The Overwhelming Case for Elimination of the Integration Doctrine Under the Securities Act of 1933

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The integration doctrine is one of the most vexing and pointless concepts of the Securities Act of 1933 (the “1933 Act”).

Some indication of this, as well as an indication of the significance of the doctrine to issuers and thus to capital formation generally, is seen in the sheer numbers of integration no-action requests received by the Securities Exchange Commission (the “SEC”). Professor Wade reports, for example, that from 1971 to 1979, the SEC received nearly 200 no-action requests on integration. Cheryl L. Wade, The Integration of Securities Offerings: A Proposed Formula That Fosters the Policies of Securities Regulation, 25 Loy. U. Chi. L.J. 199, 220 (1994). Indeed, the SEC was apparently so overwhelmed by the volume of letters that in 1979 it announced it would no longer respond to no-action letters respecting integration matters. Clover Fin. Corp., SEC No-Action Letter, 1979 WL 13557, at *7 (Apr. 5, 1979) (citing as reasons for discontinuing its prior practice of issuing no-action letters on integration “the complexity” of the matter and “the possibility that staff positions may be misconstrued and misapplied”). In 1985, the Commission’s Corporation Finance Division announced it would resume responding to no-action requests on integration matters. 17 Sec. Reg. & L. Rep. (BNA) 403 (Mar. 8, 1985) (stating that the five factors in § 502(a) of Regulation D would be considered in the letters).
Under the integration doctrine, a single “offering” or “issue” of securities cannot be split. Offering, for example, one-half of the shares under the private placement exemption from registration provided by section 4(2) of the 1933 Act and the other one-half under the intrastate exemption provided by section 3(a)(11). The rule similarly prohibits splitting a single offering or issue between a registration statement and any exemption from registration. In all events, therefore, the whole of any discrete offering or issue of securities must be offered and sold under only one exemption or a registration statement.


3 That section provides an exemption from registration for:

- Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.


4 For the purposes of this Article, the author generally uses simple and somewhat sterile examples. While these examples are typical, they are far from exhaustive. Several additional examples may be helpful in appreciating the pervasiveness of the integration issues faced by companies engaged in capital formation.

One of the most difficult integration problems that this author faced in his practice days involved the unseasoned and unsophisticated (but otherwise honest and efficient) entrepreneur who, before seeking legal advice, made an offer of its securities in a manner that destroyed all available exemptions from registration. The only way to cure such a problem is to separate the prior illegal offer from the proposed financing through application of the integration doctrine.

Another example is derived from an actual case arising some years ago when tax shelter deals were fashionable. Entrepreneurs would form multiple limited partnerships for the purpose of engaging in certain activities—drilling for oil and gas, for example. Each of these partnerships would have different properties and investors but would have the same promoters and be engaged in the same type of enterprises. The question arose whether the separate offerings by these separate entities must be integrated. See, e.g., Donohoe v Consol. Operating & Prod. Corp., 982 F.2d 1130 (7th Cir. 1992) (refusing to integrate separate limited partnerships formed to drill separate oil wells). For a discussion of this in the context of multiple partnership offerings, see ABA Subcomm. on P’ships, Trusts and Unincorporated Ass’ts, Integration of Partnership Offerings: A Proposal for Identifying a Discrete Offering, 37 BUS. LAW. 1591 (1982) [hereinafter Integration of Partnership Offerings]. For additional treatment, see ABA Comm. on Fed. Reg. of Sec., Integration of Securities Offerings: Report of the Task Force on Integration, 41 BUS. LAW. 595, 621-23, 624-31 (1986) [hereinafter Task Force on Integration].
Accordingly, if an issuer attempts to bifurcate a single offering into two separate components and qualify each component under a separate exemption or, alternatively, under an exemption and a registration statement, courts or the Commission may conclude that the two putatively separate offerings in fact amount to a single offering and thus may “integrate” the two transactions into a single offering. Once this integration occurs, the breadth of the offering or issue is defined, and all the offers and sales within this defined offer or issue must either meet all the requirements of a single exemption or be made subject to an effective registration statement.\(^5\)

Although the integration doctrine, described in these abstract terms, has a sensible ring to it, commentators over the years have picked at the doctrine.\(^6\) Much of their critical comment has focused on the confusion and uncertainty in the doctrine’s terms\(^7\) and the pernicious impact such ambiguity has on the capital formation activities of issuers.\(^8\)

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\(^6\) For criticism from commentators, see, for example, C. Steven Bradford, Regulation A and the Integration Doctrine: The New Safe Harbor, 55 OHIO ST. L.J. 255, 289 (1994) [hereinafter Bradford, Regulation A]. Bradford characterizes changes to the safe harbor rules of Regulation A as “generally positive and responsive to criticisms,” but laments that “Rule 251(c) has failed to reach its potential.” Id. See also Johnson & Patterson, supra note 5 (offering a critical analysis of Rule 152). Writing in 1986, this author criticized the doctrine as applied to Regulation D offerings. Rutheford B Campbell, Jr., The Plight of Small Issuers (And Others) Under Regulation D: Those Nagging Problems That Need Attention, 74 KY. L.J. 127, 162-70 (1985-86). In his most recent article, Professor Bradford mounted a substantial criticism of the integration doctrine, proposing a solution to the difficulties generated by integration through adoption of a “weighted exemption system.” C. Steven Bradford, Expanding the Non-Transactional Revolution: A New Approach to Securities Registration Exemptions, 49 EMORY L.J. 437, 473-85 (2000) [hereinafter Bradford, Expanding].

\(^7\) Even those who generally support the concept of integration in theory admit that the doctrine is confusing and inconsistent in application. See, e.g., Wade, supra note 1, at 208-30.

\(^8\) For example, Johnson and Patterson provide a description of the “irksome manner in which the integration doctrine constrains capital financing decisions.”
On at least two occasions, committees of the American Bar Association (the "ABA") tried their hands at bringing some sense and order to portions of the integration doctrine.\(^9\) The most significant of these ABA initiatives occurred in the mid-1980s, when a prestigious committee,\(^10\) driven primarily by concerns of the practicing bar over the unmanageable levels of ambiguity in the doctrine, proposed regulatory amendments to establish a series of broadly available safe harbors from integration.\(^11\) Interestingly and tellingly, however, the Chair of the Task Force admitted some years later that "the hopes of the task force have largely not been realized, . with the result that integration issues remain a serious problem."\(^{12}\)

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9 Integration of Partnership Offerings, supra note 4 (discussing and suggesting proposals respecting the application of the integration doctrine to successive offerings by affiliated partnerships). This article and its proposals drew sharp criticism from Dean Morrissey. Morrissey, supra note 5, at 76 (characterizing the proposal as "an elegant attempt to circumvent the registration process by artificially expanding its carefully restricted exemptions"). The second ABA paper was Task Force on Integration, supra note 4 (dealing more broadly with the integration doctrine and making recommendations of broad application respecting the doctrine).


11 The Task Force divided its safe harbor suggestions into six categories: "issuer distinctions, temporal separations, differences in securities offered, purpose differences, policy considerations, and domestic and foreign offering distinctions." Task Force on Integration, supra note 4, at 624. For a discussion of these proposals, see id. at 624-41. For a reproduction of the specific regulatory proposals, see id. at 642-43.

12 Goldwasser, supra note 10, at 230-31.

The report of the Task Force reflects the extreme theoretical difficulties encountered when one attempts to lend clarity and consistency to the integration doctrine. The problem, from the author's perspective, is that the doctrine itself is
Even the Securities and Exchange Commission, which is the doctrine’s principal architect, appears to recognize that the integration doctrine has its problems. As a result, the Commission has developed certain discrete, regulatory safe harbors from integration and recently has been especially generous in its rules protecting issuers, at least in limited situations, from the perniciousness of the doctrine.

Scholars and the Commission, however, misperceive the true nature of the integration problem, and, as a result, their prescriptions are overly modest. The fundamental problem with integration is not its terms; rather, the problem lies in the essential vacuousness of the doctrine itself. At its core, the doctrine makes no sense. Indeed, the doctrine is so utterly unsupported by any valid policy that fundamentally nonsensical. Drafting rules without a principled theoretical footing is, of course, a problematic exercise. Thus, one can sympathize with the Task Force’s frustration as it attempted to establish order in such a context.

In fact, the approach of the Task Force, in light of such circumstances, makes some sense. The Task Force opted to propose a series of safe harbor provisions designed to clarify, simplify, and reduce the application of the doctrine. See infra note 11. The perniciousness of a nonsensical doctrine is ameliorated if the rules respecting its application are simple and clear. At least clarification and simplification reduce the transaction costs in those deals in which the doctrine is implicated, since, for example, the legal costs in determining the application of the doctrine are reduced by the enhanced clarity of the rule. Similarly, to the extent the scope of integration is reduced by such safe harbors, the perniciousness of the doctrine is once again mitigated.

For a list of the Commission’s integration safe harbor rules, see infra note 77. See, e.g., Rule 251(c) of Regulation A, 17 C.F.R. § 230.251(c) (2000). The Rule was amended in 1992 in connection with the Commission’s small business initiatives. Securities Act Release No. 6949, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,439 (July 30, 1992). The new Rule minimized the impact of integration on Regulation A offerings. For an outstanding discussion of this provision, see Bradford, Regulation A, supra note 6.

Unfortunately, the Commission’s effort to eliminate uncertainty in the application of the integration doctrine has been unsuccessful in most instances. See discussion infra accompanying notes 56-65.

