
Securities Law in Perspective

HAROLD S. BLOOMENTHAL



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Harold S. Bloomenthal



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Preface

Securities Law in Perspective is more than a title; it is the focus of this book. It was written to provide a background in American securities law to students and other readers with no prior background in the field. The author approached the subject as it might be viewed by an outside observer interested in a concise but broad picture of the entire area of the law.

It soon became apparent that this approach had some synergistic value, and that the book would be useful not only to those in need of an introduction to the law, but also to those with years of experience in the field. Focusing on the entire field of securities regulation leads to insights that are helpful in discerning trends and furnishing guides to what courts may find persuasive. It will also serve as a convenient quick-reference source for the practitioner.

Finally, the book also fulfills the author's initial purpose of introducing the uninitiated to the field of securities regulation, and providing a comprehensive framework for understanding a complex field of law. It will be of value to students, lawyers, and all those who must be concerned with securities law problems—including compliance officers, registered representatives and corporate executives. For those who need further backup, it is liberally cross-referenced to the author's three-volume treatise, *Securities and Federal Corporate Law*.

I am grateful to Pam Midboe who has struggled valiantly with the many revisions to the manuscript. As always, I appreciate my wife and children who tolerated with good grace the many weekends and evenings devoted to the completion of this book, during which my typewriter and I were inseparable.

Harold S. Bloomenthal

Denver, Colorado
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Table of Chapters

| | | |
|----|---|-----|
| 1 | Regulatory Authorities | 1 |
| 2 | Securities Laws | 8 |
| 3 | Securities Markets and Securities Dealers | 11 |
| 4 | What Is a Security? | 19 |
| 5 | Public Offering of Securities by Companies | 20 |
| 6 | Exempt Offerings | 34 |
| 7 | Registration for Trading | 43 |
| 8 | Secondary Distributions and Trading by Affiliates | 48 |
| 9 | Continuous Disclosure | 52 |
| 10 | Securities Laws Violations | 60 |
| 11 | Private Express Remedies | 64 |
| 12 | Implied Remedies—Primarily Rule 10b-5 | 74 |
| 13 | Materiality | 82 |
| 14 | Reliance and Causation | 84 |
| 15 | Plaintiff's Care | 87 |
| 16 | Insider Trading | 89 |
| 17 | Fraud on Shareholders | 95 |
| 18 | Mergers and Other Corporate Combinations | 99 |
| 19 | Tender Offers | 108 |
| 20 | Proxy Regulation | 115 |
| 21 | Regulation of Broker-Dealers and Investment Advisers | 120 |

Securities Law

- 22 Investment Companies 125
- 23 SEC Enforcement 131
- 24 Venue, Jurisdiction,
Damages, and Procedure 135
- 25 Transnational Aspects 143
- 26 SEC and the Professional 156

Contents

Chapter 1

Regulatory Authorities 1

- § 1.01 Securities and Exchange Commission 1
- § 1.02 Self-Regulatory Authorities (Stock Exchanges and the NASD) 2
- § 1.03 Banking Authorities 3
- § 1.04 Municipal Securities 4
- § 1.05 State Regulation 5
- § 1.06 State Insurance Commissioners 5

Chapter 2

Securities Laws 8

- § 2.01 Federal 8
- § 2.02 State 9

Chapter 3

Securities Markets and Securities Dealers 11

- § 3.01 Distribution Markets 11
- § 3.02 Trading Markets 11
 - [1] Listed Securities 11
 - [2] Over-the-Counter Securities 13
- § 3.03 Commission Rates and Markups 15
- § 3.04 Central Market System 15
- § 3.05 Securities Industry 16

Chapter 4

What Is a Security? 19

Securities Law

Chapter 5

Public Offering of Securities by Companies 20

- § 5.01 Under Federal Law 20
- § 5.02 Under Blue Sky Laws 23
- § 5.03 NASD and Other Requirements 24
- § 5.04 Promotional Companies 24
- § 5.05 The Registration-Distribution Process 25
- § 5.06 Content of Registration Statement-Prospectus 26
- § 5.07 Projections 29
- § 5.08 Debt Securities 30

Chapter 6

Exempt Offerings 34

- § 6.01 Private Placements 34
- § 6.02 Rule 240 Offerings 36
- § 6.03 Intrastate Exemption 37
- § 6.04 Under State Blue Sky Laws 39

Chapter 7

Registration for Trading 43

- § 7.01 Federal Securities Laws 43
- § 7.02 State Blue Sky Laws 45

Chapter 8

Secondary Distributions and Trading by Affiliates 48

Chapter 9

Continuous Disclosure 52

- § 9.01 Periodic Reporting Requirements 52
- § 9.02 Timely Corporate Disclosure 55

Chapter 10

Securities Law Violations 60

- § 10.01 Federal General Fraud Provisions 60

Contents

- § 10.02 Blue Sky General Fraud Provisions 62
- § 10.03 Registration Violations 62
- § 10.04 Enforcement of General Fraud and
Registration Provisions 62

