

1975

## Book Review: *Securities Regulation: Materials for a Basic Course* by David L. Ratnert

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### Recommended Citation

Thomas L. Hazen, *Book Review: Securities Regulation: Materials for a Basic Course by David L. Ratnert*, 54 Neb. L. Rev. 435 (1975)  
Available at: <https://digitalcommons.unl.edu/nlr/vol54/iss2/11>

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## Book Review

*Securities Regulation: Materials for a Basic Course*—by  
David L. Ratner†

*Reviewed by Thomas L. Hazen\**

It has been only twelve years since Professors Richard Jennings and Harold Marsh introduced the first comprehensive casebook devoted to the laws governing securities distributions and trading.<sup>1</sup> At that time, the general trend in legal education was to give "relatively cursory attention"<sup>2</sup> to the intricacies of this rapidly developing area of the law in the standard law school curriculum. Today any practitioner who operates within a business or financial milieu must be conversant with the restrictions and practices established under federal and state securities legislation. When a business enterprise, whether it be a corporation, partnership or unincorporated association, turns to outside sources in order to raise either initial or additional capital, the advising attorney must ensure that the financing arrangements do not run afoul of the registration and disclosure requirements of the Securities Act of 1933,<sup>3</sup> and the applicable state "blue sky" laws.<sup>4</sup> The ever increasing scope of the federal anti-fraud provisions of the Exchange Act<sup>5</sup> must also be kept in mind. A further, and perhaps more important, reason for the desirability of offering at least a survey course in this area is

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† St. Paul, Minn: West Publishing Co., 1975. Pp. 893 with Supplement, pp. 263.

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1. R. JENNINGS & H. MARSH, JR., *SECURITIES REGULATION: CASES AND MATERIALS* (1963).
2. Bennett, Book Review, 16 J. LEG. ED. 374 (1964).
3. 15 U.S.C. §§ 77a *et seq.* (1971).
4. See, e.g., NEB. REV. STAT. §§ 8-1101 *et seq.* (Reissue 1970); 7 UNIFORM LAWS ANNOTATED 691-795 (1970). See generally J. MOFSKY, *BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS* (1971); L. LOSS & E. COWETT, *BLUE SKY LAW* (1958). These laws encompass even relatively small-scale financing arrangements; for example, Section 402 (b) (9) of the Uniform Act, NEB. REV. STAT. § 8-1111(9) (Reissue 1970), renders the registration provisions applicable to any "securities" offered to more than ten persons. Cf. Uniform Act § 402(b) (8) and NEB. REV. STAT. § 8-1111(8) (Reissue 1970) which exempt certain business entities from the ten offeree limitation.
5. The most prominent provisions appear in section 10(b) and the SEC's Rule 10b-5. 15 U.S.C. § 78i(b) (1971); 17 C.F.R. § 240.10b-5 (1974).

the fact that the attorney's role in advising corporate and other business clients and his preparation of materials for the Securities and Exchange Commission and investors may well expose him or her to potential liability for any inaccuracies or other improprieties.<sup>6</sup> The current trends in securities regulation have provided the impetus for a new area of professional and ethical responsibility. Given the increasing concern with the ethical practices of our learned profession, this vastly expanding area deserves adequate attention in preparing the student for practice.<sup>7</sup>

In response to the factors enumerated above, institutions of legal education have adjusted their curricula by offering a choice of upper-level study over and beyond the traditional basic survey course of corporation law. These advanced courses give the student an in-depth exposure to the more technical areas of business planning,<sup>8</sup> corporate finance<sup>9</sup> and securities regulation. The Jennings and Marsh work was the only comprehensive case approach to the securities laws on the market<sup>10</sup> until the appearance of Professor Ratner's new book. His book has arrived during a period when

