**ANNOTATIONS AND COMMENTS**

Section 12 of the Securities Act of 1933 [15 U.S.C. § 77*l*] provides that:

Any person who offers or sells a security in violation of section 5… shall be liable, subject to subsection to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

The registration requirements under Section 5 and (c) of the Securities Act, 15 U.S.C. §§ 77e, 77e, are transaction-specific; each offer or sale of a security must either be registered or qualify for a particular exemption. *SEC v. Cavanaugh*, 155 F.3d 129, 133 (2nd Cir. 1998) Thus, a particular offer or sale of a security may qualify for an exemption, but the subsequent resale of that same security may not qualify for any exemption.

*SEC v. Continental Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972); *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Holschuh*, 694, F.2d 130, 139-40 (7th Cir. 1982) (“Defendants have been held liable [under Section 5] where they have been a ‘necessary participant’ and ‘substantial factor’ in the offer and sale of unregistered securities”); *SEC v. Murphy*, 626 F.2d 633, 649-52 (9th Cir. 1980) (same); *SEC v. Friendly Power Co., LLC*, 49 F. Supp. 2d 1363, 1371-72 (S.D. Fla. 1999) (defendant “has indirectly offered or sold that security to the public if he or it has employed or directed others to sell or offer them, or has conceived of and planned the scheme by which the unregistered securities were offered or sold.”)

*United States v. Wolfson*, 405 F.2d 779, 783-84 (2nd Cir. 1968); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 392 (S.D.N.Y. 2002); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997), *aff’d*, 159 F.3d 1348 (2nd Cir. 1998). *SEC v. Tuchinsky*, 1992 WL 226302, at \*2 (S.D. Fla. June 29, 1992).

With respect to the definition of “security,” *see SEC v. Edwards*, 540 U.S. 389 (2004) and Securities Act Section 2, 15 U.S.C. § 77b. The issue of whether a particular investment is a security will depend largely on how the investment was portrayed to investors. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (“[I]t is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security).”) The issue of whether a particular investment is a “security” is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). If the court determines that the investment at issue is a security, it should so instruct the jury.

[No advice of counsel defense; state of mind.] *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2nd Cir. 1976); *SEC v. Zubkis*, 2000 U.S. Dist. LEXIS 1865, at \*17; *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y.), *aff’d* 155 F.3d 129 (2nd Cir. 1998); *Howard v. SEC*, 376 F.3d 1136, 1147-48 (D.C. Cir. 2004); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961).

[No exemption available for scheme to evade.] *SEC v. Parnes*, 2001 WL 1658275, at \*7 (S.D.N.Y. Dec. 26, 2001); *Goodwin Properties, LLC v. Acadia Group, Inc.*, 2001 WL 800064 at \*6 fn 2 (D. Me. July 17, 2001); Rule 144, Preliminary Note (17 C.F.R. § 230.144).

[Burden of the Defendant to prove an exemption.] *Pennaluna & Co. v. SEC*, 410 F.2d 861, 865 (9th Cir. 1969) (“It is well recognized as a general proposition that one who claims an exemption from the broad registration requirement of Section 5 has the burden of proving that the exemption applies”); *SEC v. Cavanagh*, 155 F.3d 129, 133 (2nd Cir. 1998); *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980).

[Exemptions from registration.] In cases where the Defendant contends that an exemption from registration applies, this instruction should be amended to address the particular exemption(s) at issue. While not an exhaustive compilation of potential exemptions, the following discusses some of the more commonly-asserted exemptions. Section 4 of the Securities Act, 15 U.S.C. § 77d, exempts “transactions by any person other than an issuer, underwriter or dealer.” This exemption is intended to “exempt only trading transactions between individual investors with respect to securities already issued…” *SEC v. Culpepper*, 270 F.2d 241, 247 (2nd Cir. 1959). Generally, an “underwriter” is a person who purchases a security from an issuer, or a person controlled by the issuer, with a view towards distribution. 15 U.S.C. § 77b. The SEC promulgated Rule 144, 17 C.F.R. § 230.144, to clarify the statutory definition of “underwriter” for purposes of Section 4. Preliminary Note to Rule 144. Rule 144 generally provides that an individual who is not affiliated with the issuer may sell securities without being considered to be an “underwriter,” if certain conditions are met. The Rule 144 safe harbor is not the exclusive means by which a seller of unregistered securities can establish that he or she is eligible for the Section 4 exemption. *SEC v. M&A West, Inc.*, 538 F.3d 1043, 1050 n.6 (9th Cir. 2008).

