No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC
(F/K/A SLACK TECHNOLOGIES, INC.) *et al.*,

Petitioners,

v.

FIYYAZ PIRANI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading.

PARTIES TO THE PROCEEDING

1. Petitioners Slack Technologies, LLC (f/k/a Slack Technologies, Inc.), Stewart Butterfield, Allen Shim, Brandon Zell, Andrew Braccia, Edith Cooper, John O'Farrell, Chamath Palihapitiya, Graham Smith, Social+Capital Partnership GP II L.P., Social+Capital Partnership GP II Ltd., Social+Capital Partnership GP III L.P., Social+Capital Partnership GP III Ltd., Social+Capital Partnership Opportunities Fund GP L.P., Social+Capital Partnership Opportunities Fund GP Ltd., Accel Growth Fund IV Associates L.L.C., Accel Growth Fund Investors 2016 L.L.C., Accel Leaders Fund Associates L.L.C., Accel Leaders Fund Investors 2016 L.L.C., Accel X Associates L.L.C., Accel Investors 2009 L.L.C., Accel XI Associates L.L.C., Accel Investors 2013 L.L.C., Accel Growth Fund III Associates L.L.C., AH Equity Partners I L.L.C., and A16Z Seed-III LLC were the defendants in the district court and the appellants below.

2. Respondent Fiyyaz Pirani was the plaintiff in the district court and the appellee below.

RULE 29.6 DISCLOSURE STATEMENT

1. Slack Technologies, LLC (f/k/a Slack Technologies, Inc.) is a wholly owned subsidiary of Salesforce, Inc., which is publicly traded (NYSE: CRM).

2. The other entity petitioners do not have any parent corporations, and no publicly held companies own more than 10% of their stock.

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Petitioners respectfully submit that the Court should reverse the judgment of the Ninth Circuit and remand with instructions to dismiss the complaint with prejudice.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-30a) is reported at 13 F.4th 940. The district court's decision (Pet. App. 31a-75a) is reported at 445 F. Supp. 3d 367.

JURISDICTION

The Ninth Circuit issued its decision on September 20, 2021, and denied rehearing on May 2, 2022. Slack timely sought certiorari on August 31, 2022, which this Court granted on December 13, 2022. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this brief. App. 1a-41a.

STATEMENT OF THE CASE

The Securities Act of 1933 requires companies to make a one-time disclosure, through a registration statement filed with the Securities and Exchange Commission, of relevant information before offering certain shares to the public. That requirement is not universal; some shares and transactions are exempt from registration. But where registration is required for particular shares, those shares may not be sold to the public unless they have been registered under a '33 Act registration statement that contains a prospectus.

The ’33 Act creates specialized liability provisions to enforce that registration requirement. Under Section 11, if a registration statement is materially false or misleading, “any person acquiring such security” can sue. 15 U.S.C. § 77k(a). And under Section 12(a)(2), anyone who offers or sells a security “by means of a prospectus” with a material misstatement is liable “to the person purchasing such security from him.” *Id.* § 77*l*(a)(2).

For more than half a century, courts agreed that the ’33 Act’s textual limitation permitting suit only by purchasers of “such security” requires plaintiffs to plead and prove that they bought securities registered under the registration statement at issue. That settled understanding resulted from extensive analysis of the Act’s text, structure, and history, and it was adopted by prominent judges, leading academics, and the SEC. And it prevailed despite protests, beginning as early as the 1960s, that changing practices in the securities markets were making it difficult for some plaintiffs to prove they bought registered shares. Congress has paid close attention to the securities laws over the years, repeatedly amending the ’33 Act, but has never amended Sections 11 or 12(a)(2) to remove plaintiffs’ obligation to prove they bought registered shares.

In 2019, Slack went public through a direct listing. Unlike a traditional initial public offering, in which newly registered shares are traded on an exchange for an initial period before preexisting unregistered shares can be traded, a direct listing like Slack’s enables all existing shares—including those exempt from the ’33 Act’s registration requirement—to be traded on an exchange immediately. Respondent Fiyyaz Pirani bought Slack shares on an exchange after the listing and later sued under Sections 11 and 12(a)(2). But he admits he does not know whether the shares he bought were registered or exempt. Because only buyers of registered shares may sue under those provisions, respondent's suit should have been dismissed.

Yet the Ninth Circuit, departing from more than 50 years of case law, held that Sections 11 and 12(a)(2) do *not* require proof that the plaintiff bought registered shares. It justified its departure from settled law based on a perceived policy concern, namely, its view that requiring proof of the purchase of registered shares "would essentially eliminate Section 11 liability . . . in a direct listing," creating "a loophole large enough to undermine the purpose of Section 11." Pet. App. 17a-18a.

The Ninth Circuit's elevation of policy concerns over statutory text, structure, and history has no basis in law and is not justified on its own terms. The Ninth Circuit's view of the '33 Act disrupts the delicate balance Congress struck, undermines the stability of the securities markets and the efficiency of the capital-formation process, and exposes issuers and others to massive and previously uncontemplated liability without fault. Practical problems of proof in '33 Act cases are nothing new, but the sky has not fallen, doubtless because there are multiple other liability provisions sufficient to ensure that companies take their disclosure obligations seriously. And if perceived policy concerns militate in favor of a different legal standard, such a change must come via congressional or regulatory revision, not judicial legislation.

A. Statutory Framework

The Securities Act of 1933 and the Securities Exchange Act of 1934 are the twin pillars of American securities law. The purpose of the '33 and '34 Acts is to establish a workable regime for requiring disclosure of relevant information that fosters efficient capital formation and that investors can use to decide whether to buy and sell securities. 15 U.S.C. §§ 77b(b), 78c(f); *see Kokesh v. SEC*, 581 U.S. 455, 458 & n.1 (2017); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976). To accomplish that purpose, the Acts impose distinct requirements: The '33 Act requires certain securities to be registered with the SEC and to be the subject of initial disclosures; the '34 Act requires ongoing disclosures for all publicly traded securities.

To register securities with the SEC under the '33 Act, an issuer must file a registration statement and pay a fee that depends on the number of shares registered. 15 U.S.C. § 77f. The registration statement is "effective only as to the securities specified therein." *Id.* § 77f(a). In other words, "only individual shares are registered," not entire classes or types of securities. *Barnes v. Osofsky*, 373 F.2d 269, 272 (2d Cir. 1967). "Unless a registration is in effect as to a security" subject to the registration requirement, it is unlawful "to sell such security." 15 U.S.C. § 77e(a).

Not all shares must be registered; many are exempt from registration for various reasons. *E.g.*, 15 U.S.C. § 77d. Shares exempt from registration often trade between individual investors even before a company goes public by listing on an exchange. For instance, shares traded "by any person other than an issuer, underwriter, or dealer" need not be registered. *Id.* § 77d(a)(1).

One commonly used exemption from registration is SEC Rule 144, which clarifies when shareholders are not acting as "underwriters" and thus can resell unregistered shares. 17 C.F.R. § 230.144. Those who have held unregistered shares for at least a year and are not affiliates of the company can use Rule 144 to sell some of their holdings to third parties. *Id.* § 230.144(b). The buyers of those shares, in turn, are generally free to sell them to others without restriction. *Id.*

The '33 and '34 Acts impose distinct but complementary disclosure requirements. The '33 Act creates a *one-time* disclosure obligation for registered securities. If shares must be registered before they can be offered and sold, the issuer must file with the SEC a registration statement covering those shares that includes a prospectus making thorough disclosures. 15 U.S.C. § 77e. The '34 Act, by contrast, creates an *ongoing* disclosure obligation for issuers of publicly traded securities, regardless of whether their securities are registered under the '33 Act. *Id.* § 78m.

This difference in focus makes the '33 Act "far narrower" than the '34 Act. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 (1975). The '33 Act " 'was primarily concerned with the regulation of new offerings.' " *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995). Its main liability provisions, Sections 11 and 12, therefore focus on the registration statements and prospectuses required with respect to offerings of particular registered securities. Section 11 limits the class of people who may sue to those who can plead and prove that they "acquir[ed] such security," but creates near-strict liability even for innocent mistakes in "any part of the registration statement" (including in the prospectus). 15 U.S.C.

§ 77k(a); *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Section 12(a)(2), which imposes negligence-based liability, is even narrower, covering only sales of stock "by means of a prospectus" directly from the defendant seller to the plaintiff who "purchas[ed] such security from him." 15 U.S.C. § 77*l*(a).

There is one "'major departure from the limitation of the 1933 Act to new offerings,'" *Gustafson*, 513 U.S. at 577-78 (brackets omitted): Section 17, 15 U.S.C. § 77q. "Unlike much of the rest of the act," Section 17 was meant "to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading." *United States v. Naftalin*, 441 U.S. 768, 777-78 (1979); *see* 15 U.S.C. § 77q(a). Although not limited in scope to registered securities, Section 17 is limited in other ways; most importantly, it vests enforcement discretion in the SEC and does not provide a private right of action. *E.g.*, *Maldonado v. Dominguez*, 137 F.3d 1, 6 (1st Cir. 1998).

Section 10(b) of the '34 Act applies even more broadly. It allows suits "in connection with the purchase or sale of any security," regardless of whether the securities were registered, 15 U.S.C. § 78j(b), and it has been interpreted to afford private investors the right to sue, *Herman & MacLean*, 459 U.S. at 380 & n.10. But plaintiffs suing under Section 10(b) must plead and prove scienter—i.e., intent to defraud. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007). And they must comply with the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995. 15 U.S.C. § 78u-4.

B. Types of Public Offerings

Traditionally, many companies have gone public through an initial public offering. In a typical IPO, a company already has unregistered shares owned by its founders, early investors, and employees, but issues new registered shares to raise capital from the investing public. Investment banks underwrite the offering by buying the new registered shares at a negotiated price, and then arrange to sell those shares to investors at a higher price. Pet. App. 7a. To prevent the stock price from being undercut once trading on the exchange begins, underwriters usually require holders of preexisting shares to agree to a "lockup" period during which they cannot sell the preexisting shares for a limited time after the IPO. *Id.* Accordingly, only registered shares are sold in the initial period following a typical IPO.

Although lockups are a common feature of IPOs, the securities laws do not require them. Pet. App. 7a. They are instead a practical consequence of the financial interests of underwriters, which typically agree to underwrite a public offering only if they can control the sale of all shares on the market during the initial period.