Chapter 11

Private Express Remedies 64

- § 11.01 Introduction 64
- § 11.02 Section 12(1): Action by Purchaser of
Unregistered Securities 64
- § 11.03 Section 11: Action for False Prospectus 65
 - [1] Who Can Assert a Claim Based on Section 11? 65
 - [2] Against Whom Can the Claim Be Asserted? 65
 - [3] What Must the Plaintiff Establish? 66
 - [4] What Are the Company's Defenses? 66
 - [5] What Are the Expert's Defenses? 67
 - [6] What Are the Other Defendant's Defenses? 67
 - [7] Special Causation Defense 68
 - [8] Section 15 of the Securities Act 68
- § 11.04 Section 12(2): Action for Fraud in the Sale
of Securities Generally 68
- § 11.05 Section 18(a): Action for Fraud in Exchange
Act Filings 69
- § 11.06 Other Express Remedies 69
- § 11.07 Statute of Limitations 70
- § 11.08 Express Remedies Under the Blue Sky Laws 70
- § 11.09 Common-Law Fraud 71

Chapter 12

Implied Remedies—Primarily Rule 10b-5 74

- § 12.01 Introduction 74
- § 12.02 Purchaser-Seller Requirement 76
- § 12.03 Privity 77
- § 12.04 Scienter 78

Chapter 13

Materiality 82

Securities Law

Chapter 14

Reliance and Causation 84

Chapter 15

Plaintiff's Care 87

Chapter 16

Insider Trading 89

§ 16.01 Liability for Short-Term Trading Profits 89

§ 16.02 Under Rule 10b-5 91

Chapter 17

Fraud on Shareholders 95

§ 17.01 Derivative Actions and the Securities Laws 95

Chapter 18

Mergers and Other Corporate Combinations 99

§ 18.01 Introduction 99

§ 18.02 Merging Subsidiary Into Parent: Oppression of Minority Shareholders 102

§ 18.03 Going Private 103

§ 18.04 The Orchestrated Merger and Causation 105

Chapter 19

Tender Offers 108

§ 19.01 Introduction 108

§ 19.02 Federal Legislation 108

§ 19.03 State Regulation 112

Chapter 20

Proxy Regulation 115

§ 20.01 Introduction 115

§ 20.02 Proxy Solicitation 115

§ 20.03 Election of Directors 116

Contents

- § 20.04 Shares Held in Street Name 117
- § 20.05 Extraordinary Corporate Actions 117
- § 20.06 Rule 14a-9 117
- § 20.07 Contribution to Disclosure 118

Chapter 21

Regulation of Broker-Dealers and Investment Advisers 120

- § 21.01 Broker-Dealers 120
- § 21.02 Investment Advisers 122

Chapter 22

Investment Companies 125

- § 22.01 Open End Mutual Funds 125
- § 22.02 Offering of Investment Company Shares 126
- § 22.03 Contractual Plans 126
- § 22.04 Registration Requirements 127
- § 22.05 Substantive Regulation 128
- § 22.06 State Regulation 129

Chapter 23

SEC Enforcement 131

- § 23.01 Criminal Violations and Injunctions 131
- § 23.02 Administrative Proceeding 132
- § 23.03 Suspension of Trading 132

Chapter 24

Venue, Jurisdiction, Damages, and Procedure 135

- § 24.01 Jurisdiction and Venue 135
- § 24.02 Statute of Limitations 136
- § 24.03 Damages 137
- § 24.04 Security for Costs and Attorney Fees 138
- § 24.05 Class Actions 138
- § 24.06 Derivative Actions 139
- § 24.07 Pendent Jurisdiction 139
- § 24.08 Waiver 140

Securities Law

Chapter 25

Transnational Aspects 143

- § 25.01 Restrictions on Access to American Capital Markets 143
- § 25.02 Regulation of Foreign Offerings, Dealers, and Companies 144
- § 25.03 Impact of Tax Laws and Exchange Controls 147
- § 25.04 Extraterritorial Application of U.S. Securities Laws 148

Chapter 26

SEC and the Professional 156

- § 26.01 Accounting and Accountants 156
- § 26.02 Lawyers 158
- § 26.03 Accountant-Lawyer Interface 159

Index 163

Chapter 1

Regulatory Authorities

§ 1.01 Securities and Exchange Commission

The U.S. Securities and Exchange Commission has the responsibility of administering and enforcing the federal securities laws. It is an independent regulatory agency consisting of five members appointed for staggered five year terms by the President with the concurrence of the Senate.¹ The Commission's principal office is in Washington, D.C.; it has nine regional offices, each headed by a Regional Administrator, and eight branch offices.² It enforces the federal securities laws by conducting investigations in large part through its regional and branch offices which may lead to criminal prosecutions, civil actions for injunctive relief, or to administrative proceedings to impose remedial sanctions on broker-dealers and investment advisers. The Commission's staff processes numerous filings under the federal securities laws, including registration of securities under the Securities Act of 1933,³ proxy soliciting material, periodic reports filed pursuant to the Securities Exchange Act of 1934,⁴ and the like. It has extensive delegated rule-making authority under specific statutory provisions, such as Section 10(b) of the Exchange Act, as well as general rule-making authority. It supervises and controls the self-regulatory authorities (the stock exchanges and the NASD), including the review of disciplinary action taken by such authorities against their members.

