

THE FUTURE OF LAW

A Review of Professor Marc Steinberg's *Rethinking Securities Law*

By James A. Deeken

The scope and substance of securities law are in a state of significant flux. The current Securities and Exchange Commission (SEC) has proposed and is in the process of considering numerous amendments to regulations issued under each of the major US securities statutes that, if adopted, will accelerate a trend from what is principally a disclosure-based regulation focused on investor protection to one that incorporates measures of social metrics disclosure and increased principles of fairness, where disclosure alone will not cure a perceived malady.

To date, most of the debate arising from the SEC's frenzied pace of proposed rulemaking has been in the realm of politicians, editorial pages, and industry and investor lobby groups. At a time when these voices are heard, academic voices are often sparse, especially since few legal academics specialize in securities law and the process for legal journals to produce articles is slow and arduous compared to the speed of the financial press. Against this backdrop, there is perhaps a no more opportune time for a renowned securities law professor to put forth an extensive analysis of the current play of securities laws and how they might be improved upon.

Marc Steinberg, Southern Methodist University's Dedman School of Law Radford Chair of Law recently published his treatise, *Rethinking Securities Law*, Oxford University Press (2021), to address matters of public concern under the current securities law framework. His proposals, based on his 30 plus years of academic research, advocate for

change in securities law and regulation. While he to-date has authored 40 books, focused mostly on business and securities law, his current may be his most provocative.

Although he employs a detached observer mindset, no one side of the political aisle will agree with all of his recommendations. Professor Steinberg focuses his proposals on revising public disclosure obligations of public companies, providing for increased shareholder say in the corporate governance of public companies, modernizing insider trading law and reforming the SEC.

Separate from its utility as a supplement of proposals for the current debate, Steinberg's book serves an independent value as a plain English summary of the mosaic that regulates the securities market and its participants. The author weaves together statutes, regulations, case law, and history to paint an educational picture of what may otherwise strike people as an overly complex system of regulations. Steinberg's first few chapters may be the most concise and the clearest overview of public securities law available, and should be required reading for anyone beginning a career in securities law or in public company reporting.

One of Steinberg's most material proposals includes a requirement that insider trading law be amended by Congress to replace the current maze of interlocking case law with a comprehensive statute modeled on similar laws from other developed countries.

Steinberg is also a critic of how long and convoluted securities disclosure documents have gotten and presses for an enhanced summary in disclosure documents that would be likely read by individual retail investors without the need to pour through

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lengthy disclosure or disclosure that incorporates other filings by reference.

Steinberg emerges as a clear proponent of continuing the direction of securities law from being solely focused on disclosure towards an approach focused on substantive fairness—an idea that certain things should not be allowed even if they are fairly disclosed. However, he acknowledges the tension with state law, which has historically been the primary body of law for regulating fair and unfair corporate governance practices.

He advocates for greater stockholder voting for issues of executive compensation, increased stockholder ability to nominate directors in a company's proxy, heightened independence requirements for independent board members accompanied by term limits and a requirement that each board have at least one employee representative. He further proposes a requirement that any defensive tactics that a company deploys against a takeover attempt be subject to stockholder approval. His proposals along these lines will further the debate about the degree to which federal securities laws should also serve a federal corporate governance role, at least for public companies.

He bemoans that the SEC has not been more focused on pursuing claims against individual actors and seems to eschew how corporate funds are often used to settle securities fraud claims. In the latter

case, thus making allegedly defrauded stockholders bear indirectly part of the cost of a settlement. Yet, he also realizes the need for, and proposes, caps on securities liabilities, where an omission was not knowingly made. In that same vein, he expresses concern for how qualified individuals might be reluctant to serve as independent directors due to potential liability and proposes some protections along those lines.

Other proposals consist of heightening investor protections in Regulation D offerings which, as offerings exempt from federal registration, have been lightly regulated and diversifying and expanding the membership of the SEC commissioners to capture an expanded cross section of stakeholders.

While not all of Steinberg's individual recommendations will be taken at face value, the book is extremely valuable as an informative and timely resource for jogging debate, in addition to serving as a helpful educational work.

There is enough for a follow-on book. Hopefully one addressing and analyzing the results of the current rulemaking activity, which would also present an opportunity for a deeper analysis for possible unintended consequences of some regulations, counter arguments, and an analysis of how rulemaking may impact capital markets. *Rethinking Securities Law* hits so many different areas that deserve deeper dives in further writings.