To what extent is disclosure regulation necessary in order to achieve fair securities markets in the United States?

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ABSTRACT

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This thesis examines the extent to which disclosure regulation is necessary to achieve fair securities markets in the United States. It explores the interplay among regulatory frameworks, market dynamics and normative standards of fairness; advocating fairness as a procedural principle that renders objectives explicit and enhances legitimacy and consistency, rather than substituting for other regulatory goals. Existing research often treats disclosure as a fragmented legal regime, scattered across state and federal laws. Even targeted legislative measures addressing specific issues typically lack comprehensive explanations or cohesive frameworks. Reliance on judicial interpretation has not sufficiently supplemented the construction of a structural coherence of disclosure laws. This is unfortunate given the historical evolution of securities disclosure regulations, which have accumulated over a century of legislative and judicial experience. While legislative lag is often considered inevitable, this research argues that the securities domain now requires forward-looking, principled and systematic guidance rather than reactive measures. To address this, the study proposes a proactive framework for disclosure legislation centred on the genuine interests of market participants. It examines three interrelated dimensions: identifying legislative scopes that genuinely support participant interests without adverse consequences, maximising compliance with diverse regulatory purposes and structuring systematic fairness standards with practical remedies for equitable redress. These dimensions offer innovative perspectives and contribute to advancing research in securities market legislation. Methodologically, the study adopts primarily a normative approach, focusing on constructing fairness principles tailored to disclosure practices and exploring legislative boundaries – areas seldom addressed systematically in existing research. Historical analysis is also employed to contextualise legislative goals, thereby enriching contemporary proposals for a forward-looking framework. While practical analysis is limited to illustrating theoretical constructs, this research lays a foundation for further exploration, inviting future studies to refine and challenge its findings and foster meaningful advancements in securities law.

TO WHAT EXTENT IS DISCLOSURE REGULATION NECESSARY IN ORDER TO ACHIEVE FAIR SECURITIES MARKETS IN THE UNITED STATES

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Chapter One
Introduction

1.1 Background and Context

According to the official website of the U.S. Securities and Exchange Commission (SEC), the mission of the SEC is to protect investors, ensure fair, orderly, and efficient markets, and facilitate capital formation.[1] The mission page of the SEC initially emphasizes the protection of investors: "The federal securities laws we oversee are based on a simple and straightforward concept: everyone should be treated fairly and have access to certain facts about investments and those who sell them"[2]. It highlights investor protection by "vigorously enforcing the federal securities laws to ensure truth and fairness"[3]. Furthermore, under the mission of maintaining fair, orderly, and efficient markets, the SEC states, "it is our job to be responsive and innovative in the face of significant market developments and trends... our ability to remain an effective regulator requires us to continuously monitor the market environment and, as appropriate, adjust and modernize our rules, regulations, and oversight tools and activities"[4]. Finally, it clearly asserts, "We keep pace with our ever-evolving markets and inspire the full confidence of the investing public and market participants alike. ... We remain dedicated to the interests of long-term investors who are entrusting their hard-earned savings to our securities markets to fund home purchases, college educations, and other important life events"[5]. From the SEC's official statement, it is clearly indicated that lawmakers responsible for crafting securities market laws and disclosure regulations have an inherent duty to embed fairness considerations within their frameworks rather than assuming that fairness deficiencies will be rectified by other department laws. It is crucial to consider this point throughout the below introduction of the background and context, in which it addresses the delicate tension between market fairness and other financial regulatory goals that are associated with integrity in the realm of legislative frameworks governing the U.S. securities market.

Although the SEC repeatedly stresses its commitment to fairness, legislative practice and historical trends show a dominant emphasis on market efficiency, often to the detriment of

[1] The U.S. Securities and Exchange Commission, 'Mission' (2023) < https://www.sec.gov/about/mission> accessed 12 December 2023.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

fairness. Fairness secures equal access to information and opportunities, sustaining trust and market integrity. Efficiency seeks rapid price formation and optimal resource use, typically through technological and financial innovations. Both are essential, but when efficiency is privileged at the expense of fairness, competition becomes uneven, trust erodes and systemic vulnerabilities grow. This pattern reveals why fairness cannot remain a residual or remedial concern. These tensions, reflected in the background that follows, demonstrate that if the U.S. framework is to reconcile its objectives in practice, fairness should be placed at the forefront of regulatory design, which provides the basis on which this study proceeds.

Since the 1970s, the U.S. securities regulation has relied on efficiency as the primary lens for market design. Informational efficiency, formalised by the Efficient Market Hypothesis (EMH), holds that prices fully reflect available information and that persistent excess returns are unattainable without additional risk.[6] This account encouraged policies that privilege rapid price discovery, liquidity and low transaction costs. It also invited an inference that well informed prices would carry capital to its best use. The inference is not guaranteed. Informational efficiency presupposes conditions that are rarely met. Access to information is uneven, analytical capacity differs across participants and institutional arrangements may privilege some actors. The Flash Crash of May 2010 showed how speed and continuous matching, often treated as efficiency, can amplify volatility and briefly unmoor prices from fundamentals when algorithmic strategies interact with large orders.[7] The Global Financial Crisis revealed a different failure. Complex securitisations were defended as instruments of diversification and thus as efficiency enhancing. Their opacity obscured correlated exposures and impeded meaningful assessment of risk. Losses propagated through balance sheets and produced a contraction in credit and activity.[8] Prices reflected a degraded information set. Informational efficiency did not prevent misallocation.

[6] Eugene F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) The Journal of Finance 383-417.
[7] Andrew Kumiega, Greg Sterijevski, Ben Van Vliet, 'Beyond the Flash Crash: Systemic Risk, Reliability, and High Frequency Financial Markets' (2016) 11(2) Journal of Trading 71-83. See also U.S. Commodity Futures Trading Commission (CFTC) and the SEC, 'Findings Regarding the Market Events of May 6, 2010: Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues' (CFTC and SEC, 30 September 2010). Available at <https://www.sec.gov/files/marketevents-report.pdf>. See also Gregg E. Berman, 'Speech by SEC Staff: Market Participants and the May 6 Flash Crash' (Speech delivered at the 11th Annual SIFMA Market Structure Conference, New York, New York, October 13, 2010), available at https://www.sec.gov/news/speech/2010/spch101310geb.htm. See also Hilary J. Allen, 'The SEC as Financial Stability Regulator' (2018) 43(4) The Journal of Corporation Law 715-72.
[8] Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Government Printing Office 2011). See also Mizen Paul, 'The Credit Crunch of 2007-2008: A Discussion of the Background, Market

In addition to informational efficiency, there is also allocative efficiency. An outcome is Pareto efficient when no feasible reallocation can make at least one participant better off without making another worse off.[9] This criterion appears neutral and tractable, and it invites regulators to remove frictions so that mutually beneficial trades can be realised. However, in modern markets this presumption is unreliable. Conditions of transparency, adjustability of control and effective intermediation are rarely satisfied. When these conditions fail, surface indicators, such as liquidity or turnover, may improve while the quality of allocation deteriorates. Recent market developments have illustrated this tension, but a fuller discussion is reserved for the later Chapter Two on efficiency as a regulatory objective.

Other regulatory aims have often been treated as corollaries of efficiency. It is commonly assumed that well-informed prices will sustain legitimacy and that other goals will follow once allocation is efficient. In practice, these assumptions are fragile. Markets may appear liquid and responsive whilst remaining prone to shocks when access to information is uneven or interpretive capacity is concentrated among a few. Under such conditions, efficiency indicators can mask deeper structural weaknesses rather than prevent them. This study argues that fairness should be specified ex ante as the procedural foundation on which efficiency and other regulatory purposes can credibly rest. Fairness is not a substitute for these objectives. Rather, it is the condition that makes them attainable in practice. Specified ex ante, fairness supplies contestable and reviewable criteria for market design. The criteria include equal access to material information within meaningful time frames, disclosures that are calibrated to investor use and limits on practices that transform structural or technological advantages into systematic informational rents. Where such criteria are met, informational efficiency has a real chance to emerge, and the market can move towards allocations that are closer to Pareto optimality. When they are absent, a semblance of efficiency can persist until the system fractures. In this sense, fairness improves the feasibility set for allocative progress. It expands the domain in which mutually beneficial trades can be identified and completed. It reduces the variance induced by opacity and design features that mute accountability and

Reactions, and Policy Responses' (2008) 90(5) Federal Reserve Bank of St. Louis Review 531-67. See also Martin F. Hellwig, 'Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis' (2009) 157(2) *De Economist* 129-207. See also Stijn Claessens, M. Ayhan Kose and Marco E. Terrones, 'The Global Financial Crisis: How Similar? How Different? How Costly?' (2010) 21(3) Journal of Asian Economics 247-64.

[9] Vilfredo Pareto, *Manual of Political Economy: A Critical and Variorum Edition* (first published 1906, Aldo Montesano, Alberto Zanni, Luigino Bruni, John S Chipman and Michael McLure eds, Ann S Schwier trs, Oxford University Press 2014). See also Andreu Mas-Colell, Michael D Whinston and Jerry R Green, *Microeconomic Theory* (Oxford University Press 1995) 312–33, 558–72. See also Hal R Varian, *Microeconomic Analysis* (3rd edn, W W Norton 1992) 225, 329.

misdirect capital. On this basis, informational efficiency gains substance, and stability becomes less dependent on emergency intervention, as shocks are absorbed within a more even distribution of knowledge and opportunity, thereby preventing the exclusion of those least able to respond in real time.

This sequencing has practical implications. When fairness is treated as the first step, assessments of market structure and instrument design must ask whether access, intelligibility and non-discriminatory participation are secured before speed and scale are pursued. Claims about efficiency must be shown to be compatible with transparent and inclusive information flows. Proposals that rely on mechanical allocation by index or on control structures that entrench agency costs require stronger justification because they threaten the allocative margin. Regulatory performance metrics should be rebalanced. Spreads, depth and volumes remain relevant. They are not sufficient. Evidence that capital moves towards projects with superior fundamentals, where control adjusts to correct value destruction, and that outside investors can use available information without specialised infrastructure, should carry greater weight. When fairness is framed in this procedural sense, it supports the informational insight of the EMH and it opens space for genuine Pareto improvements rather than for changes that only reduce transaction costs. It also strengthens legitimacy because participation does not hinge on privileged access or extraordinary interpretive resources. The analysis developed in this work proceeds from the claim that fairness must be specified as the first step in regulatory sequencing. Doing so reduces reliance on ad hoc stabilisation measures and clarifies the conditions under which efficiency and other goals can be credibly realised. This does not mean that other regulatory goals should be displaced. Rather, it highlights that their attainment depends on articulating fairness ex ante as a regulatory purpose. It is within this context that the present study turns to clarify its scope and limitations.

Against this backdrop, it is crucial to emphasise that this research does not seek to undermine other financial regulatory objectives, such as efficiency. It is equally important to recognise the converse risk, namely that an overemphasis on superficialis aequitas without substance may also be detrimental. For instance, excessive demands for corporate disclosure could lead to negative outcomes. The loss of efficiency brought about by over-regulation might stifle market vitality. If the issues and challenges within the disclosure legal regime are not properly addressed and resolved, they could, over time, erode trust and confidence in the financial system, thereby compromising other regulatory goals such as market integrity. To explore the practical implications of prioritising fairness in disclosure regulation, including the potential challenges, it is therefore necessary to provide an overview of the current regulatory landscape of disclosure in the U.S. securities market, identifying the key issues and challenges.

The regulatory landscape of disclosure in the U.S. securities market is a complex and evolving framework. Disclosure regulation, primarily enforced by the SEC, is grounded in the Securities Act of 1933[10] (the Securities Act) and the Securities Exchange Act of 1934[11] (the Exchange Act), which require public companies to disclose material information to investors. This framework aims to ensure that all market participants have equal access to the information necessary to make informed investment decisions, thereby supporting the efficient functioning of the markets. The SEC mandates a variety of disclosure requirements, including regular financial reports (such as Form 10-K, Form 10-Q, and Form 8-K), proxy statements and disclosures related to significant events such as mergers or changes in corporate governance.[12] One of the most significant developments in recent years has been the introduction and enforcement of Regulation Fair Disclosure (Reg FD) in 2000[13], which aims to prevent selective disclosure by ensuring that all material information is made available to the public simultaneously. Reg FD was introduced in response to concerns that certain market participants, such as institutional investors, were receiving preferential access to information, thereby undermining market fairness.

