, 17 M.C.C. 661 (1939), with Petroleum Products Transported Within Single State, 71 M.C.C. 17 (1957).
122 See, for exemption attitude of strict construction, Clark-Callahan Common Carrier Application, 41 M.C.C. 693 (1943).
124 Under § 206(a) such a carrier has an alternative of procuring a certificate of convenience and necessity from the ICC or a state board. 49 U.S.C. § 306(a)(1) (1964).
B. The Interstate Company

The interstate motor carrier with aggregate capitalization below one million dollars, it will be recalled, is not required to obtain the ICC's authorization to issue securities (so long as they do not increase the aggregate over that amount). However, although these securities may then have to be registered with the SEC unless falling within one of the exemptions in the Securities Act, it does not automatically follow that the carrier's issues are also within the authority of state regulation as are most SEC registrations. The Securities Act specifically reserves the powers of the states, and a similar clause is notably lacking in the Interstate Commerce Act. The question arises whether state powers would have been pre-empted without the saving clause in the former statute, and if they would have then why was it necessary to include the expression of exclusive jurisdiction in section 20a(7) of the Interstate Commerce Act? One answer which preserves the consistency of drafting is that section 20a(7) was only intended as a complement to section 3(a)(6) of the Securities Act in clarifying the ICC securities' protection from the SEC. The only flaw is that when section 20a was adopted in 1920 there was no SEC and the only reference intended could have been to the states. This suggests that securities exempted from section 20a should be outside the protection of that section's pre-emption. But there is also a problem with this theory since there were no exemptions under the original statute—section 20a(9) provided a simplified notification procedure as an alternative to authorization for some securities, unlike section 214 which establishes genuine exemptions.

One logical explanation for these unexplainable jurisdictional clauses in the two acts is that section 20a(7) was unnecessary to achieve its purpose and its helpful inclusion to prevent future interpreters from misunderstanding has led to confusion by the addition of Part II of the Interstate Commerce Act. Such a theory seems to be the rationale of a recent district court decision. Although this solution of the problem may have been only an alternative conclusion of law (since the particular point could have been decided on state law alone due to a carrier exemption in the Nebraska legislation), the case, Independent Truckers, Inc., falls back on the principle that "as to those subjects which require a general system or uniformity of

regulation, the power of Congress is exclusive." The court then applies the principle to find sole authority in the federal government to regulate the interstate carrier's securities, "and the mere fact that it does not actively exercise its authority in all phases of such financing does not permit one or more states to step into the area of federal inactivity." This decision considered only the failure of the carrier to obtain the approval of the state regulatory commission, but the broad theory of federal pre-emption of this field might extend to blue-sky laws as well.

The argument opposing the rationale of the Independent Truckers case is that the very fact of an exemption in section 214 negates the assumption that uniform regulation is necessary. But the rejoinder to that position is that section 20a has always recognized that even small issues of carriers are not proper subjects for state attention, section 202 specifically vests regulatory power in the Interstate Commerce Commission, and the proper interpretation of section 214's exemptions is that Congress decided the motor transportation industry would have a better opportunity to expand the size of its units if they went totally unregulated as to this element of growth at the early stages. The disagreement has certainly not been foreclosed by this one decision.

Virtually identical questions arise in relation to "securities" which the ICC does not recognize as such. The difference between


129 The important distinction which justifies blue-sky enforcement despite prohibitions on substantive state regulation is that public utility legislation has a purpose to regulate the carrier as such, and approval of securities is one focus of this control, while blue-sky laws are directed only at the sales of securities under fair conditions, a type of regulation which Congress in the Securities Act found unnecessary to concentrate in a single federal scheme.

130 The ICC has construed the language of § 20a(2) rather narrowly and literally; the word "securities" is limited to the varieties enumerated (capital stock, bond, evidence of interest in or indebtedness) and their technical equivalents. Louisiana Ry. & Nav. Co. For Authority to Execute a Purchase Contract, 67 I.C.C. 808 (1921); Overnite Transportation Co., 65 M.C.C. 529, 539 (1955). An equivalent must be an "evidence" of debt or interest, and this usually implies negotiability. Lehigh Valley R.R. Co., 233 I.C.C. 359, 365 (1939). A warrant is considered, for example, merely a claim to an evidence of interest and is not such itself despite its marketability (the shares to satisfy it are securities). Western Md. Ry. Co. Stock, 295 I.C.C. 100, 102 (1955).

This approach differs considerably from that of the SEC which interprets the definition of "security" in § 2(1) of the Securities Act as an expansive and all-inclusive
these securities and those exempted by the terms of section 214 is that the types involved have never been regulated by the ICC. Thus, although the basis for state jurisdiction could be stronger in the case of mortgages, conditional sales contracts, loan or credit agreements, or stock warrants or options, the cases will not likely arise since most state statutes do not purport to cover these "securities" either. The SEC does, of course, require registration of many of these ICC non-securities unless they are otherwise exempt, either specifically or by the definition of "sale." 

Surprisingly, the ICC has never sought to broaden the statutory definition of security but has instead suggested amendments specifying particular financial transactions which it would like to control. 66 ICC Ann. Rep. 147 (1952); 73 ICC Ann. Rep. 170 (1959). This seems very short-sighted.

This was refuted in Independent Truckers since there the facts were a conditional sale and a chattel mortgage, both non-securities rather than exempt securities.

Hancock Truck Lines, Inc., 56 M.C.C. 276 (1949); Davidson Transfer & Storage Co., 282 I.C.C. 521 (1952).

Hayes Freight Line, 39 M.C.C. 576 (1944).