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6. See, e.g., *SEC v. National Student Marketing Corp.*, CCH FED. SEC. L. REP. ¶ 93, 820 (D.D.C. 1973); *Black & Co. v. Nova-Tech, Inc.*, 333 F. Supp. 468 (D. Ore. 1971); *Escott v. Barchris Constr. Co.*, 283 F. Supp. 643 (S.D.N.Y. 1968). Cf. SEC Rel. No. 4445, 27 Fed. Reg. 1251 (1962). See generally Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U.L. REV. 437 (1974); Cary, *Professional Responsibility in the Practice of Corporate Law—The Ethics of Bar Associations*, 29 RECORD 443 (1974); Goldberg, *Policing Responsibilities of the Securities Bar*, 17 N.Y.U.L. FORUM 221 (1973); Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes*, 34 OHIO ST. L.J. 231 (1973); Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring some Order out of Chaos*, 28 BUS. LAW. 915 (1973); Messer, *Rules and Reasonable Expectations of the Underwriter, Lawyer and Independent Securities Auditor in the Efficient Provision of Verified Information: "Truth in Securities" Reinforced*, 52 NEB. L. REV. 429, 446-58 (1973); Sonde, *The Responsibility of Professionals Under the Federal Securities Laws*, 68 NW. L. REV. 1 (1973); Small, *An Attorney's Responsibilities Under Federal and State Securities Laws*, 61 CALIF. L. REV. 1189 (1973); Recent Development, 87 HARV. L. REV. 1860 (1974).
  7. For example, the ABA House of Delegates recently amended Standard 302(a) (iii) of its Standards for Approval of Law Schools to require instruction "in the duties and responsibilities of the legal profession."
  8. See D. HERWITZ, *BUSINESS PLANNING: CASES AND MATERIALS* (1966).
  9. See V. BRUDNEY & M. CHIRELSTEIN, *CORPORATE FINANCE: CASES AND MATERIALS* (1972).
  10. But cf. W. CARY, *CORPORATIONS: CASES AND MATERIALS* (4th unabridged ed. 1969) (Supp. 1973) (Special Supp. 1973); H. BLOOMENTHAL, *SECURITIES LAW* (1966); L. LOSS, *SECURITIES REGULATION* (student ed. 1961) which is a condensation of his three volume treatise *SECURITIES REGULATION* (2d ed. 1961), supplemented in 1969 by three additional volumes.

changes in this area of the law are occurring as rapidly as at any time since the first congressional action forty-two years ago.

Homer Kripke welcomed the enlarged 1968 edition of the Jennings and Marsh book with the observation that "it is almost unbelievable how rapidly the subject . . . is still changing in some areas and how slowly in others."<sup>11</sup> Contemporaneously the Second Circuit in its landmark *Texas Gulf Sulphur* decision<sup>12</sup> set the stage for a marked expansion of the case law under Rule 10b-5 of the Exchange Act which regulates the activities of business organizations, their officers, directors and other *insiders* by prohibiting fraud, material misstatements and omissions in connection with sales and purchases of securities. In that same year the *Barchris* case<sup>13</sup> severely limited the "due diligence" defense and opened up the parameters of individual liability for omissions and misstatements in disclosing relevant information relating to the public offering of a security, as prescribed by the federal registration statement and prospectus requirements. Only one year later a prophetic study group created by the SEC published the "Wheat Report" which has since formed the basis for widespread changes in the coverage and application of the federal securities regulatory scheme.<sup>14</sup> By 1973 "the developments were everywhere: in disclosure, insider trading, investment company regulation and market regulation . . ."<sup>15</sup>

Specifically, recent judicial decisions have enlarged the coverage of Rule 10b-5 far beyond the once expansive guidelines set out in the *Texas Gulf Sulphur* opinion. In addition to expanding personal and corporate liability for misrepresentation or non-disclosure of material information as well as the trading of securities with *inside* knowledge, the courts have created a federal common law of fiduciary responsibility of officers and directors.<sup>16</sup> There have been sev-

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11. Kripke, Book Review, 67 MICH. L. REV. 1289 (1969).
  12. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).
  13. Escott v. Barchris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968).
  14. *Disclosure to Investors—A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts—The Wheat Report* (1969).
  15. Sommer, Book Review, 28 BUS. LAW. 1361 (1973).
  16. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (proof of a security seller's actual reliance on the purchaser's representations is not required in a nondisclosure situation); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (permitting a 10b-5 suit on behalf of the injured corporation for the defendants' taking of a corporate asset by fraudulently conveying securities held by the corporation); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974) (non-trading tipper of inside

eral other significant alterations in the scope of the Exchange Act; for example, with the passage in 1968 of the Williams Act,<sup>17</sup> Congress enlarged the subject matter of the Act to encompass the regulation of tender offers. This recent across-the-board revolution in the regulation of the securities markets has not, however, been limited to the Exchange Act as there have been numerous changes in the regulation of securities distributions under the 1933 Act.<sup>18</sup>

In the process of incorporating these and other developments into their materials, Jennings and Marsh have expanded their casebook to over fifteen hundred pages in addition to a three hundred and sixty page current supplement including selected cases and Commission releases.<sup>19</sup> Manifestly, the entire contents of the en-

