

GÖTTERDÄMMERUNG FOR THE SECURITIES ACT?

JOEL SELIGMAN*

Wagner's *Ring Cycle* ends with two conclusions.¹ Most melodramatically, the Valkurie Brünnhilde, having been betrayed, and with Wagnerian logic, becomes wise, mounts her steed Grane, and rides into a conflagration. The flames from this conflagration shoot up till they engulf all of Valhalla and presumably consume the gods and heroes that reside there. This is the *Götterdämmerung* that gives the title to the final opera in the *Cycle*.²

There is a second and contradictory ending. Even as the flames lap at Valhalla, the refrain of the Rheinmusik, symbolizing the forces of nature, close the opera.³ The audience is left to contemplate whether the opera ends with the twilight of the gods or with the more inspiring theme that nature is eternal.

A similar, but less melodramatic, duality is appropriate today for the Securities Act of 1933 (the "1933 Act" or the "Securities Act").⁴ When initially adopted, this Act epitomized a third approach in the relationship of government to the economy. Rather than being restricted to the choice of inaction or laissez faire or of the full scale type of regulation earlier popularized by the Interstate Commerce Commission,⁵ the Securities Act offered a new alternative. The 1933 Act required full disclosure to investors of material information when initial sales of securities were made to the public⁶ and then left it to the investors to make appropriate decisions based on their own evaluation of the merits of an offer. Today the significance of registration under the Securities Act has vastly dissipated. A question suggested by a conference like this is whether the 1933 Act as a whole has reached a point of twilight or whether the inevitable proclivities of some issuers of securities to engage in fraud portends a greater longevity.

* Dean and Samuel M. Fegtley Professor of Law, University of Arizona College of Law.

1. RICHARD WAGNER, *RING DES NIBELUNGEN: GÖTTERDÄMMERUNG* (Dover Publications 1982) (1877). *Götterdämmerung* is the final part of Wagner's four-part opera. The other parts are *Das Rheingold*, *Die Walküre* and *Siegfried*.

2. *Id.*

3. *Id.*

4. 15 U.S.C. §§ 77a-77aa (1994).

5. The ICC, for example, regulated entry and mergers until the agency was abolished in 1996. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (effective Jan. 1, 1996).

6. *See* 15 U.S.C. §§ 77e-77h (1994).

I. THE ORIGINAL CONCEPTION

The announced aim of Congress in passing the Securities Act was to inform investors of the facts concerning securities offered for sale and to protect them against fraud and misrepresentation.⁷ It was also “to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.”⁸

The aim was to be achieved by antifraud provisions and by a registration procedure.⁹ The registration procedure was designed to place the facts before the investing public in two ways. First, adequate and accurate information in the form of a “registration statement” was to be made a matter of public record for a period of twenty days;¹⁰ this waiting period was to be used only to inform prospective investors about the issue and not to attempt to sell it.¹¹ Second, underwriters and dealers were to furnish prospective investors with a prospectus based on the information in the registration statement.¹² This is still the basic pattern of the statute, although it was amended in 1954 to permit certain types of *offers* (but not *sales*) during the waiting period.¹³

On its face, section 5, the registration provision, is all embracing.¹⁴ But its scope is limited by several exemptions in sections 3 and 4.¹⁵ Of greatest significance to us today, sections 4(1) and 4(2) effectively limit the scope of the registration procedure to initial offers or sales of nonexempt securities to

7. See generally 1 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* ch. 2.B (3d ed. 1989 & Ann. Supp. 1996).

8. S. Rep. No. 73-47 (1933). On the history of the Act, see generally JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 39-72* (rev. ed. 1995), and on the Act see generally 1-3 LOSS & SELIGMAN, *supra* note 7.

9. See 15 U.S.C. §§ 77e, 77k-77l (1994).

10. *Id.* §§ 773, 77h(a).

11. See 1 LOSS & SELIGMAN, *supra* note 7, at 211-13, 225, 337.

12. See *id.* at 389, 479-83.

13. See Act of Aug. 10, 1954, ch. 667, tit. 1, sec. 7, 68 Stat. 683, 684-85 (codified at 15 U.S.C. 773 (1994)); see also 1 LOSS & SELIGMAN, *supra* note 7, at 460-63.