IPOs have significant drawbacks. They impose high transaction costs on issuers—seven percent of the gross proceeds in many offerings. Hsuan-Chi Chen & Jay R. Ritter, *The Seven Percent Solution*, 55 J. FIN. 1105, 1109-10 (2000); Robert J. Jackson, Jr., Comm'r, SEC, Speech at the Greater Cleveland Middle Market Forum: The Middle-Market IPO Tax, app. (Apr. 25, 2018), https://bit.ly/3k1JimH. IPOs are also typically underpriced, resulting in a first-day "pop" in the share price that benefits individuals or entities allocated shares by the underwriters, not the issuer itself. Jay R. Ritter, Initial Public Offerings: Underpricing (Jan. 4, 2023), https://bit.ly/3IyRchr. Retail investors are typically left out in the cold, able to buy shares only after the initial "pop" in share price. *See generally* Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711 (2005).

Some companies have chosen other methods of going public. Google ran an unconventional reverse auction to avoid leaving money on the table through a traditional IPO. Christine Hurt, *What Google Can't Tell Us About Internet Auctions (and What It Can)*, 37 U. TOL. L. REV. 403, 415-16, 422-26 (2006). Other companies have gone public as special-purpose acquisition companies, raising capital first and then using it within two years to buy a company whose shares will then trade publicly. SEC, *What You Need to Know About SPACs* (May 25, 2021), https://bit.ly/3k2JbqX. And other companies, including Slack, have opted for a direct listing—a method of making preexisting shares available for sale on an exchange instead of issuing and selling a block of new shares. Direct listings provide an attractive alternative for companies that wish to give their employees and investors the convenience and low transaction costs of selling on a public exchange while avoiding the costs of an IPO.

C. Factual and Procedural Background

1. Slack, which offers business-collaboration software, went public through a direct listing on the New York Stock Exchange (NYSE) in 2019. Pet. App. 8a. Whereas IPOs are typically designed to raise capital for the companies going public, Slack itself sold no shares and raised no money in its direct listing. *Id.* Slack's existing shareholders had the option, but not any obligation, to sell some or all of their shares, and

only those shareholders who chose to do so made money in the direct listing.

At the time of Slack's direct listing, there were 283 million preexisting Slack shares. Pet. App. 23a (Miller, J., dissenting). The registration statement that Slack filed registered only 118 million of those shares—i.e., those shares that were subject to the '33 Act's registration requirement. C.A. ECF 11-3 at 447. The other 165 million shares were not registered because they were exempt from the Act's registration requirement (and thus already available for sale to third parties) under Rule 144. *Id.* at 540.

Because Slack was not selling any shares, it did not need to pay underwriters to find buyers for them. Pet. App. 8a. And without underwriters, there was no one with an economic incentive to insist on the lockup period used in typical IPOs. *Id.* As a result, in Slack's direct listing, unregistered exempt shares remained available for resale even as newly registered shares became available for trading. *Id.*

2. Respondent bought Slack shares on the NYSE after Slack's direct listing. Pet. App. 8a. He does not and cannot allege that the shares he bought were among the 118 million shares registered under the registration statement Slack filed. *Id.* at 23a-24a (Miller, J., dissenting). After Slack's stock price dropped, however, he nonetheless sued Slack, along with some of its officers, directors, and early investors, under Sections 11 and 12(a)(2) of the '33 Act, claiming that Slack's registration statement and the prospectus it contained were misleading. J.A. 3-5. Respondent asserted that Slack was "strictly liable" for its supposedly misleading statements (J.A. 74) and added a claim under Section 15 of the '33 Act (J.A. 78), which

makes certain "controlling person[s]" liable for violations of Sections 11 and 12, 15 U.S.C. § 77o(a).

Slack moved to dismiss. Pet. App. 10a. It argued that respondent could not satisfy the longstanding requirement that those suing under Section 11 must plead and prove that they bought shares registered under the challenged registration statement. *Id.* at 40a. Nor could respondent sue under Section 12(a)(2), Slack explained, because in requiring defendants to have sold shares "by means of a prospectus," Section 12(a)(2) necessarily applies only to registered shares. *Id.* at 54a.

3. The district court denied Slack's motion to dismiss. It held that in cases involving direct listings, Section 11 does not require plaintiffs to plead and prove that they bought shares registered under the allegedly misleading registration statement. Pet. App. 41a-50a. The court acknowledged that its decision was inconsistent with 50-plus years of cases reading Section 11 to authorize only buyers of registered securities to sue. *Id.* But it adopted a "broader reading" of Section 11 based on a policy concern that following settled law would "completely obviate the remedial penalties" of the '33 Act. *Id.* at 48a-49a.

As to Section 12(a), the district court reasoned that the words "such security" should have the same meaning as in Section 11. It therefore rejected the "argument that Section 12 liability in this case extends only to shares directly traceable to those registered under the prospectus." Pet. App. 54a.

Because the district court declined to dismiss respondent's claims under Sections 11 and 12, it also declined to dismiss his claim under Section 15. Pet. App. 71a.

4. The district court certified its decision for interlocutory appeal, Pet. App. 76a, and a divided panel of the Ninth Circuit affirmed, *id.* at 1a-22a. The majority acknowledged precedent "limit[ing] the meaning of 'such security' in Section 11 to only registered shares" but declined to follow that precedent. *Id.* at 16a. It reasoned that "requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement" would "undermine this section of the securities law." *Id*. at 16a-17a.

The majority held that unregistered Slack shares qualify as "such securit[ies]," 15 U.S.C. § 77k(a), because they "were sold to the public when 'the registration statement . . . became effective.'" Pet. App. 18a. For support, the majority looked to the rules of the NYSE, which require a registration statement to be filed before any shares can be sold on the exchange. *Id.* at 13a. Because no Slack shares could be sold on that particular exchange until Slack filed a registration statement, the majority decided that *all* shares—unregistered and registered alike—qualify as "such securit[ies]" under Section 11. *Id.* at 13a-14a. Under that interpretation, there was no need for respondent to "prove purchase of *registered* shares pursuant to a particular registration statement." *Id.* at 16a.

The majority also cited a House report stating that the '33 Act was designed to protect "'the buyer of securities sold *upon a registration statement*.'" Pet. App. 16a. The majority reasoned that because the NYSE's rules for direct listings require a registration statement before any shares can be traded, "both the registered and unregistered Slack shares sold in the direct listing were sold 'upon a registration statement'" and thus fall within the ambit of Section 11. *Id.*

Ultimately, the majority made clear that its unwillingness to follow previous case law was driven by perceived policy concerns. Pet. App. 16a-18a. In the court's view, adhering to the established rule that plaintiffs must plead and prove that they bought registered securities "would essentially eliminate Section 11 liability . . . in a direct listing" and "create a loophole large enough to undermine the purpose of Section 11." *Id.* at 17a-18a.

The majority then held that because respondent could sue under Section 11, he also could sue under Section 12. The majority reasoned that "[i]t follows from the analysis of 'such security' in Section 11, that the shares at issue in Slack's direct listing, registered and unregistered, were sold 'by means of a prospectus'" under Section 12(a)(2) "because the prospectus was a part of the offering materials . . . that permitted the shares to be sold to the public" under NYSE rules. Pet. App. 20a.

5. Dissenting, Judge Miller explained that the majority's decision had departed from the precedent of "every court of appeals to consider the issue." Pet. App. 25a-26a. He also criticized the majority opinion for "never analyz[ing] the text" of the '33 Act and for relying instead on NYSE rules. *Id*. at 27a. The legislative history further refuted the majority's conclusion, Judge Miller explained, because "the phrase 'securities sold upon a registration statement' plainly refers to registered securities," not exempt securities that (based on the rules of a particular exchange) "must wait until a registration statement becomes effective before they can be sold on [the] exchange." *Id*. at 27a-28a. And as for the policy concerns driving the majority's decision, Judge Miller explained that similar concerns had been raised by plaintiffs for decades

without any action by Congress and that, in any event, such concerns "are no basis for changing the settled interpretation of the statutory text." *Id.* at 28a.

Finally, Judge Miller explained that respondent's inability to show that he bought registered shares was also fatal to his Section 12 claim. Pet. App. 29a-30a. Section 12 authorizes only a "person purchasing such security" to sue, and the phrase "such security" "has a clear antecedent: It is a security 'offer[ed] or s[old] . . . by means of a prospectus.'" *Id.* at 29a. And because a prospectus is required only for registered securities, "[t]he unambiguous meaning of a security offered or sold 'by means of a prospectus' is therefore a registered security sold in a public offering." *Id.* (citing *Gustafson*, 513 U.S. at 584).

SUMMARY OF ARGUMENT

I. The text, structure, and history of the Securities Act of 1933 confirm that Sections 11 and 12(a)(2) require plaintiffs to plead and prove that they bought registered shares. Because respondent cannot show that the shares he bought in Slack's direct listing were registered, his claims should have been dismissed.

A. Under Section 11 of the '33 Act, if "any part of the registration statement" is false or misleading, "any person acquiring such security" can sue. 15 U.S.C. § 77k(a). The '33 Act requires issuers to register some, but not all, shares by filing a registration statement with the SEC before the shares can be sold. The registration statement is "effective only as to the securities specified therein," and the issuer pays a fee based on the "maximum aggregate price" at which the particular quantity of registered shares is to be offered to the public. *Id.* § 77f(a), (b)(1). Given the Act's focus on the registration requirement and its insistence that the requirement applies only to particular shares, not all shares of the same class or type, the "natural" way to read Section 11's "such security" limitation is that it allows suit only by those who bought securities registered under the registration statement they allege is misleading. *Barnes v. Osofsky*, 373 F.2d 269, 271-73 (2d Cir. 1967). In other words, Section 11 allows only "purchasers of a registered security to sue." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983).