Other commentators, however, are able to find purpose and sound policy at the core of the integration doctrine. See, e.g., Wade, supra note 1, at 209 (stating that the doctrine was designed “to prevent issuers from circumventing the Act’s registration requirements”), and id. at 240 (concluding that without the doctrine, issuers may “successfully evade the Act’s registration requirements”); Johnson & Patterson, supra note 5, at 542-43 (remarking that “the doctrine of integration still is needed”), and id. at 543 (finding “all-important... policy underpinnings” for the
one can only marvel that it has existed essentially unchallenged since 1933.\textsuperscript{16}

The thesis of this Article is that the Commission should entirely eliminate the integration doctrine from the 1933 Act. The doctrine is expensive for society\textsuperscript{17} and furthers no valid policy of the 1933 Act. More

\textsuperscript{16} As indicated above, commentators have occasionally argued for a limited elimination of the integration doctrine. For example, Professor Deaktor, writing in 1979, expressed a preference for the SEC to “exercise its rulemaking authority to eliminate the applicability of integration to all offerings made pursuant to a transactional exemption other than section 3(a)(9).” Deaktor, \textit{supra} note 5, at 550. Professor Deaktor apparently would condition this limited elimination of integration on the Commission’s enactment of a series of new rules pursuant to the transactional exemptions “which will contain every precaution necessary to protect investors who are offered or purchase securities in the offerings made pursuant to these rules.” \textit{Id.} at 544.

\textsuperscript{17} The integration doctrine increases the costs of capital formation in various ways, some of which are apparent and some of which are not. Obvious costs are encountered, for example, when the integration doctrine necessitates the registration of an offering when a valid exemption from registration otherwise would be available. At least one author, however, may even dispute the significance of this cost. \textit{See} Morrissey, \textit{supra} note 5, at 77 (stating that “registration is not a serious impediment to capital formation”). Dean Morrissey, however, may be in a minority in his view on this issue. \textit{See, e.g.,} 1 \textsc{Thomas Lee Hazen}, \textsc{Treatise on the Law of Securities Regulation} § 1.6, at 49 (2d ed. 1990) (estimating that in 1990 the costs of a public offering, including underwriting fees, may have been “more than several hundred thousand dollars”); Carl W Schneider et al., \textit{Going Public: Practice, Procedure, and Consequences}, 27 \textsc{Vill. L. Rev} 1, 31 (1981) (estimating in 1981 that costs for an initial public offering, not including underwriting fees, ran $175,000 to $350,000).

A less obvious economic cost of the integration doctrine, however, is the economic costs of the risk it generates. To use a simple example, an issuer may propose to sell a block of securities under a section 4(2) exemption today and another block under the section 3(a)(11) exemption four months from now. The lawyer may tell the issuer: “It is more likely than not that the two offerings will not be integrated, but there is a 20\% chance, nonetheless, of integration. If integration occurs, your liability will be approximately $1 million.” This risk is a cost to the
specifically, the doctrine does not promote investor protection but does retard capital formation, an outcome that is contrary to the presently articulated purposes of the 1933 Act.\textsuperscript{18}

Part II of this Article traces the history of the adoption of the integration doctrine both by the Commission and the courts, demonstrating the less than compelling case for the original adoption of the rule.\textsuperscript{19} Part III then outlines the shape of the rule today, in an attempt to demonstrate its uncertainty, complexity, and lack of connection to any valid principle.\textsuperscript{20} In Part IV, the Article proposes the author's simple prescription for the problems of integration, and that prescription is the complete elimination of the doctrine.\textsuperscript{21}

II. A HISTORY OF THE INTEGRATION DOCTRINE

A. The Original 1933 Act

As originally signed into law, the 1933 Act contained no clear statement of an integration doctrine.\textsuperscript{22} Thus, while at various points in the original 1933 Act one finds words that can be interpreted as relevant to the matter of integration, the statutory language is inconclusive. Indeed, to the extent the original language is suggestive of integration, it actually indicates different integration regimes for different types of offerings.\textsuperscript{23}

At least four of the major exemptions from registration in the original version of the 1933 Act contained language that can be considered relevant to the matter of integration, and no language from any of the four sections

\textsuperscript{18} See infra notes 99-102 and accompanying text.
\textsuperscript{19} See infra notes 22-47 and accompanying text.
\textsuperscript{20} See infra notes 48-95 and accompanying text.
\textsuperscript{21} See infra notes 96-108 and accompanying text.
\textsuperscript{22} Although, not surprisingly, the Securities Act of 1933 (the "1933 Act") has been amended on numerous occasions since it was originally enacted, the structure of the original 1933 Act and, indeed, even its content, are fundamentally similar to today's version. Compare Securities Act of 1933, ch. 38, 48 Stat. 74, with 15 U.S.C. §§ 77a-77aa (1994). For a discussion of the four major exemptions in the original 1933 Act, see infra notes 24-31 and accompanying text. For a history of the enactment of the 1933 Act, see 1 LOSS & SELIGMAN, supra note 5, at 168-223.
\textsuperscript{23} A valid policy reason supporting multiple integration schemes is difficult to imagine. See infra note 32 and accompanying text.
is consistent with the language from any other section. Consider first the original private placement exemption, which was found in section 4(1) of the original version of the 1933 Act and stated that “[t]he provisions of section 5 shall not apply to [t]ransactions by an issuer not with or through an underwriter and not involving any public offering.”24 On its face, this exemption arguably excludes any application of an integration concept. If a “transaction” meets the requirements of the exemption, prior or subsequent additional transactions appear, under the terms of the statute, to be irrelevant.

Next, consider the exemption provided by the first clause of the original section 4(3), which was essentially the same exemption for single company reorganizations provided by today’s section 3(a)(9).25 The original section 4(3) stated that “[t]he provisions of section 5 shall not apply to [t]he issuance of a security of a person exchanged by it with its existing security holders exclusively.”26 Once again, an integration concept does not appear on the face of this exemption. Instead, the language seems to exempt from registration the issuance of any security that is sold in exchange for an outstanding security, without regard to whether the issuer, for example, may recently have sold securities under another exemption. Nothing in the language of the section suggests that such prior sales would ever exclude the availability of the exemption, unless one is able to bend the word “exclusively” into some indication of an integration concept, and that appears to be something of an interpretative stretch.27


26 Securities Act of 1933, § 4(3).

27 Notwithstanding the author’s view about the clear language of the exemption, the Commission later took the position that the word “exclusively” required the application of the integration concept. Securities Act Release No. 33-2029, 1939 WL 1053 (Aug. 8, 1939). See also 3 LOSS & SELIGMAN, supra note 5, at 1232. These distinguished authors disagree with the author regarding the proper interpretation of the statute, and give the Commission’s interpretation mild approval by characterizing the Commission’s interpretation as one “which seems as logical as any.” Id. Professor Loss and Dean Seligman characterize the Commission’s interpretation of the word “exclusively” as doing “double duty.” Id. In fact, the word does triple duty: It means that shareholders making the exchange
The third significant original exemption was section 3(b), which authorized the appropriate administrative agency to enact additional exemptions, if such regulatory exemptions were consistent with the "public interest" and "investor protection." Exemptive regulations under section 3(b) were subject to the following limitation, however: "no issue of securities shall be exempted [if] the aggregate amount at which such issue is offered to the public exceeds $100,000." This language seems significantly more suggestive of an integration doctrine than does the language of the two exemptions discussed above, since, at least arguably, the perimeter of the section 3(b) "issue" must be established in order to calculate whether the amount limitation has been exceeded.

Finally, consider the original intrastate exemption, which at the time of the adoption of the 1933 Act was in section 5(c) and provided that the registration obligation "shall not apply to the sale of any security where the issue of which it is a part is sold only" pursuant to the terms of the intrastate exemption. This language may seem even more indicative of

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28 Securities Act of 1933, ch. 38, § 3(b), 48 Stat. 74, 77 (current version at 15 U.S.C. § 77c(b) (1994)). The original section 3(b) provided:

The Commission may add any class of securities to the securities exempted, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

Id. at 76-77

integration than the language in the original section 3(b). Arguably, the language of this original intrastate exemption suggests that valid sales under the exemption would be lost if subsequent sales, which were part of the same issue, were sold under another exemption or a registration statement.\(^\text{30}\)

One must, however, be careful not to overstate the validity of any of the foregoing interpretations.\(^\text{31}\) Indeed, while this discussion suggests that

\(^{30}\) Even this original intrastate exemption, however, is amenable to other interpretations that would avoid the problems of integration. For example, a court could define “the issue of which [the intrastate sale] is a part” to include only offers and sales that meet the requirements of the intrastate exemption. To illustrate this interpretation, assume that on January 1 an issuer offered and sold 100 shares of stock pursuant to the private placement exemption, on January 5 offered and sold 100 shares of stock pursuant to the intrastate exemption, and, finally, on January 10, offered and sold 100 shares illegally. Under the interpretation proffered here, the criteria for including the January 1 and January 10 offerings in the January 5 “issue” would not include, for example, whether the January 1 and January 10 offerings were made virtually contemporaneous with and involved the same class of securities as the January 5 offering. Rather, the criteria for including the January 1 and January 10 offerings as a part of the “issue” of January 5 would require assessing whether the January 1 and January 10 offerings were made to persons residing in the same state as that in which the issuer was incorporated and doing business.

