OHIO STATE LAW JOURNAL

Volume 13 | Autumn 1952 | Number 4

The Ohio Division Of Securities and the Ohio Securities Act.

BY JACK E. NIDA*

The Division of Securities is a subdivision of the Department of Commerce of the State of Ohio. The name is a misnomer as there are substantial duties assigned to this division in addition to the administration of the Ohio Securities Act. These additional and unrelated duties include administration of the Small Loan Act,[1] the Pawnbrokers Act,[2] and the Credit Union Act.[3] Of these laws, the demands made by the Small Loan Act are substantial. The division in turn receives substantial fees from the companies licensed.

A comprehensive picture of any governmental department is impossible unless all of the functions thereof are examined. The space allotted this article and the unrelated nature of these additional functions compel the limitation of our consideration to the administration of the Ohio Securities Act. In fairness to the division and the personnel thereof it should be said that the record of administration of these three additional laws has been a favorable one. It is complimentary to the adaptability of the personnel that four separate and distinct laws, involving entirely different businesses and problems have been well administered. This multiplicity of duties creates unusual and difficult administrative problems. The demands upon the time of the chief of division are thereby multiplied. The selection of an adequate person to fill this office is made more difficult in that the chief of division must be familiar with four complex laws and the business

*Attorney for, and Assistant Chief of Division of Securities of Ohio, 1929-1934; Past President of National Association of Securities Commissioners. Now associated with Merrill Lynch, Pierce, Fenner and Beane in Columbus.

1 OHIO GEN. CODE § 8624-50 *et seq.*

2 OHIO GEN. CODE § 6337 *et seq.*

3 OHIO GEN. CODE § 9676 *et seq.*

problems affecting four separate industries. This multiplicity of duties must be remembered as we consider the administration of only one of these laws.

It is the purpose of this article to examine the areas where actual and potential misunderstandings and difficulties may arise. These may be on the part of the public, the lawyers, dealers in securities, issuers of securities, or the division itself.

These areas of actual and potential misunderstanding or difficulty naturally fall into four categories:

1. Misunderstandings involving the function and purpose of the Act, and
2. Misunderstandings involving the theories upon which the Act is based.
3. Problems created by the law itself.
4. Administrative problems.

A brief examination of past operations of the division will serve to place this discussion in proper perspective. Historical references and citations used are not intended to be complete or exhaustive of the subject, but only for the purpose of illustrating the viewpoint and legislative intent of the period in question.

The history of the division and its predecessors falls into two distinct periods of time, dominated by the laws enacted during such periods. The years 1913 to 1929 marked the earlier period wherein the so-called "old law", the Ohio Blue Sky Law,[4] was operative. The "new law", the Ohio Securities Act,[5] fixed the pattern of operation from 1929 to the present date.

Ohio was among the earliest of states to enact a "Blue Sky Law". The earliest was the state of Kansas in 1911. There appears to be no record of any attempt to enact a similar law in Ohio prior to the Constitutional Convention of 1912. There is no doubt that the question was a live one in Ohio, for at least two proposals were made to that convention to provide some remedy for evils occasioned by fraudulent sales of securities of various kinds. These demands were recognized in the amendment to Section 2 of Article XIII of the constitution, effective January 1, 1913. This amendment provided ". . . Corporations may be classified and there may be conferred upon boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies of this state, as may be prescribed by Law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual." The legislature

---

[4] OHIO GEN. CODE § 6373-1 *et seq.* Repealed July 21, 1929.

[5] OHIO GEN. CODE § 8624-1 *et seq.* Effective July 21, 1929.

lost no time in enacting the first Ohio Blue Sky Law which became effective on August 8, 1913.[6] Similar laws, largely patterned after the original Kansas law, were enacted at about the same time in a number of states, most of them in the mid-west. All of these laws were of the general type now classified as "regulatory", and in general attempted to solve the problem by the creation of a commission or a commissioner with limited powers of discretion to disapprove the issuance and sale of fraudulent securities.

The Ohio Blue Sky Law designated the Superintendent of Banks as commissioner. Before any real progress could be made in placing the new law into effective operation, the new commissioner was faced with a very real question regarding his authority. On January 28, 1914 a United States district court in Michigan declared the newly enacted Michigan Blue Sky Law to be unconstitutional.[7] The impact of this decision is well illustrated by the special message that Governor Cox sent to the General Assembly on February 5, 1914, just eight days later. The following are significant quotations from that message: "There seems to be a well organized effort in this country to break down the so-called 'Blue Sky' laws which have been passed under the police powers of the States for the purpose of protecting investors against fraudulent enterprises. . . . The 'Blue Sky' law adopted in Ohio justified the principle suggested and vitalized by the Constitutional

6 103 OHIO LAWS 743.

7 Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173 (E. D. Mich. 1914). This was the leading case on the unconstitutionality of Blue Sky Laws. The Michigan law had been enacted in 1913 and was in many respects very similar to the Ohio Blue Sky Law. The opinion of the court in this case summarizes the most effective arguments against such legislation. While recognizing the validity of regulations affecting fraudulent transactions, the court holds the statute to exceed such limits; that the securities business is no more affected by a public interest than is the business of buying and selling groceries; and that the incidence of fraud in such business is not greater than in any ordinary business or professional occupation. Some features of the act were "not even within shadow of police power." These included provisions giving the commission the right to forbid sales of securities where it should find in all probability that such sale "would result in a loss to the purchaser," and likewise to forbid such sales "if the commission thinks the company's organization or proposed plan of business is not fair. Broader and vaguer language could not be chosen. It subjects to practically uncontrolled discretion of the commission every issue or general sale of stocks, bonds, or securities to be made in Michigan." Being beyond police power such provisions were violative of due process. A thirty day waiting period during which no sales could be made, and the regulation of notes and commercial paper maturing in more than nine months were held to be violative of due process and a burden on interstate commerce. The penalties for violation—up to five years in prison and up to $5,000 fine—were held to be excessive. The Michigan Blue Sky Law was subsequently amended and again held unconstitutional in Halsey & Co. v. Merrick, 228 Fed. 805 (E. D. Mich. 1915). This latter case was appealed to the Supreme Court and the amended law was held to be constitutional in Merrick v. Halsey & Co., 242 U. S. 568 (1917), being one of the "Blue Sky Cases" decided at that time.

