

BOOK REVIEWS

SECURITIES REGULATION. By Louis Loss. Little, Brown and Company, Boston, 1951. Pp. viii, 1283. \$17.50.

Louis Loss, associate general counsel of the Securities and Exchange Commission, has written a formidable book. It is a comprehensive study of the administration of two statutes, the Securities Act of 1933¹ and the Securities Exchange Act of 1934.² But it is much more than that. In its sweep is not only an organized legal analysis of the regulation of securities, securities markets, and securities dealings and, to a great extent, of the securities business itself, but also a treatise "of administrative law in action in one important field." Felicitously combining exhaustive research with *ad hoc* administrative dissection, logic, tempered by agency experience, with a not unnatural SEC bias, historical perspective with the urge of recency, the book is encyclopedic in scope and analytical in method. Mr. Loss has made a significant contribution to this "large acre" of the law.

There is a certain nostalgia in the book, a remembrance of things only recently past. Whatever else it meant, to the lawyer, the New Deal was a renaissance. New laws, new legal concepts, new juridical approaches burgeoned. The law review editors, armed with their latest reversal of the United States Supreme Court, went to Washington to battle for the right, the truth, and the very uncommon man who had survived a world war and an economic debacle. A focal destination was the Securities and Exchange Commission.³

While Mr. Loss does not reach the organization of the Commission as such until the last chapter, one aspect of the book is a not completely uncritical survey of the agency, often called "an outstanding example of the independent commission at its best."⁴ This constitutes a laboratory approach to administrative law. Its deficiency in this field is that it does not encompass either intensively or extensively the work of the Commission; and this, in turn, is due to Mr. Loss' limitation of his subject. In at least one-half of its life by far the most engrossing work of the SEC

1. 48 Stat. 74 (1933), as amended 48 Stat. 905 (1934), 49 Stat. 557 (1935), 54 Stat. 857 (1940), 15 U.S.C. §77 *et seq.*

2. 48 Stat. 881 (1934), as amended, 49 Stat. 1375 (1936), 52 Stat. 1070 (1938), 58 Stat. 117 (1944), 15 U.S.C. §78 *et seq.*

3. The administration of the Securities Act of 1933 was vested in the Federal Trade Commission; and it was only in the accompanying statute, the Securities Exchange Act of 1934, that the administration was set up in this independent agency.

4. *Task Force Report on Regulatory Commissions Prepared for the Commission on Organization of the Executive Branch of the Government* 144 (1949). This accolade of a committee of the so-called Hoover Commission did not, to be sure, still criticisms of specific actions of the agency (*e.g., Id.* at 148-9; Loss, SECURITIES REGULATION 177, n.171). Mr. Loss' book appeared before the current Heller House of Representatives Sub-Committee investigation got underway—the first full-scope inquiry into the Commission's activities since its organization some eighteen years ago.

has been in connection with the administration of the Public Utility Holding Company Act of 1935.⁵ While Mr. Loss purports to cover certain aspects of this legislation, he does so only tangentially. There is no pretense of analyzing the cases arising under the Commission's paramount exercise of jurisdiction under Section 11⁶ of this statute and the all-pervasive impact of that section on the regulation of securities of holding companies and of their public utility subsidiaries.⁷

If the book does not constitute a definitive study of the Securities and Exchange Commission, it does more than trace the regulation of securities by the Commission alone. After several chapters which traverse, on the whole, well-traveled routes, passing English and American common law and statutory landmarks, Mr. Loss approaches the specific impetus for federal legislation at the beginning of the Roosevelt administration. Of the many regulatory approaches available, the disclosure

5. 49 Stat. 803 (1935), 15 U.S.C. § 79a. The other statutes which the Commission administers (in addition to the Securities Act and the Securities Exchange Act) are the Trust Indenture Act of 1939, 53 Stat. 1149 (1939), 15 U.S.C. § 77aaa *et seq.*; the Investment Company Act of 1940, 54 Stat. 789 (1940), 15 U.S.C. § 80a *et seq.*; the Investment Advisers Act of 1940, 54 Stat. 847 (1940), 15 U.S.C. § 80b *et seq.* The Commission also has "collaborative" functions under Chapter X of the Bankruptcy Act, 52 Stat. 883 (1938), 54 Stat. 709 (1940), 60 Stat. 331 (1946), 11 U.S.C. § 501 *et seq.*

