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THE EXPANDING REQUIREMENT FOR REGISTRATION AS "BROKER-DEALER" UNDER THE SECURITIES EXCHANGE ACT OF 1934

*Denis T. Rice**

I. Introduction

Whether one must register as a "broker-dealer" under the Securities Exchange Act of 1934¹ normally depends on two considerations: (1) whether a person's activities bring him within the statutory definitions of "broker," "dealer," or both; and (2) whether, despite activities which might otherwise support broker-dealer status, a specific exemption from registration is available. For a person intending to carry on a regular securities business, the issue is academic; he fully expects to be labelled a broker-dealer and to register with the SEC. In the past decade, however, the definitions have been extended to activities which do not fall within traditional concepts of the securities business. This development probably results more from changing patterns in the securities industry than the tendency of the SEC to extend its regulatory scope.

The importance of the boundaries surrounding the registration requirement lies not merely in possible exposure of the unregistered broker-dealer to regulatory attack, but more pointedly in potential civil liability, including rescission resulting from noncompliance with a requirement to register. This discussion explores the shifting boundaries of broker-dealer activity, especially as delineated by SEC staff responses to requests for "no action" letters, and outlines the limited situations in which exemptions may obtain.

II. Defining "Broker-Dealers"

A. Statutory Definitions

The 1934 Act contains deceptively brief definitions of broker and dealer. "Broker" includes any person other than a bank who is "engaged in the business of effecting transactions in securities for the account of others."² "Dealer" includes any person other than a bank

engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include . . . any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business.³

Both definitions utilize the concept of being "engaged in" the securities

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¹ Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1970) [hereinafter cited as the 1934 Act].

² Section 3(a)(4) of the 1934 Act, 15 U.S.C. § 78c(a)(4) (1970).

³ Section 3(a)(5) of the 1934 Act, 15 U.S.C. § 78c(a)(5) (1970).

business. While the broker's role is "effecting transactions . . . for the account of others," the dealer buys and sells "for his own account." It should be noted that the dealer's activity must include *both* buying and selling, in contrast to the activity that gives rise to broker status. Moreover the definition of dealer specifically exempts any person trading for his own account so long as it is not part of "a regular business."

Fundamental agency law clarifies this distinction: the broker is a type of agent whereas the dealer is a principal.⁴ In either case, once a person—whether an individual, partnership or corporation—conducts activities falling within the foregoing definitions, he may not, absent an exemption, engage in these activities on an interstate basis without registration with the SEC as a broker-dealer.⁵

B. Defining "Broker"

1. "Engaged in the Business"

In ascertaining "broker" status under the 1934 Act, the threshold inquiry is whether a person is "engaged in the business" of effecting securities transactions for others. The phrase appears to imply either performing repeated transactions or holding oneself out as available to perform repeated transactions. Since the definitions of "broker" and "dealer" do not share the notion of "a regular business," arguably less activity is required to make one a broker than a dealer. Nor is it illogical to require some lower level of activity for a broker than for a dealer. The broker by definition earns his compensation from a service performed for others and not from transactions in which he has a proprietary interest. Consequently, it is more difficult to determine whether one who buys and sells securities for his own account is holding himself out as available to deal in those securities. Decisions under comparable state blue-sky laws have reached divergent conclusions as to whether the handling of an isolated securities transaction as agent results in broker status.⁶ At least where one sells a block of securities *for his own account*, the SEC staff has determined that the use of

4 Although recommending in 1936 that no legislation was needed to completely segregate broker and dealer functions, the SEC emphasized that a broker, as an agent employed to negotiate a transaction, had a fiduciary relationship to his customer, whereas the dealer simply bought and sold for his own account and not as an agent. SEC, REPORT ON THE FEASIBILITY AND ADVISABILITY OF THE COMPLETE SEGREGATION OF THE FUNCTIONS OF DEALER AND BROKER xiv-xv, 109 (1936). See also 2 SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. 48-50 (1963). Cf. the more recently evolved "shingle theory" which imposes on dealers fiduciary duties quite similar to those of agents; 3 L. LOSS, SECURITIES REGULATION 1482-83 (2d ed. 1961) [hereinafter cited as Loss]; In re Duker & Duker, 6 S.E.C. 386 (1939); Charles Hughes & Co., Inc. v. SEC, 139 F.2d 434, 435-36 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944). Some jurisdictions meld the two definitions into one; for example, California defines "broker-dealer" as "any person engaged in the business of effecting transactions in securities . . . for the account of others or for his own account." WEST CAL. CORP. CODE § 25004 (Cum. Supp. 1974).

5 Section 15(a)(1) of the 1934 Act, 15 U.S.C. § 780(a)(1) (1970).

6 Compare Owen v. Off, 36 Cal. 2d 751, 227 P.2d 457 (1951) (isolated transaction no defense to nonqualification as broker) with Marble v. Klein, 55 Wash. 2d 315, 347 P.2d 830 (1959) (isolated sale as agent; not a "broker"). 2 L. Loss, *supra* note 4, at 1295 takes the position that the "regular business" phrase used in defining dealer under the 1934 Act adds little, and implies that more than isolated transactions are required in either case. Cf. cases cited in Annot., 30 A.L.R. 834, 858, (1924); Annot., 42 A.L.R. 1226, 1230 (1926); Annot., 118 A.L.R. 646, 657 (1939); Annot., 169 A.L.R. 767, 783 (1947).

advertisements will not necessarily make him a dealer so long as there is no repetition of the activity as to other securities.⁷ Conversely, the use of publicity or advertisements which imply *general availability* for other transactions can bring one within the "engaged in business" test and thereby result in broker status even before the transactions take place.⁸

In any event, securities activities need not constitute one's principal business or principal source of income; broker-dealer status requires only something beyond *de minimis* economic involvement.⁹

Special problems in determining whether an individual is "engaged in the business" of effecting securities transactions for others arise when an issuer seeks to effect sales of its securities through its own employees.¹⁰ Key factors bearing on whether such employees are "engaged in the business" of effecting transactions for another are:

- (a) Whether the individual in fact acts as an employee or whether he is an independent contractor;
- (b) whether the individual's primary duties for the issuer are other than sale of its securities;
- (c) whether the individual receives special compensation for sales efforts;
- (d) whether the individual's employment will continue beyond the conclusion of the securities offering; and
- (e) whether the individual has previously been engaged in selling securities on a separately compensated basis.