14. See 15 U.S.C. § 77e (1994).

15. *Id.* §§ 77c, 77d.

the public.¹⁶

In its original form, the basic concern of the 1933 Act required full disclosure of material facts by generally registering private business and foreign governmental issues. When originally enacted, section 3(b) empowered the Securities and Exchange Commission ("SEC" or the "Commission") to exempt only "small" issues of \$100,000 or less.¹⁷ This power, the House Committee stated, "is expected to be used only in a sparing manner."¹⁸ The intrastate exemption in section 3(a)(11) was similarly intended to be applied "only to issues genuinely local in character."¹⁹ Additionally, of particular consequence was section 18, which preserved the concurrent jurisdiction of state securities regulation,²⁰ including necessarily the power of the states to go beyond the full disclosure approach of the federal Securities Act and regulate the merits of specific offers.²¹

II. EROSION OF THE SECURITIES ACT OF 1933²²

Between approximately 1980 and 1994, the frequency with which corporate issuers had to provide a detailed description of their firms and their businesses in a registration statement significantly declined, primarily as a result of the greater use of truncated, transaction-oriented disclosure requirements and the increased use of the private placement exemption.²³ The

16. *Id.* § 77d(1) & (2). Section 4(1) excludes from the Act secondary or resale transactions involving nonexempt securities by exempting "transactions by any person other than an issuer, underwriter, or dealer." *Id.* § 77d(1). Section 4(2) exempts private or limited offerings by excluding "transactions by an issuer not involving any public offering." *Id.* § 77d(2).

As James Landis, one of the drafters of the Securities Act, wrote in a reminiscence:

The sale of an issue of securities to insurance companies or to a limited group of experienced investors, was certainly not a matter of concern to the federal government. That bureaucracy, untrained in these matters as it was, could hardly equal these investors for sophistication, provided only it was their own money that they were spending.

James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 37 (1959).

17. An Act of May 27, 1933, ch. 38, tit. 1, § 3(b), 48 Stat. 74, 76-77 (codified as amended at 15 U.S.C. § 77c(b) (1994)); H.R. REP. NO. 73-85, at 6 (1933).

18. H.R. REP. NO. 73-85, at 6.

19. See Rule 147 Preliminary note 3, 17 C.F.R. § 230.147 preliminary note 3 (1996); 3 LOSS & SELIGMAN, *supra* note 7, at 1276-77.

20. See 1 LOSS & SELIGMAN, *supra* note 7, at 271-77.

21. See *id.* at 98-122.

22. Portions of this section are derived from LOSS & SELIGMAN, *supra* note 7.

23. Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 682-92 (1995).

significance of the mandatory disclosure system under the 1933 Act, in effect, shrunk as a consequence of the combined effect of the efficient market hypothesis, which suggested that disclosure under the 1933 Act is unnecessary if the same disclosure is made to the market under the periodic requirements of the Securities Exchange Act of 1934 ("1934 Act");²⁴ the rise of foreign capital markets, which created a practical alternative to the domestic sale of securities;²⁵ and the increased demand for securities by institutions, which effectively broadened the private placement market.²⁶

The pivotal event in this period's erosion of the private scope of the Securities Act was the 1982 adoption of the integrated disclosure system.²⁷ The SEC's integrated disclosure system has two major aspects. First, it coordinates required disclosures under the 1933 Act and the 1934 Act, in light of an assumption of the efficient market hypothesis that information effectively disseminated to the public will be rapidly reflected in share prices regardless of the source of the data.²⁸ This aspect of the system is responsible for streamlined registration forms, notably Forms S-2 and S-3, for registrants subject to the 1934 Act's continuous disclosure obligations.²⁹ Second, the system developed generic disclosure items for both 1933 Act registration and 1934 Act registration and continuous reporting by adding a new Regulation S-K (nonfinancial items) to the existing Regulation S-X (financial items).³⁰ Previously, required disclosures under the two Acts had been developed independently of each other.

The first detailed articulation of the integrated disclosure system concept was a highly influential 1966 law review article by Milton H. Cohen, entitled "*Truth in Securities*" *Revisited*.³¹ Cohen's article begins with the following

24. *Id.* at 666-72.

25. *Id.* at 661-64.

26. *Id.* at 657-61.

27. See 2 LOSS & SELIGMAN, *supra* note 7, at 599-620.

28. The applicability of the efficient market hypothesis to an integrated disclosure system was considered in several releases. See, e.g., Adoption of Integrated Disclosure System, Securities Act Release No. 33-6383, 24 SEC Docket 1318, 1320 & n.9 (Mar. 3, 1982); Reproposal of Comprehensive Revision to System for Registration of Securities Offerings, Securities Act Release No. 33-6331, 23 SEC Docket 288, 290-91 (Aug. 6, 1981); Proposed Comprehensive Revision to System for Registration of Securities Offerings, Securities Act Release No. 33-6235, 20 SEC Docket 1175, 1177-85 (Sept. 2, 1980).

