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SOME COMMENTS ON THE EXPANDING DEFINITION OF "SECURITY"*

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The securities industry is in the midst of a crucial period. A significant number of securities dealers have crumbled in a market beset with complex problems, while the remaining firms have, for the most part, reported lower profits or losses. One wonders when the next old-line dealer will shut its doors. Even a young billionaire (now only a millionaire) could not—through the application of advanced computer technology concepts to the securities business—rescue one of Wall Street's oldest and largest firms; recently, he sold off the firm's assets, attempting to cut his losses (estimated in excess of $100 million). At the same time, as if grasping for a panacea, debate has raged among government regulators, stock exchange representatives, legal writers and others over such matters as fixed commissions, a central market, and increased periodic disclosure. Fundamental changes are occurring at such a rapid pace that it is difficult to foretell with any certainty the shape of the markets of tomorrow. But the effects of some proposals and changes can be predicted, and, unfortunately, they do not augur well for the small entrepreneur. A case in point is the recent expansion of the definition of "security" to include a whole variety of financing devices that, until lately, were never regarded as subject to the restrictions imposed by the securities laws.

A threshold question to securities lawyers and their clients is whether a particular scheme of financing will be deemed a security. If so, it is subject to the costly registration provisions of the law if offered for sale but not exempt from registration. Even if exempt, the antifraud provisions of the laws may be applicable to a transaction involving the purchase or sale of a security. Federal and state securities laws impose severe civil and criminal sanctions for failure to comply with their registration provisions, and the antifraud elements of the laws have become so diluted that it is often difficult to determine in advance the kind of actions or utterances that will spell liability.

The definition of "security" is not fundamental only to such basic matters as registration and the applicability of the antifraud provisions. Indeed, it relates in obscure ways to matters never contemplated by legislators and regulators when the laws were enacted or rules adopted.

* The purpose of this article is to provide a conceptual framework for an understanding of the expanding definition of a security and should be read in conjunction with the following article by Tew & Freedman.

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For example, who would have thought that certain condominium offerings would be subject to the margin and credit restrictions of the Securities Exchange Act of 1934 and Federal Reserve Board Regulation T? Yet, depending upon the manner of their offering, condominium units may be deemed securities, and, in certain circumstances, arrangements for mortgage financing of them by their developers may be subject to such margin and credit restrictions—an impediment to the marketing of condominiums that was clearly never intended and, arguably, highly undesirable. Similarly, if a particular investment is deemed a security, its holder, depending upon the amount of that investment relative to other assets of the holder and depending on certain other factors, may become an inadvertent investment company and thus become subject to the registration and other restrictions contained in the Investment Company Act of 1940.

These few examples illustrate the significance of this central consideration—whether a particular financing or investment technique is a security. If so, it is regulated in a variety of ways that increase dramatically the costs of its promotion and sale. Those costs may pose entry barriers that some businessmen will be unwilling or unable to bear; and, if fewer persons engage in a particular business activity because of these regulatory costs, we often find undesirable social consequences such as competitive advantages that accrue to larger, more established firms to whom the regulatory costs are not too burdensome. Additionally, the larger firms that are able or willing to pay those regulatory costs often pass them on to investors or purchasers of the firms' products or services, thus in turn raising the costs of investments and other goods.

When Congress and the state legislatures enacted the securities laws, those regulatory costs were traded off in favor of the presumed benefits of "investor protection." Recent scholarship has cast grave doubts on the notion that such benefits outweigh the accompanying costs. Accordingly, the very philosophy underlying the securities laws is being questioned, and there is a growing body of empirical evidence that securities regulation is more harmful than beneficial to society. It is ironic that at such a time an increasing number of financing devices are being labeled by the courts and regulators as securities and thus subjected to costs that may on balance be creating highly detrimental economic consequences. It is particularly noteworthy, and unfortunate, that this expansion of the definition of "security" has been directed primarily at devices (such as the franchises) that have not been commonly regarded as securities and that often provide small investors with opportunities—perhaps one of their last opportunities—of participating in their own enterprises.

