## Understanding Securities Law

EIGHTH EDITION

#### CAROLINA ACADEMIC PRESS

### **Understanding Series**

UNDERSTANDING

ADMINISTRATIVE LAW

Seventh Edition

Kristin E. Hickman

UNDERSTANDING

ALTERNATIVE DISPUTE RESOLUTION

Kristen M. Blankley and

Maureen A. Weston

UNDERSTANDING ANIMAL LAW

Adam Karp

UNDERSTANDING

ANTITRUST AND ITS ECONOMIC

**IMPLICATIONS** 

Seventh Edition

E. Thomas Sullivan and Jeffrey L. Harrison

UNDERSTANDING

BANKRUPTCY

Fourth Edition

Jeffrey Ferriell and Edward J. Janger

UNDERSTANDING

CALIFORNIA COMMUNITY

PROPERTY LAW

Second Edition

Io Carrillo

UNDERSTANDING

CAPITAL PUNISHMENT LAW

Fourth Edition

Linda E. Carter, Ellen S. Kreitzberg,

and Scott W. Howe

UNDERSTANDING CIVIL PROCEDURE

Sixth Edition

Gene R. Shreve, Peter Raven-Hansen,

and Charles Gardner Geyh

UNDERSTANDING CIVIL PROCEDURE

The California Edition

Walter W. Heiser,

Gene R. Shreve, Peter Raven-Hansen,

and Charles Gardner Geyh

UNDERSTANDING

CIVIL RIGHTS LITIGATION

Third Edition

Howard M. Wasserman

UNDERSTANDING

CONFLICT OF LAWS

Fourth Edition

William M. Richman, William L. Reynolds,

and Chris A. Whytock

UNDERSTANDING

CONSTITUTIONAL LAW

Fifth Edition

William D. Araiza

UNDERSTANDING CONTRACTS

Fifth Edition

Jeffrey Ferriell

UNDERSTANDING

COPYRIGHT LAW

Seventh Edition

Marshall A. Leaffer

UNDERSTANDING CORPORATE LAW

Sixth Edition

Arthur R. Pinto and

James Fanto

UNDERSTANDING

CORPORATE TAXATION

Fourth Edition

Leandra Lederman and Michelle Kwon

UNDERSTANDING

CRIMINAL LAW

Ninth Edition

Joshua Dressler

UNDERSTANDING CRIMINAL

PROCEDURE VOL. 1:

INVESTIGATION

Eighth Edition

Joshua Dressler, Alan C. Michaels,

and Ric Simmons

UNDERSTANDING

CRIMINAL PROCEDURE VOL. 2:

ADJUDICATION

Fourth Edition

Joshua Dressler and Alan C. Michaels

UNDERSTANDING

DISABILITY LAW

Third Edition

Mark C. Weber

#### UNDERSTANDING

#### ELECTION LAW AND VOTING RIGHTS

Michael R. Dimino, Bradley A. Smith, and Michael E. Solimine

#### UNDERSTANDING

#### EMPLOYEE BENEFITS LAW

Second Edition

Kathryn L. Moore

#### UNDERSTANDING

#### EMPLOYMENT DISCRIMINATION LAW

Third Edition

Thomas R. Haggard and Bruce N. Cameron

#### UNDERSTANDING EMPLOYMENT LAW

Third Edition

Paul M. Secunda, Richard A. Bales, and Jeffrey M. Hirsch

#### UNDERSTANDING

#### ENVIRONMENTAL LAW

Fourth Edition

Kevin A. Reilly and Philip Weinberg

#### UNDERSTANDING

### ESTATE AND GIFT TAXATION

Second Edition

Brant J. Hellwig and

Robert T. Danforth

### UNDERSTANDING EVIDENCE

Sixth Edition

Paul C. Giannelli

#### UNDERSTANDING FAMILY LAW

Fourth Edition

John Gregory, Peter N. Swisher, and Robin Wilson

#### UNDERSTANDING

#### FEDERAL AND CALIFORNIA

EVIDENCE

Paul C. Giannelli

#### UNDERSTANDING

### FEDERAL COURTS AND JURISDICTION

Second Edition

Linda Mullenix, Martin H. Redish, and Georgene Vairo

#### UNDERSTANDING

#### FEDERAL INCOME TAXATION

Seventh Edition

J. Martin Burke and Michael K. Friel

#### UNDERSTANDING

#### THE FIRST AMENDMENT

Eighth Edition

Russell L. Weaver

#### UNDERSTANDING IMMIGRATION LAW

Third Edition

Kevin R. Johnson, Raquel Aldana, Bill Ong Hing, Leticia M. Saucedo, and Enid Trucios-Haynes