29. Adoption of Integrated Disclosure system, Securities Act Release No. 33-6383, 24 SEC Docket 1318, 1320-23.

30. Application of Regulation S-X, 17 C.F.R. § 210 (1996); Regulation S-K, 17 C.F.R. § 229 (1996); Form S-2, 17 C.F.R. § 239.12 (1996); Form S-3, 17 C.F.R. § 239.13 (1996).

31. Milton H. Cohen, "*Truth in Securities*" *Revisited*, 79 HARV. L. REV. 1340 (1966).

thesis:

[T]he combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts (the latter as extended in 1964) had been enacted in opposite order, or had been enacted as a single, integrated statute—that is, if the starting point had been a statutory scheme of continuous disclosures covering issuers of actively traded securities and the question of special disclosures in connection with public offerings had then been faced in this setting. Accordingly, it is my plea that there now be created a new coordinated disclosure system having as its basis the continuous disclosure system of the 1934 Act and treating “1933 Act” disclosure needs on this foundation.³²

To achieve this coordinated—or integrated—disclosure system, Cohen urged that the disclosure process under the 1934 Act, which “appears never to have been taken quite as seriously as under the 1933 Act,”³³ “should operate so that the public files contain, at any given time, information substantially equivalent to a current 1933 Act prospectus . . . with regard to any security in which there is active investor interest.”³⁴ He proposed several measures to bring the quality of 1934 Act disclosures closer to the level of 1933 Act filings: (i) the pertinent civil liability provisions in the two Acts should be harmonized rather than retaining a considerably milder standard under the 1934 Act; (ii) SEC review of 1934 Act filings should resemble “in thoroughness and promptness” its review of 1933 Act filings; and (iii) there should be a uniform system for numbering items in the basic registration and report forms.³⁵ Further, Cohen urged that once the continuous disclosure system of the 1934 Act has been improved “to the limits of practicability,” continuous registrants that are fully subject to the reporting, proxy soliciting, and insider trading provision of sections 13, 14, and 16 of the 1934 Act should be subject to “greatly relaxed” special disclosure requirements under the 1933 Act, so that a public offering filing does not merely duplicate what already exists in the public file.³⁶ In contrast, Cohen also argued that a first-time registrant should, as in the past, make a comprehensive 1933 Act filing.³⁷

32. *Id.* at 1341-42 (footnote omitted).

33. *Id.* at 1361.

34. *Id.* at 1368.

35. *Id.* at 1368-75.

36. *Id.* at 1379, 1406-07.

37. *Id.* at 1407-08.

While Cohen's logical argument was cogent, quite different factors ultimately led to the integration of the mandatory disclosure system. First, it was generally recognized that the mechanisms of an efficient market, in fact, appear to operate, at least with respect to the most actively traded securities. In 1969, the SEC's Disclosure Policy Study concurred with Cohen's proposal for a coordinated disclosure system. In *Disclosure to Investors: A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts*,³⁸ the SEC argued that information in SEC filings would be rapidly disseminated because of intermediaries in the investment process—such as professional money managers, brokerage firm research staffs, and investment advisers, who would study these filings and “filter” out key new information to a wider public—and also because of advances in the technology of data dissemination.³⁹ Subsequently, the SEC's 1977 Advisory Committee Report carried these points further, asserting that “competition among analysts results in security prices that reflect a broad set of information.”⁴⁰ This competition, in part, is dependent on “a uniquely active and responsive financial press which facilitates the broad dissemination of highly timely and material company-oriented information to a vast readership.”⁴¹ In effect, these SEC studies described mechanisms by which an efficient market could operate. Subsequently, particularly in its consideration of the eligibility requirements for the truncated Form S-3, the SEC conservatively defined the class of companies that it was confident were subject to “efficient” information dissemination and analysis.

At approximately the same time, a quite different factor strengthened the momentum for truncating the disclosure requirements under the Securities Act. For several decades the SEC had generally interpreted section 6(a) of that Act to permit registration of only those securities that would be sold soon

38. SECURITIES AND EXCHANGE COMM'N, *DISCLOSURE TO INVESTORS: A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS* (1969). Cohen was the study's director.

39. *Id.* at 10, 48, 52-54 (noting that membership in the Financial Analysts Federation had grown from 2422 members in 1950 to 11,752 by the end of 1967); *id.* at 63-64, 313-23 (noting that the new technology at that time was microfiche).

40. REPORT OF THE ADVISORY COMM. ON CORP. DISCLOSURE TO THE SECURITIES AND EXCHANGE COMM'N, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., 620-21 (1977) (footnote omitted); see also *id.* at 618-52; Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 571-72 (1984).