The regulatory framework outlined above forms the main focus of this research. While some other regulations targeting specific entities or situations that are not emphasised in this research, it is still important to acknowledge that they are typically considered within the scope of the disclosure legal regime for the background introduction's sake. For example, the SEC has also attempted to enhance transparency through initiatives such as the Sarbanes-Oxley Act (SOX) of 2002, which introduced more stringent reporting requirements and greater accountability for corporate executives.[14] In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) introduced further disclosure

[10] Securities Act of 1933, 15 U.S.C. § 77a et seq. (1933).
[11] Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1934).
[12] Form 10-K, 17 C.F.R. § 249.310 (2023); Form 10-Q, 17 C.F.R. § 249.308a (2023); Form 8-K, 17 C.F.R. § 249.308 (2023). Pursuant to Securities Exchange Act of 1934 § 13 and § 15(d), 15 U.S.C. § 78m and § 78o(d) (1934). These sections set out the reporting obligations for companies registered under the Act, and the specific forms are implemented through regulations found in the Code of Federal Regulations (C.F.R.).
[13] Regulation Fair Disclosure, 17 C.F.R. §§ 243.100–243.103 (2023).
[14] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.).

obligations, particularly in areas related to executive compensation and conflict minerals, reflecting a broader push towards greater corporate transparency and accountability.[15]

It is useful to situate the U.S. disclosure framework in comparative perspective. Although the SEC's mission explicitly commits the U.S. to "protect investors"[16] and to maintain "fair, orderly, and efficient markets"[17], fairness in practice has been operationalised largely through disclosure rules under the 1933 and 1934 Acts, supplemented by ex post enforcement. This disclosure-centric model contrasts with the regulatory philosophies of the European Union (EU) and the United Kingdom (UK), where fairness has been more directly embedded as a legislative and supervisory benchmark. In the EU, the Market Abuse Regulation (MAR) frames market integrity and the prohibition of selective disclosure as prerequisites for fair and orderly markets.[18] The Markets in Financial Instruments Directive II (MiFID II)[19] and the Prospectus Regulation[20], together with the European Securities and Markets Authority's (ESMA)[21] coordination of the single rulebook, harmonise conduct-of-business, product governance and disclosure standards across member states, implemented domestically by national authorities such as Germany's Federal Financial Supervisory Authority (BaFin) and France's Autorité des marchés financiers (AMF).[22] In the UK, the post-crisis "Twin Peaks" architecture separates prudential supervision (Prudential Regulation Authority (PRA)) from conduct regulation (Financial Conduct Authority (FCA)), with fairness expressed through explicit behavioural standards.[23] The FCA's Principles for Businesses – most prominently

[15] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. and other titles).
[16] Supra note 1.
[17] Ibid.
[18] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) [2014] OJ L173/1 (MAR).
[19] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L173/349 (MiFID II).
[20] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market [2017] OJ L168/12 (Prospectus Regulation).
[21] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84, art 1(5) (assigning to ESMA the task of developing the single rulebook).
[22] See generally Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), *Annual Report 2022* (BaFin 2023) <https://www.bafin.de>; Autorité des marchés financiers (AMF), *Rapport Annuel 2022* (AMF 2023) <https://www.amf-france.org>.
[23] HM Treasury, *A New Approach to Financial Regulation: The Blueprint for Reform* (Cm 8083, 2011) 23–28. Cm 8083 (2011) is the UK Treasury White Paper that set out the Twin Peaks model after the financial crisis. The statutory basis for the PRA is in the Financial Services Act 2012, which amended the Financial Services and Markets Act 2000 (FSMA 2000). The PRA formally came into existence on 1 April 2013; Financial Services Act 2012, s 6; Financial Services and Markets Act 2000, Part 1A (as amended). See also Bank of England, Prudential Regulation Authority Annual Report 2022/23 (BoE 2023)

Principle 6, ("treating customers fairly") Principle 7, ("clear, fair and not misleading communication") and, more recently, the Consumer Duty – foreground fairness as an outcome-oriented benchmark in retail financial markets.[24]

Practice, however, tempers these textual commitments. EU and UK regimes face recurrent criticisms of disclosure overload and disproportionate compliance costs for smaller issuers, which can blunt the informational and distributive aims of fairness even when it is legislatively prioritised. Conversely, the U.S. experience shows that a disclosure-centric framework, despite invoking fairness in the SEC's mission, often leaves fairness under-specified as an ex ante design constraint. In enforcement practice, fairness is largely equated with informational parity and market integrity, rather than developed into a broader normative baseline. The comparative lesson is not that fairness is absent in the U.S. or perfected in the EU/UK. Rather, jurisdictions differ in how fairness is operationalised. The EU and the UK diffuse fairness across conduct, market integrity and disclosure, whereas the U.S. concentrates it within disclosure obligations and litigation. Precisely because of this divergence, the U.S. provides a salient case study for examining whether fairness should be made more explicit as a sequencing principle for market regulatory design. Building on the above background, the following section sets out the research problems and objectives that structure the study in a systematic way.

1.2 Research Problem and Objectives

Disclosure regulation in the U.S. securities markets is often justified through references to other financial regulatory purposes, such as efficiency and integrity. Fairness is cited in mission statements, yet remains weakly specified as a regulatory purpose. The central problem addressed in this study is the extent to which disclosure rules are necessary to achieve fair securities markets in the U.S.; how fairness should be articulated so that it guides regulatory design in a clear and practicable way. Fairness should be treated as a procedural baseline that structures participation and information access in advance. It is not a substitute

<https://www.bankofengland.co.uk>. Financial Conduct Authority, Principles for Businesses (PRIN 2.1, Principles 6–7).

[24] Financial Conduct Authority, *A New Consumer Duty: Feedback to CP21/13 and Final Rules* (Policy Statement PS22/9, July 2022) <https://www.fca.org.uk/publication/policy/ps22-9.pdf> accessed 12 August 2025.

for other regulatory goals. Rather, it ought to be a set of commitments that makes other goals credible in practice.

Before systematically formulating the research sub-questions and aims, it is essential to acknowledge the role of self-regulatory organisations (SROs) in the U.S. financial markets. These industry bodies exemplify both the potential and the limitations of self-regulation in addressing market failures. Organisations such as the Financial Industry Regulatory Authority (FINRA), the New York Stock Exchange (NYSE) and the International Swaps and Derivatives Association (ISDA) can generate timely standards through embedded expertise. They also carry risks of conflict of interest and regulatory capture.[25] The financial crisis of 2008 showed that self-regulation cannot manage systemic risk on its own. The role of the SEC therefore remains central for investor protection and market functioning.

In this study fairness is defined as more than identical disclosures to different audiences. The focus is on equitable opportunities for all market participants to obtain, understand and use information in ways that reduce asymmetry and curb manipulation. Rawls's theory of justice as fairness supplies the normative foundation.[26] The original position and fair equality of opportunity support a level playing field in which access to the value of information is not contingent on privileged position or specialised infrastructure. The difference principle provides a tiered framework for addressing the inequalities that emerge once the veil of ignorance is lifted, allowing regulators to avoid a binary choice between procedural and distributive fairness by adopting ex ante measures that safeguard procedural equality while also promoting fairer outcomes. This focus is well suited to securities markets where information is unstable, price sensitive and quickly incorporated into trading. In order to examine its regulatory significance, fairness must be considered in relation to other objectives, most notably efficiency, which has traditionally shaped the design of U.S. disclosure regulation. Efficiency presupposes usable information and intelligible rules of participation. At the same time disclosure rules can generate costs and can compromise commercial confidentiality. Risks of over specification and regulatory lag must be

[25] For an explanation of the concept, see Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2013) 71-98.

[26] John Rawls, *A Theory of Justice* (first published Harvard University Press 1971; Oxford University Press 1973).

recognised.[27] This research therefore asks how fairness can be made explicit without overstating its reach and assuming that it will resolve every regulatory shortcoming.

The central research problem of this thesis proceeds through five sub-questions. First, what are the key principles of fairness in securities regulation, and how does Rawls's account apply to disclosure in securities markets. Second, how the goal of market fairness differs from the efficiency purpose and how these differences shape the necessity and design of disclosure. Third, how disclosure regulation in the U.S. has developed from the pre-New Deal period to the Securities Act, the Exchange Act and Reg FD, and how that history has addressed failures linked to fairness. Fourth, what risks and benefits arise when fairness is emphasised in disclosure. Fifth, how philosophical theories associated with the boundaries of public power can inform the design of disclosure rules that promote fairness while respecting the rights and interests of market participants.

From these sub-questions flow six research objectives. The first objective is to apply Rawls's theory to disclosure and to test its relevance for rule design. The second objective is to analyse market fairness in relation to market efficiency and to identify points of compatibility and tension. The third objective is to trace the historical development of disclosure rules in the U.S. and to evaluate their effectiveness. The fourth objective is to assess the risks and benefits of emphasising fairness, with attention to information asymmetry, compliance costs and commercial interests. The fifth objective is to use the insights of Locke, Kant and Mill to guide rule design that promotes fairness whilst respecting private rights. The sixth objective is to explain why fairness remains insufficiently explicit as an objective in the U.S. securities regulation and to set out proposals for clearer specification within the existing framework.

[27] While regulatory intervention offers numerous benefits, it is not devoid of costs. The mention of increased compliance costs serves as a typical example of the costs associated with regulatory intervention. Regulatory intervention often results in heightened compliance costs for participants in the market. Companies are required to allocate resources towards legal and compliance teams to navigate intricate regulations, a burden that is particularly challenging for smaller firms. Other costs linked to regulatory intervention encompass the potential for overregulation and regulatory lag. Excessive regulation has the propensity to inhibit innovation and diminish market efficiency. Overly stringent regulations can establish barriers to entry, diminish competition and ultimately negatively impact consumers by leading to elevated prices or limited choices. Government regulations may exhibit tardiness in adapting to market changes, thereby resulting in a delay between the recognition of new risks and the implementation of suitable regulatory responses. This delay can render markets susceptible to emergent threats. All of these issues are the concerns of this research and will be noted later in this chapter.

1.3 Structure of the Research

This research is structured to systematically address the central question: to what extent is disclosure regulation necessary to achieve fair securities markets in the United States? The work is organized into seven chapters, each building on the previous one to create a logical and coherent narrative. Each chapter attempts to address and accomplish single or multiple parts of the delineated sub-questions and objectives in section 1.2 above, which contribute to answering the central research question and lead to the final conclusions and recommendations.

After the present introduction chapter, Chapter Two: Efficiency and Fairness as Regulatory Objectives**,** develops the conceptual foundation by analysing how efficiency and fairness are understood in financial regulations. It discusses multiple dimensions of efficiency, including Pareto, Kaldor-Hicks, Coasean transaction costs, informational efficiency and allocative efficiency, contrasting them with fairness as a procedural baseline. This chapter also examines how fairness and efficiency can be sequenced in disclosure regulation, thereby providing the definitional and analytical background necessary for the thesis.

Chapter Three: Theoretical Framework and Literature Review, introduces the theoretical and scholarly context of the research. Rawls's theory of fairness serves as the normative basis for analysing market fairness, complemented by Locke's limited government, Kant's ethics, and Mill's harm principle. These theories frame the role of regulation in balancing rights and obligations. The chapter also surveys key literature on fairness, asymmetry, manipulation and insider trading, critically assessing gaps in current debates. It critically evaluates Reg FD's role in transparency and concludes with a critique of the current fairness paradigm. The discussion sets the foundation for later chapters to ensure a logical progression of ideas, particularly a deeper analysis of fairness in Chapter Five, while identifying key gaps this thesis aims to address.

Chapter Four: Historical Context and Evolution of Disclosure Regulation, examines the historical development of U.S. disclosure regulation, tracing key milestones from the pre-1933 era to the introduction of Reg FD. It demonstrates how legislative responses emerged from recurring market failures and how fairness concerns gradually entered regulatory debates. This historical perspective highlights both the achievements and the limitations of disclosure regulation, laying the groundwork for later evaluative chapters.

Chapter Five: Analysis of Fairness in the Current Disclosure Legal Regime. Building on the conceptual and theoretical foundations, this chapter assesses fairness within the current U.S. disclosure framework. Using Rawls's theory as a guiding lens, it evaluates whether present disclosure practices adequately promote market fairness whilst considering other regulatory goals. The discussion identifies strengths and weaknesses in the system, focusing on compliance costs, confidentiality concerns, and risks of overreach.

Chapter Six: Findings and Analysis – Rethink Disclosure and Fairness: An Extended Discussion Integrating Moral and Practical Perspectives. This chapter synthesises insights from earlier chapters to reconsider disclosure regulation in practice. It integrates moral and practical perspectives, focusing on insider trading and transparency. The analysis extends the concept of fairness beyond narrow legal rules, showing how it interacts with regulatory boundaries and legislative goals. The discussion also considers motivations shaping disclosure law and explores ways to optimise regulation.

Chapter 7: Conclusion, Contribution, Limitations and Recommendations. The final chapter consolidates the findings of the study. It demonstrates how the thesis has addressed the central research question, highlights its contributions to the field and outlines practical implications for regulators. It also recognises the limitations of the research and identifies areas for future study, reaffirming the importance of fairness as a more explicit objective in U.S. securities regulation.

1.4 Theoretical Framework and Literature Review

1.4.1 Theoretical Framework

This section lays out the theoretical framework guiding this research, starting with how John Rawls's theory of justice as fairness provides a normative standard for market fairness in the U.S. securities market. It then employs the theories of John Locke, Immanuel Kant, and John Stuart Mill to explore the boundaries of governmental power, particularly in the context of ensuring that disclosure regulations do not exceed reasonable limits. Through integrating the principles of Rawls, Locke, Kant and Mill, this theoretical framework establishes a comprehensive guide for evaluating disclosure regulations in the U.S. securities market. Together, these theories create a balanced approach to understanding how disclosure regulations can achieve fairness without overstepping the boundaries of legitimate governmental authority. This framework will guide the subsequent analysis in assessing the extent to which current regulations align with these normative standards and the implications for different categories of market participants.

A. Constructing a Normative Standard of Market Fairness

John Rawls's theory of justice as fairness[28] provides a foundational framework for constructing a normative standard of market fairness for this research, offering a balanced approach to regulatory intervention that aligns with the need for measured but effective oversight in financial markets. Rawls's framework is particularly suited to this study as it provides a middle ground between laissez-faire principles and heavy-handed regulatory approaches. While other theories, such as utilitarianism or libertarianism, prioritise efficiency, Rawls's model emphasises fairness without unduly restricting market dynamics. As this study progresses, the chosen theoretical structure ensures that regulatory measures, such as disclosure rules, benefit all participants, particularly those at an informational disadvantage. Furthermore, this framework justifies robust yet proportionate disclosure requirements, ensuring equitable access to information. By employing Rawls's theory, this research highlights the necessity of disclosure regulation in mitigating structural imbalances whilst preserving market vitality, offering a prudent set of standards for assessing fairness in securities regulation.

To start with, central to Rawls's theory is the concept of the original position, a hypothetical scenario where individuals design the principles of justice that will structure their society. However, to ensure fairness, these individuals are placed behind a veil of ignorance. The veil of ignorance means that the parties in the original position do not know any particular details about themselves, such as their talents or social status, collectively known as contingencies. This veil of ignorance ensures that the principles chosen are fair and unbiased, particularly in the context of distributing rights and responsibilities within society.

