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OPERATION OF THE TEXAS SECURITIES ACT†

by

Tom Reavley and W. Newton Barnes***

THE present Texas Securities Act was enacted by the 54th Legislature, and became effective September 6, 1955. Although its wording is not materially different from the statute it superseded, its area of application has been broadened significantly to include the regulation of the securities issued by corporations formed under the provisions of Article 1303(b), TEX. REV. CIV. STAT. (1925),¹ or similar statutory provisions. Between the 20th day of October, 1954, when the Austin Court of Civil Appeals handed down its decision in *Carney v. Sam Houston Underwriters*,² holding that the securities of 1303(b) corporations were excluded from the operation of the old Act, and the effective date of the new Act, the first thin trickle of securities issued by these 1303(b) companies had swelled into a torrent that threatened to immobilize the machinery of state securities control.

Commonly, "blue skyers" who planned some speculative enterprise, which would not meet the test imposed upon an issuer's plan of business for qualification of its stock under the then existing Securities Act, would exploit the *Carney* decision by forming a corporation under Article 1303(b) and a different corporation under some other purpose clause. The latter company's stock would be issued to the 1303(b) company, which in turn would sell its own stock at an arbitrary price to an uninformed public, usually by means of an elaborate pitch kit, and use the proceeds of the sale for whatever purpose it saw fit. It is the estimate of the Secretary of State's Office that there were 1,175 of these companies formed and that they sold over \$100,000,000

†Based upon a speech delivered by the Honorable Tom Reavley before the Dallas Bar Association, April, 1956.

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¹ Article 1303(b) provides for the formation of corporations to deal in securities without banking or insurance privileges.

² 272 S.W.2d 942 (Tex. Civ. App. 1954) *ref. n.r.e.*

in stock to the people of Texas during this ten-month period. Although it is not to be inferred that all of that stock was valueless, it is now evident that an astonishingly high percentage was grossly watered and largely speculative. By the elimination of this hiatus in the law, the Legislature has restored to the Secretary of State the power of effective securities control.

Perhaps of nearly equal importance was the increase in the appropriation by the Legislature to the Secretary of State for the purpose of administering the new Act. It is a strange thing to discover that the Securities Division was given \$45,000 in the years 1937 to 1940 and \$42,196 in 1950, and, yet, in the years from 1951 to 1954, when the Division should have been more active than ever before, the Legislature was seeking to cut it to \$25,000. In 1955 and 1956 the appropriation was increased to \$65,228,³ and the Securities Division has been able to switch from more or less a filing agency to an enforcement and administrative agency that has, to some degree, taken the offensive in this difficult field of regulation. Obviously, its budget is still pitifully small and wholly unrealistic when the vast and complicated field of securities in a growing state is considered, but it is a step in the right direction.

In approaching the philosophical and practical aspects of the Securities Act, it is well to distinguish the "fair, just and equitable" nature of the Texas Act from that of the "fraud" type act as exemplified by the New York statutes,⁴ and the "full disclosure" type act such as the federal law.⁵ The "fair, just and equitable" act contemplates that the State will act as a reviewing agency before the security is authorized to be issued to the public and that a determination shall be made that the buyer of the security is being treated fairly, justly and equitably by the issuer when he buys an interest in a business.

On the other hand, the "fraud" type act simply gives the state a right on its own initiative to intervene for its citizens when it has come to light that a fraud has been practiced in a securities

³ House Bill No. 140, 54th Legislature, Regular Session.

⁴ Article 23A, Sections 352-359, General Business Law of N. Y., as amended, April 21, 1955, by Chapter 553, 178th Legislature.

⁵ Securities Act of 1933, as amended, 48 Stat. 74 (1933), 15 U.S.C. §§ 77A-77AA (1952); Securities Exchange Act of 1934, as amended, 48 Stat. 881 (1934), 15 U.S.C., §§ 78a-78jj (1952).

sale. Supposedly, the threat of state injunctive action or criminal prosecution deters the broker or issuer from offering for sale a fraudulent security or from indulging in unfair acts in the sale itself.