Convention. . . . Notwithstanding the Michigan decision was rendered but a few days ago, the opinion has been duly digested, and a bill has been drawn through the combined counsel of the Attorney General, Commissioner of Insurance and Superintendent of Banks. It is my recommendation that the language be made less ambiguous, that the fees charged be sufficient to meet the cost of service, that the restrictions be so modified as to provide against constitutional infirmities, and that the Commissioner be given power, in proper instances, to grant temporary permits during the pendency of the applications, so that legitimate business may not be hampered." The law was amended the next day.[8]

In November of 1915 the constitutionality of the Ohio Blue Sky Law was attacked in a suit filed in the United States District Court of Southern Ohio by the Geiger-Jones Company of Canton, Ohio. Geiger-Jones Company was outstanding in the distribution of securities of newly organized corporations. Some of the companies so financed are prominent in Ohio industry to-day. Others were not so fortunate. This action, directed against the Superintendent of Banks and the Attorney General, among others, sought injunctive relief against the cancellation of the dealer's license previously granted. Companion cases raised the questions of regulating the sale of foreign securities, and supervising a salesman who lived in another state. On February 10, 1916, Judge Sater rendered his opinion holding the Ohio law unconstitutional on the following grounds: (a) The law violated the commerce clause of the United States Constitution, (b) It deprived persons of property without due process of law, (c) It delegated legislative and judicial powers in contravention of the Ohio Constitution and (d) Was not uniform in operation which likewise violated provisions of the Ohio Constitution.[9] This decision was appealed to the Supreme Court of the United States. On July 22, 1917 the Supreme Court reversed the decision of the lower court and held that the Ohio Blue Sky Law was constitutional. Companion cases,

[8] 104 OHIO LAWS 110. The first sixteen sections of the law were completely rewritten as was Section 24. The principal changes were to completely exempt all commercial paper and notes regardless of maturity, provide that temporary authority to sell could be granted during the application period, expanded the provision providing that an individual owner could sell securities he owned without violation of the act, and in the discretionary section (Section 6373-16) amended the term "unfair" to read "grossly unfair."

[9] Geiger-Jones Co. v. Turner, 230 Fed. 233 (S. D. Ohio 1916): Citing Alabama & N. O. Transp. Co. v Doyle, *supra*, note 7; Halsey & Co. v. Merrick, *supra*, note 7; Compton v. Allen, 216 Fed. 537 (S. D. Ia. 1914), which held the Iowa Blue Sky Law unconstitutional; Bracy v. Darst, 218 Fed. 482 (N. D. W. Va. 1914), which held the West Virginia law unconstitutional; and the unreported case of Sioux Falls Stockyards v. Caldwell, which related to the South Dakota law. The Sioux Falls case was subsequently appealed and became one of the Blue Sky Cases. 242 U. S. 559 (1917).

grouped under the heading of the Blue Sky Cases, upheld other state Blue Sky laws, including the amended Michigan law.[10] The Ohio case, *Hall v. Geiger-Jones*, 242 U. S. 539 (1917), continues as a benchmark in the history of such legislation.[11] On July 1, 1917 the first Commissioner of Securities was appointed and the administration of the law was assigned to a newly created Division of Securities. During the period of World War I there was little new financing, so the post war period following World War I was the first time the division was able to function to a real degree.

Prior to World War I there was little real public interest in securities. The widespread sale of Liberty Bonds and Victory Bonds during the war created a securities conscious public. The economic expansion during the 1920's created a faster tempo in the distribution of newly issued securities. Fraudulent securities and practices increased with the growing speculative interest on the part of the public. The Ohio Blue Sky Law was not geared to this increase in tempo. Some issues which received quick acceptance by-passed Ohio because of the delay incident to compliance with the law. There were objections that the desirable securities which were quickly sold were not offered in Ohio, and Ohio investors were offered the leavings. The absence of broad investigative powers hampered the division in dealing with fraudulent practices. These objections culminated in a demand that an entirely new Blue Sky Law be written. The initiative was taken by the Corporation Law Committee of the Ohio State Bar Association. Joined by committees which represented the securities industry in Ohio and the Better Business Bureaus, the drafting of a new Blue Sky Law was undertaken in 1928. As each draft was considered the results were widely circulated throughout the state. Seldom has any legislation received such widespread consideration in its drafting. In all, some six separate drafts were considered. The sixth and final draft was accompanied by a joint committee report which was submitted to the General Assembly along with the draft of the proposed new securities act. The circumstances surrounding the drafting of the law, the joint committee report and the consideration given these factors by the General Assembly are such that the report

[10] The Blue Sky Cases were Hall v. Geiger-Jones Co., 242 U. S. 539 (1917), Caldwell v. Sioux Falls Stock Yards, 242 U. S. 559 (1917), and Merrick v. N. W. Halsey & Co., 242 U. S. 568 (1917). The fourth branch of the syllabus of the Merrick v. Halsey case is significant: "The purpose of the Michigan statute is to protect investors in securities not from financial loss generally but from fraud."

[11] The Hall v. Geiger-Jones case, *supra*, note 10, in the seventh branch of the syllabus makes this interesting observation:

"Whether there is a constitutional liberty to buy securities on ones own judgment of value without governmental interposition to protect from bad bargains will not be determined at the suit of parties whose rights are involved only from the standpoint of sellers; but *quaere*: Whether the state power does not extend to such guardianship over buyers."

represents most compelling evidence of the "legislative intent" of the resulting legislation.[12] With only minor amendments which did not affect the form and purpose of the original draft submitted, the new Ohio Securities Act was enacted into law to become effective July 21, 1929.[13] Relatively few amendments have been made since that time, and the law as enacted in 1929 is the law in operation to-day.

It is interesting to note that this legislation, drafted during a period wherein certain excesses in securities markets were exerting full pressure, has operated with substantial success during periods of economic depression, recovery, World War II, and the Post-War economic turbulence. This performance is highly complimentary to those who drafted the law and to those who have administered it over a period of nearly a quarter of a century.

Although the Ohio Securities Act is still entitled to be classified as a "modern" Blue Sky Law, it is only natural that during a period of nearly twenty-five years some defects have developed. There is no demand that an entirely new law be enacted. Indeed there seem to be few new developments in such legislation which would warrant inclusion in a new law. The doctrine of "full disclosure," as represented in the Securities Act of 1933[14] is most worthy of such consideration when practical methods are developed to make such "full disclosure" truly effective in the hands of the purchaser of securities.[15]

---

[12] Report of Ohio State Bar Association Committee on Corporation Law, Committee on Blue Sky Law. Investment Bankers' Association Committee on Ohio Blue Sky Law. Better Business Bureaus Committee on Blue Sky Law. Sixth and Final Draft. Dated January 1, 1929. This report was published and distributed as a supplement to the OHIO BAR of January 15, 1929 (Vol I, No. 42).

[13] OHIO GEN. CODE §§ 8624-1 to 8624-48 inclusive. Subsequent references to sections of this Act will be referred to as Section 1, etc., the Section 8624 being omitted for brevity.

