Michigan Law Review

Volume 92 | Issue 6

1994

A Monument to a Regulatory System

Norman S. Poser
Brooklyn Law School

A MONUMENT TO A REGULATORY SYSTEM

*Norman S. Poser**

SECURITIES REGULATION. By *Louis Loss* and *Joel Seligman.* Boston: Little, Brown and Co. 1993. Eleven volumes. Pp. xxv, 5713. $1,295.

Professor Louis Loss[1] has been justly described as "the intellectual father of securities law."[2] He is also without doubt the foremost scholar in this increasingly complex field. His career spans virtually the entire era of federal securities regulation. Loss joined the Securities and Exchange Commission (SEC) as a staff attorney in 1937, only four years after the enactment of the first federal securities legislation, the Securities Act of 1933,[3] and only three years after the establishment of the SEC. Beginning in 1952, Loss taught at Harvard Law School until his retirement from active teaching a few years ago. Fortunately for us, he has not retired from active scholarship.

With the publication in 1951 of the first edition of his treatise on securities regulation, Loss created and defined the field as a separate area of the law, distinct from, although closely related to, corporate law. The subsequent history of Loss's treatise both parallels and reflects the explosive growth of the securities markets and, not entirely coincidentally, of securities regulation. The one-volume first edition was followed by a three-volume second edition in 1961 and then by a three-volume supplement to the second edition — probably the largest "pocket part" ever published — eight years later. During the 1970s, Loss took a break from treatise writing to serve as Reporter for the American Law Institute's Federal Securities Code, which not only codified the six major federal securities statutes[4] but also suggested solutions to many difficult and unresolved issues. Although never enacted into law, the Code has profoundly influenced judicial decisions and SEC rulemaking. In 1983 Loss published a marvelously concise

* Professor of Law, Brooklyn Law School. A.B. 1948, LL.B. 1958, Harvard. — Ed.

1. William Nelson Cromwell Professor of Law Emeritus, Harvard University.

2. Stephen Labaton, *For the Father of Securities Law, Yet Another Milestone,* N.Y. TIMES, Sept. 26, 1993, § 3, at 8.

3. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-aa (1988)).

4. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-aa (1988)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered subsections of 15 U.S.C. §§ 77-78 (1988)); Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 838 (codified as amended at 15 U.S.C. § 79 (1988)); Trust Indenture Act of 1939, ch. 411, 53 Stat. 1149 (codified as amended at 15 U.S.C. §§ 77aaa-bbbb (1988)); Investment Company Act of 1940, ch. 686, 54 Stat. 789 (codified as amended at 15 U.S.C. § 80a (1988)); Investment Advisers Act of 1940, ch. 686, 54 Stat. 847 (codified as amended at 15 U.S.C. § 80b (1988)).

and useful one-volume *Fundamentals of Securities Regulation,* which he updated in 1988.

Thus, while Loss has continued to shape and influence securities law using other avenues, twenty-five years have passed since the publication of the updated second edition of his first treatise. As a result, the third edition, written by Loss in collaboration with Professor Joel Seligman of the University of Michigan Law School, has been eagerly awaited. Publication of this eleven-volume treatise, begun in 1989, was completed in 1993. Seligman is a worthy collaborator. Thirty-six years younger than Loss, he obviously cannot claim an equally prolonged association with the field of securities regulation. Nevertheless, as the author of *The Transformation of Wall Street,*[5] the definitive history of the SEC, Seligman has experienced the SEC's long and interesting history vicariously. Both authors are superb scholars, and the new edition does not disappoint. It is an immeasurable contribution to the field and, what is unusual for a legal treatise, a joy to read.

The earlier editions of *Securities Regulation* and *Fundamentals of Securities Regulation* have profoundly influenced the law. Since 1969, no fewer than thirty-seven Supreme Court decisions[6] and countless decisions of the lower federal courts have cited these works. The third edition of *Securities Regulation* is bound to be at least equally influen-

5. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (1982).

6. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2091 (1993); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2789 (1991); Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2763, 2768, 2770, 2772-73 (1991); Pinter v. Dahl, 486 U.S. 622, 637-38, 641-47 (1988); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 251, 253 n.9 (1987); Randall v. Loftsgaarden, 478 U.S. 647, 656, 659, 661-62, 671 (1986); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 307 n.14 (1985); Schreiber v. Burlington N., Inc., 472 U.S. 1, 7 n.4 (1985); Landreth Timber Co. v. Landreth, 471 U.S. 681, 688 n.3, 692 n.6 (1985); Securities Indus. Assn. v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 207, 218 n.17 (1984); SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 744 n.14 (1984); Dirks v. SEC, 463 U.S. 646, 660 n.20 (1983); Herman & Maclean v. Huddleston, 459 U.S. 375, 381 n.10, 389 n.28 (1983); Aaron v. SEC, 446 U.S. 680, 696, 701, 712 n.3 (1980); Chiarella v. United States, 445 U.S. 222, 228 n.10 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); United States v. Naftalin, 441 U.S. 768, 771 n.2, 773, 775, 778 (1979); Burks v. Lasker, 441 U.S. 471, 476 (1979); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 567 n.21 (1979); SEC v. Sloan, 436 U.S. 103, 116 (1978); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476, 477 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 23 n.17 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 n.17, 210 n.29, 211, 214 (1976); Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 240 n.11, 241 n.12, 244 n.19, 255 & n.29 (1976); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 n.14, 866 n.4 (1975); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730, 732, 734 n.5, 738 n.9, 752 & n.75 (1975); Scherk v. Alberto-Culver Co., 417 U.S. 506, 514 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 128 n.9 (1973); Sennott v. Rodman & Renshaw, 414 U.S. 926, 929, 930 n.4 (1973); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 593 n.24, 611 n.11, 612 & nn.14 & 16 (1973); United States v. Byrum, 408 U.S. 125, 139 n.13 (1972); Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 425 (1972); Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972); Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 423 n.3, 438 n.12, 440 n.73 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 382 n.5, 384 n.6, 385 & n.7 (1970); SEC v. National Sec., Inc., 393 U.S. 453, 465 n.7, 470, 471 (1969).

tial. A personal reminiscence may illustrate one reason for the magnitude of Loss's influence on the law. I first met Loss in 1956 when, fortunately enough, I was a student in his Corporations course. My clearest recollection of the course today is of Loss reflecting aloud on the results of hypothetical lawsuits, some of which would not be brought — much less decided — until many years in the future. In particular, I recall his comments regarding insider trading, which he taught as part of Corporations. Under what circumstances, Loss asked, would a "tippee" — a term that Loss invented to denote a person who received a "tip" of nonpublic corporate information — be liable under SEC rule 10b-5,[7] the principal antifraud provision of the federal securities laws?[8] It was by no means clear back in 1956 that a corporate officer or director — let alone a tippee — could violate the securities laws by trading in the public securities markets while in possession of nonpublic information about his company.[9]

The following year, I took Professor Loss's course in securities regulation. My class notes, which I still have, give an indication of his extraordinary wisdom and prescience. Again, he was not content simply to teach the existing law; he insisted on discussing difficult issues of law whose resolution lay well in the future. Many of them have since been decided by the Supreme Court: When does a note fall within the definition of a "security"?[10] How should the sometimes competing goals of the securities laws and the antitrust laws be reconciled?[11] How broad is the definition of a "seller" under section 12 of the Securities Act of 1933,[12] which gives buyers a private right of action against sellers under some circumstances?[13] What is the relationship between the express civil liability provisions of the federal securities laws and civil liability implied by the courts under rule 10b-5?[14] Is the SEC permitted to suspend trading in a security without notice or hearing beyond the ten-day period expressly set forth in the statute, by tacking on additional ten-day suspensions?[15] What is the appropriate statute of limitations governing a civil action brought under rule 10b-5?[16]

In a similar fashion, Loss and Seligman's treatise concerns itself

7. 17 C.F.R. § 240.106-5 (1993).

8. The Supreme Court answered this question nearly 30 years later, in Dirks v. SEC, 463 U.S. 646 (1983).

9. The SEC's decision in *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961), was the first case to hold that insider trading in the public markets was a violation of rule 10b-5.

10. *See* Reves v. Ernst & Young, 110 S. Ct. 945 (1990).

11. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963).

12. Securities Act of 1933 § 12, 15 U.S.C. § 771 (1988).

13. *See* Pinter v. Dahl, 486 U.S. 622, 641-55 (1988).

14. *See* Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).