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information concerning lower than anticipated earnings may be held liable to uninformed purchasers); *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973); *cert. denied*, 416 U.S. 960 (1974) (plaintiffs who were neither purchasers nor sellers of securities had standing to bring suit under 10b-5 claiming that the corporation in which they owned stock had been fraudulently induced to issue certain long-term debt instruments); *Financial Industrial Fund v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir. 1973) (corporation held liable to purchasers of its shares for its delay in reporting reduced earnings). See generally A. BROMBERG, *SECURITIES LAW FRAUD SEC RULE 10b-5* (1973); Allen, *The Disclosure Obligations of Publicly Held Corporations in the Absence of Insider Trading*, 25 MERCER L. REV. 479 (1974); Jacobs, *The Role of Securities Exchange Act Rule 10b-5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27 (1973); Cox, *Fraud is in the Eyes of the Beholder: Rule 10b-5's Application to Acts of Corporate Mismanagement*, 47 N.Y.U.L. REV. 674 (1972); Comment, *Damages to Uninformed Traders for Insider Trading on Impersonal Exchanges*, 74 COLUM. L. REV. 299 (1974); Comment, *The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases*, 86 HARV. L. REV. 1007 (1973).

17. Pub. L. No. 90-439, 82 Stat. 454-55 (Jul. 29, 1968). See also, Pub. L. No. 91-567, 84 Stat. 1497-99 (Dec. 22, 1970); 15 U.S.C. §§ 78m(d), 78m(e), 78n(d), 78n(e) (1971). These provisions were interpreted to allow for substantial recovery in private damage actions in the much discussed *Chris-Craft* decisions. *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), *on remand*, CCH FED. SEC. L. REP. ¶ 94,856 (S.D.N.Y. 1974); cf. *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970).
18. For example, there has been a continuation of the expansion of an individual's potential liability for failure to comply with the Act's registration and disclosure requirements. See *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), *on remand*, 318 F. Supp. 955 (S.D.N.Y. 1970); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971). In addition the Commission has adopted many of the proposals contained in the *Wheat Report*, *supra* note 14, with its promulgation of the series 140 rules. 17 C.F.R. § 230-140 *et seq.* (1974).
19. R. JENNINGS & H. MARSH JR., *SECURITIES REGULATION: CASES AND MATE-*

larged edition cannot be absorbed within the confines of the traditional three credit-hour one semester course. With this problem in mind Professor Ratner has eschewed presenting the materials in such a comprehensive manner insofar as

[t]he book is designed for a basic two or three hour course in Securities Regulation. It is intended to give prospective lawyers a feel for the concepts underlying the provisions of federal (and state) securities law that they can expect to encounter in a corporate or business practice.<sup>20</sup>

Professor Ratner has accomplished the book's stated purpose in a most admirable manner.

Ratner's basic course is limited to a study of selected provisions of the 1933 and Exchange Acts, thereby omitting materials relating to the regulation of investment companies under the Investment Company Act of 1940 and the Investment Advisors Act of 1940.<sup>21</sup> The book presents a well balanced, representative selection of the leading court decisions, SEC opinions and the Commission's Securities Act and Exchange Act interpretative releases. This should be of primary importance to the instructor since an integral portion of any course in this area includes an analysis of the interface between the legislative authority of the statutes, the Commission's administrative rule-making and enforcement powers, and the comparison of the SEC's adjudicatory activity and the role of the judiciary.

The author supplements the foregoing primary source material with timely excerpts from the writings of various commentators in the field as well as his own explanatory notes which embellish the principal cases and present thought-provoking questions for the student. The book also includes references to the American Law Institute's Proposed Federal Securities Code which can be used to help the student understand the current regulatory scheme by considering alternative approaches. In this respect it might prove even more meaningful to present the student with selected provisions of the state statutes as an additional point of comparison. Also, at the end of each section in Ratner's text there is a list of selected bibliographical references for the student who is interested in supplemental reading and a more in-depth treatment of the subject matter. It must be pointed out that the author's note materials are geared to the needs of the law student and may not provide the

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RIALS (3d ed. 1972) and (Supp. 1974). The book is also accompanied by a current statutory supplement which includes the 1933 Act, the Exchange Act, the Investment Company Act of 1940, the Investment Advisors Act of 1940 and the SEC rules adopted thereunder.

20. RATNER, *supra* at xi.

21. 15 U.S.C. §§ 80a-1 *et seq.*, 80b-1 *et seq.* (1971).

more detailed resources for the practitioner who is seeking to learn more about the area.<sup>22</sup> Professor Ratner employs another most helpful teaching tool by including diagrams to aid the student in conceptualizing the subject matter. For example, he depicts the operation of section five of the 1933 Act as it applies to the time prior to the filing of the registration statement—the “prefiling period”—, the “waiting period” from the filing of the registration statement until the date on which it becomes effective, and the “post-effective” period.<sup>23</sup> The only criticism in this regard is that similar charts and diagrams might be equally helpful in other sections as well.