The exclusion of these contracts was thought to be established by Capital Transit Co., 40 M.C.C. 17 (1944). But in reliance upon that precedent two bus lines executed loan agreements secured by equipment purchased with the proceeds without an application to the ICC. Transcontinental Bus System, Inc., 80 M.C.C. 54 (1959).

The Capital Transit agreements were conditional and applied to a future extension of credit; thus they did not "evidence" an existing debt of the carrier, and presumably they would be followed upon maturity by notes which would require ICC approval.

The Transcontinental agreements, on the other hand, were acknowledgments of the receipt of loan funds and promises to repay on an installment schedule; thus they were current evidence of a debt, despite the fact that the bus company debtors also promised to apply for authority to issue replacement notes which would be negotiable.

So the Transcontinental case does not destroy the Capital precedent but rather clarifies it by demonstrating that the substance of the transaction may affect even the form-conscious ICC. The result is undoubtedly correct when viewed in relation to the purpose of the Commission to supervise the financial obligations of carriers, while in Capital they were not yet obligated.

One of the collateral lessons to be learned is that the best practice is always to file an application together with a motion to dismiss for lack of jurisdiction in cases of uncertainty. Rice, Regulatory Aspects of the Motor Carrier Industry, MOTOR CARRIER FORUM 15 (1963).


Many of the state laws are now patterned after the Interstate Commerce Act. See, D. Harper, Economic Regulation of the Motor Trucking Industry by the States (1959).


The ICC has interpreted its authority as extending to almost all actions of a carrier which materially affect outstanding securities; thus refunding, changes in maturity dates, interest or dividend rates, or other terms of an issue are all void if authorization is not obtained. Both stock dividends and stock splits are within the Commission's jurisdiction.

But the line has been drawn at transactions by others who are not carriers. The no-jurisdiction ruling as to secondary sales was firmly stated in a case involving an application in three parts for: (1) a stock dividend, (2) warrants to an underwriter for a future sale of common by the carrier, and (3) a sale by the shareholders of twenty-five percent of their dividend shares. The first request was approved; the second was denied as to authority for a future issue, but no authority was necessary for a simple grant of warrants to purchase when-issued shares; and as to the third, the Commission said:

Sale by the stockholders of the stock issued to them is a matter over which we have no jurisdiction; and nothing herein should be construed as indicating our approval or disapproval of this phase of the transaction, or the reasonableness of the terms of such sale.

This decision has been regularly followed, both in similar fact situations and where stock already issued is to be coupled with a new issue in a single underwriting.

The principal difficulty with this position of the Commission is determining whether its lack of jurisdiction over the particular secondary transaction brings the sale within the SEC's jurisdiction under the Securities Act. The ambiguity exists because the Securities Act exemption of section 5(a)(6) applies to "any security issued by a common . . . carrier, the issuance of which is subject to the provisions of section 20a . . . ," which the securities in question

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140 Union Pacific R.R. Co., 65 I.C.C. 735 (1921).
141 Bonds of Minneapolis & St. L. R.R., 124 I.C.C. 562 (1927).
142 Virginia Ry., 72 I.C.C. 473 (1922).
143 Greyhound Corp. Securities, 1 M.C.C. 77 (1936).
146 Id. at 232.
certainly were. Sales of treasury shares or "control" secondary sales (by a holding company parent or individuals) of securities originally issued before 1935 would have been specifically exempted under the 1941 SEC proposals which were intended to clean up minor drafting anomalies in the principal statutes it administered.\textsuperscript{148} The limitation of that proposed amendment indicates that the SEC viewed post-1935 issuances as already exempted, a position which follows from the fact that securities of motor carriers issued after 1935 would have been subject to section 20a when issued.

It is open to question whether it is correct to so assume an exemption in the light of the present tense verb "is" in section 3(a)(6). The logic of the alternative would require a reading of the subsection as exempting only "the issuance . . . which is subject to the provisions of section 20a . . . ." (emphasis added) But this construction is very appealing when compared to the exclusive jurisdiction provision of section 20a(7), the language of which indicates only a protection so that "a carrier may issue securities . . . without securing approval other than as specified herein." The ICC's language in the case in point is consistent with such an interpretation since it does not purport to recognize complete exemption for a security in this posture but only denies ICC jurisdiction.\textsuperscript{149} The initial-exemption-only theory should not be precluded merely by the section 3 heading "Exempted Securities" since subsections (9), (10), and (11) of section 3(a) are all in effect transaction exemptions.\textsuperscript{150} Yet grammatically the language of section 3(a)(6) seems to be drafted with a security exemption in mind instead of a transaction exemption because the entire phrase following the comma most naturally modifies "security" rather than "issued."

At any rate it might now prove awkward for the SEC to enforce a loophole-blocking view in contradiction of its own 1941 proposals


\textsuperscript{150} Subjecting these secondary sales to SEC registration would suggest vulnerability to blue-sky application as well. See note 129, supra. But even if issues exempted by 214 are subject to blue-sky regulation, the argument is stronger for federal preemption here: carrier securities which are once within ICC jurisdiction are prima facie significant from the point of view of a national transportation network; the federal overview necessarily extends to subsequent sales since these fundamentally affect the marketability of carrier shares. This should not preclude a different federal agency's regulation since Congress has a choice as to which commission is most appropriate in the varying circumstances of sales.
and their virtual admission of an existing incongruity. Several secondary sellers have made public offerings on the assumption that the exemption on its face applies generally to the securities if they were issued after 1935 and were not exempted by section 214. It is not clear if tracing will be applied to distinguish shares sold by control persons who have acquired securities issued both before and after 1935; also there is no case in point where a stock dividend upon pre-1935 shares was followed directly by a secondary sale of the dividend shares which would have been subject to the authorization of the ICC.