[14] Securities Act of 1933, 48 Stat. 74-92 (1933), 15 U. S. C. A. § 77a-7722 (1935) The theory of "full disclosure" is usually credited to the British Companies Acts (See 8 Edw. VII, c. 69 Secs. 80 and 81). Elements of full disclosure have been present in most of the regulatory type of Blue Sky Laws. Under these laws specified information was required to be filed with the administrating body of the act, but no provision was made for distributing this information to prospective investors. The Massachusetts law, based upon the "registration by notification" theory is an attempt to Americanize the English concept. These provisions requiring filing of specified information as a basis of exemption or exception to the law are found in the Ohio Securities Act where they are called "registration by description" — See Sections 5 to 8 inclusive of the Act.

[15] It is well recognized that the maximum effect of "full disclosure" under the Securities Act of 1933 has not been realized. In practice few investors have the opportunity to read the prospectus of a new issue of securities due to the time element. Even fewer investors take advantage of the opportunity to read the usually bulky prospectus. These facts are of concern to the Securities and Exchange Commission and efforts are being made to meet this problem within the scope of its rule making authority. Recapitulations of pertinent information are to be used in preliminary explorations for investor interest, to be supplemented

A considered re-examination of the Act should be undertaken by competent committees to the end that such changes be made as may be necessary to retain the Ohio Securities Act in the forefront of such legislation. It is highly desirable that adequate disclosure be made of the drafts prepared by such committees. The task is not one for hurried consideration.

It is not the purpose of this article to offer such a re-examination of the Act. Some of the more pressing questions will be discussed, however, with the hope that they will receive priority in treatment.

MISUNDERSTANDING OF THE FUNCTION, PURPOSE AND OBJECT OF THE ACT.

Perhaps the most universal and dangerous misunderstanding deals with the real function, objective, and purpose of the Ohio Securities Act. A cross-section of the investing public, dealers in securities, lawyers, and administrators of the Act were asked the question, "What, in your opinion, is the purpose and object of the Ohio Securities Act?" Almost universally the question was answered about as follows: "The Blue Sky Law is to protect the public." This appeared adequate to all classes named, but, like all generalities, may mean all things to all people. For example, is it the function of the law to protect the public from fraud and misrepresentation?—from foolish or unwise speculative investments?—from commitments with a very high risk factor?—from enterprises which appear to be uneconomic and susceptible of failure?—from loss in general? All agree that the function of these laws includes protection from fraud and misrepresentation. Beyond this sound ground there is a welter of confusion and no general agreement. All too frequently the real opinion held is "protection from loss."

It is not surprising that such confusion exists. The history of such legislation is replete with examples of laws intended to prevent fraudulent practices and instances of speculative excesses. Such laws follow events, they do not anticipate them. Events occur and the legislative body meets the situation with a statute. Beginning in 1720 the so-called "Bubble Act"[16] was enacted to prevent a recurrence of the South Sea Company failure and John Law's "Mississippi Bubble." The remedy in this case was to prevent the issuance of negotiable shares of

later by the full prospectus. This is a very practical step in the proper direction. Inasmuch as experience under these new regulations is not yet available, no conclusion can be reached regarding the effectiveness of this procedure. The important fact is the problem does exist and is recognized by the securities industry and the Securities Exchange Commission.

16 Act of Geo. I, c. 18. Repealed by Act of Geo. IV, c. 91 in 1825.

stock in the newly conceived form of business organization known as a corporation. Obviously this was not the cause of these debacles, and it was perhaps poor politics even then to place any blame on the so-called investors who themselves generated much of the speculative frenzy. Recurrent speculative orgies have reflected themselves in tulip bulbs, Florida real estate, whisky warehouse receipts, and cemetery lots, to cite only a few. Each has been met with legislative attempts to prevent reoccurrence. The "market crash" of 1929 was the direct cause of the enactment of the Securities Act of 1933 and the Securities and Exchange Act of 1934. The Blue Sky Laws, beginning with the Kansas Act in 1911, were the first American efforts in regulation prior to the occurrence of the event. These laws have approached the problem from various theories which are discussed in more detail later.

The earliest of the state Blue Sky Laws, including the Ohio Blue Sky Act, were enacted for the announced purpose of preventing and punishing fraud in the issuance and sale of securities. They were validated upon the same reasoning.[17] There has been a growing tendency to broaden the scope of administrative discretion until some have described the purpose of the "regulatory" type of law is to "pass upon the soundness" of issues cleared for sale.[18] Amendments to existing

[17] For fraud as the basis of validation see note 10 quoting from the syllabus of Merrick v. Halsey. Examination of the brief of the appellants in the Hall v. Geiger-Jones Co. case, *supra,* note 10, throws additional light upon the opinion. At p. 49 — "the Ohio 'Blue Sky Law' was amended to conform to the court's decision and opinion in the Michigan case (Alabama & N. O. Transp. Co. v. Doyle, note 7, *supra)* and we respectfully submit that the Ohio 'Blue Sky Law' now in force has for its sole object the prevention of fraud!! ***The Ohio law seeks to prevent the flotation of fraudulent securities only and does not in any manner, shape, or form prevent or hinder the sale of honest, valid, and safe securities. The Ohio law simply protects the unwary citizen against fraudulent misleading and in no wise 'Prevents the experienced investor from deliberately assisting the enterprise which he thinks gives sufficient promise of gain to off-set the risk of loss or which from motives of pride, sympathy or charity he is willing to aid notwithstanding a probability that his investment will prove unprofitable.' None of the results referred to in the Michigan case can follow under the Ohio law. Any person may subscribe for all the stock, common or preferred, of any corporation he wants to. There is nothing to prevent his so doing."

[18] See Wright, *Correlation of State Blue Sky Laws and the Federal Securities Acts,* 26 CORNELL L. Q. 256 (1941) at Page 262, where it states the purpose of state Blue Sky Laws is to determine the "soundness of securities." This illustrates the fallacy so frequently repeated in discussions of this type of legislation. What is a "sound" security? What may be a "sound" business man's risk for an experienced investor may be very undesirable for an inexperienced one. There are varying investment characteristics in all investments. No one investment includes all of these desirable characteristics. In general there are three basic characteristics. (1) safety of principal (2) satisfactory income, and (3) growth or speculative possibilities. These characteristics are mutually exclusive. For the maximum safety of principal you would buy United States Government savings bonds, but in so doing you will have to accept a lower interest return and no possibilities of growth. What do we mean

Blue Sky laws have frequently had for their purpose the expansion of the discretion granted administrators of the law. Administrative practice and interpretation have been effective in the same direction. Illustrative of this trend and thinking is the following statement made in an article discussing the history and analysis of the Wisconsin Securities Law:[19]

> "The substitution of tests of fairness, honesty, equitableness, public policy, and economic soundness, for the fraud test, is indicative of the change of concept of the purpose of security regulation. Whereas originally it was felt that the function of the state was to protect the public only against fraud, to-day it is thought that a legitimate function of the state is to protect the public against unsound business ventures and against unfair and inequitable practices which may not constitute actual fraud."

