IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,566

STANDFORD P. BIRNHOLZ,
individually and as trustee of the
STANDFORD P. BIRNHOLZ, P.A. PENSION PLAN,

Appellant,

v.

THE 44 WALL STREET FUND, INC.,

Appellee.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE

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STATUTES

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STATEMENT OF THE CASE AND FACTS

1. The Issue Certified To This Court

The following question was certified to this Court by the United States Court of Appeals for the Eleventh Circuit:

> WHETHER AN ISSUER THAT PROPERLY OBTAINED AN EXEMPTION FROM STATE REGISTRATION PURSUANT TO § 517.061(19), FLA. STAT. (1978 SUPP.), BUT FAILED, AFTER 36 CONSECUTIVE MONTHS OF SELLING ITS SHARES IN FLORIDA, TO FORWARD THE $750.00 FEE PROVIDED FOR IN THE AMENDED STATUTE, § 517.061(19)(b), FLA. STAT. (1979), SUBSTANTIALLY COMPLIED WITH THE EXEMPTION REQUIREMENTS, THEREBY AVOIDING LIABILITY TO INVESTORS UNDER § 517.211 FOR THE SALE OF UNREGISTERED SECURITIES IN VIOLATION OF § 517.07.'

If the certified question is answered in the negative, it would significantly deter mutual funds and other public companies from selling their shares in Florida, because they would risk being put out of business for an innocent and non-substantive clerical error. Indeed, if the draconian position advocated by the Appellant in this case were adopted by this Court, the unintentional omission to pay a $750 administrative fee during a 36-month exemption renewal period would subject an issuer to rescission claims by every Florida resident who purchased its shares duringthat 36 month period -- notwithstanding that issuer's complete compliance with all of the regulatory, disclosure and antifraud provisions of the securities laws. And if, as in this

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[1] Birnholz V. 44 Wall Street Fund, Inc., 880 F.2d 335, 341-42 (11th Cir. 1989).

case, the issuer had sold substantial amounts of stock which declined in market value during the period in question, it could be bankrupted by the Florida rescission claims.

2. The Claims Below

Appellant, Standford P. Birnholz ("Birnholz"), sued Appellee, The 44 Wall Street Fund, Inc. ("the Fund"), to recover over Three Hundred Sixty Thousand Dollars ($360,000) in market losses which he incurred in the purchase and sale of the Fund's stock. R1 11 3. Birnholz never claimed that the Fund misled him or that it failed to provide him with the disclosure materials required under the federal and Florida securities laws. R4 146-147. Nor did he claim that the Fund's alleged securities law violation had anything whatsoever to do with his decision to buy and sell. Id. Nor did he claim that this alleged violation had anything to do with the regulatory, disclosure or anti-fraud purposes of the Florida securities laws. Instead, Birnholz claims that he is entitled to recoup his market losses because the Fund failed timely to pay a $750 fee to the Florida Division of Securities and Investor Protection ("the Division").

The Fund denied that the payment of this fee was necessary to the continued validity and effectiveness of its exemption from State registration, and it contended, inter alia, that the complained of sales were made in strict and/or in substantial compliance with the Florida Securities Act. R1 4 2.

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3. Factual And Procedural Backaround

The Fund is a New York based mutual fund which has sold its shares to purchasers in approximately 23 states throughout the United States. Since 1968, the Fund has been registered as an investment company with the United States Securities and Exchange Commission ("S.E.C.") under Section 8 of the Investment Company Act of 1940, and its shares have been sold pursuant to a registration statement filed with the S.E.C. under the Securities Act of 1933. R1 11 2; R4 46-47.

On August 22, 1979 the Fund filed for an exemption from the registration requirements of the Florida Securities Act under § 517.061(19), Fla.Stat. (1978 Supp.). At that time § 517.061(19) provided that issuers, like the Fund, whose securities had already been registered with the S.E.C., could sell their securities in Florida without registering with the Division of Securities.[2]

The exemption provision under which the Fund sold its shares was first enacted by the Florida Legislature in 1978. Def.'s Ex. "11." The legislative purpose was to eliminate unnecessary duplication of the federal review process by abolishing State regulation of transactions already registered and regulated by the S.E.C. R4 81-82. Indeed, as a result of the enactment of §

[2]In 1985 the Florida Legislature repealed § 517.061(19) and enacted a new notification registration procedure in its place, which is now codified at § 517.082, Fla.Stat. (1987).

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517.061(19), the Florida Division of Securities no longer had any authority to review the sales of S.E.C.-registered issuers for approval. **R4** 82.

As initially enacted in 1978, § 517.061(19) did not require the issuer ever to renew its exemption with the Florida Division of Securities. **R4** 82-83. The S.E.C.-registered issuer was required to file its exemption documents and to pay its exemption fee to the Division only once. Thereafter, to maintain the effectiveness of its §517.061(19) exemption, the issuer needed to maintain the effectiveness of its S.E.C. registration statement -- by filing its annually updated registration, prospectus and accompanying forms with the S.E.C. Id.[3]

On September 1, 1979, after the Fund had acquired exempt status under the original statute (880 F.2d at 339; **R1** 26 5), the Florida legislature amended § 517.061(19) solely for revenue-generating purposes. As the Eleventh Circuit recognized, the amendment did not affect the substance of the original statute. It did not restore the Division's authority to regulate the transactions of S.E.C.-registered issuers. To maintain the

[3]Section 517.061(19), both as originally enacted and as amended, exempted the sale of securities made in compliance with a registration statement effective under the Securities Act of 1933, 15 U.S.C. §§ 77a, et sea. Pursuant to Section 10 of that Act, 15 U.S.C. § 77j(a)(3), an issuer is required to update its registration statement and prospectus filings with the S.E.C. no less frequently than every 16 months.

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effectiveness of its § 517.061(19) exemption, the issuer was still required to file its regulatory documents in Washington, D.C. -- not in Tallahassee. The sole effect of the 1979 amendment was to require the issuer to pay a $750 fee to the Florida Division of Securities after thirty-six (36) months of exempt Florida sales. 880 F.2d at 339-41.

The cornerstone of Appellant's brief is the assertion that the Fund did nothing from 1980 through 1985 to comply with the applicable requirements of the Florida Securities Act. That assertion is flatly contradicted by the undisputed record and the trial court's express findings of fact. At all times during the relevant period, the Fund fully complied with all of the regulatory filing requirements provided in amended § 517.061 (19) by:

a) filing its registration statement with the S.E.C. prior to August, 1979;

b) filing its Notice of Intent to Sell form along with its current S.E.C. prospectus, its irrevocable consent to service of process and its $750 fee with the Division in August, 1979; and

c) thereafter maintaining its S.E.C. registration in full force and effect by filing its renewed registration, prospectus and accompanying processing documents with the S.E.C. each year from 1980 to 1985.

R1 26 3-4; R4 47-50; Def.'s Ex. "1"; Def.'s Ex. "3."

Additionally, throughout this period, the Fund sent its current prospectus to Birnholz, and each and every prospective Florida purchaser, prior to his purchase of Fund shares. Moreover, the Fund sent, on a yearly basis, to Birnholz and each and every

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other Florida purchaser of Fund shares, each and every disclosure document required to be filed under federal and Florida law including, inter alia, its yearly renewed prospectus, its semi-annual and annual reports, its yearly audited financial statements and its proxy statements. **R1 26 4; R4 48-49;** Def.'s Ex. **"2."**

In addition to having complied with all of the applicable disclosure requirements during the period at issue, and in addition to having complied with all of the applicable S.E.C. registration and filing requirements as required under **§ 517.061(19),** the Fund at all times kept the Florida Division apprised of its Florida sales. After August 22, **1979,** when the Fund filed all of the documents necessary to its exemption with the Division, it renewed its Florida issuer-dealer registration on a yearly basis, and it continued to deliver its updated prospectuses to the Division. **R4 52-54.**

Throughout the period at issue in this case, the Division was fully aware of the Fund's Florida sales, and it never advised the Fund that it considered the Fund to be in noncompliance with any of the requirements of **§ 517.061(19). R4 55-57.** This was **SO** notwithstanding that the Fund contacted the Division, during the period in question, to inquire if anything more was required to maintain the effectiveness of its Florida exemption. Id. And the

Fund immediately paid the $750 fee to the Division as soon as it learned that the Division considered this payment to be over-due.[4]

In sum, the Fund performed a multitude of acts requisite to maintaining its exempt status. All that can be claimed it did not do is timely pay $750 to the Division.