The ICC does have jurisdiction over re-acquired treasury shares and securities which are pledged when these are to be sold or repledged, even though they have already been technically "issued." It is not necessary for the carrier to file an application for authorization for either of these dispositions; rather a certificate of notification must be filed "substantially in the form designated as Form BF-21." This should still be sufficient to bring these securities within the language of the section 3(a)(6) exemption in the Securities Act. However, re-acquired treasury shares which were originally issued prior to the enactment of the Motor Carrier Act are not within ICC jurisdiction at all, and they should therefore have to be registered with the SEC. It is unclear on which side of the fence treasury securities fall if they were exempt from section 20a when originally issued but the carrier's aggregate capitalization has increased over the section 214 minimum amounts prior to the contemplated current disposition. Presumably the decision of the ICC would control the determination of the SEC's jurisdiction. These considerations of notification certificates do not apply to securities which have been authorized for execution and authentication but not for pledge, transfer or delivery. Securities of this type are considered to be "nominally" issued, and another formal application must be filed for authorization to "actually" issue.

The increasing complications of holding company-subsidiary structures within the industry have added further uncertainties to

156 49 C.F.R. § 56.1 (1967).
determinations of the Commission’s jurisdiction vis-à-vis a given transaction. A carrier, at any level of a holding company relationship, is subject to section 214. A noncarrier at any level is not so subject, unless it is in a control relationship for which it had to obtain Commission authorization and the order deemed it a constructive carrier for the purposes of section 214. Thus in a recent case the fact situation was as follows: N was a noncarrier holding company which was organized to control two operating motor common carriers, and since these two comprised a single integrated system the acquisition was not within section 5(2); U, an operating motor common carrier, sought authority under section 5(2) to acquire control of N, and U also sought authority to issue its promissory note under section 214; N and U’s noncarrier subsidiary, T, would guarantee U’s note, and they sought approval under section 214 to assume this obligation. The decision of the ICC approved the issue by U and held that neither N nor T were subject to section 214 and could therefore assume the guarantee without any approval. This was because T was not a carrier and would not become a carrier as a result of the transaction, and N had never been subjected to section 214 by a section 5(3) order and was not itself making a section 5(2) application.

This case illustrates one of the advantages achieved by a carrier in establishing noncarrier subsidiaries which become relatively independent of the Commission in formulating their financial policies. Such subsidiaries may freely enter equipment purchase arrangements and lease the assets acquired by debt agreements to the operating parents or affiliates. These lease obligations of the carrier companies do not come with section 20a regulation, and the subsidiary’s activities do not even appear in ICC reports. The Commission for many years noted this trend with alarm and warned that

108 See supra note 77.
111 For a comment on these practices, see Fiegas, YELLOW IN MOTION 119-20 (1967). There it is also pointed out that by 1961 39.3% of the equipment of Class I and II motor carriers was leased.
112 This could have been corrected by the amendments to § 20a which the ICC sponsored in 1953. See 66 I.C.C. ANN. REP. 147 (1952). And the Commission warned of the unregulated activities over the years. E.g., 75 I.C.C. ANN. REP. 170 (1959).
subsequent applications of carriers wishing to fund the obligations which they had incurred by evading ICC jurisdiction would be looked on with disfavor,\textsuperscript{163} as well as applications under section 5 to acquire separate corporate entities despite admitted tax benefits.\textsuperscript{164} But in 1959 the realities were faced and complete opposition was abandoned in the name of fairness.\textsuperscript{165}

Similar advantages to those experienced with noncarrier subsidiaries may be obtained with the organization of parent holding companies.\textsuperscript{166} These parents are not within Commission jurisdiction unless so ordered in a section 5 proceeding, and it has previously been noted that this is often not necessary.\textsuperscript{167} The question of whether a parent is itself subject to section 214 other than under a section 5(3) order may arise under the language of section 214.\textsuperscript{168} The obvious way is for the holding company itself to be a carrier, but the other possibility is that even though not operating as a carrier and possessing no certificate the corporation may by its charter be organized for the purpose of engaging in transportation as a carrier. The Commission has specifically rejected this technique for extending its jurisdiction. The mere inclusion of such a corporate power in the charter is not considered to be genuine evidence of corporate intent to operate within the purposes of the Interstate Commerce Act and would be opposed to the drafting fashion to make

\begin{footnotes}
\item[165] We remain convinced that the reasoning in ... (Morris) is sound. However, practical considerations, including uniform standards and treatment for all carriers, require that we give further consideration to the matters involved. ... Thus, owing to our lack of jurisdiction over the organization and activities of such noncarrier entities ... our attempts ... have been largely ineffective. More important, however, is the fact that ... those carriers which attempt to abide by the spirit of the prohibition against noncarrier entities (and thereby forego the tax benefits derived therefrom) are being penalized therefor since their competitors may so operate without recourse by the Commission. Obviously, we should not foster such a situation. Roush—Control—Southern Cal. Freight Lines, 80 M.C.C. 573, 588-89 (1959).
\item[166] The purpose of organizing an intentionally unregulated parent is often freely admitted. See Kansas City So. Ind., Inc.—Control—Kansas City So. Ry., 317 I.C.C. 1 (1962).
\item[167] Text accompanying notes 75-82, 157 supra.
\item[168] This section requires approval for securities issues of “common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control. . . .”
\end{footnotes}
Second Thoughts

charter provisions extremely broad.\textsuperscript{169} Professor Loss correctly concludes that:

\textit{...[t]here should be no quibbling about where jurisdiction lies in the case, for example, of holding-company issues which are accorded carrier status by the ICC. ...}\textsuperscript{170}