6. This is the famous "death sentence" and corporate simplification section. It is the corner-stone of the Act. If Mr. Loss were writing this book as of October, 1961, instead of October, 1951, then the casual treatment of the Public Utility Holding Company Act might not in and of itself vitiate the book as a study in administrative law so far as the then current existence of this particular administrative tribunal would be concerned; for the Public Utility Holding Company Act, unlike the other statutes which the Commission administers, is largely self-liquidating. (A history and analysis of the administration of this most far-reaching, and, in its impact on solvent companies, most radical, piece of legislation which any New Deal agency was called upon to administer is still to be written. Perhaps the recently and tragically deceased Professor E. Merrick Dodd of Harvard would have been in a position to supply this need. See, *e.g.*, 56 HARV. L. REV. 780 (1942); 57 HARV. L. REV. 295 (1944); 58 HARV. L. REV. 604 (1945); 63 HARV. L. REV. 298 (1949). A provocative article in this Review unsettled some of the hard crust of thinking in this new field but stopped short where it might have gone forward. Blair-Smith and Helfenstein, *A Death Sentence or a New Lease on Life? A Survey of Corporate Adjustments under the Public Utility Holding Company Act*, 94 U. OF PA. L. REV. 148 (1946).

7. The peripheral treatment of the Commission's administration of the Public Utility Holding Company de-emphasizes vital administrative problems arising throughout the proceedings, from the calling of hearings before examiners [see, *e.g.*, current federal-state controversy involving *inter alia* Sections 2(c), 11(b), 11(c), 11(d), 11(e), 12(d), 18(f) of the Act and innumerable rules thereunder as well as provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 60 Stat. 993 (1946), 61 Stat. 37 (1947), 61 Stat. 201 (1947), 62 Stat. 99 (1948), 5 U.S.C. § 1001, in such recent cases as Public Utility District Number One, *etc. v. Securities and Exchange Commission*, No. 13243] 9th Cir., 1952 to judicial review of the agency's actions [see, *e.g.*, treatment of Section 11 reorganization plan review, which is not adequate, despite citation (at p. 91, n. 147) of Securities and Exchange Commission *v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949); *cf. Okin v. Securities and Exchange Commission*, 145 F.2d 206 (2d Cir. 1944), *remanded on other grounds*, 325 U.S. 840 (1945); *Lownsbury v. Securities and Exchange Commission*, 151 F.2d 217 (3d Cir. 1945), *cert. den.* 326 U.S. 782; *Blatchley v. Securities and Exchange Commission*, 157 F.2d 898 (1st Cir. 1946); *Goldfine v. Securities and Exchange Commission*, 157 F.2d 899 (1st Cir. 1946); *Leventritt v. Securities and Exchange Commission*, 178 F.2d 336 (2d Cir. 1949); *Gilbert v. Securities and Exchange Commission*, 146 F.2d 513 (7th Cir. 1944)].

philosophy prevailed.⁸ "Honest dealing in securities" was the President's phrase and is, in short, the abbreviated interpretation of the goal of the two statutes, which are primarily the subject of this book.

By and large the Securities Act is concerned with the initial distribution of securities to the public, through the mails or the channels of interstate commerce. Specific registration statement requirements are detailed. The statute provides for civil and criminal liabilities and also contains a far-reaching anti-fraud provision. The anti-fraud provision covers securities and transactions which are otherwise exempted by the statute.

The Securities Exchange Act of 1934 supplements the Securities Act. It is concerned mainly with post-distribution tradings. As Mr. Loss states, the Act has three basic purposes: "to afford a measure of disclosure to people who buy and sell securities; to regulate the securities markets; and to control the amount of the nation's credit which goes into those markets."⁹

Mr. Loss combines a functional approach with an analytical scrutiny of the various sections of both acts, which at times approximates only the C. C. H. or Prentice-Hall securities service but which at other times contains a sweeping and penetrating insight lacking in any such surveys. At this point it might be pertinent to observe that the text of this work, like the Wigmore to which Circuit Judge Jerome N. Frank, one-time Chairman of the Commission, somewhat hyperbolically compares it, is an uneven *collumant* of writing. It ranges, within the iron cast of a purportedly definitive work, from the most prosaic itemization (which often appears for its own sake and which sometimes looks like a concatenation of staff memoranda) to a coruscatingly brilliant exegesis. Its very weight reduces to a minimum any leavening process in thinking or presentation, and at times there is a slight confusion between the proliferation of footnotes and the citation of relevant authorities.¹⁰ But these must be considered as only slight denigrating fly specks on the general appreciation of the work.

In a short review it would be impossible to do justice to the detailed map, which Mr. Loss draws, with all the main arteries and byways (even bypaths) of this lay of the legal land. Perhaps the most interesting of the developments in his treatment is that of the special SEC fraud theories applicable mainly, although not exclusively, to corporate insiders. It is an evolving concept which is becoming increasingly known but which at

8. See SEN. REP. No. 47, at 6-7, H.R. REP. No. 85, at 1-2, 73rd Cong., 1st Sess. (1933), incorporating message of the President. Unlike the Securities Act and the Securities Exchange Act, the Public Utility Holding Company Act, on the other hand, is of an all-embracing regulatory type for an entire industry. To a lesser extent, also, the Investment Company Act goes beyond the disclosure technique of regulation.