By defining “issue” in such a way, the court could avoid the pernicious effect of permitting offers and sales taking place around the intrastate offering from eliminating the availability of the exemption when the policy bases for its application are otherwise legitimate. Notice that under this interpretation purchasers of securities in the January 1 offering and the January 5 offering would not have a cause of action, while those purchasing in the illegal January 10 offering would have a cause of action. This is the sensible and correct outcome. This interpretation would also bring the interpretation of the integration matter with respect to the intrastate exemption into line with the plain meaning of the private placement exemption, which has no hint of any integration concept. See supra note 24 and accompanying text.

Another, less pernicious interpretation of the integration matter in the intrastate exemption is offered later in this Article. See infra note 40 and accompanying text.

\(^{31}\) While the point of this section is to recount the birth of the integration doctrine, it is also relevant to consider the modern language respecting integration and the question whether the post-1933 amendments have altered the obligation to read an integration concept into the 1933 Act.

The original private placement exemption provided an exemption for “transactions by an issuer not with or through an underwriter and not involving any public offering.”\(^\text{9}\) Securities Act of 1933, ch. 38, § 4(1), 48 Stat. 74, 77 (current
the language of the particular exemptions provides essentially no support for integration in the case of the original private placement exemption, only a small amount of support for integration in the case of the original single company recapitalization exemption, but more support for integration in the cases of the section 3(b) exemption and the old intrastate exemptions, in fact, none of these conclusions is founded on anything approaching clear language.\textsuperscript{32}

The other interesting and somewhat confounding observation to be made here is the fact that those original exemptions contain such different language respecting a possible integration concept. The problem, of course, is that a valid policy reason supporting multiple integration schemes is difficult to imagine. Thus, one is hard pressed to articulate, for example, a plausible basis for different rules defining the scope of an “issue” or an “offering” made under the intrastate exemption, on the one hand, and one made under the private placement exemption, on the other.

\textsuperscript{32} See, e.g., discussion supra note 30. Johnson and Patterson, in their thoughtful work on Rule 152, state that the integration doctrine is “not expressly a part of federal securities statutes.” Johnson \& Patterson, supra note 5, at 542. Instead, they describe integration as “a doctrinal construct born of regulatory necessity.” Id. Unlike the author, however, these authors find several “all important policy underpinnings of the integration doctrine” and argue that the doctrine “still is needed.” Id. at 543.
Perhaps one can argue that Congress had more faith in one or the other of those exemptions, and thus, through varying the terms of the integration concept, determined to expand the scope of the doctrine for sound exemptions while contracting it for those less sound. Such an indirect way of limiting exemptions, however, makes little sense. If, for example, Congress were afraid that offerings under the intrastate exemption would simply get too big to justify an exemption, it could have imposed an upper limit on the exemption, perhaps $1,000,000. To argue that Congress somehow purposefully chose to deal with such a matter by imposing differing integration concepts on the various exemptions seems far-fetched.33

B. The "Creation" of the Doctrine

Over time, the task of interpreting the provisions of the 1933 Act fell to administrative agencies and to courts. Not surprisingly, it was an administrative agency, specifically the Federal Trade Commission (the "FTC"),34 that first constructed and promulgated the integration concept, and, significantly, this occurred within the first year of the effectiveness of the 1933 Act.35

As luck would have it, the first administrative opinion on the matter of integration involved an interpretation of the original intrastate exemption.36

33 On the other hand, a more plausible explanation for the "differing" approaches to integration in the four original exemptions may be that no one ever envisaged an integration doctrine at all or certainly ever imagined it would take on such a life as it presently enjoys. For this author, therefore, the apparently differing treatments of integration in the original 1933 Act actually weaken any argument that integration is required by the language of the 1933 Act.


35 See infra note 36 and accompanying discussion.

36 Securities Act Release No. 33-97, 1933 WL 2080 (Dec. 28, 1933). Apparently in the months following the adoption of the 1933 Act, the Federal Trade Commission (the "FTC"), which was initially assigned administrative responsibility over the 1933 Act, began to respond in letters to inquiries about the new 1933 Act. In 1933, therefore, the FTC issued the foregoing Release, which consisted of
which, as described above, contained some of the most compelling language supporting an integration concept. Also, as luck would have it, the facts involved in that first opinion appear about as strong as one can imagine for the application of an integration concept. Since this opinion is the genesis of the integration doctrine, it merits discussion.

Shortly after the 1933 Act was passed, a company apparently filed a registration statement for an offering of securities to be sold to the public in various states. The question posed by the issuer was whether during the waiting period it could begin to sell these securities under an intrastate exemption and then after the effective date of the registration statement complete the offering across state lines pursuant to the registration statement.37

These facts, therefore, were particularly compelling for the administrative adoption of an integration concept. The “issue” of securities clearly had been defined by the registration statement filed by the company, which proposed to register for sale a defined number of shares of the company’s stock. The issuer, by its own admission, proposed to sell a portion of those particular securities pursuant to the intrastate exemption and then to sell the balance of the securities pursuant to a registration statement.38

Considering these unusually strong facts, the agency’s lack of experience, and the relatively compelling integration language of the original intrastate exemption, the FTC’s adoption of an integration concept in its opinion is perhaps not surprising.39 Unfortunately, it was a wrong decision and one that since 1933 has generated confusion and inappropriate outcomes. To make matters even more unfortunate, the decision was one that was not required by the words of the Act.40

excerpts from a number of these letters, including one letter dealing with integration. Id. at *1.

37 Id. at *5.
38 Id.
39 Id.
40 An administrative opinion by the SEC two years later provides support for interpreting the language of the intrastate exemption as intended to deal with resales, a vertical matter, instead of integration, a horizontal matter.

In In re Brooklyn Manhattan Transit Corp., 1 S.E.C. 147 (1935), the issuer, a New York Corporation, attempted to utilize the intrastate exemption by selling bonds to four New York banking houses. The banking houses, however, resold the bonds to non-New York residents. The Commission relied on the language in section 3(a)(11), which limited the availability of the exemption to a “security which is a part of an issue sold only to persons resident within a single State,” and found that this language prohibited quick resales of such securities to persons who
Nonetheless, five years later, after the SEC had taken over for the FTC as the regulatory agency with primary responsibility for the administration of the 1933 Act,\textsuperscript{41} the SEC with seeming facility promulgated its famous \textit{In re Unity Gold Corp.} opinion in which it reaffirmed the FTC's integration doctrine, applied it to an offering under section 3(b), and commenced an articulation of the criteria it proposed to use to determine whether putatively separate offerings would be integrated.\textsuperscript{42} Integration at that point resided outside the state of New York. \textit{Id.} at 161-62. In broad terms, the Commission found that to be “an issue sold only to persons resident within” New York, all shares of the offering had to come to rest in the hands of New Yorkers. The FTC could have taken the same position in its Release and further concluded that the language of the intrastate exemption was intended only to limit resales.

Interestingly, the \textit{In re Brooklyn Manhattan Transit Corp.} opinion is sometimes cited—mistakenly, in the author’s view—as an integration case. \textit{See} Morrissey, \textit{supra} note 5, at 55 n.133 (stating that it was “the SEC’s first application of the integration doctrine to intrastate offerings”).

In a release promulgated in 1937, two years after its opinion in \textit{In re Brooklyn Manhattan Transit Corp.}, the Commission once again interpreted the same language in section 3(a)(11) (language predicating the availability of the exemption on the fact that the securities are “part of an issue sold only to persons resident within” a particular state) as limiting interstate resales until the shares had “reached the hands of [local] purchasers buying for investment and not with a view to further distribution or for purposes of resale,” or, as the Commission said elsewhere, until the shares “actually come to rest in the hands of resident investors.” Securities Act Release No. 33-1459, 1 Fed. Sec. L. Rep. (CCH) ¶ 2260, at 2261-62 (May 29, 1937).


\textsuperscript{42} \textit{In re Unity Gold Corp.}, 3 S.E.C. 618 (1938). In March of 1937, Unity Gold sold 75,000 shares of its stock to Mr. Cronan under section 3(b) and the Commission's regulations that formed the predecessor to the modern Regulation A. When, in May of 1937, Unity Gold filed a registration statement for approximately 600,000 additional shares of its stock, the question arose as to whether that subsequent registered offering would be integrated back into the prior sales under section 3(b), thereby destroying the section 3(b) exemption due to the failure to abide by the $100,000 amount limitation of that section. \textit{Id.} at 624-25.

The Commission easily found that the section 3(b) offering was part of the same issue as the registered offering and thus integrated the two, which destroyed the availability of the section 3(b) portion of the offering. The Commission concluded that the determination whether the two components should be considered a “single ‘issue’” depended upon “various factors concerning the methods of sale and distribution employed to effect the offerings.” The following were cited by the Commission as factors indicating the appropriateness of integration: “securities of the same class, offered on the same general terms to the
became firmly established as a Commission doctrine, and the Commission has never wavered in its position that integration is an integral part of the 1933 Act.\textsuperscript{43}

Interestingly, courts did not get involved in any significant integration matters until nearly 1960,\textsuperscript{44} and even then their contribution to the development of the doctrine was simply to accept the doctrine as developed previously by the Commission.\textsuperscript{45} Thus, while these early judicial decisions on integration reflect the inherent difficulty that unspecialized tribunals of general jurisdiction have in dealing with matters as technical and complex as integration,\textsuperscript{46} courts without hesitation accepted the integration doctrine

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public in an uninterrupted program of distribution,” and a “single, integrated plan for the distribution.” The Commission cited “material differences in the use of the proceeds, [and] in the manner and terms of [the] distribution” as factors weighing against integration. \textit{Id.} at 625.