The SEC staff has addressed the issuer-employee question in its responses to various requests for no-action letters. The staff's general position is that registration will not be required of regular officers, directors, or employees of an issuer, so long as they are compensated on a regular basis without reference to their selling activities.¹¹ Implicit in this position is the requirement that a true employer-employee relationship exists; presumably general principles of law will guide this determination.¹²

Individuals specifically hired by the corporation to assist in its securities sales may come within the statutory definition regardless of the way in which

7 Joseph McCulley, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,982 (1972).

8 SEC v. Schmidt, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,202 (S.D.N.Y. 1971).

9 2 Loss, *supra* note 4, at 1295; Hofheimer, Gartlir, Gottlieb & Gross, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,098 (1972) (fact that investor had a construction and realty management business did not preclude finding that he was a dealer in the business of assigning his equitable interest in various housing projects for profit).

10 Note that an issuer cannot be a dealer since it is only selling, not buying *and* selling, its securities. 2 Loss, *supra* note 4, at 1298.

11 Stratford of Texas, Inc., [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,099 (1972) (involving cattle management contracts); Woodmoor Corp., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,653 (1972) (involving sale of townhouses with management contracts); Choice Communities, Inc., [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,203 (1972) (involving limited partnership interests being sold by employees of general partner); DeMatteis Development Corp., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,415 (1971). See Augustine & Fass, *Broker-Dealer Licensing in the Field of Real Estate Syndication*, 29 BUS. LAW. 369, 371-72 (1974).

12 Compare *Commonwealth v. Pastor*, 298 Pa. 22, 136 A. 862 (1927) (under Pennsylvania blue-sky law) with *Owen v. Off.*, 36 Cal. 2d 751 227 P.2d 457 (1951). See generally RESTATEMENT (SECOND) OF AGENCY § 220 (1957).

they are compensated. The SEC staff indicated that an individual employed solely to assist in a securities offering and who was previously employed in the securities business as a registered representative of a broker-dealer would himself be a broker-dealer, even though his compensation would not be measured by sales.¹³ This interpretation also suggests that one unspoken element in the determination of whether an employee or director of an issuer acts as a broker may be his proximity to the general securities business aside from the particular issue contemplated.

This collateral involvement in the securities business may account for the staff's restrictive approach to a mutual fund's officers who were also partners of the fund's investment adviser. The staff advised that 1934 Act registration of the officers would not be required, provided that their activities were restricted to:

- (1) Publishing tombstone advertising meeting the limitations of Rule 134 under the Securities Act of 1933, mailing prospectuses to persons requesting the same, and conversing with unsolicited persons making inquiries as a result of the tombstone or the prospectus;
- (2) mailing communications permitted by Rule 134 without prior inquiry on the part of the addressee;
- (3) mailing prospectuses without prior inquiry on the part of the addressee; and
- (4) combining items (2) and (3).¹⁴

The staff implied that registration might be required if the fund officers were to engage in "unsolicited sales conversations" with clients of the investment adviser, persons recommended by such clients, or members of the public. While the SEC gave no specific rationale for its position, the staff appears to have been influenced by the officers' opportunity to profit from securities transactions through their role as investment advisers.

Conversely, the SEC staff has taken a more lenient attitude toward individuals with less involvement in the securities business. It has concluded that broker-dealer registration was not required for officers and directors of an issuer who were engaged to sell its shares on a ten percent commission basis—the same compensation as that paid to participating broker-dealers.¹⁵ The result is inconsistent with the SEC's general regulatory pattern since some of the individuals had no regular involvement in the issuer's business other than the securities offering. The staff appeared to be influenced by the fact that the selling officers and directors had agreed to work without any compensation other than their commission rights until securities were sold. Yet its conclusion that their selling activity was only incidental to their regular duties on behalf of the corporation does not logically follow, and the interpretation is hard to square with the various SEC positions noted earlier.¹⁶

More consistent with the SEC's general approach was the staff's advice

¹³ Jammer Cycle Products, Inc., Interpretive Release, REV. SEC. REG. 877 (September 10, 1973).

¹⁴ LaSalle Fund, Inc., [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,989 (1970).

¹⁵ Landcom, Inc. [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,176 (1971).

¹⁶ See notes 11-13 *supra*, and note 17 *infra*.

that broker-dealer registration would not be required of persons employed by certain colleges to solicit gifts of securities to so-called "qualified pooled trusts."¹⁷ These are vehicles by which remainder interests in property are transferred to charitable trusts in order to obtain current charitable deductions and retain a life or limited income interest. In this case, the employees who solicited gifts also participated in the colleges' general fund raising efforts and were not specially compensated based upon the amount of gifts transferred to the pooled trust. The staff reasoned that they were engaged in the "business" of the employing college—providing education—rather than in the business of a broker or dealer.