## UNDERSTANDING INSURANCE LAW

Sixth Edition

Robert H. Jerry, II and Douglas Richmond

#### UNDERSTANDING

#### INTELLECTUAL PROPERTY LAW

Fourth Edition

Tyler T. Ochoa, Shubha Ghosh, and Mary LaFrance

#### UNDERSTANDING

#### INTERNATIONAL BUSINESS AND

#### FINANCIAL TRANSACTIONS

Fourth Edition

Jerold A. Friedland

#### UNDERSTANDING

### INTERNATIONAL CRIMINAL LAW

Fourth Edition

Ellen S. Podgor, Roger S. Clark, and Lucian E. Dervan

### UNDERSTANDING

### INTERNATIONAL LAW

Third Edition

Stephen C. McCaffrey

#### UNDERSTANDING JEWISH LAW

Second Edition

Steven H. Resnicoff

### UNDERSTANDING JUVENILE LAW

Fifth Edition

Martin Gardner

#### UNDERSTANDING LABOR LAW

Fifth Edition

Douglas E. Ray, Calvin William Sharpe, and Robert N. Strassfeld

#### UNDERSTANDING

#### THE LAW OF TERRORISM

Second Edition

Erik Luna and Wayne McCormack

# UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS

Third Edition

Barlow Burke

## UNDERSTANDING LAWYERS' ETHICS

Sixth Edition

Monroe H. Freedman and Abbe Smith

### UNDERSTANDING

### LOCAL GOVERNMENT

Second Edition

Sandra Stevenson

### UNDERSTANDING

#### MODERN REAL ESTATE

TRANSACTIONS

Fourth Edition

Alex M. Johnson, Jr.

#### UNDERSTANDING

#### NEGOTIABLE INSTRUMENTS AND

#### PAYMENT SYSTEMS

Second Edition

William H. Lawrence

#### UNDERSTANDING

## NONPROFIT AND TAX EXEMPT ORGANIZATIONS

Third Edition

Nicholas P. Cafardi and

Jaclyn Fabean Cherry

#### UNDERSTANDING

#### PARTNERSHIP AND LLC TAXATION

Fifth Edition

Jerold A. Friedland

### UNDERSTANDING PATENT LAW

Third Edition

Amy L. Landers

## UNDERSTANDING PRODUCTS LIABILITY LAW

Second Edition

Bruce L. Ottley, Rogelio A. Lasso,

and Terrence F. Kiely

## UNDERSTANDING PROPERTY LAW

Fifth Edition

John G. Sprankling

#### UNDERSTANDING REMEDIES

Fourth Edition

James M. Fischer

#### UNDERSTANDING

#### SALES AND LEASES OF GOODS

Third Edition

William H. Henning, William H. Lawrence, and Henry Deeb Gabriel

#### UNDERSTANDING

#### SECURED TRANSACTIONS

Fifth Edition

William H. Lawrence, William H. Henning, and R. Wilson Frevermuth

## UNDERSTANDING SECURITIES LAW

Eighth Edition

Marc I. Steinberg

#### UNDERSTANDING SPORTS LAW

Timothy Davis and N. Jeremi Duru

#### UNDERSTANDING

### TAXATION OF BUSINESS ENTITIES

Second Edition

Walter D. Schwidetzky and Fred B. Brown

## UNDERSTANDING TORTS

Seventh Edition

John L. Diamond, Lawrence C. Levine, and Anita Bernstein

#### UNDERSTANDING

TRADE SECRET LAW

John G. Sprankling and

Thomas G. Sprankling

## UNDERSTANDING TRADEMARK LAW

Fourth Edition

Mary LaFrance

#### UNDERSTANDING

#### TRUSTS AND ESTATES

Seventh Edition

Roger W. Andersen and Susan Gary

#### UNDERSTANDING

#### WHITE COLLAR CRIME

Fifth Edition

J. Kelly Strader and Todd Haugh

## Understanding Securities Law

### EIGHTH EDITION

## Marc I. Steinberg

Radford Chair in Law and Professor of Law Dedman School of Law Southern Methodist University



Copyright © 2023 Marc I. Steinberg All Rights Reserved

## Library of Congress Cataloging-in-Publication Data

Names: Steinberg, Marc I., author.

Title: Understanding securities law / Marc I. Steinberg.

Description: Eighth edition. | Durham, North Carolina: Carolina Academic

Press, LLC, [2023] | Includes bibliographical references and index. Identifiers: LCCN 2023008138 | ISBN 9781531015053 (paperback) | ISBN

9781531015060 (ebook)

Subjects: LCSH: Securities—United States. | United States. Sarbanes-Oxley Act of 2002 | United States. Dodd-Frank Wall Street Reform and Consumer Protection Act.

Classification: LCC KF1440 .S74 2023 | DDC 346.73/0666—dc23/eng/20230508

LC record available at https://lccn.loc.gov/2023008138

Carolina Academic Press, LLC 700 Kent Street Durham, North Carolina 27701 (919) 489-7486 www.cap-press.com

