RETHINKING SECURITIES LAW

Marc I. Steinberg

OXFORD

Rethinking Securities Law

MARC I. STEINBERG



OXFORD

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press 198 Madison Avenue, New York, NY 10016, United States of America.

© Marc I. Steinberg 2021

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form and you must impose this same condition on any acquirer.

Library of Congress Cataloging-in-Publication Data

Names: Steinberg, Marc I., author.

Title: Rethinking securities law / Marc I. Steinberg.

Description: New York: Oxford University Press, [2021]

Includes bibliographical references and index.

Identifiers: LCCN 2021000011 (print) | LCCN 2021000012 (ebook) | ISBN 9780197583142 (hardback) |

ISBN 9780197583166 (epub) | ISBN 9780197583159 (updf) | ISBN 9780197583173 (online)

Subjects: LCSH: Securities—United States.

Classification: LCC KF1439 . S7329 2021 (print) | LCC KF1439 (ebook) | DDC 346.73/0922—dc23

LC record available at https://lccn.loc.gov/2021000011

LC ebook record available at https://lccn.loc.gov/2021000012

DOI: 10.1093/oso/9780197583142.001.0001

1 3 5 7 9 8 6 4 2

Printed by Integrated Books International, United States of America

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

You may order this or any other Oxford University Press publication by visiting the Oxford University Press website at www.oup.com.

Summary Contents

Acknowledgments About the Author		
1. Rethinking Securities Law—Laying the Groundwork	= 1	
2. The Disclosure Regimen of the Federal Securities Laws	13	
3. Exemptions from Securities Act Registration	51	
4. The Securities Act Registration Framework	93	
5. Federalization of Corporate Governance	123	
6. Private Securities Litigation	163	
7. Insider Trading	211	
8. Mergers and Acquisitions	239	
9. The Securities and Exchange Commission	267	
10. Summary of Recommendations for Adoption	301	
Index	323	

Detailed Contents

Aci	Acknowledgments		XV
		e Author	xvii
1.		inking Securities Law—Laying the Groundwork	¥1 1
		ntroduction	1 4
		The Preeminence of the U.S. Securities Law Framework	8
		The Need for Rethinking the Securities Laws	12
	IV.	Conclusion	12
2.	The	Disclosure Regimen of the Federal Securities Laws	13
Ţ.		introduction	13
		Focus on Disclosure—Not Substantive Fairness	13
		A. Rejection of a Federal Fairness Approach	14
		B. Episodic Application of Fairness Approach	16
		C. Enhancing Fairness through the Guise of Disclosure	18
		D. Propriety of Federal Law Regulating Substantive Conduct	19
	III.	The Concept of Materiality	21
		A. Meaning of Materiality	21
		B. Qualitative Economic Materiality	24
		C. Application of Different Materiality Thresholds	25
		D. Materiality Analysis—Management Integrity	27
		E. Flexible Standards of Materiality	29
	IV.	The Mandatory Disclosure Framework	30
		A. Established Presence of a Mandatory Disclosure System	31
		B. Effectiveness of the Mandatory Disclosure Framework	32
		C. Incorporation by Reference—Informational Disparities	36
		D. Proposed Adoption of a Mandatory "Summary" Section	39
		in SEC Filings	41
		E. Partial Dismantling of the Mandatory Disclosure Framework	43
		F. Requirement to Disclose All Material Information	46
	Т ,,	G. Proposed Mandate to Disclose All Material Information	48
	V.	Conclusion Conclusion	
3	. Ex	mptions from Securities Act Registration	51
		Introduction	51
	II.	Primary Exemptions from Securities Act Registration	52
		A. The Traditional Rule 506 Exemption	52