Another commonly-asserted exemption is Section 4 of the Securities Act, 15 U.S.C. § 77d, which applies to “transactions by an issuer not involving a public offering.” Although not defined in the Securities Act, a “non-public offering” is “[a]n offering to those who are shown to be able to fend for themselves \* \* \* \* The focus of inquiry should be on the need of the offerees for the protections afforded by registration.” *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953). Following *Ralston Purina*, courts have relied on four factors in determining whether an offering is a private placement: the number of offerees and their relationship to the issuer; the number of units offered; the size of the offering; and the manner of the offering. *See Doran v. Petroleum Management Corp.*, 545 F.2d 893, 900 (5th Cir.1977). A person invoking this exemption must demonstrate that the offers or sales at issue do not constitute a disguised public offering. *SEC v. Cavanaugh*, 1 F. Supp. 2d 337, 368 (S.D.N.Y. 1998). Thus, the person invoking this exemption must, among other things, demonstrate that he or she took adequate precaution to ensure that the purchaser would not resell the security to the public, such as including a restrictive legend on the certificates for the securities. *Interpretative Releases Relating to the Securities Act of 1933 and General Rules and Regulations Thereunder*, Securities Act Release No. 5121, 1970 WL 116591 (Dec. 30, 1970) (“It is essential that the issuer of the securities take careful precautions to assure that a public offering does not result through resales of securities purchased in transactions [exempt under Section 4 ].”); *Cavanaugh*, 1 F. Supp. 2d at 369.

The SEC promulgated Regulation D to create a non-exclusive “safe harbor” within the Section 4 exemption by defining certain transactions as non-public offerings. See 17 C.F.R. § 230.501, *et seq.* Rules 501 through 503 of Regulation D contain definitions, conditions, and other provisions that apply generally throughout Regulation D. Rules 504, 505 and 506 detail specific exemptions from registration. Rule 504 provides exemptions for companies that are not required to file periodic reports with the SEC for the offer and sale of up to $1,000,000 of securities in a 12-month period. Rule 505 exempts offers by companies of up to $5,000,000 of securities in a 12-month period, so long as offers are made without general solicitation or advertising. In determining whether the maximum offer or sale amounts have been satisfied, all sales by the issuer within a certain time period must be “integrated” (that is, treated as one offering). *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 642 n.5 (11th Cir. 2010). Rule 506 provides an exemption without any limit on the amount offered or sold, so long as offers are made without general solicitation or advertising and sales are made only to investors that meet certain qualifications. *See generally, Revisions of Limited Offering Exemptions in Regulation D, Securities Act Rel. No. 8828*, 2007 WL 2239110 (Aug. 3, 2007). Each of these rules has additional specific requirements that must be satisfied before the exemption will apply. Because Regulation D provides a non-exclusive safe harbor, the failure to satisfy all the terms and conditions of any particular rule within Regulation D does not create a presumption that the exemption provided by Section 4 of the Securities Act is not otherwise available. *See* Comment 3 to Regulation D.

Another frequently- claimed exemption from registration is Section 3 of the Securities Act, *15 U.S.C. § 77c*, commonly referred to as the “intrastate offering exemption.” This statute exempts from registration securities that are “part of an issue offered and sold only to persons resident within a single state or territory, where the issuer… is a person resident and doing business within… [that] State or Territory.” Because the exemption requires the entire issue to be offered and sold exclusively to residents of the state in which the issuer is resident and doing business, an offer or sale of any part of the issue to a single non-resident will destroy the exemption for the entire issue.

The SEC promulgated Rule 147, *17 C.F.R. § 230.147*, to provide a safe harbor under the intrastate exemption. Under that rule, the intrastate offering will be available for offers and sales of securities that meet all the terms and conditions of the Rule. Those conditions are: the issuer must be resident and doing business within the state or territory in which the securities are offered and sold (Rule 147 ); the offerees and purchasers must be resident within such state or territory (Rule 147); resales for a period of 9 months after the last sale which is part of an issue must be limited as provided in Rule 147 and . In addition, the Rule provides that certain offers and sales of securities by or for the issuer will be deemed not “part of an issue” for purposes of the rule only (Rule 147). *Examination of the Effects of Rules and Regulations on the Ability of Small Businesses to Raise Capital and the Impact on Small Businesses of Disclosure Requirements under the Securities Acts*, Securities Act Rel. No. 5914, 1978 WL 197119 (Mar. 6, 1978). The Rule also provides objective standards for the statutory terms “doing business within,” “resident within,” and “part of the issue.”