41. Proposed Comprehensive Revision to System for Registration of Securities Offerings, Securities Act Release No. 33-6235, 20 SEC Docket 1175, 1179 (Sept. 2, 1980).

after the registration statement was declared effective.⁴² As a practical matter, this view prevented “shelf registration,” by which an issuer would register and leave the securities “on the shelf” until market conditions warranted a “takedown,” or sale of the securities.

A combination of regulatory and marketplace changes inspired the Commission to reexamine the shelf registration issue early in the 1980s.⁴³ Most significantly, the growth of a competitive Eurobond market placed SEC regulation of new issues in a new international context.⁴⁴ Unless SEC administration of the Securities Act permitted issuers to sell securities as rapidly in the United States as in Europe, it was reasonable to assume that a considerable portion of both American and foreign issues would exclusively be sold abroad. In 1980, the SEC attempted to enable U.S. investors to participate more effectively in the international bond market by publishing a staff interpretation—known at the SEC as the “Kingdom of Sweden” Release—indicating that foreign governments and their political subdivisions would be permitted to sell debt issues “off the shelf” in the United States if they undertook to file posteffective amendments with the SEC.⁴⁵

Cumulatively, the general recognition of the mechanisms of an efficient market for information dissemination and the potential for significant export of U.S. securities sales persuaded the SEC in 1982 to adopt both the current integrated disclosure system and shelf registration Rule 415.⁴⁶ The integrated disclosure system permits specified seasoned issuers using a truncated Form S-3⁴⁷ to file a brief registration statement primarily describing the securities

42. 1 LOSS & SELIGMAN, *supra* note 7, at 353-54. The last sentence of section 6(a) provides: “A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.” 15 U.S.C. § 77f(a) (1994).

43. 1 LOSS & SELIGMAN, *supra* note 7, at 359.

44. *See id.* at 357-58. Eurobonds, in essence, are bonds issued abroad—in Europe and elsewhere—effectively outside any national regulatory system.

45. *See* Interpretative Release Relating to Delayed Offerings by Foreign Governments or Political Subdivisions Thereof, Securities Act Release No. 33-6240, 20 SEC Docket 1358 (Sept. 10, 1980) (“setting forth the Division [of Corporate finance’s] views regarding the use of registration statements for delayed offerings by foreign governments or political subdivisions thereof”).

46. *See* Adoption of Integrated Disclosure System, Securities Act Release No. 33-6383, 24 SEC Docket 1318 (Mar. 3, 1982); *see also* 17 C.F.R. § 229 (1996) (Regulation S-K disclosures); *id.* § 230.415 (1996) (setting forth shelf registration rules).

47. Initially the Commission adopted two general types of eligibility requirements for Form S-3. First, there [were] registrant requirements. American companies (and under certain circumstances foreign private issuers) [were required to] have reported under the 1934 Act for the past 36 calendar months, with a default-free record since the end of the last fiscal year on dividend and sinking fund installments on preferred stock, debt installments, or long-term lease rentals if the defaults in the aggregate [were] material to the financial position of the registrant. Second, there [were] transaction

issuance and recent material changes.⁴⁸ Form S-3 also incorporates by reference: (i) the registrant's latest Form 10-K annual report, (ii) subsequent quarterly and monthly 1934 Act reports, and (iii) "if capital stock is to be registered and the same class [is] registered under section 12 of the [1934] Act, the description of such class of securities which is contained in a registration statement filed under the [1934] Act, including any amendments or reports filed for the purpose of updating such description."⁴⁹ Rule 415, the new shelf registration rule, permits specified seasoned issuers eligible to file on Form S-3 to register for the shelf for up to two years.⁵⁰

During the same period when Form S-3 and Rule 415 were being adopted, a third significant change in the scope of the registration requirements of the 1933 Act occurred. It had always been an underlying premise of the Securities Act that "private placements" of securities to institutional investors or a limited number of sophisticated investors would not have to be registered.⁵¹ During the last few decades, the proportion of new corporate financing conducted through private placement, rather than public sale, has

requirements. A company satisfying the registrant requirements could [then] use Form S-3 (1) for primary cash offerings if it had the requisite \$150 million float[—that is, stock ownership by outside shareholders rather than the inside central group—]or a \$100 million float and annual trading volume of at least 3 million shares; (2) for primary cash offerings of "investment grade" nonconvertible debt or nonconvertible preferred stock; (3) for secondary offerings offered by any person other than the issuer (including underwriters) if securities of the same class were listed on a national securities exchange or quoted in NASDAQ; or (4) for certain rights offerings, dividend or interest reinvestment plans or conversions or warrants.