But he finds it necessary to resort to legislative intention as prevailing over "the letter of the law" since section 3(a)(6) of the Securities Act uses only the word "carriers." Probably a better approach is simply to admit the ICC's precedence over the SEC in this area, and as a corollary to find that whenever the ICC in a section 5(3) order provides that the holding company "shall be considered as a carrier" that this constructive rebirth is binding on other agencies where the nature of the corporation is relevant. Substantially this reasoning was applied in a recent case involving a similar exemption from the Investment Company Act.\textsuperscript{171}

In exercising authority under section 5(3) the statute allows a holding company to be subjected to several sections of the Interstate Commerce Act "to the extent provided by the Commission." This discretion is exercised in the interest of limited regulation when the parent company is primarily involved in other businesses. The factors weighed in making its determinations include the degree of control of a segment of the transportation industry, as well as the proportion of the parent's investment related to carrier operations and the

\textsuperscript{169} Woods Industries, Inc.—Control—United Transports, Inc., 85 M.C.C. 672 (1960).
\textsuperscript{170} Loss, \textit{Securities Regulation} 570 (1961 ed.).
\textsuperscript{171} Schwartz v. Bowman, 244 F. Supp. 51, 66 (S.D.N.Y., 1965). Such an acceptance of the ICC's favored position is difficult to avoid since the Court's handling of the series of Breswick cases. Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957), \textit{on remand sub nom.} Breswick & Co. v. United States, 156 F. Supp. 227 (S.D.N.Y., 1957), \textit{rev'd per curiam sub nom.} Alleghany Corp. v. Breswick & Co., 355 U.S. 415 (1958). Alleghany controlled the C.&O. railroad and because of its stock holdings it had been subjected to an ICC § 5(3) order, removing it from SEC jurisdiction under the Investment Company Act. Subsequent to its disposal of the C.&O. stock, Alleghany obtained working control of the New York Central; but during the interim before a new order was entered under § 5(3), because of Alleghany's control activities through the Central System, the Commission acquiesced in Alleghany's requested delay in setting aside the original C.&O. order. Despite the lower court's opinion that the ICC was "regulating a company which should be properly under control of another agency, ... granting a wrongdoer sanctuary from the Investment Company Act," Breswick & Co. v. United States, 156 F. Supp. 227, 296-97 (S.D.N.Y. 1957), the Supreme Court dismissed the argument in a one paragraph per curiam remand to decide a narrow issue.
essentially local nature of the carrier business.\textsuperscript{172} Whenever a section 5 transaction will also involve an issuance of securities a separate application under section 214 is necessary. The approval of a control arrangement which is dependent upon a securities issue to finance or consummate the agreement does not of itself constitute an approval of the proposed securities.\textsuperscript{173} The proper procedure is for a carrier or holding company anticipating the necessity for approval under both sections to file the applications simultaneously, and all the questions will be decided in one integrated proceeding.\textsuperscript{174} But such joint application is not mandatory, and a section 5 proposal may be approved without authorizing the related security issue or approving consummation of the transaction through issuance without first obtaining authority under section 214.\textsuperscript{175}

One other common problem often facing a regulated motor carrier or a holding company ordered into carrier status is the consequence of void securities.\textsuperscript{176} The Commission has held from the very beginning that “no means are provided for validating them.”\textsuperscript{177} This does not prevent an authorized issuance of new securities to replace those that are void because issued without authority.\textsuperscript{178} The public interest in allowing replacement in the face of the issuer’s past violation is the controlling factor, assuming all the other standards of section 20a are met, and this usually depends on the good

\textsuperscript{172} The Pittston Co.—Control—Brink’s Inc., 75 M.C.C. 345 (1958). This case also shows the Commission reversing in part a previous order and upon reconsideration of the facts freeing a holding company from § 214 but maintaining the requirement for reports and accounts because even this small carrier element of the company’s business was a majority of the armored car service in the nation.

The controlling standard for the Commission in exercising any of its discretion under the Interstate Commerce Act is the National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1. The policy is “to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . .”


\textsuperscript{175} Maislin Bros. Transport, Ltd., 75 M.C.C. 329 (1958).

\textsuperscript{176} The penalties of § 20a(11) are outlined in the text accompanying notes 71-72 supra.

\textsuperscript{177} Greyhound Corp. Securities, 1 M.C.C. 77 (1936). Consolidated Freight Lines, Inc., 5 M.C.C. 749 (1938).

SECOND THOUGHTS

faith of the unauthorized issue. Thus a misconception of the law is usually found to be a redeeming fact.

A more serious question may be whether the void securities, issued without section 20a authorization, violate the Securities Act of 1933 if they are not within an exemption of that statute. There are at least three ways of approaching this problem. One is that the word “void” means that there is technically no “security” sold. However, the common understanding of “void” is more in the nature of “voidable”, and this is the interpretation suggested by the ICC’s admission in the Transcontinental Bus case that nonetheless “the agreements have a status under law.” A second method of attack on Securities Act liabilities is that the section 20a penalties are logically and necessarily exclusive. This conclusion follows from the fact that the Commission’s jurisdiction is supposed to be “exclusive and plenary”, and to subject an issuer to another agency because of an avoidance of the Commission would contradict legislative purposes. The third approach follows naturally from the second and has been hinted at by Professor Loss in his discussion of the Securities Act: “the 3(a)(6) exemption literally applies, even before ICC approval, to any security whose issuance ‘is subject to’ section 20a.”