The problem is not with such standard instruments as stocks, bonds, debentures, or notes, for they are readily identifiable as securities. Rather, the difficulty arises with the more ingenious devices that do not clearly come within the purview of the orthodox terminology. To be more specific, the problem stems from the way courts and regulators define the terms "investment contract," "certificate of interest or participation in any profit-sharing agreement," and "any interest or instrument commonly known as a security." Those catchall interests are uniformly included in the federal and state definitions of "security," and depending on the content given to those terms, a financing plan may or may not be regarded as a security.

The catchall terms were placed in the statutes to cover those situations where a financing plan has the main attributes of a stock or bond offering but were either labeled with a unique name or structured in such a manner that they would technically avoid traditional categorization and thus escape the registration, antifraud and other provisions of the laws. However, it was no small task to choose catchall terms that were sufficiently narrow to embody the principal elements of stocks and bonds but also broad enough to encompass an ingenious scheme that was virtually identical to those investment forms but called by some other name. Given this problem in legislative draftsmanship, the framers of state and federal securities statutes opted for extremely broad catchall terms, leaving the courts with great flexibility to create standards and limitations as cases arose. The high degree of discretion delegated to the courts has resulted in a remarkable proliferation of cases, many with varying definitions of "investment contract" and others with practically no visible standards at all. Thus, as the standards are judicially changed and as the courts apply the catchall terms without giving them conceptual content, lawyers and their clients are often left with the dilemma of guessing whether a particular plan of financing will be deemed a security.

The process all began in 1917 when the Minnesota Legislature incorporated the term "investment contract" in its statute defining "security."[1] That term, along with the other well-known catchall terms, ultimately spread throughout the states and was adopted by Congress when it enacted the federal securities laws. Considering the literal meaning of the words "investment" and "contract," any contractual arrangement whereby capital was employed to produce income or profit could have been found by the courts to constitute a security. And since capital can take many different economic forms including human capital as well as money or tangible assets, the offer of employment contracts coupled with the expectation of income or profit for the person contributing his human resources could literally amount to an investment contract and, consequently, a security. Indeed, in the first case defining the term, the Supreme Court of Minnesota, in 1920, recognized the economic meaning of "investment" when it said: "No case has been called to our attention

1. MINN. GEN. L., ch. 429, § 3 (1917).

defining the term 'investment contract.' The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood."[2]

Initially, that broad definition often appeared without elaboration in court decisions, although, in fact, the courts did not apply it strictly to all factual situations. In refraining from a literal application, the courts were in effect recognizing the enormous regulatory burden and cost to society that would result from subjecting all contractual arrangements involving investments to the securities laws. Thus, very early, the courts recognized the policy question of where to draw the line. Almost at the outset, they placed the cut-off point where the investor was actively involved in the concern. Accordingly, contracts which contemplated a purely passive role by the investor were held to constitute securities while those which anticipated active participation by the investor were deemed not to involve securities. This conclusion was a realistic approach, since the purpose underlying the securities laws was to protect investors. If the investor were actively engaged in the operations from which he derived his profit, he could protect himself; on the other hand, the passive investor was not in a position to look after his own interests and thus needed the protection afforded by the securities laws.

Moreover, this passivity element was also at the heart of most stock and bond offerings. Thus, by analogy, an investment contract which contemplated a purely passive role by the investor was not, stripped of its form, essentially different in substance from more traditional securities. In addition to the limited liability factor, a principal reason for the development of the corporate form was its inherent quality of centralized management accompanied by its ability to raise capital from a large number of investors who would not participate in management decisions. Except to the extent that shareholders elected directors and voted on certain organic corporate changes, stockholders and bondholders as such had little control over the policies of the firm. It was not until much later that, for tax and other reasons, the close corporation developed (where there is often an identity of interest between the investment and management functions). The principal motivation of stock and bond investors, except in some close corporation situations, was, and still is, a return or profit based upon the decisions of other persons—the managers. Thus, it is apparent that the passivity element is typical and central to the stock or bond interest. To the extent that stock- or bondholders may also be managers, their management function is different from their function as capital contributors; the distinction between entrepreneurial, capital-contributing, and management activities has long been recognized in economic theory as well as in practice.