§ 1.02 / Securities Law

§ 1.02 Self-Regulatory Authorities (Stock Exchanges and the NASD)

There are eleven active registered national securities exchanges (including the prestigious New York Stock Exchange) with self-regulatory responsibilities. The National Association of Securities Dealers (NASD) has similar responsibilities with respect to over-the-counter securities dealers. Many securities firms are members of one or more exchanges and, since they engage in over-the-counter securities transactions of the NASD as well, are subject to the overlapping jurisdiction of such self-regulatory organizations.

Each of the registered national securities exchanges and the NASD must adopt rules “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.”⁵ The rules of such self-regulatory authorities must provide for the disciplining of their members, and persons associated with their members, for violations of the rules of the exchange, and for violations of the Exchange Act and rules adopted thereunder. Such rules must provide a fair procedure for determining violations and imposing sanctions.⁶ Such disciplinary procedures relating to members and associates of members are subject to review by the Securities and Exchange Commission.⁷

The exchanges and the NASD are primarily concerned with policing their members and associates of their members; adopting rules governing trading in securities, and settling disputes among their members. For the most part, such self-regulatory authorities are not concerned with disclosure requirements nor with substantive regulation of the companies whose securities are traded by the members. Each exchange establishes the requirements for listing on the exchange, however, which requires the filing of some information other than prescribed SEC reports with the exchange, and the exchanges (and the NASD) through listing agreements and stock-watch procedures also perform important functions in regard

to the obligation of companies listed (or quoted, in the case of the NASD) to make timely disclosure of material corporate developments.⁸ The rules of the exchanges and the NASD also play an important role in terms of soliciting proxies from the beneficial owners of stock held in street name as is discussed in § 20.04. The New York and American Stock Exchanges (and some of the other principal exchanges) have rules that affect such substantive corporate matters as voting rights, preemptive rights, audit committees, and shareholder approval of the issuance of additional shares.⁹ In addition, since the issuance of additional shares of the listed security must be approved for listing, the exchange can, and in isolated instances does, control corporate behavior by denying approval for listing to shares to be issued.¹⁰

§ 1.03 Banking Authorities

To the extent banks are subject to regulation under the federal securities laws, generally, such regulation is by the appropriate banking authority. See the discussion at § 9.01. The appropriate banking authority for this purpose is the Comptroller of the Currency for national banks; the Board of Governors of the Federal Reserve System for state banks which are members of that system; and the Federal Deposit Insurance Corp. (FDIC) for state banks which are not part of the Federal Reserve System, but which are members of the FDIC. Banks whose securities are subject to registration under the Exchange Act (see § 7.01) register with the appropriate banking authority, and file periodic reports with such banking authority in accordance with the rules of the appropriate banking authority. Further, such banks are subject to the proxy and tender offer regulations of the appropriate banking authority rather than those of the Commission. Section 16(b) (see § 16.01) liability attaches to insider transactions of banks whose securities are registered under the Exchange Act, but exemptive and other appropriate regulations, as well as filing of the reports required by Section 16(a), are pursuant to the rules of the appropriate banking authority.¹¹ Bank securities are generally exempt from registration under the Securities Act,

§ 1.04 / Securities Law

but the appropriate banking authorities, under their general regulatory power to supervise banks, regulate certain public offerings of bank securities.¹² A bank holding company is not a bank for securities purposes and it is subject to securities regulation by the Commission.

§ 1.04 Municipal Securities

Municipal securities are broadly defined to include securities issued by a state of the United States, a state agency, or a political subdivision (county and municipal) of a state.¹³ Such securities historically have been exempt from registration and subject only to certain of the fraud provisions of the securities laws. The 1975 amendments do not affect the exempt status of such securities, but do require for the first time that broker-dealers must register with the Commission as such, notwithstanding the fact that their securities business is confined to municipal securities.¹⁴ A unique feature of the federal securities laws is reflected by those provisions of the 1975 amendments creating the Municipal Securities Rulemaking Board, a board which has authority to adopt (but not to enforce) rules relating to dealers in municipal securities.¹⁵ Such dealers (including banks or separate departments of banks) must register with the Commission and must comply with both the rules of the Municipal Securities Rulemaking Board and, to the extent the Commission determines them applicable, the rules of the Commission. The Commission has exclusive authority as to municipal securities dealers other than banks to initiate and conduct proceedings to impose remedial sanctions on them for violations of the federal securities laws and rules adopted thereunder, including those of the Municipal Securities Rulemaking Board.¹⁶ If the securities dealer regarding which such proceeding is to be initiated is a bank or department of a bank, both the Commission and the appropriate regulatory authority for the bank have authority to initiate proceedings and to impose remedial sanctions. Before initiating a proceeding, however, each must consult the other concerning, among other things, the feasibility of coordinating proceedings.¹⁷