

**FUNDAMENTALS
OF
SECURITIES REGULATION**

Sixth Edition

2013 Supplement

**LOUIS LOSS
JOEL SELIGMAN
TROY PAREDES**



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Fundamentals of Securities Regulation, Sixth Edition

*by Louis Loss, Joel Seligman and
Troy Paredes*

Fundamentals of Securities Regulation is a concise treatise that provides essential information covering a wide array of topics concerning securities law. This compendium reviews the most significant aspects of securities regulation.

The Sixth Edition of *Fundamentals of Securities Regulation* incorporates the statutory changes provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Topics covered also include primary liability under Section 10(b), insider trading, sanctions, disclosure requirements, rules and forms for offerings, SEC reporting, forward-looking statements, class action suits, bespeaks caution cases, and ADR in securities disputes. To facilitate more detailed analysis, its fourteen chapters parallel the organization of the full treatise, and extensive cross-references show you exactly where to turn.

2013 Supplement Highlights

New legislative, regulatory, and case law developments are analyzed in the 2013 Supplement.

Highlights include:

- Congressional enactment of the JOBS Act of 2012. The JOBS Act notably:



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- Creates broad new exemptions for emerging growth companies (defined to reach, among others, companies with total gross revenues of up to \$1 billion) from specified executive compensation and financial data requirements, the internal accounting control provisions, reduces to two years the requirement of audited financial statements, streamlines applicable research report requirements, and permits emerging growth companies to confidentially submit draft registration statements (Ch. 3, §C.10; Ch. 8, §A.8.e).
- Amends Regulation D's Rule 502(c) prohibition on general solicitation and advertising so that it no longer applies to Rule 506 offerings solely to accredited investors (Ch. 3, §C.7.b.(iv)).
- Amends Rule 144A(d)(1) to now permit general solicitation and advertising in Rule 144A offerings (Ch. 3, §D.3).
- Crowdfunding is now permitted for sales up to \$1 million in a 12-month period under a new heavily regulated provision (Ch. 3, §C.7.d).
- The Commission is directed to add a new \$50 million small issue exemption for securities that may be offered and sold publicly (Ch. 3, §B.6.a).
- Sections 12(g)(1)(A) and (B) were amended to raise the 1934 Act registration thresholds to 2,000 holders of record (Ch. 6, §A.3.d).
- Congressional enactment of The STOCK Act, which amends § 21A to prohibit insider trading by members of Congress, employees of Congress, executive branch employees, Federal judges, and judicial employees on the basis of material nonpublic information derived from the performance of these persons' official responsibilities (Ch. 9, §B.5.e).
- Rule adoptions or amendments required by the Dodd-Frank Act, including:

- Amendments to Securities Act Rules 134, 138, 139, 168, Forms S-3, S-4, F-3, and F-4, as well as Schedule A to remove references to reliance on security ratings (Ch. 2, §D.2.b).
- Amendments to Rules 501(a)(5) and 215 to revise the accredited investor standards (Ch. 3, §C.7.b.(i)).
- Adoption of Rule 13h-1 to assist the Commission in obtaining trading information on large traders (Ch. 7, §A.1.b).
- Adoption of Rule 204(b)-1 to require investment advisers registered with the SEC that advise one or more private funds and have at least \$150 million in private funds assets under management to file Form PF with the Commission (Ch. 8, §C.2.a.(ii)).
- Adoption of Rule 202(a)(11)(G)-1 to define family offices that will be excluded from the definition of investment adviser under the Investment Advisers Act (Ch. 8, §C.2.a.(ii)).
- U.S. Supreme Court decision in *Credit Suisse Sec. (USA) LLC v. Simmonds*, in which the Court held that the §16(b) limitations period is not tolled until the filing of a §16(a) statement (Ch. 11, §D.2.a.(i)).
- Second Circuit decision in *Fiero v. FINRA*, which held that FINRA does not have authority to bring court actions to collect disciplinary fines (Ch. 7, §C.4).
- *Brown v. Calamos*, in which Judge Posner distinguished three different approaches in analyzing SLUSA motions to dismiss (Ch. 11, §B.10).
- Second Circuit decision in *Lehman Bros. Mortgage-Backed Sec.*, which held that a credit rating agency that provided advice and strategic direction to an issuer did not control the issuer under §15 (Ch. 11, §D.1.a).
- *SEC v. Citigroup Global Markets, Inc.*, in which the Second Circuit stayed an earlier order by Judge Rakoff that had

concluded that a proposed consent judgment was “neither fair, nor reasonable, nor adequate, nor in the public interest.” The Second Circuit sharply disagreed with virtually all aspects of Judge Rakoff’s analysis (Ch. 13, §B.1).