From this original position, Rawls argues that rational individuals would choose two fundamental principles to govern their society. In the realm of financial markets, they are particularly relevant as it advocates for the fair distribution of opportunities and benefits. The

[28] Supra note 26.

first principle states that each person has an equal right to the most extensive basic liberties compatible with similar liberties for others; it aligns closely with the goal of ensuring equal access to information in the securities market. The second principle has two parts: fair equality of opportunity and the difference principle.

The fair equality of opportunity principle claims that everyone should have a fair chance to attain offices and positions, regardless of their social background. This goes beyond mere formal equality and requires that society ensures people have genuinely equal opportunities. In the context of disclosure regulation, this principle's emphasis on genuinely equal opportunities is particularly insightful in understanding the real value of information that can lead to informed decision-making for market participants. At the same time, this principle emphasizes the importance of ensuring that all participants, regardless of their status, have equal access to the information that influences market decisions. The second part of the second principle (the difference principle) states that social and economic inequalities are permitted, but only if they benefit the least advantaged members of society. This principle represents a significant departure from strict egalitarianism and is intended to ensure that any inequality serves a purpose that benefits everyone, particularly those who might otherwise be left behind. This explains the reason that, compared to other fairness and equality standards, Rawls's principles of fairness are most applicable to the regulation of the securities market. The difference principle is directly applicable to the regulation of information disclosure, as it underscores the need to prevent information asymmetry that disproportionately disadvantages certain market participants. Under this normative fairness standard, the uneven status between different categories of market participants has the opportunity to be adjusted in a genuinely beneficial way.

In general, Rawls's fairness theory seeks to ensure that the basic structure of society is fair and just to all its members. This fairness is achieved through the original position and the veil of ignorance, which ensure that the principles of justice are chosen fairly and impartially so that the principles chosen are universally acceptable. The two principles of justice (liberty and difference principles) then provide a framework for organizing society that protects individual liberties whilst also addressing social and economic inequalities in a fair manner. Rawls's framework, therefore, serves as a normative benchmark for assessing market fairness. By applying Rawls's theory, this research evaluates whether current disclosure regulations align with these principles, ensuring that fairness is maintained even when market dynamics could potentially favour some categories of market participants over others, thus preventing systemic injustices.

B. Exploring the Boundaries of Public Power

John Locke's theory of limited government provides the foundation for understanding the necessity and limits of regulatory intervention in the market.[29] Locke emphasizes that governmental authority arises from the consent of the governed; without this consent, there is no legitimate authority. This principle is crucial in assessing whether disclosure regulations overstep the boundaries of what is justified by the consent of market participants. Locke argues that individuals enter into a social contract, surrendering certain freedoms to the government to protect their rights, particularly property rights. However, this power is not unlimited; it must be carefully constrained to avoid infringing on the private rights of individuals. In the context of securities regulation, Locke's theory suggests that while regulation is necessary to protect market fairness, it must not infringe on the autonomy of market participants beyond what is necessary to achieve that fairness. This delicate balance ensures that regulations are accepted by those governed, as they align with their interests and rights. This balance is particularly important in disclosure regulation, where the government's role is to ensure transparency and fairness without unduly burdening or interfering with the operations of businesses. In addition, Locke's emphasis on the separation of powers further informs the need for checks and balances in the regulatory process, ensuring that those who create the rules are not the same as those who enforce them, thereby preventing the abuse of regulatory authority. Locke's ideas also intersect with Kant's ethical framework, particularly concerning the moral duty of regulators to respect the autonomy and dignity of individuals. While Locke focuses on the practical aspects of governmental authority, Kant provides the ethical grounding that further limits this authority, ensuring that individuals are treated as ends in themselves and not merely as means to regulatory goals.

Immanuel Kant's categorical imperative[30] complements Locke's theory by providing a moral foundation for the protection of individual rights within the regulatory framework. Kant asserts that individuals possess intrinsic worth and should be treated as ends in themselves, not as means to an end. This principle is vital in the context of disclosure regulation, where

[29] John Locke, *Second Treatise of Government* (Ian Shapiro (ed), Yale University Press 2003).
[30] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor and Jens Timmermann (eds and trs), 2nd edn Cambridge University Press 2012).

the goal is not only to ensure market transparency but also to respect the autonomy of all market participants. In applying Kant's theory, this research explores how disclosure regulations can be designed to respect the rights and autonomy of market participants whilst still achieving the broader goal of market fairness. Kant's ethical framework supports the idea that regulations should not impose undue burdens on companies or investors, and should always consider the dignity and rights of those they affect. For instance, the materiality principle in disclosure regulation exemplifies how an open-ended legal standard can embody both flexibility and fairness. Such interpretive openness provides a normative space where ethical considerations can guide consistent and rights-respecting application. Mandatory disclosure requirements should be designed in a way that respects the autonomy of companies and investors, avoiding unnecessary intrusions while still ensuring that critical information is made available to those who need it. Kant's theory thus serves as an ethical check on Locke's practical limitations on government power, ensuring that the regulatory framework is both just and respectful of individual autonomy. This intersection of Kant's and Locke's theories creates a robust foundation for evaluating the appropriateness of disclosure regulations.

John Stuart Mill's harm principle[31] further refines the discussion on the limits of governmental power, particularly in the context of preventing harm in the securities market. Mill argues that the only justification for exerting power over an individual is to prevent harm to others. In the realm of securities regulation, this principle is applied to justify disclosure regulations that aim to prevent harms such as market manipulation and fraud. Mill's principle, however, must be applied with consideration of the specific context of securities markets, where the nature of harm might differ from that in other areas of law, such as criminal justice. For instance, while market manipulation or fraud clearly constitutes harm that justifies regulatory intervention, excessive or overly burdensome disclosure requirements might themselves be harmful if they infringe on business operations or compromise proprietary information. Thus, Mill's harm principle provides a nuanced approach to regulation, advocating for measures that prevent significant harm while respecting the autonomy and operational needs of market participants. It complements Locke's and Kant's

[31] John Stuart Mill, 'On Liberty' in JM Robson (eds), *The Collected Works of John Stuart Mill Vol. XVIII: Essays on Politics and Society* (University of Toronto Press 1977) pp 213-310.

theories by emphasizing the importance of limiting regulation to what is necessary to prevent harm, thereby maintaining a balanced and just regulatory environment.

C. Coherence of the Framework

It is clear from the introduction to this study's theoretical framework that each component is interconnected. In addition to the previously discussed theories on limiting public power, which complement and reinforce each other, Rawls's theory is also deeply influenced by other aspects of earlier philosophical traditions, particularly those of Locke and Kant. Rawls builds on Locke's theory, which holds that legitimate political authority arises from the consent of the governed. However, while Locke emphasized natural rights, Rawls focuses more on the fairness of the system itself rather than on pre-existing natural rights. Kant's influence is significant in Rawls's emphasis on autonomy and rationality. The original position and the veil of ignorance resemble Kant's idea of moral reasoning, where individuals must act according to principles that they would want to become universal laws. For Rawls, the principles chosen in the original position reflect this Kantian universality and impartiality. Nevertheless, this theoretical framework establishes a comprehensive foundation for examining the role of disclosure regulation in achieving market fairness within the U.S. securities market. By integrating the principles of Rawls, Locke, Kant and Mill, this research is equipped to critically assess the extent to which current regulations align with the normative standards of fairness, autonomy and the appropriate limits of government intervention. These theories will guide the subsequent analysis of disclosure regulations, providing a coherent narrative that addresses the central research question of this study.

1.4.2 Literature Review

Securities regulation has long been described as a field animated by overlapping and sometimes conflicting objectives. Efficiency, fairness, integrity, investor protection and systemic stability are all invoked as regulatory purposes, yet their relationship is unsettled. Economic analysis often places efficiency at the centre, while legal and policy-oriented scholarship has tended to emphasise fairness and the legitimacy of market outcomes. This section provides an initial engagement with the main strands of scholarship relevant to this study, highlighting where existing work has advanced understanding and where it leaves gaps. A fuller conceptual treatment of efficiency and fairness as regulatory purposes follows in Chapter Two.

1.4.2.1 Fairness and Efficiency in Securities Regulation

The most influential statement of efficiency in financial economics is the EMH, which formalises the idea that prices reflect all available information and therefore that persistent excess returns are unattainable without additional risk.[32] The EMH provided intellectual support for the view that markets can achieve allocative efficiency without heavy-handed intervention, so long as disclosure ensures that relevant information reaches market participants. In policy debates during the 1970s and 1980s, the EMH underpinned deregulatory arguments which assumed that well-informed prices would carry capital to its best use. However, subsequent empirical research has identified anomalies that challenge the strong form of the hypothesis. Lo and MacKinlay showed that price patterns contain elements inconsistent with randomness, including momentum effects that allow abnormal profits to persist.[33] The collapse of dot-com valuations at the turn of the millennium and the global financial crisis of 2007-2008 reinforced scepticism about the assumption that markets are informationally efficient in practice.[34] These episodes suggest that efficiency may be undermined when transparency, analytic capacity and institutional arrangements are unevenly distributed.

In addition to informational efficiency, the economic literature has also conceptualised allocative efficiency, typically defined through the criterion of Pareto optimality. An allocation is Pareto efficient when no feasible reallocation can make at least one participant better off without making another worse off.[35] This notion has the appeal of neutrality and tractability, and it underpins general equilibrium models of Arrow and Debreu.[36] However, scholars have noted that Pareto optimality rests on demanding assumptions of complete information and frictionless markets that are rarely met in practice.[37] Kaldor and Hicks sought to relax these conditions with a compensation test, but this still assumes away

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[32] Supra note 6.
[33] Andrew W Lo and A Craig MacKinlay, *A Non-Random Walk Down Wall Street* (Princeton University Press 1999) 3-11.
[34] Robert J Shiller, *Irrational Exuberance* (Princeton University Press 2000) 3-17, 171-90. See also supra note 8 Paul (2008), Hellwig (2009), and Claessens et al. (2010).
[35] See supra note 9 Pareto (English trans 1971).
[36] Kenneth J Arrow and Gerard Debreu, 'Existence of an Equilibrium for a Competitive Economy' (1954) 22(3) Econometrica 265-90.
[37] See for example Louis Kaplow and Steven Shavell, 'Fairness Versus Welfare' (2001) 114(4) Harvard Law Review 961, 977–89.

distributional effects that are central to fairness.[38] This body of literature shows that while Pareto efficiency provides a benchmark for evaluating market outcomes, it does not resolve questions about fairness or legitimacy in financial regulation. Legal and regulatory literature has highlighted that efficiency, when treated as the dominant objective, can obscure other values. Stiglitz argued that information asymmetry and transaction costs make perfect efficiency unattainable, thereby justifying regulatory intervention to correct market failures.[39] Fairness, by contrast, has been cast in terms of the baseline conditions for participation in markets. Rawls conceptualised fairness as equality of opportunity, while Sen shifted attention to the substantive opportunities that individuals are able to realise.[40] Within securities markets, fairness has also been framed in operational terms such as equal access to information, freedom from coercion and the integrity of pricing.[41]

These debates illustrate that fairness is not a singular or static concept. It functions simultaneously as a legitimating value, grounding the authority of market rules, and as a procedural baseline against which market design can be assessed. Shefrin and Statman argued that fairness encompasses entitlements to transparent prices and to rules that prevent coercion.[42] O'Hara demonstrated that measures designed to secure fairness may constrain liquidity, while innovations that enhance efficiency (such as algorithmic and high-frequency trading) can generate distributional outcomes that investors perceive as unfair.[43] Empirical studies confirm that informational advantages available to select traders can widen gaps in market access, even when overall transaction costs fall. Angel, Harris and Spatt, for instance, showed that speed advantages available to high-frequency traders increased informational rents at the expense of slower participants.[44]

This tension underscores that efficiency and fairness cannot be collapsed into a single objective, and seems that regulatory design must contend with trade-offs between them. Some scholars argue that fairness, even if difficult to define precisely, is indispensable to

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[38] For the Kaldor-Hicks efficiency criterion, see Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 549–52; John R Hicks, 'The Foundations of Welfare Economics' (1939) 49(196) The Economic Journal 696-712.
[39] Joseph E Stiglitz, 'The Allocation Role of the Stock Market - Pareto Optimality and Competition' (1981) 36(2) The Journal of Finance 235-51.
[40] Supra note 26 Rawls (1973). Amartya Sen, *Inequality Reexamined* (Oxford University Press 1992).
[41] Hersh Shefrin and Meir Statman, *Ethics, Fairness, Efficiency, and Financial Markets* (The Research Foundation of The Institute of Chartered Financial Analysts 1992).
[42] Ibid.
[43] Maureen O'Hara, *Market Microstructure Theory* (WILEY Blackwell 1995) 129-78.
[44] James J. Angel, Lawrence E. Harris and Chester S. Spatt, 'Equity Trading in the 21st Century' (2011) 1(1) The Quarterly Journal of Finance 1-53.

market legitimacy because it shapes public perceptions of the system's integrity.[45] Others contend that efficiency must retain priority to ensure that capital is allocated productively, but that distributive effects should be addressed through complementary safeguards.[46] Together, this body of scholarship suggests that efficiency and fairness should be treated as distinct, interacting objectives, rather than as competing claims for a single regulatory goal.

1.4.2.2 Disclosure Regulation and Information Asymmetry

Disclosure has long been treated as the principal instrument for mitigating information asymmetry. A large body of empirical literature suggests that disclosure can improve price accuracy, enhance investor confidence and reduce the cost of capital. Healy and Palepu's survey concluded that transparent disclosure reduces information risk and thereby lowers firms' cost of equity.[47] Verrecchia emphasised that the quality, credibility and timeliness of disclosure matter as much as the volume of information released.[48] Greenstone, Oyer and Vissing-Jorgensen found positive market effects from mandatory disclosure provisions, including increased returns for investors.[49] At the same time, disclosure is not a panacea. Concerns have been raised that disclosure regimes can produce information overload, with investors confronted by extensive and technical reports that obscure rather than illuminate key facts. Skeel argued that over-disclosure risks overwhelming users with immaterial detail, while Langevoort questioned whether the regulatory model adequately accounts for divergent capacities between institutional and retail investors.[50] These criticisms highlight that more disclosure is not necessarily better. Rather, it must be calibrated to the needs of investors.