Birnholz' argument to this Court also heavily relies on the Division's practice in administering the exemption statute. However, what Birnholz asserts was the Division's practice is **not** what the record reveals.

Birnholz asserts that the Division interpreted amended § 517.061(19)(b) to require S.E.C. registered issuers to refile their State exemption documents every thirty six months. He points to Rule 3E-500.09, Fla. Admin. Code (1979) as proof of this document re-filing requirement. However, a review of the Rule reveals that it did not even address the amended subsection (b) renewal requirement. And the only competent record evidence of how the Division interpreted amended § 517.061(19)(b) was provided by the testimony of Phillip Snyderburn, who was the Division's director (i.e., the highest ranking Division official) when the

[4]Appellant's brief miscites the record by suggesting that the Division denied the Fund's request to issue it a retroactive exemption certificate upon payment of allegedly past-due fees. What the record indicates is that the Division neither approved nor denied this request. R4 73, 150. Moreover the record demonstrates that the Division never brought any enforcement proceedings nor took any other administrative action against the Fund for its alleged noncompliance with § 517.061(19). R1 26 4; R4 55-57.

amendment was enacted and the Rule was promulgated. R4 77-78, 85-86. Mr. Snyderburn testified that the Division did not interpret the amended exemption statute to require issuers to refile their State exemption documents after thirty six months. R4 91.

According to Birnholz, the Division's "true" interpretation of amended § 517.061(19) is "evidenced" by a letter which a Division staffer, Geraldine Harrison, wrote to Birnholz' lawyer shortly before trial.[5] Because Ms. Harrison elected not to testify, however, the unverified statements in her letter to Birnholz' lawyer could never be subjected to cross-examination. Nor could her version of Division policy be reconciled with: 1) the contrary views testified to at trial by the official who headed the Division during the applicable period and 2) the Division's failure to adopt any rule providing for the position articulated in Ms. Harrison's letter. The trial court considered both Ms. Harrison's letter and Mr. Snyderburn's testimony, and it decided to accept the testimony presented by Mr. Snyderburn.

Birnholz also asserts that Fund's § 517.061(19) exemption expired in October, 1980 because the Division issued a

[5]Contrary to what is represented in Appellant's brief, Ms. Harrison has never been the head of the Florida Division of Securities -- she is merely the "chief" of one of its bureaus. (Pl.'s Ex. "15.") And there is nothing in the record to indicate what, if any, position she held during the time periods addressed in her letter.

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"notification of exemption" certificate -- which Birnholz characterizes as a "permit" -- with a one-year termination date. However, both Mr. Snyderburn and Birnholz' own expert, Donald A. Rett, who co-authored § 517.061(19) with Mr. Snyderburn and headed the Division immediately prior to Mr. Snyderburn (R5 165, 172), testified -- directly contrary to what Birnholz argues before this court -- that: 1) the statutory exemption was self-executing and therefore the issuance of the "notification of exemption" certificate was irrelevant to obtaining the exemption and 2) the one-year limit on the certificate had no substantive legal effect. Indeed, both experts agreed that this certificate was nothing more than a nonbinding comfort letter which was never intended to define or limit the legal duration and effect of an issuer's § 517.061(19) exemption. R4 92-96; R5 208-209.

The district judge, the Honorable Kenneth L. Ryskamp, found that the renewal requirement first provided under the 1979 amendment to §517.061(19) could not be retroactively applied against the Fund. As such, he concluded that the Fund had strictly complied with the requirements of § 517.061(19), because the Fund had, at all times subsequent to its August, 1979 State exemption filing, made all of the regulatory filings necessary to maintain the effectiveness of its S.E.C. registration statement. Moreover, Judge Ryskamp ruled that even if the amended statute were applicable, the Fund's non-compliance would still only have

amounted to the unintentional failure timely to pay $750 to the Division in 1982. And because this oversight did not prejudice Birnholz and in no way impaired the regulatory, disclosure or antifraud purposes behind the Florida Securities Act, Judge Ryskamp held that the Fund substantially complied with the amended exemption requirements, thereby avoiding liability under § 517.211. R1 26.

Birnholz appealed Judge Ryskamp's decision to the United States Court of Appeals for the Eleventh Circuit. The appellate court affirmed Judge Ryskamp's interpretation of the amended statute, finding that the only effect of the 1979 amendment to § 517.061(19) was to require additional fee payments -- not additional document filings -- after thirty-six (36) months of Florida sales. However, the appellate court reversed Judge Ryskamp's conclusion that the amended statute could not be applied, finding that it was a procedural amendment which was subject to automatic retroactive application. Finally, the Eleventh Circuit certified the substantial compliance issue to this Court, at the same time as it invited review by this Court of the other issues in the case.

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SUMMARY OF THE ARGUMENT

The Fund strictly complied with the statutory requirements in effect at the time it perfected its § 517.061(19) exemption. Only by retroactively applying an amended provision of the statute can even a technical violation be demonstrated. Then, solely on account of this technical violation, i.e., the Fund's clerical omission to pay a $750 administrative fee, Birnholz urges that the Fund should be faced with § 517.211 rescission claims by every Florida resident who purchased its shares between 1982 and 1985. Birnholz alone would thereby recoup a $360,000 windfall at the Fund's expense.

Birnholz' draconian approach to statutory construction should be rejected by this court. In holding that amended § 517.061(19)(b) could be retroactively applied against the Fund, the Eleventh Circuit reasoned:

> The amended statute simply supplemented the original statute with a new process by which an issuer could maintain the exempt status of its securities transactions -- for a potentially unlimited period of time .... The substance of the original statute -- exemption from state registration for sales of S.E.C.-registered securities -- was not affected by the amendment.

880 F.2d at 339 (emphasis supplied).

The Fund does not agree that the non-substantive nature of the 1979 amendment permits a retroactive application in this case. However, if this Court agrees that it does, then the liberal

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statutory construction generally afforded to non-substantive provisions is also appropriate. The Fund's failure strictly to comply with the amended "exemption process," which the Eleventh Circuit recognized to constitute only a "technical violation," 880 F.2d at 341, should not subject the Fund to the civil remedies provisions applicable to sellers of unregistered securities.

Birnholz' assertion that the doctrine of substantial compliance is not applicable to the Florida Securities Act lacks any precedential support. This Court has repeatedly upheld the doctrine of substantial compliance in construing a wide variety of Florida statutes -- especially where, as here, an inflexible construction would yield absurd results. And the vast majority of jurisdictions recognize that substantial compliance is fully applicable to the construction of State Blue Sky statutes.

Birnholz' inflexible standard of statutory construction is particularly inappropriate here -- where the statute at issue was enacted to reduce red tape by eliminating State regulation of transactions already registered with the S.E.C. It would be anomalous to construe this statute to permit an issuer, which at all relevant times fully complied with its registration and regulatory filing requirements, to be crippled merely on account of an untimely payment of a $750 State exemption fee. And such a result would in no way further the investor protection purposes behind the Florida Securities Act.