In establishing the elements of "investment contracts" and other

2. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938 (1920).

catchall securities, we have observed that the early courts had substantial basis for drawing the line as indicated in the above analysis. The next step was for the courts to translate their policy decision into a formula. Ultimately, that was done, and in the landmark case of *SEC v. W.J. Howey Co.*,[3] the United States Supreme Court spelled out a threefold test that signified "investment contract": (1) An investment of money in (2) a common enterprise and (3) profits to come solely through the efforts of others. That formula illustrates nicely how the courts cut back from the economic realities underlying investments generally and defined investment contracts in terms that were analogous to the typical bond or stock offering. For example, the Supreme Court test is geared to an investment of money and is not based on the investment of other forms of capital. Additionally, the Supreme Court definition contemplates passivity on the part of the investors, since their investment of money must be made with the expectation that they would earn a profit "solely through the efforts of the promoter or someone other than themselves."

The *Howey* test has not been free from interpretive difficulties. For example, there remained problems such as defining "common enterprise" and determining whether a nominal or token participation was sufficient to overcome the *solely* standard. But the courts were able to resolve these issues, and lawyers were provided with guidelines with which they could predict, without great difficulty, whether a particular financing plan involved a "common enterprise." Furthermore, courts have held that mere token participation by the investor would not preclude application of the securities laws. When these interpretations were combined with the *Howey* formula, determination of whether a particular scheme involved a security became, for the most part, a mechanical matter. But as courts, regulators, and legal writers sought expansion of the catchall definitions, that mechanical quality of the *Howey* formula began to create serious conceptual problems. This phenomenon was not unique to the area of securities regulation. Courts and regulators, for policy reasons, have often decided to extend or contract the reach of some legal principle; and such decisions have required reversal of position or development of new rationale to justify the policy change. But when the United States Supreme Court has established the legal principle or when the principle has existed for an extensive period, it is obviously indelicate, not to mention reversible error, for lower courts to hold contrary to the established maxim. Accordingly, such courts, and regulators administering a body of law, have attempted to circumvent a direct confrontation with a particular principle by developing new rationale. That is exactly what has happened with respect to the definition of "security."

One theory offered to justify expansion of the catchall definitions is called "risk capital." Actually courts, regulators and damaged investors

3. 328 U.S. 293 (1946).

have not been able to agree upon a single "risk capital" test. Accordingly, several varieties of "risk capital" have been developed, all spawned by policy determinations that the securities laws should extend to new business or financing devices. Although several federal courts have toyed with the concept, it is really a creature of state law, given birth by the Supreme Court of California in connection with that court's attempt to define "security" for purposes of California law. In the seminal case,[4] the term was used throughout the court's opinion, but it was never defined. However in that case, it was obvious that the entire scheme was extremely speculative in view of the small capital contribution by the promoters. Such riskiness was probably the crucial factor in the court's policy determination. And in the cases that have followed California's lead, "risk capital" has been employed where the promoters' investment is small relative to the needs of the particular businesses and where there is a high degree of risk to the outside contributors of capital.

In such situations, most of the requisite capital is raised from outside persons who do not generally participate in the management of the promoter's operations. For example, in the case of some multi-level distributorships, the promoter selling distributorships may seek to raise most of his capital from distributorship purchasers who earn a profit only if they (the distributorship purchasers) *actively* sell a product or service. But that purchaser may have no control over the managerial decisions of the promoter. Similarly, in the case of the typical franchise, the franchisee earns a profit only if he *actively* engages in the sale of a bucket of chicken or some other product. Yet in most franchise situations, the franchisee is given no authority to participate in the franchisor's policy formulation. In some such franchise operations, virtually all of the franchisor's necessary capital is raised through the sale of franchises. In those situations, it is essentially the proceeds derived from franchise sales that are risked to promote the franchisor's business and, in effect, the total enterprise (including the individual franchisee outlets). The risk extends to the total enterprise, since the success of the franchisor and franchisee are inextricably related. Speculativeness of a franchise operation is particularly high with respect to initial franchise purchasers who may be providing the promotor's seed capital before the viability of the particular franchise concept is proven.