C. The Foreign Company

Canadian corporations are realistically the only foreign motor carriers which could come within the provisions of the Interstate Commerce Act. Such a corporation is required to obtain a certificate of convenience and necessity covering that portion of its operations within the United States, and it is subject to other requirements related to these operations (e.g. safety and rates). However, in a case involving an application by a regulated Canadian motor carrier which predominantly operated in Canada and sought authority under section 214 to effect a recapitalization and public distribution, the Commission held that it had no jurisdiction. The decision was definitely related to the facts, namely that the issuer intended to sell the entire lot to a Canadian underwriter who, in turn, proposed

181 Id.
183 Loss, Securities Regulation 571 (1961 ed.).
to sell all the shares in Canada to the Canadian public. This is an interesting approach on the part of the Commission, although fully justified, since the usual rhetoric of ICC securities regulation is directed at assuring sound decisions of the carrier, while in this situation the territorial limits as they affected potential investors were considered controlling.85

VII. POLICIES AND PRACTICES OF THE INTERSTATE COMMERCE COMMISSION

A. Standards for Approving an Issue of Securities

The ICC has historically taken a very restrictive view of the purposes justifying an issue within the framework of section 20a. This has led to a general policy of approving only those issues the proceeds of which are to be applied to the acquisition of new revenue equipment or improvement of existing productive assets (primarily rolling stock and terminal facilities), to provide capital for the refunding of outstanding obligations, or to liquidate carrier debt.86 The policy has not required advance approval of the expenditures for these purposes, and an issue may be approved to reimburse the treasury which was depleted for such a purpose or to capitalize the permanent investment by transferring surplus with a stock dividend.

To implement its policies the Commission developed the standard of "capitalizable assets" which would determine whether the carrier's capitalization was in fact devoted to providing carrier services.87 Under this rule the aggregate book value of permanent assets devoted to carrier uses (including working capital)88 is compared to aggregate capitalization. If the former exceeds the latter then securities will be adequately supported and may be considered for approval. Naturally, whenever an asset of the capitalizable variety is to be purchased it should offset the increase in capitalization necessary to provide the purchase funds.

85 "One of the canons of statutory construction which has been recognized and followed by the courts is that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. at 856.


88 The normal concept of working capital is somewhat modified to reduce the amount capitalized. Lipfert & Mechem, Regulation of Motor Carrier Securities, 11 Vand. L. Rev. 1095, 1103-04 (1958).
The use of capital to pay salaries, bonuses, or recurring operating expenses is systematically discouraged; these annual expenditures are expected to be met from carrier revenues. These specific limitations seem reasonable to insure that unprofitable carriers are not incurring added capital obligations without compensating prospects for improved earnings. But it may be noticed that the formulation of the capitalizable assets policy evolved long before motor carriers were regulated, and the same policies have not always fit with precision the two cases of overcapitalized railroads and expanding, undercapitalized truck lines. One example is that expenditures for new trackage and terminals have been proportionally far below those for new truck terminals and warehouses. This is undoubtedly due to the virtual maturity of the railroad industry when ICC securities regulation began as opposed to the relative infancy of motor carriers. Thus to some extent the Commission has been forced to relax its standards, but it has still not faced all the realities.

Another example of failure to adapt the standards to the business needs of the motor carrier industry is the financing of acquisitions. The Commission will regularly approve carrier combinations for reasonable consideration, taking into account all of the elements of value. However, it refuses to include such important factors as the goodwill of the acquired company (and for small regulated carriers their operating authorities are often their most salable asset, particularly to an acquiring line seeking to complete a network) in the acquiring corporation's asset base for the purpose of authorizing the issuance of securities to consummate the transaction. Furthermore, even the technically capitalizable assets obtained in an acquisition must be recorded at net book value as held by the acquired carrier; the combined effects of inflation and accelerated depreciation often result in the purchaser recording assets at a price far below that paid. This anachronism is the consequence of a refusal on the

190 Cases cited note 187 supra.
192 Despite the predominance of leasing of facilities, Falgas, supra note 161, at 120, capitalization of leasehold improvements has been prohibited unless the lessee is "the virtual owner." Denver & Rio Grande W. R.R., 290 I.C.C. 178, 182 (1955).
194 Lippert & Mechem, Regulation of Motor Carrier Securities, 11 Vand. L. Rev. 1095, 1102 (1958). See also Turney, supra note 186, at 115-16.
part of the Commission to adopt a more flexible and fair policy of capitalizing earnings, despite its announced limitation of capitalization (regardless of underlying asset surpluses) to a level supportable by earnings.

There is some indication that the Commission is modifying its past posture on these matters; perhaps this is not a general modification but only a liberalization to meet the special circumstances of motor carriers. In 1958 a prominent practitioner before the Commission wrote that:

It may be seriously questioned whether the financial stability of carrier companies is fostered by adherence to the philosophy that they should engage in carrier business and nothing else. Soundly conceived diversification in other fields may actually strengthen and support the carrier's ability to render transportation service by increasing the attractiveness of its securities to investors.

This suggestion brought into question a long history of decisions in which the policy had developed that, unless an issuer was a holding company with a small proportion of its business devoted to common carriage, noncarrier subsidiaries could not be financed by the securities issues of a carrier. Similarly, it was considered to be opposed to the public interest for a carrier itself to issue securities and use the proceeds for purposes not related to carrier service.