FIRST ISSUE

WHETHER THE FAILURE TIMELY TO PAY A $750 FEE BY AN ISSUER WHICH HAS OTHERWISE FULLY COMPLIED WITH ALL OF THE REQUIREMENTS PROVIDED UNDER AMENDED § 517.061(19) AND THE FLORIDA SECURITIES ACT SHOULD BE EXCUSED UNDER THE DOCTRINE OF SUBSTANTIAL COMPLIANCE.

Birnholz never squarely addresses this issue, although this is the issue which the Eleventh Circuit certified to this Court. Instead, he reformulates the substantial compliance issue by factoring in a more substantive violation than that found by the district and circuit courts. He does so by reading a requirement for renewal document filings into amended § 517.061(19) and by reading into the 1979 amendment a statutory purpose of enabling the State to insure that the issuer had maintained the effectiveness of its S.E.C. registration. However, as was found by both the district and the circuit courts, the statutory requirement and the legislative purpose which has been posited by Birnholz simply does not exist.

In view of the "spin" which Birnholz employs in reformulating the certified question, it is important to keep the true issue in mind. The Fund did not fail to comply with any disclosure and/or regulatory filing requirements. Amended § 517.061 (19)(b) was enacted solely for revenue raising purposes. The only violation presented by this case, as the district and circuit courts each found, is the untimely payment of a $750 fee.

1. The doctrine of substantial compliance is fully applicable to the Florida Securities Act.

It is well-settled that a party's failure strictly to comply with each and every requirement contained in a statute will not necessarily trigger penal and/or civil remedies consequences. Where the object of the statute has been fulfilled through a party's substantial compliance with the statutory dictates, the courts will refrain from applying remedial measures designed for statutory violators. See Dixon v. D.H. Holmes Co., 566 F.2d 571 (5th Cir. 1978); Sanders v. Auto Assoc., 450 F.Supp. 900, 903-04 (D.S.C. 1978); Bernstein v. Board of Trustees, 376 A.2d 563, 566 (N.J. Sup. Ct. 1977); Wheeler v. Dist. of Columbia Bd. of Zoning, 395 A.2d 85, 90 (D.C. App. 1978); Application of Santore, 623 P.2d 702, 708 (Wash. 1981).

The doctrine of statutory substantial compliance is fully applicable to the construction of securities statutes. See 79 C.J.S. Supp., Securities Regulation, § 196. See also Sharp v. Idaho Inv. Corp., 504 P.2d 386 (Idaho 1972) (Blue Sky registration requirements): N.C. Roberts Co. v. Topaz Transformer Products, 49 Cal. Rptr. 209, 221 (Cal. App. 1966) (Blue Sky registration requirements); Monoaram Industries v. Royal Industries, 372 A.2d 171 (Blue Sky tender offer requirements); Wellman v. Dickinson, 475 F.Supp. 783, 833 (S.D.N.Y. 1977), aff'd, 647 F.2d 160 (2d Cir. 1981), cert. denied, 460 U.S. 1069 (1983) (federal securities law

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tender offer requirements); Miller v. Griffith, 196 N.E.2d 154, 156 (Ohio Com. Pl. 1961) (Blue Sky registration requirements).[6]

Similarly, this Court has repeatedly held that the doctrine of substantial compliance is fully applicable to the construction of Florida statutes. See, e.g., Boardman v. Esteva, 323 So.2d 259 (Fla. 1975), cert. denied, 425 U.S. 967 (1976) (absentee ballot election statute: "[s]trict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot"); State v. Laiser, 322 So.2d 490 (Fla. 1975) (seizure held valid notwithstanding search warrant statute not strictly complied with); Turfway Lines, Inc. v. Florida Public Service Comm'n., 191 So.2d 431, 432 (Fla. 1966) (excusing "technical" violation of common carrier certification statute); Fallis v. City of North Miami, 127 So.2d 883, 884 (Fla. 1961) (debt securities issued without strict compliance with city charter held valid); Inland Waterway Dev. Co. v. City of Jacksonville, 37 So.2d 333 (Fla. 1948) (taking upheld notwithstanding eminent domain statutes not strictly complied with).

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[6]Illinois is the only jurisdiction where the courts have rejected the doctrine of substantial compliance in the area of Blue Sky requirements. See McConnell v. Surak, 774 F.2d 746 (7th Cir. 1985). And it is notable that the Illinois legislature recently amended its Blue Sky statute in order to avoid the harsh consequences which were wrought by the Illinois courts' disavowal of the doctrine of substantial compliance. See McConnell v. Surak, id.

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Birnholz' assertion that strict compliance is required because the § 517.061(19)(b) renewal fee requirement is stated in mandatory (i.e., "shall") terms, is specious. Each of the Florida cases cited immediately hereinabove -- in which the doctrine of substantial compliance was applied to excuse non-substantive statutory violations -- involved statutory requirements expressed in similarly mandatory language.

The mandatory/directory dichotomy relied on by Birnholz addresses the issue of whether complete non-compliance is excusable -- it has nothing to do with the application of the substantial compliance doctrine. Florida courts have repeatedly applied substantial compliance in construing statutory requirements expressly held to be mandatory. See Boardman v. Esteva, 323 So.2d at 267; Farrington v. Flood, 40 So.2d 462, 465 (Fla. 1949); Florida Tallow Corp. v. Bryan, 237 So.2d 308, 310 (Fla. 4th DCA 1970). Indeed this Court recently noted that it is unnecessary to determine whether a statute is mandatory or directory where the defendant has substantially complied with requirements of that statute. State v. Martinez, 536 So.2d 1007, 1009 (Fla. 1988). See also Metropolitan Dade County v. Shelton, 375 So.2d 32, 33 (Fla. 4th DCA 1979) (finding that defendant substantially complied with

licensing statute requirements made it unnecessary to determine whether the statue was mandatory or directory).[7]

Birnholz has not offered a single valid reason why substantial compliance should be held any less applicable to amended § 517.061(19) than it is to any other Florida statute or to the requirements provided under the securities statutes in other states. His assertion that strict construction is required because of the consumer protection nature of the Florida Securities Act is unavailing for three independently sufficient reasons.

First, even if § 517.061(19) is afforded a strict construction, that does not mean that a defendant's substantial compliance with the statutory requirements does not suffice. Indeed this Court has repeatedly applied the doctrine of substantial compliance to excuse non-substantive violations of statutes afforded strict construction. See Inland Waterway Dev. Co. v. City of Jacksonville, 37 So.2d at 335 ("[w]hile statutes giving the right to appropriate private property for public use are to be construed strictly, a substantial compliance with their

[7]It is telling that only one of the cases cited by Birnholz in his discussion of the mandatory/directory issue even addressed substantial compliance. And in that case, Ferlita v. State, 380 So.2d 1118 (Fla. 2d DCA 1980), the district court applied the strict compliance standard to avoid a forfeiture -- not to accomplish one as Birnholz seeks in this case. Ferlita does not stand for the proposition that -- contrary to this Court's holdings --mandatory statutory language compels the application of a strict compliance standard.

provisions is held to be sufficient"); Boardman v. Esteva, 323 So.2d at 265 ("strict construction ... does not mean strict compliance").

Second, while Birnholz argues that § 517.061(19) must be strictly construed, this Court has held, to the contrary, that the Florida Securities Act should "be given a broad and liberal interpretation to effectuate the [statutory] purpose[s]." McElfresh v. State, 9 So.2d 277, 278 (Fla. 1942). Such a construction clearly does not preclude a court from excusing non-substantive omissions in determining an issuer's compliance with the requirements of the Act.