2. "Effecting" Transactions for Another

The phrase "engaged in the business" includes a further requirement for broker status: whether a person "*effects* transactions" for the account of others. The verb "effects" has been variously construed in different contexts. Three principal sources of ambiguity exist: (1) independently consulting with an issuer contemplating sale of its securities; (2) acting as a "finder" in mergers or acquisitions; and (3) rendering services to one engaged in brokerage activities.

a. *Consulting Independently with an Issuer*

An independent contractor engaged to assist a company which contemplates issuing securities is not necessarily a broker. However, to avoid broker status, the independent consultant must limit his activities to advising the issuer on how to develop and present an offering of securities. He may not assist or supervise sales efforts. These limitations will insure that his activities fall short of "effecting transactions in securities for the account of others."¹⁸

In line with this general principle, the SEC staff took the view in a no-action response that a consultant retained to develop the proposed business plan of a new corporation, including the program for offering its securities, but who would not participate directly or indirectly in offering the securities, need not register as a broker-dealer.¹⁹ Also relevant was the fact that the consultant would cover all of his own expenses and would not pay the commissions of selling broker-dealers.

The range of the services which a consultant can perform without becoming a broker-dealer extends even to preparing the offering material and clearing it

17 American Council on Education, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,179 (1972). The letter asking for the interpretation had argued that "Persons employed by the college who solicit gifts by means of pooled trusts are employed in connection with the college's over-all fund raising activities and are not specially compensated through commissions or salaries based upon the amount of gifts transferred to the pooled trust."

18 Cf. 17 CONN. OP. ATT'Y GEN. 293 (1932) ("rendering of services or advice relating to securities" distinguished from Connecticut definition of brokerage activity); Irey v. Len, 191 Cal. App. 2d 13, 12 Cal. Rptr. 403 (1961) (CPA working as part-time officer of corporation not required to qualify as business opportunity broker where he consulted and advised on finances); P. W. Chapman & Co. v. Cornelius, 39 F.2d 555 (2d Cir. 1930) (furnishing data and consultation regarding loan on real estate deemed not to be "negotiation" of loan).

19 Stamp Collector Associates, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,562 (1971).

with appropriate state securities administrators.²⁰ However, if he goes beyond this and becomes involved in the actual sales effort, such activity will likely render him a broker.²¹

b. *Acting as a Finder*

A finder typically brings together two entities interested in forming a business combination. So long as the finder merely brings the entities together and does not become involved in negotiating an acquisition or merger (both of which necessarily involve the issuance or sale of securities), he will not act as a broker.²² However, a professional finder who brings together a potential seller and buyer and also participates in the negotiation by advising on questions of value or performing other acts to facilitate the transaction will be deemed a broker.²³

Another characteristic of the classic finder situation is that the clients are typically interested in the underlying business operation rather than in an investment. In other words, securities enter the picture only incidentally as part of the mechanics by which the control of a business is purchased or sold. By way of contrast, one who regularly brings together investors who merely trade investment securities with each other as principals will take on the hue of a broker, even though his compensation is a flat fee and is not geared to the value of any transactions the investors might make.²⁴

c. *Activities Related to the Business of a Broker-Dealer*

There are at least three activities related to the functions of a registered

20 Christian Bonds, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,407 (1971). Here the services consisted principally of advising church officials on methods and procedures relative to bond offerings, providing necessary charter amendments, resolutions, interest schedules and the like, and arranging with banks to handle the retirement of bonds and the payment of principal and interest. The company also gathered information for the offering circular, wrote it, cleared it with the appropriate state securities regulatory agency and had it printed for distribution. It took no part in a subsequent sales effort, nor did it train or direct sales personnel, and its name did not appear on any of the sales literature utilized by the churches. It charged between three and four percent of the total offering as a fee for its services, depending upon particular state regulatory limitations. The company was found to be engaged in the business of promoting church bond issues, acting as fiscal agent and trustee of the property, and directing the bond sales programs. The company was also found to be a dealer, since it purchased many of the church bonds for its own account and later resold them.

21 *Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357 (5th Cir. 1968), *cert. denied*, 393 U.S. 913 (1968).

22 See cases involving state law definition: *Zugsmith v. Mullins*, 81 Ariz. 33, 299 P.2d 629 (1956), *modified*, 81 Ariz. 185, 303 P.2d 261 (1956); *Freeman v. Jergins*, 125 Cal. App. 2d 536, 552, 271 P.2d 210, 221 (1954); *Stoll v. Mallory*, 173 Cal. App. 2d 694, 343 P.2d 970 (1959); *McKenna v. Edwards*, 19 Cal. App. 2d 327, 65 P.2d 810 (1937); *Regan v. Consolidated Bakeries, Inc.*, 262 Mich. 249, 247 N.W. 171 (1933).

23 *May-Pac Management Co.*, [1973-74 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,679 (1973); *Henry C. Coppelt d/b/a May Pac Management Co.*, [1973-74 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,814 (1974); *Fulham & Co., Inc.*, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,186 (1972). See *Tullet, Riley and Greenshields, Inc.*, no action letter (Nov. 10, 1973, available Dec. 19, 1973). For state law, see *Evans v. Riverside International Raceway*, 237 Cal. App. 2d 666, 47 Cal. Rptr. 187 (1965); *Rhode v. Bartholomew*, 94 Cal. App. 2d 272, 210 P.2d 768 (1949). Cf. *Hoff v. Sprayregan*, 339 F.Supp. 369 (S.D.N.Y. 1971). See generally *Richman & Pollack, Catch 22 for Deal-Makers*, 6 REV. SEC. REG. 941 (1974).

24 *Public Securities Locating Service*, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,528.

broker-dealer which can bring one within the definition of a broker: (1) performing customer-related services for broker-dealers, institutions, or issuers; (2) channelling potential customers to broker-dealers or investment companies; and (3) sharing in broker-dealer compensation or charging fees based on a broker-dealer's transactions.