Section 11's use of "such security" mirrors similar usage throughout the Act. Section 5 provides that "[u]nless a registration statement is in effect as to a security, it shall be unlawful . . . to sell *such security*." 15 U.S.C. § 77e(a) (emphasis added). "Such security" there can mean only the particular shares that the Act requires to be registered—not all shares of the same class or type as those subject to the registration requirement—because in the absence of a registration statement, it *is* lawful to sell securities that are exempt from the registration requirement. Similarly, Section 6 provides that registration statements cover only "the securities specified therein" and that applicants must pay a fee based on the "maximum aggregate price at which *such securities* are proposed to be offered." *Id.* § 77f(b)(1) (emphasis added). Again, the only plausible way to read that language is as a reference to registered securities. And if there were any doubt about the antecedent to which Congress was referring when it used the phrase "such security" in Section 11(a), it would be resolved by looking to the immediately preceding provision, which refers to the sale of "securities *registered under*" the Act. 15 U.S.C. § 77j(f) (emphasis added).

No less influential an interpreter of the securities laws than Judge Friendly reached precisely this conclusion more than 50 years ago. As he explained, it is not plausible "that the section developed to insure proper disclosure in the registration statement was meant to provide a remedy for other than the particular shares registered." *Barnes*, 373 F.2d at 272.

B. Section 12(a)(2) makes anyone who sells "a security . . . by means of a prospectus" that is false or misleading liable to the person who bought "such security from him." 15 U.S.C. § 77*l*(a)(2). This Court held in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), that "prospectus" means a document describing "a public offering of securities by an issuer" and that there can be no liability under Section 12(a)(2) "unless there is an obligation to distribute [a] prospectus in the first place." *Id.* at 571, 584. The '33 Act also makes clear that there is an obligation to distribute a prospectus only for *registered* shares. 15 U.S.C. §§ 77d, 77e. Consequently, the only shares whose sale can give rise to Section 12(a)(2) liability are registered shares.

Other aspects of the statutory text confirm that reading. Sections 5 and 10 of the '33 Act expressly link the prospectus and the registration statement, underscoring Section 12(a)(2)'s focus on the sale of the particular securities registered under that statement. And the dramatic remedy that Congress originally enacted in Section 12—full rescissory damages not limited to harm caused by the misrepresentation that the plaintiffs challenge, *see Pinter v. Dahl*, 486 U.S. 622, 641 n.18 (1988)—would have been ruinous had Congress intended it to apply to sales of *any* share, registered or unregistered.

C. The broader statutory context and structure further confirm that Sections 11 and 12(a)(2) require plaintiffs to plead and prove that they bought registered shares. When the 73d Congress wanted to regulate a wide range of securities trading, it used correspondingly broad language reaching sales of "any" security. It used that language in Section 17 of the '33 Act, which—in a "major departure" from the rest of the Act, *Gustafson*, 513 U.S. at 577—prohibits fraud "in the offer or sale of any securities." 15 U.S.C. § 77q(a). The same Congress used similar language in Section 10(b) of the Securities Exchange Act of 1934, which has been interpreted to create a private right of action to recover for fraud "in connection with the purchase or sale of any security." *Id.* § 78j(b). Likewise, when the 73d Congress wanted to regulate with respect to entire "classes" of securities, it said so, including throughout the '34 Act. *E.g.*, *id.* §§ 78*l*(b), (g), 78o(d), 78p(a)(1). But Sections 11 and 12 of the '33 Act are different, and their more limited language and focus on *registered* shares "convey [a] difference[] in meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018).

Sections 11 and 12(a)(2) of the '33 Act also sit in a delicate balance with Section 10(b) of the '34 Act. Section 10(b) provides a "'catchall' antifraud provision" reaching "any security" but requiring plaintiffs to "prove that the defendant acted with scienter." *Herman & MacLean*, 459 U.S. at 381-82. The '33 Act allows for suit only "by a purchaser of a registered security" but imposes a "virtually absolute" standard of liability. *Id.* This Court has always insisted that the '33 and '34 Acts "be construed harmoniously," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-85 (1989), and here, that requires limiting '33 Act plaintiffs to those who bought shares registered under the registration statement that the '33 Act requires.

D. For decades, courts, regulators, and commentators have agreed that plaintiffs suing under the '33 Act must show that they bought registered shares. Judge Friendly's landmark opinion in *Barnes*, which itself relied on years of case law and scholarship, received unanimous endorsement from federal courts across the country. The SEC likewise embraced the rule: Its amicus brief in *Barnes* arguing that Section 11 requires proof that the plaintiffs bought registered shares was a significant factor in Judge Friendly's decision, and the Commission has repeatedly adhered to that view in briefs filed in this Court and the courts of appeals.

Despite repeated calls to consider whether that rule should be changed to account for how securities trading was happening on the ground, Congress has never amended Sections 11 or 12 to remove the requirement of proof of purchase of registered shares. That inaction was not the product of inattention, as Congress has repeatedly revised Sections 11 and 12 and other provisions of the '33 Act over the decades. Congress's choice not to "disturb [the] consistent judicial interpretation" of the Act indicates that it "acquiesce[d] in" and "affirm[ed]" that reading. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988).

II. The Ninth Circuit departed from text, context, and history because, in its view, requiring proof of purchase of registered shares in the context of Slack's direct listing would "undermine the purpose of" the '33 Act. Pet. App. 18a. That reasoning is improper as a matter of law and misguided as a matter of policy.

A. Because "'no legislation pursues its purposes at all costs,'" courts cannot base their rulings on a statute's generally "remedial" nature instead of a conclusion grounded in text and structure. *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014). Yet here, the district court and Ninth Circuit reasoned backward from policy concerns to fashion implausible readings of the '33 Act that create more problems than they purport to solve and that would seriously disturb the delicate balance on which federal securities law depends.

B. The policy concerns motivating the courts below are also substantially overstated. Sections 11 and 12 are neither the exclusive nor the most important provisions of the federal securities laws addressing misleading statements. Other provisions, including Section 17 of the '33 Act and Section 10(b) of the '34 Act, powerfully deter companies from misleading the public in their offerings. And if market innovations like direct listings or practical difficulties in tracing purchases of registered shares did militate in favor of a change to the regulatory framework, that change would be for Congress or the SEC to adopt. Leaving policy adjustments to the political branches is particularly appropriate here because there would be many more tailored ways to address the sorts of concerns motivating the courts below. Endorsing the blunt solutions of those courts, conversely, would result in a dramatic overnight expansion of the scope of liability under the '33 Act, suppressing capital formation and innovation at the expense of all market participants.

ARGUMENT

I. SECTIONS 11 AND 12 REQUIRE PLAINTIFFS TO PROVE THEY BOUGHT REGISTERED SHARES.

The '33 Act creates specialized rules for public offerings, requiring issuers to file registration statements that include prospectuses providing material information about the registered securities being offered. 15 U.S.C. §§ 77e-77g, 77j. Two of the Act's liability provisions, Sections 11 and 12(a)(2), specifically prohibit false or misleading statements in registration statements and prospectuses. *Id.* §§ 77k-77*l*. But both provisions permit suits only by those who bought "such security." *Id.* §§ 77k(a), 77*l*(a).

Properly construed, Sections 11 and 12 require plaintiffs to plead and prove that they bought *registered* shares, not shares exempt from the registration requirement that the '33 Act imposes. That conclusion flows from the statutory text and structure, which links the right to sue under Sections 11 and 12(a)(2) to the purchase of securities registered under the Act. It ensures "a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), by respecting and preserving the textual and structural differences between Sections 11 and 12 of the '33 Act, on the one hand, and Section 17 of the '33 Act and Section 10(b) of the '34 Act, on the other. And it has been consistently endorsed by courts and the SEC and ratified by Congress. The Ninth Circuit's contrary conclusion—under which Sections 11 and 12 would apply to *all* shares of the same class, registered or exempt, that under the rules of a particular exchange can be traded only after a statement has been filed for the registered shares—has no basis in the text, context, or history.

A. Section 11 Requires Plaintiffs to Prove They Bought Registered Shares.

Section 11 of the '33 Act allows "any person acquiring such security" to sue for material misrepresentations in a registration statement. 15 U.S.C. § 77k(a). The question here is whether "such security" means (as this Court has suggested) "a registered security" issued under the supposedly misleading statement, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), or instead (as the Ninth Circuit held) *any* security, registered or exempt from the registration requirement, so long as that security could not be traded on a public exchange without the filing of a registration statement, Pet. App. 15a-18a. The text of Section 11 makes clear that it focuses on, and creates liability in connection with, only *registered* shares.

The '33 Act is focused on creation and enforcement of a registration requirement that applies to particular shares. Some shares—like those held by employees or investors of a company without a controlling stake—are exempt from registration. 15 U.S.C. §§ 77c-77d; 17 C.F.R. § 230.144. But for shares subject to the registration requirement, Section 5 of the Act provides that "[u]nless a registration statement is in effect as to a security, it shall be unlawful . . . to sell such security." 15 U.S.C. § 77e(a). Section 6 of the Act then confirms that a registration statement is "effective only as to the securities specified therein," *id.* § 77f(a)—i.e., it covers only the registered shares identified in the registration statement, not all shares of the same class or type. Section 6 also requires the issuer to pay a fee based on the "maximum aggregate price at which such securities" (i.e., the particular shares covered by the registration statement) will be offered to the public. *Id.* § 77f(b)(1). At every turn, then, the Act's registration requirement is tied to certain securities (those subject to registration) but not others of the same class or type (including those exempt from the Act's registration requirement).

Given this explicit and consistent statutory focus on the registration of particular shares, rather than of entire classes of securities, there is no doubt what Congress meant when it limited the right to sue based on a misleading registration statement to buyers of "such security": It meant buyers of *registered shares*, i.e., shares registered under the registration statement at issue.

To be sure, the word "security" does not appear in Section 11 before the "such security" phrase. But "such" means that which is "described or implied or intelligible from the context or circumstances," CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1218 (1931 ed.), and in the context of a provision implementing the '33 Act's registration and disclosure requirements, that can only mean those particular shares that are registered under the Act. Consider Section 5, which states that "[u]nless a registration statement is in effect as to a security, it shall be unlawful . . . to sell such security." 15 U.S.C. § 77e(a). Because Section 5's provisions do not apply to transactions involving shares exempt from the Act's registration requirement, *see id.* § 77d(a), the only plausible way to read the phrase "such security" is as a reference to the particular shares that the Act requires to be registered—not all shares of the same class or type as those that must be registered. Similarly, Section 6 provides that a registration statement is effective "only as to the securities specified therein" and that the applicant must pay a fee based on "the maximum aggregate price at which such securities are proposed to be offered." *Id.* § 77f(b)(1). In context, "such securities" can only mean registered securities—not, as the Ninth Circuit held, all shares of the same class or type, even if exempt from registration. Section 11's reference to "such security" mirrors the language used in these related provisions and likewise must be understood to refer only to those shares that are subject to the registration obligation and accompanying disclosure requirements enforced by Section 11—namely, registered shares.