Printed in the United States of America

## Contents

Acknowledgments — First Edition	xix
Acknowledgments — Second Edition	xxi
Acknowledgments — Third Edition	xxiii
Acknowledgments — Fourth Edition	xxv
Acknowledgments — Fifth Edition	xxvii
Acknowledgments — Sixth Edition	xxix
Acknowledgments — Seventh Edition	xxxi
Acknowledgments — Eighth Edition	xxxiii
Chapter 1 · Introduction	3
\$1.01 Purpose of Text	3
§1.02 Overview	3
§1.03 Selected Securities Law Research Sources	6
Appendix	14
Chapter 2 · Definition of a "Security"	29
§ 2.01 Introduction	29
§2.02 Overview of Key U.S. Supreme Court Decisions	30
§ 2.03 Key Issues For "Investment Contract" Analysis	37
[A] "Solely from the Efforts of Others"	37
[B] "Expectation of Profits"	38
[C] The "Common Enterprise" Requirement	39
[D] Summary	40
§ 2.04 Application of the <i>Howey</i> Test to Specific Ventures	41
[A] Limited Partnership Interests	41
[B] General Partnership Interests	42
[C] Limited Liability Partnership (LLP) Interests	44
[D] Limited Liability Company (LLC) Interests	44
[E] Property Interests Combined with Service Contracts	46
[F] Franchises	48
[G] Digital Assets	49

viii CONTENTS

	§ 2.05 State Law: The Risk Capital and Investment Contract Tests	54
	§ 2.06 Debt Securities	56
	[A] Notes	56
	[B] Certificates of Deposit	62
C	Chapter 3 · Issuer Exemptions from Registration	65
	§ 3.01 Exempt Securities from Registration	65
	§ 3.02 Why Perfect a Transactional Exemption?	66
	§ 3.03 Transactional Exemptions — Introductory Points	69
	§ 3.04 "Testing the Waters" and Other Broad-Based Communications	70
	[A] Rule 241—"Test-the-Waters" Communications	71
	[B] Rule 148 — Demo Days Exclusion from General Solicitation	72
	§ 3.05 The Burden of Proof File, SEC Staff No-Action Letters,	
	and Rescission Offers	73
	[A] Burden of Proof File	73
	[B] SEC Staff No-Action Letters	74
	[C] Rescission Offers	74
	§ 3.06 The Section 4(a)(2) Private Offering Exemption	75 70
	§ 3.07 Rule 506 of Regulation D	78 79
	[A] Historical Perspective [B] Traditional Rule 506 — Rule 506(b)	78 79
	[C] JOBS Act — Rule 506(c)	84
	[D] Issuer Reluctance to Use the "Public" Rule 506(c) Exemption	87
	[E] "Bad Actor" Disqualifiers	88
	§ 3.08 Rules 507 and 508 — Substantial Compliance Standard and	
	Filing of Form D	89
	§ 3.09 The Meaning of "General Solicitation"	91
	§ 3.10 The Limited Offering Exemptions	98
	[A] The Section 4(a)(5) Exemption	98
	[B] The Section 3(b) Exemptions	98
	[1] Rule 504	98
	[2] Rule 505	100
	[3] Rule 701	102
	[4] The Section 3(b)(2) Exemption — Regulation A	103
	§ 3.11 Chart of Selected Securities Act Exemptions	108
	§ 3.12 Rule 1001 — The "California" Exemption	111
	§ 3.13 The Federal Crowdfunding Exemption	112
	§ 3.14 Intrastate Offerings	115
	[A] The Section 3(a)(11) Exemption	115
	[B] The Rule 147 Exemption	116
	[C] The Rule 147A Exemption	117
	[D] Chart — Rule 147 and Rule 147A	119
	[E] ALI Federal Securities Code	120

CONTENTS	ix
----------	----

§ 3.15 The Section 3(a)(9) and 3(a)(10) Exemptions	121
§ 3.16 Integration of Offerings	123
§ 3.17 State "Blue Sky" Law Exemptions	128
§ 3.18 Extraterritorial Application — Regulation S	130
[A] General Conditions	131
[B] Issuer Safe Harbor — Rule 903	133
[C] Resale Safe Harbor	137
[D] The Regulation S Amendments	137
[E] Facilitating Global Trading	139
Appendix	140
Chapter 4 · The Registration Process	159
§ 4.01 Overview of the Registration Process	159
§ 4.02 Framework of Section 5	161
[A] Issuer Classifications	161
[1] Non-Reporting Issuers	162
[2] Unseasoned Issuers	162
[3] Emerging Growth Companies (EGCs)	162
[4] Seasoned Issuers	163
[5] Well-Known Seasoned Issuers (WKSIs)	163
[B] The Pre-Filing Period	164
[1] Overview	164
[2] Conditioning the Market ("Gun-Jumping")	165
[3] Rules 163, 163A, and 163B	167
[4] Effect of Rule 135	168
[5] Confidential SEC Review of IPO Registration Statements	169
[6] Transactions Between Market Professionals	170
[7] Rules 137, 138, and 139 and Emerging Growth Companies	170
[C] The Waiting Period	173
[1] Overview	173
[2] Free Writing Prospectus	173
[3] Media	176
[4] The Rule 134 Public Notice	177
[5] Roadshows	178
[6] SEC's Power of Acceleration	179
[D] The Post-Effective Period	180
[1] Overview	180
[2] Access Equals Delivery	180
[E] Chart of Time Periods	181
§ 4.03 The "Misleading" Prospectus	184
§ 4.04 "Going Public" — Pros and Cons	186
§ 4.05 A Brief Look at the Process of a Public Offering	187
§ 4.06 State "Blue Sky" Law	191