Furnishing merely clerical or ministerial services related to the broker-dealer function will not, as a general rule, bring one within the definition of broker, so long as such activities are narrowly confined.²⁵ For example, the SEC staff determined that simply processing investor applications, developing data-processing systems for use in the creation and maintenance of shareholder records for mutual funds, and acting as a shareholder service agent but not handling any customer monies²⁶ did not create a need for registration. Involvement in additional aspects of the securities business may bring the service entity to the point where it is a broker-dealer because it is involved as a "significant participant" in effecting transactions. If in performing the service of clearing securities transactions for broker-dealers and banks, the organization advances any part of the securities sale price received for clearance—on either the "buy" or "sell" end of the transaction—the involvement in customer funds and credit arrangements results in participation "significant" enough to require registration.²⁷

The SEC staff has accordingly taken the position that acting as a transfer agent for either the issuer or investor in securities transactions and maintaining custody or possession of funds or securities at any stage of a securities transaction are both more than merely clerical or ministerial functions. Absent an exemption, both require registration as a broker-dealer.²⁸

The type of activity requiring registration does not necessarily depend on direct contact with public investors. A no-action request was made by a distributor for an insurance company which sold "loss insurance" to cover declines in mutual fund shares. The distributor acted only as an intermediary between the insurance company and mutual fund underwriters to whom the insurance was

25 E. WEISS, REGISTRATION AND REGULATION OF BROKERS AND DEALERS 7 (1965).

26 Applied Financial Systems, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,385 (1971).

27 Securities Processing Services, Inc., [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,060 (1972).

28 The Stallion Fund, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,499 (1971); ESE Stock Transfer Corp., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,452 (1971). By the same token, where a company maintained complete accounting and recordkeeping services on each transaction for broker-dealers, segregated and held for safekeeping all of the broker-dealers' securities together with securities of its own customers, maintained a trust account for each broker-dealer client, and received, transferred and delivered securities in accordance with instructions of its broker-dealers' customers, it was held that the nature of the business required registration under the 1934 Act. Clearing Services, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,715 (1972). Compare Data-Sys-Tance, Inc., [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,126 (1972), where the SEC staff, in view of pending legislation relating to the regulation of transfer agents and service companies, and in light of certain controls being utilized by the service company, asserted that a company acting as a transfer agency and performing certain shareholder recordkeeping services for mutual funds would not be obliged to register as a broker-dealer, although it had limited responsibility and control over both funds and stock certificates. Cf. Bradford Mutual Fund Services, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,702 (1972). For further authority that an entity will not be considered "engaged" so long as it carries on purely ministerial functions, see Boston Mutual Life Insurance Co., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,650 (1972); United Benefit Life Insurance Co., [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,059 (1971).

sold; it did not deal at all with mutual fund investors. The investors, in turn, bought the loss insurance from the fund underwriters who were also the named insureds under the policies. Nonetheless, because the distributor was selling a security (the loss insurance) to the underwriters who then resold the same securities to mutual fund purchasers, the SEC staff felt registration as broker-dealer was required.²⁹

An entity which buys or sells securities on behalf of a broker-dealer for compensation is itself clearly engaging in the securities business as a broker.³⁰ However, more ambiguous situations may arise in determining whether "channeling" potential customers to a broker-dealer requires the entity to register as a "significant" participant in "effecting" securities transactions. The SEC staff has taken the position that a direct mail service by which selected persons would be informed that a specific broker-dealer or mutual fund representative wished to contact them would constitute solicitation of customers and come within the definition of brokerage activity.³¹

Similar reasoning underlies requiring registration by one whose service consists of inviting persons to complimentary dinner-seminars where no specific sales efforts are made but at which investment topics are discussed and sales representatives of broker-dealers are present by prearrangement.³² The solicitation or channelling concept has been extended to include a restaurant which proposed a ticker tape and telephone operation which would make information on exchange transactions available to diners and would furnish free telephone lines to brokerage firms.³³ The restaurant was to receive a small fixed fee from brokerage firms to cover the telephone and stock ticker costs.³⁴

The channelling concept does not hinge on whether one is *directly* compensated for such activities. The SEC staff has taken the position that an insurance firm specializing in disability insurance for airline pilots, which proposed to advise beneficiaries to invest portions of their insurance proceeds in a specific, income-oriented mutual fund, would be a broker-dealer even though the insurance firm received no remuneration from the mutual fund.³⁵

In the area of investment advisers, there has been some inconsistency in applying the channelling concept. An investment adviser (whether or not registered under the Investment Advisers Act) is usually not deemed a broker despite the fact that he places orders with brokers and dealers on behalf of his clients,

29 IMF Services, Inc. [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,345 (1971).

30 WEISS, *supra* note 25, at 8.

31 John T. Goggin, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,285 (1973).

32 Leonard-Trapp & Associates Consultants, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,971 (1972). The SEC staff view that the test is whether a significant role in channelling the distribution of securities is involved appears in Charles J. Hecht, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,749 (1972).

33 George T. Baylor, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,390 (1971). Even more clearly, a representative of a foreign stock exchange who receives quotations and distributes them to subscribers in the U. S., and in turn receives and transmits orders to the foreign exchange, would be required to register. Irving Marmer, [1972-73 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,283 (1973).

34 George T. Baylor [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,390 (1971). The restaurant could, of course, be viewed as receiving a "profit" to the extent the arrangement involves a reduction in its promotional and advertising expenses.