15. *See* SEC v. Sloan, 436 U.S. 103 (1978).

16. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780-81 (1991).

with many unresolved issues as well as with existing law. *Securities Regulation* views federal securities regulation not so much as a body of black-letter law but rather as an evolving set of principles and doctrines, informed by the past and peering questioningly into the future. Just as in Loss's Corporations and Securities Regulation classes, the treatise focuses on the uncertainties in the law and the issues that the cases have thus far left unresolved. The issue of whether scienter is required under rule 10b-5 provides an example. Loss and Seligman point out that although the Supreme Court held in the landmark decision of *Ernst & Ernst v. Hochfelder*[17] that scienter, or "intent to deceive, manipulate, or defraud,"[18] is a necessary element of a private action brought under rule 10b-5, "[t]he majority opinion in *Ernst & Ernst* is puzzling, and it leaves as many questions as it answers" (p. 3663). The authors then devote several pages to a provocative discussion of the questions that *Ernst & Ernst* failed to resolve, including the relationship between the meanings of the term *scienter* under the securities laws and under the common law tort of deceit and whether scienter includes reckless as well as intentional conduct (pp. 3663-77).

The complex and interesting history of federal securities regulation goes back to the common law of England and the United States and to English statutes of the nineteenth century, as well as to the efforts of state legislatures in the early twentieth century to regulate the securities markets in order to protect investors. *Securities Regulation,* like its earlier editions, helps the reader understand this history. During the New Deal era, this history led to the creation of a regulatory system that now consists of a highly complex apparatus with its own mystique and "common law." The very first paragraph of Chapter One sets the tone for what is to follow — and also gives a good idea of how well the treatise is written:

> The Securities Act of 1933 did not spring full grown from the brow of any New Deal Zeus. It followed a generation of state regulation and several centuries of legislation in England. Indeed, the problems at which modern securities regulation is directed are as old as the cupidity of sellers and the gullibility of buyers. [p. 3]

The next twenty-five pages trace the financial history of England and the United States that provided the impetus for securities legislation (pp. 3-28). A later subchapter, entitled "The Battle of the Philosophies," discusses the controversy between those who favored substantive or "merit" regulation of distributions of securities and those who favored relying principally on disclosing material facts to investors in order to ensure the honesty and efficiency of the securities markets (pp. 171-224). This controversy ended with the enactment of the Se-

17. 425 U.S. 185 (1976).

18. 425 U.S. at 193.

curities Act of 1933,[19] which gave a victory to the proponents of a disclosure system. Merit regulation, however, persists in several states, including California, which refuses to permit a distribution of securities unless the Commissioner of Corporations finds, among other things, that the proposed issuance of securities is "fair, just, and equitable" (p. 108).

The treatise's emphasis on the need to understand the historical background of regulatory decisions is by no means confined to its introductory chapter. The authors introduce every major topic with a discussion of its common law and statutory antecedents. For example, the subchapter on market manipulation opens with a description of a typical "pool" manipulation of the 1920s and proceeds to discuss the English and pre-SEC U.S. manipulation cases, beginning with the first English manipulation case in 1814 (pp. 3939-52). This interesting and important material provides a proper understanding of the legislative history of the prohibition of certain types of manipulative practices that is contained in section 9 of the 1934 Act, as well as an understanding of the prohibitions themselves.[20] The history of manipulation also bears on the meaning of "manipulative or deceptive device or contrivance" in section 10(b) of the Securities Act.[21]

The treatise also dissects and debates the public policy considerations that inform legislative, administrative, and judicial attempts to work out solutions to complex problems involving investor protection, competition, market efficiency, and the nation's economic well-being. The authors' great interest in the policy considerations underlying the securities laws manifests itself throughout the treatise. For example, the treatise's material on the establishment of a national market system for securities, an explicit goal of the 1975 Exchange Act amendments, includes a policy-oriented — and highly critical — discussion of the regulatory restraints that the SEC has placed upon competition between stock exchange specialists and over-the-counter market-makers (pp. 2591-602).

Furthermore, Loss and Seligman firmly ground their discussions of policy in the economic reality of markets. For example, the authors introduce the material on the Williams Act — the 1968 amendments to the 1934 Act regulating tender offers and related transactions — with a lengthy discussion of the tender-offer phenomenon and the ongoing policy debate between those who believe tender offers enhance the efficiency of American companies and those who regard tender

19. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-aa (1988)).