x CONTENTS

Chapter 5 · Disclosure, Materiality, and the Sarbanes-Oxley and	
Dodd-Frank Acts	193
§ 5.01 Introduction	193
§ 5.02 The Integrated Disclosure Framework	193
[A] Securities Act Registration Forms	194
[1] Form S-1	194
[2] Form S-3	196
[3] Critical Analysis	197
[B] Ways That a Company Becomes Subject to the Exchange	
Act's Reporting Requirements	198
[C] Reduced Disclosure Requirements for Certain Issuers	200
[1] Emerging Growth Companies	200
[2] Smaller Reporting Companies	201
[D] Shelf Registration	202
§ 5.03 The Mandatory Disclosure System Debate	204
§ 5.04 "Plain English" Disclosure	207
§ 5.05 Disclosure of "Forward-Looking" Information	208
[A] Rule 175	209
[B] The PSLRA Safe Harbor	210
[C] Management Discussion and Analysis ("MD&A")	210
§ 5.06 Disclosure of Information Focusing on Director/Officer	
Integrity or Competency	211
§ 5.07 Qualitative Economic Materiality	213
§ 5.08 The Sarbanes-Oxley Act	215
[A] Introduction	215
[B] CEO and CFO Certifications	217
[C] Audit Committees	219
[1] Audit Committee Independence	219
[2] Audit Committee Financial Expert	220
[D] Improper Influence on Audits	221
[E] Forfeiture of Bonuses and Profits — Clawbacks	221
[F] Officer and Director Bars	222
[G] Insider Trading During Blackout Periods	222
[H] Disclosure of Off-Balance Sheet Transactions	223
[I] Prohibition of Loans to Directors and Officers	224
[J] Reporting of Insider Transactions	224
[K] Management and Auditor Assessment of Internal Controls	224
[L] Senior Financial Officer Code of Ethics	225
[M] Real-Time Disclosure	226
[N] Accounting Oversight Board	226
[O] Auditor Independence	227
[1] Non-Audit Services	227
[2] Audit Committee Pre-Approval of Permitted Non-Audit	
Services	227

CONTENTS xi

[3] Audit Partner Rotation	228
[4] Report to the Audit Committee	228
[5] Cooling-Off Period	228
[P] Attorney Professional Responsibility	228
[1] "Up-the-Ladder" Reporting	229
[2] Qualified Legal Compliance Committee	229
[Q] Financial Analysts' Conflicts of Interest	229
[R] Remedies and Criminal Penalties	230
[1] Statute of Limitations — Private Actions	230
[2] Whistleblower Civil Remedy	230
[3] Insider Trading During Blackouts — Disgorgement of Profits	231
[4] No Discharge of Securities Fraud Debts in Bankruptcy	232
[5] Court Order Freezing Certain Extraordinary Payments	232
[6] Fair Funds Provision	232
[7] SEC Equitable Relief	232
[8] Enhanced Criminal Sanctions	233
§ 5.09 The Dodd-Frank Act — Corporate Governance	234
Chapter 6 · Resales and Reorganizations	239
§ 6.01 Introduction	239
§ 6.02 The Concept of "Underwriter"	240
[A] The Presumptive Underwriter Doctrine	241
[B] Participating in the Underwriting Effort	242
§ 6.03 Distributions by Controlling Persons or Affiliates	243
[A] The Concept of "Control"	243
[B] Effecting a "Distribution"	244
§ 6.04 Contractual Agreements to Sell and Related Issues	245
[A] Contractual Agreements to Sell	245
[B] Letter from Issuer's Counsel	247
[C] Additional Pitfalls	247
[D] PIPEs	248
§ 6.05 Purchasing from an Issuer with a View Toward Distribution	248
[A] Holding Period	249
[B] Restrictive Legends — Change in Circumstances	250
[C] Sales by Pledgees	250
§ 6.06 Rule 144	252
[A] Background	252
[B] Provisions of the Rule — Overview	253
[C] Certain Sales by Non-Affiliates	256
[1] Restricted Securities	256
[2] Nonrestricted Securities	259
[D] Chart	261
Rule 144	262
§ 6.07 The Section "4(1½)" Exemption	262
§ 6.08 The Section 4(a)(7) Exemption	264

xii CONTENTS

§ 6.09 Rule 144A	266
[A] Requirements	267
[B] Criticism	269
§ 6.10 Corporate Reorganizations	270
[A] In General	270
[B] Rule 145 — Ramifications	270
[C] "Downstream Sales"	270
[D] "Spin-Offs"	272
Chapter 7 · Due Diligence and Securities Act Liability in Registered	
and Public Offerings	275
§ 7.01 Introduction	275
§ 7.02 The Registered Offering — Framework of Section 11	276
[A] Persons Subject to Section 11 Liability	276
[B] Overview of the Section 11 Right of Action	277
[1] Statements of Opinion or Belief	280
[2] Tracing in Direct Offerings	283
[3] Statute of Repose	285
[C] Defenses	286
[1] General	286
[2] Due Diligence — Overview	286
[3] Due Diligence Standard	287
§ 7.03 Contribution and Indemnification	288
§ 7.04 Due Diligence in the Registered Offering Context	290
[A] Directors	290
[B] Signatories	292
[C] Attorneys	293
[D] Tasking of Due Diligence	295
[E] Underwriters	295
[F] Accountants	297
§ 7.05 Impact of the Integrated Disclosure System	299
§ 7.06 Director Review and Signing of Form 10-K	303
§ 7.07 Shelf Registration	304
\$7.08 Section 12(a)(1) of the Securities Act	307
§ 7.09 Section 12(a)(2) of the Securities Act	307
[A] Overview	307
[B] The Meaning of "Seller"	310
[C] Secondary Liability	311
[D] Limited to Public Offerings	312
[E] The Reasonable Care Defense	314
[F] Indemnification and Contribution	316
[G] Affirmative Defense of Section 12(b)	317
§7.10 Section 4A(c) — The "Crowdfunding" Remedy	317
Appendix	319
LL	517