In presenting his streamlined materials the author, within the confines of a basic survey course, gives more than adequate attention to the most important areas of the law, all of which are currently in a state of flux. The book is separated into five chapters beginning with a three hundred page section devoted to a study of the 1933 Act's regulation of initial public securities offerings by the issuer. This chapter encompasses the basic coverage of the Act, including the major exemptions, SEC enforcement, and the criminal and civil liabilities arising out of violations of the Act; also, there is a short section dealing with the registration and disclosure requirements of the state securities statutes and their relationship to each other and to the federal regulatory scheme. This portion of the text is to be used in conjunction with problems as well as a sample prospectus and underwriting agreements which are found in the accompanying supplement which also contains the relevant federal statutes and SEC rules. There are twelve problems relating to the first three chapters of the text which provide a helpful instructional tool given the overwhelming amount of statutory material and companion administrative rules and regulations which the student is expected to master. This problem-solving approach can be used for classroom discussion, as supplementary review materials for students, or as the basis for written assignments.

The second chapter, entitled “Regulation of Transactions by Persons Connected with an Issuer,” covers secondary distributions un-

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22. For example, SEC Commissioner Sommer observed that the Jennings and Marsh book provides “a tremendously helpful manual for the attorney who wants to learn more about the field (or one of its subfields) in some depth. . . .” Sommer, Book Review, 28 BUS. LAW. 1361 (1973). And, of course, most corporate practitioners are familiar with the voluminous explanatory material contained in W. CARY, CORPORATIONS: CASES AND MATERIALS (4th unabridged ed. 1969).

23. Ratner, *supra* at 45. For a casebook which employs diagrams and other visual aids to a greater degree, see, e.g., H. HENN, CORPORATIONS: CASES AND MATERIALS (1974).

der the 1933 Act, the liability of control persons for short-swing profits under section 16(b) of the Exchange Act,<sup>24</sup> and Rule 10b-5's restrictions against the trading of securities by individuals and corporations in possession of material inside information. Chapter Three is devoted to the "Regulation of Corporate Transactions" including the disclosure requirements imposed by Rule 10b-5 and the rule's expansion into the general area of corporate mismanagement as well as civil liability thereunder and the restrictions and rules governing corporate acquisitions and tender offers. The third chapter also contains a section relating to Rule 10b-5 as it applies to sales of controlling interests in corporations, sanctions against a corporation and *insiders* for the issuance of securities for inadequate consideration, and a comparison of the disclosure requirements and philosophies of the 1933 and Exchange Acts.

Tender offers are given additional consideration in the fourth chapter, which also treats market manipulation in connection with the distribution of securities, "hot issue" situations and a corporation's repurchases of its own shares. The fifth and final chapter is addressed to the "Regulation of the Securities Business" and is divided into four subsections: conflicts of interests of broker-dealers, the securities industry's obligation to "know the security", the duty of supervision and self regulation of exchanges including a discussion of the NASD.

The most significant and a very commendable attribute of the author's organization of the cases and other materials is his unified treatment of each type of transaction according to the business context in which it arises. He adopts this approach rather than separating the Commission's enforcement from private enforcement and the imposition of civil and criminal liability,<sup>25</sup> and rather than organizing the course according to the sections of the securities acts. This conceptual consistency would appear to be a boon to the student in synthesizing the basic concepts underlying the intricate technicalities which pervade this area of the law.

The overall utility of the book must be viewed within the context of the author's stated purpose<sup>26</sup> and will vary according to the curriculum of each law school. The continued expansion of the scope of the Exchange Act, and in particular Rule 10b-5, has led many instructors to emphasize that area in their basic corporations survey course, which may also include proxy regulation under

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24. 15 U.S.C. § 78p(b) (1971) requires a ten per cent owner to disgorge to the corporation all profits realized through his or her purchases and sales within a six month period of that corporation's securities.

25. Compare RATNER Chap. I with JENNINGS & MARSH Parts I and III, *supra* note 19.

26. See text accompanying note 20 *supra*.

section 14 as well as short-swing profits under section 16. Professor Ratner would therefore appear to be justified in not devoting a section of the book to the regulation of the proxy machinery *per se*. However, given the substantial attention that Rule 10b-5 may receive in today's basic corporations course, the author's comprehensive treatment of that area may be questioned, especially when compared with his overview approach to the 1933 Act. Within a curriculum offering the broader-based corporations survey course, students will be entering the upper-level advanced course in securities regulation with a working knowledge of a sizable portion of the materials covered in Professor Ratner's text. With this caveat in mind, the book presents a valuable alternative to the Jennings and Marsh work for use in a basic securities course.