20. *See* Securities Exchange Act of 1934 § 9, 15 U.S.C. § 78a (1988).

21. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1988). *See* Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985) (interpreting similar language in the Williams Act, Pub. L. No. 90-439, 82 Stat. 454, 457 (1968) (codified as amended at 15 U.S.C. § 78n(e) (1988))).

offers as destructive instruments of greedy corporate raiders (pp. 2123-61).

Securities Regulation repeatedly — and justifiably — emphasizes the continuing relationship between federal securities regulation on the one hand and the common law and "Blue Sky" laws — state securities laws — on the other. Before they even begin to describe the federal securities laws, the authors devote over one hundred pages to tracing the history of the Blue Sky laws and analyzing their provisions (pp. 29-152). In this way, the reader becomes aware, not only that the enactment of the Blue Sky laws — beginning with a Kansas statute in 1911 — preceded federal securities regulation, but also that Congress based its decision to enact the securities laws during the 1930s in part on a perception that the then-existing pattern of state legislation inadequately regulated markets that had become national in scope. Furthermore, in connection with the discussion of almost every major topic covered by the treatise, the authors refer to the relationship between the federal securities laws and the common law.

The treatise's overall organization generally follows that of the earlier editions. In fact, many authors of casebooks and treatises on securities regulation have followed similar methods of organizing the materials that Loss first used in the 1951 first edition of his treatise.[22] Thus, Loss's organization of the subject has become familiar to more than a generation of law students. In broad outline, the treatise first covers federal regulation of the distribution of securities under the 1933 Act, including the registration process, as well as definitions and exemptions from registration (pp. 315-1589). The Trust Indenture Act of 1939 and the SEC's functions under the Bankruptcy Act — now greatly curtailed by the 1978 amendments to that statute — also are covered (pp. 1591-690). The authors then turn to the registration and postregistration provisions of the 1934 Act, including reports required of registered companies, proxy regulation, regulation of tender offers, and regulation of short-swing trading by corporate insiders (pp. 1729-2475). This material is followed by a chapter on regulation of the securities markets themselves, including a comprehensive description of the structure of the markets and covering such topics as securities exchanges, securities associations — the only one is the National Association of Securities Dealers — regulation of brokerage commission rates, and the clearing and settlement of securities transactions, and also by a chapter on the regulation of brokers, dealers, and investment advisers (pp. 2477-3401). An exhaustive treatment of the subjects of securities fraud and market manipulation follows (pp. 3403-4118). Finally, the treatise covers express and implied civil liability

22. *See, e.g.*, JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS (1991); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION: CASES AND MATERIALS (6th ed. 1987).

under the federal securities laws and civil and criminal actions by the government (pp. 4119-773). The final 660-page volume is entirely devoted to a Table of Contents, Appendixes, a Table of Cases, a Table of No-Action and Interpretative Letters, a Table of SEC Releases, and Tables of Statutory and Rule Citations.

The above brief summary, which describes only the principal topics that *Securities Regulation* covers, does not adequately portray the richness and comprehensiveness of the treatise. Furthermore, despite its traditional organization, *Securities Regulation* contains much that is new. A substantial portion of the third edition is concerned with areas of regulation that either have changed fundamentally since the publication of the 1969 supplement to the second edition or did not even exist at that time. The new materials include a detailed discussion of the SEC's efforts to establish a national market for securities pursuant to its authority under the Securities Acts Amendments of 1975 (pp. 2548-78); a description of the markets for derivative securities — that is, stock options and stock index options and futures — which began with the establishment of the Chicago Board Options Exchange in 1973, and of the regulation of these markets (pp. 2602-52); and a discussion of federal and state regulation of tender offers, which began with the enactment of the Williams Act in 1968 (pp. 2123-309). Furthermore, throughout the treatise the authors discuss the international aspects of securities regulation, which have assumed unprecedented importance during the past decade.[23]

The reader will find possibly the best example of Loss and Seligman's treatise-writing techniques in the 322-page subchapter on "Fraud by Issuers and 'Insiders'" (pp. 3448-770). Unbelievably, scarcely more than thirty years have elapsed since the SEC first held that trading in the public securities markets by a corporate insider who is in possession of material, nonpublic information constitutes securities fraud.[24] The law of insider trading has developed since that time, based almost entirely on a judicial and administrative gloss on the concise and very generally worded provisions of section 10(b) of the 1934 Act and SEC rule 10b-5. The authors summarize this extraordinary development: "[I]t is difficult to think of another instance in the entire *corpus juris* in which the interaction of the legislative, administrative rulemaking, and judicial processes has produced so much from so little" (p. 3485). Furthermore, the United States' proscription of insider trading has had a major influence elsewhere in the world: during the past few years every member state of the European Community (EC) has outlawed insider trading.[25] The premise seems

23. *See, e.g.*, pp. 743-806, 5016-52.