35 Contrails Growth Fund, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,666 (1971).

so long as he receives no special compensation for placing the orders.³⁶ Nonetheless, the staff cautioned that an investment adviser which proposed to forward its clients' orders for Australian securities to Australian broker-dealers would be deemed a broker, although no additional charge for this forwarding service would be made.³⁷ The SEC staff has also advised that offering newsletter subscribers the opportunity to advertise the purchase or sale of securities at no additional cost beyond their subscription fee would likewise require the publication to be registered as a broker-dealer.³⁸

Another test to determine whether a person is indirectly "effecting" securities transactions is whether he receives any portion of the compensation realized by a broker-dealer. As noted above, an investment adviser does not necessarily become a broker by channelling business to other broker-dealers. But if the adviser receives any portion of the broker-dealer's income from securities transactions, the adviser himself must also register as a broker-dealer.³⁹ One request for a no-action letter described a plan under which a registered broker-dealer would enter into agreements with various investment advisers who in turn would contract for portfolio management with customers of the broker-dealer. The broker-dealer, in return for part of the fees generated by the investment advisers, would perform services including: (1) executing orders at the direction of the adviser in discretionary accounts; (2) obtaining approval from customers for transactions in other adviser-directed accounts; (3) providing the adviser with various records of the transactions; (4) keeping the adviser and client fully informed as to the status of the account; and (5) preparing brochures for prospective customers and educating personnel of the broker-dealer concerning the program. The investment advisory agreements entered into by the broker-dealer's customers with the participating investment advisers would provide for compensation to the adviser and the remittance of a portion to the broker-dealer. The staff took the position that investment advisers entering into such arrangements would themselves be subject to registration as broker-dealers.⁴⁰

The investment adviser's status as broker-dealer may also depend in part on the extent of discretionary power it exerts. Normally, the adviser does not act as a broker even for discretionary accounts. Where a registered investment adviser operated a pooled investment program for its clients and secured au-

36 2 Loss *supra* note 4, at 1299; First Atlantic Investment Advisory Corp., [1973-74 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,746 (1974).

37 HMI Corp., [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,173 (1971). Compare John Kane, [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,087 (1971), where broker-dealer registration was deemed necessary by the SEC staff for the proposed publication of a monthly list of new issues where the subscribers, given a desire to purchase a specific new offering, could place an order from money on deposit with the publisher, which in turn received no compensation directly geared to the stock purchase but was compensated for the overall service.

38 Investors Cooperative Letter, [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,136 (1971). *Cf.* note 24 *supra*.

39 Fundamental Advisers, Inc., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,568 (1971); Edmund C. Mead, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,323 (1971); B. M. Mecs, [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,999 (1970). Both staff responses also pointed out that charging fees based on the number or type of transactions raises serious questions of breach of fiduciary duties under the Investment Advisers Act.

40 Reinholdt & Gardner, [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,120 (1971). The staff also viewed the arrangement as raising conflict of interest problems.

thorization from customers prior to investment of funds in the pooled account, the SEC staff indicated it would not require registration as a broker-dealer, taking specific note of the absence of discretionary power.⁴¹

Sharing in commission income can also bring professionals other than investment advisers within the broker definition. The SEC staff has stated that broker-dealer registration would be required for an escrow agent who would receive and accumulate funds for the purchase of mutual fund shares and receive a portion of the brokerage commissions generated.⁴² The activities were part of a split-funding plan for the purchase of mutual fund shares and life insurance coverage.

C. Defining "Dealer"

1. "Engaged in the business . . . as part of a regular business"

As noted earlier, "dealer" is defined as

any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.⁴³

Like the broker, the dealer must be "engaged in the business" of securities transactions. To the extent the statutory language is parallel, the same judicial and administrative gloss is useful in evaluating a given set of facts.⁴⁴ However, the requirement that the dealer's activity be "part of a *regular business*" serves to distinguish the securities dealer from the ordinary trader—the active investor who buys and sells with frequency but does not attempt to attract a clientele.

In practice, such a semantic distinction becomes blurred. One commentator offered some general characteristics of the dealer as opposed to the trader: (1) conscious efforts to obtain and keep a regular clientele; (2) substantial transactions directly with investors, as contrasted with other broker-dealers; (3) maintenance of a regular place of business where he holds himself out as engaged in buying and selling securities; and (4) a fairly regular turnover in secondary transactions.⁴⁵ In contrast, the trader neither performs services characteristic of

41 Thorndike, Doran, Paine & Lewis, Inc., 163 BNA SEC. REG. & L. REP. C-3 (1972).

42 Interact Marketing Company, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,642 (1972). The same ruling also indicated that the coordinator of the plan would have to register as a broker-dealer, because its activities would consist of processing applications and acting as coordinator between the parties involved, and its compensation would consist solely of override commissions from the sale of insurance and license fees for the use of certain copyrighted and trademarked material. Compare First Atlantic Investment Advisory Corp., [1973-74 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,746 (1974), giving the view that a firm transmitting orders to a trustee, bank or broker for execution need not register as a broker-dealer.

43 Note 3 *supra*.

44 See text accompanying notes 6-9 *supra*.

45 2 Loss, *supra* note 4, at 1296-97. Compare the application of the trader-dealer dichotomy under the Internal Revenue Code, where the test is whether securities are held "primarily for sale to customers in the ordinary course of [the taxpayer's] trade or business." INT. REV. CODE OF 1954, § 1221(1) (emphasis supplied). See George R. Kemon, 16 T.C. 1026 (1951), *acquiesced in*, 1951-2 CUM. BULL. 3.

dealers (quoting the market, arranging or extending credit, giving incidental investment advice), handles money or securities belonging to others, nor makes a market in any securities.⁴⁶

It should also be observed in passing that a dealer is one who both buys *and* sells. Accordingly, one who merely sells securities, such as an issuer distributing its securities directly to the public, would not come within the definition of dealer.⁴⁷

2. "Dealer" Distinguished from "Broker"

It sometimes becomes important to determine whether given activities are those of a broker or a dealer. For example, in "best efforts" underwritings, the issuer may be bound on a *respondeat superior* basis by actions of its underwriter acting as its agent, while the same issuer would not be bound were the same underwriter acting as a principal. In a case decided by the Court of Appeals for the Second Circuit,⁴⁸ purchasers of stock in a best efforts underwriting asserted liability on the part of the issuer and its officers for the underwriter's failure to remit the proceeds to the issuer and deliver stock certificates to the purchasers. The issuer and its officers had exercised reasonable care under the standards of the 1933 Act;⁴⁹ hence they would not be liable unless the court found that the underwriter was their agent. The court, however, held the underwriter to be a principal, stressing that its fee had been termed a discount in the underwriting documents and that the collection of proceeds and issuance of certificates were within the underwriter's control.⁵⁰