The *Howey* formula cannot be applied literally to the foregoing fact patterns, inasmuch as the investors (franchisees and distributorship purchasers) earn a return based, at least to some extent, on their own efforts. That test is inapplicable, unless we are prepared to conclude that the word "solely" need not be taken at face value. Several state courts, in adopting the "risk capital" concept, have coupled that concept with a diluted passivity element carried over from *Howey*. For

4. Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961).

example, the Supreme Court of Hawaii decided that an investment contract was created whenever:

(1) An offeree furnishes initial value to an offeror;
(2) A portion of this initial value is subjected to the risks of the enterprise;
(3) The furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and
(4) The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.[5]

Thus, the Hawaii court combined the risk capital approach with a modification of the *Howey* standards. First of all, the Hawaii court recognized the economic reality that an investment may exist even if the offeree contributed capital other than money; accordingly, the court talked about the investor's contribution using the general term "value." Furthermore, with respect to the passivity question, the court eliminated the element of *solely* through the efforts of others and replaced it with an absence of practical and actual control over the managerial decisions of the enterprise.

Other state courts, coming to grips specifically with the franchise or distributorship question, have also adopted standards designed, for policy reasons, to regulate those special situations. For example, an Idaho court said that a security would be present if the following could be found:

(1) a common enterprise,
(2) expectation of monetary profit or some other benefit and
(3) either (a) nonparticipation or (b) a double-investment situation where there is a contribution of risk capital, as well as nonparticipation in the franchisor's separate business.[6]

As the courts sought to escape the narrowness of the *Howey* formula, they offered rationale for a more general test. But when one moves from specific to new, general propositions, one always increases the likelihood of conceptual and practical problems. For example, does "risk capital" mean the initial capital required to promote and finance a totally new venture? Or, does it mean the capital necessary to finance a risky (unproven) venture, regardless of the stage of its development? Finally, could it mean capital invested with less than a "fair" chance of return?

5. State v. Hawaii Market Center, Inc., 52 Hawaii 642, 649, 485 P.2d 105, 109 (1971).
6. State v. Glenn Turner Enterprises, Inc., 3 BLUE SKY L. REP. ¶ 71,023, at 67,201 (Idaho 4th Dist. 1972).

The importance of how we define "risk capital" is thus readily apparent. If it means initial capital, then we would observe the stage of development of a venture and the amount of capital supplied by the promoters compared to the amount necessary to make it economically feasible. If there is a vast disparity between the amount of capital invested by the promoter and the amount sought from franchisees or purchasers of distributorships, then the arrangement would be deemed to involve "risk capital." However, if "risk capital" means continuing capital—that is, capital necessary to finance an existing but unproven or risky business—the fact finder would first determine whether the business was an existing one, and then it would be necessary to ascertain when the business was sufficiently proven (lacking in risk) so that the capital contributed by franchisees and purchasers of distributorships would no longer come within this definition of "risk capital." The factual determinations to be made under either definition could be difficult, but the task involved with the concept of continuing "risk capital" could be especially troublesome. Moreover, we must recognize the reality that courts will invariably be judging "risk capital" with the benefit of hindsight. How then can a lawyer safely advise his client with respect to the amount of promoter's contribution, whether initial or continuing, necessary to escape the hazards of a "risk capital" trap?

The variety of ways in which risk capital (initial or continuing) can be combined with diluted passivity (no control over the franchisor's management decisions) has led to several different definitions of the catchall terms. That in turn has generated increased uncertainty regarding the meaning of "security." But uncertainty is not the only high cost created for entrepreneurs by virtue of expanding the definition of "security." Other significant costs include the inefficiencies and practical difficulties that underlie some of the new concepts. To be specific, the so-called "two-tier" or "double-level" analysis of franchise agreements amply illustrates these latter costs.

The proponents of the two-tier analysis argue that, on one level, the franchisee's investment is in his own business for which he purchases equipment, realty, leases, inventory, labor, and all other assets necessary to operate the business. On the second level, it is maintained that the franchisee also invests in a separate business, that of the franchisor. His investment in the franchisor's operation may be through an initial franchise fee, monthly or yearly franchise payments, payment for services or inventory to be rendered or sold by the franchisor to the franchisee, or through other means such as rebates or overrides. The common-enterprise aspect of the total franchise arrangement lies in the fact that: (a) franchisees are contributing franchise payments that are often used as the initial or continuing capital to commence or support the franchisor's operations, and (b) franchisees' profits are related to and depend, in varying degrees, on the sound management and success of the franchisor's operations, over which individual franchisees generally have no control.

