SECURITIES

PRIVATE PLACEMENTS AND LIMITED PARTNERSHIP OFFERINGS: CHANGES IN THE RULES

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The past year saw perhaps the most significant changes in and interpretations of Nebraska securities law in terms of practical impact since the Modified Uniform Securities Act was adopted in Nebraska in 1965.1 These changes and interpretations, which took place at the legislative,2 administrative,3 and judicial4 levels, dramatically affected the two most frequently used exemptions from securities registration in Nebraska: the private placement exemption5 and the exemption for bona fide nontransferable partnership interests.6

The Nebraska Legislature substantially liberalized the rules for making private placements, although it imposed a new filing requirement to establish the exemption,7 and made it easier for people to sell their own securities without the use of a registered broker.8 The Department of Banking and Finance (Department of Banking) adopted Rule 70, governing notice requirements in private placements,9 and adopted two formal interpretative opinions addressed to the isolated transaction exemption in Ne-

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1. NEB. REV. STAT. §§8-1101 to 1207 (Reissue 1974).
5. NEB. REV. STAT. § 8-1111(9) (Reissue 1974).
7. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9) (Reissue 1974)).
8. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1103(3)(c) (Reissue 1974)).
and the integration of offerings. In May, the Nebraska Supreme Court considered both the private placement exemption and the isolated transaction exemption in *Labenz v. Labenz*.12

This year also saw the adoption of the Department of Banking Rule 71, defining the requirements of the bona fide limited partnership exemption under Nebraska law,13 and making it clear that a Certificate of Partnership filed with the county clerk is, by itself, insufficient to make a partnership "bona fide."14 In fact, the exemption has been made unavailable for all practical purposes for any type of conventional syndication. Real estate and oil and gas ventures, which have frequently been sold on a large scale basis without registration under the Securities Act of Nebraska, must now be registered unless they can be sold pursuant to another exemption. Although the adoption of Rule 71 surprises some, and although numerous Nebraska practitioners have opposed such a rule, the rule essentially adopts judicial precedents construing similar language in other states.15

The Legislature also broadened the enforcement powers of the Department of Banking16 in order to give the Department more power to act quickly to suspend illegal public or private offerings. This change has a less direct impact upon the practice of the average practitioner.

NEW PRIVATE PLACEMENT RULES

Under section 11(9) of the Securities Act of Nebraska as it existed in Nebraska prior to September 1, 1977, an offering of securities was a private offering if offers were extended to not more than ten persons.17 In addition, an unlimited number of offers to sell preorganizational subscriptions to a new venture could be made under section 11(10),18 provided that sales were not actually made to more than ten persons.19 Any transaction

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12. 198 Neb. at 549-50, 253 N.W.2d at 856-57.
16. See L.B. 263, supra note 2 (amending Neb. Rev. Stat. §§ 8-1109(1), (8), (9), (10) (Reissue 1974)).
19. Section 11(10) makes no provision for sales, and one of the conditions
which qualified as an isolated transaction under section 11(1) was also exempt from registration.\textsuperscript{20}

Under section 11(9), as amended by the Legislature, an \textit{unlimited number of offers} to sell securities may be made in a private offering, provided that not more than \textit{ten sales} are made and certain other conditions are met.\textsuperscript{21} The special exemption for an unlimited number of offers for preorganizational subscriptions has been preserved,\textsuperscript{22} as has the isolated transaction exemption,\textsuperscript{23} although the only remaining purpose served by these exemptions is to excuse technical compliance with certain provisions governing section 11(9) private placements.

In addition to the condition that sales be made to no more than ten persons, other conditions required to exempt a private placement from registration under section 11(9) of the Securities Act of Nebraska are as follows:

1. No sales commission or other remuneration may be paid to any person in connection with soliciting any sale, unless such a person is registered as a broker-dealer or issuer-dealer in securities under the Securities Act of Nebraska.\textsuperscript{24} The same rule existed under the old law.

2. There may be no solicitation by radio, television, or newspapers.\textsuperscript{25} Although this is new language, the old law would have prevented such solicitations as well, since an offer by radio, for example, would have been an offer to the listening audience,\textsuperscript{26} and offers were limited to ten in number.\textsuperscript{27}

3. A notice that the exemption is being relied upon must be

for the exemption is that "no payment is made by any subscriber." Once the subscriptions have been obtained, the actual sales must be made pursuant to the exemption provided by § 8-1111(9), or some other exemption which relates to actual sales as well as offers. Neb. Rev. Stat. §§ 8-1111(10), (9) (Reissue 1974).

24. L.B. 263, \textit{supra} note 2 (amending Neb. Rev. Stat. § 8-1111(9)(b) (Reissue 1974)). \textit{See} 198 Neb. at 549-50, 253 N.W.2d at 856-57; \textit{see} notes 60 to 66 and accompanying text \textit{infra}.
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filed with the Department of Banking prior to the time any sales are made. This is a new requirement.

4. As under previous law, the seller must reasonably assure himself that all purchasers are taking for investment and not with a view toward redistribution.

5. Full disclosure respecting the merits and risks of the investment must be made to all purchasers, in accordance with the anti-fraud rules found in section 2(1) of the Securities Act of Nebraska. The same rule existed under previous law.

The remainder of this section will focus on some implications of these changes.

SHIFT FROM COUNTING OFFERS TO COUNTING SALES

The old rule, that not more than ten offers could be made without registration, was so restrictive that it amounted to almost no exemption at all. At one time, it might have been a useful rule, but there has been increasing judicial expansion at the federal level of the concept of offer. Section 22 of the Securities Act of Nebraska requires that the Act be construed to achieve uniformity with related federal legislation. Accordingly, such federal decisions are strong precedent in Nebraska.

It has been held that the term “offer” includes even a “preliminary negotiation or conversation” for the purpose of “ascertaining which of various possible purchasers would be willing to accept an offer.” It has been suggested that an offer materializes as soon as the issuer is identified and his desire to obtain capital is made known. If offers are made to partnerships, investment clubs, trusts, or the like, each of the beneficial owners may have to be counted individually unless there is a clearly defined independent investment authority such as a bank trust department.

28. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1111(9)(c) (Reissue 1974)). The time of filing, place of filing and content of the notice are specified in Rule 70 of the Nebraska Department of Banking.
33. 2 Goldberg, supra note 32, § 2.3(b) at 2-14.
As a practical matter, few business ventures can be put together under the ten offerees exemption. It is not possible to ascertain in advance who is likely to accept an offer before entering into preliminary conversations, which are themselves offers. One sale out of ten contacts would be an excellent result in the difficult business of capitalizing business ventures, and even those who raise venture capital professionally may need to make more than ten contacts just to ascertain the general type of investor likely to display interest in an offering. Many people of means permit offers to be made to them because they are polite, curious, or uncertain as to their own investment intentions, but have no real inclination to invest. To expect that any meaningful attempt at capitalizing a new or existing business could be made within the scope of ten preliminary conversations ignores reality.

While solicitations could theoretically be made under the old law through existing registered broker-dealers, such broker-dealers have neither the inclination nor facilities to finance more than a very limited number of start-up ventures or small businesses in a given year. The structure of the investment banking industry in Nebraska and elsewhere is not such that broker-dealers can readily fill the function of finders in many situations where a small amount of capital needs to be raised through a few investors.

Some assume that an investment banker who can privately place a $1,000,000 equipment financing for the Union Pacific Corporation can obviously place a $5,000 investment in a new community dinner theater, parking garage, or any other business. Such assumptions are based on a gross misconception of the function of the investment banker. The business of investment bankers is to deal in publicly traded stocks and bonds, and to effect private transactions for major established businesses; many are loath to act as finders in small transactions. It is also erroneous to assume that smaller transactions can be handled by smaller investment bankers, because they have proportionately smaller staffs and facilities and fewer sources of capital. Furthermore, new ventures and existing small businesses are so dependent upon the individual talents and abilities of REGULATION 2647 n. 76 (Supp. 1969); S.E.C. Securities Act Release Nos. 4642 (Sept. 25, 1963), 4378 (July 6, 1961), 4371 (June 7, 1961); S.E.C. Securities Exchange Act Release Nos. 7329 (June 2, 1964), 5690 (May 7, 1958). An institution may be acting either for itself or for others (as in the case of bank trust departments) so long as the persons it represents are not parties to the offer. See NEB. REV. STAT. § 8-1111(8) (Reissue 1974).
management that it is neither desirable nor always possible for sales to be solicited by a third party. Indeed, the Securities and Exchange Commission requires that, in private placements made under Rule 146, the investors have the opportunity to ask questions of the issuer or others acting on its behalf before making their investment decision.35

Thus the shift from counting offers to counting sales is a realistic one and creates an exemption of meaningful value.

**Ten Sales Over Twelve Months—Integration of Offerings**

The Securities Act of Nebraska, as amended, provides an exemption for “[a]ny transaction pursuant to a sale to not more than ten persons . . . during any period of twelve consecutive months . . . .”36, with the exception of financial institutions and similar purchasers enumerated in section 11(8).37 Sales to exempt purchasers are not counted toward the limitation of ten sales.38

This raises the question, however, of the definition of a transaction for the purposes of this section. Is the sale of common stock to ten persons in January, followed by sales of the same common stock in June to ten more persons, two separate transactions within the meaning of section 11(9)? Under federal securities law, the answer is generally negative.39 Under state law, the Department of Banking has stated that such transactions taking place within twelve months of each other would be treated as part of the same transaction, and would therefore exceed the ten sale limit.40

In adopting its position on integration of offerings, the Department of Banking indicated through a formal interpretative opinion that it will examine substantially the same factors which the Securities and Exchange Commission would examine

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37. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1111(9) (Reissue 1974)), specifically exempts sales to institutions as enumerated in section 11(8), which include “a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity.” L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1111(8) (Reissue 1974)).
in making the same determination at the federal level. The Department of Banking said that, in determining whether a sale to ten or fewer Nebraska investors should be integrated, it would consider whether:

1. the different offerings are part of a single plan of financing;
2. the offerings involve the issuance of the same class of securities;
3. the offerings are made at, or about, the same time;
4. the same type of consideration is received;
5. the offerings are made for the same general purpose.

The Department of Banking provided the following example of a series of similar transactions which it would integrate:

An issuer is involved in the business of offering working interests in oil and gas wells to Nebraska investors. The issuer has the policy of trying to get each investor to invest in three, four, or five different wells per year so that he may spread his risk. Through these four or five well offerings to Nebraska investors, the issuer makes sales to 23 different Nebraska investors. However, in each individual well, there are only ten or less sales to Nebraska residents. If you examine all the wells which one particular investor invested in, and count the total number of other Nebraska residents who invested in those wells, the total number of sales to Nebraska investors would be greater than ten.

In this case, the Department of Banking indicated that it would integrate the offerings, because each separate well offering is part of a related series of offerings which should be combined into one large offering. The Department of Banking considered that, in this example, each of the five relevant factors cited above would be considered to be present. The example leaves an interesting question open: if a promoter syndicates ten different wells in Nebraska, each to ten different people so that no person has invested in more than one well, are the one

41. The Securities and Exchange Commission considers the same five factors which the Department of Banking considers. See S.E.C. Securities Release No. 4434 (Dec. 6, 1961).
43. Id.
44. The question of integration of offerings arises most frequently in the case of oil and gas ventures and real estate partnerships. The question of when real estate partnerships are integrated is one which has been investigated in some depth in a publication of the National Association of Realtors. Sonfield, Integration of Limited Partnership Offerings, 2 REAL EST. SEC. AND SYNDICATION NEWSLETTER 1 (Nat'l A. of Realtors, May 1974).
hundred resulting sales part of a single integrated offering, or are they ten separate offerings? No definitive answer is available at this time.