While the result was probably fair under all the circumstances, the court arguably gave insufficient consideration to the practical fact that in a best efforts underwriting the issuer is normally not obligated to compensate the underwriter (whether that compensation be labelled commission or discount) unless the underwriter actually sells the shares and remits the proceeds.⁵¹ Moreover, the best efforts underwriter by definition does not run the risk of buying securities which cannot be resold. Indeed, in other contexts courts have found that best efforts agreements created an agency or brokerage relationship between the underwriter and issuer rather than a dealer relationship.⁵²

D. Special Problems Involving Tax Shelter Syndications

The SEC staff views broadly the situations in which the general partner-

46 2 Loss, *supra* note 4, at 1296-97.

47 Weiss, *supra* note 25, at 3.

48 DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968).

49 Securities Act of 1933 §§ 12(2), 15, 15 U.S.C. §§ 771(2), 77o (1970).

50 390 F.2d at 844-45.

51 The court implied that the underwriter would bear the risk of loss of the stock certificates between the time they were delivered to it by the transfer agent and the time that it delivered the certificates to customers. 390 F.2d at 844. However, any agent that mislays or loses property in his possession will be liable to his principal.

52 Spence v. Balogh & Co., 216 F. Supp. 492, 494 (D.D.C. 1962), *aff'd on opinion below*, 317 F.2d 909 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 823 (1963); SEC v. Investment Bankers, 181 F. Supp. 346, 348 n.4 (S.D.N.Y. 1960). See generally 1 Loss, *supra* note 4, at 172 n.24; 4 Loss at 2296.

promoter of a typical tax shelter syndication may be considered a broker-dealer. If the general partner of a limited partnership repeatedly sets up syndications and then sells out his general partnership interest as it moves from one deal to the next, the general partner arguably is either engaging in the business of acquiring and disposing these interests and hence is a dealer, or he is effecting transactions on behalf of another entity (the limited partnerships) and consequently is a broker.⁵³

Without exploring the niceties of these contentions, the staff has informally indicated that a professional syndicator—an issuer who has been recently involved as principal in more than two syndications—cannot avail himself of the issuer exemption.⁵⁴ In the prototype situation, the professional syndicator puts together the financing of a tax shelter project, bringing in cash investors as limited partners and taking a general partnership interest for himself. Depending upon the circumstances, he may also take a limited partnership interest. His profits as general partner are taken as consideration for services in putting the transaction together and in managing the enterprise. Apparently the SEC staff advocates the theory that a syndicator becomes a general partner in each syndication in order to market the limited partnership units under the issuer exemption, thereby circumventing the requirement under the 1934 Act that the units be sold through licensed brokers. Consequently, the professional syndicator should register as a broker.⁵⁵

The SEC staff has not yet delineated the foregoing theory in no-action letters or interpretative releases. Indeed, the staff advised in one no-action letter that a company which developed low-income housing projects owned by limited partnerships and participated in the formation and operation of each project either as a general or limited partner did not need to register as a broker-dealer.⁵⁶ However, it specified that any money received through the sale of the company's limited partnership interest would have to be promptly transmitted to the limited partnership, an escrow agent, or separate bank account (if payment was geared to any future contingencies).⁵⁷

In another ruling, the SEC staff said it would not require registration by a privately held real estate development corporation which was to become a general partner in a number of limited partnerships owning real estate. The State of New York would finance 95 percent of each limited partnership and the limited partnership interests would contribute the remaining five percent. In some cases the limited partnership interests would be distributed to the public by a registered broker-dealer. In other situations, limited partnership interests would be "privately placed with knowledgeable investors" for substantial amounts. In view of the active participation of the development corporation in the operation of the partnerships, the staff did not require registration.⁵⁸

53 See Murdock, *Tax-Sheltered Securities: Is There a Broker-Dealer in the Woodwork?* 25 HASTINGS L. J. 518, 537-46 (1974). Cf. Interpretive Opinions Nos. 72/54C and 72/159C of California Commissioner of Corporations.

54 Augustine & Fass, *supra* note 11, at 371-72.

55 *Id.*

56 Continental Wingate Investments, Inc., 140 BNA SEC. REG. & L. REP. C-2 (1972).

57 *Id.*

58 DeMatteis Development Corp., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,415 (1971). It is important to note that the development corporation whose employees

III. Exemptions from Registration

Despite activities that would otherwise bring one within the statutory definition of broker or dealer, registration is not required if any of the exemptions created in the statute apply. There are three general kinds of exemptions: (1) those arising from the geographical place where transactions occur; (2) those arising from the market in which transactions occur; and (3) those arising from the kinds of securities involved.

A. Exemption Related to the Place Where Transactions Occur

1. Extraterritorial Operations

Section 15(a)(1) of the 1934 Act prohibits unregistered brokers or dealers from "use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security"⁵⁹