The "full disclosure" statute does not purport to determine the fairness of an issue but only requires that every purchaser have the benefit of full and complete information as to the plan of business and as to all material facts surrounding the issuance of the stock. This is accomplished through the vehicle of a prospectus which has been exhaustively checked for accuracy, not only as to facts represented, but as to whether it fully reveals all facts which might bear upon the value of the security.

DEALERS LICENSES

The new Texas Securities Act provides for State licensing of the people who deal in securities as well as State qualification of the security itself. Considering the licensing provisions first (Sections 13, 14, 18), there are four categories: the general dealer's license covering the whole field; the salesman's license that applies to employees of particular dealers and for whom the dealer is always responsible; oil and gas dealers, who are limited to trafficking in mineral securities; and oil and gas salesmen attached to a dealer. As of May 1, 1956, there were a total of 6,839 licensees for all categories. However, this figure is somewhat misleading since corporate licenses, of which there are considerable number, entitle all officers and directors of the corporation to act in its behalf.

Before the Secretary of State grants a license, the applicant is required to make an affirmative showing that he, if an individual, or the principals, if incorporated, are of good business repute and that the plan of business reflected by the applicant is fair, just and equitable. If these standards cannot be met, the Secretary of State must refuse the issuance of a license.

SECURITIES REGISTRATION

As to qualification of securities (Section 5), the Act provides that where an issuer has been in business for at least three years and where over the prior three years its average net earnings have

exceeded one and one-half times the amount of interest charges or specified dividends required by outstanding securities of that issuer, plus five per cent return upon all other outstanding securities together with the new stock to be offered, then, if the Secretary of State takes no exception, that issuer's new offering may be sold five days after certain information proving that the issuer comes within this provision is filed with the Secretary of State. This is called qualification by notification.

Any other issuer must obtain a permit by showing that the proposed plan and price of the stock is fair, just and equitable and no fraud would be worked upon the purchasing public. These permits are for one year, assuming no contrary notice is issued during that year. If a portion of the securities remain unsold at the end of the year, then a renewal permit is necessary in order to continue the sale. The new Act has prescribed that renewal be contingent upon the issuer having conducted his business in accordance with the previously approved method and plan (Section 9) in addition to the previous requirement of fairness.

Exemptions

There are a number of different types of exemptions where no permit is required or where the Securities Act itself has no application.

The securities which are exempt when sold by a licensed trader were moved from Section 23 of the old law to Section 4 of the new Act. These include securities issued by a governmental agency, a bank, a regulated utility, or certain non-profit corporations and securities listed upon the stock exchanges named in the statute. The new Act enlarges the exempted issuers to cover expressly any corporation whose rates or charges are regulated by a municipal corporation, and also notes maturing in less than 24 months.

Section 3 of the Act names certain transactions where some type of exemption is enjoyed. This includes judicial sales, stock dividends, sale of capital stock of a corporation only to its prior stockholders, and transfer or exchange of securities in a reorganization, merger, or consolidation where there is no additional cost to the stockholder. It includes the solicitation of no more than twenty-five persons for the sale of securities of a Texas corpora-

tion so long as no prospectus or other advertising is used and no actual public offering is involved. Incidentally, the Attorney General has indicated that where more than fifteen persons buy stock, the issue must be qualified although there has been no solicitation and although all of the purchasers have banded together jointly to bring the corporation into existence.⁶ Section 3 also exempts sales of partnership interests or interests in companies other than corporations so long as the membership of such company does not exceed ten in number after the sale.

The new Act expressly exempts a trade closed upon an unsolicited order. The old Act previously had been construed to this effect by the office of the Secretary of State on the ground that it regulated selling and not buying.

Section 3 exempts the sale of personal holdings so long as the seller is not engaged temporarily or permanently in the business of selling securities. Though "temporarily" as here used is admittedly open to construction, there are cases suggesting that one isolated transaction may be such as to negative this exemption.⁷ The new Act provides in this connection that a dealer may act as agent for a person who is disposing of his own personal holdings.