In any event, even if "such security" in Section 11(a) required a more explicit "antecedent," BLACK'S LAW DICTIONARY 1674 (3d ed. 1933), the Court would need look no further than the sentence that immediately precedes Section 11(a). Both as enacted and today, the last sentence of Section 10 of the '33 Act refers to "the sale of *securities registered under*" the Act. Securities Act of 1933, ch. 38, § 10(d), 48 Stat. 74, 81 (codified as amended at 15 U.S.C. § 77j(f)) (emphasis added). The first sentence of Section 11 picks up that thread by addressing a "registration statement," and "such security" appears later in that same sentence. 15 U.S.C. § 77k(a). Under any plausible reading, therefore, "such security" as used in Section 11 means a security registered under the registration statement that the Act requires.

Further support for this conclusion comes from Section 11's provisions capping available damages. The measure of damages in a Section 11 suit is tied to the "price at which the security was offered to the public," and Section 11 provides that "[i]n no case shall the amount recoverable . . . exceed the price at which the security was offered to the public." 15 U.S.C. § 77k(e), (g). Similarly, for an underwriter defendant, liability cannot exceed "the total price at which the securities underwritten by him and distributed to the public were offered to the public." *Id.* § 77k(e). Those provisions tie the maximum recovery under Section 11 to the value of the registered shares offered to the public, not to the value of *all* shares on the market of a similar class or type. Those limits would make little sense if (as the Ninth Circuit held) Section 11(a) gave plaintiffs a right to sue even where they bought securities exempt from the registration requirement. But those limits make perfect sense under the correct reading of Section 11(a), namely, that it restricts the right to sue to purchasers of registered securities.

Judge Friendly, who "did more to shape the law of securities regulation" than any other jurist, Louis Loss, In Memoriam, *Henry J. Friendly*, 99 HARV. L. REV. 1722, 1723 (1986), reached precisely this conclusion more than 50 years ago. As he explained, because the '33 Act requires "only individual shares [to be] registered," it is "unlikely that the section developed to insure proper disclosure in the registration statement was meant to provide a remedy for other than the particular shares registered." *Barnes v. Osofsky*, 373 F.2d 269, 272 (2d Cir. 1967). The more "natural" reading, Judge Friendly explained, is that Section 11 applies only to plaintiffs who buy "a security issued pursuant to the registration statement"—i.e., the "registered shares." *Id.* at 271. A plaintiff who cannot plead and prove that he "purchase[d] . . . registered shares" therefore cannot sue under Section 11. *Id.* at 272.

Judge Friendly reached that conclusion after canvassing the views of courts, scholars, and regulators. The Second Circuit had already observed that the '33 Act's liability provisions could be invoked "only by one who comes within a narrow class of persons," namely, "those who purchase securities that are the direct subject of the prospectus and registration statement." *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 786 (2d Cir. 1951). *Fischman* was authored by Judge Frank, "a leading member of the SEC in its early days," and the interpretation it endorsed soon made its way into the "leading treatise" on securities law. *Barnes*, 373 F.2d at 273. As that treatise explained then (and continues to explain today), a plaintiff who buys stock when the shares registered under the supposedly misleading statement are intermingled with others "must be able to trace his particular securities to the registration statement." 3 LOUIS LOSS, SECURITIES REGULATION 1731 n.160 (2d ed. 1961); *accord* 9 LOUIS LOSS ET AL., SECURITIES REGULATION ch. 11(C)(2) (Supp. 2023) (claim "may be brought by any person who acquired a *registered* security").

Judge Friendly also drew from the analysis in *Colonial Realty Corp. v. Brunswick Corp.*, 257 F. Supp. 875 (S.D.N.Y. 1966). There, the court emphasized the textual link between Section 6, which deems registration statements "effective only as to the securities specified therein," and Section 11, which gives the right to sue only to a person "acquiring such security." *Id.* at 877-78 (quoting 15 U.S.C. §§ 77f(a), 77k(a)). That language leaves "little doubt" that Section 11 refers back to "the securities specified in the registration statement"—i.e., registered shares. *Id.* at 878. Expanding Section 11 beyond purchasers of registered shares, the court reasoned, would "radically . . . expand the number of potential plaintiffs" and "the total economic liability of the members of the securities industry," a change that would have dramatic "economic repercussions." *Id.* at 884.

Finally, Judge Friendly considered the views of the SEC, which filed an amicus brief in *Barnes*. 373

F.2d at 273. The SEC's brief explained that the phrase "such security" "is clearly a limitation" indicating that Section 11's cause of action must "be coextensive with the scope of the registration provisions." Brief for the SEC at 3-4, *Barnes*, 373 F.2d 269 (Nos. 30867-30869) [hereinafter *Barnes* SEC Br.].[1] The SEC grounded that view in the statutory text. As it explained, where Congress intended to refer to a broader " 'class' of securities" rather than specifically to registered securities, it "expressly said so." *Id.* at 6 (citing 15 U.S.C. §§ 78*l*(g), 78o(d), 78p(a)). And Section 11's damages cap confirms the "limitation upon the class of persons entitled to recover" by tying the maximum recovery to the value of the registered shares offered to the public. *Barnes* SEC Br. 4-5. As Judge Friendly put it in endorsing the SEC's view, if Section 11 were read to allow suits by plaintiffs who bought *any* shares, whether or not registered under the supposedly misleading registration statement, "their recovery would be greatly diluted" by the damages cap's limitation to the proceeds of the sale of registered shares. *Barnes*, 373 F.2d at 272.

As the SEC correctly reasoned in *Barnes*, shareholders who rely on a misleading registration statement but "cannot qualify for relief under Section 11" may "have a remedy under other provisions of the federal securities laws." *Barnes* SEC Br. 8-9. For instance, Section 17 of the '33 Act empowers the SEC to seek relief for an array of misrepresentations, and private plaintiffs may sue directly under Section 10(b) of the '34 Act. But the only parties who can take advantage of Section 11's near-strict-liability remedy for a false registration statement are those who can show

[1] The SEC's brief is available from the National Archives at Kansas City and at https://bit.ly/3XVBkdl.

that they "acquire[d] shares *actually registered*" under that statement. *Barnes* SEC Br. 8-9 (emphasis added). The Ninth Circuit's conclusion to the contrary lacks any basis in the text.

B. Section 12 Requires Plaintiffs to Prove They Bought Registered Shares.

Under Section 12(a)(2) of the '33 Act, "[a]ny person who . . . offers or sells a security . . . by means of a [misleading] prospectus . . . shall be liable" to the person who bought "such security from him." 15 U.S.C. § 77*l*(a)(2). The key word is "prospectus," which this Court interpreted in *Gustafson*, 513 U.S. 561. There, the Court held that " 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer" and that liability under Section 12(a)(2) "cannot attach unless there is an obligation to distribute [a] prospectus in the first place." *Id.* at 571, 584. The '33 Act is clear that the obligation to distribute a prospectus extends only to *registered* shares to be sold in a public offering; no prospectus is required for the sale of securities exempt from registration, 15 U.S.C. §§ 77d, 77e, or sales in the aftermarket, *Gustafson*, 513 U.S. at 569-70, 578, 581. It necessarily follows, therefore, that the only shares whose sale could give rise to liability under Section 12(a)(2) are registered shares.

In his dissent below, Judge Miller correctly applied that reasoning to conclude that respondent's Section 12 claim should be dismissed. He explained that Section 12, like Section 11, limits the class of eligible plaintiffs to those who bought "such security," which can mean only a security "offer[ed] or s[old] . . . by means of a prospectus." Pet. App. 29a. Given this Court's interpretation of the word "prospectus" in *Gustafson*, "[t]he unambiguous meaning of a security offered or sold 'by means of a prospectus' is therefore a registered security sold in a public offering." *Id.*

The text and structure of the '33 Act confirm Section 12's limited scope. Section 10 of the Act, for example, ties together the prospectus and the registration statement. It requires that every prospectus "contain the information contained in the registration statement" and, in requiring certain information to be up to date, measures the timeliness of the prospectus based on "the effective date of the registration statement." 15 U.S.C. § 77j(a)(1), (3). Section 5 of the Act likewise connects the prospectus to the registration statement: It makes it unlawful to sell a security through interstate commerce without a "prospectus [that] meets the requirements" of Section 10, which governs registered securities. *Id.* § 77e(b)(1). "Thus Congress repeatedly used the term 'prospectus' in provisions concerning registration statement requirements in initial distributions." *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 689 (3d Cir. 1991).

Moreover, the 73d Congress gave Section 12 plaintiffs a particularly drastic remedy: full rescissory damages, meaning that plaintiffs' recoveries were not limited to losses caused by the defendant's misrepresentations but could instead encompass all market losses the plaintiffs suffered, regardless of the cause. *Pinter v. Dahl*, 486 U.S. 622, 641 n.18 (1988).[2] Such a sweeping remedy may have been appropriate when an issuer or company insider sold a registered share directly to a purchaser through a misleading prospectus, as Section 12(a)(2) (properly construed) requires. 15 U.S.C. § 77*l*(a)(2). But the Ninth

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[2] Congress modified this provision in 1995. *Infra* p. 37.

Circuit's reading assumes that Congress intended to create the possibility of draconian Section 12 liability for *every* share, registered or unregistered. Pet. App. 19a-21a. Nothing in the Act indicates Congress intended Section 12 to have such a ruinous impact.

Given their similar limiting language, complementary purposes, and shared history, it is unsurprising that Sections 11 and 12(a)(2) operate in lockstep: Both require proof that the plaintiff bought registered shares.

C. The Broader Statutory Context and Structure Confirm the Limited Scope of Sections 11 and 12.

That Sections 11 and 12 require proof that the plaintiff bought registered shares becomes clearer still when those provisions are "read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

1. When the 73d Congress wanted to impose liability reaching a wide range of securities activity, it used correspondingly broad language: "any security." That is what Congress wrote, for instance, in Section 17 of the '33 Act, which prohibits fraud "in the offer or sale of any securities." 15 U.S.C. § 77q(a). Section 17's "extensive" scope represents a "major departure" from the rest of the Act, which instead focuses on "new offerings." *Gustafson*, 513 U.S. at 577-78. The 73d Congress used the same broad language the following year in Section 10(b) of the '34 Act, which likewise prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). Section 10(b)'s broad language makes it a " 'catchall' antifraud provision" that can be invoked "by a

purchaser . . . of '*any* security' against '*any* person.'" *Herman & MacLean*, 459 U.S. at 382.