X DETAILED CONTENTS

		B. The JOBS Act Rule 506 Exemption	56
		C. The Regulation A, Tier 2 Exemption	58
		D. Integration of Securities Offerings	60
	III.	A Proposed Framework for Primary Securities Act Exemptions	62
		A. Private Offerings	62
		B. Limited and Exempt Public Offerings	66
		1. Rule 504	66
		2. Regulation A	67
		3. Intrastate Offerings	71
		4. Summation	73
		C. Integration of Primary Exempt Offerings	73
	IV.	A Proposed Framework for Resales of Securities	78
		A. The Unacceptable Current Resale Exemption Framework	79
		B. A Proposed Framework for Resale Exemptions	86
		1. Public Resales of Securities	86
		2. Private Resales of Securities	89
		3. Resales to Qualified Institutional Buyers	91
	V.	Conclusion	92
			93
4.		e Securities Act Registration Framework	
	I.	Introduction	93
	II.	Fundamental Principles—The Need for Revision	94
		A. Mandatory Disclosure of Material Information	94
		B. Uniform Standards of Materiality	95
		C. Incorporation by Reference Based on Efficient Markets	96
		D. Mandatory Inclusion of Summary Section	96
		E. Summation	97
	III.	Multi-faceted Issues Implicated in the Registration	
		Statement Process	98
		A. Well-Known Seasoned Issuers	98
		B. Testing the Waters	100
		C. Unduly Broad Definition of Accredited Institutional Investor	101
		D. Individual Investors—Registered Offerings Compared to	
		Rule 506 Offerings	102
		E. Certainty of Rules, Conditioning the Market Concerns	103
		F. "Scaled" Disclosure and Smaller Reporting Companies	105
		G. The SEC's Undue Emphasis on Capital Formation	106
	IV		108
		A. Due Diligence and the Integrated Disclosure System	109
		B. Due Diligence—Outside Directors	112
		C. Due Diligence—Underwriters	115
	V	. Conclusion	121
_	г	Jamelization of Cornorate Governance	123
5		deralization of Corporate Governance	123
	I	Introduction	12.

	II.	The Federalization of Corporate Governance—Historical	
		Overview Handbard Handbard Franch Promoter 1	124
		A. Congressional and Judicial Overview	124
		B. The SEC's Role in the Federalization of Corporate Governance	127
		C. More Recent Legislation Federalizing Corporate Governance	132
		D. Federalization of Corporate Governance Benefitting Corporate	
		Interests Turner and the last palent be included in	135
	TIT.	Recommended Federal Corporate Governance Standards	137
		A. Composition of Boards of Directors and Board Committees	138
		B. Shareholder Say-on-Pay and Related Issues	151
		C. Undue Reliance on State Law	156
	137	Conclusion	160
			1.00
6.	Pri	vate Securities Litigation	163
		Introduction	163
	II.	The Current Federal Securities Law Framework—Needed	
		Revisions	164
	.01	A. Publicly-Traded Companies—Registered Offerings versus	
		Secondary Market Trading	164
		B. Uniform Level of Mental Culpability	171
		C. Pleading Requirements in Private Securities Litigation	173
		D. The Propriety of Secondary Liability in Private Securities Actions	176
		E. The Unduly Expansive Protection Given to Puffery, Statements of	
		Belief, and Forward-Looking Statements	181
		F. Federal Preemption of Securities Class Actions	185
		G. Broker-Dealers and Investment Advisers	187
		H. Summation Supplied and quies and submitted in	194
	Ш.	Replacement of the Current Private Securities Litigation	
		Framework	194
		A. Recommended Provisions for the Revised Framework	195
		1. A Near Uniform Mental Culpability Standard of Negligence	195
		2. Primary Liability Principles	197
		3. Secondary Liability Principles	200
		4. Elimination of the Reliance Requirement	203
		5. Cap on Damages	205
		B. Summation	208
	IV	Conclusion	209
			011
7.	Ins	sider Trading	211
	I	Introduction I was an a small transport	211
	II.	The Unacceptable Current Insider Trading Framework	212
		A. Setting the Stage	212
		B. Supreme Court Decisions	214
		C. The SEC's Responses to Court Decisions	217
		1. Insider Trading in the Tender Offer Context—Adoption	
		of Dula 14a.3	218