Such thinking is in keeping with the "planned economy" theories we have experienced during the past two decades. There is reason to believe that the courts would uphold legislation based upon such objectives and purposes unless we experience a trend away from the approval of broad grants of discretion to administrative personnel.[20]

---

by "safety"—safety of dollars or safety of purchasing power? These three basic characteristics correspond with the investment objectives of various investors. If our tax laws remain in substantially the form they are to-day it is quite probable that a younger person, wishing to create an estate, should look to growth securities as a "sound" investment. Such would not be the case for a widow. So it is that such generalities as "sound investments" do not stand the test of analysis. Nor is there any proven method whereby future developments may be predicted. In the early 1900's securities of interurban traction lines were considered as having substantial investment merit. Does "soundness" mean freedom from loss? If so the investment offering the highest safety factor, government bonds, would fail to qualify. Within a period of less than two years the longer term United States Treasury bonds have dropped in market price nearly ten points, or $100 per $1000 bond. It is not sufficient to "pass the buck" to an administrator of the law, no matter how competent and well trained he may be, and leave to him the task of determining "soundness." It is a different matter with fraud and misrepresentation. Such facts can be and are determined by adequate administration.

19 Marshall, *History and Analysis of the Wisconsin Securities Law,* [1942] WIS. L. REV. 540, 580.

20 See Rottschafer, *The Constitution and a "Planned Economy."* 38 MICH. L. REV. 1132 (1940) wherein there is an excellent discussion of shifts in public opinion occasioned by economic causes and the expansion of governmental power granted by decisions of courts broadening interpretation of such powers as interstate commerce. This article illustrates the fallacy of attempting to stop such grants of power through recourse to the courts. The proper approach is through the legislative bodies which have passed laws granting such expanded discretion. It would appear that more emphasis should be placed upon the "practical" aspect of such delegation of discretion and the probable results, rather than attempting to hold such laws to be unconstitutional.

A strange corollary to this grant of broad discretion is the almost complete absence of any questioning of the ability of human experience to cope with such problems and, equally strange, no standards or qualifications to insure adequate and able personnel to exercise this broad discretionary power. In fact, there does exist, hand in hand with such legislation, a reluctance to provide adequate compensation for good, sensible, honest, and sincere personnel. Certainly there is little incentive to attract personnel of extraordinary ability—in fact some laws would require superhuman ability. Blue Sky legislation is typical. Who is to impose the tests of "fairness, honesty, equitableness, public policy and economic soundness"—"unsound business ventures, . . . unfair and inequitable practices . . . "? Do you know of a person who has the ability to pre-determine economic success of business ventures? Have you ever heard of such a person? If one should exist is it within reason that the State of Ohio could entice him or her into the job of chief of division at a salary even double or triple the one now paid? Frankly such a person would not have to work. His fortune could be secured by knowing just which new venture to back.

Fortunately this problem should not concern us in Ohio. There is clear and convincing evidence that the "legislative intent" was that the Ohio Securities Act should be firmly based on the solid ground of prevention of fraud and misrepresentation in the sale of securities. The joint committee report[21] accompanying the sixth and final draft states:

> (page 6) "Neither this nor any other Blue Sky law nor any other device which government may provide will prevent the loss of money in unwise investments or in investments originally sound which fail through change of circumstances."
> (page 7) "Having in mind the general experience with Blue Sky Laws in many states, the committees strongly protest against the establishment of a censorship with authority to pass upon securities and to determine what our citizens may buy and what they may not buy. The object of the act should be limited to averting, forestalling, preventing and punishing *deception* in the sale of securities."
> (page 11—in conclusion) "Leaving out of consideration a survey of the more detailed administrative provisions, the proposed act aims to achieve the following results: It seeks to facilitate the transaction of honest, legitimate business; to protect investors against sales of securities wherein there is likelihood of deception either in the basis of issuance or in the manner of their sale; and to provide a clear, understandable, workable law with adequate revenue through fees to provide the means of its enforcement—a law under which the Division of Securities may operate with certainty, fairness and dispatch."

---

[21] See note 12, *supra.*

The title of the bill enacting the first Blue Sky Law in Ohio provided "To regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales."[22] The title to the bill enacting the Ohio Securities Act was "To revise the laws regulating the sale of securities and to repeal Sections 6373-1 to 6373-24, both inclusive, of the General Code."[23]

Insofar as the Ohio Securities Act is concerned, there appears to be little question regarding the function, purpose, and object of the Act. If there exists a general misunderstanding regarding these functions, a program of education would appear to be indicated.

Any future examination of the Act should consider the questions discussed. Of equal importance in such consideration is the very real problem of raising capital—particularly risk capital—for the continuance and enlargement of our capitalistic system.

There has been only one substantial deviation from the announced purposes of the Act insofar as amendment is concerned. The "regulatory" portion of the Act, as originally drawn, provided that certain securities and transactions in securities were made an exception to the rule that all securities should be *registered by qualification*[24] (the discretionary section of the Act) if certain information is filed with the division before the sale is made. These securities and transactions were designated as those *registered by description.*[25] No discretion was given to the division regarding these filings. Under Section 15 of the Act there was power to suspend and revoke such filings if it were subsequently found the facts did not come with the *registration by description* sections. In 1938 this Section 15 was repealed, and Section 16, previously relating only to suspension and revocation of *registration by qualification,* was amended to include *registrations by description* as well as *registration by qualification.*[26] The effect was to extend the discretionary power of the division, heretofore limited to *registrations by qualification,* to *registrations by description* by way of the back door. In other words, while one has the right to register by description certain securities and transactions by strict compliance with the terms specified in the Act, the division, through the expanded power to suspend and revoke where it may find the offering is on "grossly unfair terms,"[27] has in effect the power to amend the provisions of Sections 5 and 6 by ruling that certain practices and conditions constitute

22 103 OHIO LAWS 743.

23 113 OHIO LAWS 743.

24 Section 10 of the Act.

25 Sections 5 and 6, also Sections 7 and 8 of the Act.

26 117 OHIO LAWS 776.

27 The term "grossly unfair terms" is the source of discretion under the regulatory provisions of the Act. In the original Ohio law the term was "unfair," but was amended to read "grossly unfair" following the original Michigan decision. See note 8, *supra.*

"grossly unfair terms." This expanded power is not generally understood, and is confusing to lawyers and others who are under the impression that Sections 5 and 6 mean what they say. The division has, by informal rulings, included the following situations under the heading of "grossly unfair":

(a) An issue of preferred stock which makes no provision for voting rights in the event of default of a certain number of dividend payments.
(b) An issue of notes wherein there is not a reasonable ratio between the debt sought to be created and the existing equity represented by common stock.