The Greyhound case in 1962 followed up on the advice that the Commission should review the wisdom of its habitual attitude. The precedent value of this departure was underlined by the fact that the decision was by the entire Commission sitting en banc, an unusual occurrence. And the significance of the decision may be indicated by the strong dissent of five Commissioners. Greyhound sought authority to issue almost 300,000 shares of 50 dollar par preferred stock in exchange for all the outstanding stock of a corporation engaged in the business of leasing industrial equipment. The avowed purpose of the acquisition was to continue a program of diversification designed to stabilize and increase Greyhound's earnings and thereby improve its ability to provide reliable passenger service. This

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197 Lüpfert, supra note 194, at 1106.
199 Columbia Terminals Co., Notes, 37 M.C.C. 569 (1941).
went beyond the scope of approved acquisitions in the past where the acquired companies performed carrier-related activities such as leasing trucks.\footnote{Ryder System, Inc., Stock, 295 I.C.C. 626 (1957).} The Commission concluded that the proposal would not represent a substantial diversion of equity since the authorized shares would constitute only 2.8 percent of Greyhound's outstanding par value, but this figure ignored the company's previous diversification into the restaurant, supplies, delivery service, parking, and trucking fields, all of which varied from its carrier purpose of serving passengers. But the fundamental rationale of the opinion represented a reversal of policy:

Judicious common carrier investment in stable noncarrier business enterprises, if limited, would contribute to the provisions of a soundly financed common carrier system and would not do violence to the principle that corporations endowed with a public interest should direct their primary activities to the public service nature of their operations.\footnote{Greyhound Corp. Stock, 90 M.C.C. 215, 223 (1962).}

The dissent noted that this decision overlooked "over 40 years [during which the standards of section 20a] have consistently been interpreted as precluding a finding by the Commission that a railroad or motor carrier may be permitted to issue securities for purposes unrelated to its carrier operations."\footnote{Id. at 224.} And it also noted that virtually all of the applications which had been received during that period had been from motor carriers. It is almost inescapable that the majority intended to provide some leeway for successful motor carrier organizations to invest their talent and earnings other than in a continuing series of consolidations of carrier enterprises. This policy is not needed to the same extent for railroads whose successes have been notably lacking and whose equipment and facilities require far more attention than that of the motor carriers. The dissent points out that Greyhound's motorbus earnings have been consistently good, and there was no evidence that there was a need for stability or that this particular investment would provide it. The consequence of the precedent must be that a motor carrier which has demonstrated good carrier performance will be permitted to issue limited amounts of securities to pursue other businesses.

Subsequent to this decision Greyhound Corp. became a holding company and converted its carrier activities into a wholly owned subsidiary, Greyhound Lines, Inc. This was effective on December
31, 1963, but the holding company had already been subjected to section 214 in anticipation of the reorganization by an order dated October 25, 1963. Then in 1964 the diversification precedent was followed in two concurrent orders approving common stock issues to acquire firms operating motor lodges, restaurants, and related facilities; the purpose of these acquisitions was to enable Greyhound to organize a food division.204 Although these purchases were related to the motor carrier activities of Greyhound Lines, it is not entirely clear that they would have been approved as to the stock issues without the prior Greyhound case since even though the issuer had become a holding company its principal business was still running the carrier.

Also in 1964 the Commission decided the McKee case205 which serves to provide some perspective on the Greyhound rule. The company had issued a stock dividend of its preferred stock without Commission authorization, and then it filed an application to issue replacement shares. The majority of McKee's assets were devoted to non-carrier activities, many of them having been purchased for cash, and the Commission refused to consider these in evaluating capitalizable assets available to support an issue of securities. Of the property not already covered by capitalization, that which qualified as capitalizable assets amounted to just one-tenth of the par value of the proposed dividend. In response to the argument that Greyhound applied to permit this more liberal approach to securities issues the ICC pointed to the fact that after the Greyhound issue the carrier retained a cushion of over 20 million dollars in capitalizable assets devoted to carrier uses. Thus the distinguishing feature in the McKee case was that it had "used its cash resources to acquire non-carrier assets, but, unlike Greyhound, it has not been able to build up its carrier assets sufficiently to justify the issuance. . . ."206

The conclusion suggested by these opinions is that the Commission has decided to ease its arbitrary rules as to diversification, but it has no intention of letting regulated carriers forget their reason for existence. This modification, and the limits placed on it, are reasonable when considered in the light of the National Transportation Policy which directs the ICC to provide regulation in the interest of a soundly financed transportation system, not simply in

206 Id.
the interest of sound finance. Fears of a Commission retrenchment in the McKee decision may be alleviated by another capitalizable asset case less than two months later in which property not directly used in transportation but indirectly related (storage facilities for a household goods carrier) was held to be part of the company's capitalizable assets.207

B. Procedures and Organization of the Interstate Commerce Commission

The application for authority under section 214 must be filed using form BF-6

(a) to nominally issue securities, (b) to sell, pledge, repledge, or otherwise dispose of securities nominally issued or assumed or nominally outstanding, (c) to actually issue securities, or (d) to assume any obligation or liability as lessor, lessee, guarantor, endorser, surety, or otherwise. 208

The application identifies the applicant as either a carrier or a holding company subjected to section 214 by a section 5(3) order. It describes the proposed securities, lists the states of incorporation, where business is authorized, and where the carrier actually operates, provides general information about the applicant (e.g., corporate facts), submits the latest financial statements, outlines the purposes of the issue or assumption and the proposed use of the proceeds, explains the terms of the sale or other disposition and estimated itemized expenses, summarizes the pertinent contracts, underwritings, resolutions and other corporate authorizations, and includes an opinion of counsel.