Third, the nature of the particular statutory provision before this Court, and the legislative history behind its enactment, plainly make substantial compliance the appropriate test. Section 517.061(19) was enacted in 1978 to streamline the bureaucratic process by eliminating State regulation of the sales of securities already registered with the S.E.C. The sole purpose behind the 1979 amendment to the exemption statute was to increase Division revenues. R1 26 4-6; R4 81-86, 90-91. It is settled that revenue raising requirements are afforded a more lenient construction than the regulatory requirements contained in a statute. 82 C.J.S., Statutes § 396, pp. 955-956. See also Associates Commercial Corp. v. Sel-O-Rak Corp., 746 F.2d 1441, 1444 (11th Cir. 1984). And given that the exemption statute's underlying purpose was to reduce

red tape on the State administrative level, it would be anomalous to hold a § 571.061(19) issuer to a uniquely strict standard of compliance with the State processing requirements provided in that statute.

Finally, none of this Court's prior decisions construing Chapter 517 in any way support the contention that only strict compliance with even non-substantive requirements will suffice. The Amicus Curiae misplaces its reliance on State v. Houghtaling, 181 So.2d 636 (Fla. 1965), which only involved the issue of whether the absence of scienter excused complete non-compliance with State registration requirements. Similarly misplaced is Birnholz' reliance on E.F. Hutton & Co. v. Rousseff, 537 So.2d 978 (Fla. 1989), which had nothing whatsoever to do with substantial compliance or with registration requirements. The issue before this Court in Rousseff was whether proof of loss causation was necessary to a § 517.211(2) fraud claim. Birnholz cannot read Hutton as support for his proposition that 5517.211 actions should be only determined by a strictly mechanical application of the literal statutory language. Indeed in Hutton, this Court found that "justifiable reliance" was a necessary element of a Chapter 517 fraud claim -- notwithstanding that such requirement is nowhere expressed in the language of §§ 517.211 or 517.301.

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2. The Fund substantially complied with the Florida Securities Act.

The parameters of the doctrine of substantial compliance are well-settled. In order to avoid becoming subject to the penalties applicable to statutory violators, a defendant must show that: (1) the plaintiff was not harmed; (2) the defendant took a series of steps to comply with the statute and acted in good faith; and (3) the essential purposes of the statute were not impaired. See Boardman v. Esteva, 323 So.2d 259 (Fla. 1975), cert. denied, 425 U.S. 967 (1976); Bernstein v. Board of Trustees, 376 A.2d at 566; Application of Santore, 623 P.2d at 708. In Santore, for example, the Washington Court of Appeals aptly explained:

> If an act is performed, but not in the time or in the precise manner directed by statute, the statutory provision should not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized.... In matters of formal procedure ... this Court has never exacted anything more than a substantial compliance with the statute. Amendable defects ... have not been held fatal unless injury directly caused thereby has been shown, and it seems to us now that this is the just rule. Any other rule usually leads to a sacrifice of substance to form and to decisions which shock the sense of justice and rights, even in minds trained to the technicalities of the law.

At all times during the relevant period, the Find fully complied with all of the regulatory filing requirements provided for in amended § 517.061 (19) by:

a) filing its registration statement with the S.E.C. prior to August, 1979;

b) filing its Notice of Intent to Sell form along with its current S.E.C. prospectus, its irrevocable consent to service of process and its $750 fee with the Division in August, 1979; and

c) thereafter maintaining its S.E.C. registration in full force and effect by filing its renewed registration, prospectus and accompanying processing documents with the S.E.C. each year from 1980 to 1985.

R1 26 3-4; R4 47-50; Def.'s Ex. "1"; Def.'s Ex. "3."

Further, during this period, the Fund at all times fully complied with the Act's disclosure requirements, by providing Birnholz and every other Florida investor with all of the information which § 517.061(19) requiredto be filed in Washington, D.C., and in Tallahassee, Florida. R1 26 4; 4 48-49; Def.'s Ex. "2."

Finally, during this period, the Fund at all times fully complied with the Act's licensing requirements by: 1) registering with the Division in 1979 as a § 517.12 issuer dealer -- for the sole purpose of selling its shares in Florida and 2) thereafter renewing its Florida issuer dealer license on an annual basis, by filing the necessary license renewal application and paying the necessary license renewal fee. R4 51-52; Def.'s Ex. "4."

It is manifest that the statutory purposes have been served by these actions. The omission to timely pay the $750 renewal fee

provided in amended § 517.061(19)(b) did not detract from the substance of the Fund's compliance.'

In light of the facts presented by this case, the former Fifth Circuit's reasoning in Dixon v. D.H. Holmes Co., 566 F.2d at 571, where the Court refused to allow the plaintiff his statutory remedies under the Truth in Lending Act, 15 U.S.C. §§ 1601, et seq. -- although an award of such remedies was technically mandated by the statute's terms -- is equally applicable here:

> The Truth in Lending Act requires truth in lending, but it's not an act that requires sacrament in language. It does not require the use of shibboleths or other sacred terms.
>
> * * *
>
> ... I see nothing there but a substantial compliance with the requirements of the regulation; and, indeed, elsewhere it has been the uniform interpretation, both of the Courts and the Federal Reserve Board, that substantial and not sacramental compliance is what is necessary.

In order to overcome the Fund's substantial compliance with the statutory requirements, Birnholz attempts to narrow the focus solely onto the following question: "What did the Fund do between

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[8]The merely technical nature of the Fund's noncompliance is underscored by the fact that the Division never alerted the Fund that its $750 fee was overdue or that its Florida sales were unlawful as a result. This is so notwithstanding that the Fund regularly kept the Division apprised of its Florida sales and even requested the Division's advice, which was never responded to, as to whether "anything further was required in order to maintain the effectiveness of the registrations of the Fund's shares in [Florida]." R4 53-54.

1980 and 1985 to comply with its § 517.061(19) exemption obligations?" According to Birnholz, the answer is: "Nothing!" Even assuming, arguendo, the propriety of Birnholz' narrow focus, however', his assertion that the Fund did nothing to comply with the applicable § 517.061(19) requirements between 1980 and 1985 is flat wrong.

Birnholz' misstatement is based upon a misapprehension of the exemption statute and a complete disregard of the record. First, he wrongfully posits that the only requirement for maintaining the § 517.061(19) exemption is the amended subsection (b) renewal requirement. However, as the Eleventh Circuit correctly recognized, the primary requirement for maintaining the § 517.061(19) exemption is provided for in the statute's first

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[9]The Eleventh Circuit recognized that a broader focus was warranted. In certifying the substantial compliance issue to this Court, it expressly accounted for the Fund's filing with the Division, in August 1979, of all of the required § 517.061(19) documents. Birnholz' suggestion that this Court ignore that exemption filing in determining the substance of the Fund's compliance is nonsensical given that: 1) it was the only exemption filing which § 517.061(19) required the Fund to ever make with the Division and 2) the information contained in the Fund's 1979 filing remained on file at the Division between 1980 and 1985 -- as was expressly provided for in the statute. Moreover, applicable case law suggests that the Fund's complete compliance, during 1980 through 1985, with all of the disclosure and licensing requirements provided in other sections of the Florida Securities Act must also be taken into account. See Metropolitan Dade County v. Shelton, 375 So.2d 32 (Fla. 4th DCA 1979), where the court refused to limit its inquiry to the narrow subsection in which noncompliance was admittedly established -- recognizing that substantial compliance must be determined in view of the defendant's compliance with the overall statutory requirements and purposes.

sentence -- the issuer must at all times maintain the effectiveness of its S.E.C. registration statement under the Securities Act of 1933. And Birnholz ignores that the Fund at all times fully complied with this requirement, which was expressly incorporated into Florida law through § 517.061(19), by filing its annual updated registration, prospectus and related regulatory documents in 1980, 1981, 1982, 1983, 1984 and 1985. Def.'s Ex. **"1."**

Research has revealed only one Florida case involving an analogous factual context -- where complete compliance with a filing requirement was coupled with the untimely payment of a required fee. In Williams v. State, 324 So.2d 74 (Fla. 1975), this Court held that the untimely payment of a mandatory appellate fee would **not** void the appeal where the notice of appeal was timely filed. Given that the § 517.061(19)(b) renewal fee requirement was only applied against the Fund in this case (on a retroactive basis) because it was held to be procedural, Williams provides an important precedent for this case.