The situations described in these informal rulings are unquestionably elements which affect the investment merit of the securities. There is no claim that fraud and misrepresentation is occasioned by such provisions or lack of them. The division is, by such rules, substituting its investment judgment for that of the purchaser in such instances. There is no question of the motives of the division, clearly these informal rulings are for the purpose of preventing the offering of securities which, in the judgment of the division, would be "unfair" to the purchaser. It should be added in all fairness to the present administration of the division, that the amendment in question and the rulings resulting therefrom are actions of previous administrations. The present administration appears to be following the precedent.

There was no general circulation of drafts of the proposals to amend the law in 1937-38.[28] These proposals were worked out in a small committee in which the then administration of the division played a very dominant part. Notes of such proceedings, if any, were not generally circulated. It is understood that the announced purpose of repealing Section 15, and amending Section 16 to include *registrations by description,* was to enable the division to suspend and revoke registrations by description of offerings which were inconsistent with the purpose of the Ohio Securities Act. In other words, the law relating to *registration by description* was such that filings were being made which were of a nature that should not be permitted, and the division sought the power to suspend and revoke them. Nothing was said, so I am informed, about the possibility of such amendment permitting the division to rule, in advance, that certain situations would be "grossly unfair," which would have the practical effect of permitting the division to amend provisions of Section 6 and 5 by interpretations of what constitutes "grossly unfair." This amendment, which in effect gives the power to the division to amend provisions of the Act by regulations and rulings, presents an interesting question

28 Drafts which resulted in the enactment of amendments contained in 117 OHIO LAWS 776.

of delegation of legislative power. In any event it appears clear that before such rulings could be maintained, the provisions of the Administrative Procedure Act[29] should be complied with.

Administrative rulings and interpretations should be consistent with the basic object and purpose of the Act, regardless of the high ideals and unquestioned motives which exert a natural tendency on those administering the Act to broaden the granted discretion to include those situations wherein injustice may appear even though fraud and misrepresentation is absent. In this connection it should be realized that the term "fraud" has a very broad meaning by definition. Section 2, subsection 10, of the Act defines fraud as follows:

> "Fraud," "fraudulent acts," "fraudulent practices," and "fraudulent transactions," wherever used in this act, shall mean and include anything now or hereafter recognized as such in courts of law or equity, and in addition thereto shall mean and include any device, scheme or artifice to defraud, or to obtain money or property by means of any false pretense, representation or promise; and any fictitious or pretended purchase or sale of securities; and any act, practice or transaction or course of business relating to the sale of securities which is fraudulent or which has operated or which would operate as a fraud upon the purchaser thereof.

It is clear that the division is not confined to the limited discretion granted by the Act, but is given a broad scope of operations under this expanded definition of fraud. This is consistent with the announced objectives and purposes of the Act.[30]

Misunderstandings Involving The Theories Upon Which The Law Is Based.

The Ohio Securities Act is not easily understood. It represents a combination of established theories for the regulation of the securities business, and the issuance and sale of securities. Brief mention of these various theories is made solely for the purpose of showing their respective effects on this Act. In general there are three basic approaches to the problem:

1. The Full Disclosure Laws.
2. The Fraud Laws.
3. The Regulatory Laws.

Some authorities have added Registration by Notification Laws and Dealer Licensing Laws.[31] Inasmuch as most of the regulatory type

29 Administrative Procedure Act Sec. 154-61 to 154-73 inclusive.

30 See note 21, *supra*.

laws include these features they will be considered under the heading of Regulatory Laws.

FULL DISCLOSURE LAWS require all pertinent information to be made available from which the investor may exercise his own investment judgment. Penalties, both civil and criminal, are provided for false information or the failure to disclose required facts. The Securities Act of 1933 is representative of this approach. No attempt is made to "pass upon" the investment merit of the offering.

FRAUD LAWS broaden the definition of fraud, provide stiff criminal penalties where fraud is discovered and, through injunctive powers, bring to an immediate halt any offering or procedure wherein fraud is found. The New York law, commonly known as the Martin Act, is the outstanding example of this theory.

REGULATORY LAWS seek to prevent fraud and deception before such offerings reach the public. Beginning with the assumption that all securities are subject to regulation, such laws create standards which securities must meet before being sold within the state. Limited discretion is given the administrator. The practical problem of "passing upon" all securities was evident in the earliest of such laws. Realizing that certain exceptions must be made to meet legal questions and physical limitations, these laws created certain exemptions from the operation of the laws. These exemptions were based upon the likelihood that fraud and deception would not ordinarily be associated with such sales. Examples of these exceptions are found in the old Ohio Blue Sky Law, Section 6373-2, and include: mortgage bonds and notes, other than corporate bonds where more than fifty percent of the entire issue is not included in a sale to one purchaser; securities of public utility companies under the regulation of a governmental body; bank and building and loan stocks or obligations; a bona fide owner selling his own stock for his own account; sales by one in a trust capacity; sales by banks where not more than two percent commission is charged by such banks; sales to dealers; sale by a pledgee of pledged securities; and Ohio corporations where the securities are sold for the sole account of the issuer without commission and at a total cost of not to exceed two percent plus five hundred dollars, and where securities are sold only for tangible property located in Ohio.[32] Also excepted

[31] See Wright, *Correlation of State Blue Sky Laws and the Federal Securities Acts*, 26 CORNELL L. Q. 256 (1941), where detailed analysis is made of the various types of laws. The author has considered Registration by Notification and Licensing of Dealers as separate headings.

[32] This last exemption, sales by an Ohio corporation for its own account, was the so-called "2-f" exemption whereby the preponderance of all newly organized corporations were permitted to sell securities upon the filing of information showing compliance with this provision. Note that the old law provided *exemption* from the law on compliance with this section. The section was carried into the new law as a Transaction Eligible for Registration by Description—Section 6 (1) of the Act.

from the Act under Section 6373-10 were: where current market quotations for a period of at least six months were available in market reports of a daily newspaper in Ohio; where sold in one transaction to a single buyer by a single seller and the amount involved was five thousand dollars or more; securities of going concerns, not in default, which had been issued prior to March 1, 1914; where information regarding the security is available in a standard securities manual; sales by members of a regularly organized and recognized stock exchange, provided the broker maintained an office within the state.

In most instances regulatory laws provide for the licensing of dealers in securities with broad powers of suspension and revocation of license for improper conduct.[33]

The next development in the regulatory law field was registration by notification. Following the Ponzi affair Massachusetts attempted to adapt the principles of "full disclosure" to an American Blue Sky Law. Provision was made for the filing of pertinent information with the administrator of the law, whereupon sales of securities could be made without approving action by the administrator. No provision was made for supplying such information to the investor; the fact that such was on file and open for public inspection was deemed sufficient. While registration by notification is not regulatory in nature, the more modern Blue Sky Laws adopted this procedure and incorporated the theory as a part of the regulatory system. Sections 5 to 8 inclusive of the Act illustrate this treatment.