The application is to be submitted at least thirty days before the proposed date of issuance or assumption.209 Although it is said that most simple issues may be decided in less than thirty days,210 there is no requirement that an applicant delay his issuing preparations until approval is obtained. Thus many large issues are conditionally sold to underwriters and advertising commenced, even before an application is filed.211 Within fifteen days of filing the governor of any concerned state and any protestors or petitioners

208 Form BF-6, General Instructions.
209 49 C.F.R. § 55.3 (1967).
211 Loss, SECURITIES REGULATION 417 (1961 ed.).
are expected to notify the Commission of their representations.\footnote{212} A hearing may be called,\footnote{213} but this occurs in only a small minority of cases.\footnote{214}

Section 20a(10) requires that the Commission receive periodical or special reports as to the disposition and the application of the proceeds of any securities authorized by section 20a. The regulations promulgated under this section provide that such information must be included in the Annual Report Form to the ICC by March 31 of the year following any issue or assumption.\footnote{215} In addition a special report on Form BF-23 must be filed within thirty days of the initial date of issue; and if there is another section 214 application before the balance of the former issue is disposed of, there must be an interim report in the same form. A final report must also be filed upon completion of the disposition, and if this occurs before thirty days this may be substituted for the initial special report.\footnote{216}

Between January 1, 1936, and June 30, 1961, there were a total of 1,416 section 214 applications. A majority of these were combined with combination and control transactions under section 5.\footnote{217} These combined applications naturally take longer to process, but since 1959 there have been 581 motor carrier applications and the trend seemed to have dropped to about twenty-five percent to finance section 5 acquisitions.\footnote{218}

Following a general reorganization plan which was adopted in March, 1961, the Commission consolidated its decisional functions into three divisions. Previously, most of the finance cases were heard by Division 4. Under the new arrangement Division 3 deals with finance, safety, and service, but most of the Commission's safety responsibilities and the related staff were transferred to the new Department of Transportation in April, 1967. Each division still consists of three commissioners.

Until 1965 the Bureau of Finance, with its own employee-direct-
tor but responsible to the Office of the Managing Director, included
the three Finance Boards. These boards were staffed by employees
of the Commission, and they were delegated matters for initial de-
cision, among them applications of motor carriers for authority to
issue securities or assume obligations. Finance Board 2 decided non-
adversary uncontested applications of both railroads and motor
carriers under sections 20a and 214 which did not involve section 5,
while Finance Board 1 decided motor carrier applications under sec-
tions 5 and 214 involving mergers, consolidations, acquisitions of
control, and the related issuances of securities. The only direct con-
nection between the Bureau of Finance and Division 3 was one of
"technical direction and communication." In each case the board's
action is administratively final if no appeal is taken to the Division.
If there is an appeal the Division's decision is administratively final
with no right of review by the entire Commission. The Division
itself originally hears and decides, without certification from the
boards, applications involving testimony taken at a public hearing
or by affidavit submitted as evidence by opposing parties.

By the end of 1965 the Bureau of Finance, along with the other
two formal proceedings bureaus, was consolidated into the Office of
Proceedings. The Deputy Director of the Office of Proceedings in
charge of the Section of Finance handled approximately the same
responsibilities as the former director of the Bureau of Finance. He
was indirectly responsible to the chairman of Division 3 as he was
before on technical aspects of that Division's cases appealed from
the Finance Boards, all but one of which were in 1965 designated
Finance Review Boards. These boards, however, were now reporting
directly to the Director of the Office of Proceedings for administra-
tive matters to insure their independence from the Section of Fi-
nance as to the decisions of proceedings pending before them.

As a logical follow-up to this functional reorganization the
processing of section 5 authorizations was transferred in 1966 from
the Bureau of Operations and Compliance to the Office of Proceed-
ings. Then in 1967 the three separate proceedings sections, which
were formerly bureaus, were consolidated into a single Section of
Opinions. Also a Policy Review Committee was established with a
Deputy Director equal in level to the Deputy Director in charge of
the Section of Opinions. The purpose of this committee was stated

220 79 I.C.C. ANN. REP. 5-7 (1965).
to be to "assist in identifying, defining, and proposing realistic solutions to the critical policy problems which occur in the proceedings area." Finally, the Finance Review Boards lost their specialized status as their functions were transferred to conglomerate Review Boards. So now there is only one Finance Board, and there are five Review Boards. The only occasion for referring an application to the Finance Board is when there are no collateral problems other than the issue itself, no testimony, and no evidence submitted by opposing parties.

Thus since 1961 the staff organization of the ICC has shifted from a subject-matter and carrier-type orientation to a purely functional operation. This will be furthered by planned cross-training of lawyers and examiners to eliminate specialties. While this is undoubtedly more efficient for the processing of proceedings and the coordination of transportation policies (the Commission cites figures of cost savings and some ambiguous trends to faster processing), there is a terrible danger of overlooking the distinctions between motor carriers and railroads as well as submerging any developing distinctions between public offerings of securities and the other reasons for seeking section 214 authorization. It is very questionable whether the Policy Review Committee has the responsibilities or capabilities to promote such considerations.

It is a justifiable fear that the above noted tendencies will be climaxed by the Commission's draft revision of the Interstate Commerce Act which is to be submitted to Congress: "The Commission has undertaken a consolidation of the four parts of the Interstate Commerce Act into a single comprehensive enactment, a task of considerable merit and magnitude." The prevailing attitude seems to be reflected in Commissioner Tucker's statement that "specialization became a luxury the Commission simply could not afford." But there are suggestions that in many ways specialization was not a luxury but a problem of coordination. An agency can hardly be blamed for reconsidering its internal structure when criticized as openly as it was by at least one court:

222 81 I.C.C. ANN. REP. 3-7 (1967).
223 Id.
224 Tucker, Renovating the Decisional Process in an Independent Regulatory Commission, 35 I.C.C. PRAC. J. 207, 216 (1968). This reprint of an address given by Mr. Tucker while he was Chairman outlines many of the considerations weighed by the Commission in adopting its reorganization of 1961-1967, particularly those reflecting its role as a combined legislative-judicial decision maker.
This whole case—both before and subsequent to our limited remand—has been needlessly complicated by the Commission’s persisting in the fiction that the “control” and “Finance” matters are separate. We can acknowledge, of course, that as to each, different statutory requirements and principles must be satisfied. Likewise, as a matter of administrative housekeeping, it perhaps makes for a more neat and orderly disposition to segregate them by separate docket numbers. At the same time, they are one proceeding.225

The only question is whether the ICC has over-reacted to its internal problems and sacrificed some of its former advantages.