This supplement includes significant updating to the Table of Cases, Table of SEC Releases, Table of Statutory Citations, Table of Rule Citations, Table of Item Citations, and Table of Form Citations, incorporating all additions and changes to the text.

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PREFACE

This past year was dominated by the Congressional enactment of The JOBS Act of 2012 and The STOCK Act of 2012.

The JOBS Act notably:

- Creates broad new exemptions for emerging growth companies (defined to reach, among others, companies with total gross revenues of up to \$1 billion) from specified executive compensation and financial data requirements, and the internal accounting control provisions, reduces to two years the requirement of audited financial statements, streamlines applicable research report requirements, and permits emerging growth companies to confidentially submit draft registration statements. See generally Chs. 3.C.10, 8.A.8.e.
- The Act amends Regulation D's Rule 502(c) prohibition on general solicitation and advertising so that it no longer applies to Rule 506 offerings solely to accredited investors. See Ch. 3.C.7.b.(iv).
- Similarly, as amended, Rule 144A(d)(1) now will permit general solicitation and advertising in Rule 144A offerings. See Ch. 3.D.3.
- Crowdfunding is now permitted for sales up to \$1 million in a 12-month period under a new heavily regulated provision. See Ch. 3.C.7.d.
- The Commission was directed to add a new \$50 million small issue exemption for securities that may be offered and sold publicly. See Ch. 3.B.6.a.
- Of particular note, §§12(g)(1)(A) and (B) were amended to raise the 1934 Act registration thresholds to 2,000 holders of record. See Ch. 6.A.3.d.

PREFACE

The STOCK Act amends §21A to prohibit insider trading by members of Congress, employees of Congress, executive branch employees, Federal judges, and judicial employees on the basis of material nonpublic information derived from the performance of these persons' official responsibilities. See Ch. 9.B.5.e.

There were several rule adoptions or amendments last year required by the Dodd-Frank Act, including:

- Amendments to Securities Act Rules 134, 138, 139, 168, Forms S-3, S-4, F-3, and F-4, as well as Schedule A to remove references to reliance on security ratings. See Ch. 2.D.2.b.
- Amendments were made to Rules 501(a)(5) and 215 to revise the accredited investor standards. See Ch. 3.C.7.b.(i).
- Rule 13h-1 was adopted to assist the Commission in obtaining trading information on large traders. See Ch. 7.A.1.b.
- Rule 204(b)-1 was adopted to require investment advisers registered with the SEC that advise one or more private funds and have at least \$150 million in private funds assets under management to file Form PF with the Commission. See Ch. 8.C.2.a.(ii).
- Rule 202(a)(11)(G)-1 was adopted to define family offices that will be excluded from the definition of investment adviser under the Investment Advisers Act. See Ch. 8.C.2.a.(ii).

There were notable judicial developments as well.

In *Fiero v. FINRA*, see Ch. 7.C.4., the Second Circuit held that FINRA does not have authority to bring court actions to collect disciplinary fines.

In *Brown v. Calamos*, see Ch. 11.B.10, Judge Posner distinguished three different approaches in analyzing SLUSA motions to dismiss.

In *Lehman Bros. Mortgage-Backed Sec.*, the Second Circuit held that a credit rating agency that provided advice and strategic direction to an issuer did not control the issuer under §15. See Ch. 11.D.1.a.

In *Credit Suisse Sec. (USA) LLC v. Simmonds*, the Supreme Court held that the §16(b) limitations period is not tolled until the filing of a §16(a) statement. See Ch. 11.D.2.a.(i).

PREFACE

In *SEC v. Citigroup Global Markets, Inc.*, the Second Circuit stayed an earlier order by Judge Rakoff that had concluded that a proposed consent judgment was “neither fair, nor reasonable, nor adequate, nor in the public interest.” The Second Circuit sharply disagreed with virtually all aspects of Judge Rakoff’s analysis. See Ch. 13.B.1.

In June 2008, Troy Paredes was confirmed as a Commissioner of the Securities and Exchange Commission. This is a richly deserved recognition of his outstanding scholarship. I look forward to working with him after he returns from his service at the SEC. Until then, the Treatise and its Annual Supplements will continue on schedule.

Troy Paredes worked on the Treatise and its Annual Supplements while a Professor of Law at Washington University School of Law before being sworn in and taking office as a Commissioner of the SEC. The views expressed in the Treatise and its Annual Supplement reflect the views of Troy Paredes, Joel Seligman, and the late Louis Loss and do not necessarily reflect those of the SEC or other Commissioners.

Let me acknowledge my gratitude to Lynne Hasman who is responsible for typing this Annual Supplement and to Beth Cross-Wilhelm for her cite checking.

This Annual Supplement speaks generally as of June 1, 2012, although there are occasional references to later materials.

J.S.

July 2012

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