2 LOSS & SELIGMAN, *supra* note 7, at 615-16 (footnotes omitted). For background on the Release, see 2 *id.* at 608-14.

In 1992, the SEC adopted revisions to Form S-3 that (i) shortened from 36 to 12 months the minimum issuer reporting requirements for all offerings of non-asset-backed securities; (ii) reduced the minimum public float requirement for issuers with at least \$75 million in voting stock held by nonaffiliates; and (iii) added offerings of investment grade asset-backed securities qualified to be registered for automatic effectiveness upon filing of a Form S-3 relating solely to a dividend or interest reinvestment plan. Simplification of Registration Procedures for Primary Securities Offerings, Securities Act Release No. 33-6964, 52 SEC Docket 3014, 3015-16 (Oct. 29, 1992) (adopting proposal in Simplification of Registration Procedures for Primary Securities Offerings, Securities Act Release No. 33-6943, 51 SEC Docket 1501 (July 16, 1992)).

48. Specifically, a registrant filing on Form S-3 must include Items 202, 501-512, 601, and 702 of Regulation S-K and information on material changes. Form S-3, 17 C.F.R. § 239.13 (1996). Each of these items and the concept of material changes are described in 2 LOSS & SELIGMAN, *supra* note 7, at 663-64.

49. Form S-3, 17 C.F.R. § 239.13 (1996). Each of the reports is incorporated by reference and is analyzed in 4 LOSS & SELIGMAN, *supra* note 7, at 1854-84.

50. Rule 415(a)(1)(x)m, (a)(2), 17 C.F.R. § 230.415(a)(1)(x), (a)(2) (1996).

51. See *supra* note 16. For discussion of the private placement exemption, see generally 3 LOSS & SELIGMAN, *supra* note 7, at 1350-450.

increased substantially. In 1970, for example, approximately seventeen percent of all corporate securities sales were private.⁵² Between 1984 and 1987, the figure ranged from thirty percent to thirty-nine percent.⁵³ To facilitate the institutional market in the resale of privately placed securities, the SEC in 1990 adopted Rule 144A,⁵⁴ which permits “qualified institutional buyers” to purchase specified privately placed securities without registration under the Securities Act.⁵⁵

A fourth significant erosive development during this period between 1980 and 1994 was a considerable expansion of the Commission’s authority to exempt “small issues.” Between 1933 and 1945, the Commission’s authority under section 3(b) had been limited to offerings of up to \$100,000.⁵⁶ In 1970, the limit was raised to \$500,000.⁵⁷ In 1980 section 3(b) was further amended to raise the threshold to \$5 million.⁵⁸ So empowered, the Commission

52. A 1988 SEC release included the following table:

New Corporate Public and Private Financing
[Millions of dollars]

	Public	Percent public	Private	Percent private	Total new financing
1970	31,130	83	6,373	17	37,503
1975	46,820	78	13,515	22	60,343
1980	57,330	78	15,700	22	73,030
1981	56,085	75	18,400	25	74,485
1982	62,566	72	24,300	28	86,866
1983	97,103	73	35,600	27	133,703
1984	82,199	61	53,258	39	135,457
1985	138,288	65	73,093	35	211,380
1986	[28]6,040	70	123,457	30	409,497
1987	271,477	66	139,355	34	410,832

Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, Securities Act Release No. 33-6806, 42 SEC Docket 91, 93 tbl.1 (Oct. 25, 1988).

53. See *supra* note 52.

54. Rule 144A, 17 C.F.R. § 230.144A (1996).

55. Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under rules 144 and 145; Securities Act Release No. 33-6862, 46 SEC Docket 23 (Apr. 23, 1990); see LOSS & SELIGMAN, *supra* note 7, at 406-24 (Ann. Supp. 1996).

56. An Act of May 27, 1933, ch. 38, tit. 1, § 3(b), 48 Stat. 74, 76-77 (current version at 15 U.S.C. 77c(b) (1994)). See generally 3 LOSS & SELIGMAN, *supra* note 7, at 1307-10.

57. Act of Dec. 19, 1970, Pub. L. No. 91-565, 84 Stat. 1480 (current version at 15 U.S.C. 77c(b) (1994)). See generally 3 LOSS & SELIGMAN, *supra* note 7, at 1310-13.

58. Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, tit. 3, sec. 301, 94 Stat. 2275, 2291 (codified at 15 U.S.C. 77c(b) (1994)). See generally 3 LOSS & SELIGMAN, *supra* note 7, at 1313-19.

subsequently raised the dollar limit to \$5 million under Regulation A for small issues in 1992.⁵⁹ Additionally, the Commission has significantly encouraged private placement or small issue exemption of securities through Regulation D, initially adopted in its current form in 1982,⁶⁰ and through the \$5 million figure in the Rule 505 safe harbor and the no-dollar limit in Rule 506.⁶¹

III. ACCELERATED EROSION

After the 1994 congressional elections, the pace of the erosion of the Securities Act accelerated. Let me highlight four particularly significant events:

(1) The 1995 Private Securities Reform Act has dramatically expanded the safe harbor available to issuers under the Securities Act for the publication of inaccurate, forward-looking statements.⁶² Most significantly, in section 27A(c)(1)(B), the new safe harbor protects defendants unless the plaintiff can prove that a false, forward-looking statement was made with "actual knowledge," a considerably more difficult culpability standard than was previously required by any of the antifraud provisions in the Securities Act.⁶³

(2) The National Securities Markets Improvement Act of 1996⁶⁴ amended section 18 of The Securities Act to preempt state securities regulation from adopting standards that go beyond those required by federal securities law for covered securities⁶⁵ and specifically prohibited merit regulation of covered

59. Securities Act Release No. 33-6949, 51 SEC Docket 2154 (July 30, 1992).

60. Securities Act Release No. 33-6389, 24 SEC Docket 1166 (Mar. 8, 1982) (adoption of proposal in Securities Act Release No. 33-6339, 23 SEC Docket 446 (Aug. 7, 1981)); *see also* 3 LOSS & SELIGMAN, *supra* note 7, at 1405-14.

61. 17 C.F.R. §§ 230.505-.506 (1996); *see also* 3 LOSS & SELIGMAN, *supra* note 7, at 1411-14.

62. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, tit. I, § 102(a), 109 Stat. 737, 749 (codified at 15 U.S.C. § 77z-2 (Supp. 1996)); *see also* discussion in LOSS & SELIGMAN, *supra* note 7, at 130-34 (Ann. Supp. 1996).

63. 15 U.S.C. § 77z-2(C)(1)(B) (Supp. 1996).

64. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, tit. 1, 110 Stat. 3416.

65. Section 18(b)(1) defines a security as a covered security when such security is:

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed on the National Market System of the Nasdaq Stock market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

securities.⁶⁶

(3) Early in 1996, a Commission Task Force on Disclosure Simplification proposed the most comprehensive revision of SEC forms and rules since the integrated disclosure system was adopted.⁶⁷ Shortly later the Commission rescinded certain rules and forms addressed by the Task Force and continued its consideration of the rest of the Task Force's recommendations.⁶⁸ Specifically the Commission rescinded:

- (a) Regulation B and Forms 1-G and 3-G;
- (b) Regulation F and accompanying Form 1-F;
- (c) Securities Act Rules 148, 445, 446, 447, and 494;
- (d) Securities Exchange Act Rules 16b-1(c) and 16b-4;
- (e) Regulation S-K Item 501(b) and 501(c)(8), as well as Exhibits 6, 7, 14,

(C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

Id. § 18(b)(1) (codified at 15 U.S.C. § 77r(b)(1)). Sections 18(b)(2)-(4) then add three other categories of covered securities: (1) under section 18(b)(2), *all* securities issued by a registered investment company (that has filed a registration statement under the Investment Company Act of 1940); (2) section 18(b)(3) creates a transaction exemption for offers or sales to "qualified purchasers," a term to be defined by the Commission; and (3) section 18(b)(4) more broadly defines covered securities to include transactions that are exempt from registration under:

(A) paragraph (1) or (3) of section 4, and the issuer of such security files reports with the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934;

(B) section 4(4);

(C) section 3(a), other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4) or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located; or

(D) Commission rules or regulations issued under section 4(2), except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996.

Id. (codified at 15 U.S.C. § 77c(b)(2)-(4)).

66. *Id.* (codified at 15 U.S.C. § 77r(a)(3)).

67. Securities and Exchange Comm'n, Task Force Report on Disclosure Simplification, [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,738, at 87,514 (Mar. 1996). The Task Force summarized its principal recommendations:

The Task Force recommends eliminating or modernizing many rules relating to disclosure and registration procedures to simplify the rule books and reduce the cumulative burden of compliance. By eliminating unnecessary detail, these recommendations also should help focus disclosure on issues of importance to investors. If all of the recommendations are implemented, the Commission would eliminate 81 rules and 22 forms, and modify dozens of others. In total, the recommendations would eliminate or modify approximately 23 percent of the rules and 54 percent of the forms and schedules reviewed by the Task Force.