Comparative studies underscore the importance of institutional design. Armour and colleagues emphasised that disclosure does not operate in isolation but is embedded in wider

[45] Janet Austin, 'What Exactly is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation' (2017) 8(2) William & Mary Business Law Review 215-40.
[46] Henry T C Hu, 'Faith and Magic: Investor Beliefs and Government Neutrality' (1996) 78(4) Texas Law Review 777-884.
[47] Paul M. Healy and Krishna G. Palepu, 'Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature' (2001) 31 Journal of Accounting and Economics 405–40.
[48] Robert E. Verrecchia, 'Essays on Disclosure' (2001) 32(1-3) Journal of Accounting and Economics 97-180.
[49] Michael Greenstone, Paul Oyer and Annette Vissing-Jorgensen, 'Mandated Disclosure, Stock Returns, and the 1964 Securities Acts Amendments' (2006) 121(2) The Quarterly Journal of Economics 399-460. (See also Greenstone et al., 'Value of Knowing', (2006) 29(2) The Regulation 52-58.)
[50] David Skeel, *Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From* (Oxford University Press 2005) 175-92. Donald C. Langevoort, 'The SEC, Retail Investors, and the Institutionalization of the Securities Markets' (2009) 95 Virginia Law Review 1025.

enforcement and governance systems.[51] Gilson and Gordon similarly note that disclosure operates differently depending on surrounding rules of corporate governance and the mechanisms available for private enforcement.[52] Within the U.S., Reg FD has been studied as an attempt to operationalise fairness by preventing selective release of information to analysts and institutional investors. Early evaluations of Reg FD suggest that it reduced opportunities for informed trading, although critics argue that it also limited the flow of qualitative information to the market.[53] Taken together, literature shows that disclosure is essential for promoting efficiency and fairness, but its effectiveness is contingent on design, quality and audience. It also illustrates the gap between stated regulatory objectives, such as fairness in access to information and the operational standards through which those objectives are pursued.

1.4.2.3 Remaining Gaps

The review above suggests two persistent gaps. First, efficiency has been theorised with great sophistication, whereas fairness is often invoked without clear, uniform and satisfactory standards for all parties involved or reduced to the prevention of egregious practices such as insider trading or manipulation. Discussions of fairness rarely extend to a systematic framework for embedding it as an ex ante regulatory objective. Secondly, although disclosure is a central mechanism of securities law, its role in explicitly delivering fairness has been underexplored. Studies of disclosure overload, complexity and asymmetrical investor capacities are rarely framed as questions of fairness in regulatory design. This thesis addresses these gaps by examining how fairness can be specified more explicitly as a regulatory objective in the U.S. securities regulation. It argues that fairness should be understood as a procedural baseline, providing the conditions under which efficiency and other purposes can be credibly pursued. The following chapter develops this conceptual framework in greater detail, defining efficiency and fairness in operational terms as well as clarifying how their interaction shapes securities regulation.

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[51] John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N Gordon, Colin Mayer, and Jennifer Payne, *Principles of Financial Regulation* (Oxford University Press 2016) 51-79, 143-202.
[52] Ronald J Gilson and Jeffrey N Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2019) 113(4) Columbia Law Review 863-928.
[53] The Securities and Exchange Commission, 'Final Rule: Selective Disclosure and Insider Trading' Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99, RIN 3235-AH82 (Aug 21, 2000). Frank Partnoy, 'Barbarians at the Gatekeepers? A Proposal for a Modified Strict Liability Regime' (2001) 79 Washington University Law Quarterly 491-547.

1.5 Significance and Contribution

This research directly addresses the central question of to what extent disclosure regulation is necessary to achieve fair securities markets in the United States. This research holds significant value both in the context of existing literature and in its practical implications for the regulatory landscape of the U.S. securities market. The study specifically addresses the underexplored relationship between fairness and disclosure regulation, a critical yet often overlooked aspect of financial regulation. This research also addresses critical gaps in the current understanding of fairness within the framework of securities regulation, particularly concerning the role of disclosure regulations in the U.S. securities market. Unlike existing studies that often emphasize the operational aspects of disclosure and its impact on market efficiency, this research takes a normative approach; it applies theories from John Rawls to John Locke and other philosophical theories to scrutinize the necessity and boundaries of regulatory intervention.

Existing research on financial regulation has concentrated on market efficiency, often treating it as the dominant objective in both theoretical analysis and regulatory design. Efficiency-based accounts frequently rest on the implicit assumption that fairness can be sufficiently secured, an assumption that does not hold in practice. At the same time, even within the fairness-focused literature, it is usually treated in broad and indeterminate terms, with little sustained analysis of how it should be conceptualised, optimised and operationalised through disclosure regulation. This lack of conceptual clarity and practical application defines the gap that this study seeks to address.

While scholars have provided theoretical foundations for fairness in broader social and economic contexts, their application to the specific mechanisms of securities disclosure remains underdeveloped. This research bridges that gap by applying normative theories of fairness, particularly those proposed by Rawls, to the practical design of disclosure regulation. It advances a framework that defines the content of fairness, develops ex ante design criteria for disclosure rules and calibrates those criteria to intelligibility, usability, cost and confidentiality. In doing so, it demonstrates that fairness can serve as the foundation upon which other regulatory objectives, most notably efficiency, can credibly rest. The study also responds to the persistent problem in the literature of treating issues such as disclosure overload or informational inequality as intractable. Building on an original analysis of market failures and the legislative responses that shaped disclosure rules, this study demonstrates how its fairness framework can anticipate and address such problems in advance rather than accept them as recurring flaws. It further shows how disclosure requirements may intersect with other responsibilities, including fiduciary duties, in ways that impose unnecessary burdens on companies without delivering fair outcomes. By clarifying fairness in this way, the thesis moves the debate beyond vague invocations of equal access, provides a framework ready for implementation and establishes a normative foundation that existing accounts have left underspecified.

Besides filling in the gap in answering why fairness remains insufficiently specified as an objective in U.S. securities regulation and providing a creative response to the solution, this research further contributes originality by introducing philosophical theories of public authority (including Locke's account of limited government, Kant's ethics and Mill's harm principle) into the context of securities regulation. These perspectives purposefully establish a normative boundary for the exercise of regulatory power, ensuring that legal intervention is justified only to the extent required to sustain fairness as specified by market participation. By bringing these theories into dialogue with disclosure regulation, the study offers a framework that clarifies both the necessity and the limits of intervention, a contribution that is largely absent from existing scholarship. Just as the problem of legislative lag is innovatively addressed through the thesis's discussion of fairness, its treatment of legislative boundaries likewise advances a model that confronts regulatory delay. This ensures that intervention is not only constrained by principled limits but also guided by forward-looking criteria that enable adaptation to the evolving and complex character of financial markets. In sum, the thesis advances understanding of fairness in disclosure regulation and provides an original response to the problem of regulatory inertia, offering both theoretical insight and practical guidance for future securities regulation.

1.6 Research Methodology and Limitations

1.6.1 Methodology

The research methodology is designed to address the central question of the extent to which disclosure regulation is necessary to achieve fair securities markets in the U.S.. Owing to the complexity of this inquiry, the study combines normative, doctrinal, historical and case study approaches, supported by a qualitative method. Each strand contributes to analysing the legal, philosophical and practical dimensions of disclosure regulation.

A. Normative Approach

The normative approach is central. It establishes criteria for assessing the fairness of disclosure rules and clarifies the limits of policymaking authority. Philosophical theories provide the framework. Rawls's account of fairness highlights equitable access to information and the equal capacity to utilise it, as well as the ex ante design to address anticipated unfairness. Locke's limited government theory specifies the boundaries of public power, grounding regulation in the consent of the governed. Kant's categorical imperative underscores the duty to treat market participants as ends in themselves, while Mill's harm principle justifies intervention only to prevent harm. Together these theories provide a principled standard for examining how disclosure regulation can promote genuine fairness whilst respecting the limits of public authority.

B. Doctrinal Approach

The doctrinal approach examines the statutory and regulatory framework, notably the Securities Act of 1933, the Securities Exchange Act of 1934, Regulation Fair Disclosure and SEC principles, together with their interpretation in judicial decisions such as those under Rule 10b-5. This analysis clarifies how disclosure law is applied, its alignment with stated objectives and its effectiveness in promoting fairness.

C. Historical Approach

The historical approach complements the doctrinal analysis by providing the necessary context for understanding the evolution of disclosure regulations. While the doctrinal approach focuses on the current application and interpretation of laws, the historical approach traces the development of these regulations over time, examining the specific securities market failures and legislative responses that led to their enactment. This method is essential for identifying how past regulatory decisions have shaped the current legal landscape and for assessing the ongoing relevance of these laws. By exploring the historical context, this research not only highlights the legislative intent behind key disclosure laws but also offers insights into the necessity and potential direction of future regulatory changes.

D. Case Study Approach

Case studies provide concrete illustrations of how disclosure rules operate in practice. They examine regulatory failures, enforcement actions and the application of fairness principles in specific contexts. They also consider hypothetical scenarios, showing how reforms grounded in the proposed framework might address problems evident in earlier episodes. This approach links theoretical insights to practical regulatory design.

E. Qualitative Research

The overall method is qualitative, centred on textual, theoretical and historical analysis rather than numerical data. This approach is appropriate given the study's concern with the normative foundations and doctrinal structure of disclosure regulation. It allows for close examination of how fairness can be specified, tested against legal practice and applied to the design of rules for securities markets.

1.6.2 Limitations

This thesis provides original insights into the necessity and limitations of disclosure regulation for fair securities markets. However, several limitations should be acknowledged. First, the study is confined to the U.S. and does not undertake a systematic comparative analysis. The conclusions should therefore be applied with caution beyond that context. Second, the methodology is primarily normative and qualitative. Philosophical and doctrinal analysis allows depth, but it cannot substitute for large-scale empirical testing of outcomes. Third, whilst the thesis traces market failures and legislative responses, access to the most recent enforcement activity and evolving practice is inevitably incomplete, which may affect the timeliness of some observations. Fourth, the proposed fairness framework is designed to address legislative lag and to specify fairness ex ante, however, its implementation will be shaped by political incentives, institutional capacity and market dynamics that sit outside the model. Fifth, the argument deliberately narrows its analytical lens to market fairness and efficiency. Other financial regulatory aims are acknowledged only where strictly necessary. This focus enhances the clarity of the contribution, but it restricts the scope of claims that can be made about the broader architecture of financial regulation. These constraints indicate directions for future work, including empirical evaluation of the framework in specific disclosure settings and analysis of its interaction with institutional constraints, with added adjacent areas of financial law.

1.7 Conclusion

This thesis has demonstrated that fairness remains an insufficiently explicit objective within U.S. securities regulation, despite its repeated invocation in statutory language and policy discourse. The central argument is that disclosure regulation, as the principal mechanism for achieving informational parity, must embed fairness as a defined and actionable purpose rather than an assumed by-product of efficiency. By situating fairness as a procedural baseline for regulatory design, the study establishes that efficiency and other objectives can only operate credibly when fairness is clearly articulated ex ante.

The research has contributed both conceptually and practically. Conceptually, it develops a normative framework grounded in Rawls's justice as fairness and supported by Locke's theory of limited government, Kant's ethics, and Mill's harm principle. Together these theories provide principled limits for the exercise of regulatory power and guide the definition of fairness in disclosure rules. Practically, the study clarifies how fairness can address the structural problem of legislative delay by offering forward-looking criteria for the design of disclosure regulation that anticipates rather than merely reacts to market failures.

While confined to the U.S. context, the analysis offers broader implications for understanding how fairness can underpin legitimacy in financial regulation. By redefining fairness as an ex ante regulatory purpose rather than a residual aspiration, this thesis advances both theoretical understanding and policy design. It concludes that a clearer specification of fairness within disclosure regulation would strengthen investor confidence, support efficiency and provide a more coherent foundation for the future development of U.S. securities law.

Chapter Two

Efficiency and Fairness as Regulatory Objectives

2.1 Introduction

The regulation of securities markets is traditionally justified by reference to a series of interlocking objectives. Among these, efficiency has long dominated the American discourse, with fairness and other regulatory goals often treated as ancillary or derivative concerns. However, efficiency itself is a complex and contested concept, one that resists easy definition. The purpose of this chapter is to disentangle the various meanings of efficiency and to set a proper procedural baseline in order to construct a framework capable of guiding disclosure regulation in the United States. By proceeding in this manner, the chapter seeks to answer two questions. First, what is meant when regulators assert that markets should be efficient, and what criteria are implicit in such claims? Second, how might the articulation of fairness as an ex ante regulatory purpose shape the pursuit of efficiency?

Efficiency in securities law has primarily been articulated through the lens of informational efficiency, closely associated with the EMH. Alongside this, other conceptions such as allocative efficiency and the transaction-cost perspective provide complementary ways of assessing market outcomes. Classical benchmarks of Pareto and Kaldor-Hicks optimality also continue to shape how regulators and courts approach the economic and distributive implications of market design. In practice, securities law translates these theoretical categories into concrete rules on disclosure, market conduct and regulatory oversight. At the same time, it is important to acknowledge the longstanding view that efficiency and fairness are in tension. Much of the law and economics literature has presented efficiency as the maximisation of aggregate welfare, whilst fairness has been portrayed as a distributive or corrective constraint that can diminish efficiency. However, this chapter develops a different perspective. It argues that efficiency and fairness are not necessarily mutually exclusive. On the contrary, fairness can function as the set of baseline commitments that allow efficiency and other relative regulatory goals to be pursued in a credible manner. For example, liquidity and low transaction costs may foster price discovery, but if retail investors perceive markets to be structurally biased in favour of high-frequency traders, their withdrawal erodes both allocative quality and systemic resilience. Conversely, articulating fairness criteria, such as equal access to material information within meaningful timeframes, can enlarge the domain in which informational efficiency is capable of emerging.

