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SEC Consequences of Corporate Acquisitions. Carl W. Schneider, ed.

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BOOK REVIEWS

SEC CONSEQUENCES OF CORPORATE ACQUISITIONS. (Carl W. Schneider ed.). New York: Practising Law Institute. 1971. xvi + 383 pages. \$50.00.

E. W. DANN STEVENS*

If it be assumed that new books in a particular area of the law are normally given to an expert in that field to review, we have departed from that norm in this case. We can establish some sort of rationale for such departure by pointing out that the book is a Practising Law Institute publication and the reviewer, as a general law practitioner, is a member of that Institute.

Published in 1971, the volume is an edited transcript of a P.L.I. program on "Tax and SEC Consequences of Corporate Acquisitions" given in New York City on May 20-22, 1970. This particular program represented an expansion of smaller P.L.I. workshops on the tax aspects of acquisitions presented on three occasions in New York City during 1969. Following the P.L.I. pattern of repeating a program in different areas, apparently selected to permit vacation opportunities to be combined with the pursuit of continuing education, the panel "tried out" in New Orleans in February of 1970 and in San Francisco in March of 1970, prior to the New York presentation in May.

While our local and state Bar Associations have traditionally done outstanding work in the continuing education field, it is P.L.I. that commands the national respect necessary to put together panels of experts in the more specialized fields. This volume on recent SEC developments is an excellent example of this national appeal as the panel of participants includes Philadelphia, Washington and Chicago attorneys to compliment the customary New York City contingent of attorneys and accountants.

This volume deals primarily with problems in acquisitions arising under securities laws, leaving those portions of the transcript dealing primarily with tax and accounting aspects of acquisitions to be dealt with in a companion P.L.I. volume, *Tax Aspects of Acquisitions*.

The credentials of the panel chairman and editor of this transcript, Carl W. Schneider, are, to say the least, impressive. His experience in SEC work includes not only private practice but,

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as a former advisor to the Division of Corporation Finance of the Securities and Exchange Commission and as Lecturer at the University of Pennsylvania Law School, he has experience on both sides of the street. The book's lengthy appendix (123 of the total 383 pages) includes a 1968 University of Pennsylvania Law Review article, a 1969 critique of the *Wheat Report* and two detailed comment letters on SEC releases, all by the active Mr. Schneider. His three co-panelists, Jeffrey D. Bauman, Herbert S. Wander and Martin D. Ginsburg are obviously equally expert in their fields, although the major burden of the presentation was retained by Chairman Schneider.

After the first helpful chapter covering terminology and a summary of the balance of the book, ten separate chapters follow, each dealing with a particular area of current concern in SEC acquisition lore. The volume is well footnoted with the notes appearing, conveniently, directly at the conclusion of each chapter.

Chapters 2, 3, 4 and 9, "Rule 133," "B Transactions and Certain 1933 Act Problems," "The Wheat Report" and "Securities Exchange Act of 1934, Section 16," are designed to review the current state of the principle legislation in the securities field and to identify problem areas arising under present and proposed regulations. The six remaining chapters deal with specific problems arising in acquisition situations and trends in litigation involving acquisitions.

Rule 133, which spells out the restriction on the resale of securities received by the controlling stockholders of the acquired corporation, provides more uncertainty and questions for the securities practitioner and fittingly is accorded the most thorough treatment. After tracing the history of the Rule, the panel effectively covers the 1% leakage formula and then addresses itself to five interpretive questions dealing with areas of particular uncertainty. In handling these questions, the panel is at its best and, if the practitioner is fortunate enough to find his problem related directly to one of these five, the book would immediately earn its keep.

In chapter 3, the breadth of the coverage shrinks as the problem areas are more clearly defined. In this chapter, the reviewer was particularly delighted to find a rather full development of the fungibility doctrine, which provided guidance on a current client question.

The *Wheat Report*, released in 1969, is, in the words of the author "a masterful job of critical and constructive self-appraisal by an administrative agency"¹ designed to eliminate uncertainty in the field. The panelists enthusiastically endorse the changes proposed by the Report and indicate questions now present in acquisitions that would be eliminated. As with any proposals for new regulations, new problems arise and some of these are forecast in dealing with acquisitions of both privately and publicly held target companies.

Panelist Wander leads the discussion of "Restrictive Legends, Registration Covenants and Freeing Restrictive Securities" covered in chapter 5, and in chapter 6, Mr. Bauman covers "Tender and Exchange Offers." Both chapters are accompanied by extensive and informative outlines reprinted in the appendix. Each man takes a very practical approach in viewing possible problems as seen through the eyes of counsel for both the acquiring and the acquired company. Although Mr. Bauman's topic may be somewhat less current in appeal due to the decline in the number of such offers resulting from recent market changes, his ability to organize his subject matter and his graphic outline of steps to be taken on behalf of a corporate client from the very moment it has reason to suspect it may be a candidate for a takeover attempt, made this chapter especially helpful.

The chapter on "Case Law Development" focuses on several main themes running through litigated cases in an effort to help the practitioner avoid challenges to business combinations and keep his client free from involvement in any acquisition litigation. Important areas of self-dealing, proxy statement preparation and directors' responsibilities are covered with a thorough review of recent cases and the important implications of these decisions.

Chapters 8, 9 and 11 are again shorter as they relate to more specific topics involving a greater degree of certainty than those previously discussed. The advice offered can be more exact,

1. P. 64.

such as when² and when not³ to seek prior discussions with the Commission's staff on difficult questions.