Accordingly, the registration requirements should not apply to foreign broker-dealers who have no contact with either the United States or its citizens.⁶⁰ Section 30(b) expressly provides that it does not apply to a person "insofar as" he transacts business outside the United States.⁶¹ When a foreign broker-dealer participates in the sale of United States securities abroad, extraterritorial application of the 1934 Act becomes less clear. While § 15(a)(1) arguably extends to such transactions, the SEC has indicated that it will generally raise no objection if a foreign broker-dealer participating in an underwriting of

were to distribute the units was a general partner of the issuer in each instance; if the issuer used a subsidiary or affiliate to offer the securities, which subsidiary or affiliate was not a partner, registration would be required. See Augustine & Fass, *supra* note 11, at 372 n.16. A collateral issue which arises in the area of real estate syndications and other tax shelters is whether in fact a "security" is involved, since broker-dealer definition hinges upon the purchasing and selling of securities. In the usual limited partnership situation, there is no great difficulty determining that the limited partnership interests are "securities" within the scope of the 1934 Act. There have been more shadowy questions in the area of condominium real estate sales. While normally a sale outright of a condominium would not necessarily be viewed as the sale of a security, if any of three elements are included in the context of the offering, it may be viewed as an investment contract: (1) The offering of participation in a "rental pool" arrangement, in which the seller of the condominium units arranges with the purchasers to rent out the units for the benefit of the purchasers on some compensated basis; (2) The offering of a rental or similar arrangement in which the purchaser must hold his unit available for rental for any part of the year; (3) The offering of a rental arrangement or other similar service with emphasis on the benefits to be derived by the purchaser from efforts of the promoter or a third party in connection with the rental of the units. In other words, condominiums coupled with rental arrangements are deemed to be securities, and persons engaged in the business of selling such condominiums will come under the definition of broker-dealer. SEC Securities Act Release No. 5347 (January 4, 1973).

⁵⁹ Section 15(a)(1) of the 1934 Act, 15 U.S.C. § 78o(a)(1) (1970). "Any means or instrumentality of interstate commerce" is defined in Section 3(a)(17) of the Act to include "trade, commerce, transportation, or communication . . . between any foreign country and any State. . . ." 15 U.S.C. § 78c(a)(17) (1970).

⁶⁰ See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 207-08 (2d Cir. 1968); cf. *SEC v. Myers*, 285 F. Supp. 743, 746 (D. Md. 1968) (the "necessary element" in subjecting one to regulation under the Investment Advisers Act of 1940 "is the carrying on of a business in this country").

⁶¹ Section 30(b) of the 1934 Act, 15 U.S.C. § 78dd(b)(1970). The section provides that the SEC may prescribe rules to prevent "evasion" of the 1934 Act by foreign persons. See *Schoenbaum v. Firstbrook*, *supra* note 60.

United States securities limits his activities to: (1) taking down securities which are sold outside the United States solely to persons other than American nationals and (2) participating solely through membership in the underwriting syndicate in interdealer activities of the syndicate in the United States. Examples of the latter would be sales to selling group members, stabilization, overallotment, and group sales, all of which are carried out for the syndicate by a managing underwriter or underwriters registered with the SEC.⁶² However, selling securities into the United States or purchasing securities in the United States for resale to American investors abroad would, in the SEC's view, bring the foreign broker-dealer within the scope of the 1934 Act.⁶³

Although it could apparently exert its jurisdiction in such contexts, the SEC has stated that it will not require registration of a foreign broker-dealer who buys shares issued by a United States open-end investment company (whether from the investment company directly or from its underwriter) for resale in a foreign country, so long as: (1) such shares are sold only to foreign nationals outside the United States and (2) the foreign broker-dealer is neither directly nor indirectly selling such shares to or acting for the account of an unregistered investment company whose portfolio contains shares issued by open-end investment companies registered under the Investment Company Act of 1940.⁶⁴

The SEC is thus more concerned with protecting American nationals than with regulating purchases of United States securities. The staff position is that where foreign issuers solicit American citizens for investments, the agents making the solicitations must register under the 1934 Act, even though the funds are forwarded directly to the issuer outside the United States.⁶⁵

2. Transactions Exclusively Intrastate

A broker or dealer whose business is exclusively intrastate is specifically exempted from the registration requirement.⁶⁶ The statutory term "exclusively" is strictly construed; even if the interstate transactions are few and *de minimis*, the exemption will be lost.⁶⁷ Moreover, the entire transaction must be kept within a single state. For example, a violation of the registration requirements occurs when, although the parties enter into a transaction in one state, payment is actually received in another.⁶⁸

The SEC staff has impliedly taken the position that once an interstate distribution is part of a firm's business—even where registered broker-dealers effect the distribution—it will integrate the intrastate business with the interstate transaction. In one case, a general partner made exclusively intrastate distributions of units in its limited partnerships. It proposed separately to participate as a

62 SEC Securities Exchange Act Release No. 7366 (July 9, 1964).

63 *Id.*

64 Guidelines concerning the applicability of the Federal securities laws to the offer and sale outside the U. S. of shares of registered open-end investment companies, SEC Investment Company Act Release No. 6082 (June 23, 1970).

65 R. Allen Neblett, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,327 (1971).

66 Section 15(a)(1) of the 1934 Act, 15 U.S.C. § 78o(a)(1) (1970).

67 In the Matter of Capital Funds, Inc., SEC Securities Exchange Act Release No. 7398 (August 20, 1964); In the Matter of Marks, 25 S.E.C. 208 (1947).

68 *Guon v. United States*, 285 F.2d 140 (8th Cir. 1960).

general partner in real estate limited partnerships which would be interstate in nature; a registered broker-dealer was to distribute the securities. The company requested a no-action letter as to whether registration would be required if it continued to offer the intrastate units. The staff refused to issue a no-action letter.⁶⁹

The SEC can also integrate the activities of one person selling on an intrastate basis with efforts of others selling in different states for the same issuer so as to destroy the exemption. For example, the SEC staff has required registration where two individuals (both of whom had formerly been securities salesmen) proposed to distribute an issuer's stock solely within California, because the issuer planned to sell portions of the same offering in other states and both individuals had previously engaged in interstate securities business.⁷⁰ This ruling reveals that once interstate business has been established, it may be extremely difficult to regain the exemption. The SEC staff refused to sanction an exemption for a registered broker-dealer who proposed to withdraw his registration and engage in solely intrastate transactions. The SEC staff felt that the intrastate business would involve "continuation" of the firm's current business although on a contractual basis.⁷¹