The 73d Congress did not use similarly broad language in Sections 11 and 12. Instead, after prohibiting misleading statements in registration statements and prospectuses, those sections create private rights of action only for buyers of "such security." 15 U.S.C. §§ 77k(a), 77*l*(a). Congress's use of the more limited language "such security" in Sections 11 and 12 "convey[s] [a] difference[] in meaning"—a presumption that carries "particular strength" where, as here, the provisions are part of two "companion" statutes that "handle much the same task." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018).

2. Another structural feature reinforces the distinction. As the SEC explained in *Barnes*, the 73d Congress knew how to legislate for entire *classes* of securities when it wanted to. *Barnes* SEC Br. 6. It did so throughout the '34 Act. *E.g.*, Securities Exchange Act of 1934, ch. 404, §§ 12(c), 13(c), 16(a), 48 Stat. 881, 893, 895-96 (codified as amended at 15 U.S.C. §§ 78*l*(c), 78m(c), 78p(a)(1)). The '33 Act is different: It calls for registration only as to individual shares "specified []in" the registration statement. 15 U.S.C. § 77f(a). The requirement that a plaintiff have bought shares registered under the supposedly misleading statement "is an unavoidable result of a statutory scheme that registers units, not classes of securities." JOHN C. COFFEE, JR. ET AL., SECURITIES REGULATION: CASES AND MATERIALS 981-82 nn.43-44 (14th ed. 2020).

Judge Friendly agreed with the SEC and commentators, rejecting the plaintiffs' argument that Section 11 allows suit by anyone who buys "a security of the same nature as that issued pursuant to the registration statement." *Barnes*, 373 F.2d at 271. Yet respondent has tried to revive that long-rejected theory, contending that he should be able to sue under the '33 Act because both the registered and exempt Slack shares on the market were of "the same type and class." Br. in Opp'n 1; *see id.* at 4 ("same type and character"); *id.* at 17 (securities of the "same type"). Nothing in the '33 Act supports that argument or suggests that Sections 11 or 12 permits suit based on the general class or type, rather than the registration status, of a security.

3. This Court has recognized the need to interpret the '33 and '34 Acts "harmoniously," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-85 (1989), and in a way that ensures "a symmetrical and coherent regulatory scheme," *Gustafson*, 513 U.S. at 569. Enforcing Section 11 and 12's limits is critical to maintaining that balance. Judge Friendly explained as much, noting that the "stringent penalties" available under the '33 Act must be limited to "the particular shares registered," leaving Section 10(b)'s "general antifraud provision" to cover other sales of securities. *Barnes*, 373 F.2d at 272. This Court echoed Judge Friendly's analysis more recently in *Gustafson*, rejecting the argument that Section 12 should be read to create "vast additional liabilities" that reach beyond the specific "violations of the obligations [the '33 Act] had created." 513 U.S. at 572.

The delicate interplay between the '33 and '34 Acts ensures both that issuers prepare registration statements and prospectuses with a high degree of care and that the '33 Act's draconian liability provisions do not extend so far that they chill capital formation. As Judge Miller put it, the "strong medicine" of the drastic remedies of the '33 Act is "temper[ed] . . . by limiting the class of plaintiffs who can sue." Pet. App. 24a. Disrupting that state of affairs would destabilize the settled, predictable regulatory regime, subjecting companies to "a stringent standard of liability" based on even "innocent misstatements" for a much wider array of securities trading. *Herman & MacLean*, 459 U.S. at 381-82.

D. The Limited Scope of Sections 11 and 12 Has Been Ratified Over Time.

As this Court has long recognized, Congress's failure "to disturb a consistent judicial interpretation of a statute" supports the inference that it "acquiesces in" and "affirms" that reading. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988). For decades, courts and regulators have maintained, "with virtual unanimity," *id.*, that plaintiffs suing under the '33 Act must plead and prove they bought registered shares. Congress has amended the Act many times, but never to unsettle that rule. Congress's silence speaks volumes—especially because courts have for decades resisted calls from plaintiffs to change the rule in response to practical difficulties hindering their ability to prove that they bought registered shares.

1. Until the Ninth Circuit's divided opinion below, every court of appeals to weigh in had agreed with the Second Circuit in *Barnes* that plaintiffs must prove that they bought registered shares. The First, Third, Fifth, Eighth, Tenth, and Eleventh Circuits have so held. *E.g.*, *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 755-56 (1st Cir. 2016); *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 491-99 (5th Cir. 2005); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002); *Joseph v. Wiles*, 223 F.3d 1155, 1158-60 (10th Cir. 2000), *abrogated on*

other grounds by Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007); *see* Pet. 15-19. Until this case, the Ninth Circuit's own case law fit comfortably in that line of precedent. *E.g.*, *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999). And many district courts likewise adopted Judge Friendly's reasoning.[3]

To the extent those courts considered legislative history, they found it consistent with the requirement that plaintiffs prove they bought registered shares. In *Colonial Realty*, for example, the court emphasized that the '33 Act was designed "to protect the public with the least possible interference to honest business." 257 F. Supp. at 879 (quoting S. Rep. No. 47, 73d Cong., 1st Sess. 6-7 (1933)). The court explained that "the legislative history leads to the conclusion that by the term 'such security' Congress meant the securities issued and sold pursuant to the registration statement," not "all securities of the same class as those registered." *Id.* Likewise, in *Barnes*, Judge Friendly highlighted a House report stating that the '33 Act would "entitle the buyer of securities *sold upon a registration statement* including an untrue statement" to bring a lawsuit. 373 F.2d at 273 (quoting

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[3] *E.g.*, *Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 767-68 (S.D. Ind. 1996); *PPM Am., Inc. v. Marriott Corp.*, 820 F. Supp. 970, 975 (D. Md. 1993); *Guenther v. Cooper Life Scis., Inc.*, 759 F. Supp. 1437, 1439 (N.D. Cal. 1990); *Abbey v. Comput. Memories, Inc.*, 634 F. Supp. 870, 875-76 (N.D. Cal. 1986); *Gibb v. Delta Drilling Co.*, 104 F.R.D. 59, 69-70 (N.D. Tex. 1984), *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 641-42 (N.D. Cal. 1980); *Turner v. First Wis. Mortg. Tr.*, 454 F. Supp. 899, 911 (E.D. Wis. 1978); *In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 351, 376 n.16 (N.D. Okla. 1977).

H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933)) (emphasis added). Although the report clarified that Section 11 would give remedies to purchasers whether "they bought their securities at the time of the original offer or at some later date," nothing in the legislative history suggested the '33 Act would extend rights beyond "purchasers of . . . registered shares." *Id.*

Courts since *Barnes* have noted the limits of legislative history, which "often cuts both ways." *Joseph*, 223 F.3d at 1160. Respondent himself argued below that the legislative history was "vague." C.A. ECF 69 at 5 n.3. But no court has found clear evidence that Congress intended to give anyone who did not buy registered shares the right to sue. To the contrary, courts have emphasized that given the '33 Act's focus on "the registration statement" and imposition of near-strict liability, the Act's remedies should be limited to those "who purchased stock that was originally issued under the registration statement in question." *Lee*, 294 F.3d at 977; *accord Krim*, 402 F.3d at 499 (embracing Judge Friendly's reading of the legislative history).

2. The SEC's view has been equally uniform. Its amicus brief in *Barnes* laid out its position in detail. In rejecting the argument that plaintiffs could sue even without proof that they bought "shares covered by the registration statement," the SEC emphasized that the Act's registration requirement reached "only . . . the securities specified" in the statement and that a prospectus was necessary only for "purchasers of shares covered by a registration statement." *Barnes* SEC Br. 3-4 (citing 15 U.S.C. § 77f(a)).

The SEC also responded to concerns that, under the '33 Act's plain text, whether plaintiffs could sue would be "fortuitous"—i.e., could depend on the state of the market and on practical difficulties in proving what type of shares the plaintiff bought. *Barnes* SEC Br. 7-8. As the SEC explained, plaintiffs "who rely on misleading statements in a registration statement but who cannot qualify for relief" under the '33 Act may well "have a remedy under other provisions of the federal securities laws," including Section 10(b) of the '34 Act. *Id.* The '33 Act simply provides *additional*, specialized protection for those "who acquire shares actually registered." *Id.* at 9.

The Commission has repeatedly reaffirmed that view. It told this Court, for instance, that unlike in a case brought under Section 10(b), "[a] plaintiff may seek relief under Section 11 only with respect to securities covered by the registration statement." Brief for the SEC at 19, *Herman & MacLean*, 459 U.S. 375 (Nos. 81-680 & 81-1076), 1982 WL 608452. That is true even if the plaintiff was "induced to purchase previously outstanding securities of the same or a different class by intentional misstatements in that document"—a scenario for which Section 10(b) would provide a remedy. *Id.* at 19-20. This Court evidently agreed (albeit in dicta) with the SEC's views, observing that Section 11 "allows *purchasers of a registered security* to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement." *Herman & MacLean*, 459 U.S. at 381 (emphasis added); *accord id.* at 382.

The SEC has advanced the same view in the courts of appeals. It told the Ninth Circuit, for instance, that the Section 11 remedy is for purchasers "who can trace their securities to a registration statement," meaning those who bought "shares that were registered." Brief of the SEC at 6-7, *Hertzberg*, 191 F.3d 1076 (No. 98-16394), 1998 WL 34102713. And it hewed to that position before several other circuits. Brief of the SEC at 3-6, 13-14, *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002) (No. 00-3728), 2001 WL 34108887 (agreeing with the "leading treatise" that the '33 Act allows for suits "by any person who acquired a registered security" (quoting 9 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4249 & n.136 (3d ed. 1992 & Supp. 1999))); Brief of the SEC at 4-7, 12-13, *Lee*, 294 F.3d 969 (No. 01-1369), 2001 WL 34095763 (similar); Brief of the SEC at 3-4, 8-10, *In re WRT Energy Sec. Litig.*, 75 F. App'x 839 (2d Cir. 2003) (No. 02-7829), 2003 WL 24136189 (similar).