The sale of stock to bankers, trust companies, or licensed security dealers is an exempt transaction, the theory being that these purchasers need no protection.

Section 3(r) exempts the sale of securities owned by a dealer so long as certain requirements are complied with.⁸ The new Act

⁶ Attorney General's Opinion No. 0-6457.

⁷ *Breeding v. Anderson*, 152 Tex. 92, 254 S.W.2d 377 (1953). Also see *Cosner v. Hancock*, 149 S.W.2d 239 (Tex. Civ. App. 1941) *dism., judgm. corr.*

⁸ A question has been raised about a dealer selling securities which were once exempt but now require qualification. If a permit has been granted or if a security has been qualified by notification, the Act permits subsequent resale, by a dealer or any other holder. But what about 1303(b) stock, for instance, which was issued before September 6, 1955, but for which no qualification has ever been obtained? Then one must look to the exemptions set forth in § 3. Subsection (c) applies only to persons not in the business of selling securities. A dealer must look to subsection (r) assuming he is not making his sale to another dealer under subsection (i), and under subsection (r) he must meet these several requirements, among others: the issuer may not receive any benefit from the sale, the price must be reasonably related to the current market price, the issuer must be a going concern actually engaged in business; and information about the issuer must appear in one of the security manuals, such as Moody's, or Standard & Poors, or Fitch — or certain current information about the issuer (§ 5(r)) must be filed in the office of the Secretary of State. Thus, if a dealer should own unqualified stock and want to sell it, he would have to obtain a permit or find an exemption; and where the requirements in § 3(r) fit, he may make the sale, but in most cases, that will necessitate filing information about the issuer with the office of the Secretary of State.

no longer requires a dealer to notify the Secretary of State of such a sale.

ADVERTISING

The section on advertising, Section 23, has been entirely rewritten. The use of advertising matter in connection with an unexempt security transaction is prohibited unless: (1) the advertiser has a license, (2) the security is qualified, and (3) the material is filed with the Secretary of State prior to its use. However, because it would be entirely impractical to apply this literally to newspaper advertising, it is the policy to allow dealers to send a copy of the newspaper ad simultaneously with its publication, provided that the ad is of the tombstone type, that is, one containing only the announcement of the security and its issuer and the dealer. Where the material may be available before publication and in the case of circulars or brochures or any other type of ad, copies must be filed before that advertising is used.

The prospectus of an SEC issue may be used after being filed, even before the security is qualified, if the prospectus shows that the security has not yet been qualified in Texas.

It is a violation of the Act to use a dealer's registration, or the fact that a permit has been granted for the particular security, in connection with the sale of any security (Section 10, 21). The Secretary of State's policy is to permit the following language on the front of the prospectus: "These securities are offered for sale in the State of Texas under a permit granted by the Securities Commissioner of Texas. This permit is permissive only and does not constitute a recommendation or endorsement of the securities permitted to be issued."

Section 7 provides that the total expenses, including organization expense and any other cost of marketing the security, shall not exceed 20% of the total price paid for the security issue. The Secretary of State may limit this to a smaller percentage.

VIOLATION AND ENFORCEMENT

The following violations constitute felonies, punishable by \$1,000 fine or a two year term in the penitentiary, or both (Section 30):

1. Selling or offering to sell a security which is not qualified and for which there is no exemption.
2. The solicitation or selling or trading by a person without a license to do so.
3. The sale of a security by a dealer after receiving from the Secretary of State notification in writing not to sell.
4. The making of a known false statement, either to the Secretary of State in connection with qualifying an issue, or in connection with the sale of a security.
5. Fraud in dealing with securities, including an unfounded promise or prediction as to the future, or a misleading statement to the public as to the value of a security.
6. Knowingly participating in the payment of a cash dividend out of funds other than earnings.
7. Advertising not in compliance with Section 23.