Birnholz' assertion that § 517.061(19) is **"a** form of licensing **statute,"** and that this case should be analogized to cases where the defendant has done business in this State without required regulatory approval, is frivolous. The only licensing provision of Chapter 517 which was applicable to the Fund during the relevant period is contained in § 517.12, Fla. Stat. -- with which the Fund at all times strictly complied. R4 52. Again, § 517.061(19) was

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enacted to eliminate Division "licensing" of the sales of S.E.C.-registered securities in Florida. The Division's "approval" of an issuer's § 517.061(19) exemption was neither required nor authorized.[10] The Florida cases relied upon by Birnholz all involved failures to make necessary regulatory filings and/or failures to obtain licensing necessary for doing business in this State. They do not stand for the proposition that an innocent oversight timely to pay an administrative fee will subject a defendant to severe civil sanction."

None of the Blue Sky cases cited by Birnholz support his contention that the Fund failed substantially to comply with § 517.061(19). All of these cases, unlike this case, involve

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[10]Unlike in the licensing context, where State agency approval is required for regulated activity, the § 517.061(19) exemption was wholly self-executing. Exempt sales could begin, pursuant to the plain statutory terms, when the Division "received" the issuer's exemption filing -- not when it "approved" that filing. Moreover, exempt sales could continue without the need for Division approval. The exempt issuer was only required to pay the Division a renewal fee. The statute did not require the issuer to file any renewal documents with the Division -- let alone to obtain Division approval to renew the § 517.061(19) exemption. R4 82-83, 95-96; R5 208-209.

[11]In Mobil Oil Corp. v. Thoss, 385 So.2d 726 (Fla. 5th DCA 1980), for example, a corporation continued to hold itself out to the public as being authorized to do business in Florida after its authority to do business had been revoked by the Secretary of State. On that basis the district court applied a statute imposing individual liability on corporate directors -- but it withheld the application of such liability on the directors who didn't know of the corporation's dissolution.

complete non-compliance with regulatory filing requirements that were necessary to the State securities agency's oversight of an issuer's sales. None of Birnholz' cases involve an issuer which, like the Fund, at all times fully complied with all of the applicable regulatory filing and disclosure requirements imposed by the State securities laws and had merely been late in paying a fee.

In Bell v. Le-Ge, Inc., 20 Ohio App. 3d 127, 485 N.E. 2d 282 (Ct. App. 1985), for example, the defendant corporation made no effort whatsoever to comply with either the registration or the exemption filing requirements provided under the Ohio Blue Sky statute, and the issue of substantial compliance was not raised. Similarly, in Miller v. Griffith, 196 N.E.2d 154 (Ohio Com. Pl. 1961), rescission was only allowed because the defendants did nothing at all to comply with the pertinent regulatory Blue Sky requirements. At the same time, the Miller court noted that if, as here, "a registration was made which was inappropriate in some respects, but which substantially followed the Securities Act," rescission would not be appropriate. 196 N.E. 2d at 156.

The cases of Green v. Weis, Voisin, Cannon, Inc., 479 F.2d 462 (7th Cir. 1973) and Mark v. McDonnell & Co., 447 F.2d 847 (7th Cir. 1971), are inapposite because they apply Illinois law, which as noted above, disavows the doctrine of substantial compliance. In addition, the facts in McDonnell established fraud, 447 F.2d at

850, and the facts in Green established that the issuer had never made any of the regulatory filings required under the Illinois Blue Sky statute. 479 F.2d at 464.

Similarly in Cole v. PPG Industries, 680 F.2d 549 (8th Cir. 1982), the issuer had never made any regulatory filings with the State, and the issue of substantial compliance was not raised before the court.

In sum, then, even assuming arsuendo that amended § 517.061(19)(b) is applicable in this case, none of Birnholz' precedents support his attempt to shift his $360,000 market loss to the Fund because of the mere clerical omission to pay a $750 fee. The district court's application of the doctrine of substantial compliance under the facts of this case was proper.

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SECOND ISSUE

WHETHER THE DISTRICT AND CIRCUIT COURTS ERRED IN FINDING THAT THE ONLY WAY THE FUND FAILED TO COMPLY WITH THE AMENDED EXEMPTION STATUTE WAS IN FAILING TO PAY A $750 FEE IN 1982.

Both the district and circuit courts concluded that the only effect of the 1979 amendment to § 517.061(19) was to require the exempt issuer to pay an additional $750 fee to the Division after thirty-six months. Birnholz' contention that both courts erred, and that additional document filings were also required, is contrary to the statutory language, the legislative intent, as well as the contemporaneous administrative construction.

The only renewal requirement expressed in the statute's 1979 version is for the payment, on a recurring 36 month basis, of a $750 fee. Indeed, while the legislature amended the part of the statute which pertained to the required fee payment (sub-section "b"), it at the same time omitted to add similar renewal language to the portion of the statute pertaining to the required document filings (sub-section "a"). And, as correctly stated by the Eleventh Circuit, 880 F.2d at 341, where the legislature expressly provides for a particular requirement in one portion of a statute, the court should not construe that same requirement into another portion of the statute by implication. **See** Russello v. United States, 464 U.S. 16, 23 (1983); Devon-Aire Villas Homeowners v. Americable Assoc., Ltd., 490 So.2d 60, 62, n.5 (Fla. 3d DCA 1985). Cf. Thaver v. State, 335 So.2d 815, 817 (Fla. 1976) (recognizing

the general principle of statutory construction that "the mention of one thing implies the exclusion of another").[12]

Birnholz complains that the Eleventh Circuit should have looked beyond the statutory language in construing amended § 517.061(19). What Birnholz fails to mention is that when the district court considered the legislative history as well as the administrative practice, it reached the same conclusion as the Eleventh Circuit Court of Appeals.

It is inescapable from the record that the legislative purpose behind the 1979 amendment to § 517.061(19) was solely to increase the Division's revenues. The House and Senate Staff Reports on the proposed amendment plainly demonstrate that the legislative focus was confined to the fee payment requirement:

> ... [t]he Division proposes that the existing fees required by sub-section 19(c) be paid for each consecutive 36-month period in which the securities are offered and sold. The existing provision requires a one time fee payment.

Def.'s Ex. **"10."** There is no legislative history indicating any purpose similarly to alter the original statutory requirement for

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[12]As such, Birnholz' assertion that the statutory language contained in sub-section (b) can be read to imply that a new Notice of Intention to Sell form needed to accompany each fee payment carries little weight. Especially is this so in that, in order to make this argument, Birnholz is forced to misleadingly paraphrase the language of the statute as providing that: "each thirty-six month period shall commence upon receipt by the Department of the Notice of Intention to Sell." Appellant's Brief, p. 17. Of course, the implication is nowhere close to as strong from the actual statutory language.

a one-time only State document filing. And given that the legislative purpose behind the 1978 enactment of § 517.061 (19) had been to reduce State filings, it would make no sense to read into this record a legislative intent to do an about face one year later and increase State filings.

