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Book Reviews: A Guide to Securities and Exchange Commission Rule 144

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would otherwise receive. These little hints are a few random gleanings of the many nuggets to be found in Mr. Avnet's book.

Many will also find its extensive source references, checklists, mortality, work career and discount tables and its Key to Interpretive Hospital Symbols (almost 18 pages of same) most useful.

The book is primarily a Hornbook-type presentation. This has its own merit since a work of this nature should be both broad in range of subject matter, interesting and reasonable in size (in this case 280 pages, including tables).

Which leads us to the final question: Does the book's value warrant its acquisition? For the young lawyer and for his older brothers whose exposure to negligence work is sporadic, the answer is yes. It is carefully written, easy to follow and well illustrated. It provides a capsulized do-it-yourself guide, and a guide is what was promised. Seasoned negligence practitioners may find it useful as a quick reference. It very likely will find a place in many a lawyer's library.

A GUIDE TO SECURITIES AND EXCHANGE COMMISSION RULE 144, 67 NW. U.L. REV. (SUPP. 1972). Pp. 152. \$15.00. Reviewed by Ronald M. Shapiro.*

The editors of the *Northwestern Law Review* have, in their own words, published a guide "to provide lawyers, brokers, control persons, and others with a single, easy to use volume of articles and reference materials that can be used to solve most problems involved in the resale of restricted and control securities under Securities and Exchange Commission Rule 144."¹ While their stated purpose may not be entirely achieved due to the rapidity of change in the so-called "lettered stock" area, the editors have nevertheless prepared a collection of materials that will serve as a solid background reference work and, in a number of instances, a practice aid.

The book is a collection of essays and appendices which evolved from a two day seminar on Rule 144 held at Northwestern University in early 1972. Certain of its contributions may be somewhat dated, but it does not appear that the book, as a sum of its parts, will accumulate bookshelf dust for several years.

The overall layout of the book is set within a thoughtful framework. After a brief preface, several articles review the historical stage on which the lettered stock Rule 144 entered. The succeeding articles then state and analyze some of the very technical and detailed components of the Rule and related SEC releases. The two year holding period, the

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1. *Preface* to *Nw. U.L. Rev. (Supp. 1972)*.

quantity limitation imposed on resale, the manner of resale of lettered stock and the availability of public information requirements are all carefully considered. Following the analysis of such requirements are articles that consider related practice matters including anti-fraud regulations, drafting problems, lettered stock implications for business combinations and a presentation of the SEC's approach to Rule 144.

The final section of the book, in contrast to the earlier academic and practitioner contributions, is either student written, collected or arranged. The student material may provide, especially to those occasionally involved in lettered stock problems, a source of very useful practice material. As one thumbs from the back of the book and its well organized reference index, to a 152 page appendix of the lettered stock and related SEC rules (Rule 144, 237, 145, and 153A), SEC Releases and Interpretations (SEC Release Nos. 5223, 5306, 5307, 5224, 5226, 5225, 5243, 5246, and 5316), and then to a substantial amount of important antecedent regulatory material, one can only be impressed with the thoroughness of this collection of primary material. This impression is reinforced by the relative currency of the material, which includes SEC action as recent as late 1972. In fact, as the editors note in their preface, "publication . . . was delayed several weeks . . . in order to keep the articles current with this rapidly developing area of the law."

Although the editors' goal of a current collection may be dampened by the bound nature of their book and the passage of time, the pragmatic character of their effort is nevertheless highlighted by their Rule 144 "Check List for Compliance" and their "Summary" of SEC no action and interpretive letters relating to lettered stock. The deceptive simplicity of check lists and summaries can mislead the uninitiated into improper action. Yet in fine SEC-disclaimer style, the editors warn against undue reliance on their material, and then proceed to set out comprehensive guides built upon a demonstrably thorough understanding of the SEC rules. These guides provide a quick reference source to key Rule provisions, as well as set forth the documents needed and the questions which must be asked in implementing a Rule 144 transaction.

In the first of the non-editor contributions, Professor David Ruder of Northwestern Law School discusses "Federal Restrictions on the Sale of Securities." The article provides an important reference into the basic regulation-registration-exemption scheme of the Securities Act of 1933. For those only vaguely familiar with the "going public" requirements, Professor Ruder not only provides a statutory guide to the registration provisions and related regulatory material, but also conveys the atmosphere of the steps involved in bringing a company public. His discussion of the perils of "gun jumping"—conveying public information about a company prior to filing or effectiveness of its registration statement—is especially illuminating. Professor Ruder does

admit to what may be the only failing of his contribution: while his explanation of the registration process might be lauded for its detail, his top-of-the-iceberg analysis of exemption problems is superficial. Perhaps this slight failing of his article is attributable to, as Professor Ruder notes, the fact that the exemptions involved "areas of interpretation which are changing dramatically and rapidly."