The example does make it clear that integration of offerings is clearly a question which must be considered whenever the same promoter or same group of promoters becomes involved in selling securities to more than ten persons in Nebraska during any period of twelve consecutive months. It should not make any difference that different limited partnerships own each well or each property.\(^{46}\) Integration can become a consideration in some cases merely through the involvement of the same personnel in the issue, especially the same promoters.\(^{47}\)

**Ban on Radio, Television, and Newspaper Advertising**

Under section 11(9) of the Securities Act of Nebraska, as amended, no radio, television, or newspaper advertising may be employed if the exemption is to apply.\(^{48}\) This provision stops short of the Securities and Exchange Commission's ban on public solicitation for private offerings subject to federal law. Under federal law, direct mail advertising is also prohibited,\(^{49}\) as are any means of general solicitation.\(^{50}\) Presumably in Nebraska, direct mailings, handbills, and other means of widely distributed advertising may still be employed. However, if one offer slips across the state line, or if an offer is made to a resident of another state who happens to be in Nebraska, federal registration provisions may immediately come into play.\(^{51}\) Accordingly, some discretion should still be used in connection with dissemination of information about securities offerings.

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47. Id.
48. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1109(d) (Reissue 1974)).
51. S.E.C. Rule 147(d), 17 C.F.R. 230.147(d) (1977). The antifraud (full disclosure) provisions of federal law apply, of course, even if all the purchasers are Nebraska residents, unless the defendant can establish that no facilities of interstate commerce (i.e., the mail or the telephone) were employed in connection with the offering. Interstate commerce exists if there is any use of the mail or of the telephone, even if wholly within one state, or any travel between states, even by means of private transportation. Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 693 (as to intrastate mail service), 693-94, n. 18 (as to intrastate telephone service), 693 (as to private travel between two states) (5th Cir. 1971). See also Lawrence v. S.E.C. 398 F.2d 276, 279 n. 2 (1st Cir. 1968); Myzel v. Fields, 386 F.2d 718, 727 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968). See also 3 A. Bromberg, Securities Law § 11.2, at 245-46 (1971); 6 L. Loss, Securities Regulation 3747-48 (Supp. 1969); 62 Mich. L. Rev. 1080-84 (1964).
FILING OF NOTICE REQUIREMENT

The new law provides a private placement exemption from securities registration only if "a notice is given, stating the seller's name and address and a statement that the conditions of this exemption have been met . . ."52 Rule 70 of the Department of Banking, which has the force of law,53 specifies that the notice must be filed "prior to any sales made in reliance on the . . . exemption."54 The term "sale" in the Securities Act of Nebraska includes "every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."55 Thus, offers may be made before the Rule 70 notice is filed, but no consideration may be accepted, and no contract of sale may be made.

A Rule 70 notice must contain the following information:

(1) the name and address of the issuer,
(2) the names and addresses of the individuals selling or promoting the offering,
(3) the business in which the issuer is to be engaged in,
(4) the type of security being issued (common stock, limited partnership interests, debentures, etc.), and the total dollar amount of such securities,
(5) a statement that all of the conditions of section 8-1111(9) will be met.

Notice requirements of this type have proved troublesome in other states, because people tend to forget to file such notices. The notice requirement is simple and is not burdensome, but it is a trap for the unwary. The most unfortunate thing at this point is that there does not appear to be any way to cure a Rule 70 violation. Inadvertent Rule 70 violations are sure to become very common, and it would make good sense for the Department of Banking to expand the rule to permit the director to issue an order declaring that the statutory filing of notice requirement will be deemed to have been met upon a finding by the director that the issue has complied with sections 11(9)56 and

52. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1111(9)(c) (Reissue 1974)).
54. Neb. Dept. of Banking, Rule 70(b) (1977). Rule 70 requires that the notice be filed at the following address: Nebraska Department of Banking and Finance, 301 Centennial Mall South, Post Office Box 95006, Lincoln, Nebraska 68509.
Such a modification of Rule 70 is possible, because the statute does not specify when notice must be filed.

**Ban on Payment of Commissions**

The requirement that no commissions be paid to solicit sales in private placements of securities has been preserved. Not only the payment of commissions, but also any remuneration directly or indirectly paid for soliciting any prospective buyer, is prohibited. Thus, salesmen cannot be hired in any private placement unless the salesmen are employed by registered broker-dealers. This provision does not change preexisting law.

The Nebraska Supreme Court, in the case of *Labenz v. Labenz*, considered the effect of payment of commissions upon the private placement exemption. There, the defendant, a salesman, had a contract with an issuer providing for a commission of eight percent of the value of the stock sold. The defendant received and cashed a check representing his sales commission, but the check was returned for insufficient funds. The court rejected the argument that because the check had been returned, no commission or other remuneration was paid for soliciting the plaintiff. The court said: "The section contemplates a situation where no remuneration is to be given to the offerer in any form . . . . The fact that he did not receive payment on the check does not change the situation."

The *Labenz* case involved a transaction with only seven purchasers. It makes it very clear that "[t]he Securities Act of Nebraska should be liberally construed" and that any kind of actual or intended commission or remuneration to an unregistered person will destroy the private placement exemption under Nebraska law.

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57. NEB. REV. STAT. § 8-1102(1) (Reissue 1974) is the general anti-fraud provision of the Securities Act of Nebraska, equivalent to S.E.C. Rule 10b-5, 17 C.F.R. 240.10b-5 (1977). See text to notes 86 to 88, infra. The Department of Banking should not issue such an order if it finds that fraud has been involved in the offering.

58. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9) (Reissue 1974)).

59. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9)(b) (Reissue 1974)).

60. Payment of commissions to registered broker-dealers is expressly permitted by the statute. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9)(b) (Reissue 1974)).

61. 198 Neb. at 550, 253 N.W.2d at 857.

62. Id.

63. Id. (emphasis in original).

64. Id.

65. LB 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9)(b) (Reissue 1974)).
Labenz also carries a potent message for those who would act as salesmen in an unregistered offering. The court found no difficulty in imposing liability directly upon the salesman. The salesman's liability was not limited to the amount of his commission but was for the full amount of the investment.66

PURCHASE FOR INVESTMENT

One of the conditions to establishing the exemption afforded by section 11(9) of the Securities Act of Nebraska is that "the seller reasonably believes that all the buyers are purchasing for investment."67 The Department of Banking has not taken a formal position on what is necessary to establish the requisite element of investment intent under Nebraska law, and there are no reported cases at the state level.