It has been argued that this second level of investment in the franchisor's operations is itself a security. The Idaho decision, previously cited, made specific reference to this "double-level" or "two-tier" aspect of franchise agreements. Under this concept, it would be necessary to grant franchisees some amount of managerial control over the franchisor's separate business for the second-level to escape being deemed a security. Yet it is not difficult to imagine the managerial chaos that would result from such planning. For example, how much managerial control is enough? Over what substantive matters must the franchisees have control? And how will the franchisees exercise managerial control—at perhaps something like a town meeting where they can all gather, voice their comments, and ultimately vote in a democratic fashion? We may seriously wonder if there are many entrepreneurs who, as franchisors, would invest their resources in such arrangements. Of course, entrepreneurs could avoid these problems by simply registering the franchises. That course of action raises the specter of all the economic costs associated with securities law compliance. Firms like McDonalds would not be affected adversely. Indeed, the larger franchisors would have a competitive advantage over some smaller operations for whom the marginal costs of compliance might exceed the marginal benefits. Thus, we could predict adverse social consequences in the form of diminished competition.

In analyzing this area of franchises and multi-level distributorships, the courts and regulators overlook an important point regarding managerial control. That is, franchisees do not ordinarily seek managerial control over their franchisor. In fact, one of the benefits purchased by the franchisee is the franchisor's expertise. The typical franchise arrangement simply puts into practice the principle that specialization of labor generally generates greater economic efficiency. The effect of a rule creating a security out of an ordinary franchise is to raise the costs of specialization and thus inhibit efficient allocation of resources.

This concept of managerial control can also be shown to demonstrate logical consequences that its proponents would never knowingly accept. If the franchisee has managerial control over the franchisor's operations, then the franchise is not a security. Accordingly, the registration and antifraud provisions of the securities laws are avoided. By analogy, is the common stock owned by the president of General Motors Corporation any less a security because it is held by a person who has managerial control over the operations of the firm? One can readily imagine the response of the Securities and Exchange Commission if GM's president attempted to sell his stock in violation of the registration and antifraud provisions of the securities laws.

In some states, the advocates of "investor protection" have not been content to let the courts expand the definition of "security" as described above. For example, the Oklahoma legislature recently enacted a revision of its statutory definition of "security" to include certain multi-level distributorships and, additionally, to reflect an extremely broad version of the "risk capital" theory.[7] To illustrate, the Oklahoma definition of "risk capital" seems to include an employment arrangement if the promoter of the venture does not have the capital to pay for the employee's services as they are performed but promises some later benefit (cash payment or some other benefit), provided the employee has no direct control over the investment or policy decisions of the venture. Under the definition, the employee's services are deemed an investment. To put it another way, an investment of human capital may spell security under some circumstances.

The Oklahoma language defining multi-level distributorships as securities is also very broad. In this connection, the statute exempts from the definition of "security" those distributorships that the Oklahoma Securities Administrator may exclude because "public interest" or "protection of investors" does not, in the Administrator's opinion (no other standards are provided in the statute), warrant such regulation. It is not difficult to predict the kind of lobbying that may result from such a provision—the larger, more affluent persons lobbying for an exclusion from the definition, and the smaller, newer promoters being unable to compete for such an exemption. The social costs of such legislation seem high indeed. As we observed earlier, a McDonalds will not be adversely affected; such firms will in fact be benefited.

In essence, the Oklahoma legislature has made a merit judgment that certain franchises, multi-level distributorships and pyramid promotions need regulation under the securities laws. Accordingly, in the wake of complaints and suits surrounding the *Glenn Turner* and similar enterprises, a statute was enacted ensuring such regulation. Many state courts have made the same kind of merit judgment when they have expanded the definition of "security." Such judicial judgments, while generating high social costs that have already been mentioned, are not inconsistent with the merit approach generally underlying state securities regulation.