CONTENT THE	•••
CONTENTS	X111

Chapter 8 · Section 10(b) and Related Issues	325
§ 8.01 Overview	325
§ 8.02 Standing: The Purchaser-Seller Requirement	329
§ 8.03 Requisite Culpability Level	331
[A] Private Damages Actions	331
[B] SEC Actions for Injunctive Relief	332
[C] "Recklessness"	332
[D] State Court Reaction	333
§ 8.04 Pleading Requirements	334
§ 8.05 The "Manipulation" or "Deception" Requirement	337
[A] Breach of Fiduciary Duty Not Sufficient	337
[B] Federal Claims Premised on Breach of Fiduciary Duty	339
[1] Post-Santa Fe State Court Decisions	339
[2] Post-Santa Fe Federal Court Decisions	340
[3] Caveats	340
[4] Summation	342
[C] Manipulation	343
§ 8.06 The Reliance Requirement	345
[A] Generally	345
[B] The "Fraud on the Market" Theory	346
[1] Supreme Court Approval — Basic, Inc. v. Levinson	346
[2] Supreme Court Decisions — Halliburton I and Amgen	348
[3] Supreme Court's Affirmation of the "Fraud on the	
Market Theory" — Halliburton II	350
[4] Supreme Court Decision—Goldman Sachs Group	352
[5] Characteristics of an "Efficient" Market	353
[C] The "Fraud to Enter the Market" Theory	354
[D] Plaintiff Due Diligence (Justifiable Reliance)	356
[1] The "Bespeaks Caution" Doctrine	357
[2] Reliance on Oral Statements Inconsistent with Written	
Offering Materials	358
§ 8.07 Loss Causation	359
§ 8.08 Cumulative Remedies	360
§ 8.09 Statute of Limitations	362
[A] Merck & Co., Inc. v. Reynolds	363
[B] Supreme Court Decisions After <i>Merck</i>	364
§ 8.10 Measure of Damages	365
§ 8.11 <i>In Pari Delicto</i> Defense	367
§ 8.12 Contribution, Proportionate Liability, and Related Issues	369
§ 8.13 The Private Securities Litigation Reform Act (PSLRA): Class Action	
Reform And Related Issues	372
[A] Class Action Reform	372
[B] Sanctions for Abusive Litigation	374

xiv CONTENTS

[C] Stay of Discovery and Preservation of Evidence	374
[D] Auditor Disclosure of Corporate Fraud	375
§ 8.14 Extraterritorial Reach of Section 10(b)	376
[A] Transnational Fraud	376
[1] Prior to Morrison	376
[2] Morrison v. National Australia Bank	377
[3] SEC Extraterritorial Reach	378
[4] Invocation of Other Provisions — Extraterritorial Reach	379
[B] Securities Act Registration	380
[C] Tender Offers	380
Chapter 9 · Alternative Remedies	383
§ 9.01 Introduction	383
§ 9.02 Implied Rights of Action — In General	383
[A] Pre-1975 Approach	383
[B] The <i>Cort</i> Formulation and Its Apparent Demise	384
§ 9.03 Availability of Implied Rights of Action Under Select Statutes	386
§ 9.04 Section 17(a) of the Securities Act	388
[A] Generally	388
[B] Supreme Court Decisions	388
[C] Availability of Implied Right of Action	389
§ 9.05 Section 14(a) of the Exchange Act (the Proxy Statute)	390
[A] Elements of Private Right of Action	390
[B] A Look at Virginia Bankshares	393
[C] Contexts Where Proxy Provisions Apply	396
§ 9.06 Section 29(b) of the Exchange Act	396
§ 9.07 Section 18 of the Exchange Act	398
§ 9.08 The Racketeer Influenced and Corrupt Organizations Act (RICO)	399
§ 9.09 State Securities and Common Law Remedies	401
[A] Obstacles to State Law Relief	401
[1] Overview	401
[2] The Securities Litigation Uniform Standards Act (SLUSA)	402
[B] Advantages of State Claims	406
Chapter 10 · Secondary Liability and Distinguishing Primary	
from Secondary Liability	413
§ 10.01 Aiding and Abetting Liability	413
§ 10.02 SEC Enforcement Authority against Aiders and Abettors	415
§ 10.03 Distinguishing Primary from Secondary Conduct	416
[A] Central Bank of Denver	416
[B] Rejection of a Broad "Scheme to Defraud" Theory	417
[C] Janus Capital and Its Ramifications	419
[D] The SEC's "Flexible" Interpretation	421
[E] Reinvigorating "Scheme" Liability Under Rule 10b-5(a) and (c)	423

