SECURITIES REGULATION

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SECURITIES REGULATION

Sixth Edition

Marc I. Steinberg
Radford Professor of Law
Southern Methodist University

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121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
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MATTHEW BENDER

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Acknowledgments - First Edition

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It is fitting that I dedicate this Second Edition to one of the individuals for whom the First Edition was dedicated – Judge Stanley N. Barnes (of the U.S. Court of Appeals for the Ninth Circuit) who passed away in 1990. I had the privilege of clerking for Judge Barnes. He was a great man and I am lucky that our paths crossed. Judge Barnes perhaps was the most successful person I've ever known – a fine judge (trial and appellate), an Assistant Attorney General of the United States, a superb trial attorney, a member of the National Collegiate Football Hall of Fame (he was an All-American on the "Cal Wonder Team"), National President of his fraternity, Sigma Chi, an avid traveler with an impressive anthropological mask collection, an active bridge player and stamp collector, a giver of his time to worthwhile causes, including the Los Angeles Orthopaedic Hospital for Children, and a dedicated family man. Judge Barnes taught me that a person can be very successful at his or her career while actively pursuing other objectives and joys. To all this, Judge Barnes would probably say: "My good friend Earl Warren said, 'compliments to me is like water running down a duck's back but the duck likes it."

Acknowledgments - Third Edition

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As with the Second Edition, I extend my appreciation to Ms. Kathleen Vaughan for her expert assistance. I also thank my colleagues and good friends on the SMU Law Faculty who have been instrumental in enabling me to enjoy my relationship with this fine school. In particular, I wish to dedicate this book to a few of my very special friends in Dallas who I am lucky to have in my life: Laurie Beth Dodic, Roy Anderson, Alan Bromberg, Tim Davis, Robert Feiger, Chris Hanna, Linda and Jim Hobbs, Ralph Janvey, George Martinez, Joe Norton, Doug Ramsey, Henry Rosen, Wayne Secore and Bob Wise.

Acknowledgments - Fourth Edition

It has been nearly twenty years since the First Edition of this textbook was published. Much has happened in securities regulation, in the world, and in my life - Thank God, mostly for the better.

I thank Dean John B. Attanasio and the SMU Dedman School of Law. The strong support I receive from this superb law school is truly appreciated by me. I wish to extend my gratitude for the summer research grant awarded for this project. I also extend my appreciation to Ms. Jan Spann for her excellent secretarial assistance.

I dedicate the Fourth Edition to my terrific dad, Gerry Steinberg, in honor of his 90th birthday on March 3, 2004. I am blessed to have such a wonderful, kind and supportive father. Dad, this is dedicated to you with all my love.

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I dedicate this Fifth Edition to my terrific Uncle, Irving Steinberg, in honor of his 90th birthday on May 6, 2008. Uncle Irv, the younger brother of my Dad Gerry Steinberg, honorably served our country as a Major during World War II, being awarded a Bronze Star at the Battle of the Bulge. He and my Dad were “best friends” and business partners for nearly fifty years. Dedicating this Fifth Edition to you, Uncle Irv, is a way for me to say thanks for being a wonderful uncle to our family and personally to me.

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I dedicate this Sixth Edition to my cousin David Steinberg. Not having a brother, David comes as close to a brother as I have. He is a wonderful and loyal friend as well as a man of integrity. In addition, David is a superb attorney, has keen judgment, and a good sense of humor. Dedicating this Sixth Edition to you, David, is a way for me to say thanks for being my terrific "younger brother."

Preface

The developments in securities regulation during the past several years have been multi-faceted. A text for a course on this subject should therefore not only present the basic theories and principles but also should: (1) present the material in a manner that reflects the current trends and developments, (2) encompass timely additional material, including law review commentary and SEC releases, and (3) make the material as interesting as possible, given that the class will be comprised of upper-level students who are anxious for creative and practical "lawyering." With these thoughts in focus, the text is organized and directed toward a number of different perspectives. For example:

(1) The Securities and Exchange Commission, through rulemaking, has integrated the Securities Act of 1933 with the Securities Exchange Act of 1934. From the standpoint of applicable disclosure obligations, both in the primary and secondary markets, the integration concept has a tremendous impact. Moreover, grave liability concerns are raised in this context.

(2) The Supreme Court and the lower federal courts have been extremely active in the securities law area. Supreme Court decisions during this era generally reflect a trend toward restricting the scope of the securities laws. The lower federal courts, however, have not necessarily followed the High Court's restrictive approach.

(3) The Private Securities Litigation Reform Act, enacted by Congress in 1995, reflects a trend toward facilitating capital formation and the conducting of business, with private litigation viewed frequently as an undue impediment. The JOBS Act enacted in 2012 similarly reflects a strong federal policy seeking to enhance capital raising by smaller enterprises.

(4) The SEC continues to facilitate capital formation through its rulemaking process in both the private and public offering settings.

(5) The Sarbanes-Oxley Act of 2002 federalizes key aspects of corporate governance and sets forth new obligations for corporate insiders as well as professionals, including accountants and legal counsel. The Dodd-Frank Act of 2010 likewise federalizes aspects of corporate governance.

(6) There is the role of counsel as adviser and planner, which is the principal function of the securities lawyer. In connection therewith, the attorney and his/her client may have conflict-of-interest dilemmas, disclosure duties, and the apprehension of SEC enforcement action. This apprehension is magnified in view of the Sarbanes-Oxley and Dodd-Frank Acts.

(7) During the past several years, there have surfaced a number of intriguing issues, some of which directly impact on traditional securities regulation. For example, we have seen the Supreme Court restricting the scope of primary liability and a renewed interest in state securities regulation.

The coverage of the text is designed for both the basic securities regulation course and advanced seminars. The text covers the traditional issues as well as the developing areas. Subjects that receive extensive treatment include: definition of a security, exemptions from registration, the JOBS Act, the registration process, Sarbanes-Oxley, Dodd-Frank, the policy debate underlying disclosure, resales (including SEC Rule 144), due diligence

(including the integrated disclosure framework), disclosure obligations in a myriad of contexts, international securities developments including global offerings, remedies and liabilities under both federal and state securities law, broker-dealer regulation, corporate control transactions, attorney professional responsibility, SEC enforcement, and "Blue Sky" regulation.

The objective of the text is to treat the above subjects in a comprehensive, understandable, yet intellectually challenging manner, seeking to combine both the theoretical and practical in this complex subject area. While the case method is employed, it is by no means exclusive. In addition to case law, the text includes other relevant material such as SEC releases and scholarly commentary. Moreover, the problem method is used extensively. This method is particularly suitable for a "practical" course where upper-level students are seeking to do some "lawyering." Thus, it is hoped that the text will stimulate intellectual discussion, and, at the same time, provide students who await either a sophisticated securities or, alternatively, a general business practice with much-needed practical analyses and skills.

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