The Securities and Exchange Commission requires that for investment intent to be established at the federal level, the purchaser must be advised of applicable limitations on resale of the securities. The seller has the obligation to "inform the purchaser that the securities are unregistered and must be held indefinitely unless they are subsequently registered under the Securities Act of 1933 or an exemption from such registration is available."68 The seller must also point out that any routine sales of securities made in reliance upon Securities and Exchange Commission Rule 14469 can be made only in limited amounts in accordance with the terms and conditions of that rule. In the case of securities to which that rule is not applicable, compliance with Regulation A70 or some other disclosure exemption will be required.71

If the issuer is under no obligation to register the securities or to comply with any such exemption, that fact should be made clear to the purchaser [and] [t]he purchaser must be informed as to whether the seller will

66. 198 Neb. at 548, 253 N.W.2d at 856. The court properly noted that section 18(1) of the Securities Act of Nebraska provides that,
Any person who offers or sells a security in violation of section 8-1104 . . . shall be liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per annum from the date of payment, costs, and reasonable attorneys' fees . . . .
198 Neb. at 549, 253 N.W.2d at 856, quoting NEB. REV. STAT. § 8-1118(1) (Reissue 1974) (omission in original).
67. L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1119 (Reissue 1974)).
supply the purchaser with any information necessary to enable the purchaser to make routine sales of securities under Rule 144.\footnote{Id.}

In addition, the Securities and Exchange Commission strongly recommends the use of restrictive legends on stock certificates and stop-transfer instructions to transfer agents as a means of preventing the illegal sale of privately placed securities . . . , and the purchaser should be informed prior to being committed to purchase the securities whether such a legend will be placed on the certificate or such instructions will be issued.\footnote{Id.}

Whether the same or similar requirements are necessary at the state level is a matter of judgment. There are significant structural differences between state and federal law, however, which would suggest that a different rule might be appropriate for the state. For example, under federal law, where an individual sells securities, the sale is exempt from registration as long as the seller is not an “issuer, underwriter, or dealer.”\footnote{Securities Act of 1933 § 4(1), 15 U.S.C. § 77d(1) (1970).}

“Issuer” is broadly construed to mean anyone who is in a control relation with the issuer (an affiliate),\footnote{Id. at § 2(11), 15 U.S.C. at § 77(b)(11). However, Rule 144 exempts affiliates selling securities for their own account from registration requirements under certain circumstances. S.E.C. Rule 144, 17 C.F.R. 230.144 (1977).} and an “underwriter” is anyone who takes with a view toward public redistribution.\footnote{Id. at § 2(11), 15 U.S.C. at § 77(b)(11). An “underwriter” is not deemed to be involved when the redistribution is private in nature. Value Line Fund, Inc. v. Marcus, '64-'66 CCH Transfer Binder ¶ 91,523; 1 L. Loss, SECURITIES REGULATION 551 (2d ed. 1961).}

However, it is generally held that nonaffiliates who have had a change in circumstances after four years can redistribute.\footnote{See no-action letters collected in the Washington Service Bureau S.E.C. No-Action Letter Index, § 4, Category 2, Washington Service Bureau, Washington, D.C. (1974-77). In the case of publicly held corporations meeting certain conditions, affiliates and others may make a public redistribution in the over-the-counter market or on a securities exchange after two years subject to several limitations. S.E.C. Rule 144, 17 C.F.R. 230.144 (1977).}

Thus, persons who are not affiliates of the issuer, and who have held for the requisite period of time, can make a broad public offering of their securities without registration.\footnote{Subect, of course, to their obligation to make full disclosure to the purchasers in accordance with S.E.C. Rule 10b-5, 17 C.F.R. 240.10b-5 (1977).}

Under Nebraska law, this is not the case. There is no general exemption for a transaction not involving an issuer, underwriter, or dealer. The registration provisions apply to sales by all
sellers, whether individuals or issuers.\textsuperscript{79} The long holding period required by federal law may not be necessary under state law for the protection of investors, since no matter how long an investor holds, he can only redistribute in another private placement\textsuperscript{80} (or another exempt transaction\textsuperscript{81}), or pursuant to a registration statement filed with the Department of Banking.

There is no law in Nebraska as to what constitutes the requisite holding period to establish the statutory element of investment intent. It could be that a court would consider the general directive to construe the state act in accordance with related federal legislation, and would determine that a holding period of several years coupled with a personal change in circumstances should be the standard.

On the other hand, it would seem that because of the essential differences between the structure of the state and federal laws, a one year holding period should be sufficient. A one year holding period would ensure that resales by purchasers would not be integrated into and become a part of the original sale to the purchaser. This is an area in which it would be desirable for the Department of Banking to promulgate a definitive rule, in order to clear up the uncertainty.

CONTINUED APPLICABILITY OF DISCLOSURE REQUIREMENTS

It should be noted that the exemption provided for private placements is an exemption from the registration provisions only of the Securities Act of Nebraska,\textsuperscript{82} and not from the full disclosure or anti-fraud provisions, which are found in section 2(1) of the Act.\textsuperscript{83} These rules, which are virtually identical to federal law, make it unlawful to effect the private or public sale of any security without disclosing to the purchaser every fact which a reasonable investor might consider important in making his investment decision.\textsuperscript{84} Thus, the obligation to make full

\textsuperscript{79} NEB. REV. STAT. § 8-1104 (Reissue 1974). There is an exemption for unsolicited brokers' transactions, NEB. REV. STAT. § 8-1111(3) (Reissue 1974) but there is no intrastate securities market. As a practical matter, the trade would have to be effected over a national securities exchange or in the national over-the-counter market by a federally-registered broker-dealer, and the more restrictive federal rules would apply.

\textsuperscript{80} L.B. 263, supra note 2 (amending NEB. REV. STAT. § 8-1111(9) (Reissue 1974)).

\textsuperscript{81} NEB. REV. STAT. § 8-1111 (Reissue 1974).