Id. at 87,515.

68. Securities Act Release No. 33-7300, 62 SEC Docket 75 (May 31, 1996).

and 28 (under both Regulation S-K and Regulation S-B);

(f) Industry Guide 1;

(g) Form 701 as well as Securities Act Rules 702(T) and 703(T);

(h) Form F-6 Items 3(e) and 4(a);

(i) Form 10-C and rules 13a-17 and 15d-17; and

(j) Regulation S-X Rules 3-16, 4-05, 4-06, and 4-10.⁶⁹

(4) Subsequently in 1996, the Commission's Advisory Committee on the Capital Formation and Regulation Processes (chaired by Commissioner Wallman) issued a Report⁷⁰ that proposed a more far-reaching effort to achieve company registration than was proposed in Milton Cohen's article.⁷¹ The SEC has circulated a concept release to invite comments on this company registration proposal.⁷² The Commission summarized:

The Advisory Committee Report's primary recommendation is that the Commission further its integrated disclosure system by implementing a system based on a "company registration" concept first envisioned by the American Law Institute's Federal Securities Code. As formulated by the Advisory Committee, a company registration system generally would be accomplished through the following steps:

- On a one-time basis, the issuer files a registration statement

69. *Id.* at 77-80. In most of all of these instances, the rules and forms were little used or outdated. *See generally* Phase-One Recommendations of Task Force on Disclosure simplification, Securities Act Release No. 33-7271, 61 SEC Docket 1201 (Mar. 11, 1996).

The Commission subsequently also proposed several other form and rule changes recommended by the Task Force, principally including: (1) the Form D federal filing requirement would be eliminated for the Regulation D and section 4(6) exemptions, although Form D itself would be retained; (2) Form SR, the use of proceeds report for initial public offerings, would be eliminated, and the information currently required by Form SR would be required in Exchange Act periodic reports; (3) the Securities Act registration forms would be amended to permit a company to register concurrently a public offering under the Securities Act and a class of securities under the Exchange Act by filing a single form that would cover both registrations"; (4) Form 8-A, the short-form Exchange Act registration statement, would be amended to "provide[] automatic effectiveness for all registration statements on that Form, just as currently [is the case] for exchange-listed debt securities"; and (5) Post-effective amendments to Securities Act registration statements filed solely to add exhibits would become effective automatically upon filing. Phase-Two Recommendations of Task Force on Disclosure Simplification, Securities Act Release No. 33-7301, 62 SEC Docket 87, 89-90, 92-93, 96 (May 31, 1996).

70. Securities and Exchange Comm'n, Report of the Advisory Committee on the Capital Formation and Regulatory Processes, [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,834, at 88,403 (Apr. 24, 1996) [hereinafter Advisory Committee Report].

71. *Compare id.* with discussion accompanying *supra* notes 31-37.

72. Securities Act Concepts and Their Effects on Capital Formation, Securities Act Release No. 33-7314, 62 SEC Docket 1046, 1046 (July 25, 1996).

(deemed effective immediately) that includes information similar to that currently provided in an initial short-form shelf registration statement. This registration statement could then be used for all types of securities and all offerings (including those offered in furtherance of business acquisitions) and all offerings could be subject to Section 11 strict liability;

- current and future Exchange Act reports are incorporated by reference into that registration statement;

- around the time of the offering, transactional and updating disclosures are filed with the Commission, usually in the Form 8-K that is incorporated by reference into the registration statement and subject to Section 11 strict liability, but in certain cases, at the option of the issuer, through a prospectus supplement like those traditionally filed in shelf takedowns;

- other than a nominal fee paid at the initial filing, registration fees would be paid at the time of sale rather than prior to making any offers (the “pay as you go” feature);

- issuers would be required to adopt some disclosure enhancements (and encouraged to adopt others) that seek to improve the quality and timeliness of disclosure provided to investors and the markets; and

- formal prospectuses would be required to be physically delivered only in non-routine transactions and, when so required to be delivered, they would have to be delivered in time to be considered in connection with the investment decision. In almost all instances, an issuer could incorporate by reference filed information into selling materials or the confirmation of sale to satisfy the legal obligation to deliver a prospectus (which, under the statute, must precede or accompany a confirmation of sale).⁷³

The proposal was intended to remove unnecessary costs and restrictions on issuer access to capital while enhancing investor protection through improvements in the disclosure process. Among other recommendations, the Advisory Committee proposed that the current system of delivering and filing prospectus supplements after investment decisions be made, be replaced.⁷⁴ The Advisory Committee noted also that the distinction between public and private offerings has become increasingly blurred by such innovations as

73. *Id.* at 1048.