Birnholz' assertion that the legislative purpose behind amended § 517.061(19) was really to enable the Division to ensure that the issuer had maintained the effectiveness of his S.E.C. registration statement -- and that it is necessary to read a renewal document filing requirement into the statute to effectuate such legislative intent -- finds absolutely no support in the record. If this was truly the intent, it can be presumed that such purpose would at least have been mentioned in the legislative history. Especially is this so given that the fee-enhancing purpose of this amendment was specifically addressed.[13]

Nor does the contemporaneous administrative construction support Birnholz' position. Phillip Snyderburn, who headed the

[13]Moreover if, contrary to the record evidence, the legislature had really intended that renewal document filings would enable the Division to ensure the issuer's compliance with its S.E.C. registration requirements, it would have required renewal on a yearly basis, i.e., each time the issuer's updated prospectus was required to be filed with the S.E.C. -- not on a 36-month basis. And Birnholz' unsupported contentions about how the absence of renewed document filings would impair the Act's regulatory purposes is off base in this case, where the Fund did file its updated prospectus with the Division more frequently than every 36 months (R4 52-53), and kept the Division advised, each year, of the sales of its shares in Florida. (R4 51-52.)

Florida Division of Securities when amended § 517.061 (19) went into effect (as well as when the Division proposed the 1979 amendment to the legislature), testified that the Division interpreted §517.061(19) solelv to require the payment of a fee after 36 months of exempt Florida sales. R4 91. There is no competent evidence in the record to rebut Mr. Snyderburn's testimony in this regard.

Birnholz' contention that the district and circuit courts' construction of § 517.061(19) was contrary to the weight of the evidence -- because it was not consistent with the position expressed by Geraldine Harrison in her letter to Birnholz' trial counsel -- is utterly absurd. Ms. Harrison, who, as explained supra, is not and never has been the "chief" of the Florida Division, did not testify in the proceedings, and the unverified positions expressed in her letter were never subjected to cross-examination. Her letter to Birnholz' lawyer was not authenticated, and because Rule 3E-100.004, Fla. Admin. Code (1985) indicates that it was in no way transmitted pursuant to any duty imposed by law, it was rank hearsay. See Univ. of North Florida v. Unemployment Appeals Comm'n, 445 So.2d 1062-63 (Fla. 1st DCA 1984). While Judge Ryskamp admitted the letter because it was a non-jury trial -- with the caveat that he would "give it what weight it is entitled to" (R4 34-35) -- Birnholz can hardly complain that the court refused to adopt the positions advanced in the letter.

The position of Birnholz and the Amicus Curiae, that the district and circuit courts' construction of amended § 517.061(19) is "precluded" by an agency rule to the contrary, is wrong on two counts.

First, contrary to what Birnholz and the Amicus Curiae assert, the Division did not promulgate a rule requiring renewal document filings pursuant to amended § 517.061(19). A review of the language of the rule upon which Birnholz and the Amicus Curiae rely, Rule 3E-500.09, Fla. Admin. Code (1979), reveals that the rule did not even address the sub-section (b) 36-month renewal requirement.

In apparent recognition of this inescapable fact, Birnholz and the Amicus Curiae suggest that the requirement of renewal document filings should be inferred from the regulatory language. However, the Division has promulgated rules in parallel administrative contexts which expressly require the refiling of documents on a recurring basis. See, e.g., Rules 3E-600.001(1)(a) and 3E-600.015(2), Fla. Admin. Code (1985). And the sworn record testimony by the individual who headed the Division when Rule 3E-500.09 was promulgated -- that the Division did not interpret amended § 517.061(19) to require refiling of the State exemption documents -- should plainly take precedence over the implications drawn by State officials ten full years after the Rule was promulgated and four years after § 517.061(19) was repealed. See

P.W. Ventures v. Nichols, 533 So.2d 281 (Fla. 1988); Brennan v. General Telephone Co., 488 F.2d 157, 160 (5th Cir. 1973) (contemporaneous agency construction preferred).[14]

Second, even if the Division had promulgated a rule requiring document filings under amended § 517.061(19) (which it did not), the courts would still be free to arrive at their own construction of the statutory requirements. See G.E.J., etc. v. State, 401 So.2d 1325 (Fla. 1981) ("[w]hile administrative rules and usage may be considered in construing a statute, they are not conclusive or determinative"); Starr v. Karst, Inc., 92 So.2d 519, 520 (Fla. 1957) (agency construction of statute rejected notwithstanding legislative authorization for agency to make rules necessary to proper administration of statute). Cf. Florida Growers Coop. Transport v. Dep't. of Revenue, 273 So.2d 142, 144 (Fla. 1st DCA), cert. denied, 279 So.2d 33 (Fla. 1973); Board of Optometry v. Florida Medical Ass'n., 463 So.2d 1213, 1215 (Fla. 1st DCA), pet.

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[14]For example, Birnholz suggests that the requirement to re-file exemption documents with the Division after 36 months should be inferred from the language of Rule 3E-500.09, which prohibits "incorporation by reference to previous filings." As Mr. Snyderburn testified, however, this language refers to the new exemption filings necessitated by an issuer's filing of a new S.E.C. registration statement for a new issue of stock -- not by the passage of 36 months of sales under the same registration statement.

rev. denied, 475 So.2d 693 (Fla. 1985) (invalidating agency rules which added regulatory conditions not included in statute).[15]

In sum, the Florida legislature enacted § 517.061(19) in 1978 to abolish Division review of the Florida sales of S.E.C.-registered issuers. The language of the 1978 statute afforded an exemption to issuers -- upon a one-time document filing and fee payment with the Division -- which would remain in effect as long as they maintained the effectiveness of their registration statement with the S.E.C. In 1979, when the legislature amended § 517.061(19), it did so only to increase revenues. While it amended the statutory language to require renewal fee payments, it did **not** amend the statutory language pertaining to document filings. The Division has never promulgated a rule which states that renewal document filings are required under the amended exemption statute (which would be of doubtful validity given the statutory language and the legislative history), and the contemporaneous agency construction of amended § 517.061(19) was that such filings were **not** required.

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[15]The cases relied upon by the Amicus Curiae involve § 120.68, Fla. Stat. judicial proceedings reviewing final agency action. The desree of deference to be afforded to agency findings in such proceedings is far greater than is warranted here, where the issue of statutory construction arises in a litigation between private parties. And especially because the contemporaneous agency construction in this case is directly contrary to that advocated in the Amicus Curiae brief, the Amicus cases provide no support for Birnholz' position.

In the face of this overwhelming record, Birnholz' assertion that the district and circuit courts erred in failing to read a document refiling requirement into amended § 517.061(19)(b) must be rejected.

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THIRD ISSUE

ASSUMING THAT THE FUND'S COMPLIANCE WITH AMENDED § 517.061(19) WAS NOT SUFFICIENT TO AVOID LIABILITY UNDER § 517.211, DOES THE FUND'S STRICT COMPLIANCE WITH THE REQUIREMENTS OF THE ORIGINAL EXEMPTION STATUTE PRECLUDE LIABILITY IN THIS CASE?

1. The amended exemption statute's requirement for a recurring 36 month fee payment should not be retroactively applied to the Fund's sale of securities which were registered and exempted prior to the effective date of the amendment.

Birnholz has vigorously asserted that the 1979 amendment to § 517.061(19) was sufficiently substantive so that the failure "strictly" to comply negated its substantial compliance with the overall exemption statute's requirements. However, in recognition of the fact that the amendment is only applicable in this case if it is retroactively applied, Birnholz abruptly shifts gears in his analysis of the retroactivity issue, and he urges that the amendment was non-substantive.

Birnholz cannot have it both ways. The Fund urges that the amended § 517.061(19) requirement should not be retroactively applied in this case under any circumstances. However, if the 1979 amendment is sufficiently substantive so that untimely compliance can void a § 517.061(19) exemption, then retroactive application is especially inappropriate.