In the thorough consideration given the drafting of the Ohio Securities Act the committees gave full consideration to the fraud law, registration by notification, and the regulatory laws enacted up until that time.[34] The doctrine of "full disclosure" did not come into popular consideration in America, except as represented by the Massachusetts law, until the Securities Act of 1933. The Ohio Securities Act therefore represents a combination of the theories of regulatory laws, registration by notification, and the fraud laws.

It is important to the understanding of the Act that these separate theories be identified.

The regulatory provisions are keyed to Section 10, requiring all securities to be registered by qualification. The exemptions from such regulation are set forth in Section 3, (exempt securities), and Section 4, (exempt transactions).

The registration by notification provisions are found in Sections 5 to 8, inclusive. Note the "full disclosure" background of these sections.

Licensing of dealers, common to both regulatory and fraud laws, is covered by Sections 17 to 22, inclusive.

The fraud law theory, which was emphasised by the joint

33 See Section 6373-6 for example of such authority.

committees, is found in the following sections:

Section 28 which gives the division very broad investigational powers.

Section 29 which gives the division broad powers to subpoena records.

Sections 30 and 31 provide for injunctions to be granted on request of the division.

Section 32 provides for the appointment of a receiver.

In general the regulatory portions of the Act govern the issuance and sale of securities while the fraud sections cover the conduct of parties to a securities transaction. When considering application of the Act to facts surrounding the issuance and sale of securities you assume that such securities must be registered by qualification—Section 10.[35] If your facts come within the provisions of the exemptions—Sections 3 and 4—you may proceed without further compliance with the regulatory features of the Act. You have the burden of proof of establishing your right to such exemption. The fraud sections are still applicable. Similarly, if you believe the facts permit the effective registration by description under either Sections 5 or 6 you may proceed to comply with those sections by appropriate filing. Note however that compliance with Section 5 and Section 3 does not permit the sale to be made by other than a licensed dealer. Consideration must also be given to the possibilities of subsequent transactions in such securities. This will be covered under the discussion of the Act.

Civil liability may also be created under the following sections:

> Section 35. Where an offering is made involving a written instrument containing false statements, the purchaser relying thereon may recover for loss or damage caused by such falsity. Under certain circumstances this liability attaches to directors of corporations where the corporation is liable.
>
> Section 36. An advisor, for gain, who advises the purchase of securities, without disclosing his interest therein is liable for the amount of damage incurred.
>
> Section 48a. Sales made in violation of the Act are voidable at the election of the purchaser under certain circumstances.

It is not the purpose of this article to discuss the application of the Act to various situations and facts which frequently occur. This

---

[34] See Joint Committee Report cited in note 12, *supra*.

[35] See last paragraph of Section 25 providing that the presumption is that Section 10 applies and that exceptions thereto must be established by the person claiming such exception. See also Catterlin v. State, 16 Ohio L. Abs. 410, wherein this shift of the burden of proof was sustained.

discussion of the theories upon which the Act is based is to suggest the proper approach which should be made in such determination.

PROBLEMS CREATED BY THE ACT

The paramount problem involving the Act is that of regulation of the secondary market in securities. It is customary to classify securities trades in the categories of listed trading, *i. e.*, on various stock exchanges, and unlisted, or over-the-counter trading, which includes all trades other than those on such stock exchanges. This classification is proper as there are different problems involved, the listed trading being usually on an auction market basis while the over-the-counter business is usually on a negotiated basis.[36]

There is another classification of securities transactions which is equally important and less generally understood. This classification is between the original distribution and the secondary market.

Original distribution covers the sale of newly issued securities to the investing public. Such issues include securities of newly organized corporations and additional issues of securities by established companies. This classification is frequently called the primary market, but the more accurate term is original distribution.

The secondary market covers all subsequent trading in such securities after they have been sold to the investing public. Trades between individuals, dealers and individuals, between dealers and institutional investors such as insurance companies, banks, trusts, pension funds, and other dealers, are covered by the secondary market. Trading on the various stock exchanges is also included.

The problems involved in each market are substantially different. Normally securities sold in the original distribution are sold by dealers acting as principals as distinguished from agents. Their profit is represented by the difference between the price paid the corporation and the price paid by the public. In most instances involving newly organized companies the investing public is unfamiliar with the issuer. The dealer must merchandise these securities to the public. By this means new capital or additional capital is supplied to our industry. When issues are underwritten by dealers the issuer is assured of the agreed amount of capital. The dealer assumes the risk involved in his ability to sell the securities at a profit. There are instances where the dealer over-estimates the investment demand or fails to properly price an issue. The result is a loss to the dealer. All of these functions of the distributing dealer, usually called an investment banker, are accepted as necessary and desirable in our economic system.

---

36 For discussion of these classifications see *The Over-the-Counter Securities Market* by John C. Loeser (1940) published by National Quotation Bureau.

The various Blue Sky Laws, including the Securities Act of 1933, are directed to the regulation of this original distribution market to keep it free from fraud and misrepresentation. This is true historically and in practice.

The secondary market presents entirely different problems. The issuer of the security is not involved, and does not receive the proceeds of the sale of its securities involved in such a transaction. Trading is between owners, the investment public. A substantial amount of the transactions are in securities which are listed on the various stock exchanges. These trades, and many others, are made on an agency basis, the dealer or broker charging a nominal commission for such services.[37] Relatively few securities have sufficient widespread investment interest to warrant a national market, or even a market involving a substantial geographical area. In order that dealers may function as agents, *i.e.,* brokers, there must be enough interested buyers and sellers to create a continuous market in such securities. Many issues of exceptional investment merit are not sufficiently available or are relatively unknown by investors. To provide a market for sellers and buyers there are dealers who "make a market" in certain such securities. This is also known as "position trading" wherein the dealer will maintain a bid for a limited number of shares and will offer a limited number of shares at a slightly higher price. When securities are offered to the dealer by an owner, the dealer may not have a ready buyer available. He buys the security at the bid price and "positions" or inventories the security until a buyer is found. The "spread" between the bid and asked sides of the market represents the margin of profit the dealer receives for this service. There is a market risk involved. If there is a market decline before the positioning dealer can find a buyer, he experiences an inventory loss, as he would be unable to sell at a higher price than the competitive market.[38] In such instances the dealer acts as a principal, not as an agent or broker. While not directly involved in raising capital for industry, the existence of a good secondary market is an inducement for the purchase of a new issue of securities. Few securities would be sold if the buyers had to hold them indefinitely or find a buyer themselves. An individual owner-seller would not have the benefit of the broad competition afforded in the secondary market. Trading in government bonds is

---

37 The commissions fixed by the New York Stock Exchange set the standard by which other commmissions are judged. These commissions on the New York Stock Exchange average less than two per cent on the dollar amount involved. For example, a hundred shares of security selling at 20 may be traded for a commission of $20.00, one per cent of the dollar amount involved. The percentage is slightly higher where the price is under 20, and lower where the price is above 20.