C. The Public Offering

The Securities Act of 1933 requires a prospectus, the contents of which are reviewed and regulated by the SEC, to accompany public sales of securities. The Interstate Commerce Act has no comparable specific provisions, and the ICC has assumed this is not its proper function. But it has become the common practice for underwriters to prepare prospectuses along the line of those required by the SEC, and most of those have been of remarkably high quality.226

It has been observed that “in many, if not most, cases where a public offering is made, the Bureau of Finance of the ICC requests that a copy of the offering circular be filed with the Commission, and generally in advance of the final order of authorization.”227 But there was no evidence until recently that the Commission has assumed any regulatory authority over the document itself. Then in 1964 in an unreported decision which was not significant in any other respect the Commission said, through Finance Board 2, that in view of the fact that the proposed use of the proceeds of the issue of stock was at variance with that stated in the draft of the prospectus presented with the application, the authority granted would be subject to the provision that the prospectus be amended accordingly.228

An expansion of the Commission’s role in this area was indirectly encouraged by a complicated case decided in June, 1967.229 In its opinion the Supreme Court read the phrase “the public interest” in section 20a as encompassing more than just the National Transportation Policy. Thus it extends at least as far as considera-

226 See text accompanying note 90 and note 90 supra.
227 Turney, supra—note 186, at 118.
tions of anticompetitive effects of Commission authorizations. The Court expressly rejected the argument that:

section 20a was designed to accomplish only the limited objective of protecting stockholders and the public from fiscal manipulation. . . . Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects.230

And this conclusion was reached despite the fact, admitted by the majority and emphasized by the dissent, that the draftsmen knew how to explicitly refer to competition in section 5 and chose not to do so in the standards of section 20a(2). But the opinion went further and declared that although a hearing is not mandatory under sections 214 and 20a, when serious questions are presented in the ICC proceedings the reviewing court will closely scrutinize the Commission’s satisfaction of its obligations to protect the public interest in its authorizations. Such strong language as this, coupled with the Commission’s discretionary powers under section 20a(3) to condition its authorizations, puts heavy pressure on the ICC to assume an SEC-style regulatory burden. Surely the disclosure and accuracy policies of the SEC are fundamental to the public interest in public offerings, and part of the reason for exemption from the 1933 Act was the assumption that the ICC was performing an overlapping job. And also it should not be argued that the approval investigations of the Commission remove any need for individual investor information upon which to make independent judgments and comparisons.

The acceptance of the SEC role by the ICC was urged by an earlier commentator,231 apparently overlooking his own observations that “in applying the respective statutory standards, an entirely different type of expertise is required as between the two commissions.”232 It is hard to take seriously his conclusion that, if the ICC is unwilling to pursue regulation of issuer disclosure, an acceptable alternative would be repeal of section 214 because, as compared to railroads, motor carriers “are much less important from the standpoint of their effect upon the national transportation system.”233

In response to these two points it is important to realize first the strain on ICC resources if its staff were forced to engage in an unfamiliar type of regulation, especially following its complete re-

230 Id. at 492.
231 Turney, supra note 186, at 118, 123-24.
232 Id. at 119.
233 Id. at 123.
organization to facilitate handling of its present workload. And second, it should be apparent that all of the necessary skills to oversee public distributions are possessed by the SEC. Added to this is the fact that the Securities Act is tailored to this specific problem, both in its substantive provisions and its penalties. A final consideration is that the processing of both agencies could be coordinated to prevent unnecessary time lags, and the expense of preparing prospectuses would not be an additional burden since it is assumed now.

VIII. CONCLUSIONS

These considerations of the motor carrier industry and the regulation of its securities show some obvious defects in correlating growth with public protection. In some areas, particularly in authorizing securities issues, the Interstate Commerce Commission has been too restrictive; in others there has been exhibited an undue reluctance to accept increased responsibilities. The jurisdictions of the various agencies and governments have not been as clearly defined as was intended. Some of the deficiencies are administrative, some legislative, but as to both there are several current opportunities for beneficial re-examination of policies and practices.

As preliminary points of departure for the necessary evaluation, the following suggestions are offered:

1. The applicability of blue-sky regulation by the states should be recognized, preferably as an amendment to the Interstate Commerce Act. At the very least this jurisdiction should cover motor carrier issues which are exempt from section 20a.

2. The exemption of ICC regulated issues from the provisions of the Securities Act of 1933 should be terminated by repealing section 3(a)(6).

3. Regulated motor common carriers should be exempted from section 12(g) of the Securities Exchange Act of 1934. Although this could be a justified statutory amendment, the preferable policy would be for the SEC to act by rule or order under section 12(h), thus allowing future flexibility.

4. Section 20a(2) of the Interstate Commerce Act should be interpreted by the ICC to extend the definition of "security" to include all relevant financing tools. The same result could be obtained by amending the statute, but along the lines of section 2(1) of the Securities Act, rather than the narrow
techniques of extending the detailed list of covered securities as proposed by the ICC.

5. The ICC should broaden further its acceptable purposes for a motor carrier securities issue, although this need not be extended to railroads. Distinctions between modes of transportation should be justified by the public interest standards controlling ICC policy.

6. And the ICC should expand its concept of capitalizable assets. Although both this suggestion and number 5 have been advanced somewhat by recent Commission decisions, the use of a formula shorthand term should not prevent the acceptance of a capitalized earnings standard.