\textsuperscript{43} The SEC has, however, developed different criteria for integration, depending on the particular exemption or registration involved. \textit{See infra} notes 70-77 and accompanying text. Also, the Commission has ameliorated the impact of the doctrine in certain limited cases. \textit{See infra} notes 85-92 and accompanying text.

\textsuperscript{44} For a discussion of the early integration cases, \textit{see infra} note 45.


Professor Loss and Dean Seligman observe that “the Commission’s standard [for common law integration] in recent years has often been followed by courts.” 3 \textit{LOSS & SELIGMAN}, \textit{supra} note 5, at 1213. Professor Deaktor, however, seems to disagree, stating that “a relatively large proportion of the integration cases make no mention of the work of the SEC in the area, nor of cases or authorities which have drawn on that work.” Deaktor, \textit{supra} note 5, at 509.

\textsuperscript{46} For example, the court’s treatment of the integration issue in \textit{Shaw v. United States}, 131 F.2d 476 (9th Cir. 1942), is essentially unintelligible. The cases following \textit{Shaw}, while broadly intelligible, are nonetheless confusing and based on uncertain principles and fail to articulate with clarity the criteria of integration.

Thus, in \textit{Hillsborough I}, 173 F Supp. at 86, the second reported case dealing with integration, the court held that Hillsborough could not rely on the intrastate exemption because of recent interstate sales of its securities. Virtually the only explanation offered for integration in this case was a statement of the court indicating that it would integrate “all the shares of common character originally
essentially as it had been developed by the Commission and continue to apply the doctrine today.\textsuperscript{47}"

\textit{Id.} at 88 (quoting \textit{Shaw}, 131 F.2d at 478, 480). Obviously, such a statement is overbroad and essentially useless as a single criterion for integration.

The third reported integration case once again involved Hillsborough. SEC \textit{v.} Hillsborough Inv Corp. (\textit{"Hillsborough II"}), 176 F. Supp. 789 (D.N.H. 1959), \textit{aff'd}, 276 F.2d 665 (1st Cir. 1960). Shortly after the injunction was entered against Hillsborough in \textit{Hillsborough I}, Hillsborough offered New Hampshire residents holding the previously issued shares the opportunity to exchange their shares for new shares that had somewhat different contractual terms. Hillsborough planned to sell additional, similar shares to other New Hampshire residents for cash, claiming that the entire new offering (i.e., both the part sold in the exchange and the part sold for cash) was exempt from registration under the intrastate exemption. \textit{Id.} at 790.

Apparently based on its determination that the new securities “differ from the old securities [that were sold illegally] only in a small degree,” the court determined that the sale of the new securities under such a condition would be in violation of the 1933 Act. \textit{Id.} While the outcome seems based on the notion that the old offering must be integrated with the new offering, the analysis is far from crisp and relies more on generalized notions of bad faith. In short, the opinion provides no meaningful analysis of the application of the integration doctrine or the criteria used to determine that the two offerings should be combined.

The fourth of the earliest integration cases is \textit{Los Angeles Trust Deed \& Mortgage Exch.}, 186 F Supp. at 830; here, too, the analysis of the court is less than precise. That case involved the application of the integration concept to offerings purportedly made under the intrastate exemption. The court apparently integrated the offerings because “[t]he terms and conditions under which [the offerings were made were] identical.” \textit{Id.} at 871.

The purpose of this review is to point out that courts had difficulty in early integration cases. Such difficulty is understandable, given that the courts were dealing with complicated and technical matters for the first time.

C. Observations and Conclusion

The author offers two observations from his examination of the history of the integration doctrine. The first is that the original statutory language of the 1933 Act provided a less than compelling mandate for agencies or courts ever to adopt the integration doctrine in the first place. In some instances, the wording of the exemptions contained absolutely no language suggesting an integration doctrine; in other cases, the language was suggestive of integration but amenable to alternative interpretations. The second observation is that the entire integration doctrine goes back to an administrative opinion rendered by the FTC only a few months after the 1933 Act was passed. Thus, the doctrine was created approximately seventy years ago in the middle of the Great Depression by a completely inexperienced agency interpreting a new, highly technical statutory regime.

The conclusion of the author, therefore, is that statutory language, history, and precedent provide no compelling support for the continuation of the integration doctrine.

III. THE STATE OF THE INTEGRATION DOCTRINE TODAY

Over the years, able commentators have written on the integration doctrine and its application both broadly and in the context of specific situations. Professor Deaktor’s article, although now over twenty years old, continues to be the most exhaustive law review article on the doctrine. Later works by Dean Morisseys, Professor Johnson and Steve Patterson, Co., 326 F. Supp. 588 (S.D. Fla. 1971) (holding that two issues of securities offered by the defendant were not part of a single plan of financing and therefore should not be integrated), rev’d on other grounds, 463 F.2d 137 (5th Cir. 1972); Livens v. William D. Witter, Inc., 374 F Supp. 1104 (D. Mass. 1974) (accepting the definition of integration in Securities Act Release No. 33-4552, 1962 WL 3573 (Nov. 6, 1962)) and refusing to integrate six offerings made over an eight month period because they were not part of a single plan of financing); Bayoud v. Ballard, 401 F Supp. 417 (N.D. Tex. 1975); Barrett v. Triangle Mining Corp., [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,438 (S.D.N.Y 1976); SEC v. Galaxy Foods, Inc., 417 F Supp. 1225, 1243 (E.D.N.Y. 1976) (citing Hillsborough I, 173 F. Supp. at 86, as support for the integration of two issues of securities that formed part of a single plan of financing), aff’d, 556 F.2d 559 (2d Cir. 1977).
Professor Bradford,51 and Professor Wade52 all make significant contributions to the literature on integration, as do, of course, treatises, such as the definitive work by Professor Loss and Dean Seligman53 and the fine treatise by Professor Hicks.54

The point of this section of the Article, therefore, is not to restate the work of prior commentators by describing in detail the integration doctrine and its application to various situations. Instead, the description of the doctrine offered here is only for the purpose of supporting the author’s critical points by highlighting the doctrine’s ambiguity, the absence of any relationship between the criteria of integration and the purposes of the 1933 Act, and, finally, the doctrine’s overwhelming and unnecessary complexity.

The discussion of today’s integration doctrine can profitably be bifurcated into the common law rules of integration and the Commission’s discrete safe harbor rules of integration.

A. The Common Law of Integration

The common law of integration traces its roots to the early administrative and court decisions described in the immediately preceding section55 and is applicable to offerings of securities in the absence of any specific Commission rule dealing with a particular integration matter.

The common law doctrine is best understood as the five factor integration test that is consistently articulated by the Commission. Thus in determining, for example, whether securities sold in January of a particular year under the intrastate offering will be integrated with securities sold in April of the same year under the private placement exemption, courts (or the Commission) will consider whether the two blocks of securities are (i) “part of a single plan of financing;” (ii) “of the same class of securities;” (iii) offered “at or about the same time;” (iv) offered to generate the “same type of consideration” for the issuer, and (v) offered “for the same general purpose.”56 In a common law analysis, therefore, the presence of each of

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51 Bradford, Regulation A, supra note 6.
52 Wade, supra note 1.
53 3 LOSS & SELIGMAN, supra note 5, at 1211-28.
55 See supra notes 34-47 and accompanying text.
56 See the discussion in 3 LOSS & SELIGMAN, supra note 5, at 1212-13. The Commission, for example, both in Rule 147, 17 C.F.R. § 230.147 preliminary note 3 (2000), and in Regulation D, 17 C.F.R. § 230.502(a) note (2000), cited these
the foregoing is a factor that increases the probability that the January and April blocks of securities would be integrated and thus considered a single offering.\footnote{57} 

The very nature of these criteria makes them difficult to apply \footnote{58} In the first place, the meaning of the individual factors themselves are generally ambiguous and confusing. The “single plan of financing” factor, for example, not only is itself inherently ambiguous\footnote{59} but also appears to be similar to the “same general purpose” factor.\footnote{60}

\footnote{57} Professor Deaktor’s 1979 article, Deaktor, \textit{supra} note 5, at 529-38, and Professor Wade’s later 1994 article, Wade, \textit{supra} note 1, at 211-20, provide separate, in-depth discussions of each of the five common law factors of integration. \textit{Task Force on Integration, supra} note 4, at 600-23, is also particularly rich in its research on the five common law factors of integration, although its discussion is organized around particular exemptions rather than around the factors themselves.

\footnote{58} Loss and Seligman state, for example, that this “multifactor test may fairly be criticized as ‘indeterminate.’” \textit{3 LOSS \& SELIGMAN, supra} note 5, at 1213. Professor Wade, although clearly supportive of the integration doctrine, concedes that the doctrine is confusing in its application. Wade, \textit{supra} note 1, at 211-27 “[T]he SEC’s no-action letters and the opinions of courts have provided very little guidance with respect to the analysis that must be performed under the five factor test.” \textit{Id.} at 221.