Merit standards are not, however, part of the theoretical fabric of the federal securities laws. Nevertheless, recently the federal district court of Oregon speciously reasoned that the "risk capital" theories of California, Oregon and Hawaii could be appropriate tests for determining what is "commonly known as a security" under that catchall phrase contained in the federal definition of "security."[8] In effect, the court held that because a financing device was a security under a few state decisions, it automatically became a security under federal law, despite the difference in regulatory philosophy between state and federal law. The court

7. Okla. L. 1973, H.B. 1035 [2 BLUE SKY L. REP. ¶ 39,102 (June 19, 1973)].

8. SEC v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766 D. Ore. 1972), *aff'd*, 474 F.2d 476 (9th Cir.), *cert. denied*, 94 S.Ct. 117 (1973).

also stressed the essential managerial test developed by the Supreme Court of Hawaii thus again drawing on state judicial pronouncements.

The Court of Appeals for the Ninth Circuit affirmed the District Court of Oregon holding,[9] but was silent regarding the lower court's reasoning regarding state concepts of "risk capital." In support of its affirmance, the appellate court offered a rationale that the *Howey* test should not be applied mechanically. It stated that "[r]egardless of the fact that the purchaser here must contribute something besides his money, the essential managerial efforts which affect the failure or success of the enterprise are . . . not his own."[10] Essentially, the Ninth Circuit held that the Supreme Court's *solely* standard in *Howey* should not be taken literally. This policy decision may have been based on the Ninth Circuit's reaction to the facts of the case before it. Witness this sentence from the first paragraph of the court's opinion: "The trial court's findings, which are fully supported by the record, demonstrate that defendants' scheme is a gigantic and successful fraud."[11] Unfortunately that case, and others like it, may be demonstrating the truth of the old maxim that hard cases make bad law.

Shortly after the District Court of Oregon rendered its opinion, suit was filed under virtually identical facts (and by the same plaintiff—the United States Securities and Exchange Commission) in another federal district court (Northern Dist. of Georgia). The Georgia court found that the financing device was not a security.[12] With respect to the question of whether an "investment contract" was involved, the court refused to depart from the *solely* test of *Howey*: "This district court sees no freedom to coin a new, different and more expansive standard in light of these binding higher court decisions."[13] In connection with the "commonly known" argument on which the Oregon federal court relied, the Georgia decision recognized that while there was an emerging philosophical trend to incorporate the "risk capital" theory into the body of securities law, an emerging trend and "commonly known" are quite different. Furthermore, how many state court decisions adopting the "risk capital" theory are sufficient to justify a conclusion that business devices falling within the concept are "commonly known" as securities? Do we count the jurisdictions adopting and rejecting "risk capital" and make our decisions accordingly? And is that technique a proper standard at all for determining whether a plan is "commonly known" as a security? In any event, there are really only a few jurisdictions that have adopted the "risk capital" concept, and the Georgia federal court perceived that fact.

9. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973), *cert. denied*, 94 S. Ct. 117 (1973).

10. *Id.* at 483.

11. *Id.* at 478.

12. SEC v. Koscot Interplanetary, Inc., 365 F. Supp. 588 (N.D. Ga. 1973), *appeal docketed*. No. 73-2339, 5th Cir., May 4, 1973.

13. *Id.* at 592.

Thus, some courts have been unwilling to make policy decisions regarding the need for regulation and to then expand the law by adopting convenient, albeit not consistent, rationale.

While "consumerism" is not new to securities regulation, it has been a significant force in the expansion of such regulation, both with respect to the quantity of regulation and the kind of interests subjected to regulation. If members of the public are damaged by virtue of some kind of business activity, it is natural for them to complain; and if their complaints can be transformed into legal action, it is understandable that they will pursue this course, particularly if their cause is politically popular and if government agencies stand ready, equipped with public funds, to assist the hapless victims. Unless the targets of such action are heavily financed and well organized politically, it will be particularly difficult for them to resist an attack mounted under the banner of "consumerism" (or "investor protection" in the case of securities regulation). In the securities area, the government agency bringing a suit for injunctive relief can simply outlast many targets, especially if they are "Johnny-come-latelies." From the cases and administrative releases, it is apparent that the Securities and Exchange Commission, as well as many state administrators, has jumped on the bandwagon seeking injunctions on the basis of an expanded definition of "security." Unhappily, the administrators and some of the courts have not examined the social costs generated by their desire to protect the investing public.