24. *See In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

25. The Council of Ministers of the European Community adopted an Insider Trading Directive (ITD) in November 1989, requiring every member state to adopt national legislation

to be that insider trading is inimical to mature securities markets. In fact, in one important respect the EC goes further than the United States: in order to reduce the opportunities for insider trading, the law requires publicly held companies in EC member states to disclose promptly and publicly developments that may affect investors' decisions.[26]

The treatise's treatment of insider trading, which is combined with coverage of regulation of fraudulent disclosures by issuers, exhibits all of the characteristics that make *Securities Regulation* a fascinating as well as useful work: discussion of the historical origins of the subject; concern with policy; analysis of the relevant statutory provisions, rules, and cases; examination of the relationship between the federal securities laws and the common law; and discussion of unresolved issues.

The portion of the treatise dealing with insider trading begins with a very full exposition of the legal and economic arguments that have been made for and against regulating this type of activity. It then describes how the common law treated insider trading, both before and after the enactment of the 1934 Act. Next, it launches into an in-depth discussion of SEC rule 10b-5, the principal antifraud provision of the federal securities laws. This material includes a fifty-five-page discussion of three key cases interpreting rule 10b-5 that have shaped the law of insider trading: the SEC's decision in *Cady, Roberts & Co.*[27] and the Supreme Court's decisions in *Chiarella v. United States*[28] and *Dirks v. SEC*[29] The treatise then covers the scienter requirement and the scope of rule 10b-5; rule 14e-3, which prohibits insider trading in connection with tender offers; and the sanctions that may be imposed for insider trading, including special sanctions imposed by legislation enacted in the 1980s (pp. 3448-770).

The subchapter ends with a discussion of the much-debated question of whether the statute should include a definition of insider trading. Although insider trading is a serious crime, the Exchange Act

outlawing insider trading by June 1, 1992. Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Dealing, art. 1, 1989 O.J. (L 334) 30, 32. *See* NORMAN S. POSER, INTERNATIONAL SECURITIES REGULATION § 4.1.2.2 (1991) [hereinafter POSER]. Every member state except Germany complied with the ITD by the required date. NORMAN S. POSER, INTERNATIONAL SECURITIES REGULATION § 4.2.2 (Supp. 1992). Germany enacted a law making insider trading a criminal offense in July of 1994. Ferdinand Protzman, *Germany Enacts a Ban On Trading by Insiders*, N.Y. TIMES, July 11, 1994, at C6.

26. POSER, *supra* note 25, § 4.1.2.2. The rules of the New York Stock Exchange and other U.S. self-regulatory organizations require prompt disclosure of material corporate information, unless an exception to the rule can be justified. Under federal securities laws, however, a company may remain silent or say "no comment." *Id.* § 4.1.2.2 n.75. *See* Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).

27. 40 S.E.C. 907 (1961).

28. 445 U.S. 222 (1980).

29. 463 U.S. 646 (1983).

nowhere defines it.[30] Congress amended the Act twice during the 1980s to increase the sanctions against insider trading, but it refused to succumb to pressure to define the offense, leaving this task to the courts. Loss and Seligman believe, however, that the time has come for a legislative definition:

> With full appreciation of the advantages of the common law's *ad hoc* approach, it still seems clear that the jurisprudence on trading while in possession of material nonpublic information has developed to the point where it cries out for the kind of philosophic consistency that only studied legislation can provide. [p. 3762]

