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From the Editor's Desk

Notre Dame Law Review Editors

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In this issue, the *Lawyer* is pleased to present three fine articles which expose varying nerve endings on the highly controversial subject of mutual funds. The first is a study of federal investment company legislation by Walter P. North. As Associate General Counsel of the Securities and Exchange Commission and its legislative liaison officer, Mr. North is ably qualified to furnish such a history. He discusses all the pertinent bills which have or have not been enacted since 1940, and treats as well the important background materials to these bills. After demonstrating that the integrity of the original Investment Company Act of 1940 has remained largely intact, having yielded only to occasional and slight amendment through the years, Mr. North relates recent and current attempts to amend the Act and opines that some of these will soon be successful.

Secondly, Parker M. Nielson, a Salt Lake City attorney who represented the plaintiff in the recent landmark case of *Esplin v. Hirschi,* discusses the concept of an implied private cause of action under the Investment Company Act of 1940 and its usefulness in stockholder litigation. Mr. Nielson examines those sections of the Act that give rise to such a cause of action; the necessary elements for a private cause of action; the fiduciary duties that are imposed on the management of those companies covered by the Act; the effect of a failure to register under the Act; and, finally, the importance of the Act's voidability provisions. Noting that the Act's definition of an "investment company" can easily give rise to what has been termed "the inadvertent investment company," that is, a company that falls within the Act's definition of an investment company without actually knowing it, Mr. Nielson concludes by cautioning both management and shareholders alike to be aware of those provisions of the Act which can provide a "potentially useful tool in the assertion of stockholder rights by way of a private cause of action."

The third article concerns the controversial uniform price maintenance provisions of the Investment Company Act of 1940. Co-authored by Murray Simpson and Scott Hodes, two Chicago attorneys who are especially knowledgeable in this area, the article examines the background and content of section 22(d) of the Act and the SEC's Rule 22d-1. Having considered current legislative attacks on section 22(d) and the SEC's proposed amendments to Rule 22d-1, the authors display a fund management viewpoint in arguing for the maintenance of the status quo.

The members of the *Lawyer* organization are particularly proud of the survey of the mutual fund industry which is published herein. Extremely comprehensive in scope, the survey is the product of numerous interviews, nationwide trips and several months of intensive research. It is devoted to a general study of management investment companies with primary emphasis directed to mutual funds. Beginning with a delineation of the industry structure and functional operation, it analyzes the practices and abuses that pervade the industry, both historically and at the present time. It gives particular attention to past, present

and pending legislation intended to regulate the industry and eliminate abuses, and concludes with a detailed evaluation of the effect of such legislation. Through the depth of their analysis and the persuasion of their argument, the student authors herein serve notice on the SEC of their legal aspirations.

The faculty of the Notre Dame Law School voted last April to abandon its present system of grading in favor of a system which will distribute grades over four tiers: Honors, High Pass, Pass and Fail. To be effective in the 1969-70 academic year, this new attempt to eliminate the "injustice" and "unfairness" inherent in a more multi-tiered system will be accompanied by the total abolition of class rank for internal as well as external purposes.

The basic premise underlying the need for reform was that the correlation between legal ability and law school examination grades was not sufficiently great to justify fine one and two point distinctions on a one-hundred point grading scale. The damage occurs in the job market, where the distinctions are magnified by an employment process that makes class rank (a cold fact which says nothing about the hot breath of its neighbor to the rear) a prime indicator of attractiveness.

Undoubtedly empirical research would support the truth of the basic premise. Undoubtedly law teachers will more consistently give grades that are properly reflective of a student's legal knowledge and ability when they need only choose between four, as opposed to one-hundred, categories. Obviously this new system devoid of class rank will remove the "fine distinction" specter from the job marketplace, and will have the salutary effect of forcing employers to give a greater measure of consideration to other meaningful factors.

But it is somewhat disturbing to wonder, from the vantage point of a Notre Dame law student, what the "other meaningful factors" will be after our new system has made us all a little more equal. Will employers devise their own methods of testing legal ability and build them into the interviewing process? How much more important will resume preparation and interviewing techniques become? Are these "meaningful factors"? Granted, these are the employers' problems, but it is questionable how they will react. From the vantage point of a Notre Dame law student, it is difficult to have any measurable degree of confidence in the new system.

Such a system would be ideal were Notre Dame a Harvard, a Yale or a Stanford, where individual rank is unimportant because collective rank is established enough to make every individual a sought after commodity. But Notre Dame is not a Harvard, a Yale or a Stanford. Such a system would be workable at a law school which had manufactured a strong rapport with employers through an active and able placement facility, but Notre Dame is not such a law school. A law school which adopts a system such as this relies on its reputation or influence to sell its students. Unfortunately, Notre Dame chose to do so before it had a significant national proportion of either.

The trouble is that we at Notre Dame have been telling ourselves of the worth of our Law School so sincerely and so long that we have begun to accept it as a self-evident truth. We are good, but we are not the best nor are we

on the level of the best — at least not where it counts, in the national opinion of the legal profession — and only the best can afford not to be hungry. In legislating away rank at this time, there is the very real danger that our faculty has legislated away one of the finest attributes of the Notre Dame law student — his hunger, his scrappiness, his habit of competition, his habit of hard work. Indeed, in some quarters of our Law School, the signs of relaxation are already apparent.

There is no particular reason, absent a dramatically increasing job market, why employers should come to what they consider an O.K. to good law school and force upon themselves the difficult task of making an unguided differentiation between a classful of what they consider to be, by and large, O.K. to good law students. While class rank is admittedly not the only, and may not even be the most, valid index of ability, it is as valid and more definite than any guideline offered by a no-rank system. For recruiters who look to O.K. to good law schools, this could prove a powerful magnet away from Notre Dame.

In terms of jobs, Notre Dame law graduates will probably reap the benefits of a short-term appreciation occasioned by the abundance of High Pass grades that under the new system will be average. This deceitful, or inflationary if you will, system of labeling is itself disturbing because it again manifests the self-delusion that Notre Dame is in no way average. Sooner or later, after enough High Pass Notre Dame law students have, by more objective standards, produced average work (because they have lost the habit of working hard enough to make it better than average), the rose will be seen for what it is — still a rose.

Notre Dame has a good Law School. Hopefully in time, through its new Law Center and an increased and improved faculty, it will be an outstanding Law School and will justify the use of a no-rank system. Meanwhile, it would seem to be as good a place as any to teach its students that compensation and advancement and courtroom triumph and the elimination of social injustice don't just happen without hard work. These satisfactions are not doled out equally on the principle that "I'm as good a lawyer as you are, and it shouldn't count against me that I don't show it." The name of the game is competition.