38 For a full description of such operations see *The Over-the-Counter Securities Market,* note 36, *supra,* at page 40 *et seq.*

almost exclusively in this market. All trades on the various stock exchanges are included. Such investment favorites as bank and insurance stocks are primarily traded in this market. This brief description attempts to give some idea of the scope of the secondary market.

Historically the Blue Sky Laws did not attempt to regulate the secondary market. The original West Virginia Blue Sky Law was held to be unconstitutional for the reason that it did not exempt sales of securities by bona fide owners.[39] The court said (page 490) "The sweeping effect of such a provision is at once apparent as it would substantially limit the brokerage business in the state and the purchase by its citizens of standard foreign securities, which would have to be sold by them outside of the state." The old Ohio Blue Sky Law which was upheld in the *Hall v. Geiger Jones Co.* case[40] did not attempt to cover the secondary market[41] except where there was a "pretended" secondary market transaction which in fact represented and original distribution. It was quite common for those attempting to circumvent the Blue Sky Laws to have all of the securities issued to one person, usually the promoter, who then claimed that he was selling the securities as a bona fide owner. The provision in Section 6373-2 (a) "when such disposal is not made in the course of repeated and successive transactions of a similar character" was to meet this situation.

It is clear that the intention of the drafters of the Ohio Securities Act was not to include the secondary market under the regulatory sections of the law, but rather that the fraud provisions should adequately meet the problem. The following quotation is from the joint committee report[42] page 9:

> It must be carefully borne in mind that the regulatory provisions of the proposed act go only to the basis of issuance of securities (except as to those which must be affirmatively approved) and that even though a security may be sold with no prior approval, its offering is nevertheless subject to the all-pervading provisions against deception.

Unfortunately the drafters used certain language which, when given usual and ordinary meaning, seems to include the secondary

---

39 Bracy v. Darst, 218 Fed. 482 (N.D. W.Va. 1914).

40 See note 10, *supra*, and text relating thereto.

41 See OHIO GEN. CODE §§ 6373-2 and 6373-10. Section 6373-2 (a) exempted the following:

"An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is the bona fide owner of the security, and disposes of his own property for his own account."

42 See note 12, *supra*.

market within the regulatory provisions of the Act.[43]

In Sections 3, 4, 5, and 6 the terms used are respectively: securities exempt from registration, transactions exempt from registration, securities eligible for registration by description, and transactions eligible for registration by description. The word "transaction" presupposes a trade between specified parties, with the clear implication that the relationship between these parties is the quality which exempts the transaction or makes it eligible for registration by description. The security involved in the transaction is not the important factor. Therefore, when this particular transaction is completed, the authority granted by the statute ceases. Future transactions in the same security, unless between the identical parties, must again clear through the Act. This is particularly important to the lawyers of the state as a very high percentage of all filings with the division are under the provisions of Section 6—transactions eligible for registration by description. The use of the word "transaction" by implication brings the entire secondary market within the regulatory provisions of the Act. The division has so interpreted the Act and as a result has been faced with many complex problems. The dealers in securities are likewise faced with potential civil and criminal liabilities for failure to comply with provisions which were not intended to be covered by the drafters of the Act. The division has recognized the difficulties faced by the dealers and has cooperated with them to solve some of the problems involved. An attempt was made to meet the question by amendment to the Act. Section 4, subsection 12, was enacted in 1938.[44] This subsection is complex and difficult to interpret by lawyers specializing in the securities field. Each dealer is faced with the daily problem of applying this section to a trade which must be accepted or rejected without delay. Frequently he must refuse to bid upon a security for "position" fearing that before he may legally sell the security in Ohio he may be faced with the almost impossible task of qualifying the security under Section 10. Without the cooperation of the issuer, who has no interest in the transaction, it would be practically impossible to obtain necessary facts to effect such qualification. The "transportation with one year" provision is unrealistic and impractical from the dealer's standpoint. He must accept the word of the seller for the facts, with no recourse if the information is incorrect. The fact that some person, including a dealer, has held a security for a year does not impart any quality to the security. In fact the contrary might well be inferred—that the holder has been unable to dispose of the security for over a year.

---

43 For further discussion of this problem see PROCEEDINGS OF THE SIXTEENTH ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF SECURITIES COMMISSIONERS. (1933) Report of the Committee on Laws, page 253.

44 117 OHIO LAWS 776.

The impact of this problem on the brokerage or agency portion of the business has not been so great. For all practical purposes straight brokerage transactions appear to be exempt. Section 3, subsection 4, exempts the securities which are listed on the New York Stock Exchange, New York Curb Exchange (now the American Stock Exchange), the Cincinnati Stock Exchange, and the Cleveland Stock Exchange. The Cleveland Stock Exchange is now a part of the Midwest Stock Exchange. With regard to brokerage transactions involving securities not listed on the approved stock exchanges, the exemption applying to "bona fide owners" and to other stock exchanges, Section 4, subsection 1, would apply in most instances. The subsection provides that a sale made "on behalf of a bona fide owner" comes within the exemption. The owner may not be the issuer or a dealer, however. Some confusion has arisen regarding that portion of this subsection which reads "and not being made in the course of repeated and successive transactions of a like or similar character." The historical background of this clause has been discussed *supra,* at page 18. When examined in this light, the clear intention of this clause is to cover the "pretended" secondary market transaction which is in fact an original distribution. The restriction applies to the principal, the owner of the security, and the fact a dealer executes several orders in the same security for different owners would not withdraw the exemption afforded by this subsection to the owners who make the later sales. The question of purchases by a customer through a broker has also arisen. The word "purchase" is not defined or specifically used in these sections. The definition of the word "sale" in Section 2, subsection 3, is probably sufficiently broad to cover the "purchase" of securities. That being true, the word "purchase" should be read as "sale" and the above Section 4, subsection 1, would be equally applicable to the purchase by a bona fide customer who, on purchasing the security, becomes a bona fide owner. If the word "purchase" is not considered as being within the definition of "sale", it would still be a part of "the business of acting as broker for others" and "the business of buying, selling or dealing in securities"[45] which requires a dealer's license. Licensed dealers would therefore be free to engage in such transactions.[46]

---

[45] Section 17, providing for the licensing of dealers. See also the definition of "dealer" in Section 2, subsection 5.