Section 34 of the statute provides that the purchaser can avoid any security transaction which is in violation of the Act within two years after the violation is discovered or within two years after, if by the exercise of ordinary care, it should have been discovered.⁹ The new Act now requires that at least fifteen days before bringing suit to recover the price paid, the purchaser must first make a written demand for the return of the money, tendering the security in proper form for transfer.

A dealer cannot sue for his commission in the courts of the State unless he was duly licensed and the securities sold were properly qualified. The statute requires that these facts be alleged and proved in a civil action (Section 35).

Section 33 of the statute provides that the Secretary of State and Attorney General may obtain an injunction against any person or company employing any device or scheme to defraud the purchasers of securities, and an interesting part about this provision is that it applies to any security even though it would be otherwise exempt under Sections 3 or 4.

The following powers are given to the Secretary of State for the enforcement of the law:

1. He has the power to subpoena and investigate compliance with the law (Section 29). The investigation itself is confidential and the fruits of the investigation under the statute may not be disclosed to

⁹ Brown v. Cole, 276 S.W.2d 369 (Tex. Civ. App. 1955), *aff'd*, _____ Tex. _____, _____ S.W.2d _____, (Tex. Sup. Ct. Reporter, March 31, 1956).

the public. This does not apply to a ruling or order by the Secretary of State and, incidentally, it does not apply to the exhibits and instruments filed in connection with the application for qualification of a security which has been approved or denied — all of which are public records.

2. The Secretary of State may require any dealer to file a list of all the securities which that dealer has offered for sale or advertised within this State during the preceding six months (Section 24).
3. The Secretary of State may direct a written notice to any dealer directing that a certain security shall not thereafter be sold by that dealer, based upon a finding by the Secretary of State that in his opinion the further sale of the security would not be in compliance with the Act or would tend to work a fraud on any purchaser thereof or that the plan of business of the issuer of that security is not fair, just and equitable.
4. The Secretary of State may likewise direct a written notice to any dealer forbidding the publication or use of any type of advertisement based upon the opinion of the Secretary of State that the advertisement contains a statement which is false or misleading or likely to deceive a reader thereof.

All of these rulings or actions by the Secretary of State are, of course, subject to review. If the Securities Commissioner refuses a license, a hearing may be held before the Secretary of State and in the event of an unfavorable finding and order after that hearing, an appeal may be taken to the District Court of Travis County. The trial will then be *de novo*, based upon the entire record certified to the court by the Secretary of State and upon such other evidence as the court may in its discretion receive. The new Act expressly provides that the substantial evidence rule shall not apply. A like appeal is provided against any unfavorable action of the Secretary of State upon a security permit, or notice prohibiting the use of advertising matter or the further sale of a security.

DEFINITIONS

As to the key definitions in Section 2 of the Securities Act, one will find that they are very broad. The definition of "fraud," for example, includes an intentional failure to disclose a material fact, a prediction as to the future which is not made honestly and in good faith, or the obtaining of an unconscionable fee. In connection with misrepresentations as to facts, the oftentimes burden-

some showing of scienter is not required. The definition of "sale" includes any link in the chain of the selling process.¹⁰ Also see the all-inclusive definition given to the term "security."¹¹

It should be noticed that the interest in an oil lease is a security, and therefore one who trades in such must be licensed, and the lease or any interest thereunder must be qualified under the law as a security unless it comes within some exemption. In many oil trades some applicable exemption can be found. The original lease by the landowner ordinarily does not come within the definition.¹² Often the transaction is a purchase rather than a sale as defined in the Act since the solicitation comes from an agent for the buyer, and thus comes within Section 3(s). If the sale is to another licensed dealer, it comes within Section 3 (i). If the sale is by one who is not in the business of trading this or any other security, it would come within Section 3(c). Where there is a group of people sharing undivided interests not exceeding ten in number, the transaction may come within the exemption of Section 3(k). It is submitted, however, that this part of the Securities Act may be more of a trap than a protection. Oil trading is not going to await government approval. The consequences would not be drastic except for the civil penalty and the likelihood that some purchaser will get a "free ride" and, after the well proves dry, avoid his transaction if he wishes.¹³ It would be more realistic to have an exemption for the sale of oil interests which would provide that the Secretary of State could rescind the exemption upon finding that the sale would tend to work a fraud upon purchasers. This type of provision is now used in connection with Section 3(r).