\footnote{59} Loss and Seligman conclude that the “Commission staff’s no-action letters are not entirely consistent” on the definition of a “single plan of financing.” \textit{3 LOSS \& SELIGMAN, supra} note 5, at 1214. They state, however, that the term “tends to refer to factors such as the method of offering the security, the timing of plans for raising capital, and whether the offerings are financially interdependent.” \textit{Id.} Professor Wade agrees with Loss and Seligman on the three factors that make up the “single plan of financing” factor, also finding “confusion from the SEC’s and the courts’ failure to define precisely and apply consistently the three suggested components of the single plan of financing factor.” Wade, \textit{supra} note 1, at 212. Professor Deaktor states that the staff’s definition of this factor “has lacked consistency ” Deaktor, \textit{supra} note 5, at 529.

\footnote{60} \textit{3 LOSS \& SELIGMAN, supra} note 5, at 1214 (“[T]here tends to be considerable overlap between instances in which there is a ‘single plan of financing’ and those in which there is the ‘same general purpose.’ “); Deaktor, \textit{supra} note 5, at 529 (“In some inquiries, the single plan of financing factor appears to have been equated with the purpose of the offerings factor.”); Wade, \textit{supra} note 1, at 213 (“[C]ases and no-action letters commonly fail to distinguish between the single plan of financing and the same general purpose factors.”).
The other integration factors are equally uncertain in their meaning. For example, it is unclear what types of contractual variances are necessary to establish that two securities are not part of the “same class of securities.” How different do the contractual terms have to be in order to be separate classes? Are debt and equity always separate classes of securities? What if the equity is a preferred stock and the debt is a subordinated debenture that have essentially the same rights, except for the preference of the debentures over the preferred in bankruptcy?

Finally, and certainly without attempting to be exhaustive regarding the inherent ambiguity in the common law integration factors, consider the “at or about the same time” factor. Obviously, the time between the sale of two blocks of securities can be one day, one month, one year, etc. How far apart do the two sales have to be in order to be considered not “at or about the same time”? A related uncertainty regarding the “at or about the same time” factor is the question of whether it is an all-or-nothing matter or, instead, a factor that counts more (or less) as the two offerings become closer (or more remote) in time. Under an all or nothing regime, the existence of the factor might be established by a discrete line (six months, for example) and all sales within that six month period would be considered “at or about the same time” and would count the same toward integration, whether such sales are one day apart or five months and twenty-nine days apart. Alternatively, the factor could operate without a discrete line and could vary in its weight, depending on how far apart in time the two blocks are sold. Under this analysis, offerings one year apart, for example, may still have a small tendency to support integration, while

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61 Interestingly, Professor Deaktor in his discussion of the meaning of separate classes emphasizes, instead of contractual differences between or among securities, the identity of the issuer and the identity of the offerees. Deaktor, supra note 5, at 531-32.

62 Wade, supra note 1, at 216-18. “[T]he SEC and courts have failed to articulate a precise formula to determine whether securities are of the same class.” Id. at 216. Although Loss and Seligman characterize the Commission’s approach to this element as “relatively straightforward,” 3 LOSS & SELIGMAN, supra note 5, at 1218, their subsequent discussion of the element suggests significant uncertainty. Id. at 1219-21.

63 For example, although Loss and Seligman opine that the six months safe harbor provision of Rule 147 and Regulation D “suggests that a six-month period will be necessary to demonstrate that it was not made ‘at or about the same time,’” 3 LOSS & SELIGMAN, supra note 5, at 1221, the authors state that a separation of “six months or more will alone not necessarily lead to nonintegration.” Id. at 1222.
offerings one day apart may have a much stronger tendency to support integration.64

Beyond the inherent ambiguity in the common law integration factors themselves, an additional and perhaps even more significant ambiguity is generated by the uncertainty about the particular mix of factors required for integration.65 Is one out of five factors sufficient to require integration? Two out of five? Do some factors count more than others?66 What is the relationship between strength and number? Does the strength of a factor

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64 Professor Deaktor opines that “[p]roximity in time has seldom been determinative.” Deaktor, supra note 5, at 534.

65 “Neither the Commission nor the courts have provided express guidance on how to weigh these factors when analyzing an integration problem.” 3 Loss & Seligman, supra note 5, at 1222.

One is, of course, reminded of the old Treasury Regulations for determining whether a business entity other than a trust (called an “association” by the regulations) was to be taxed as a partnership or a corporation. In order to make this determination, the regulations set forth four major corporate characteristics that distinguished a corporation from a partnership. These characteristics were (1) continuity of life, (2) centralized management, (3) limited liability, and (4) free transferability of ownership interests. Treas. Reg. § 301.7701-2(a)(2) (as amended in 1960). An entity exhibiting any three of these corporate characteristics would be taxed as a corporation, while an entity exhibiting less than that number would be taxed as a partnership. Treas. Reg. § 301.7701-2(a)(3) (as amended in 1960). See Thomas M. Hayes, Note, Checkmate, the Treasury Finally Surrenders: The Check-the-Box Treasury Regulations and Their Effect on Entity Classification, 54 WASH. & LEE L. REV 1147, 1151-1160 (1997), for a discussion of how the old regulations functioned.

Interestingly, and perhaps instructively for this paper, the Treasury eventually replaced the corporate resemblance test with a regime allowing the taxpayer, within broad rules, to elect whether it will be taxed as a partnership or a corporation. Treas. Reg. §§ 301.7701-1 to – 6 (as amended in 1996). See generally Hayes, supra, at 1160 (describing the function of the new regulations).

66 Loss & Seligman suggest that “[a] review of the cases and no-action letters strongly suggests that the ‘single plan of financing’ and ‘same general purpose’ factors normally are given greater weight than the other factors.” 3 Loss & Seligman, supra note 5, at 1222. Professor Deaktor opines that “even if [offerings are] simultaneous [and are thus made ‘at or about the same time’], one or more of the other integration factors often will be viewed as more important.” Deaktor, supra note 5, at 534. See also Wade, supra note 1, at 214 (“Like the single plan of financing factor, the weight of the same general purpose factor in the integration analysis is unclear.”).
count more than the number of factors—for example does three strong factors weigh more heavily than four weak factors?67

The point need not be belabored. Essentially, everyone concedes the ambiguity in the common law criteria of integration and the difficulty of applying the criteria. Indeed, this view appears to be held even by commentators who, unlike this author, are able to find a policy basis for integration and thus (broadly, at least) support some continued role for the doctrine.68

An even more troubling aspect of the current common law of integration is the absence of any connection between the integration criteria and sound policy. Indeed, the common law criteria of integration actually encourage conduct on the part of issuers that is socially counterproductive.

This problem is best demonstrated by focusing on the common law integration factors and the steps an issuer may take under those tests in order to avoid integration. Assume once again a simple situation in which an issuer completes an intrastate offering of its common stock in January and then proposes to offer more securities in April under the private placement exemption. To avoid integration in such a case, the issuer is encouraged by the common law integration criteria to offer a different class of securities, perhaps preferred shares, in its subsequent April offering and to delay the proposed April offering, perhaps for many months.69

67 At one point in its work the ABA Task Force on Integration lamented: “[N]owhere is there any indication of how to evaluate these five criteria. In a number of no-action letters, a single criterion established in the release has taken precedence over the remaining four.” Task Force on Integration, supra note 4, at 623.

68 See, for example, Wade, supra note 1, at 211-20, and the discussion of Professor Wade’s ideas in supra notes 57-60, 62.

69 Another option for the issuer, a response that some commentators find to be socially advantageous, is for the issuer to register the offering. See supra note 15. This alternative, however, is problematic, both for its facts and for its policy. First, if the total offering is small, registration is practically impossible because costs are prohibitively high. Second, registration of the April tranche following the January intrastate offering will likely destroy the intrastate exemption for the January offering, if out-of-state offers are made in April. Registration of the April offering does not protect the January offering from backwards integration. Finally, registration is not always an attractive outcome for society. Indeed, Congress has determined that, based on policy consideration, certain types of offerings and certain types of offerees and purchasers do not need the special protections of mandated, scheduled disclosures that accompany registration. See infra text accompanying notes 99-105.
One is, of course, at a total loss to find any social benefit in varying the class of securities or delaying the April offering. Neither of these steps protects investors nor generates any other perceivable benefit. The January investors are unaffected by the issuer's alteration of either the contractual terms of the securities to be offered in April or the timing of the proposed April offering. Similarly, the subsequent April investors are accorded no additional protection as a result of such a change.

Importantly, of course, the incentives created by these criteria generate societal and economic costs, as the issuer is forced (or is, at least, encouraged) to change the terms of its optimal investment contract and postpone its offering. In economic terms, such outcomes raise the issuer's cost of capital and make the issuer less competitive in the product market. Stated alternatively, in more human terms, such an outcome is unfair to the issuer and its constituents, especially in light of the fact that such issuers are often small entrepreneurs with limited opportunities to acquire capital. Indeed, in extreme situations these criteria may effectively deny the issuer access to capital.

In short, issuers, in order to avoid integration under the common law criteria for integration, are encouraged to act in ways that are actually socially detrimental. To avoid integration, they are likely to offer investment contracts that have inefficient financial terms and to market their securities pursuant to inefficient strategies, and these societal costs are not counterbalanced by any enhanced investor protection or any other apparent social benefit.

B. The Commission's Safe Harbor Rules

Over the years, the Commission in a number of instances abandoned a common law approach to integration matters in favor of a safe harbor regime. While the terms of the various safe harbor regimes differ, compliance with the Commission's criteria for a particular safe harbor ensures the absence of integration; failure to meet the specific terms of any particular safe harbor, however, only means that the safe harbor is unavailable and that integration, therefore, is determined under the common law rules.