The remainder of this chapter is organised as follows. Section 2.2 analyses efficiency in its classical and contemporary forms, beginning with Pareto and Kaldor-Hicks optimality, before turning to transaction cost economics and informational efficiency. Section 2.3 considers allocative efficiency in modern securities markets and the ways in which surface indicators of efficiency may conceal deeper misallocations. Section 2.4 introduces fairness as a procedural baseline, explaining its role in structuring the conditions under which efficiency claims can be credibly assessed. Section 2.5 then uses disclosure regulation to illustrate how sequencing fairness before efficiency can provide a more robust framework for regulatory design. It then concludes the chapter by summarising the key insights and preparing the groundwork for the normative elaboration of fairness in the next chapter.

2.2 Efficiency in Securities Regulation

2.2.1 Pareto and Kaldor-Hicks Efficiency as Normative Starting Points

The concept of efficiency in economics has historically been anchored in the criterion of Pareto optimality. First formalised by Vilfredo Pareto in the early twentieth century, an allocation is said to be Pareto efficient when no feasible reallocation can make at least one person better off without making another worse off.[54] What makes this definition appealing is its apparent neutrality. It avoided interpersonal comparisons of utility and promised a tractable benchmark for judging economic outcomes.[55] In regulatory contexts, the Pareto criterion suggested that state intervention was justified where markets failed to exhaust mutually beneficial trades.[56] If frictions, asymmetries or externalities prevented certain gains from being realised, regulation could be seen as enlarging the set of feasible transactions; yet the elegance of the Pareto standard conceals demanding assumptions. It presumes that market participants have sufficient information to identify potential improvements, that property rights are clearly defined and

[54] See supra note 9 Pareto (English trans 1971).
[55] See for example Christian Seidl and Ulrich Schmidt, 'Pareto on Intra- and Interpersonal Comparability of Utility' (1997) 5(3) History of Economic Ideas 19-33. See also supra note 36, Arrow and Debreu (1954).
[56] See ibid Arrow and Debreu (1954). See also Bruce C. Greenwald and Joseph E. Stiglitz, 'Externalities in Economies with Imperfect Information and Incomplete' (1986) 101(2) The Quarterly Journal of Economics 229-64.

enforceable, and that transaction costs do not impede the realisation of gains.[57] In securities markets, these conditions are rarely met. Information asymmetries between issuers and investors, principal-agent conflicts within financial institutions, and structural barriers to entry all prevent Pareto improvements from being identified or consummated. Moreover, the neutrality of the criterion has been criticised for masking distributional consequences.[58] A policy may be Pareto efficient yet preserve entrenched inequalities, since it requires only that no one be made worse off, not that overall welfare be fairly distributed.[59]

In response to these limitations, Nicholas Kaldor and John Hicks proposed an alternative test in 1939, which has come to be known as the Kaldor-Hicks criterion.[60] Under this standard, an allocation is efficient if the winners from a change could, in principle, compensate the losers and still remain better off, even if such compensation is not actually paid. The attraction of this approach is that it allows for efficiency-enhancing policies that generate losers, provided the aggregate gains exceed the aggregate losses. It recognises that real-world reforms often create costs as well as benefits, and that strict Pareto improvements may be impossible. The Kaldor-Hicks test has exerted considerable influence in law and economics, not least because it aligns with cost-benefit analysis as a tool of regulatory appraisal.[61] Courts and agencies in the U.S. frequently invoke efficiency in this Kaldor-Hicks sense when assessing disclosure obligations, market structure reforms or enforcement priorities. For instance, the SEC is statutorily required under the National Securities Markets Improvement Act 1996 to consider efficiency, competition and capital formation when promulgating rules.[62] In practice, this has meant weighing the costs of compliance against the expected benefits of enhanced transparency or reduced informational asymmetry.

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[57] See for example Richard A Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8(3) Hofstra Law Review 487-507.

[58] See Amartya Kumar Sen, 'The Impossibility of a Paretian Liberal' (1970) 78(1) Journal of Political Economy 152-57. See also Irene van Staveren, 'An Evolutionary Efficiency Alternative to the Notion of Pareto Efficiency' (2012) 1(1) Economic Thought 109-26. The issue was approached from different perspectives in the two studies.

[59] This can also be reflected in Armour's statement: "A highly competitive economy may be a highly unequal one", and that Pareto optimality "only holds if the various conditions associated with the existence of perfectly competitive markets are fulfilled", "which may justify government intervention to redistribute resources to the most needy, even in the absence of market failures". Supra note 51, Armour et al. (2016) at 54.

[60] See supra note 38 Kaldor (1939) and Hicks (1939).

[61] Matthew D. Adler and Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (Harvard University Press 2006) 9-24.

[62] National Securities Markets Improvement Act of 1996, Pub L No 104–290, 110 Stat 3416, § 106 < https://www.congress.gov/104/plaws/publ290/PLAW-104publ290.pdf> Accessed July 2025.

Despite its pragmatic appeal, the Kaldor-Hicks standard is not without criticism. Scholars have noted that the reliance on hypothetical compensation ignores the distributional impact of regulatory choices.[63] A disclosure rule that imposes disproportionate costs on smaller issuers may be deemed efficient in aggregate if investor protection gains outweigh compliance burdens, yet the smaller issuers may find their access to public markets curtailed. This raises questions about whether efficiency, so defined, adequately captures the normative commitments of securities regulation. Investor protection and fairness may demand more than aggregate surplus maximisation. The limitations of both Pareto and Kaldor-Hicks efficiency are particularly salient in financial markets, where externalities and systemic interdependencies are pervasive. The collapse of one institution can impose losses on others in ways not captured by bilateral cost-benefit calculations.[64] Moreover, information asymmetries are not incidental but constitutive of securities markets. Issuers always know more about their prospects than investors. As a result, the application of efficiency criteria to securities regulation must be sensitive to distributional effects and systemic consequences. It is for this reason that there are significant limitations in regarding efficiency alone as the primary goal of regulation.

2.2.2 Coase and Transaction Costs in Market Regulation

The classical efficiency criteria of Pareto and Kaldor-Hicks provide important starting points, yet they remain abstract and indeterminate when applied to securities markets. A further strand of economic thought that has shaped legal understandings of efficiency is transaction cost economics, most famously associated with the work of Ronald Coase. In his seminal study, Coase argued that the allocation of resources depends not only on substantive entitlements, but also on the costs of transacting.[65] Where transaction costs are negligible, parties can bargain to efficient outcomes regardless of the initial allocation of rights, a proposition later labelled the Coase Theorem.[66] In the context of securities markets however, transaction costs are significant and pervasive. They arise not only from brokerage fees and bid-ask spreads but also from information acquisition, monitoring, enforcement, and the design of trading infrastructure.[67]

[63] See for example Yoon-Ho Alex Lee, 'The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus?' (2015) 57(1) Arizona Law Review 85-128.
[64] Steven L Schwarcz, 'Systemic Risk' (2008) 97(103) Georgetown Law Journal 193-249.
[65] Ronald Harry Coase, 'The Problem of Social Cost' (2013) 56(4) The Journal of Law and Economics 837-77.
[66] Steven G Medema, 'The Coase Theorem at Sixty' (2020) 58(4) Journal of Economic Literature 1045-1128.
[67] Merritt B Fox, Lawrence R Glosten and Gabriel V Rauterberg, *The New Stock Market: Law, Economics, and Policy* (Columbia University Press, 2019) 33-58. See also Yesha Yadav, 'The Failure of Liability in Modern Markets' (2016) 102 Virginia Law Review 1031-1100.

Regulation thus plays a dual role; on the one hand, it can reduce transaction costs by standardising disclosures, mandating fair trading rules, and establishing clearing and settlement systems. On the other hand, regulation itself imposes costs, both in compliance burdens and in the potential for rigid rules to prevent welfare-enhancing bargains. The question is therefore how to structure regulation so that the gains from reduced informational and procedural frictions outweigh the costs of regulatory intervention.[68]

The U.S. securities regulation has frequently been justified in precisely these terms. The Securities Act 1933 and the Securities Exchange Act 1934 sought to reduce the cost of information asymmetry by mandating disclosure and penalising fraud, thereby enabling investors to trade on a more equal footing. More recently, Regulation National Market System (Reg NMS) of 2005 exemplifies a regulatory attempt to enhance operational efficiency by mandating best execution and by linking fragmented trading venues through consolidated quotation systems;[69] yet the experience with Reg NMS also illustrates the difficulties of transaction-cost regulation. While the rules reduced visible spreads and increased competition among venues, they also incentivised complex order types and fostered high-frequency trading strategies that exploited latency advantages.[70] In this sense, regulation reduced some transaction costs while simultaneously creating new forms of rent-seeking behaviour. The relevance of transaction cost economics to securities law therefore lies less in the abstract claim that markets will self-correct when transaction costs are low, and more in the recognition that transaction costs are constitutive of market design. Market efficiency is not simply a product of information and incentives, but also of institutional architecture. Clearing houses, disclosure systems, and trading platforms are not neutral backdrops; they determine who bears the costs of transacting and who reaps the benefits of liquidity. This recognition has also informed international regulatory debates. For instance, the Financial Stability Board has emphasised the need for market infrastructures that minimise counterparty and operational risks while maintaining fair access for participants.[71]

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[68] Supra note 51, Armour et al. (2016), 157-59.
[69] Securities and Exchange Commission, 'Regulation National Market System' (Release No 34–51808, 2005).
[70] Congressional Research Service, 'High-Frequency Trading: Background, Concerns, and Regulatory Developments' (CRS Report R43608, 19 June 2014).
[71] The Financial Stability Board, see Financial Stability Board (FSB), 'Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions' (March 2015), <https://elischolar.library.yale.edu/ypfs-documents/1226> accessed July 2025. See also for example the International Organization of Securities Commissions (IOSCO) and the Committee on Payments and Market Infrastructures (CPMI), Principles for Financial Market Infrastructures (PFMI), available at < https://www.bis.org/cpmi/info_pfmi.htm>, accessed July 2025.

At the same time, reliance on transaction-cost reasoning has its limitations. Critics have observed that the language of reducing costs can obscure distributional choices. A rule that facilitates electronic trading may lower spreads for institutional investors, but disadvantage retail participants lacking access to comparable technology.[72] Similarly, disclosure mandates may reduce aggregate information costs but impose disproportionately heavy compliance costs on smaller issuers. These examples, while useful, illustrate that transaction-cost efficiency cannot by itself provide a comprehensive normative guide to securities regulation. It shows that efficiency is deeply intertwined with fairness, since decisions about how to allocate and reduce transaction costs inevitably affect the inclusiveness and legitimacy of the market.

2.2.3 Informational Efficiency and the Efficient Market Hypothesis

A further dimension of efficiency that has exercised considerable influence in securities regulation is informational efficiency, formalised in the Efficient Market Hypothesis (EMH).[73] In its strong form, the EMH holds that security prices fully reflect all available information, whether public or private, such that no trader can systematically earn excess returns without assuming additional risk.[74] In its semi-strong version, which has been most influential in legal and policy discourse, the hypothesis maintains that prices rapidly incorporate all publicly available information.[75] This account suggested that disclosure regulation and antifraud enforcement were sufficient to guarantee that prices transmitted accurate signals about fundamental value.

For several decades, the EMH shaped the orientation of American securities regulation. It provided an intellectual rationale for privileging liquidity, rapid price discovery and low transaction costs as regulatory goals.[76] If prices were presumed to be efficient conveyors of information, then the role of the regulator was primarily to ensure equal access to information and to prevent fraudulent distortions.[77] The emphasis on informational parity underpinned the

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[72] Supra note 51, Armour et al. (2016), 160-64.
[73] Supra note 6, Fama (1970).
[74] Ibid.
[75] Ibid. See also Eugene F Fama, 'Efficient Capital Markets: II' (1991) 46(5) Journal of Finance 1575-1617.
[76] Supra note 67, Fox et al. (2019).
[77] For discussions on the regulator's role in demanding disclosure and preventing fraud, as well as on situations where prices may not serve as effective conveyance of information, see Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2006) 55(4) Duke Law Journal 711-82.

design of disclosure mandates, insider trading prohibitions, and selective disclosure restrictions such as Regulation Fair Disclosure (Reg FD).[78] Courts too adopted the language of informational efficiency, most notably in the fraud-on-the-market doctrine articulated in *Basic Inc. v. Levinson* (1988), which presumes that investors rely on the integrity of market prices as a reflection of available information.[79]

Yet the practical limits of the EMH are now widely acknowledged. First, the assumption of homogeneous access to information rarely holds. Institutional investors and high-frequency traders enjoy technological and analytical advantages that allow them to extract rents from informational disparities.[80] Second, informational efficiency does not guarantee allocative efficiency. The Global Financial Crisis demonstrated that prices could reflect the information that is available and thus appear informationally efficient yet still transmit distorted signals because the underlying information environment is degraded. Complex securitisations were rated as low-risk and priced accordingly, but opacity concealed correlated exposures and systemic vulnerabilities.[81] Third, informational efficiency does not necessarily enhance stability. The Flash Crash of 6 May 2010 illustrated how algorithmic trading and continuous order matching, often defended in the name of speed and price efficiency, could amplify volatility and decouple prices from fundamentals, even if only briefly.[82] These events showed that informational efficiency, narrowly conceived, may create fragility rather than resilience. Finally, informational efficiency is highly sensitive to the design of disclosure rules; information that is legally disclosed but practically unusable (due to excessive volume, complexity, or inaccessibility) does little to improve price accuracy.[83] The risk is that formal compliance with disclosure mandates produces informational overload, obscuring the very signals that investors require.