74. Advisory Committee Report, *supra* note 70, at 88,421-22.

Rule 144A.⁷⁵

The Advisory Committee specifically recommended a company registration pilot program limited to a senior class of seasoned issuers (i.e., issuers with a \$75 million public float, two years of reporting history, and a class of securities listed on a national securities exchange or traded in the NASDAQ national market system).⁷⁶

And, as the 105th Congress begins, there are already ruminations of a new concerted effort to attempt to preempt state law private remedies, at least those that go beyond federal securities law private remedies.⁷⁷

In other words, the original conception of the 1933 Act has systematically been eroded. Fewer registrants now are required to file full registration statements. Liability under the federal securities laws has been weakened, at least for forward-looking statements. Concurrent state securities regulation of new issues has generally ended at the registration process level for issuers subject to the 1933 Act; there is now a parallel effort to end state law remedies that go beyond federal securities law generally.⁷⁸

IV. WHY?

A conference such as this one invites speculation that these significant ongoing changes in the scope and effectiveness of the Securities Act are the consequence of a gathering electronic age. Elsewhere, I have urged that computerization is one of several factors that have fundamentally altered the context of securities regulation.⁷⁹ But it is only one factor and significant weight also must be given to several other factors including changes in the investor community,⁸⁰ internationalization,⁸¹ the maturing of financial economics,⁸² and a vastly altered political context of securities regulation.

At this time and for the foreseeable future, in my opinion, changes in the political context of securities regulation are likely to have a more profound impact on securities regulation than new applications of information

75. *Id.* app. A at 88,450.

76. *Id.* app. B.

77. *See, e.g.*, Broker-Dealer Duties, Preemption, CEA Reform Issues Confront Congress, 29 Sec. Reg. & L. Rep. (BNA).

78. *Id.*

79. Seligman, *supra* note 23, at 665-66.

80. *Id.* at 657-61.

81. *Id.* at 661-64.

82. *Id.* at 666-72.

technology. By this I do not simply look to the Democratic Party's control of both houses of Congress and the White House in 1933 and the Republican Party's newly won control of both houses of Congress in 1994 and 1996.

I am rather more impressed by a Manichean struggle for public opinion that has successfully altered the ideology of securities law. When the 1933 and 1934 securities acts were adopted, a primary purpose of these laws, with little question, was to prevent the managers of corporate and foreign governmental issuers from defrauding investors.⁸³ Today, if there is a basic thrust to several recent events, it is that the cost of registration, particularly of private securities litigation, no longer can be justified. Some sense of the dimensions of this ideological transformation is implicit in the recent report of the Commission's Advisory Committee on the Capital Formation and Regulatory Processes, which included a detailed Appendix A analyzing the costs of securities regulation, but offering no direct analysis of the extent to which federal securities laws deter or reduce fraud—a basic benefit.⁸⁴ When the 1964 Special Study of the Securities Markets was published, fraud was its basic concern in the counterpart portions of that Report.⁸⁵

Why has this happened? Let me conclude by emphasizing a point much appreciated by the securities industry, but less well articulated by the academic community: You cannot argue with a rising stock market. In the last decade, for example, the Dow Jones Industrial Average has more than tripled.⁸⁶ 1996 was the sixth consecutive year during which the Dow Jones Industrial Average rose, making this six-year period the longest bull market in this century. In a broader sense, we have experienced generally rising markets for close to fifteen years.⁸⁷ This bull market has made it far less likely that investors, particularly ones investing through portfolio mechanisms, will be concerned about being defrauded, and far more likely that those investors will credit overheated rhetoric about greedy plaintiff lawyers.

Will the current wholesale changes in the Securities Act prove wise or enduring? The test will come after the next sustained stock market decline. As the nautical saying goes, "You cannot tell what will be left on the beach until the tide rolls out." I may prove to be too inveterate a fan of Wagnerian opera or possibly to lack sufficient trust in human nature, but I suspect we will hear

83. See SELIGMAN, *supra* note 8, chs. 1-3.

84. Advisory Committee Report, *supra* note 70, app. A.

85. See SELIGMAN, *supra* note 8, at 312-16 for a summary of the Special Study.

86. THE WORLD ALMANAC AND BOOK OF FACTS 130 (Robert Famighetti et al. eds., 1996).

87. *See id.*

yet another refrain of the *Rheinmusik*, with which I began this piece, before the Securities Act has run its course.