\textsuperscript{82} Exemptions are from the application of sections 8-1103-1109; there is no exemption from section 8-1102 which is the fraud provision. NEB. REV. STAT. § 8-1111 (Reissue 1974).

\textsuperscript{83} NEB. REV. STAT. § 8-1102(1) (Reissue 1974).

\textsuperscript{84} Id. This is the United States Supreme Court's interpretation of rule
and fair disclosure to purchasers of securities persists, even where the securities need not be registered with the Department of Banking.\footnote{Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972). See also Erwin, New Guidelines for Private and Intrastate Securities Offerings: Securities and Exchange Commission Rules 146 and 147. 7 CReighton L. REV. 455, 461-62 (1974). Rule 10b-5, 17 C.F.R. 240.10b-5 (1977), is virtually identical to NEB. REV. STAT. § 8-1102(1) (Reissue 1974), and the Nebraska Securities Act is to be construed in light of the related federal legislation under NEB. REV. STAT. § 8-1122 (Reissue 1974).}

The disclosure requirements for private placements are illustrated by a recent federal case. In \textit{Rochez Bros. v. Rhoades}, a man quietly bought out his business partner without disclosing that he had been conducting negotiations with a third party for the sale of the entire business at a higher price. The court held that the purchaser had an obligation to disclose these negotiations to the seller, notwithstanding the fact that this was a private transaction between two business owners who were obviously well acquainted with each other.\footnote{491 F.2d 402 (3d Cir. 1973).}

The \textit{federal} full disclosure provisions come into play if any use is made of the mail or the telephone, even if the use is completely intrastate, if the offering involves any travel to another state, or if the business has a substantial part of its assets or conducts a substantial part of its business in another state. The federal full disclosure provisions may apply even if the actual offering was entirely intrastate. Attorneys should be aware of the fact that litigation is more likely to arise out of alleged violations of state and federal full disclosure provisions than out of technical violations of the registration provisions.

In addition to supplying all other relevant information, the issuer of unregistered securities should make sure that the purchaser is aware that he can only sell on an \textit{intrastate basis} after a holding period necessary to establish investment intent, and

\footnote{\textit{Id.} at 405-07.}
\footnote{\textit{Id.} at 407-08.}

\footnote{The principal federal full disclosure provision is S.E.C. Rule 10b-5, 17 C.F.R. 240.10b-5 (1977). As to use of the mails, telephone and travel between states, see note 51, \textit{supra}. As to property located in another state, or a business which conducts operations in another state, see S.E.C. Rule 147, 17 C.F.R. 230.147 (1977).}
that he can only sell pursuant to an exemption provided by section 11, or pursuant to a registration statement filed in compliance with section 4 of the Securities Act of Nebraska.\textsuperscript{90}

The purchaser should also know that he cannot resell on an \textit{interstate basis} without complying with federal law and the laws of other states in which offers or sales are made.

\section*{The Isolated Transaction Exemption}

The isolated transaction is actually a type of private placement. Section 11(1) of the Securities Act of Nebraska provides an exemption for "any isolated transaction, whether effected through a broker-dealer or not."\textsuperscript{91} This exemption is not subject to the conditions for the other private placement exemption of section 11(9),\textsuperscript{92} such as the restrictions on commissions\textsuperscript{93} and advertising,\textsuperscript{94} the requirement that the purchase be made for investment,\textsuperscript{95} and the requirement of notice to the state before the sale.\textsuperscript{96}

The isolated transaction exemption has not been very important in Nebraska, because most exempt offerings were effected under the private placement exemption\textsuperscript{97} or under the exemption for bona fide nontransferable partnership interests.\textsuperscript{98} However, since the Rule 70 notice requirements for private placements under section 11(9)\textsuperscript{99} are likely to be overlooked by many purchasers, and since Rule 71 has made it clear that the partnership exemption is no longer available for large scale general public offerings of the type it sheltered in the past,\textsuperscript{100} the isolated transaction exemption is likely to become more important.

The isolated exemption was recently considered by the Nebraska Supreme Court in \textit{Labenz v. Labenz}. In \textit{Labenz}, the

\begin{footnotesize}
92. L.B. 263, \textit{supra} note 2 (amending \textsc{Neb. Rev. Stat.} § 8-1111(9) (Reissue 1974)).
93. L.B. 263, \textit{supra} note 2 (amending \textsc{Neb. Rev. Stat.} § 8-1111(9)(b) (Reissue 1974)).
94. L.B. 263, \textit{supra} note 2 (amending \textsc{Neb. Rev. Stat.} § 8-1111(9)(d) (Reissue 1974)).
95. L.B. 263, \textit{supra} note 2 (amending \textsc{Neb. Rev. Stat.} § 8-1111(9)(a) (Reissue 1974)).
97. L.B. 263, \textit{supra} note 2 (amending \textsc{Neb. Rev. Stat.} § 8-1111(9) (Reissue 1974)).
100. \textsc{Neb. Dept. of Banking}, Rule 71 (1977).
\end{footnotesize}
defendant argued that even if the private placement exemption was not available because he entered into an agreement relative to the receipt of a commission, the isolated transaction exemption could be available.\textsuperscript{101} Without extended discussion, the court said: "The facts in this case show defendant offered and sold stock of the same issue to seven persons over a period of a short time. Under the circumstances, it is clear to us the sale of the unregistered securities to plaintiff was not an isolated transaction . . . ."\textsuperscript{102} Unfortunately, the court did not provide any further guidance as to what it deems an isolated transaction to be. However, the Department of Banking recently issued a formal interpretative opinion in which it discussed the isolated transaction exemption in detail.\textsuperscript{103}

The Department of Banking said that whether a transaction falls within the isolated transaction exemption will not turn upon the number of sales made, but upon the facts and circumstances surrounding the transaction.\textsuperscript{104} The Department of Banking said that the terms "isolated" and "transaction" were to be deemed to have the following meanings:

Isolated—The transaction must be isolated from all other transactions. An isolated transaction is one standing alone, detached and separated from all other transactions.\textsuperscript{105}

Transaction—There can only be one transaction. However, it is possible to have more than one sale in a transaction, if all sales are part of one transaction.\textsuperscript{106}

The Department of Banking also said:

If a number of sales of securities over a reasonable period of time indicate that the seller has one general purpose in making this number of sales and the sales approximate the same aim and aren't so detached and separated as to form no part of a single plan, then the sales are not part of an isolated transaction and are not exempt under Section 8-1111(1).\textsuperscript{107}

In order to clarify this general language, the Department of Banking set forth a number of examples.