[78] The United States Regulation Fair Disclosure, 17 CFR § 243 (2021).
[79] *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Regarding details of the case, associated court interpretation, and the case's role in disclosure regulation, see Chapter Three of this work.
[80] And such informational disparities can affect traditional institutional investors as well in a negative way. See for example Jacob Adrian, 'Informational Inequality: How High Frequency Traders Use Premier Access to Information to Prey on Institutional Investors' (2015) 14(1) Duke Law & Technology Review 256-79.
[81] Steven L Schwarcz, 'Regulating Complexity in Financial Markets' (2009) 87(2) Washington University Law Review 211-68. See also supra note 8 Financial Crisis Inquiry Commission (2011); Paul (2008); Hellwig (2009); Claessens et al. (2010).
[82] See supra note 7 Kumiega et al. (2016); CFTC and SEC (2010); Berman (2010); Allen (2018).
[83] Troy A. Paredes, 'Blinded by the Light: Information Overload and Its Consequences for Securities Regulation' (2003) 81(2) Washington University Law Quarterly 417-86.

For these reasons, informational efficiency is a valuable but incomplete regulatory objective. It is challenging to use it as the sole organising principle of securities regulation. Its effectiveness depends on the fairness of the conditions under which information is generated, disseminated and absorbed. When fairness is articulated ex ante (e.g. through commitments to equal access within meaningful timeframes, usable disclosure formats, and limits on structural advantages), the informational content of prices becomes more reliable. Informational efficiency and fairness are therefore not inevitably opposed, but interdependent; the credibility of one depending on the articulation of the other.

2.3 Allocative Efficiency in Contemporary Securities Markets

Allocative efficiency concerns the extent to which capital flows towards its most productive and socially valuable uses. In principle, securities markets are designed to achieve this function by channelling savings into investment opportunities that offer the highest expected returns for a given level of risk.[84] When allocative efficiency is attained, firms with viable projects are able to raise funds at reasonable cost, while investors receive returns that compensate for risk. This process supports overall economic growth and innovation. However, the assumption that securities markets naturally achieve allocative efficiency is increasingly difficult to sustain. Several developments illustrate how surface indicators of efficiency, such as high liquidity, narrow spreads, or rapid price adjustment, may obscure significant allocative failures.

First, the rise of index-linked investing has introduced mechanical allocation mechanisms that are only loosely connected to fundamental assessments of productivity or risk.[85] Passive investment strategies now dominate large segments of the U.S. equity market, with capital inflows determined by benchmark inclusion rather than company-specific analysis.[86] This produces co-movement within indices, weakens the informational content of prices around inclusion events, and alters the cost of capital for reasons orthogonal to fundamentals. Firms may therefore experience shifts in financing conditions unrelated to their underlying performance, undermining the allocative function of the market.

[84] Ronald J Gilson and Reinier Kraakman, 'The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549-644.
[85] Jeffrey Wurgler, 'On the Economic Consequences of Index-Linked Investing' (NBER Working Paper No w16376, September 2010) 1–27.
[86] Ibid.

Second, the proliferation of special purpose acquisition companies (SPACs) has provided an alternative route to public listing that circumvents traditional disclosure and underwriting scrutiny.[87] While SPACs raise substantial funds, post-merger outcomes for public investors have frequently been disappointing, with persistent underperformance relative to traditional IPOs.[88] The mechanics of sponsor promotes and fee structures ensure that insiders are insulated from downside risk, while outside investors bear the losses. In allocative terms, this represents a diversion of capital into vehicles that benefit intermediaries rather than directing resources to their most productive use.

Third, dual-class share structures with indefinite control rights have become more common among high-growth technology firms.[89] These structures facilitate capital formation and insulate management from short-term market pressure, but they also embed durable agency costs and weaken accountability. Empirical evidence suggests that valuation gaps between voting and non-voting shares widen over time, as entrenched control diminishes the sensitivity of corporate decisions to fundamentals.[90] The allocative consequence is that capital remains locked into firms where governance arrangements reduce responsiveness to market signals.

Fourth, seasoned equity offerings (SEOs) illustrate another channel through which allocative efficiency may be compromised. Issuers with superior information about firm value, time their offerings strategically leading outside investors to demand discounts.[91] As a result, even projects with positive net present value may be deferred or financed in ways that reflect informational rents rather than transparent certification. Liquidity and low transaction costs do not cure the adverse selection problem that drives these outcomes. Each of these examples

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[87] Gregg A. Noel, Risk Fleming, Usha R. Rodrigues and Mike Stegemoller, 'Panel Three: How Should SPACs be Treated Going Forward (IPOs, Mergers, or Distinctly Different?)' (2022) 27(2) Fordham Journal of Corporate and Financial Law, 382-402.

[88] Michael Klausner, Michael Ohlrogge and Emily Ruan, 'A Sober Look at SPACs' (2022) 39(1) Yale Journal on Regulation 228-303.

[89] Dhruv Aggarwal, Ofer Eldar, Yael V Hochberg and Lubomir P Litov, 'The Rise of Dual-Class Stock IPOs' (2022) 144(1) Journal of Financial Economics 122-153.

[90] Ibid. See also Martijn Cremers, Beni Lauterbach and Anete Pajuste, 'The Life-Cycle of Dual Class Firms' (ECGI Finance Working Paper No 550/2018, May 2018), 1-64. See also Paul A Gompers, Joy Ishii and Andrew Metrick, 'Extreme Governance: An Analysis of Dual-Class Firms in the United States' (2010) 23(3) The Review of Financial Studies, 1051-88. See also Lucian A. Bebchuk and Kobi Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock' (2017) 103(4) Virginia Law Review 585-630.

[91] See Ali Sanati and Ioannis Spyridopoulos, 'Comparing Capital Allocation Efficiency in Public and Private Equity Markets' (SSRN Working Paper No 4403578, 2024). See also Stewart C Myers and Nicholas S Majluf, 'Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have' (1984) 13 Journal of Financial Economics 187-221.

reveals how allocative efficiency depends on institutional design, not merely on the presence of active trading or liquid markets. Where information is incomplete, incentives misaligned, or governance arrangements distort decision-making, capital may be channelled in ways that appear efficient on the surface but weaken long-term productivity.

The regulatory challenge is that allocative failures are less visible than informational or transactional frictions. Spreads, volumes and volatility are readily measured, while allocative quality requires assessing whether capital genuinely supports projects with superior fundamentals.[92] For this reason, regulators often default to observable proxies of efficiency, such as liquidity or depth, even though these may conceal misallocations. The risk is that regulatory reliance on narrow indicators produces a stylised image of efficiency while undermining the substantive objective of resource allocation. This analysis reinforces the claim that efficiency, in its allocative dimension, is very difficult to use as the sole organising principle of securities regulation. Without procedural guarantees of fairness, such as transparent participation rules, equal access to material information and accountability in governance structures, the allocative role of markets cannot be trusted to operate effectively. It is to this procedural baseline that the next section turns.

2.4 Fairness as a Procedural Baseline

Fairness, as employed in this chapter, is not advanced as a fully elaborated normative concept. Its role is functional and procedural. It refers to the baseline conditions of participation in securities markets that allow efficiency and other financial regulatory objectives to be credibly pursued. In this sense, fairness is best understood not as an outcome but as a set of process-oriented commitments that shape the design of regulatory frameworks. Several minimum conditions illustrate the procedural role of fairness. First, market participants must have equal access to material information within meaningful timeframes.[93] Reg FD in the U.S. sought to address this requirement by prohibiting selective disclosure to analysts or institutional investors.[94] Second, disclosures must be intelligible and usable across investor types. Information overload can be as exclusionary as opacity, since retail investors and smaller

[92] Supra note 67 Fox et al. (2019).
[93] Ibid. See also pp 131-240.
[94] Supra note 78.

institutions may lack the capacity to process excessive data.[95] Third, participation must not be distorted by structural or technological advantages that allow some actors to systematically extract informational rents.[96] High-frequency trading, for example, enhances liquidity but also raises concerns about whether speed advantages undermine confidence in the fairness of execution. Without such procedural guarantees, efficiency metrics may be misleading. Liquidity, narrow spreads and rapid price discovery may persist even as informational rents accumulate, allocative quality declines, and systemic fragility increases. By contrast, when fairness criteria are specified ex ante, efficiency becomes more credible. Investors are more willing to commit capital when they trust that markets operate on level terms, and stability is less dependent on emergency interventions when shocks are absorbed by a robust informational environment.

Fairness, framed in this way, is not a substitute for efficiency or stability. Rather, it is the sequencing principle that enables those objectives to be realised in practice. In its absence, trade-offs among regulatory purposes are decided implicitly, often in favour of speed and liquidity because these attributes are visible and easy to measure. When fairness is articulated as a baseline, however, regulators are required to ask whether access, intelligibility and non-discriminatory participation have been secured before privileging surface indicators of efficiency. The articulation of fairness as a procedural baseline therefore performs two functions. It enlarges the feasible domain for allocative progress by ensuring that mutually beneficial trades are not blocked by asymmetries of access or capacity. It reduces reliance on ad hoc stabilisation measures by embedding resilience in the informational architecture of the market. This is not to claim that fairness guarantees optimal outcomes. It is to insist that without fairness, neither efficiency nor other relevant purposes can be credibly attained. The substantive definition of fairness, and the normative grounds for embedding it within securities regulation, will be developed in the following chapters. Here, fairness is positioned only as the structural base on which other regulatory goals rest, a skeletal framework to be fleshed out by the theoretical and doctrinal analysis that follows.

[95] Supra note 83.
[96] Terrence Hendershott, Charles M. Jones and Albert J. Menkveld, 'Does Algorithmic Trading Improve Liquidity?' (2011) 66(1) Journal of Finance 1-33. See also supra note 67 Yadav (2016). See also Yesha Yadav, 'Insider Trading and Market Structure' (2016) 63(4) UCLA Law Review 968-1033.

2.5 Sequencing Fairness and Efficiency in Disclosure Regulation

The preceding sections have clarified that efficiency, whether defined in terms of Pareto optimality, Kaldor-Hicks compensation, or informational benchmarks, provides at best a partial framework for regulatory appraisal. The limitations are especially acute in the domain of disclosure, where the law has long relied on the language of efficiency but has struggled to address its distributive consequences. Conventional cost-benefit analyses weigh aggregate gains in transparency against compliance burdens, often treating efficiency as the decisive criterion while relegating fairness to a secondary role. The result is a regulatory discourse that risks overstating success where liquidity and trading volumes increase, while neglecting the baseline conditions of equal access, intelligibility and participation that make such indicators meaningful. A sequencing principle which places fairness first can provide a corrective. By specifying procedural fairness as the initial rung of regulatory evaluation, the pursuit of efficiency becomes not only measurable but normatively defensible.

This point is well illustrated by the adoption of the Reg FD. The rule was introduced to curb selective disclosure, whereby issuers provided material information to analysts or institutional investors before making it available to the wider market. In conventional efficiency terms, selective disclosure was tolerated so long as prices quickly incorporated the information, producing informational efficiency. From a fairness-first perspective, however, the practice undermined the legitimacy of price discovery because retail investors were denied an opportunity to react contemporaneously. Empirical studies following Reg FD's adoption indicate that enforcement actions by the SEC coincided with a measurable decline in opportunistic insider trading, suggesting that the rule did enhance baseline fairness.[97] At the same time, critics observed that analyst coverage of smaller firms declined, raising questions about whether aggregate informational efficiency was impaired.[98] All these illustrate the insight that fairness and efficiency are not inherently antagonistic. Rather, fairness criteria

[97] See Adam S. Koch, Craig E. Lefanowicz and John R. Robinson, 'Regulation FD: A Review and Synthesis of the Academic Literature' (2013) 27(3) Accounting Horizons 619-646. See also for example U.S. SEC, 'Siebel Systems, Inc., Release No 46896' (25 November 2002) available at <https://www.sec.gov/enforcement-litigation/administrative-proceedings/34-46896> accessed August 2025; U.S. SEC, 'Press Release 2019-156, SEC Charges TherapeuticsMD with Regulation FD Violations' (20 Aug 2019), available at <https://www.sec.gov/news/press-release/2019-156> accessed August 2025.

[98] See for example Anup Agrawal, Sahiba Chadha and Mark A. Chen, 'Who Is Afraid of Reg FD? The Behavior and Performance of Sell-Side Analysts Following the SEC's Fair Disclosure Rules' (2006) 79(6) The Journal of Business 2811-34. See also Divya Anantharaman and Yuan Zhang, 'Cover Me: Managers' Responses to Changes in Analyst Coverage in the Post-Regulation FD Period' (2011) 86(6) The Accounting Review 1851-85.

establish the procedural conditions within which efficiency gains can be credibly realised. Without such baseline safeguards, efficiency metrics risk being distorted by structural asymmetries.

The Sarbanes-Oxley Act 2002 (SOX) provides a further example. Adopted in response to accounting scandals such as Enron and WorldCom, the statute imposed stringent disclosure and governance requirements, including internal control reporting and executive certification of financial statements.[99] From an efficiency perspective, SOX could be defended as restoring investor confidence and reducing information risk.[100] However, the compliance costs (particularly for Section 404 internal control reporting) fell disproportionately on smaller issuers, prompting repeated calls for exemptions or scaled requirements.[101] The aggregate benefits may have outweighed the aggregate costs in a Kaldor-Hicks sense, but the distributional impact raised concerns of fairness. Smaller firms faced barriers to accessing public markets, and some delisted to avoid compliance burdens.[102] The sequencing framework highlights this asymmetry. Efficiency gains that are premised on exclusion or disproportionate burdens are fragile, since they rest on eroded fairness baselines. Where fairness is not articulated ex ante, efficiency metrics can mask long-term deterioration in market inclusiveness.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) further illustrates how disclosure reforms can oscillate between efficiency and fairness rationales. Among its many provisions, Dodd-Frank required enhanced disclosures on executive compensation, conflict minerals and derivatives exposures.[103] Proponents argued that these rules would improve transparency and discipline excessive risk-taking, thus serving efficiency and stability. Critics countered that the proliferation of disclosure mandates produced information overload, diluting the salience of material information and imposing high

[99] Supra note 14.
[100] See Pankaj K. Jain, Jang-Chul Kim and Zabihollah Rezaee, 'The Sarbanes-Oxley Act of 2002 and Market Liquidity' (2008) 43(3) The Financial Review 361-82. See also John C Coffee Jr, 'Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms' (2004) 84(2) Boston University Law Review 301-64 for cautioning that SOX's impact is limited because it did not address the core issues of executive compensation structures and gatekeeper liability.
[101] Ivy Xiying Zhang, 'Economic Consequences of the Sarbanes–Oxley Act of 2002' (2007) 44 Journal of Accounting and Economics 74–115.
[102] Ehud Kamar, Pinar Karaca-Mandic and Eric Talley, 'Going-Private Decisions and the Sarbanes–Oxley Act of 2002: A Cross-Country Analysis' (2009) 25(1) The Journal of Law, Economics, & Organization 107-133.
[103] Supra note 15.

compliance costs.[104][105] Once again, the sequencing principle clarifies the normative stakes. A fairness-first perspective would ask whether disclosures were intelligible and accessible to ordinary investors, rather than whether they merely increased the quantity of available information. In doing so, it considers the danger of equating more disclosure with better regulation.

