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Introduction

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INTRODUCTION

by

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Once a remote adjunct of corporate and business law, securities regulation has become not only an integral part, but a large and central part. This is the result of an unusually fruitful collocation of forces. Broad legislation has shown adaptability to new situations with only rare amendments. Courts have been willing to pursue the policy of investor protection into uncharted territory. (The Supreme Court has spoken seldom on securities matters, but almost always in broad policy terms, with horizon-expanding effects.) An able and aggressive administrative agency has been alert and adept in its multiple roles as investigator, enforcer, interpreter, rule-writer and decision-maker. A sophisticated and articulate securities bar has not only protected its clients but created new law in the courts and at the SEC. Its clients—the issuers, dealers, stock exchanges and trade associations—are both the subject of this body of law and contributors to the creative tension which helped to shape it. Generally increasing prosperity and broadened share ownership have extended its field of operations. Investors have played a role in giving form and import to the markets in which they place their money, often creating new problems with their changing preferences. Commentators from several of these groups and from the universities have helped mould the corpus juris by their efforts to synthesize, rationalize and criticize.

It would take a historian to portray the conflicts and power balances among these groups over the decades. But there is a fairly visible passage of the torch of leadership in the development of securities law. Beginning with Congress (or even farther back, with the President) in 1933, the impetus passed briefly to the FTC and then to the SEC. It moved considerably to private litigants and the courts in the later forties and fifties but back to the SEC in the early sixties at the time of the Special Study of the Securities Markets. Congress again took over with the 1964 Securities Act Amendments, and the SEC with their implementation. The trade groups have had a share of the initiative, especially in recent years.

The original policies of federal securities regulation are still going strong. Disclosure, though not as systematic as it might be, or as effective as some hoped, is still valid and valuable. Industry regulation, particularly self-regulation, is probably harder than ever, and

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the results largely good. Fraud prevention, which can never hope to be complete, has been reasonably effective and indeed—as fraud has tended to be regarded as mere unfairness—has come to affect daily business transactions which no one would have thought fraudulent a generation ago.

While the growth of securities law has been most conspicuous at the federal level, the states were first in the field and have continued to figure significantly in it, most recently by a trend toward harmonious legislation. This is the product of the Uniform Securities Act, itself a distillation of existing state laws and federal experience.

Ironically, one of the problems from which securities law has suffered is inadequate disclosure of the law itself. Statutes and rules applied far beyond their literal terms have not been amended to state their new or extended meanings. SEC and blue sky commissioners' positions have often gone unpublished (though less so in recent years) and therefore unknown to many of those concerned. Major instruments of disclosure in these areas have been treatises, law review articles, and institute speeches.

This symposium surveys some of these developments in their present stage. Its dimensions are historical and economic as well as legal and analytical.

Ex-Commissioner Sargent writes of the 1964 Amendments which required Exchange Act registration of thousands of publicly held companies. Incorporating experience with the first wave (1965) registrants, he gives a comprehensive guide for the company facing initial registration in the current second wave or in the future. He also introduces it to the jolting sequel of registration: proxy, insider trading and current reporting rules.

Insider trading is probed more deeply by Messrs. Lang and Katz who concentrate on fast-breaking developments in corporate reorganizations, reclassifications and conversions. They examine the degree to which the profit-recovery provisions are triggered by these transactions. Tracing the schism between flexible and rigid decisions, they argue for a more liberal approach by way of an SEC exemption rule, perhaps underestimating the possibility of abuse of inside information in transactions of this kind.

Julian Meer's article supplies a practical and historical perspective to the private offering, which is the most widely used exemption from registration for an offering of securities. His thorough treatment dramatizes the narrowing scope of this vital exemption and the consequently increasing risk in reliance on it. He closes with suggestions for revision.

Perhaps the most explosive development in modern securities law has been the widespread acceptance of implied liability in private actions under SEC Rule 10b-5. The jurisprudence consists mainly of decisions on whether a cause of action has been stated. The serious but largely unexplored problems of a later stage—the extent and character of available remedies—has excited much interest because of the *Texas Gulf Sulphur* case and is explored by Mr. McLane in his comment.

Although lawyers don't customarily think in these terms, securities markets are at least as much economic institutions as legal ones. The SEC *Special Study* helped remind us of this duality. Mr. Johnson deals with both aspects in his study of markets and related organizations. He examines the applicability of the anti-trust laws to such practices as minimum commission schedules and restrictions on off-board trading by stock exchange members. These restrictions have led to the "third market" where listed securities are traded by non-members. Mr. Schlesinger's comment focuses on this development at a different angle from Mr. Johnson's. Both write in areas where major change is expected.

Blue sky law is important for many reasons, including its operation where federal law disappears because of exemptions or non-use of the mails or interstate commerce. Even when they apply concurrently, state law may have advantages for an unhappy investor in its express or implied civil liabilities. Professor Wolens scouts this territory and finds a surprising variety of individuals who may be liable because of quite incidental connection with a transaction which, even though entirely honest, transgresses some technical requirement. Written as a guide for the shrewd, his article serves equally to expose traps for the careless.

State law is also the subject of the article by Messrs. Morris and Slover on Title 8 of the Uniform Commercial Code and issuers of corporate securities and their transfer agents. Though concerned primarily with Texas, which has just adopted the code, this survey has relevance in the many other states which have the UCC. And it closes the circle by exploring questions in the transfer of securities restricted by federal law because they are held by controlling persons or were issued in a private placement.

These articles display the combination of technical command and practical evaluation, of intellect and experience, of perspective and precision, which has characterized the best writing in the securities field. Gratitude is due the authors and the two sets of editors who have brought this project to completion.