CONTENTS xv

§ 10.04 Controlling Person Liability § 10.05 Respondeat Superior Liability	425 428
Chapter 11 · Issuer Affirmative Disclosure Obligations	433
\$11.01 Overview	433
§11.02 Impact of the "MD&A" Requirements	436
§11.03 Rumors and Third Party Statements	437
§11.04 Disclosure of Merger Negotiations	438
§11.05 Disclosure of "Soft" Information	440
[A] Generally	440
[B] Application to "Merger" Context	442
[C] The "Bespeaks Caution" Doctrine	444
[D] The Private Securities Litigation Reform Act (PSLRA) —	
Safe Harbor for Certain Forward-Looking Statements	446
§11.06 Duty to Update	451
§11.07 Real-Time Disclosure	453
[A] Sarbanes-Oxley Directive	453
[B] Form 8-K Amendments	454
[C] Critique of Form 8-K Amendments	457
§11.08 Regulation FD	459
[A] Purposes of Regulation FD	459
[B] Scope of Regulation FD	460
[C] Meaning of "Material" and "Nonpublic"	461
[D] Intentional or Non-Intentional Selective Disclosure	462
[E] Methods for Making Public Disclosure	463
[F] Exclusions for Registered Offerings	464
[G] Application to Company Web Sites and Social Media Channels	465
[H] SEC Enforcement, No Private Remedy	467
§11.09 Stock Exchange Rules—Affirmative Disclosure Obligations	468
§11.10 Responding to Auditor Requests	469
Chapter 12 · Insider Trading	473
§12.01 Overview	473
§12.02 Supreme Court Decisions of the Early 1980s — Chiarella & Dirks	476
§12.03 The Misappropriation Theory	480
[A] United States v. O'Hagan	480
[B] Family and Other Personal Relationships and Rule 10b5-2	482
\$12.04 "Possession" vs. "Use" and Rule 10b5-1	483
§12.05 Right of Action for Contemporaneous Traders	487
§12.06 Damages and Monetary Penalties	488
[A] Damages — Section 10(b) Actions	488
[B] Monetary Penalties §12.07 Rule 14e-3	490
§12.07 Rule 14e-3 §12.08 The Mail, Wire, and Securities Fraud Statutes	491
VIZ.UO THE IVIAH, VVITE, AND SECUTIOES FRAUD STATUTES	492

xvi CONTENTS

§12.09 Blackout Periods — Insider Trading Prohibitions	493
§12.10 The STOCK Act	494
§12.11 Section 16 — "Short-Swing" Trading	495
[A] Overview	495
[B] Relevant Issues	497
[1] Beneficial Ownership and the Concept of Attribution	497
[2] Directors—"Deputization"	498
[3] Officers	498
[4] Ten Percent Beneficial Owners	499
[5] Objective Approach vs. Pragmatic Approach	500
Chapter 13 · Broker-Dealer Regulation	503
§13.01 Overview	503
§13.02 Arbitration	506
[A] Key Supreme Court Decisions	506
[B] Aftermath of McMahon and Rodriguez	509
[C] Arbitration Today	511
§13.03 Special Concepts of Fraud for Broker-Dealers	513
§13.04 Regulation Best Interest (BI)	515
§13.05 Conflicts and Screening Procedures	518
[A] In General	518
[B] The Need for Reinforcement Measures	519
[C] Regulatory Treatment of Chinese Walls	520
[D] SEC Global Research Analyst Settlement	521
[E] Sarbanes-Oxley Act Provisions	523
[F] Impact of the JOBS Act	523
§13.06 Secondary Liability — Failure to Supervise	525
Chapter 14 · Corporate Control Acquisitions and Contests	527
§14.01 Introduction	527
§14.02 Going-Private Transactions	528
[A] State Law	528
[B] Federal Law	529
§14.03 Proxy Contests	531
§14.04 A Primer on the Williams Act	532
[A] Introduction	532
[B] Legislation	534
[C] Debate	536
§14.05 Definition of Tender Offer	537
§14.06 Constitutionality of State Takeover Statutes	540
[A] The CTS Decision	540
[B] The "Third Generation" Statutes	542
[C] Need for Federal Preemption	544
§14.07 Disclosure of Beneficial Ownership Interest	545
§14.08 SEC Tender Offer Rules	547
§14.09 Substantive Regulation of Defensive Tactics	550