"Fair, Just and Equitable"

Section 8 of the Securities Act provides that a permit shall be

¹⁰ Brown v. Cole, *supra*.

¹¹ "The term 'security' or 'securities' shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not."

¹² Culver v. Cockburn, 127 S.W.2d 328 (Tex. Civ. App. 1939) *dism., judgm., corr.*

¹³ Brown v. Cole, *supra*.

issued if the Secretary of State finds the proposed plan of business to be fair, just and equitable, and if the consideration paid by the promoters for their stock is fair, just and equitable when compared with the proposed offering price that the public is to be asked to pay. This latter requirement is a part of the new Act.

Is the security offering something other than what it is made to appear to be? That would not be fair to the purchaser. Is the promoter attempting to profit unreasonably by the contribution the newcomer is asked to pay? That would not be fair. Deception and inequitable distribution of price and risk are two ultimate trials. Whereas the final decision is not the sort of thing one can place on a slide rule, there are standard devices which the Secretary of State employs to penetrate the issue.

In the first place, the venture must be a bona fide endeavor by people of some experience in the business and ability to make a going and profitable concern. This is to be distinguished from the not uncommon promotional scheme devised and hatched to make the promoters an attractive commission. Thereafter the corporation may or may not be able to do the business it was designed to do. It is not considered to be the task of the office of the Secretary of State to predict the prospects of profit for the applicant. To say that the plan is fair, just and equitable, is hard enough; but to say that it will be successful is even more onerous. For example, suppose the applicant corporation is on a wildcat oil venture. Obviously the odds are against the discovery of oil. The Secretary of State should be satisfied that the management and promoters are really after oil rather than after a stock bonanza. They should have had experience in oil and they should have an investment of their own in the corporation. Such facts would tend to establish that the primary purpose of the venture is to find oil rather than stock purchasers.

Or suppose Moon Travel, Inc., is working on a rocket to the moon. Should a permit be denied on the ground that profits are impossible? It seems that, even here, such impossibility should not be ground for denial. A denial might be required because the plan in itself is misleading in that the public might not realize it is actually an experiment in which they are investing their money. Or the plan may be unfair in that the promoters avoid similar

risks. In this sort of operation, further, the Secretary of State would be inclined to allow no one a profit for selling the stock, but require that the corporation receive all of the price of the stock less bare necessary expenses. There being no deception or inequitable treatment of investors, why should the public not be allowed to buy? The Legislature did not intend for the Secretary of State to prohibit Texans from losing money on stocks, nor was he detailed to be High and Wise Investment Counsellor to the State.

In the second place, under the terms of the new Act the contribution of the promoter in a new business must compare reasonably with the price the public is asked to pay. This guide is used: if the promoter paid 80¢ for this stock, then the public should not be asked to pay more than \$1.00.

In the third place, the public investor should receive an equity in the corporation's property of a value which suits the price which he has paid for the stock. The general policy is this: for each dollar which he pays on his stock, an investor must get at least 80¢ in assets or net worth of the corporation, together with the same dividend and voting rights as the other stockholders. This suggests the question of valuation of the assets, which is often the biggest problem.

Valuation

Book value cannot always be the valuation test. And this is true in many cases even though competent accountants have certified to the financial statements. The Secretary of State would be inclined to take a proper certification and opinion as to such things as inventory, accounts receivable, and cash on hand. But where the accountant is not qualified to appraise the value of real property or some other type of substantial asset of the corporation, more is required: detailed statements by experts under oath as to all of the facts which a lawyer would want to elicit from an expert witness on the stand if he were proving value to a court. More is wanted than a letter from someone in the business stating a conclusion as to what he thinks the value is. The Secretary of State wants to be convinced that the appraisal is correct, and in order to be convinced, he must have all the facts and experience upon which the opinion is predicated.