xii DETAILED CONTENTS

		2. The Misappropriation Theory—Adoption of Rule 10b5-2	219
		3. Selective Disclosure—Adoption of Regulation FD	221
		4. Summation	223
		D. The Elimination of the Improper Benefit Test in	
		Criminal Cases	224
		E. Loopholes Created by the SEC	225
		1. Relaxation of Insider Liability under Section 16(b)	226
		2. Insider Trading Plans under Rule 10b5-1	228
		F. Conclusion	230
= II	I.	Recommendations for Improved Insider Trading Regulation	230
		A. Requiring Company Disclosure of All Material Information	230
		B. Advance Notice of Insider Trades, Revision of Insider	
		Trading Plans, Repeal of Section 16(b)	232
		C. Adoption of a Comprehensive Access Approach	235
t tr	V.	Conclusion -	238
		An	220
8. A		gers and Acquisitions	239
		Introduction with a supplemental to the first term of the first te	239
		Critique of the Current M&A Framework	239
I	II.	Necessary Revisions for Implementation in the M&A Setting	250
10		A. Recommendations for Reform	251
		1. Disclosure of Beneficial Ownership	251
		2. Golden Parachutes	253
		3. Greenmail	254
		4. The Acquirer's Shareholders	255
		5. Repeal of State Takeover Statutes	256
		6. Shareholder Ownership Threshold Requiring Takeover	
		Bid for All Outstanding Voting Shares	257
		7. Measures in Response to Takeover Bids	260
		B. Summation	265
I	V.	Conclusion de Land and the Conclusion of the Con	266
			267
9. 1	ne	Securities and Exchange Commission	267
		Introduction	268
	11.	The SEC's Unacceptable Focus	268
		A. Adoption of a Current Reporting System	270
		B. Insulating Liability Exposure for Companies and Their Insiders	
		C. Enforcement Policies, Practices, and Priorities	276
		D. Declining to Implement Statutory Directives	282
		E. Lack of Enforcement against Insiders of Large Enterprises	288
KK		F. Summation	292
I	II.	Reconstituting the Securities and Exchange Commission	292
		A. The Revolving Door Challenge	293
		B. Reconstituting the Composition of SEC Commissioners	295
1	W	Conclusion	299

10.	Summary of recommendations for 1240F	301
	I. Introduction	301
	II. Recommendations for Adoption	301
	A. The Disclosure Regimen of the Federal Securities Laws	301
	1. Propriety of Federal Law Regulating Substantive Fairness	301
	2. The Concept of Materiality	301
	3. The Mandatory Disclosure Framework	302
	B. Issuer Exemptions from Securities Act Registration	303
	1. Regulation D	303
	2. Enhanced Funding of State Securities Regulatory Agencies	304
	3. Regulation A	304
	4. Intrastate Offerings	305
	5. Integration of Primary Exempt Offerings	305
	C. Exemptions for Resales of Securities	305
	Public Resales of Securities	305
	2. Private Resales of Securities was but the beautiful and the	306
	3. Resales to Qualified Institutional Buyers	306
	D. The Securities Act Registration Framework	307
	1. Disclosure—Securities Act Registration Statements	307
	2. The Registration Process—Time Periods	307
	3. The SEC's Misapplication of Section 28 of the Securities Act	308
	E. Due Diligence in Registered Offerings	308
	1. Outside Directors	308
	2. Underwriters	308
	F. Federalization of Corporate Governance	309
	Composition of Boards of Directors and Board	
	Committees	309
	2. Shareholder Say-on-Pay and Related Issues	310
	3. Undue Reliance on State Law Principles	310
	G. Private Securities Litigation	311
	Publicly-Traded Companies—Registered Offerings versus	
	Secondary Market Trading	311
	Uniform Level of Mental Culpability	311
	3. Pleading Requirements in Private Securities Litigation	312
	4. Primary Liability Principles	312
	5. Elimination of the Reliance Requirement	313
	6. Secondary Liability in Private Securities Actions	313
	7. Puffery, Statements of Belief, and Forward-Looking	
	Statements	313
	8. Federal Preemption of Securities Class Actions	314
	9. Broker-Dealers and Investment Advisers	314
	10. Cap on Damages	315
	H. Insider Trading	315
	Requiring Company Disclosure of All Material Information	315
	1 0	

XIV DETAILED CONTENTS

		2. Advance Notice of Insider Trades	316
		3. Revision of Insider Trading Plans	316
		4. Repeal of Section 16(b) of the Securities Exchange Act	316
		5. Adoption of the Access Approach	316
			317
		1. Federal Law Should Govern Substantive Issues in	
		the M&A Setting	317
		2. Disclosure of Beneficial Ownership	317
			317
			317
		5. The Acquirer's Shareholders	317
			318
		7. Shareholder Ownership Threshold Requiring Takeover	
			318
			318
		J. The Securities and Exchange Commission	319
		Failure to Adopt an Acceptable Continuous Disclosure	
		Framework	319
		2. Unduly Insulating Liability Exposure for Companies and Their	
, iii		Insiders Record and American State of the Am	320
111		3. Enforcement Policies, Practices, and Priorities	320
		4. Declining to Implement Statutory Directives	320
		5. Reconstituting the Securities and Exchange Commission	321
	III.	Conclusion Conclusion	322
		Ac y secondary of the material field 3	
T., J		The second of th	323
Ind	ex		