The Department said that sales of stock by a corporation to a single passive investor in a twelve-month period or the sale of

\begin{footnotes}
\item[101] 198 Neb. at 549, 253 N.W.2d at 856-57.
\item[102] Id.
\item[104] Id.
\item[105] Id.
\item[106] Id.
\item[107] Id.
\end{footnotes}
a working interest in an oil and gas well to one investor in a twelve-month period would constitute an isolated transaction.\(^{108}\) On the other hand, the sale of stock in a development corporation to seven people over a twelve-month period by the corporation or the promoter would not qualify as an isolated transaction.\(^{109}\) Although the Department of Banking did not comment on intermediate cases, one may deduce that it will consider a sale to more than one person to be not an isolated transaction where unrelated persons or entities are involved.

The Department of Banking made it clear that when a family farm or an existing partnership are incorporated, the isolated transaction exemption may be claimed regardless of the number of family members or preexisting partners.\(^{110}\) The Department cited two other examples of transactions which could qualify for the isolated transaction exemption, even though more than one person is involved:

An incorporation of a corporation which has three incorporators who all are shareholders of the new corporation. All three incorporators had a business relationship prior to the incorporation and no incorporator made solicitations to unknown investors to become incorporators. The shareholders could be involved in the operation of the corporation or passive investors.\(^{111}\)

Four individuals or four business entities involved in the oil business, whether through drilling, operating, professional geologists, or other oil business, form a joint venture to drill one oil or gas well. The joint venture is formed simultaneously and not as a result of one of the joint venturers soliciting investors to become members of the joint venture.\(^{112}\)

Clearly then, some element of preexisting personal or business relationship is required in order to maintain the isolated transaction exemption where more than one person is involved.

It is also clear that the Department of Banking is adhering to the concept of the bona fide joint venture exemption.\(^{113}\) As

108. Id.
109. Id. (citing Labenz, 198 Neb. at 548, 253 N.W.2d at 856).
111. Id.
112. Id.
113. See, e.g., Holmberg v. Marsden, 39 Cal.2d 592, 248 P.2d 417 (1952). In Holmberg, the California Supreme Court considered a situation where three individuals (the plaintiff and two defendants) agreed to organize a corporation, each taking equal shares. Id. at —, 248 P.2d at 417-18. The court found that there was factual evidence to support the defendants' contention that they had not offered or sold preorganizational subscriptions to the plaintiff, but had jointly participated with him in the organization of the business. Id. at —, 248 P.2d at
early as 1922, the Attorney General of Nebraska ruled that if three persons desired to associate themselves together in business, and they were to be the operating personnel and were to contribute all of the money required, then registration would not be required under the Nebraska securities law as it then existed. At the same time, the Attorney General made it clear that if the organizers proposed to finance the venture by the sale of interests to others, then registration would be required. The same view is expressed in the examples set forth by the Department of Banking as to the kind of transaction which will not qualify for the isolated transaction exemption:

An incorporation of a business with three of the incorporator-shareholders to be actively involved in the business of the corporation, and the other three incorporator-shareholders to be passive investors. The three incorporators that are to become actively involved in the business solicited passive investors to become shareholders of the corporation within a two-month period. The three passive investors who became shareholders of the corporation purchased individually and were contacted individually.

A promoter of a real estate limited partnership or working interest in an oil and gas offering solicits investors to invest in the limited partnership or oil working interest offering. He makes sales to four individuals of separate limited partnership interests or working interests.

From these examples and from the attitude of the Nebraska Supreme Court in Labenz, it should be apparent that the isolated transaction exemption is no substitute for the private placement exemption. One may feel that the position adopted by the Department of Banking is unduly restrictive, but it is unlikely to be any more restrictive than the attitude which

419-20. There appeared to the court to be no more reason for the defendants to reimburse the plaintiff than for the plaintiff to reimburse the defendants. Id. at —, 248 P.2d at 420. The court said:

Whether the three men, as among themselves, be termed partners, joint venturers, or copromoters of a corporation . . . it is obvious that the trial court was justified in concluding that they stood on equal footing as entreprenuers.

Id. at —, 248 P.2d at 419-20. (citations omitted). See also discussion and other citations in 1 L. Loss, SECURITIES REGULATION 459-60 (2d ed. 1961). For a discussion of analogous cases dealing with the formation of bona fide limited partnerships, see generally Erwin, Partnership Interests as Securities: An Alice in Wonderland Tour, 9 CREIGHTON L. REV. 310, 320-37 (1975).

114. NEB. ATT’Y GEN. OPIN. 164 (1921-22).
116. Id.
117. Id.
would be adopted by the Nebraska Supreme Court. The court would be understandably reluctant to impose liability upon one who had relied in good faith upon a formal interpretative opinion of the Department of Banking, but from the court’s position in *Labenz*, one may surmise that the Department’s opinion is likely to be liberally construed.

**REGISTRATION OF AND BONDING ISSUER-DEALERS**

If sales are to be made outside the scope of the exemptions provided by sections 10 and 11 of the Securities Act of Nebraska, the securities must be registered under the Act, and all sales must be effected by registered broker-dealers or registered issuer-dealers. Broker-dealers are qualified to trade in the securities of any issuer and to conduct a general securities business. Issuer-dealers are qualified only to sell their own securities.

The statute prescribes that both issuer-dealers and broker-dealers must take a test. The Department of Banking requires broker-dealers to take a very difficult and comprehensive test administered by the National Association of Securities Dealers, Inc., but it permits issuer-dealers to take a relatively simple test designed to ensure that they are familiar with their basic obligations under the Securities Act of Nebraska.