9. P. 84.

10. In this respect the book must be contrasted with the much slimmer and less ambitious volume *Understanding the Securities Act and the S.E.C.*, by Edward T. McCormick, published in 1948, when Mr. McCormick was an Assistant Director of the Corporation Finance Division of the Commission. Mr. McCormick subsequently became a member of the Commission itself and is now head of the New York Curb Exchange. Mr. McCormick is not an attorney.

first may have seemed astonishing, if not shocking, to what Roscoe Pound has called "the lawyer taught the tough law."

One set of circumstances is as follows: Mr. A begins buying some stock of the B corporation. He becomes increasingly interested in such corporation and negotiates with the controlling stockholders of the B corporation to purchase their securities. At the same time he asks various brokers, requesting them not to reveal his name or his position or inevitable position in the new company and not disclosing his program with respect to the company, if he has any, to purchase, on the over-the-counter market, the securities of the B company at the best prices obtainable.¹¹ If in fact the change in control of the company affects the value of the stock (and it would be the atypical case when it would not) and if in fact A's silence is not vitiated by material facts known to the stockholders selling their securities, then

a. may A be enjoined, upon the instance of the SEC, in a district court, from continuing to purchase stock through the brokers and even be compelled to rescind the purchases made? and

b. may an individual stockholder who has sold his stock, sue, on his own behalf and also on behalf of stockholders similarly situated, for damages or rescission?

The answer in both instances is, yes.¹²

The statutory basis for recovery is the broadly-phrased Section 10(b) of the Securities Exchange Act.¹³ Under this section the

11. These are substantially the facts in the case of *Securities and Exchange Commission v. Cohen*, Civ. No. 5461, E.D. Pa. December 11, 1945, Litigation Release 311. Like in a number of these cases, no opinion was entered. The papers are of record and are available to attorneys. Mr. Loss' table of cases does not include the *Cohen* case, cited a number of times (see, e.g. at p. 823, n. 51; p. 827, n. 61) or other similar matters, available as tools for the practitioner (see, e.g., in the same district: *Securities and Exchange Commission v. Greenfield*, Civ. No. 5361, E.D. Pa., April 2, 1946, Litigation Release 302, 333). An expansion of the table of cases should be considered in any revision of the volume.

12. See LOSS, *SECURITIES REGULATION* 823 ff. Of course, when an individual security holder sues, specific damage must be demonstrated. Some of Mr. Loss' paragraph headings and section markings will indicate the scope, the problems, and the difficulties involved. Among these are: "who is an 'insider'?", "purchases by the issuer itself," "insiders' sales," "transactions on an exchange," "what must be disclosed," "duty of purchaser and his broker to investigate," "non-limitation . . . to the organized markets," etc.

13. This reads as follows:

"Sec.10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

The present reviewer could not but believe that the usefulness of this large and somewhat physically unwieldy tome would have been not inconsiderably enhanced by the inclusion in their entirety (in one place) of the Securities Act and the Securities Exchange Act, apposite portions of the other statutes administered by the SEC

Commission entered its equally broad Rule X-10B-5.¹⁴

This rule effected an expansion of the common law fraud concepts and closed a loop-hole in securities sale and purchase regulation that may not have been covered by the otherwise comprehensive Securities Act. But aside from the hoary constitutional-administrative law problem of sufficiency of the standard in the congressional delegation of authority,¹⁵ the problems and difficulties arising under the rule are considered with circumspection (at times Mr. Loss does not appear to go as far as the cases do) and sagacity. In his discussion Mr. Loss is aided by only one specific SEC report, and that almost to the year after the promulgation of the rule;¹⁶ but even in so short a time he has a plethora of judicial determinations or references, to consider, assay, distinguish, clarify, and fit into the flow and flux of the evolving regulatory jurisprudence. In this task Mr. Loss is at his best.¹⁷ He is excellent also in giving direction to this duty-expanding legal concept.¹⁸

and relevant examples of the rules and regulations of the Commission promulgated under the 1933 and 1934 acts. Obviously a full detailing of the rules (and forms) would not be feasible, but the fifty pages that the above would take would be well worth the space. Without the section printed *in extenso*, the Damocles sword of Mr. Loss' statutory interpretation often swings dangerously only in thin air. In this respect the commercial services are not so parsimonious. Mr. Loss, no master of brachylogy, could have condensed far more than the necessary pages to have included these matters.