3. For as long as courts and the Commission have read the '33 Act in this way, plaintiffs have called for a different rule. In *Barnes*, for instance, the plaintiffs objected that requiring litigants suing under Section 11 to prove they bought registered shares would "make[] the result turn on mere accident since most trading is done through brokers who neither know nor care whether they are getting newly registered or old shares." 373 F.2d at 271-72. In declining to "depart[] from the more natural meaning of the words" in favor of broader liability, Judge Friendly suggested that "the time may have come for Congress to reexamine these two remarkable pioneering statutes in the light of thirty years' experience." *Id.* at 273. Judge Friendly's invitation echoed *Colonial Realty*, which explained that given the "intricate interrelationship" of the securities laws and the dramatic "economic repercussions" of changes to the regulatory structure, any change must "be by comprehensive legislation," not "ad hoc judicial reform." 257 F. Supp. at 884.

Courts and commentators continued to observe that any "concerns caused by [S]ection 11's tracing requirement" could "be resolved by Congressional action." Joseph A. Grundfest, Morrison*, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1, 67 (2015). In *Krim*, for instance, the plaintiffs bought stock at a time when shares registered under the statement they challenged were "intermingled" with other shares in the market. 402 F.3d at 492. Given "market realities," there was no way for the plaintiffs to determine which of the shares they bought were registered. *Id.* at 492, 498. Although the plaintiffs protested that it was unfair to reject their Section 11 claim on that ground, the Fifth Circuit explained that such protests could be "addressed by Congress," not the courts. *Id.* at 498-99.

Similar concerns were raised in *Jensen v. iShares Trust*, 44 Cal. App. 5th 618 (2020). That case involved another recent market innovation: "exchange-traded funds," which sell "large aggregations or blocks" that make it impossible for purchasers to prove ownership of individual shares. *Id.* at 625-26, 638. Plaintiffs objected that requiring proof of "ownership of a particular share" would "in effect immuniz[e] the issuer" of exchange-traded funds from Section 11 liability. *Id.* at 638-39. But the California Court of Appeal, after detailing the long history of cases enforcing Section 11's requirements "despite express recognition that tracing may be impossible," held that it was not within the purview of the courts " 'to rewrite the statute to take account of' . . . modern market conditions." *Id.* at 639 (quoting *Krim*, 402 F.3d at 498).

4. Congress has never deemed it necessary to amend the '33 Act to remove the requirement that plaintiffs prove they bought registered shares. Congress's inaction is telling because, although it has

never shown "appetite to address tracing concerns" under the '33 Act, in recent decades it "has enacted a wide range of reforms" aimed at addressing other facets of liability under the Act. Grundfest, 41 J. CORP. L. at 67.

For instance, in the Private Securities Litigation Reform Act of 1995, Congress directly amended Sections 11 and 12, adding to Section 11 a limitation on the liability of outside directors, Pub. L. No. 104-67, § 201(b), 109 Stat. 737, 762 (codified at 15 U.S.C. § 77k(f)(2)), and to Section 12 an affirmative defense for defendants who can show that any part of a drop in share price resulted from factors other than the alleged misrepresentation, *id.* § 105, 109 Stat. at 757 (codified at 15 U.S.C. § 77*l*(b)). The PSLRA also amended the '33 Act in other respects, including by adding a safe harbor for certain forward-looking statements by companies, *id.* § 102(a), 109 Stat. at 749-52 (codified at 15 U.S.C. § 77z-2), and imposing special rules on securities class actions intended to reduce frivolous litigation, *id.* § 101(a), 109 Stat. at 737-42 (codified at 15 U.S.C. § 78u-4). And Congress has continued to modify the '33 Act in other respects, including by adding "security-based swaps" to the scope of Section 17. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. VII, § 762(c)(2), 124 Stat. 1376, 1759 (2010) (codified at 15 U.S.C. § 77q(a)).

These "substantial and significant revision[s]" to the '33 Act demonstrate that Congress carefully considered the need for modifications to the Act's liability regime at a time when the *Barnes* rule was well established, yet chose to leave that rule undisturbed. *Herman & MacLean*, 459 U.S. at 384-85. That decision "suggests that Congress ratified" the approach endorsed by the courts and the SEC. *Id.* at 386.

When it comes to securities law, "stability and reliance are essential." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055 (2017). Congress's choice not to intervene—in the face of "years of judicial interpretation" endorsing the rule that plaintiffs must prove they bought registered shares—"supports adherence to th[at] traditional view." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004).

II. THE ALTERNATIVE READINGS ADOPTED BY THE COURTS BELOW ARE INDEFENSIBLE.

The Ninth Circuit decided that Sections 11 and 12(a)(2) must apply even to shares exempt from registration because, in its view, limiting those sections to registered shares would "undermine the purpose of" the '33 Act. Pet. App. 18a. This Court has consistently repudiated such purpose-driven analysis. In any event, the supposed problems that the Ninth Circuit set about solving—what it called "tracing challenges" (*id.* at 13a)—are as old as the '33 Act itself. Congress has never seen any need to ameliorate them, likely because plaintiffs who cannot prove they bought registered shares have other remedies, including under Section 10(b) of the '34 Act. If anyone is to decide that existing remedies are inadequate, it should be the political branches, not the courts.

A. Policy Concerns Are No Basis to Rewrite Statutory Text.

This Court has repeatedly cautioned against the mistake of assuming that whatever "might appear to 'further the statute's primary objective must be the law.'" *Henson v. Santander Consumer USA Inc.*, 137

S. Ct. 1718, 1725 (2017) (brackets omitted). Because "'no legislation pursues its purposes at all costs,'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014), courts must be careful not to disrupt a carefully balanced and long-settled statutory scheme to elevate one set of interests over others.

Securities laws are no exception. This Court has rejected interpretations of the securities laws that depend on their perceived remedial purpose rather than the text Congress enacted. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), for example, the plaintiffs took issue with the longstanding interpretation of Section 10(b) requiring plaintiffs to prove scienter, arguing that the "'remedial purposes' of the [securities] Acts demand a construction . . . that embraces negligence as a standard of liability." *Id.* at 200. This Court rejected that argument as out of step with the text of the securities laws, in which "Congress did not adopt uniformly a negligence standard even as to express civil remedies." *Id.* The best guide to congressional intent, it explained, was "the language of th[e] section" at issue, not the Act's "broad remedial goals." *Id.*

The courts below favored remedial purpose over statutory text and structure. The district court decided that, despite the settled meaning of "such security" in Sections 11 and 12 in other contexts, it means something different "in this unique circumstance—a direct listing in which shares registered under the Securities Act become available on the first day simultaneously with shares exempted from registration." Pet. App. 48a-50a. That reasoning embraces "the dangerous principle that judges can give the same statutory text different meanings in different cases," which amounts to "invent[ing] a statute rather than interpret[ing] one." *Clark v. Martinez*, 543 U.S. 371, 378, 386 (2005).

The majority of the divided Ninth Circuit panel focused on the same policy concern, namely, that requiring proof of purchase of registered shares would "create a loophole large enough to undermine the purpose of Section 11." Pet. App. 17a-18a. The majority parted ways with the district court only in the solution it devised: It relied on NYSE rules to define "such security" not as a registered security, but as any security whose "public sale cannot occur without the only operative registration in existence." *Id.* at 14a-15a.

In addition to conflicting with the text, structure, and longstanding judicial and administrative interpretation of the '33 Act, the majority's proposed solution creates more problems than it purports to solve. The panel's reinterpretation of "such security" would transform unregistered shares into "such securit[ies]" not just in direct-listing cases, but also in cases involving traditional IPOs. Following any lockup period after an IPO, *see supra* p. 7, insiders can sell their unregistered exempt shares on an exchange once that period expires—an outcome possible under exchange rules only because a registration statement is on file. Pet. App. 14a-15a. Under the majority's but-for standard, *every* post-lockup purchaser could sue under Section 11, regardless of whether he bought registered or exempt shares, because those shares were available for sale on an exchange only because of the registration statement. That has never been the law, and it would dramatically expand the scope of liability under the '33 Act.

B. The Ninth Circuit's Rule Makes for Bad Policy.

Even if courts could depart from statutory text in the name of policy, the decision below would still be wrong. Extending Sections 11 and 12 to transactions involving exempt shares would upset the delicate balance Congress struck in the '33 and '34 Acts; erase the distinction between registered and exempt shares; discourage innovation in methods of going public that promises significant benefits to all market participants; and usurp the role of the political branches in deciding whether and how the securities laws should be updated to account for new market realities.

1. The securities laws offer a limited menu for would-be plaintiffs. Purchasers of registered shares can obtain relief for misleading registration statements or prospectuses under relatively lenient standards, but suits by other plaintiffs or based on other allegedly misleading statements must satisfy more rigorous pleading and proof requirements. *Herman & MacLean*, 459 U.S. at 381-82. Plaintiffs cannot pick and choose by taking advantage of easier-to-prove liability without showing they fit within the limited class of parties entitled to sue under Sections 11 and 12.

If Sections 11 and 12 were not limited to those plaintiffs who bought shares registered under the challenged statement, plaintiffs would sue under those provisions whenever possible, substantially undercutting the previously understood scope of Section 10(b) of the '34 Act. That result would upset the longstanding balance between these provisions and violate "the principle that the 1933 and 1934 Acts should be construed harmoniously because they 'constitute interrelated components of the federal regulatory scheme governing transactions in securities.'" *Rodriguez de Quijas*, 490 U.S. at 484-85.

This Court and others have resisted efforts to erase the limitations of one provision of the securities laws in a way that would dramatically erode the incentive to sue under another. In *Ernst & Ernst*, for example, the Court refused to extend Section 10(b) to cover claims of mere negligence in part because "[s]uch extension would allow causes of action covered by §§ 11, 12(2), and 15 to be brought instead under § 10(b)," thereby erasing the "carefully drawn procedural restrictions" in those sections. 425 U.S. at 210. Similarly, in *Ballay*, the Third Circuit held that Section 12(a)(2) could not apply to aftermarket trading because, if it did, "the more lenient requirements of [that section] would effectively eliminate the use of section 10(b) by securities purchasers," who would be inclined to avoid "its more stringent burdens of proof." 925 F.2d at 692-93 & n.13.