The Eleventh Circuit's conclusion that amended § 517.061(19) is subject to automatic retroactive application is inconsistent with Florida law for two independently sufficient reasons.

First, the Eleventh Circuit overlooked Florida law which provides that even a procedural law will not be retroactively applied in the face of a legislature expression to the contrary. 49 Fla. Jur.2d, Statutes, § 109. See also Foas v. Southeast Bank, 473 So.2d 1352, 1353-54 (Fla. 4th DCA 1985). And the legislative intent for a prospective application of amended § 517.061(19)(b) is manifest from the statutory language in this case.

Section 517.03(2), Fla. Stat. (1979), which was enacted simultaneously with amended § 517.061(19)(b), expressly provides for prospective application of the 1979 amendment to § 517.061(19):

> No provisions of this Chapter imposing liability shall apply to an act done, or omitted to be done, in conformity with the rule of the [Division] in existence at the time of the act or omission, even though such rule may thereafter be amended or repealed or determined by judicial or other authority to be invalid or any reason.

Mr. Snyderburn, who participated (as the Division's director) in the hearings which resulted in the enactment of the 1979 amendments to Chapter 517, testified that the idea of making the 1979 amendments retroactive was considered and expressly rejected. R4 89-90. Indeed, even Birnholz' expert opined that the 1979 amendments were not intended to be applied retroactively. R5 209.

In view of the intent, clearly expressed by the legislature, that the 1979 amendments to Chapter 517 should be prospectively applied, the Eleventh Circuit's retroactive application of amended § 517.061(19)(b) was contrary to Florida law.

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Second, the Eleventh Circuit overlooked the controlling principle of Florida statutory construction that statutes creating "a new obligation or duty" are applied prospectively in the absence of a clear legislative expression to the contrary. See Youns v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985); Larson v. Independent Life & Accident Ins. Co., 29 So.2d 448 (Fla. 1947); St. John's Village I. Ltd. v. Dep't of State, 497 So.2d 990 (Fla. 5th DCA 1986). It cannot be disputed that amended § 517.061(19)(b) imposed a new "obligation or duty" on those issuers -- like the Fund -- whose securities were already S.E.C.-registered and Division-exempted before September 1, 1979.

There is no precedent for the Eleventh Circuit's application of the "procedural" exception in its construction of amended § 517.061(19)(b). Every Florida case which has upheld retroactive application on the basis of the so-called procedural exception has involved a rule of judicial or quasi-judicial procedure. Indeed, the black letter definition of the word procedure, i.e., "[t]he mode of proceeding by which a legal right is enforced" supports the conclusion that it is only applicable in judicial and quasi-judicial contexts. Black's Law Dictionary, 5th Ed. (1979).

It is notable that in properly determining that amended § 517.061(19)(b) was not "remedial," the Eleventh Circuit recognized that the provision did not "prescribe the means employed in enforcing a right or redressing an injury." 880 F.2d at 339.

The Court's critical error was in failing to recognize that this finding equally precluded the application of the procedural exception. See Richardson v. Honda Motor Co., 686 F.Supp 303, 304 (M.D. Fla. 1988).

The Eleventh Circuit retroactively applied amended § 517.061(19)(b) -- not on the basis of precedent -- but on the basis of its determination that the requirement to pay a new fee had no effect on the substance of the exemption statute. 880 F.2d at 339. Whether the procedural exception should be extended in such fashion is open to question. However, there is no question that if this Court answers the certified question in the negative -- and determines that the § 517.061(19) issuer's failure timely to comply with amended subsection (b) would constitute a sufficiently substantive omission to invalidate that issuer's exemption -- this Court should similarly reverse the Eleventh Circuit's application of the procedural exception in construing amended § 517.061(19)(b).[18]

Birnholz' argument that the application of amended § 517.061(19)(b) in this case does not constitute retroactive application is flatly contrary to the record. The amended statute

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[18]Birnholz' argument that Rule 3E-500.09(5), Fla. Admin. Code (1979) (Pl.'s Ex. 16) supports application of the amended exemption against the Fund fails. Florida law permits retroactive application only when the lesislature -- not an agency -- so provides.

became effective on September 1, 1979. Def.'s Ex. "12." The Division received the Fund's exemp ion documents and its fee before September 1, 1979 (R4 49-50, 92-93), and the statute's plain terms state that S.E.C.-registered securities are exempt when the Division has "received" the exemption filing. As correctly found by both the district and circuit courts, the shares at issue in this case had been Fund-issued, S.E.C.-registered and Division-exempted prior to the effective date of amended § 517.061(19).

Birnholz relies on the October, 1979 "effective date" stated on the Fund's "notice of exemption" certificate to challenge this finding. However both sides' experts agreed that the § 517.061(19) exemption was self-executing upon filing, and that the Division's certificate was only a non-binding comfort letter -- unnecessary to the § 517.061(19) exemption. R4 92-96; R5 208-209. Indeed, notwithstanding the effective date stated on the Fund's certificate, the Division processed the Fund's exemption filing under the pre-September 1, 1979 law. R4 93-94; R5 228.

In the face of this record, this Court's holding in Gulf Pines Memorial Park v. Oaklawn Memorial Park, 361 So.2d 695 (Fla. 1978), controls. In Gulf Pines, this Court held that the additional requirements provided by an amendment to a licensing statute could not be imposed upon applicants whose license requests were received before the amendment's effective date. After noting that the statute there at bar required the agency to investigate the

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applicant's license request "upon receipt of the application," and that there was no language in the statute evidencing the legislature's intent for a retroactive application, this Court based its decision on the "well-established [rule] that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." 361 So.2d at 700, n.13. Gulf Pines' holding applies with special force here, where there is similarly no statutory language to indicate that a retroactive effect was intended, and the statute contemplates no further Division action after its receipt of the issuer's exemption filing.

Birnholz' attempt to draw a parallel between this case and Davidson v. City of Coral Gables, 119 So.2d 704 (Fla. 3d DCA 1960) fails for several reasons. First, in Davidson, unlike here, the issue was whether the legislature had the constitutional power to retroactively apply new statutory conditions -- not whether such application was intended as a matter of statutory construction. Moreover, here, unlike in Davidson, the Fund did not have an application "pending" which required further Division approval at the time the new statute went into effect. And, in any event, after this Court's decision in Gulf Pines, which precluded an agency from evaluating a license application under criteria first set out in a statute which post-dated its receipt of the application, Davidson's continued validity is doubtful.

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2. The one year termination date on the Fund's "notice of exemption" certificate did not limit the effectiveness and duration of the Fund's § 517.061(19), Fla. Stat. (1978 Supp.) exemption.

Birnholz has vigorously asserted that the Florida Securities Act must be afforded a hypertechnical strict construction, such that even the most trivial omission subjects the issuer to civil remedies. However, to refute the Fund's showing that it strictly complied with the exemption statute in effect when the Fund acquired exempt status, Birnholz urges that the statute should **not** be construed according to its terms.