CONTERNITO	••
CONTENTS	XV11

[A] Federal Law	550
[B] State Law	552
Chapter 15 · SEC Enforcement	557
§15.01 Introduction	557
§15.02 SEC Subpoena Power	558
[A] Overview	558
[B] Supreme Court Standards	559
[C] Notice to Third Parties	560
§15.03 Parallel Proceedings	562
§15.04 SEC Administrative Enforcement Remedies	563
[A] Cease and Desist Orders	564
[B] Money Penalties	565
[C] Disgorgement	565
[D] Officer and Director Bars	566
[E] Refusal and Stop Orders	566
[F] Summarily Suspending Trading in a Security	566
[G] Broker-Dealer Disciplinary Sanctions	567
[H] Section 15(c)(4) Disciplinary Proceedings	567
[I] Section 21(a) Reports of Investigation	568
§15.05 SEC Injunctions	568
[A] Standards for Injunctive Relief	568
[B] Implications of Central Bank of Denver,	
the PSLRA, and Dodd-Frank	570
[C] Collateral Consequences	571
[D] Disgorgement and Other Relief	572
[E] Modification or Dissolution of SEC Injunctions	574
§15.06 Officer and Director Bars	576
§15.07 Money Penalties	577
§15.08 Statutes of Limitations	578
§15.09 Professional Responsibility	579
[A] Rule 102(e) [formerly Rule 2(e)]	579
[B] SEC Standards of Conduct	582
§15.10 Sarbanes-Oxley Act and Dodd-Frank Act Enhanced Enforcement	584
Appendix	587
SEC Order Directing a Private Investigation	587
SEC Subpoena Order	591
Glossary	593
Table of Cases	649
Table of Statutes	665
Index	669

## Acknowledgments—First Edition

I wish to thank a number of individuals for their help regarding this project. In particular, my thanks to Professors Alan Bromberg, Dennis Honabach, and Mark Sargent for their comments. I thank Ralph Ferrara, Robin Goldman, Sam Gruenbaum, Will Kaulbach, Joe Kempler and Richard Starr, all of whom were my coauthors for certain publications, portions of which appear herein. My thanks also to Callaghan & Co., publishers of my treatise on Securities Practice: Federal and State Enforcement (1985) (updated annually) (coauthored with Ralph Ferrara), and to Law Journal Seminars-Press, publisher of my treatise on Securities Regulation: Liabilities and Remedies (1984) (updated annually) for granting their permission for me to use excerpts from the respective treatises. I also thank several law reviews in which I authored articles for granting their permission to use certain portions thereof herein, including the Cornell Law Review (67 Cornell L. Rev. 557 (1982), 66 Cornell L. Rev. 27 (1980)) and Fred B. Rothman & Co., the Emory Law Journal (30 Emory L.J. 169 (1981)), the Journal of Corporation Law (11 J. Corp. L. 1 (1985)), the Loyola of Los Angeles Law Review (13 Loyola Univ. (L.A.) L. Rev. 247 (1980) (coauthored with Samuel Gruenbaum), the University of Maryland Law Review (46 Md. L. Rev. 923 (1987)) (coauthored with Robin Goldman), the University of Pennsylvania Law Review (129 U. Pa. L. Rev. 263 (1980)) (coauthored with Ralph Ferrara) and Fred B. Rothman & Co., and the Vanderbilt Law Review (40 Vand. L. Rev. 489 (1987)) (coauthored with Will Kaulbach).

From the University of Maryland Law School, I thank Bob Krusen for his research assistance, Anne Rollins for her comments, and LuAnn Marshall, Gwen Davis, and Eileen Gretes for their expert secretarial help. This book was written while I was a member of two faculties, the faculties of the University of Maryland Law School and the Southern Methodist University School of Law. I thank both institutions and their respective deans, Mike Kelly at Maryland and Paul Rogers at SMU, for their support of this project.

I wish to dedicate this book to my friends at The University of Maryland School of Law. I've been fortunate to teach during the past six years at this superb institution with wonderful colleagues and students. As I enthusiastically join the SMU Law faculty on a more permanent basis, I will miss my friends at the Maryland Law School.

June 1989

## Acknowledgments—Second Edition

The Second Edition to this reference text comes during my seventh year at SMU. It has been a fine seven years and I thank the university and my colleagues.

This project was funded by summer research grants (including the William Hawley Atwell Fund) from SMU Law School. I thank Dean Paul Rogers and the Atwell Fund for their support.

I owe many thanks to several individuals for helping this project become reality. I certainly thank the contribution of all those mentioned in the acknowledgments to the First Edition as well as the publishers who granted permission for me to use excerpts from my other books and articles.

For the Second Edition, I thank my secretary, Ms. Kathleen Vaughan, for her significant assistance. I also thank Professor Alan Bromberg, Mr. Ralph Janvey, Mr. Daryl Lansdale, Mr. Bruce Mendelsohn, Mr. Chris Olive and Mr. Buddy Reece as well as my research assistants, Mr. Cory Farley, Ms. Julie Herzog, and Mr. Cliff Murray, for their meaningful input. My thanks as well to The International Lawyer granting permission for me to use excerpts from my article that appeared in 29 Int'l Law. 43 (1995). I again thank Law Journal Seminars-Press for granting permission for me to use excerpts from my treatise, Securities Regulation: Liabilities and Remedies.

I dedicate this Second Edition to my good friend and colleague Professor Alan R. Bromberg. Professor Bromberg truly is the preeminent scholar in the United States in the areas of the law relating to securities fraud and partnership law. He also is a wonderful and generous individual. His help and guidance through my years at the University of Maryland and here at SMU have meant so very much to me. I thank you Alan.

August 1995

## Acknowledgments—Third Edition

Fifteen years have elapsed since the publication of the First Edition of Understanding Securities Law. As this reference text undergoes modification due to securities law developments and the author's prerogative, I thank the contribution of all those mentioned in the acknowledgments to the First and Second Editions as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

This project was funded by summer research grants from the SMU School of Law. I thank Dean John Attanasio and the Law School for their generous support.