[46] This problem of brokerage transactions has been avoided in other states by the specific exemption. See Marshall, *History and Analysis of the Wisconsin Securities Law,* [1942] WIS. L. REV. 540, 563 (1942), where it explains that an amendment to the Wisconsin law made an exception to the term "sale" of orders as agent for the purchaser and solicitation of orders as agent for the purchaser and solicitation of orders for securities on national stock exchanges. The exception was restricted to acting as agent for one party only, and would not be applicable where the broker acted as agents for both parties to the transaction. Similar clarification in the Ohio law would end the confusion now existing.

This problem of secondary market inclusion in the regulatory provisions of the Act is immediate and pressing from the viewpoint of the dealer in securities and the lawyer who uses the registration by description section with great frequency.

It should not be assumed that the secondary market is entirely unregulated. Quite the contrary. In Ohio the fraud provisions have unquestioned application. The Securities and Exchange Act of 1934 exercises a very real and severe regulation of all such transactions[47]. In addition, the National Association of Securities Dealers offers a self-regulatory body within the securities industry.[48] Insofar as Ohio is concerned the most practical method of regulating the secondary market lies in the broad discretionary powers granted the division over licensed dealers and the fraud provisions of the Act.

When a considered re-examination of the Act is made, the practical aspects of the exemptions and registrations by description should be given careful scrutiny with regard to the actual protection from fraud and deception these sections provide. It is suggested that a practical application of the "full disclosure" theory in the form of a simplified offering circular may make the registration by description sections more effective.

Administrative Problems

Good administration can make a poor law effective but a good law cannot survive poor administration. This is true in all governmental departments, but particularly so in the Division of Securities. As previously discussed, the personnel of the division must administer four different laws and consider the problems of four unrelated industries. This in itself requires unusual adaptability. The very broad powers given the chief of the division serve to give additional emphasis to the importance of above average personnel.

On the whole the division has been unusually fortunate in the personnel administering the Act since 1929. There is obvious danger in relying on providence to be equally kind in the future. In company with other subdivisions of the state government, the division faces the problems of attracting able personnel, adequate salaries, and tenure.

---

[47] Securities and Exchange Act of 1934. 48 Stat. 905 (1934), 15 U.S.C.A. § 78 (a) (1935). For discussions of such regulation, see Clinton, *Over the Counter Securities Markets,* 1 VAND. L. REV. 602 (1948); Lesh, *Federal Regulation of Over-the-Counter Brokers and Dealers in Securities,* 59 HARV. L. REV. 1237 (1946); *Halsted, Regulation of Stock, Grain and Commodity Exchanges,* 3 JOHN MARSHALL L. Q. 80 (1937); *The Over-the-Counter Market* (note 36, *supra.*) at page 104 *et seq.*

[48] See *The Over-the-Counter Market* (note 36, *supra*) at page 117 *et seq.;* Wertwood and Howard, *Self Government in the Securities Business,* 17 LAW & CONTEMP. PROB. 518 (1952).

This article cannot solve those problems, but should highlight the above average requirements for this division which in turn increase the impact of these common difficulties. The salary scale should be sufficient to attract very competent personnel so we need not rely, as now, on the sense of duty of many to remain in government service when industry is willing to offer higher inducements. The policy making portion of the personnel is not protected by civil service and is subject to change at the will of the governor. In the past it has been the practice to carry over from one administration to another certain of the higher personnel to effect some continuity in the administration of the Act. In many instances, the protection offered these higher echelon personnel by civil service is more theoretical than real.

There appears to be a real need for an upward revision of salary scales and some workable method which will afford a continuity in operation of the Act when changes of administration occur. Possibly some consideration should be given to the creation of four assistant chiefs of division, each assigned to one of the separate laws administered, with terms of at least four years. The problem should be thoroughly considered and proper legislation enacted to effect workable continuity.

The only office or position created by the Act is that of attorney-inspector (Section 44) who must be an attorney-at-law and who shall receive $3,500.00 per annum.

There are very broad powers vested in the office of chief of division.[40] No requirements or standards for this office are contained in the Act. In most instances the chief of division has been an attorney. The multiplicity of problems of interpretation and application of the Act require a chief of division who is not a lawyer to rely heavily upon legal assistance from his aides. Unquestionably some provision should be made to provide competent lawyers in the higher ranks of the personnel of the division. Legislative requirements and standards will not assure the appointment of competent and sensible administrators. The industries affected by the division and the legal profession should exert every effort to impress the appointive power, the governor, with the importance of competent personnel for this division.

---

40 The chief of the division is the grantee of the powers and discretion conferred by the Act. This office must determine what is "grossly unfair." (Sections 10 and 16). The broad investigative powers granted under Section 28 and 29 could be the subject of great abuse in the hands of an incompetent administrator. Such authority is circumscribed only by what the chief of division "may deem relevent or material." Above all there is the very real and potential power of "publicity." While this power is not expressly granted it does exist in the office. Unfavorable publicity, even though later withdrawn, may be equally effective in stopping a securities sale and destroying a dealer's reputation, even though revocation of authority or dealer's license is not effected. Unwise application of these broad powers may be as disastrous as intentional misuse of them. All of this points to the great importance of this position of chief of division.

The history of the division over the last quarter century discloses a record which reflects favorably upon the various administrations of the Act. The division has not always been favored with a liberal budget for operations. Unquestionably some criticisms which could be made may be answered by reference to available funds. Perhaps the expense involved in printing a new booklet covering the Ohio Securities Act and regulations and administrative rulings thereunder, pursuant to the Administrative Procedure Act, (Sec. 154-61 et seq.) may account for the failure to publish any rulings or changes in regulations since 1947. While economy is desirable, it is equally necessary that such regulations and rulings be current, and a supplement covering such should be published. If in fact no such rulings have been made in compliance with the Administrative Procedure Act, as appears to be the case with the division, the use of informal rulings, or office practices which have the effect of rulings, should be subject to most careful review.

CONCLUSION

Of paramount importance is the continuing need for competent, adequate, well paid personnel for the division. Provisions for reasonable tenure in office should be made and inducements offered able employees to make a career of this service. Reasonable continuity of administration should be provided during periods of change in the administration of the state government.

The applicability of the regulatory sections of the Act to truly secondary markets presents the more pressing problem affecting the division, the lawyers, and the securities industry.

The Ohio Securities Act and its administration should be subject to periodic review by a competent body which should include personnel of the division, the legal profession, and representatives of the industries regulated by the Act. The law should be maintained in modern form, including advancements in the field of "blue sky" legislation, but within the scope of an overall objective and purpose.

The administrators of the Act, past and present, together with those who drafted the law, are to be congratulated on a quarter century of sensible and practical operation of the Division of Securities.