The next two articles, A. A. Sommer's "Considerations Leading to the Adoption of Rule 144" and Alan Applebaum's "Rule 144 'Overview'" are brief, but to the point. Mr. Sommer's piece explains the nebulous Securities Act concept of "statutory underwriter" and "distribution" and their relationship to securing a valid pre-Rule 144 private placement exemption. His analysis somewhat compensates for the deficiencies in the earlier Ruder article. After discussing what was more pre-Rule 144 lore rather than law respecting holding periods, Sommer explains the SEC's quest for objective holding periods and the manner in which Rule 144 seeks to resolve past ambiguities. In short, he states:

Rule 144 attempts to perform its function by defining two critical terms—"distribution" and "underwriting." It basically provides that any person who sells securities acquired from an issuer or controlling person otherwise than in a public offering, or any person who sells securities for the account of a controlling person, shall be deemed not to be engaged in a distribution (and therefore not an underwriter and therefore entitled to a section 4(1) exemption) if all the conditions of the Rule are met.²

A brief excerpt from the Applebaum article, when coupled with the quoted statement by Mr. Sommer, may provide a clear perspective on the objectives and techniques of Rule 144:

The conceptual whole of the Rule may be restated in one overly complex sentence: Sales of "letter" or "control" securities are not distributions, and the seller of letter securities and the control person's broker are accordingly not underwriters, thereby rendering the sales exempt, if adequate disclosure of the issuer's affairs has been made, if the volume and manner of sale are such as not to have an untoward effect on the trading market, and if the securities have been outstanding long enough to negate an inference of distribution by the issuer without compliance with the Securities Act's disclosure system. There is little, if anything, left to be desired in a trading-market disclosure system.³

2. 67 Nw. U.L. REV. 73 (Supp. 1972).

3. Id. at 77.

Mr. Applebaum's article then concludes with a brief summary of the key Rule 144 provisions and sets the stage for the more technical articles that follow.

While it is beyond the scope of this review to undertake an analysis of each of the highly technical provisions of the lettered stock Rule, it need only be said that the remaining articles, at least from the perspective of November, 1972, are a combination of probing analysis and clear presentation. Neal Flanagin, in "Rule 144 Holding Period," explains one of the major intricacies of the Rule: Rule 144 requires that a "person" for whose account "restricted securities" are sold must have "beneficially owned" those securities for at least two years. Further, after examining problems of pre-Rule 144 law holding period issues (also previously discussed by Sommer and Ruder), Flanagin then cites the key Rule 144 issues in this area. Making the determination of who is a "person," resolving the concomitant "attribution" issues, and ascertaining the meaning and implications of "beneficial ownership" are easier tasks with Mr. Flanagin's explanations as a guide. Mr. Flanagin, who has perhaps made the most substantial non-student contribution to the book both in terms of quality and quantity, then analyzes the problems of "tacking" involved in such contexts as convertible securities and pledges. The pragmatism of his piece culminates with a presentation on procedures for implementing a private placement transaction after the effectiveness of Rule 144 and for implementing the resale of restricted securities in accordance with the Rule. He further enhances this article by attaching exhibits comprised of forms of investment letters and restrictive legends which might be utilized in Rule 144 transactions.

Flanagin's article is followed by articles by Herbert Wander, Berton Reisman, Warren Grienberger, Donald Schwartz and Alan Levinson. Wander's article on the quantity limitations—the so-called one percent rule—effecting resales under Rule 144, and Reisman's analysis of the "manner of sale and availability of public information" do not attempt to analyze any difficult questions. They do, however, serve the purpose of presenting in clear form these basic rule requirements. Mr. Grienberger's article touches upon certain anti-fraud implications of Rule 144 practice and discusses the general information requirement under Rule 144: "Persons planning to sell shares under Rule 144 must file notice of the proposed sale with the SEC and with the principal national securities exchange on which the security to be sold is traded, using form 144."⁴ The bulk of Mr. Grienberger's article merely re-states the item-by-item requirements of form 144. He then concludes with very brief discussions of the requirement of a "bona fide intention to sell within a reasonable time" as well as the "important duty of the issuer to disclose resale restrictions".

4. *Id.* at 138.

Professor Donald Schwartz' article on "Business Combinations Under New SEC Rules" is up to the usual level of high scholarship consistently demonstrated by him. However, it is more of an historical analysis than a current contribution. In short, it was drafted from the perspective of the old SEC business combination Rule 133, prior to the adoption of the SEC's new position on mergers and other business combinations, *i.e.* Rule 145. Professor Schwartz' article is followed by a very brief piece by Alan B. Levinson, the Director of the SEC's Division of Corporation Finance, on the SEC approaches to Rule 144. This article must be viewed not only as too brief to be a significant contribution, but also as suffering from the same problem of passage of time that affects Professor Schwartz' contribution.

In summary, the editors of the Northwestern University Law Review and the contributors of the articles contained in the *Guide to Securities and Exchange Commission Rule 144*, published by the Review, have joined together to produce a scholarly and practical work on restricted securities—Rule 144. As of this writing, the volume is still worth its \$15.00 purchase price. One can easily conjecture, however, that the high quality of this effort would have been greatly enhanced had the volume been published in looseleaf form and been kept current as a lettered stock service in the years to come. Such a task, however, may be beyond the view of legitimate law review efforts and, at the very least, the volume in its present form is a substantial accomplishment and solid contribution.

Current Publications

LAW, LANGUAGE AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHODS. By: William R. Bishin and Christopher D. Stone. New York: The Foundation Press, Inc. 1972. Pp. 1284. \$18.50.

This casebook approaches the introduction to law from such varied and diverse disciplines as science, philosophy, literature, sociology, and psychology. This unique presentation makes the study of law seem relevant to all fields of human endeavor and should provide the new student of law with an exciting introduction to the legal profession. William Bishin and Christopher Stone are Professors of Law at UCLA.