There is no good reason to depart from statutory text and structure to expand Sections 11 and 12, which are only two parts of the larger, comprehensive statutory regime governing securities. Other provisions already provide remedies to private and government plaintiffs in the circumstances that concerned the courts below. Section 10(b) remains "a catchall provision, the most open-ended and the most important" of the securities laws, ROBERT C. CLARK, CORPORATE LAW § 8.9, at 309 (1986), "but what it catches must be fraud," *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). And Section 17, which permits enforcement actions by the government, is even broader; it creates sweeping liability for negligent misstatements. 15 U.S.C. § 77q.

Given these other significant remedies, issuers, underwriters, directors, and corporate officers have every reason to be careful about what they say in their registration statements and other public filings irrespective of potential liability under Sections 11 and 12. The Ninth Circuit was therefore wrong to conclude that, under Judge Friendly's rule in *Barnes*, "companies would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements." Pet. App. 17a. No rational issuer would be "incentivized" to engage in securities fraud merely because plaintiffs may face difficulty prevailing under Sections 11 and 12(a)(2) in some cases.

The Ninth Circuit similarly missed the big picture when it said that "from a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing." Pet. App. 17a. How a company chooses to go public depends on a long list of factors, including whether it needs to raise capital through the underwriter-led sales efforts and publicity that are part of a traditional IPO. A direct listing like Slack's, by contrast, "is appropriate only to firms that are both well known and well capitalized." Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 74 (2021). In fact, since Spotify's pioneering direct listing in 2018, *hundreds* of companies have chosen to go public through IPOs, whereas far fewer have gone public through direct listings. *Compare* Jay R. Ritter, Initial Public Offerings: Updated Statistics (Jan. 6, 2023), https://bit.ly/3kiixua, *with* Jay. R. Ritter, Initial Public Offerings: Direct Listings (May 19, 2022), https://bit.ly/3XEylWt.

2. The Ninth Circuit's decision also runs roughshod over the important statutory and regulatory distinction between registered and exempt shares. From the outset of the federal securities regulatory regime, Congress and the SEC have carefully distinguished between shares that must be registered to be sold and shares that may be sold in a transaction free from the registration requirement. *See* Securities Act of 1933, ch. 38, §§ 3-4, 6-7, 48 Stat. 74, 75-77, 78-79 (codified as amended at 15 U.S.C. §§ 77c-77d, 77f-77g). Legions of cases address the contours of the registration requirement—such as whether a sale qualifies for an exemption or whether a person qualifies as an "underwriter" for purposes of Rule 144. *E.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 120 (1953); *SEC v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 330 (6th Cir. 2013); *SEC v. M & A W., Inc.*, 538 F.3d 1043, 1046 (9th Cir. 2008); *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 212 (3d Cir. 2006); *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998). Congress, the SEC, and the courts would not have devoted such painstaking attention to the distinction between shares that must be registered to be sold and those that need not be registered if those two categories could be unceremoniously lumped together for regulatory purposes. But that is the upshot of the Ninth Circuit's decision—that shares approved for sale by the SEC *without* registration should be treated as if they were subject to the '33 Act's registration requirement.

3. The Ninth Circuit's rule also discourages innovation in methods of going public. Companies contemplating going public would be less inclined to try

newly developed offering types if they might face unexpected liabilities for their trouble.

Innovation in the securities markets is valuable and overdue. To be sure, there is much to recommend the traditional IPO—it offers the benefits of sophisticated marketing through the underwriting process and a guarantee that the issuer will raise a certain amount of capital. But issuers pay a heavy price for those benefits in the form of high transaction costs (underwriters earn a significant portion of the raised capital) and potential capital left on the table (only those fortunate buyers who are allocated shares by the underwriters get the benefit of any "pop" in the share price after trading begins). *Supra* pp. 7-8. Alternative methods of going public offer the promise of lower costs and higher proceeds for issuers. *E.g.*, Arman Tabatabai, *TechCrunch Conversations: Direct Listings*, TECHCRUNCH (Jan. 19, 2019), http://bit.ly/3QCHFYE.

IPOs can also be unfriendly to retail investors. Because underwriters typically presell the offering to large institutional investors, retail investors are able to buy only later—often after the share price has risen dramatically. *See, e.g.*, Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 714-18, 731 (2005).

Direct listings are an answer to these problems. They permit retail investors to buy shares in newly public companies just like other market participants. Direct listings also give issuers who do not need to raise capital an efficient mechanism for going public to reward their early investors and employees, thereby incentivizing investment in new ventures and providing liquidity to employees who have contributed to the company's development. Greg Rodgers et al., *Evolving Perspectives on Direct Listings After Spotify and Slack*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 17, 2019), http://bit.ly/3COMUih; Katie Roof, *Direct Listings Provide Benefits for Venture Investors Over Traditional IPOs*, WALL ST. J. (May 10, 2019), https://on.wsj.com/3HgEDGH. Before the issuer goes public, selling shares can be a daunting prospect. Trading in exempt shares is generally limited to large lots on private marketplaces with weak price discovery and high costs for matching buyers and sellers. *See* Matthew Wansley, *Taming Unicorns*, 97 IND. L.J. 1203, 1244-47 (2022). Finally, the issuer itself benefits from going public, even if, like Slack, it raises no capital. It can readily raise capital in the future if the need arises, and it can also use its newly public shares to fund acquisitions or compensate its employees with stock that has become more attractive because it is easily tradeable.

4. The Ninth Circuit cast all these benefits aside in the name of enabling more investors to impose near-strict liability on issuers. Pet. App. 16a-18a. But even if innovative methods of going public like direct listings somehow posed a threat to investor protection, the courts still would not be the right forum for addressing those concerns. That is why, until this case, courts have consistently refused calls to interpret the '33 Act more broadly than Judge Friendly did in *Barnes*. *Supra* pp. 35-36.

The SEC would have ample tools at its disposal to address the concerns identified by the courts below if they were problematic. It could, for example, mandate a lockup period *whenever* registered shares first become available for trading on a public exchange. Under that approach, anyone buying shares on an exchange during the lockup period could sue under

Section 11 for allegedly false statements in the operative registration statement.

Congress or the SEC could also require changes to the financial system to facilitate the tracing of specific shares. Just as when *Barnes* was decided, today "it is often impossible to determine" whether shares were registered under a challenged registration statement. 373 F.2d at 272. Whether technological advancements have made such tracing practicable and whether there is sufficient social benefit to warrant it are questions that only the political branches can answer. *See, e.g.*, Kelsey Bolin, Note, *Decentralized Public Ledger Systems and Securities Law: New Applications of Blockchain Technology and the Revitalization of Sections 11 and 12(a)(2) of the Securities Act of 1933*, 95 WASH U. L. REV. 955, 976-80 (2018) (calling for blockchain-enabled tracing).

For now, the only question is whether the statutory text means what it says. Until this case, courts had consistently held that it does. That consistency enabled market participants—issuers, underwriters, financial advisors, directors-and-officers insurers, and more—to make decisions knowing the full scope of their potential liability. The decision below "introduces an element of uncertainty into an area that demands certainty and predictability." *Pinter*, 486 U.S. at 652. The Court should eliminate that uncertainty and leave any potential reforms to those branches better suited to assess them.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint with prejudice.

Respectfully submitted.

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APPENDIX:
Statutory Provisions Involved

15 U.S.C. § 77d
(§ 4 of the Securities Act of 1933)

§ 77d. Exempted transactions

(a) In general

The provisions of section 77e of this title shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

(5) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 77c(b)(1) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

(6) transactions involving the offer or sale of securities by an issuer (including all entities controlled by or under common control with the issuer), provided that—

(A) the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, is not more than $1,000,000;

(B) the aggregate amount sold to any investor by an issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, does not exceed—

(i) the greater of $2,000 or 5 percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; and

(ii) 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000;

(C) the transaction is conducted through a broker or funding portal that complies with the requirements of section 77d–1(a) of this title; and

(D) the issuer complies with the requirements of section 77d–1(b) of this title.

(7) transactions meeting the requirements of subsection (d).

(b) Offers and sales exempt under 17 CFR 230.506

Offers and sales exempt under section 230.506 of title 17, Code of Federal Regulations (as revised pursuant to section 201 of the Jumpstart Our Business Startups Act) shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.

(c) Securities offered and sold in compliance-with Rule 506 of Regulation D

(1) With respect to securities offered and sold in compliance with Rule 506 of Regulation D under this subchapter, no person who meets the conditions set forth in paragraph (2) shall be subject to registration as a broker or dealer pursuant to section 78o(a)(1) of this title,1 solely because—

(A) that person maintains a platform or mechanism that permits the offer, sale, purchase, or negotiation of or with respect to securities, or permits general solicitations, general advertisements, or similar or related activities by issuers of such securities, whether online, in person, or through any other means;

(B) that person or any person associated with that person co-invests in such securities; or

(C) that person or any person associated with that person provides ancillary services with respect to such securities.

(2) The exemption provided in paragraph (1) shall apply to any person described in such paragraph if—

(A) such person and each person associated with that person receives no compensation in connection with the purchase or sale of such security;

(B) such person and each person associated with that person does not have possession of customer funds or securities in connection with the purchase or sale of such security; and

(C) such person is not subject to a statutory disqualification as defined in section 78c(a)(39) of this title 1 and does not have any person associated with that person subject to such a statutory disqualification.

(3) For the purposes of this subsection, the term "ancillary services" means—

(A) the provision of due diligence services, in connection with the offer, sale, purchase, or negotiation of such security, so long as such services do not include, for separate compensation, investment advice or recommendations to issuers or investors; and

(B) the provision of standardized documents to the issuers and investors, so long as such person or entity does not negotiate the terms of the issuance for and on behalf of third parties and issuers are not required to use the standardized documents as a condition of using the service.

(d) Certain accredited investor transactions

The transactions referred to in subsection (a)(7) are transactions meeting the following requirements:

(1) ACCREDITED INVESTOR REQUIREMENT.—Each purchaser is an accredited investor, as that term is defined in section 230.501(a) of title 17, Code of Federal Regulations (or any successor regulation).

(2) PROHIBITION ON GENERAL SOLICITATION OR ADVERTISING.—Neither the seller, nor any person acting on the seller's behalf, offers or sells securities by any form of general solicitation or general advertising.

