

Should the Federal Securities Act of 1933 be Modified?

Arguments Opposing

C O N

MISCONCEPTIONS about the Securities Act and its effects seem to abound. Like the passions aroused by some of our causes celebre in this country, the Securities Act is tending to divide its opponents and adherents into separate camps. Studied and colorless consideration of the nature of the Act and the character of its effects has, in the main, been lacking. Such intemperate attitudes to this most complex problem of the control of corporate financing are nothing short of a tragedy. And if the issue develops, as it now threatens to develop, into one of the public against the bankers, instead of that of a consideration of the best interests of the public—a concept which still includes the banking group—what legislation will evolve out of such an emotional tempest is certain to be both unwise and impractical.

This attitude that now threatens, is so different from that which prevailed as of the time of the birth and passage of the Securities Act. The President's message calling for federal security legislation and outlining the basic principles that should be embodied in such legislation has yet to find any critic. No opposition to the President's aims was voiced at the hearings on the bill, which were wholly devoid of any sensationalism. Some five weeks of what might properly be termed unremitting labor by a subcommittee of the House were spent in working over the details of the legislation before the bill emerged from committee. With one exception, its passage through the House as well as the passage of the companion bill through the Senate evoked no dramatic speeches, no threat of retaliation against a class. Those who had the opportunity to watch the progress of this bill at close range could not fail to be impressed with the earnestness, sincerity and competence of those members of the House and of the Senate who had the bill in charge. I cite these facts merely as illustrative of a Congress with its emotions unaroused but deeply conscious of the evils which unrestrained exploitation of our capital resources had brought into existence.

One other characteristic of the framing of the Securities Act deserves notice. It is customary for some critics to regard the Act as the product of a single session of Congress, to attribute its authorship to individuals, to think of it as new and hastily drawn legislation. Nothing is farther from the facts. The experience of many years and of many nations is epitomized in the provisions of the Securities Act. Many of its features, with variations suitable to the form of financing in this country and to the constitutional limitations upon federal power, have been drawn from the English Companies Act, which represents the culmination of almost a hundred years of struggling with this problem abroad. Since 1911 most of our forty-eight states have been developing forms of

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security legislation and much of the experience of these states has gone into the federal act. More specifically the work of the Capital Issues Committee during the War led to the introduction of a bill in Congress, known as the Taylor Bill, whose basic outlines are essentially similar to those of the Securities Act. Later the Denison bill, devised

primarily to make more effective state security regulation, actually passed the House but failed of action in the Senate. In other words, the Securities Act embodied little that was novel in conception, nor did it emanate from a Congress that for the first time had been called upon to consider the problem of security regulation.

I need spend little time in outlining the principal features of the Securities Act. Rather I shall assume a knowledge of its basic features and use my time in discussing a problem that seems to give the most concern. This is the problem of civil liability. What liability there exists for damages for violation of the Act comes as a result of the provisions embodied in Sections 11 and 12, but I intend to limit myself merely to a discussion of Section 11, the section that imposes liabilities consequent upon misstatements in a registration statement.

The suggestion has been made on occasion that civil liabilities arise also from a violation of Section 17, the first sub-section of which makes unlawful the circulation of falsehoods and untruths in connection with the sale of a security in interstate commerce or through the mails. But a reading of this section in the light of the entire Act leaves no doubt but that violations of its provisions give rise only to a liability to be restrained by injunctive action or, if wilfully done, to a liability to be punished criminally. That such a conclusion alone is justifiably to be drawn from its provisions is a matter upon which the Federal Trade Commission has already made a pronouncement, the authoritative quality of which I shall have occasion to consider later.

Turning now to Section 11,—the section from which liability arises as a result of misstatements in the registration statement—it is worth our while carefully to analyze its content from several angles: (1) the persons upon whom it imposes liability; (2) the standards of conduct that it insists these persons shall observe in order to be immune from liability; (3) the damages that flow from a violation of its provisions.

Broadly speaking, the persons upon whom liability may be imposed can be divided into five groups: (1) the issuer; (2) the directors of the company, whether or not they have signed the registration statement; (3) the chief officials of the company; (4) experts, such as accountants, engineers, appraisers, and any person whose profession gives authority to a statement made by him—a phrase

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