1. Earlier Safe Harbors

Although the Commission's first safe harbor from integration appeared as early as 1935, it was not until the 1970s that the Commission seriously
pursued integration safe harbors through its adoption of certain regulatory exemptions from registration. The first of these was incorporated into old Rule 146, which became effective in 1974 and was the predecessor to today’s Rule 506. Virtually contemporaneously with its adoption of Rule 146, the Commission also adopted Rule 147, which for the first time established intelligible criteria for compliance with the intrastate exemption. Rule 147 also contained an integration safe harbor, which was


For purposes of this rule only, an offering shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemptions provided by section 3 or section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, Provided, That there are during neither of said six month periods any offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.


72 17 C.F.R. § 230.506 (2000). The safe harbor integration language for Regulation D differs from the safe harbor language in old Rule 146. Specifically, Regulation D offerings are protected by safe harbor from:

Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act.

Id. § 230.502(a).

73 Id. § 230.147
identical to the integration safe harbor of Rule 146. Although the new safe harbors in Rule 146 and Rule 147 mitigated, at least to some degree, the ambiguity of integration, the new regulatory integration regimes introduced by these rules were significantly and needlessly complex and again failed to connect the criteria for the safe harbor with any legitimate policy.

The complexity inherent in these early safe harbors and, indeed, in all of the Commission’s integration safe harbors, is due at least in part to the sheer number of safe harbor regimes and the differences among the various regimes’ criteria. Presently, for example, the Commission has at least

74 Id. § 230.147(b)(2). The safe harbor language of Rule 147 states:
For purposes of this rule only, an issue shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemption provided by section 3 or section 4(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, Provided, That, there are during either of said six month periods no offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

75 Even the Commission’s more recent attempts to deal with integration through safe harbor provisions have drawn fire from commentators. For example, Professor Bradford, writing on the current integration provisions of Regulation A, has observed:

The changes adopted [to the integration safe harbor rules in Regulation A] are generally positive and responsive to some of [the] criticisms [from commentators]. But the SEC’s failure to explain or justify provisions like Rule 251(c) produces unnecessary ambiguity and uncertainty. As a result, Rule 251(c) has failed to reach its potential.

Bradford, Regulation A, supra note 6, at 289.

76 Even those regimes that appear to be similar are not. Consider, for example, the integration regimes in Regulation D, see supra note 72, and Rule 147, see supra note 74. Under Regulation D, offers and sales outside the six-month window periods do not destroy the integration safe harbor, so long as during the six-month window periods the issuer makes no offers or sales of the same class of securities as are offered in the Regulation D offering. 17 C.F.R. § 230.502(a). Under Rule 147, however, safe harbor from sales outside the six-month window periods requires not only “clean windows” but also that the sales outside the window periods be made “pursuant to the exemptions provided by section 3 or section 4(2) of the Act or pursuant to a registration statement.” Id. § 230.147(b)(2) (emphasis
seven different integration regimes in its rules.\textsuperscript{77} Accordingly, even ignoring the difficulty of the interfaces among the safe harbor regimes and the interfaces between each of those regimes and the common law rules of integration, one struggles to understand why the Commission would complicate integration with so many differing sets of integration criteria.\textsuperscript{78}

When one begins to apply these safe harbors in instances where two or more various integration regimes interface with one another, the complexities of the safe harbor rules increase dramatically. Consider the following example, which is built primarily around the safe harbor of Rule 147. That particular safe harbor protects a Rule 147 offering from integration with prior sales, if such prior sales were made more than six-months prior to the Rule 147 offering, if such sales were made “pursuant to” a section 4(2) exemption, a section 3 exemption, or a registration statement, and if during the last six months the issuer has made no offers or sales of a “similar”

\textsuperscript{77} These include: Rule 152, 17 C.F.R. § 230.152 (2000) (dealing with integration in certain cases between public and private offerings); Rule 147, \textit{id.} § 230.147(b)(2) (1999) (safe harbor from integration in intrastate offerings made under Rule 147); Regulation D, \textit{id.} § 230.502(a) (safe harbor for certain small offerings and private placements made under Regulation D); Rule 701(f), \textit{id.} § 230.701(f) (safe harbor for certain offerings involving employee compensation made under Rule 701); Rule 144A, \textit{id.} § 230.144A(e) (safe harbor for resales of restricted securities to certain qualified institution buyers); Regulation A, \textit{id.} § 230.251(e) (safe harbor for small offerings made pursuant to the requirements of Regulation A). In the Release adopting Regulation S, the Commission stated: “[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously.” Offshore Offers and Sales, Securities Act Release No. 33-6863, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,681 (Apr. 24, 1990).

\textsuperscript{78} Even if the Commission wants different integration standards as a way to open up or shut down exemptions that it considers more or less desirable, a more principled and direct path is open to the Commission to reach this objective. Suppose, for example, the Commission wishes to limit the availability of intrastate offerings under Rule 147 because (for whatever reason) the Commission concludes that such offerings are especially ripe for fraud. Rather than making integration more expansive, which is haphazard in its outcome and essentially unprincipled, the Commission could impose additional, substantive conditions on the availability of the exemption—such as limiting the dollar limit of the exemption (e.g., limit Rule 147 to $1,000,000 per year) or requiring disclosure as a condition for exemption.
class of securities like those in the Rule 147 offering. This last criterion is referred to as a requirement of having “clean windows” or “clean window periods.” 79

In this example, assume that on January 1 Issuer sold a block of its common stock in reliance on the private placement exemption provided by the common law of section 4(2), and that on July 1 Issuer sold additional common shares under a valid registration statement. On August 1, Issuer proposes a third offering of its common stock, this time as an intrastate offering under Rule 147. In evaluating the availability of the Rule 147 exemption, Issuer must determine whether either of the prior offerings will be integrated into its August offering.

Applying the safe harbor criteria from the Rule, one first finds that the Rule 147 offering in August will not be protected from the July offering, even though the July offering was registered and thus represents, one assumes, the ideal way for the distribution to take place. The problem, obviously, is that the July offering was within six months of the proposed August offering, and accordingly the Issuer lacks the clean windows that are required for safe harbor qualification under Rule 147 80

Consider now whether the safe harbor provisions of Rule 147 protect the proposed August offering from integration with the prior January offering. Since the section 4(2) offering in January was more than six months prior to the Rule 147 offering in August, one may preliminarily think that the safe harbor is available to protect the August offering from the January offering. The obvious problem, however, is that the safe harbor, even for sales outside the six month period, requires clean windows, and the July sale of common stock destroyed the clean windows for the August sale. 81

79 17 C.F.R. § 230.147(b)(2). For the text of the integration safe harbor provision in Rule 147, see supra note 74.

80 If, however, the July securities are not of “the same or similar class” as the August securities, safe harbor may still be available, since under Rule 147 safe harbor from the effects of offers and sales outside the six-month window period is lost if offers or sales within the six-month window period involve securities “of the same or similar class as those offered pursuant to” Rule 147. 17 C.F.R. § 230.147(b)(2). For the language of the safe harbor provision of Rule 147, see supra note 74.

81 The contamination of sales during the six-month window period is eliminated only if those securities are not “of the same or similar class” as the Rule 147 stock. 17 C.F.R. § 230.147(b)(2). The fact that the sales during the window period were made pursuant to a registration statement, therefore, is irrelevant. For the language of the safe harbor provision of Rule 147, see supra note 74.
Even if, however, the Issuer were able to ensure that the July sale involved securities that were not of the “same or similar class” as the August sale, the safe harbor may not protect the August sale from the January sale. Assume that in looking at the January offering, Issuer discovers that an offer was made to an unsophisticated person, thereby destroying the availability of the section 4(2) exemption for the January offering. Given this new fact, the safe harbor may not be available to protect the August Rule 147 offering from the January offering, even though the window periods are clean and the January offering was more than six months before the August offering. The possible loss of the safe harbor rests on the argument that the January offering was not made “pursuant to” (i.e., in compliance with) the exemption “provided by” section 4(2), as required by the integration language of Rule 147, which under the Rule is a prerequisite to safe harbor protection.

Even if, however, the January offering were at the time entirely in compliance with the requirements of section 4(2), safe harbor protection for the August offering still may be uncertain. Now the problem is the notion of one-way integration. Although the safe harbor of Rule 147 is available to protect the August offering, it does not protect the section 4(2) January offering. Thus, the question of whether the January offering is contaminated by either the registered offering in July or the Rule 147 offering in August is determined by the common law of integration. The bizarre outcome here is that, if under common law integration the July offering or the August offering is integrated backwards into the January offering, then the January offering does not meet the requirements of section 4(2).

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82 Section 4(2) of the 1933 Act provides an exemption from registration for “transactions by an issuer not involving any public offering.” 15 U.S.C. § 77d(2) (1994). Broadly, this exemption is predicated on all offerees and purchasers having sufficient sophistication to be able to evaluate the merits and risks of the offering and having access to the same information that would be contained in a registration statement. See Thomas Lee Hazen, The Law of Securities Regulation § 4.21, at 224-34 (3d ed. 1996) (suggesting that “[a] literal reading of more recent cases” leads one to conclude that “[e]ach offeree must have access to the types of information which would be disclosed” in a registration statement, id. at 229 (emphasis added), “offerees must also be sophisticated,” id., and “each offeree must be provided with an opportunity to ask questions of the issuer and verify information,” id. at 231 (emphasis added)).