The question frequently arises as to the value of intangibles, such as patents, trademarks, and licenses. Such intangibles may have value and should be included rightfully as a part of the net worth of the issuing corporation. But — and this is important — the Secretary of State is interested in the value of that patent, trademark, or license at the time the permit is being sought: what an able buyer would pay a willing seller at that time. What people repeatedly try to do in sustaining a high price to be asked of the public investor and a high net worth to support such price is to prove value by taking seven or ten years future earnings of the corporation and capitalize that for the present valuation. It is true that when one appraises the value of some intangible, he might want to use potential earnings in the analysis. But the value which must be found is the present value and what the intangible will sell for now. One does not merely capitalize future earnings and say that the corporation with successful management and distribution and advertising of the product can make so much profit, and therefore the license or formula is already worth that figure. It will be the corporation itself, including the stockholders' money, that will make those earnings a reality in the future.

Now, a word about the evaluation placed upon labor or services performed by a promoter. In the first place, pre-incorporation labor and services have been held not to be consideration for the issuance of stock under Article 12, Section 6, of the Texas Constitution.¹⁴ However, where the labor or services are essential to the creation of the corporation, such as legal services relating to the procurement of the charter, and where the charges are reasonable, the company will be permitted to capitalize as an asset the amount paid for those services or labor so long as the stated capital of the corporation is unimpaired after such disbursements. Where performed after incorporation it is required that enhancement of the worth of a specified asset must have resulted from the labor or services performed, or that a property right has been acquired for the corporation as a result of such labor or services, which is essential to the attainment of its corporate purpose. Again, the valuation placed upon the labor or services must be realistically supported by appraisals. Of course, if it is evident that the labor or services

¹⁴ Attorney General's Opinion No. V-156.

claimed went into an asset shown and valued on the balance sheet of the company, then the value of the labor or services would not be allowed as a separate asset.

The two requirements as to the comparable contribution of the promoter and the supporting net worth of the corporation are applied in cases of new business ventures. If the company is not new and if it has a record of earnings, these two rules will be subject to frequent exceptions. For one thing, in the case of the appreciation of the original investment of the promoters, the net worth of the corporation probably will support charging the public a higher figure for its stock than the promoters had to pay. Where the corporation proves that it can make money, the new price may be realistically related to the profit history of the company. In addition, the Secretary of State will sometimes permit issuance of a different class of stock if the issuer has demonstrated that it can meet the demands of dividends or interest payments cast upon it by the new issue.

A difficult situation is presented where an existing company finds itself in a short cash operating position and forms a new company for the purpose of acquiring the assets of the old company at an appraised value rather than at the book value at which they were carried on the books of the old company, with the thought of getting a permit to sell stock based upon the newer and higher figures. This is frequently done in the case of crude oil producing companies where there is oftentimes no real relationship between book and actual values. Here the Secretary of State is primarily interested in finding whether the company is attempting a "bail-out" at the expense of the public, and in this respect the history of the old company is usually good evidence of the intentions of the applicant. Consistent operating losses in the past weigh heavily against such a plan and the Secretary of State is not easily persuaded to approve the security issue.

The Secretary of State is enabled to use the escrow device described in Section 7 of the Act to assure the securities buyer of protection against the failure of an issuer to sell sufficient stock to carry out the plan of business set forth in its application. It is the practice to require the escrow of all proceeds of the sale of the issuer's securities in those situations where a specified sum of

money is absolutely necessary to the realization of the issuer's undertaking. For example, assume that a company is being formed for the purpose of underwriting and forming an insurance company and that \$250,000 is needed to capitalize the proposed insurance company. It will be required that all sums received for stock be placed in escrow, not to be released until such time as the proceeds net to the issuer shall reach that figure, and until the issuer has indicated that the proposed insurance company lacks only the escrow money to insure its consummation. If the stipulated sum is not reached within a specified time, then all money paid on stock is refunded and the stock cancelled. Thus, the investor is assured that he will not be left holding a stock certificate in a company that is not sufficiently capitalized to do the very business it was organized to accomplish.