To balance the picture, it should be noted that in some respects the intrastate exemption from broker-dealer registration under the 1934 Act is not as stringent as the parallel exemption from registration under the 1933 Act for so-called intrastate offerings. For example, so long as buyers and sellers are in the same state, the issuers of the securities need not also be residents of the state and the exemption will not be destroyed by sending the securities to out-of-state transfer agents.⁷²

B. Exemption Related to the Market Where Transactions Occur

Exemption from registration under the 1934 Act exists when the broker-dealer confines all of his securities activities to effecting transactions or inducing purchases and sales on national securities exchanges. Section 15(a)(1) of the 1934 Act prohibits including the purchase or sale of any security by an unregistered broker or dealer (with certain exceptions) "otherwise than on a National Securities Exchange." A "National Securities Exchange" is one registered with the SEC pursuant to § 6 of the 1934 Act.⁷³

In line with this exemption, the staff advised a general partnership which intended to limit its transactions to one National Securities Exchange and not effect any transactions in the over-the-counter market that registration would not be required.⁷⁴ As with the intrastate exemption, this exemption is also strictly

69 Boetel & Co., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,343 (1971).

70 Jammer Cycle Products, Inc., [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,478 (1973).

71 Winchester Securities Corp., [1970-71 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,119 (1971).

72 2 Loss, *supra* note 4, at 1300.

73 Section 6 of the 1934 Act, 15 U.S.C. § 78f (1970).

74 Allstate Trading Co., [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,744 (1972).

construed. If the broker or dealer engages in any over-the-counter securities transactions not otherwise exempted by the 1934 Act, he will be required to register irrespective of whether these other transactions are investments of the broker-dealer or business transactions.⁷⁵

C. *Exemption Related to the Kind of Securities Bought or Sold*

There are other exemptions from registration which apply when the broker-dealer deals exclusively in specified types of securities. The 1934 Act thus makes it unlawful for an unregistered broker-dealer (except as otherwise exempted) to effect a transaction or induce the purchase or sale of any security "other than" commercial paper, bankers' acceptances, commercial bills, or an "exempted security."⁷⁶

Accordingly, if a broker or dealer can confine his over-the-counter activities to the statutorily exempted classifications of commercial paper, bankers' acceptances, commercial bills, or other "exempted" securities, he would not be required to register.⁷⁷ However, if a broker-dealer effects *any* over-the-counter transactions in nonexempt securities, he must register even though he may be dealing primarily in exempted securities.⁷⁸

The various kinds of securities statutorily exempted under § 3(a)(12) of the 1934 Act are:

1. Securities which are direct obligations of or obligation guaranteed as to principal or interest by the United States;
2. Securities issued or guaranteed by corporations in which the United States has a direct or indirect interest and designated for such exemption by the Secretary of the Treasury as necessary or appropriate in the public interest or for the protection of investors;
3. Securities which are direct obligations of or guaranteed as to principal or interest by a State or any political subdivision, agency, or instrumentality thereof;
4. Industrial development bonds;
5. Interests or participation in common trust funds; and
6. Interests or participations in collective trust funds.

Among the securities designated by the Secretary of the Treasury for exemption under § 3(a)(12) are the:

1. Central Bank for Cooperatives securities;
2. Federal Land Banks farm loan bonds;
3. Federal Intermediate Credit Banks debentures;
4. Federal Home Loan Bank Board and Federal Home Loan Banks securities;
5. Federal National Mortgage Association securities and certificates;

⁷⁵ WEISS, *supra* note 25, at 10-11.

⁷⁶ Section 15(a)(1) of the 1934 Act, 15 U.S.C. § 78o(a)(1)(1970).

⁷⁷ Such registration would not be required even though the broker-dealer also engaged in transactions in other kinds of securities, so long as the other transactions were not in the over-the-counter market but were confined to those executed on a National Securities Exchange. See WEISS, *supra* note 25, at 11.

⁷⁸ Burley & Co., 28 S.E.C. 126 (1948).

6. Commodity Credit Corporation special issue designated as "Special Series Certificate of Interest"; and

7. Export-Import Bank participation certificates or other securities issued by the Export-Import Bank.

While the specified exemptions initially appear clear and specific in scope, there are always gray areas of interpretation and ambiguity, requiring care in ascertaining whether in fact a particular security falls within the defined exemption.⁷⁹

IV. Conclusion

A person who clearly intends to engage in the business of handling securities transactions for the public will be neither concerned with nor affected by subtle expansions in the definition of broker-dealer activity. Nor is it likely that various statutory exemptions, such as that for exclusively intrastate operations or for broker-dealers handling solely exempted securities, will be of much practical interest. In the context of present financial difficulties in the securities business it is of little purpose to consider curtailing one's activities. The areas most open to future development are tax shelter operations, where individuals or firms have traditionally operated as partners of syndicates without registration under the 1934 Act, and the business of acting as finders in mergers and acquisitions. In addition, the increase in entities performing back-office administrative services for existing broker-dealer firms may offer an opportunity for future expansion of the definitional scope of broker-dealer.

⁷⁹ For example, where a nonprofit corporation proposed to issue nursing home bonds in cooperation with a city, in an arrangement under which the nursing home would be purchased from another nonprofit corporation under a sale and leaseback arrangement, with the city to acquire title upon retirement of the debt, the bonds were not deemed to be issued by a "governmental unit" under § 3(a)(12) of the Act and hence not exempted. *Pioneer Manor Bldg. Corp.*, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,766 (1972). Investment units offered by an investment company whose portfolio consists entirely of securities issued by or on behalf of states, counties, territories, or municipalities of the United States and subdivisions thereof are not themselves exempt securities under § 3(a)(12). *Municipal Investment Trust Fund*, [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,710 (1972).