83 Professor J. William Hicks, certainly one of the leading authorities on Rule 147, reaches a similar conclusion. 7 Hicks, supra note 54, § 4.03[3], at 4-28.

84 A compact and excellent discussion of one-way integration is found in Bradford, Regulation A, supra note 6, at 270-72.
in turn, may mean that the January offering was not made “pursuant to” section 4(2), and thus the safe harbor may no longer be available to protect the August Rule 147 offering from the January offering.\textsuperscript{85}

While instinctively one is skeptical that such overwhelming complexity can ever be justified, the problematic nature of these safe harbor rules can be fully appreciated only when one realizes that, as was the case with the common law rules of integration, the safe harbor criteria for integration are unconnected to any sound policy. Thus, the Commission’s regulatory criteria to qualify for a safe harbor from integration again lead issuers to engage in conduct that is socially counterproductive.

To illustrate this point, consider the steps that the Issuer in the foregoing example may be encouraged to take in order to garner safe harbor protection for its proposed August offering in light of potential contamination by the January offering. Most obviously, the Issuer will likely take steps to ensure that the August offering has clean windows. This could be done either by varying the contractual terms between the July offering and the August offering\textsuperscript{86} or by delaying the August offering for another five months.\textsuperscript{87}

Once again, however, one is unable to find any social benefit for the requirement that the Issuer take such steps. Neither of these steps protects the January, July or August investors nor generates any other perceivable benefit for society. Importantly, such cumbersome steps once again generate societal and economic costs, as the Issuer is forced to change from its optimal investment contract or delay its optimal offering date for the August offering.

Safe harbor criteria, therefore, have done nothing to relieve the disconnect between the criteria of integration and any valid economic or

\textsuperscript{85} Professor Hicks opines that such a result would “defeat the whole purpose of the [safe harbor integration provision of the] Rule.” 7 HICKS, supra note 54, § 4.03[3], at 4-27 He characterizes such an outcome as “perverse” and generously concludes that it is “very unlikely that the SEC would intend such a result.” Id.

\textsuperscript{86} Under Rule 147, the July offering would not destroy the safe harbor protection the August offering otherwise enjoys, so long as the July offering does not involve “offers or sales of securities of the same or similar class as those [securities] offered or sold” in the August, Rule 147 offering. 17 C.F.R. § 230.147(b)(2) (emphasis added).

\textsuperscript{87} By delaying the August, Rule 147 offering for an additional five months (a total of six months from the July offering), the Rule 147 offering would be protected from the January and the July offering, since those prior offerings would then be outside the six-month window period and no sales would have occurred during the window period. 17 C.F.R. § 230.147(b)(2).
societal policies. Under the safe harbor criteria, issuers are still encouraged to offer inefficient investment contracts and to market their securities inefficiently. These costs are not counterbalanced by any enhanced investor protection or any other apparent social benefit.

2. More Recent Safe Harbors

In more recent years, the Commission seems to have made some effort to simplify and reduce the pernicious effects of its safe harbor regimes. Thus, for example, the 1992 amendments to Regulation A appear to be an attempt both to simplify and ameliorate the impact of the integration doctrine in Regulation A offerings. Briefly, a Regulation A offering is now protected by safe harbor from any prior offering and from certain prescribed subsequent offerings (including all offerings "made more than six months after the completion of the Regulation A offering"), and the safe harbor of Regulation A, when applicable, provides two-way integration protection (i.e., it protects the Regulation A offering from contamination by the other offerings and also protects the other offerings from contamination by the Regulation A offering).

Rule 701, which essentially provides an exemption from registration for employee stock purchase plans of non-1934 Act companies, offers an even more generous safe harbor from integration by providing complete, two-way protection for and from any Rule 701 offering. In short,

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89 Regulation A provides an exemption from registration for offerings of up to $5,000,000 by non-1934 Act companies. The exemption is predicated upon the filing of an "offering statement" with the Commission and providing each investor with an "offering circular." 17 C.F.R. §§ 230.251-.263 (2000).

90 Id. § 230.251(c)(2)(v).

91 Id. § 230.251(c). Professor Bradford provides an excellent discussion of this matter. Bradford, Regulation A, supra note 6, at 270-73. Professor Bradford points out some scholarly disagreement on the notion that the integration protection under Regulation A is two-way. Id. at 272 n.89 (citing 3A HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW 5-12 to 5-14 (2d ed. 2000)).


93 Once again, Professor Bradford provides an excellent discussion of this integration provision. Bradford, Regulation A, supra note 6, at 270 n.82. Professor Bradford points out that Professor Hicks has characterized the safe harbor as only "one directional," but Bradford argues that Hicks is wrong about this. Id. (citing 7A
integration is not applied to Rule 701 offerings. Accordingly, a Rule 701 offering cannot contaminate any other offering, and the other offering cannot contaminate the Rule 701 offering.94

These are, of course, encouraging signs, although the Commission is moving in an extremely slow, uneven, and piecemeal manner and, at least from the perspective of some commentators, is still leaving substantial ambiguity and problems untreated.95 Nonetheless, these regulatory developments reflect, on the part of the Commission, some appreciation of the nonsense of the integration concept and may signal a willingness by the Commission to engage in a broader reexamination of the concept.

IV INTEGRATION PRESCRIPTION

The prescription offered by this Article for the problems created by the integration doctrine is simple and direct: the integration doctrine should be entirely eliminated from the 1933 Act.96

94 The Commission has also taken a special, generous integration approach for extra-territorial offerings made in compliance with Regulation S. In the Release adopting that Regulation, the Commission stated: “[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously.” See Offshore Offers and Sales, Securities Act Release No. 33-6863, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. ¶ 84, 524, at 80,681 (Apr. 24, 1990).

95 Professor Bradford is somewhat critical of the continued ambiguity in the new Regulation A integration safe harbor, characterizing it at one point as “expansive yet enigmatic.” Bradford, Regulation A, supra note 6, at 255.

96 The wholesale elimination of the integration doctrine would not eliminate the necessity of resolving certain integration-like problems. For example, the Commission in recent years has always had some type of regulatory small-offering exemption from registration enacted under section 3(b) of the 1933 Act, and that exemption has always had some size limitation. Today, that exemption is found in Rule 504 and is limited to $1,000,000 within any twelve month period. 17 C.F.R. § 230.504 (2000). In a world without an integration concept, an issuer might sell $200,000 in securities on Monday under the exemption provided by section 4(2), and $200,000 on Tuesday under section 3(a)(11). If the issuer on Wednesday decides to sell additional securities under Rule 504, a rule would be needed to determine whether the issuer could then sell securities in the amount of $1,000,000, $800,000 or $600,000 under the Rule.

Obviously, it would not be difficult to construct a rule dealing with that matter and to do so without resorting to the integration doctrine.
While the uncertainty, complexity and misdirected criteria described in the immediately preceding section are important to the analysis underlying this recommendation, these problems, standing alone, may be insufficient to compel a complete elimination of the integration doctrine.\footnote{7} Such problems are not, of course, unique to securities laws and, more importantly, are ones that often can be eliminated or at least ameliorated by procedural and doctrinal adjustments that are less drastic than the elimination of an entire doctrine.\footnote{8}

In the case of the integration doctrine, however, these less drastic adjustments are inappropriate prescriptions because the doctrine itself makes no sense.\footnote{9} Indeed, the integration doctrine is inconsistent with the very policies underpinning the 1933 Act itself.

The 1933 Act strikes a balance between investor protection and capital formation.\footnote{10} The common sense of this is overwhelming, of course. The 1933 Act could never have been intended to protect investors to such a degree that capital formation is precluded. At the same time, investors must be protected, even if the price of raising capital is increased somewhat. This balance was in recent years reiterated in the National Securities Markets Improvement Act of 1996 ("NSMIA").\footnote{11} Specifically, section 106(a) of NSMIA\footnote{12} amended section 2 of the 1933 Act to indicate

\footnote{7} The uncertainty and complexity of the integration doctrine have captured most consistently the attention of commentators and the bar. An interesting manifestation of this was the charge to the Task Force on Integration, which did its work in the early 1980s. The charge was "to make proposals that would help the Commission and the securities bar to answer questions of integration." Task Force on Integration, supra note 4, at 596.

In this writer's view, that was an unfortunate and overly modest charge.

\footnote{8} In Part III of this Article, the author argued that the criteria for the application of the integration doctrine are nonsensical. See supra notes 48-95 and accompanying text. Here the author makes a somewhat similar but different argument, arguing now that the doctrine itself is nonsensical.

\footnote{9} Wade, supra note 1, at 227 (recognizing, before NSMIA, "the emerging importance of the Act's policy to assist in capital formation where disclosure through registration would be unduly burdensome"). An example at the Commission level of the recognition of the balance can be seen in the way the Commission developed and ultimately approved Regulation D, with its increasingly rigorous investor protection as deal size increases. See Campbell, supra note 6, at 127-31 (outlining the history leading to the adoption of Regulation D).


\footnote{11} Id. § 106(a), 110 Stat. at 3424 (codified as amended at 15 U.S.C. § 77b(b) (Supp. IV 1998)).
that the 1933 Act was intended both to provide for “protection of investors” and to “promote efficiency, competition, and capital formation.”