My only reservation about the coverage and organization of the treatise concerns the relative sparseness of its treatment of the Investment Company Act of 1940,[31] a statute of ever increasing importance as investors shift from direct investment in securities to collective investment through mutual funds and other types of investment companies, as well as through other financial institutions, particularly pension and profit-sharing funds. In 1994, mutual funds — which the Investment Company Act regulates — with one trillion dollars in assets, have almost overtaken banks as both the principal repository of household wealth and the supplier of capital to small- and medium-sized businesses.[32] Commentators have suggested that, as direct investment by individuals decreases and the focus of regulation shifts to the intermediaries, including investment companies, "the need and demand for the more paternalistic forms of regulation become less as well."[33]

Nevertheless, *Securities Regulation* devotes surprisingly little attention to the Investment Company Act. The treatise briefly summarizes the provisions of the Act in Chapter One as part of its general overview of the federal securities laws (pp. 243-65), and several other parts of the treatise contain material on provisions of the Act in the context of particular regulatory issues. For example, Chapter Two covers regulation of the distribution of securities under the Investment Company Act, along with regulation of distributions under other "special statutes" (pp. 829-46), and Chapter Eleven covers civil liability under the Act (pp. 4447-53). One wishes, however, that the treatise had discussed the Investment Company Act in the same comprehensive and thorough way as it does the other major federal securities statutes.

The publication of these volumes inevitably raises the question of the practical usefulness of the traditional multivolume treatise, of which this — despite my one reservation — is such a superlative ex-

30. *See* 15 U.S.C. §§ 77-78 (1988).

31. 15 U.S.C. § 80a (1988).

32. *See* David Hale, *Experiment in Democracy*, FIN. TIMES (Eur. ed.), Feb. 4, 1994, at 16.

33. COX ET AL., *supra* note 22, at 1326.

ample. Three reasons lead me to raise this question. First, legislative, regulatory, and judicial changes today follow each other so rapidly that a treatise is threatened with obsolescence almost as soon as it is published. Annual supplements are of some help but are not a complete solution. This difficulty is particularly evident with an eleven-volume treatise, as the task of keeping it up to date may be as daunting and frustrating as the task of keeping the windows of the World Trade Center washed. The authors even had to update the treatise during the years that it took to publish it; in fact, supplements to earlier volumes were published before its completion. But supplements are not enough to save a treatise from almost instant obsolescence.

Second, no treatise, no matter how thorough and detailed, can serve as more than a starting point in researching any important issue in a legal field as massive and complex as securities regulation. Research on a particular issue is likely to require a review, not only of the relevant statutory provisions — and perhaps their legislative history — and caselaw, but also of SEC regulations, administrative decisions, releases, and no-action letters, as well as comparable state law materials.

Third, electronic research services, kept current almost on a real-time basis and immediately available via desktop computer, have largely supplanted traditional research methods and, it may be argued, have also made the treatise obsolete.

Such criticisms are valid, it appears to me, only if one takes an overly narrow view of the treatise form as simply a compendium of legal rules and doctrine. Certainly, the problem of galloping obsolescence cannot be avoided: parts of Loss and Seligman's great work already need supplementation. Certainly, anyone researching a particular securities regulation problem will want to go beyond the text of *Securities Regulation* — although the treatise serves as a wonderful starting point for almost any inquiry, as there are very few issues to which its authors have not applied their acuity. Moreover, electronic services such as LEXIS and Westlaw have a practical usefulness that no treatise can replicate — although there is no reason why the treatise and the sources it cites cannot be made available through electronic means.

However, this treatise is much more than a compendium of the law. Along with a meticulous and prodigious attention to detail, its 5700 pages provide something that cannot be obtained from an electronic research service or, in my opinion, from any of the other texts — although many of them are excellent — on securities regulation. That something is the authors' thoughtful and exhaustive probing of the many problems that interest both practitioners and scholars in the field. As suggested above, *Securities Regulation* possesses four salient characteristics: first, a strong sense of how the past is a prologue to the present; second, a deep interest in issues that remain to be decided in the future; third, a genuine concern for the fundamental policy and moral goals of the securities laws, the public interest, and the protection of investors; and, finally, a sense of the relationship between federal securities law on the one hand and state statutory and common law on the other.

Securities Regulation is a monumental work. Loss and Seligman's treatise stands alone, both in its comprehensiveness and in the depth of its scholarship and understanding. Moreover, *Securities Regulation* is pleasurable as well as instructive to read. Every practitioner and scholar in the field owes Professors Loss and Seligman a great debt of gratitude.