APPLICATION PROCEDURE

In order to qualify an issue of securities and get a permit, considerable information is required. The statute makes certain requirements that must be fulfilled. The Secretary of State must have the names of the officers, directors, copies of the articles and amendments to the charter or articles of incorporation. He needs to see a full financial picture of the corporation, including the statement of all of its capital and the operating plan, what business it is in, the prospects for its success. The Secretary of State must know the arrangement for underwriting or sale of securities and where the fees are going for the organization and sale of stock. He is interested in all proposed advertising and prospectuses as well as copies of the stock certificates and contracts that are to be used. As has been said, he must know the net worth of the corporation as well as its balance sheet picture, and if there is any question as to the real value of the property, he will require proper appraisals. Of course, he will want to know the complete picture of the record of earnings of the corporation.

It is suggested that when one begins to qualify his first stock issue, he should first be certain his charter authorizes the stock, and would probably do well to write to the Securities Commissioner to get a copy of the application forms. In the letter, one should tell briefly what type of corporation he has and what he

wants to do. When these papers are received, the requirements there as to the information required and the exhibits which are necessary should be gone over. Then, if the case justifies it or if there are any complications, one should make an appointment with someone in the Securities Division and either call or come to that office to go over the proposed application.

This procedure may be anticipated in the processing of an application: receipt of the application is acknowledged, and it is assigned to an examiner. Within seven days the applicant is sent another letter which sets the application down for submission before the Securities Commissioner at a date not more than three weeks from the date the application was received, at which time the examiner will present the application to the Commissioner. If there have been any difficulties or if the examiner finds some issue to which he objects, the applicant may appear and be heard orally at this time. If the Securities Commissioner approves of the application, he will take it to the Assistant Secretary of State who will make an independent examination of the file. Then the permit will either be issued or denied within three days after submission before the Securities Commissioner. Of course, if it is denied, an appeal may be taken to the Secretary of State.

Hearing

In the event an applicant is to have an administrative hearing before the Secretary of State on a permit application, a license application, or some other action that the Secretary's office has taken, the applicant should know the general procedure to expect. The hearing will be private unless for some reason a public hearing is requested. It is ordinarily held in the office of the Secretary of State. Witnesses are sworn and all parties have the right to cross-examine. A record is kept. If it is a matter of the revocation of a license or some action that has been initiated by the office of the Secretary of State, the Securities Commissioner is required to give the party notice of what the charge or issue will be so that the defense may be prepared. The Commissioner will have the burden of proof. If it is a hearing following the denial of an application to qualify a security, the burden of proof will be on the applicant to show that the qualification and sale of that security would be fair,

just and equitable to the public. The hearing is informal, but an attempt is made to get to the issues and stick to them. Where the real issue is the question of a valuation of some asset, and the full application with all the exhibits is before the Secretary of State, there is no point in stating the whole plan, and the hearing can go directly to the question of valuation.

CONCLUSION

The new Securities Act can work effectively to the best interests of the Texas public. Its standards of fairness, justice and equity place a great burden upon its administrators. The objective is to translate the theoretical implications of that high sounding phrase into the practicalities of present day business. It is true that a larger appropriation from the Legislature would help, and that a continuing study of the Act and the decisions under it are important, but all parties must be aware that the prime requisite for the successful administration of any law — and it is particularly so here — is the liberal use of common sense. The office of the Secretary of State does not pretend to have a corner on that valuable commodity. The Secretary of State needs, and respectfully invites, constructive criticism from the Texas Bar and the securities industry in order that their knowledge and experience can be utilized for the benefit of the investing public.