Two officers and any person selling securities on behalf of an issuer must pass the issuer-dealer test. Most people pass the test on their first or second attempt, so one may assume that the test serves its purpose without being a significant deterrent to the legitimate raising of capital. The bonding requirement found in the old statute, however, worked a significant hardship in many cases, and it has been substantially modified.

Under the old statute, an issuer-dealer was required to have $25,000 in capital or to post a bond in that amount. Many issuer-dealers found this to be an insurmountable requirement.

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120. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1101(7) (Reissue 1974)).  
since many people cannot obtain bonds. One of the most frustrating problems faced by the Small Business Development Center of the Omaha Chamber of Commerce has been the inability or minority contractors to obtain construction bonds so that they can bid on jobs which they are otherwise capable of performing. This is not strictly an ethnic problem, however, since the same problems would be encountered by many lower, middle, and upper middle class individuals and by many new and existing businesses.

The increased awareness of potential securities liabilities on the part of bonding companies has made securities bonds almost impossible to obtain. One prominent group of businessmen in western Nebraska reportedly contacted every bonding company licensed to write securities bonds in this state. One company agreed to write the $25,000 bond, but it required $40,000 cash collateral. The bonding company wanted to be protected against its attorneys' fees as well as its losses.

Eventually, a bank agreed to pay a maximum of $25,000 for proven securities law liabilities after the businessmen deposited $25,000 from their personal funds. The Department of Banking agreed to treat this as a bond within the statutory definition. However, many people do not have $25,000. Raising capital for business should be a right rather than a privilege limited to those of means. A balance should be struck between the goal of promoting free enterprise and the goal of investor protection. Under the old law, the scale was tipped so far in the direction of investor protection that, in some cases, free enterprise was hopelessly stifled.

The Legislature has rectified this problem by amending the bonding requirement so that the Department of Banking may permit the posting of a signature bond rather than a bond issued by a surety company, when the Department finds that requiring a surety bond would cause an undue burden. Because a person may not have the means to honor his bond, the goal of investor protection may have been compromised, but given the value of promoting small businesses, the compromise would appear to be a reasonable one.

NEW RULES RELATING TO LIMITED PARTNERSHIPS

In October 1976, the Department of Banking issued a re-
lease, setting forth its interpretation of the exemption found in the Securities Act of Nebraska for bona fide nontransferable limited or general partnership interests. In October 1977, the Department of Banking proposed Rule 71, which essentially codified its previous release. The adoption of a rule is significant, because formal rules of the Department of Banking have the force of law.

The Department said that "when under no condition could a limited partnership interest be transferred," it will be deemed to be nontransferable. Transferable includes transfers by will or operation of law. Thus, according to the Department of Banking, the word nontransferable means nontransferable.

Despite the reasonableness of the Department's construction, the Department reports informally that some still argue nontransferable means "restricted as to transfer," generally meaning that it can be transferred "only with consent of the general partner." This is a convenient interpretation for the real estate or oil and gas syndicator, but it is an undesirable one for several reasons.

Historically, partnership interests in legal, medical, or accounting partnerships have never been transferable. Under the Nebraska general partnership law, the death of a partner dissolves the partnership in the absence of provisions to the contrary—the interest is not inheritable or transferable. Similarly, the assignment of a limited partnership interest or the death of a limited partner works a withdrawal of the limited partner from the partnership in the absence of contrary provisions.

Where affirmative provisions are built into a partnership agreement to negate statutory nontransferability, these will remove the partnership interest from the nontransferable category for state securities law purposes.

Rule 71 also makes it clear that a bona fide limited partnership would be deemed to exist only when "a personal business relationship exists between all the limited partners, and between the limited partners and the general partner" prior to the offering of the limited partnership interest. Rule 71 specifical-

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128. NEB. REV. STAT. § 8-1117 (Reissue 1974). See also text to notes 139-144, infra.
130. Id.
ly states, "It is, therefore, impossible for a bona fide limited partnership to offer limited partnership interests to the public, whether the offering is through general or private solicitation." The Department is picking up the California rule, also implied in other states, that the element of *delectus personarum*—the right of each person in a partnership to select each other person—must exist for a partnership to be considered bona fide.

The Department of Banking has made it clear that a personal business relationship cannot exist between a corporation and individuals, and that, therefore, a corporation cannot serve as a general partner in a bona fide partnership. This does not mean that corporations cannot be general partners, but it does mean that partnerships with corporations as general partners must register their securities.

The partnership exemption from securities registration in Nebraska should be strictly construed. Partnerships may conduct any business which a corporation may conduct and may also conduct some that were traditionally prohibited to corporations, such as law, medicine, and dentistry. To say that all partnership interests are exempt from registration is to say, in effect, that Nebraska has no securities registration for anyone willing to structure a proposed business venture as a limited partnership rather than as a corporation. Even the feature of complete limited liability can be achieved where a corporation is utilized as a general partner.

An example of the type of offering which would be unregulated in the State of Nebraska if partnership interests were indiscriminately deemed to be exempt from registration is reproduced below. This is a handbill left in the screen door of an Omaha attorney. Without passing judgment on the merits of the investment, it is certainly safe to say that it has historically been the policy of the state to regulate million dollar offerings involving hundreds of purchasers. The offering relates to a conglom-
erate of different business enterprises, any one or all of which could as expeditiously be conducted through a limited partnership as through a corporation. In the absence of strict interpretation of the partnership exemption provision, Nebraska would have no effective securities law at all. In this case, the Department of Banking issued a cease and desist order prohibiting further offers.\textsuperscript{138}

PHOTO-WORLD, LTD

PHOTO-WORLD is a proposed 4 story photographic and fashion center complex, with a limited partnership of 250 limited partners and a general partner. This complex is to be built on a 5 acre tract of land, on the northwest corner of highway 370 and Hiway 73-75.

PHOTO-WORLD is being set up under the provisions of the Uniform Limited Partnership Act of the State of Nebraska.