Taken together, these episodes show that disclosure regulation in the U.S. has often been evaluated through an efficiency lens, yet efficiency alone is an unstable guide. Gains in liquidity or transparency can coincide with fairness deficits that ultimately erode legitimacy and participation. Conversely, rules designed to enforce procedural fairness, such as Reg FD, may initially appear costly in efficiency terms but, over time, strengthen the conditions for allocative quality and systemic resilience. The sequencing principle therefore offers a way to transform the relationship between efficiency and fairness without collapsing one into the other. Fairness is set as the foundational step, beginning with equal access to material information, disclosures calibrated to investor use, and constraints on informational rents. Efficiency is then assessed against this baseline, ensuring that surface indicators of market performance correspond to substantively inclusive outcomes. In practical terms, this reframing would alter the methodology of regulatory appraisal. Instead of treating fairness as an implicit corollary of efficient markets, regulators would be required to articulate fairness criteria at the outset and to demonstrate that proposed rules meet those criteria before turning to aggregate cost-benefit analysis. Such an approach would not displace efficiency but would condition its relevance. Efficiency claims would be meaningful only where fairness conditions are secured, much as the validity of a contract presupposes basic procedural safeguards. This reframing also tempers the reliance on ad hoc stabilisation measures. When fairness standards are specified ex ante, the informational commons becomes more robust, shocks are more evenly absorbed, and systemic stability is less dependent on emergency intervention.

The argument of this section thus culminates in a simple but consequential proposition, that securities regulatory goals should be sequenced so that fairness is treated as the initial benchmark; efficiency and other goals should be evaluated only once fairness is secured. This

[104] David M. Lynn, 'The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues' (2011) 6(2) Journal of Business & Technology Law 327-56.
[105] While say-on-pay (section 951) increased shareholder oversight, section 1502 of the Dodd–Frank Act illustrates how disclosure regulation has been extended beyond financial reporting, with conflict minerals disclosures employing securities filings to advance broader policy objectives. See Dodd-Frank §951, §1502.

proposition does not deny the importance of efficiency. Rather, it insists that efficiency metrics are intelligible and sustainable only within a fairness-structured environment. By making fairness explicit in this way, regulators gain a contestable and reviewable basis for market design, one that aligns procedural legitimacy with substantive performance. It must be emphasised, however, that fairness has here been introduced in a functional and skeletal sense. The current chapter has not sought to elaborate a full normative theory of fairness, but only to establish its role as a regulatory baseline. The substantive content of fairness (including its philosophical foundations), its collaboration with the limits of public power and its translation into normative standards of market fairness, remains to be developed. These tasks are undertaken in the following chapters, which will also construct a normative framework capable of guiding the evaluation of disclosure regulation in practice. The next chapter will start from developing, in greater detail, the normative grounds for fairness and the conceptual architecture through which it can serve as a fundamental regulatory objective in U.S. securities law.

Chapter Three
Theoretical Framework and Literature Review

This chapter aims to establish the theoretical foundation necessary for exploring the central research question: to what extent is disclosure regulation necessary to achieve fair securities markets in the United States? It examines the necessity and limitations of regulation, balancing public power with private rights, and uses these philosophical insights to evaluate the boundaries of regulatory intervention in securities markets. The chapter is structured to provide a systematic approach, from setting regulatory limits to defining fairness in the market.

The first part of the chapter, section 3.1 Between Market Participant's Rights and The Government Order, investigates the distinction between market forces and government intervention, particularly focusing on the protection of private rights in a market economy. It further explores how disclosure, a crucial regulatory tool in securities markets, plays a vital role in protecting market participants. These sections lay the groundwork for understanding the interplay between public power and private rights, setting the stage for the more detailed theoretical discussions that follow.

In section 3.2 Theoretical Framework, these philosophical theories are employed to outline the boundaries of public power within securities markets. Locke's limited government theory provides the foundation for this section, emphasizing the essential role of government in protecting property rights whilst remaining limited in its scope.[106] Kant's ethics supplements Locke by emphasizing the moral duty of regulators to treat market participants as ends in themselves, ensuring that regulation respects individual autonomy.[107] Mill's harm principle further reinforces the idea that regulatory intervention should only occur to prevent harm, ensuring that the boundaries of public power are properly defined.[108] These theories provide the normative backdrop for understanding how far regulatory intervention should go in the context of securities markets, ensuring that public power is only exercised to the extent necessary.

[106] Supra note 29, 100.
[107] Supra note 30.
[108] Supra note 31.

The chapter then shifts to subsection 3.2.2 Constructing a Normative Standard of Market Fairness, where Rawls's theory of justice as fairness is introduced.[109] Unlike the previous theories that focus on limiting the authorities' power, Rawls provides a framework for helping define market fairness itself. His concepts of the veil of ignorance and the two principles of justice form the basis for establishing fairness in disclosure regulations. The examination of Rawls's theory focuses on ensuring that disclosure rules are not only equitable in form but also in substance. This ensures that all market participants, regardless of their position, have equal access to information and can understand its true value.
The third part of the chapter, section 3.3 provides a focused literature review on fairness in U.S. securities regulation. It begins by discussing the concept of fairness in market practices, followed by an analysis of informational asymmetry and its impact on disclosure regulations. The review also addresses market manipulation and insider trading, exploring their effects on fairness. Regulation Fair Disclosure is critically assessed for its role in promoting transparency. Finally, the section critiques the current fairness paradigm in securities regulation, identifying shortcomings that this thesis seeks to address.

By combining these theoretical insights and literature review, this chapter provides the conceptual tools necessary to explore the central research question in a systematic manner. It offers a balanced perspective, ensuring that disclosure regulation in securities markets is not just a matter of transparency but also one of fairness, bounded by reasonable limits on public power. Through the cohesive progression of these sections, this chapter lays the necessary theoretical and contextual groundwork for the subsequent historical analysis of disclosure regulation in Chapter Four, ensuring a systematic and logical approach to addressing the central research question.

3.1 Between Market Participant's Rights and The Government Order

In this section, subsection 3.1.1 presents the characteristics of market mechanisms and their influence on social structures. This subsection reviews the interdependence between market mechanisms and broader social norms by introducing literature associated with market autonomy and self-regulation. The discussion on the separation of market and governmental

[109] Supra note 26.

order in market economies is of particular importance, leading to the protection of private rights for market participants. Concurrently, to achieve such protection, the necessity of introducing public regulatory oversight beyond market regulations and incorporating social considerations into economic policies is highlighted. Furthermore, the need for government intervention to correct market failures and safeguard societal welfare arises from the potential adverse effects of market autonomy. Examining this need also entails exploring the essential protection of private rights that allows market participants to realise a genuine market economy.

Following these investigations of the market in general, an examination of the requirements within the specific securities market context ensues in subsection 3.1.2. In the context of securities markets, the protection of market participants requires a certain degree of transparency. The demand for transparency implies that information asymmetry can pose risks, which could impede the attainment of integrity and fairness within securities markets. As discussed in subsection 3.1.1, legitimate means of government intervention in markets contain rationality. Within the realm of securities markets, disclosure requirements are considered a legitimate form of regulation that facilitates market transparency. Hence, the role of disclosure requirements as a mechanism is indispensable in safeguarding the interests of market participants. At the same time, excessive regulation of disclosure practices could inadvertently compromise the private interests of market participants. The examination of disclosure activities as an externalised manifestation of market participants' interests also allows for an intuitive reflection of the necessity and limits of government regulations discussed in subsequent 3.2.1 within the field of securities markets.

3.1.1 The separation of the market and the government order, and the protection of the private rights of market participants in a market economy

The intricate dance between market forces and government regulation forms the bedrock upon which modern economies stand. The discourse surrounding the separation of the market and the government, alongside the protection of the private rights of market participants, is both extensive and nuanced. This subsection explores these concepts through two distinct lenses. Firstly, the notion that market power is constituted by and exercised by participants. Secondly, the conception that the realisation of the market economy correlates with the sufficient protection of the private rights of the market participants.

A. Market power is constituted and exercised by participants.

Milton Friedman[110] and Ronald Coase[111] offer complementary viewpoints on how market power is constituted. Friedman, as an advocator for laissez-faire economics, argued that the market functions most efficiently when it is left to operate with minimal government intervention.[112] He believed that the free market, constituted by the voluntary exchanges of market participants, naturally regulates itself through the principles of supply and demand.[113] Market power is thus a direct result of the activities of these participants, whose individual decisions to buy or sell form the basis of market dynamics. The foundation of a market economy lies in a mechanism whereby the independent and self-driven behaviours of these numerous individuals embody market processes, which serve to allocate resources efficiently and oversee market participants.[114] In the market economy, through the mechanism of supply and demand, prices in markets serve as signals that guide individuals and firms in making decisions about production, consumption and investment. Meanwhile, market prices reflect the scarcity of resources and consumers' preferences, leading to an optimal allocation of goods and services.[115] In contrast, Coase presents a refined viewpoint on market transactions by introducing his theory of transaction costs. He argues that market efficiency is achieved when property rights are clearly delineated and transaction costs are minimised.[116] Coase emphasises that market power is not solely determined by the forces of supply and demand.

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[110] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 2002).
[111] Richard H. Coase, 'The Problem of Social Cost' (1960) 3(1) Journal of Law and Economics 1-44.
[112] See for example "The kind of economic organisation that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other". Supra note 110 at 9. "A major source of objection to a free economy is precisely that it... gives people what they want instead of what a particular group thinks they ought to want". Supra note 110 at 15.
[113] See also Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace Jovanovich 1980), in which they point out that free markets represent the optimal mechanism for resource allocation, facilitating economic prosperity and empowering individuals to act in accordance with their own self-interest.
[114] See Armen A. Alchian, 'Uncertainty, Evolution, and Economic Theory' (1950) 58(3) Journal of Political Economy 211-221 for Alchian's analysis of the dynamic of market processes, wherein the collective actions of individuals pursuing their self-interest result in the efficient allocation of resources and the disciplining of market participants through competition.
[115] Ibid. See also F. A. Hayek, 'The Use of Knowledge in Society' (1945) 35(4) The American Economic Review 519-530. Hayek argued that economic problems arise as a result of change, and the significance and frequency of these changes are often underestimated. Hayek at 523. He asserts that the market efficiently aggregates dispersed information through the price mechanism. This process allows individuals, acting on their own local knowledge and preferences, to coordinate their activities without central direction, thereby contributing to an efficient allocation of resources.
[116] See supra note 111. See further Richard H. Coase, 'The Nature of the Firm' (1937) 4(16) Economica 386-405 for the reason firms (as market participant entities) emerge in a market economy and how they are structured to minimize transaction costs associated with market exchanges.

The exercise of market power is intrinsically tied to the capacity of market participants to engage in negotiation and transactions within these established frameworks.

As market dynamics are based on the decisions and capabilities of individual participants, market power is constituted and exercised by participants.[117] Market power is not a static entity, but rather emerges from the interactions and behaviours of market participants.[118] However, since the interactions among market participants have an impact on market forces and market strategies, (and due to the variations in the capabilities of different participants in decision-making, negotiation and trading)[119] certain interactions may inevitably result in market power exacerbating economic inequality. For example, the concept of power law described by Xavier Gabaix illustrates that in financial markets, a handful of significant market movements or transactions have a significant effect on overall market behaviour, while the vast majority of transactions have minimal impact.[120] Additionally, another example is that market power achieved through interactions such as collusion, merger and exclusion can contribute to unjust outcomes.[121] Due to market power's inherent limitations in

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[117] See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France*, 1978-1979 (Michel Senellart (ed), Graham Burchell (trs) Palgrave Macmillan 2008). Market power should not be seen as a possession but rather as a dynamic strategy. It is not a form of property of capitalists nor a form of power that can be owned by some and exercised over others.

[118] Regarding the significance of market participants in shaping market dynamics and outcomes, Xavier Gabaix's research has provided valuable insights into the dynamics of complex systems by examining how individual actions or events among market participants can influence more considerable outcomes within a market economy. His work has notably introduced the concept of power law distributions to analyse the effects of these distributions on various economic and financial phenomena. Gabaix has introduced the concept of power laws, which represent a mathematical pattern used to characterize the distribution of outcomes in diverse systems, including economics and finance. Power laws illustrate a scenario where a select few entities or events exert a significantly outsized influence while the majority possess a relatively minor impact. He utilizes this concept to clarify the fundamental mechanisms that drive market phenomena, underscoring the pivotal role of individual entities in shaping economic occurrences. *See Xavier Gabaix, 'Power Laws in Economics: An Introduction' (2016) 30(1) Journal of Economic Perspectives 185-206.* Gabaix et al. also analysed how market power arises endogenously through the interactions and preferences of market participants. See *Xavier Gabaix, Parameswaran Gopikrishnan, Vasiliki Plerou and H. Eugene Stanley, 'A Theory of Power Law Distributions in Financial Market Fluctuations' (2003) 423 Nature 267-70.* Gabaix contends that acknowledging the influence of individual behaviour on market outcomes is essential for crafting effective economic policies and promoting fairness within economic systems. *See Xavier Gabaix, 'Power Laws in Economics and Finance' (2009) 1 Annual Review of Economics 255-93.* In his recent work, Gabaix extends his analysis to incorporate behavioural considerations into macroeconomic modelling. By integrating insights from behavioural economics with traditional macroeconomic frameworks, he underscores the role of individual behaviour in shaping aggregate economic outcomes. *See Xavier Gabaix, 'A Behavioral New Keynesian Model' (2020) 110 (8) American Economic Review 2271-2327.*

[119] To supplement this argument, see Ludwig von. Mises, *Human Action: A Treatise on Economics* (Yale University Press 1949). Mises emphasized that individual action driven by subjective values and informed by economic calculation is central to market processes. Mises at 30-71 and 258-323.