These articulated policies, in turn, can be reconciled with a sensible economic view of the 1933 Act. Under this economic interpretation, the 1933 Act is seen as a legislative scheme requiring mandatory disclosure of investment information in situations where bargaining between or among the parties for investment information is inefficient or impossible. This explains, then, the fundamental rule of section 5 of the 1933 Act, which mandates disclosure by the issuer to offerees and purchasers in connection with a public offering of securities. Bargaining for individually customized investment information between the issuer, on the one hand, and, on the other hand, each of the hundreds or thousands of investors in the public offering, could be considered to be either prohibitively expensive or literally impossible. As a result, the 1933 Act through section 5 mandates particularized disclosures that must accompany such public offerings.

Consistent with this analysis, the rule of mandatory disclosure is relaxed through the exemptions in the 1933 Act in situations where bargaining for investment information is possible and efficient. Accordingly, in the private placement exemption in section 4(2), mandatory disclosure is not required, because the investors have “access to information” and thus are able to “fend for themselves.” Similarly, in the

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102 Section 2(b) of the 1933 Act now requires the Commission, when engaged in rulemaking in the public interest, to “consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” 15 U.S.C. § 77b(b).

103 This is somewhat of an overly simplistic view of the 1933 Act, because in certain instances the 1933 Act eliminates mandatory disclosure for reasons other than ease of bargaining for investment information. For example, in section 3(a)(2) of the 1933 Act, 15 U.S.C. § 77c(a)(2) (1994), offerings by banks are exempt from registration, and one may conclude that this exemption is based, not on the ability to bargain for investment information, but on the protection of investors by the regulatory scheme applicable to banks. Another example is section 3(a)(4), 15 U.S.C. § 77c(a)(4), which provides an exemption for securities issued by charitable organizations and may best be understood as designed to promote charities.

104 These are the broad criteria for the availability of section 4(2) as announced by the U.S. Supreme Court in SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953). Today, probably the two most important requirements for exemption from registration under section 4(2) are the requirement that the offerees be sophisticated and the requirement that they have access to the same information that would be contained in a registration statement. For a good discussion of this, see HAZEN, supra note 82, § 4.21, at 224-34.
intrastate exemption in section 3(a)(11), Congress apparently concluded that geographic proximity between the investors and the issuer ensures efficiency in bargaining for investment information, thereby alleviating the need for mandated disclosure.105

With these basic ideas in hand, one is able to demonstrate that the integration doctrine is antithetical to the balances struck within the 1933 Act and thus leads to a mandatory disclosure regime in instances where Congress indicated that the proper balance between investor protection and capital formation called for investors and issuers to bargain for investment information.

Again, this is best demonstrated by an example. Imagine an intrastate offering in January under the common law of section 3(a)(11) and a private placement in April of the same year under the common law of section 4(2). Assuming integration is inapplicable, the January tranche is exempt from mandated disclosure because, presumably, Congress determined that the geographic proximity of the parties eliminated any need for mandated disclosure. All investors in that intrastate block of securities are able to protect themselves by bargaining for their investment information, and capital formation is encouraged by eliminating the requirement that the issuer underwrite the costs of mandatorily providing information that the investors may not desire. Continuing the assumption that integration is inapplicable, the April private placement tranche is also exempt from mandated disclosure, in this instance because Congress determined that the investors' access to information eliminated the need for mandated disclosure.

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105 Some uncertainty exists regarding the basis for the intrastate exemption in section 3(a)(11). In his early article on Rule 147, Professor Hicks stated:

The following reasons have been offered from time to time in support of the intrastate exemption: (1) In terms of economic policy, it is useful to allow securities offerings by a small businessman to his friends, relatives, business associates, and others, without federal restrictions; (2) registration for such small offerings would, as a practical matter, be almost impossible; (3) investors in local financings are protected by the sanctions of public opinion; (4) such investors are protected by their proximity to the issuer; (5) such investors are protected by state regulation; and (6) intrastate offerings do not present questions of national interest.

J. William Hicks, Intrastate Offerings Under Rule 147, 72 Mich. L. Rev 463, 499 (1974) (footnotes omitted). In its Release adopting Rule 147, the Commission stated that if the conditions of section 3(a)(11) were met, “[i]n theory, the investors would be protected both by their proximity to the issuer and by state regulation.” Conditions for Intrastate Offering Exemption, Securities Act Release 33-5450, 1 Fed. Sec. L. Rep. (CCH) ¶ 2340, at 2611-2 (Jan. 7, 1974).
disclosure. Once again, all investors in the private placement block are able to protect themselves by bargaining for investment information, and the costs of capital formation are reduced by eschewing mandated disclosure.

In this case, therefore, rejecting any application of integration and thereby preserving each exemption is the sensible outcome, since it maintains the statutory balance struck between investor protection and capital formation. The critical point here, of course, is that the existence of neither tranche compromises the policy bases for the other tranche’s exemption from registration. Thus, the policy bases for not imposing a regime of mandated disclosure on the January offering is unaffected by the subsequent April offering. With or without the April offering, the January investors have the same geographic proximity to the issuer and accordingly are able to bargain with equal efficiency for their investment information. The same holds true for the April investors. With or without the January offering, the April investors have the same access to information and sophistication levels that support the private placement exemption contained in section 4(2). Sales by an issuer, therefore, whether before or after an exempt offering, are neutral events as concerns the policy bases for the exemption.

Applying the integration doctrine to this situation, however, reverses all this and leads to an inappropriate result. Assume, for example, that the outcome of applying the integration doctrine to our example is to cause the exemptions from registration to become unavailable, thus forcing the issuer to register the entire offering.

This result is inconsistent with the 1933 Act and the balance it strikes between investor protection and capital formation. Congress determined that the proper balance between investor protection and capital formation was to be achieved by foregoing registration in instances where either geographic proximity (the intrastate exemption) or investor sophistication and access to information (the private placement exemption) made private bargaining for investment information efficient. By hypothesis, those conditions exist in our example, and as a result, integration, which forces this offering into a mandated disclosure regime, essentially and inappropriately reshapes the policies of and balances struck in the 1933 Act.

Some commentators, however, object to the elimination of the integration doctrine, fearing that such an approach would allow issuers to evade the strictures of the 1933 Act, specifically the registration requirements, by permitting a single public offering to be fragmented under multiple exemptions—thereby avoiding registration.¹⁰⁶

¹⁰⁶ Professor Bradford makes this argument in its most persuasive form. He argues that elimination of the integration doctrine “allows an issuer to avoid
To demonstrate this concern, consider an extreme example in which an issuer sells 100 shares of stock under section 4(2) on January 1, 100 shares under the intrastate exemption on January 5, 100 shares under section 4(2) on January 10, and 100 shares under the intrastate exemption on January 15. The issuer may continue this basic pattern, selling at every opportunity 100 shares under the private placement exemption or the intrastate exemption. Devotees of integration would likely consider this example strongly demonstrative of the need for the application of the integration doctrine, arguing as they would that without the doctrine the issuer is able to make a continual unregistered public offering while evading the registration obligations of section 5.\footnote{See supra note 15.}

When examined closely, however, the argument in favor of an integration doctrine, even in this extreme case, flounders for the very reasons stated above. Even in this extreme example, each 100 share tranche is made in a situation in which Congress concluded that free bargaining is the most efficient way to generate investment information and, accordingly, that society in such transactions is better off by allowing free bargaining to determine the scope of disclosure. None of the investors is in any way harmed by the fact that other securities are sold around the same time as her or his purchase. The legitimate bases for Congress’s willingness to forego mandated disclosure are similarly uncompromised by the other offerings.

In short, the integration doctrine makes no sense in any setting. The availability of an exemption should be entirely independent of the fact that other offers or sales have (or have not) been made by the issuer.\footnote{This should not be understood as limiting the Commission’s right to enact regulatory exemptions that contain size limitations, or the right of the Commission to impose “bad boy” provisions on exemptions (see, e.g., 17 C.F.R. § 230.505(b)(2)(iii) (2000)).} Other such sales are irrelevant to the question of whether or not the policy bases for an exemption exist for a particular sale. Such other offers and sales are neutral events respecting the question of whether investment information should be mandated or be the subject of free bargaining between parties.
The 1933 Act contains no clear mandate for an integration doctrine. Nonetheless, the Commission tumbled into the doctrine shortly after the enactment of the 1933 Act, and thereafter neither the Commission nor the courts ever bothered to consider whether the doctrine is consistent with the policies of the 1933 Act.

This exceedingly thin doctrinal history should not be overlooked when adjustments to or elimination of the integration doctrine are considered. Thus, the thinness—indeed, the non-existence—of the mandate for the creation of the integration doctrine should free the Commission and the courts from the normal restraints of precedent, if they were to choose to make sense out of this messy situation.

The prescription proposed by this paper is the complete elimination of the integration doctrine. The doctrine is confusing and complex for issuers and thus expensive for society. The criteria of integration provide perverse incentives and thus lead issuers to engage in conduct that is counterproductive. Finally, and perhaps most importantly, the doctrine is antithetical to the balances struck in the 1933 Act between mandatory disclosure and free bargaining for investment information, often forcing into a mandatory disclosure regime offerings in which the policy bases for free bargaining are intact.

The Commission and its predecessor, the FTC, created this mess. The Commission, therefore, should through the exercise of its rule-making power take the lead in eliminating integration. Not only would such Commission action be consistent with agency accountability, but also the Commission is best positioned and equipped to effect an efficient remedial action.