1. A complete photographic retail store where we will sell anything related to photography.

2. A Fashion Center comprised of the latest men and ladies fashions, most of which will be original creations.

3. A complete Photographic Processing Lab, not only for what our photographers shoot, but we will furnish custom printing for professional studios in the Omaha area.

4. Fashion: We will have a department devoted to the furtherance of Fashion Photography, and in bringing part of the New York Market to Omaha in some of the major magazines on a month to month basis.

5. Weddings: We feel that because of the better service and quality we will be capturing most of the wedding photography in the Omaha and surrounding communities.

6. Family Portraiture.

7. School Photography, including Senior Portraiture.

8. Commercial and industrial: in this department we will do all types of photography related to the Business world of Omaha, including commercial art, Advertising and aerial.

9. Motion picture where we will film, commercials, sports, weddings, conventions, Historical happenings etc.

10. Cosmetics, since make-up plays an essential part in photography we will have a studio girl cosmetic section.

PHOTO-WORLD will be comprised of 10 major departments all related to the photographic industry, listed in order as follows:

To be a Limited Partner in PHOTO-WORLD one must be a Nebraska resident and a sign a contract obligating themselves for $4,000.00. The limited partner pays $50.00 down and $50.00 per month until the bank obligations have been paid in full. In which we estimate to be approximately one year. Never does a limited partner pay more than $50.00 per month. The payments toward the $4,000.00 will stop as soon as the bank obligations have been met. If we meet our obligations as expected, each limited partner would have been paid about

The limited partners will each share in 50% of the net profits from the total complex.

Since the partnership is limited to only 250 persons, only the most qualified will be accepted.

If interested you may call ———- at ———.

General Partner

It is fortunate that the Department of Banking determined to turn its October 1976 interpretative release into a formal rule. Interpretations of securities laws by state or federal administrative authorities are followed by the courts only when found to be legally correct. 139 While interpretative releases from the Securities and Exchange Commission are to be accorded "marked deference" by the courts because of the expertise of that agency, such releases are not binding on the courts. 140

Formal rules adopted by the Department of Banking, however, have the force of law, unless specifically shown to be beyond the statutory authority of the Department. 141 As an example, the Department of Banking may issue stop orders where offerings violate its formal rules, 142 while it may not issue such an order on the basis of violation of interpretative releases. Where a formal rule exists, the person enjoined must show that the rule is invalid to void the order. 143 Further, a willful violation of a formal rule is a criminal offense, 144 whereas willful non-compliance with an informal interpretation of the statute may not be. Thus, the adoption of Rule 71 gives full effect to the Department of Banking's position on limited partnerships.

OTHER CHANGES

Other amendments to the Securities Act of Nebraska, addressed primarily to the task of regulation and enforcement by the Department of Banking, were adopted by the Legislature.

Amendments were adopted making it clear that the Department of Banking has discretionary authority to deny registra-

140. Id.
141. NEB. REV. STAT. § 8-1120(3) (Reissue 1974). Rule violations carry criminal and civil sanctions. NEB. REV. STAT. §§ 8-1117, 8-1118(4) (Reissue 1974). As a general principle of administrative law, a rule exceeding statutory authority could, of course, be declared invalid by the courts. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 at 299 (1958).
142. NEB. REV. STAT. § 8-1109(2) (Reissue 1974).
143. NEB. REV. STAT. § 8-1121 (Reissue 1974).
144. NEB. REV. STAT. § 8-1117 (Reissue 1974).
tion to any offering if it deems the registration statement to be incomplete or misleading. Previously, it had been argued that the Department of Banking had such power with respect to intrastate offerings, but not with respect to interstate offerings filed with the Securities and Exchange Commission.

The Department was also given the power to require issuers located in other states but selling their securities in Nebraska to register as Nebraska issuer-dealers. Previously, the statute was ambiguous as to whether out-of-state issuers should be required to register, or indeed could be permitted to register.

Finally, the director of the Department was given express statutory authority to suspend the effectiveness of any registration statement if it comes to his attention that the offering is being made by means of misleading advertising, the business of the issuer is found to be unlawful, or the issuer refuses “to furnish information required by the director within a reasonable time . . . .”

These changes, although not significant to the average practitioner, should help to simplify the enjoining of certain kinds of securities violations in Nebraska.

CONCLUSION

The past year has seen some significant developments in Nebraska securities law. The private placement exemption has been broadened to a point where it should be useful in many business contexts. The old exemption was so narrow that it was doubtful that many offerings took place in strict compliance


146. Neb. Rev. Stat. § 8-1106(3) (Reissue 1974) provided that:
A registration statement under this section [§ 8-1106] shall automatically become effective at the moment the federal registration statement or qualification becomes effective if all the following conditions are satisfied:
(a) No stop order is in effect and no proceeding is pending under the Securities Act of 1933, as amended;

The legislature added “or under section 8-1109” at the end of clause (a), making it clear that the Department of Banking also has the power to stop-order federally registered offerings. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1106(3) (Reissue 1974)).

147. L.B. 263, supra note 2 (amending Neb. Rev. Stat. § 8-1107(b) (Reissue 1974)).

148. Under Neb. Rev. Stat. § 8-1101(7) (Reissue 1974), an issuer-dealer was defined as “any issuer located in the State of Nebraska. . . .”

149. L.B. 263, supra note 2 (amending Neb. Rev. Stat. §§8-1109(8), 8-1109(9), 8-1109(10) (Reissue 1974)).
with the law. The important thing to remember, however, is that a Rule 70 notice must be filed with the Department of Banking prior to any sale or contract of sale.

Registration as an issuer-dealer has also been eased. Formerly, issuer-dealer registration required $25,000 in net worth, or the posting of a $25,000 surety bond. These requirements represented insurmountable hurdles for some legitimate entrepreneurs seeking to capitalize their small businesses. Now the Department of Banking has the authority to accept a signature bond in lieu of a surety bond.

Investor protection has been strengthened by the adoption of Rule 71 which clarifies the nontransferable bona fide partnership exemption. The Department of Banking has sound legal footing for its restrictive interpretation, and it can only be hoped that the adoption of a formal rule will terminate the overt abuse of this exemption which has existed in previous years.