For the Third Edition, I thank my secretary, Ms. Judy Parsley, for her significant assistance. I also thank my research assistants Mr. Jeff Brown, Mr. Noah Hansford, Mr. Barrett Howell, and Mr. Jason Myers for their meaningful input.

I dedicate this Third Edition to my parents Gerald and Phyllis Steinberg in honor of their fifty-ninth wedding anniversary. I am a lucky man to have two wonderful and loving parents. Mom and Dad, thanks so very much for your love, support, and guidance.

September 2000

## Acknowledgments—Fourth Edition

Twenty years have elapsed since the publication of the First Edition of *Understanding Securities Law*. As this reference text undergoes modification due to securities law developments and the author's prerogative, I thank the contribution of all those mentioned in the acknowledgments to the First, Second and Third Editions as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

This project was funded by a summer research grant from the SMU Dedman School of Law. I thank Dean John Attanasio and the Law School for their generous support.

For the Fourth Edition, I particularly thank my administrative assistant, Ms. Jan Spann, for her significant contribution. I also express my gratitude to Ms. Michele Oswald and Ms. Carolyn Yates for their secretarial assistance.

I thank Mr. Gregory Ivy, Associate Director of the Underwood Law Library, for his contribution of "Selected Securities Law Research Sources" contained in Chapter 1 of the book. My thanks also to my research assistants, a number of whom are now practicing lawyers—Mr. Chris Claasen, Ms. Karen Crenshaw, Ms. Shanna Nugent, Ms. Andrea Petersen and Mr. Tabor Pittman—for their meaningful input.

I dedicate this Fourth Edition to my wonderful family—my wife Laurie, my daughter Alexandra (Alex), and my sons Avram (Avi) and Phillip (Bear)—with all my love.

November 2006

## Acknowledgments—Fifth Edition

This project was funded by a summer research grant from the SMU Dedman School of Law. I thank Dean John B. Attanasio and the Law School for their generous support. I also thank my research assistants Mr. Dustin Appel and Mr. Ignacio Hirigoyen as well as my administrative assistant Ms. Jan Spann for their assistance. In addition, I wish to extend my appreciation to those persons mentioned in the acknowledgments to the First, Second, Third and Fourth Editions as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

I dedicate this Fifth Edition to my terrific aunt and uncle, Frances and Fred Marblestone. Aunt Frances and Uncle Fred—this is a "small" way for me to say thank you for being so wonderful to my Mom and Dad, my sister Nancy, and me.

December 2008

## Acknowledgments—Sixth Edition

This project was funded by a summer research grant (the Michael C. and Jacqueline M. Barrett Endowed Faculty Research Fund) from the SMU Dedman School of Law. I thank former Dean John B. Attanasio, Interim Dean Julie Forester and the Law School for their generous support. I also thank Ms. Jan Spann for her excellent administrative assistance. In addition, I wish to extend my appreciation to those persons mentioned in the acknowledgments in the first five editions of this text as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

The Sixth Edition is dedicated to two "personalities" who have brought much joy to our family—our wonderful dogs, Popeye and Patsi.

December 2013

## Acknowledgments— Seventh Edition

Nearly three decades have elapsed since the publication of the First Edition of *Understanding Securities Law*. As this reference text undergoes modification due to securities law developments and the author's prerogative, I thank the contributions of all those mentioned in the acknowledgments in each of the previous six editions as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

For the Seventh Edition, I particularly thank my administrative assistant, Ms. Carolyn Yates, for her significant contribution. I also wish to express my appreciation to my research assistants who diligently proofread the manuscript: Mr. Hayden Baker, Mr. David Watson, and Mr. Logan Weissler.

I dedicate this Seventh Edition to my wonderful Aunt Muriel who recently celebrated her 96th birthday. The younger sister of my father, Aunt Muriel has been an affectionate, supportive, and steadying presence in our family. I am so very appreciative of the kindness and love she has shown me through the years. Accordingly, I am delighted to dedicate this book with love to my Aunt Muriel.

April 2018

## Acknowledgments— Eighth Edition

Over four decades have passed since the publication of the First Edition of *Understanding Securities Law*. As this reference text undergoes modification due to securities law developments and the author's prerogative, I thank the contributions of all those mentioned in the acknowledgments in each of the previous seven editions as well as the publishers who have granted permission for me to use excerpts from my other books and articles.

For the Eighth Edition, I particularly thank my administrative assistants, Ms. Carolyn Yates and Mr. Christopher Garza, for their significant contribution. I also wish to express my appreciation to my research assistants, Ms. Hailey Collett and Mr. Taylor Santori, for their diligence. I also thank Mr. Greg Ivy, Associate Dean for Library and Technology, for his assistance.

I dedicate this Eighth Edition to Ms. Carolyn Yates who is retiring from SMU after thirty years of outstanding service to the law school and university. During the many years I have worked with Carolyn, her collegial attitude, due diligence, and superb work product have been a constant presence. I am fortunate to have had the privilege of working with her on a daily basis. Carolyn, I thank you so very much for your trustworthiness, support, and excellence these many years. I wish you a well-deserved happy and healthy retirement. I am delighted to dedicate this book to you.

February 2023