§ 517.061(19), Fla. Stat. (1978 Supp.) exempted from State registration the following:

> (19) The sale of securities pursuant to a registration statement effective under the Securities Act of 1933, provided that the department has received, prior to the offer or sale:
>
> (a) A notice of intention to sell which has been executed by the issuer, any other person on whose behalf the offering is to be made, a dealer registered under this part, or any duly authorized agent of any such person, and which sets forth name and address of the applicant, the name and address of the issuer, and the title of the securities to be offered in this state;
>
> (b) A copy of the initial registration statement and prospectus filed with the Securities and Exchange Commission; and
>
> (c) Copies of such information or documents which the department may by rule require; and

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> the person filing a registration statement shall at the time of filing pay the department a nonreturnable fee of **0.1** percent of the aggregate sales price of the securities offered or to be offered in this state, but not less than $20 or more than **$750;** and there shall be filed with the registration statement or prospectus the irrevocable written consent as required by **s. 517.101.**

As such, pursuant to **§ 517.061(19),** Fla. Stat. **(1978** Supp.), S.E.C. registered issuers, like the Fund, seeking exemption from Florida registration, were required to file certain statutorily prescribed documents and to pay a fee to the Florida Division of Securities before selling securities in Florida. Apart from the initial filing with the Florida Division, however, **§ 517.061(19),** Fla. Stat. **(1978** Supp.), did not require the issuer ever again to renew its exemption with the Florida Division -- either by payment of money or by filing of documents. Instead, the initial exemption filing entitled the issuer to remain exempt from registration in Florida as long as it maintained its S.E.C. registration in full force and effect.

This interpretation of the **1978** exemption statute is simply not a matter of serious dispute. At the same time that **§ 517.061(19)** was first enacted, the legislature amended **§ 517.07,** Fla. Stat., which governed State registration requirements, to expressly provide that the effectiveness of an issuer's Florida registration was limited to one year. See Ch. **78-435, §** 2, Laws of Fla. (Def.'s Ex. **"11").** Had the legislature intended to impose

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a similar limitation upon the § 517.061(19) exemption, it would have similarly so provided.

Birnholz necessarily attempts to divert the focus away from the statute and onto the one-year certificates which the Division issued under the 1978 version of §517.061(19). However, Birnholz' argument that the issuance of these one-year certificates constituted agency action which effectively limited the duration and/or effectiveness of the Fund's exemption is specious.

Phillip Snyderburn (who co-authored § 517.061(19) and who headed the Division when the one-year certificates were issued) testified that these certificates were nothing more than a nonbinding comfort letter -- irrelevant to the effectiveness of an issuer's exemption and wholly unnecessary to its ability to sell its shares in Florida. R4 94-96. And Birnholz' own expert completely agreed:

> Q. Under the law as it was in effect prior to September 1, 1979, there was no renewal requirement or durational limitation upon the exemption conferred under § 517.061(19) and there was no need to pay an additional fee, correct?
>
> A. True.
>
> Q. And the certificates, such as [Pl.'s Ex. 5] which were issued by the Division ... that certificate was in no way a precondition to an issuer obtaining the exemption, correct?
>
> A. Correct.
>
> Q. This was an entirely self-executing exemption?
>
> A. Correct.

Q. And you would agree that nothing that the Division could set forth in a certificate could in any way limit the exemption that was provided under the law.

A. Correct.[17]

The non-rule and non-final nature of the agency action in question, i.e., the issuance by the Division of its one-year certificates, distinguishes this case from each case relied upon by Birnholz.[18]

First, the agency's failure to promulgate a rule purporting to limit the § 517.061(19), Fla. Stat. (1978 Supp.) exemption distinguishes this case from State Bd. of Educ. v. Nelson, 372 So.2d 114 (Fla. 1st DCA 1979). And it is settled that where an agency intends to adopt a policy of general applicability -- like

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[17]R5 208-209. The experts' testimony was consistent with the statute's clear terms, which provide that securities can be sold pursuant to the § 517.061(19) exemption once the Division "has received" the issuer's filing -- not when it issues "permits" for those sales. As Mr. Snyderburn explained, it was the very purpose of § 517.061(19)'s enactment to take away the Division's power and authority to regulate securities transactions which were already registered and reviewed by the S.E.C. R4 81-82. Consistent with this purpose, the Division recognized that once the issuer filed its exemption documents and paid its $750, no approval or any other blessing from the Florida Division was necessary or appropriate to trigger the § 517.061(19) exemption. R4 82-83. As such, Birnholz' characterization of the Fund's Notice of Exemption certificate (Pl.'s Ex. "5") as a "permit" prejudicially misrepresents the true nature of that document.

[18]Because the certificate was not "specifically identified as [a] rule, declaratory statement or final order ... [it could] ... not be considered final agency action." Rule 3E-100.04, Fla. Admin. Code (1979) (brackets added).

limiting the duration of the § 517.061(19), Fla. Stat. (1978 Supp.) exemption -- it can only do so by promulgating a rule pursuant to § 120.54, Fla. Stat. See McCarthy v. Dep't. of Insurance, 479 So.2d 135 (Fla. 2d DCA 1985); Gulfstream Park Racing Ass'n. v. Div. of Pari-Mutuel Wagering, 407 So.2d 263, 265 (Fla. 3d DCA 1981).[19]

Similarly, Birnholz misplaces his reliance on McDonald v. Dep't. of Banking, 346 So.2d 569, 581 (Fla. 1st DCA 1977), cert. denied, 368 So.2d 1370 (Fla. 1979), and its progeny for his proposition that a rule was not necessary. These cases merely stand for the proposition that the §§ 120.52(14) and 120.54, Fla. Stat. rulemaking requirements cannot be read to require agencies to promulgate rules to support their every action. At the same time, however, these cases expressly recognize that non-rule agency **"policy"** is only enforceable against a party where it has been defended in an adjudicative proceeding and is supported by record evidence which explicates the basis for that policy. See

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[19]Moreover, because Florida administrative agencies are powerless to take action -- by rule, adjudication, or otherwise -- which adds conditions not included in the statute, it is doubtful whether the Division could have validly promulgated a rule limiting the § 517.061(19) exemption to one year. See Florida Growers Coop. Transport v. Dep't. of Revenue, 273 So.2d 142, 144 (Fla. 1st DCA), cert. denied, 279 So.2d 33 (Fla. 1973); Board of Optometry v. Florida Medical Ass'n. 463 So.2d 1213 (Fla. 1st DCA) pet. rev. denied, 475 So.2d 693 (Fla. 1985). Indeed, even if such a rule had been adopted, that rule could not be found to be "carrying out the duties, obligations and powers conferred on [the Division]" as provided for under § 517.03, Fla. Stat. (1977). This is so because here, unlike in Nelson, the legislature had taken away the agency's authority to regulate the particular activity at issue.

§ 120.57, Fla. Stat. See also Florida Cities Water Co. v. Florida Public Service Comm'n, 384 So.2d 1280 (Fla. 1980) (striking down non-rule policy adopted without record basis and without a § 120.57 hearing). The absence of any 5120.57 hearing supporting the Division's alleged one-year limitation of the §517.061(19) (1978 Supp.) exemption makes Birnholz' "non-rule policy" cases wholly inapposite to this case.

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CONCLUSION

This Court should answer the certified question in the affirmative. The clerical omission to timely pay a **$750** fee by an issuer which at all times fully complied with all of the regulatory filing and disclosure requirements of the Florida Securities Act and **§ 517.061(19)** does not detract from the substance of the issuer's compliance and should not subject it to the civil remedies provisions applicable to the sale of unregistered securities.

Alternatively, this Court should apply the requirements of the exemption statute in effect when the Fund registered and exempted the securities at issue in this case. The Fund at all times strictly complied with the **1978** exemption statute.

Either way Birnholz should not be permitted to cash in on what was, at worst, an immaterial clerical oversight which had no impact upon him or upon the investor protection purposes of the securities laws.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6 day of October, **1989** to RICHARD A. WARREN, ESQ., Herbert A. Warren, P.A., Attorneys for Appellant, **1401** Brickell Avenue, Suite 801, Miami, Florida **33131** and to R. Michael Underwood, Esq., Deputy General Counsel, FLORIDA DEPARTMENT OF BANKING AND FINANCE, Office of the Comptroller, The Capitol, Suite **1302**, Tallahassee, Florida **32399-0350.**

By: _____
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