14. Rule X-10B-5 reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

15. *Cf.* Panama Refining Co. v. Ryan, 293 U.S. 388 (1934).

16. Ward La France Truck Corp., 13 SEC 373 (1943). The report on the investigation was filed on May 20, 1943; Rule X-10B-5 became effective May 21, 1943 (Ex. Act Release No. 3230). An interesting account of this matter was included in an address of the late Edward H. Cashion, counsel to the Corporation Finance Division of the Commission, who helped nudge the law in cases arising under the rule, before the National Association of State Securities Commissioners at St. Louis, on December 13, 1944. See 1 P.H. Securities Regulation Par. 11,230.2. While the *La France* case is the only formal report of the Commission, the SEC has had occasion to consider the applicability of Rule X-10B-5 in a number of broker-dealer revocation cases. These are set forth in a number of places in the book under discussion (pp. 839 ff.).

17. This reviewer's only negative reaction was to the perhaps necessary dichotomy in the substantive treatment of the "fraud" concepts under Rule X-10B-5 (at 823-844) and the allegedly procedural problems (beginning at 1043). Such questions as the applicable statute of limitations present difficulties of presentation here as they do in so many legal situations. The separation in the discussion gives rise to what appears undue (albeit necessary) cross-referencing and restatement.

18. Most of the seminal cases under Rule X-10B-5 have arisen in the Third Circuit. *E.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (on motion to dismiss complaint), 73 F. Supp. 798 (E.D. Pa. 1947) (on the merits), 83 F. Supp. 613 (E.D. Pa. 1947) (on requests for additional findings); see excerpt in Loss, SECURITIES REGULATIONS 1047-49; also 46 MICH. L. REV. 680 (1948); Fry v.

The entire volume is invaluable as an expression of 20th century law in action. As such it must become part of the equipment of any well-rounded practitioner in this field, each of whom will thus become his own critic suggesting rearrangements, more logical expression, correction of the very few typographical inaccuracies, but not being able to add much to the basic and well-thought-out disquisition. New challenges should be met by the promised pocket supplements.

In addition, the book may be of assistance to the ever increasingly prolific fraternity of brokers, dealers, underwriters, investment advisers, and investors—at least, those with the mental acuity and desire to serve themselves, their clients and customers best in this regulated world. Occasionally lurid journalism to the contrary notwithstanding, the legal and administrative climate of our times is far different from that of the world the nineteenth century robber barons inhabited.

Then, too, Mr. Loss' book can supplement non-Langdellian courses in the post World War II law school. The book is in fact being used at least as an adjunct to the regular casebooks at Yale, where Mr. Loss was a lecturer, and at Harvard, where he will be.¹⁹ As such a text, the book has much to commend. To this end, it may be supposed Mr. Loss included excerpts from some ten decisions. On the whole, one may cavil at this miniscule effort, both with respect to the specific inclusions as well as to missing favorites. Frequently, too, the lengthy quotations, which in any event cannot substitute for recourse to the reports, constitute an intrusion into the text of the book.²⁰ The happy welding of "raw materials" with refined comment has not been effected. Nonetheless, the volume, allusive and theoretical, as well as specific and practical, should serve as a happy guide for the law professor exploring this no longer *terra incognita* with applying students.

In spite of an embroidery of sometimes factitious literary allusions and an assumed verbal sprightliness (and due often to it), Mr. Loss' heavy book is not always a work of art. Perhaps it was not intended to be. It is definitely, however, a substantial volume of thorough legal scholarship, clear and incisive thinking, and shared experience.

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Schumaker, 83 F. Supp. 476 (E.D. Pa. 1947); *Speed v. Transamerica Corp.*, 71 F. Supp. 457 (D. Del. 1947) (on motion for summary judgment), 99 F. Supp. 808 (D. Del. 1951) and 100 F. Supp. 461 (on the merits); *Rosenberg v. Globe Aircraft Corporation*, 80 F. Supp. 123 (E.D. Pa. 1948); *Slavin v. Germantown Fire Ins. Co.*, 174 F.2d 799 (3d Cir. 1949); see also 44 ILL. L. REV. 841 (1950); *Robinson v. Difford*, 92 F. Supp. 146 (E.D. Pa. 1950); see also 64 HARV. L. REV. 1018 (1951). Then, too, see cases arising in the third circuit determined without opinion: at n.10, *supra*. Also: *McManus v. Jessup & Moore Paper Co.*, Civ. No. 8015, E.D. Pa., July 30, 1948. As Mr. Loss points out (at 838, n.92), an excellent discussion of the rule is contained in a comment in 59 YALE L.J. 1120 (1950).

19. The Harvard Law School Record 1 (February 21, 1952).

20. Compare comment on omission of text of statutes at note 12, *supra*.

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