The timing of this publication might be considered less effective than the scheduling of the original panels as the acquisition boom appears to have subsided somewhat with the more unsettled economic and financial climate. It seems safe to predict, however, that general practitioners will be more and more apt to become involved in acquisition questions involving corporate clients or venturesome investors. Clearly the day of the entrepreneur with a "hot" idea and the need to raise equity money for development purposes is not gone. The impatience of the sophisticated investor with the recent performance of listed investment grade securities has enhanced the availability of capital for private investment opportunities. In spite of the regulatory efforts of the "Nixonomics," inflation continues to loom as a serious threat, causing investors to look for investments that show promise of protecting the dollar's buying power. Most client lists will include at least one candidate for possible acquisition by a giant conglomerate or even by a smaller publicly held corporation. Although the incidence of acquisition problems faced by the general practitioner will continue to remain low, it would seem highly desirable to increase the average law office's capability in the SEC field.

Probably second only to the field of patent law, this SEC involvement calls for retention of expert counsel. Granting the intention to turn to an expert, even the small office should develop a familiarity with the specialty sufficient at least to identify the need for assistance. If nothing else, this book clearly points out question areas and indicates fact situations that will lead to possible SEC problems. On the other hand, the securities law specialist who did not attend the panel presentation will benefit from the personal experiences and predictions of these experts.

Even assuming the actual number of corporate acquisitions has decreased, the flood of litigation involving such acquisitions has probably not crested. As the panelists point out, recent case law

2. "On the general subject of press releases, where there are different disclosure problems, [Mr. Schneider] feel[s] that it is appropriate to discuss problems with the Commission's staff." P. 177.

3. "[W]e rarely request a no-action letter for a client when the issue involves the sale of investment securities, a Rule 133 question or the determination of whether someone is an underwriter or controlling person." P. 244.

and new legislation has "opened the door to a vast amount of federal litigation involving acquisitions."⁴ The various types of cases that might be presented to the general practitioner are discussed and very practical advice is given to corporate counsel for a target company as well as for an acquiring company or its subsidiary. Hints on basic corporate structure, such as a charter or by-law provision for a staggered board of directors, are set forth as effective defensive tactics.

Although the book cannot hope to dispel the shroud of mystery that surrounds securities regulations, the reader may gain some solace from the realization that even with the experts, many areas remain in question without reliable guidelines in the law, regulations, case law, or even Commission attitudes. On this point, the panelists went to some lengths to point out the dangers of "practicing by ear" in this rapidly changing field. Always a dangerous temptation to the busy general practitioner, the possibility of unnecessarily asking the Commission or its staff for an opinion on a proposed client course of action, thereby running the risk of a snap negative answer with possible drastic results, is condemned. The need for involving counsel with practical experience in the securities field without resort to the Commission itself for guidance is suggested frequently by all the panelists.

Perhaps the most striking testimony to the uncertain state of the art in the SEC field is the anecdote involving a panel appearance of the chief counsel to the Division of Corporation Finance of the SEC who replied "I don't know" to the question "What is the status of the negotiated sales transaction today?" When further pressed by the question "You are the person in charge; why don't you know?" he answered "You asked me what it is today. I left Washington yesterday; I knew what it was then, but I'm not sure what it is today."⁵ Even assuming the answer was in jest, the story illustrates the extreme uncertainty in the field and the obvious need to keep up with new developments almost on a daily basis. The unique complexities of the field are sufficient to discourage all but the most persistent of scholars. Mr. Ginsburg himself explains that he is "a tax man who never did understand

4. P. 150.

5. P. 22.

SEC rules, which is why [he] got out of the SEC field years ago"⁶

It would be patently unfair to rate the book on its utility as a research tool. Obviously, even with the most careful editing and reorganization, clearly evident in this volume, the transcript of a panel discussion should not be compared with a text on the subject. It is rather, as intended, a refresher course for practitioners in the field, with considerable content for the novice, intermediate and expert. The length of the index is contributed to by the excellent paragraphing and sectioning which seem especially helpful when discussing such involved topics. Some spontaneity and humor have been retained, which add to the readability of the presentation. The following single sentence is an exception which points up the need to deal with the complexities as concisely as possible:

The Exchange Act specifically exempts from the disclosure requirements of Section 13(d) securities which are covered by a registration statement under the Securities Act (although the acquisition of securities through a registered exchange offer is subject to Section 14(d)—and thus to the same disclosure and filing requirements of Schedule 13D that would have existed had there been no exemption), acquisitions aggregating less than 2% of a specified class of securities within 12 months of the acquisition when the acquisition itself would otherwise have triggered the filing requirements of the statute, acquisitions exempted by the SEC as not having the effect of changing control of the issuer, and (except for Section 13(e), discussed herein) most repurchasers [*sic*] by an issuer of its own shares.⁷

In general, the sentence structure is excellent with an easy, natural flow which captures the flair of the panel presentation. This reviewer felt a glossary of familiar terminology would have been helpful as would a descriptive summary listing the various laws, regulations and rulings referred to during the discourse. These minor technical suggestions are not intended to detract in any way from the overall high value of the book. The coverage of the subject seems very complete and the effort to make it as current as possible was obvious and successful.

The book's excellent organization, generally readable style and coverage of predictable and some unpredictable problems rec-

6. P. 127.

7. P. 116 (footnote omitted).

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commend it to the partner in charge of the library as an important acquisition in the rapidly changing securities field. Particularly, in areas where existing law and Commission practice are in doubt, the practical suggestions of the expert panelists could be of great assistance in providing paths to skirt dangerous pitfalls for the less experienced.