(3) INFORMATION REQUIREMENT.—In the case of a transaction involving the securities of an issuer that is neither subject to section 78m or 78o(d) of this title, nor exempt from reporting pursuant to section 240.12g3–2(b) of title 17, Code of Federal Regulations, nor a foreign government (as defined in section

230.405 of title 17, Code of Federal Regulations) eligible to register securities under Schedule B, the seller and a prospective purchaser designated by the seller obtain from the issuer, upon request of the seller, and the seller in all cases makes available to a prospective purchaser, the following information (which shall be reasonably current in relation to the date of resale under this section):

(A) The exact name of the issuer and the issuer's predecessor (if any).

(B) The address of the issuer's principal executive offices.

(C) The exact title and class of the security.

(D) The par or stated value of the security.

(E) The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year.

(F) The name and address of the transfer agent, corporate secretary, or other person responsible for transferring shares and stock certificates.

(G) A statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date.

(H) The names of the officers and directors of the issuer.

(I) The names of any persons registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person's participation in the offer or sale of the securities.

(J) The issuer's most recent balance sheet and profit and loss statement and similar financial statements, which shall—

(i) be for such part of the 2 preceding fiscal years as the issuer has been in operation;

(ii) be prepared in accordance with generally accepted accounting principles or, in the case of a foreign private issuer, be prepared in accordance with generally accepted accounting principles or the International Financial Reporting Standards issued by the International Accounting Standards Board;

(iii) be presumed reasonably current if—

(I) with respect to the balance sheet, the balance sheet is as of a date less than 16 months before the transaction date; and

(II) with respect to the profit and loss statement, such statement is for the 12 months preceding the date of the issuer's balance sheet; and

(iv) if the balance sheet is not as of a date less than 6 months before the transaction date, be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than 6 months before the transaction date.

(K) To the extent that the seller is a control person with respect to the issuer, a brief statement regarding the nature of the affiliation, and a statement certified by such seller that they have no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

(4) ISSUERS DISQUALIFIED.—The transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer.

(5) BAD ACTOR PROHIBITION.—Neither the seller, nor any person that has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller is subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) of Regulation D (17 CFR 230.506(d)(1)) or is subject to a statutory disqualification described under section 78c(a)(39) of this title.

(6) BUSINESS REQUIREMENT.—The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.

(7) UNDERWRITER PROHIBITION.—The transaction is not with respect to a security that constitutes the whole or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution.

(8) OUTSTANDING CLASS REQUIREMENT.—The transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

(e) Additional requirements

(1) IN GENERAL.—With respect to an exempted transaction described under subsection (a)(7):

(A) Securities acquired in such transaction shall be deemed to have been acquired in a transaction not involving any public offering.

(B) Such transaction shall be deemed not to be a distribution for purposes of section 77b(a)(11) of this title.

(C) Securities involved in such transaction shall be deemed to be restricted securities within the meaning of Rule 144 (17 CFR 230.144).

(2) RULE OF CONSTRUCTION.—The exemption provided by subsection (a)(7) shall not be the exclusive means for establishing an exemption from the registration requirements of section 77e of this title.

15 U.S.C. § 77e
(§ 5 of the Securities Act of 1933)

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets

the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Security-based swaps

Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of title 7.

15 U.S.C. § 77f
(§ 6 of the Securities Act of 1933)

§ 77f. Registration of securities

(a) Method of registration

Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) Registration fee

(1) Fee payment required

At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to $92 1 per $1,000,000 of the maximum aggregate price at which such securities are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (2).

(2) Annual adjustment

For each fiscal year, the Commission shall by order adjust the rate required by paragraph (1) for such fiscal year to a rate that, when applied to the baseline estimate of the aggregate maximum offering prices for such fiscal year, is reasonably likely to produce aggregate fee collections under this subsection that are equal to the target fee collection amount for such fiscal year.

(3) Pro rata application

The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(4) Review and effective date

In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5. An adjusted rate prescribed under paragraph (2) and published under paragraph (5) shall not be subject to judicial review. An adjusted rate prescribed under paragraph (2) shall take effect on the first day of the fiscal year to which such rate applies.

(5) Publication

The Commission shall publish in the Federal Register notices of the rate applicable under this subsection and under sections 78m(e) and 78n(g) 1 of this title for each fiscal year not later than August 31 of the fiscal year preceding the fiscal year to which such rate applies, together with any estimates or projections on which such rate is based.

(6) Definitions

For purposes of this subsection:

(A) Target fee collection amount

The target fee collection amount for each fiscal year is determined according to the following table:

Fiscal year:	**Target fee collection amount**
2002……………………………...	$377,000,000
2003……………………………...	$435,000,000
2004……………………………...	$467,000,000
2005……………………………...	$570,000,000
2006……………………………...	$689,000,000
2007……………………………...	$214,000,000
2008……………………………...	$234,000,000
2009……………………………...	$284,000,000
2010……………………………...	$334,000,000
2011……………………………...	$394,000,000
2012……………………………...	$425,000,000
2013……………………………...	$455,000,000
2014……………………………...	$485,000,000
2015……………………………...	$515,000,000
2016……………………………...	$550,000,000
2017……………………………...	$585,000,000
2018……………………………...	$620,000,000
2019……………………………...	$660,000,000
2020……………………………...	$705,000,000
2021 and each fiscal year thereafter	An amount that is equal to the target fee collection amount for the prior fiscal year, adjusted by the rate of inflation.

(B) Baseline estimate of the aggregate maximum offering prices

The baseline estimate of the aggregate maximum offering prices for any fiscal year is the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during such fiscal year as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget, using the methodology required for projections pursuant to section 907 of title 2.

(c) Time registration effective

The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) Information available to public

The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) Emerging growth companies

(1) In general

Any emerging growth company, prior to its initial public offering date, may confidentially submit to the Commission a draft registration statement, for confidential nonpublic review by the staff of the Commission prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the Commission not later than 15 days before the date on which the issuer conducts a road show, as such term is defined in section 230.433(h)(4) of title 17, Code of Federal Regulations, or any successor thereto. An issuer that was an emerging growth company at the time it submitted a confidential registration statement or, in lieu thereof, a publicly filed registration statement for review under this subsection but ceases to be an emerging growth company thereafter shall continue to be treated as an emerging market growth company for the purposes of this subsection through the earlier of the date on which the issuer consummates its initial public offering pursuant to such registrations statement or the end of the 1-year period beginning on the date the company ceases to be an emerging growth company.

(2) Confidentiality

Notwithstanding any other provision of this subchapter, the Commission shall not be compelled to disclose any information provided to or obtained by the Commission pursuant to this subsection. For purposes of section 552 of title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Information described in or obtained pursuant to this subsection shall be deemed to constitute confidential information for purposes of section 78x(b)(2) of this title.

15 U.S.C. § 77g
(§ 7 of the Securities Act of 1933)

§ 77g. Information required in registration statement

(a) Information required in registration statement

(1) In general

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of section 77aa of this title, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B of section 77aa of this title; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(2) Treatment of emerging growth companies

An emerging growth company—

(A) need not present more than 2 years of audited financial statements in order for the registration statement of such emerging growth company with respect to an initial public offering of its common equity securities to be effective, and in any other registration statement to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its initial public offering; and

(B) may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Registration statement for blank check companies

(1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors—

(A) require such issuers to provide timely disclosure, prior to or after such statement becomes effective under section 77h of this title, of (i) information regarding the company to be acquired and the specific application of the proceeds of the offering, or (ii) additional information necessary to prevent such statement from being misleading;

(B) place limitations on the use of such proceeds and the distribution of securities by such issuer until the disclosures required under subparagraph (A) have been made; and

(C) provide a right of rescission to shareholders of such securities.

(2) The Commission may, as it determines consistent with the public interest and the protection of investors, by rule or order exempt any issuer or class of issuers from the rules prescribed under paragraph (1).

(3) For purposes of paragraph (1) of this subsection, the term "blank check company" means any development stage company that is issuing a penny stock (within the meaning of section 78c(a)(51) of this title) and that—

(A) has no specific business plan or purpose; or

(B) has indicated that its business plan is to merge with an unidentified company or companies.

(c) Disclosure requirements

(1) In general

The Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.

(2) Content of regulations

In adopting regulations under this subsection, the Commission shall—

(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and

(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including—

(i) data having unique identifiers relating to loan brokers or originators;

(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) the amount of risk retention by the originator and the securitizer of such assets.

(d) Registration statement for asset-backed securities

Not later than 180 days after July 21, 2010, the Commission shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 78c(a)(77) 1 of this title) that require any issuer of an asset-backed security—

(1) to perform a review of the assets underlying the asset-backed security; and (2) to disclose the nature of the review under paragraph (1).

15 U.S.C. § 77j
(§ 10 of the Securities Act of 1933)

§ 77j. Information required in prospectus

(a) Information in registration statement; documents not required

Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e)—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A of section 77aa of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of section 77aa of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or

regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(b) Summarizations and omissions allowed by rules and regulations

In addition to the prospectus permitted or required in subsection (a), the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b)(1) of section 77e of this title which omits in part or summarizes information in the prospectus specified in subsection (a). A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 77k of this title. The Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection, if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading. Upon issuance of an order under this subsection, the Commission shall give notice of the issuance of such order and opportunity for hearing by personal service or the sending of confirmed telegraphic notice. The Commission shall vacate or modify the order at any time for good cause or if such prospectus has been filed or amended in accordance with such order.

(c) Additional information required by rules and regulations

Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) Classification of prospectuses

In the exercise of its powers under subsections (a), (b), or (c), the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) Information in conspicuous part of prospectus

The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d), when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) Prospectus consisting of radio or television broadcast

In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities registered under this subchapter.

15 U.S.C. § 77k
(§ 11 of the Securities Act of 1933)

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration

statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be

responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration

statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of

contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u–4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

15 U.S.C. § 77*l*
(§ 12 of the Securities Act of 1933)

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

15 U.S.C. § 77o
(§ 15 of the Securities Act of 1933)

§ 77o. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

15 U.S.C. § 77q
(§ 17 of the Securities Act of 1933)

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) 1 of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) Use of interstate commerce for purpose of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

15 U.S.C. § 78j
(§ 10 of the Securities Exchange Act of 1934)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement 1 any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate

> Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u–1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.