[120] See ibid Gabaix 2016. Note that this pattern contrasts with more evenly distributed outcomes, where each event or entity contributes relatively equally to the overall system.

[121] Lina M. Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harvard Law & Policy Review 235-94. Market power, achieved through collusion,

satisfying the diverse demands of market participants and ensuring compliance with their appeals to rights, it is necessary to seek external forces to promote fairness and accountability in a market where power dynamics are fluid and contingent on interactions.[122] Whether it is resorting to market power or external forces such as government regulation, the operation of the dynamics of the market economy, and the expectations of the establishment of market fairness and integrity are required to be generated from the protection of the private rights of market participants who constitute and exercise market forces.

B. The realisation of the market economy correlates with the sufficient protection of the private rights of the market participants.

The recognition that market power is not a static possession but a dynamic strategy has significant implications for the protection of market participants' rights. In a market where power is contingent on interactions and strategies, the realisation of a market economy means that market participants have interacted with each other from the appeal of their interests. Safeguarding the rights of participants is fundamentally maintaining this interaction, thereby effectively leveraging market forces to fully uphold market dynamics. Therefore, upholding the appeals of the rights of market participants becomes crucial to ensuring fairness, integrity and efficiency. Market participants (such as investors, corporations and financial entities) rely on a set of rights and protections to engage in market activities with confidence and trust.

One of the critical reasons why protecting market participants' rights is essential lies in the asymmetric nature of market power dynamics. Certain entities may possess more significant resources, information or influence in any market environment, allowing them to wield disproportionate power over others.[123] Without adequate safeguards and regulations in place, these power differentials can lead to market abuses, manipulation and exploitation, undermining the integrity of the market as a whole. These adverse consequences are often known as market failure or inefficiencies. Incorporating specific governmental regulatory measures to rectify market inefficiencies is a foundational element of economic theory. These

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mergers, and exclusion, allows businesses to extract greater wealth from the public than would be possible in competitive markets. Ibid at 246. This leads to elevated consumer prices and depressed producer prices, transferring income from the ordinary many to the elite few. Market power gives firms political clout, enabling them to influence legislators and regulators to lock in their gains and lobby for policies that enhance their wealth and power. Ibid at 294.

[122] See also supra note 117.

[123] Ibid.

measures have been extensively examined from diverse theoretical viewpoints over the course of many decades. For instance, John Maynard Keynes advocates for government intervention, particularly through fiscal and monetary policies, to manage aggregate demand, stabilise the economy and prevent or mitigate market failures. [124] In a further example, Joseph E. Stiglitz argues for a coordinated global effort to establish a framework that ensures market stability and benefits all participants through operating markets with governmental regulations, in order to avoid negative consequences for the majority of people.[125]

In addition to utilising macroeconomic policies[126] to prevent market failures (based on the market power and dynamics stemming from the interactions of its participants, as elucidated above) another important aspect of protecting market participants' rights lies in promoting market efficiency and stability. Markets function most effectively when participants have confidence in the fairness and integrity of the system. When market power is concentrated in the hands of a few entities or when participants' rights are not adequately protected, market efficiency can be compromised, leading to market distortions, inefficiencies and systemic

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[124] See John Maynard Keynes, *The Collected Writings of John Maynard Keynes: Volume 7 The General Theory* (Elizabeth Johnson and Donald Moggridge (eds) Royal Economic Society 1978). In Book I of this collection, which was originally referred to as *The General Theory of Employment, Interest, and Money* (first published in 1936), Keynes proposed a range of governmental interventions to rectify market failures and promote overall economic stability and prosperity. Notably, he emphasized the use of fiscal policy as a key tool, advocating for government intervention through strategic adjustments in spending and taxation to stabilize the economy. In instances of economic downturn, heightened government spending was seen as a mechanism to stimulate demand and invigorate economic activity. Conversely, in periods of elevated inflation or economic overheating, the government was advised to curtail spending and elevate taxes to mitigate aggregate demand and manage inflation effectively. Additionally, Keynes espoused countercyclical policies, which involved governmental actions aimed at offsetting the inherent fluctuations of the business cycle. This approach encompassed augmenting public investment during economic recessions to bolster growth while scaling back investment during periods of economic expansion to avert overheating. Moreover, Keynes emphasized the necessity of regulating financial markets to curtail excessive speculation, foster stability, and prevent financial crises. This regulatory framework encompassed initiatives such as imposing capital requirements for banks, overseeing and regulating the use of derivatives and other financial tools, and instituting safeguards to uphold financial stability.

[125] See Joseph E. Stiglitz, *Globalization and Its Discontents* (Penguin Books 2002). "In a globalized world, in which markets can easily move, we need a global economic and social framework — a global New Deal — to regulate markets, to ensure that they are stable and work to the benefit of everyone, not just of a few. This means a strong role for government, for markets on their own, unregulated, often fail to deliver what's best for society". Ibid at xxiv. Stiglitz critiques the notion of laissez-faire economics and argues for the importance of government regulation in addressing market failures, particularly in the context of globalisation. He highlights how deregulation and market-oriented policies can exacerbate income inequality, environmental degradation, and financial instability. Stiglitz advocates for a more active role for government in regulating markets to ensure equitable outcomes and sustainable development.

[126] See for example fiscal policy and monetary policy as discussed in supra note 124. Generally speaking, macroeconomic policies can also refer to regulatory policy (For example in the field of this research, i.e. in the securities markets, governments implement regulations to prevent market failures arising from issues such as externalities, asymmetric information, and systemic risks in financial markets.), stabilisation policies, income and wealth redistribution, etc.

risks.[127] By safeguarding the rights of all participants and promoting a competitive and fair market environment, regulatory bodies can contribute to the overall health and resilience of the market. The connotation and standards regarding market fairness will be detailed in the subsequent Chapter Five of this research. In addition to protecting the efficiency of market operations, regulatory bodies can establish clear rules, standards, and protective measures to foster an environment of trust and confidence among market participants. This will facilitate increased transparency and accountability in markets, and protect market participants' rights.[128] Promoting transparency and accountability in a market is particularly significant in the securities markets. Therefore, it will be discussed in the following section.

3.1.2 Market participants' protection and the nature of disclosure in the securities markets

This subsection examines two critical perspectives concerning the securities markets: the importance of transparency within the market system, and the regulatory framework for disclosure as an indicator of the government's position regarding securities markets. Focusing on market participants' protection and the nature of disclosure in securities markets, this subsection aims to explain the reasons for the necessary and restricted regulatory measures (from the perspective of enhancing transparency and safeguarding the rights of market participants).

A. The securities market as a fundamental component of the market system and its requirement for transparency.

As introduced at the end of 3.1.1, markets function most effectively when participants have confidence in the fairness and integrity of the system. The securities market serves as an integral element of the overall market system, crucial for capital allocation and investment activities. Enhancing transparency and accountability within a market holds particular importance in terms of the protection of the market participants, especially in the context of

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[127] Empirical studies, such as Michael E. Porter, *Interbrand Choice, Strategy, and Bilateral Market Power* (Havard University Press 1976) and R. E. Caves and M. E. Porter, 'Market Structure, Oligopoly, and Stability of Market Shares' (1978) 26(4) The Journal of Industrial Economics 289-313, have demonstrated that monopolistic or oligopolistic market structures can impede competition, distort price signals, and restrict consumer choice, which adversely results in market inefficiencies. Consequently, market distortions arise, hindering allocative efficiency and undermining overall economic performance.

[128] In terms of the importance of transparency and accountability in fostering trust among market participants (e.g. consumers) and ensuring market efficiency, see for example Paul Latimer and Philipp Maume, *Promoting Information in the Marketplace for Financial Services: Financial Market Regulation and International Standards* (Springer 2015).

securities markets. Within this context, the requirement of transparency and the management of information asymmetry are paramount considerations for market participants and regulators. Therefore, it is essential to introduce the connotation of transparency in the securities markets. Transparency in securities markets encompasses various dimensions aimed at addressing information asymmetry.

It entails the timely and accurate disclosure of financial information by publicly traded companies, including financial statements, earnings reports and material events.[129] Such disclosures provide investors with insights into the company's performance, risks and prospects, thereby reducing uncertainty and asymmetrical access to information.[130] Additionally, regulatory initiatives such as mandated reporting requirements[131] and insider trading regulations,[132] contribute to transparency by ensuring that material information is disseminated equitably among market participants. Consequently, transparency requirements extend to market structure and operations. For instance, a transparent pricing mechanism, as one of the typical market structures, can promote fair and efficient trading by aligning the incentives of market participants.[133] By reducing information asymmetry, a transparent mechanism can stimulate competition, deter market manipulation, improve market efficiency and safeguard market participants.[134] Transparency is a cornerstone for fostering trust, efficiency and fairness within securities markets. By mitigating information asymmetry and

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[129] Regarding the significance of accurate financial disclosure to investors, see for example Ray Ball and Lakshmanan Shivakumar, 'Earnings Quality at Initial Public Offerings' (2008) 45 Journal of Accounting and Economics 324–349. See also Christine A. Botosan, 'Disclosure Level and the Cost of Equity Capital' (1997) 72(3) The Accounting Review 323-349 in which Botosan investigates the relationship between the extent of financial disclosure and the cost of equity capital for publicly traded companies, highlighting the importance of transparency in reducing investors' perception of risk and thus lowering the cost of capital.

[130] See also Paul M. Healy and Krishna G. Palepu, 'Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature' (2001) 31 Journal of Accounting and Economics 405–40. This research examines empirical studies on corporate disclosure and its impact on capital markets. It emphasizes the role of transparent financial reporting in reducing information asymmetry and enhancing market efficiency.

[131] For details see the subsequent Chapter Four of this thesis.

[132] For the implementation of the disclosure legal regime and the optimization of the regime in the field of insider trading, refer to Chapter Seven of this thesis.

[133] See for example Robert H. Battalio, Shane A. Corwin and Robert H. Jennings, 'Can Brokers Have It All? On the Relation between Make-Take Fees and Limit Order Execution Quality' (2016) 71(5) Journal of Finance 2193-2238. See also Sugato Chakravarty, Huseyin Gulen and Stewart Mayhew, 'Informed Trading in Stock and Option Markets' (2004) 59(3) The Journal of Finance 1235-1257 for transparent securities market mechanisms can stimulate competition and improve market efficiency by reducing information asymmetry and enhancing price discovery.

[134] See Ananth Madhavan, 'Market Microstructure: A Survey' (2000) 3(3) Journal of Financial Markets 205-258, which provides a comprehensive overview of market microstructure theories and their implications for market transparency and efficiency. It offers theoretical insights into the role of transparent securities market mechanisms in reducing information asymmetry, promoting competition, and improving market liquidity.

promoting open access to market information, transparency contributes to the stability and resilience of securities markets, ultimately benefiting its participants and the broader economy.

B. The essence of disclosure and its regulatory framework as indicators of the government's stance towards securities markets.

As a direct action, disclosure points to market transparency; it holds an essential position in the field of securities markets, both from the perspective of addressing information asymmetry, and as a tangible behaviour subject to regulation. The conception and connotation of disclosure in the field of securities markets revolve around the exchange of information among market participants to facilitate fair, efficient and informed trading activities. Disclosure encompasses the timely and accurate dissemination of relevant information by issuers of securities to investors, regulators and other stakeholders. This information typically includes financial statements, earnings reports, material events and other disclosures mandated by regulatory bodies. These aspects are also important manifestations of market transparency, as discussed in subsection A above. From the perspective of interaction between market participants, disclosure serves several crucial purposes. Firstly, it reduces information asymmetry by ensuring that all market participants have equal access to information, thereby promoting fair competition and preventing certain participants from gaining unfair advantages.[135]

Secondly, disclosure enables investors to make informed investment decisions, assess the risks associated with investing in particular securities, and allocate their capital efficiently.[136] Thirdly, it enhances market transparency by providing visibility into the operations and financial condition of issuers, which in turn fosters market participants' confidence and trust in the integrity of the securities markets.[137] However, achieving transparency in securities

[135] For stringent disclosure requirements promote transparency and reduce information asymmetry and therefore foster fair competition and prevent certain participants from gaining unfair advantages, see for example supra note 48 and John C. Coffee Jr., 'A Theory of Corporate Scandals: Why the U.S. and Europe Differ' (2005) 21(2) Oxford Review of Economic Policy 198-211. Regarding disclosure requirements reducing information asymmetry between issuers and investors, see for example Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1997) 107 Yale Law Journal 2359-2430.

[136] See supra note 128, Latimer and Maume (2015) at 4-48.

[137] The concept of market integrity is closely related to the trust of market participants built through disclosure activities. In Austin (2017) (see supra note 45), Austin turned to various sources that defined market integrity. The commonplace these references possess is that market integrity can be referred to as the ability of investors to transact in a fair and informed market. Ensuring a fair and informed market depends on timely, accurate, and

markets faces challenges and trade-offs. Balancing the disclosure of relevant information with protecting sensitive business data and proprietary strategies requires careful consideration.

It is worth noting that although not all securities regulations specifically stipulate disclosure rules[138], the attitude of regulators towards disclosure activities often reflects the government's attitude towards regulating securities markets. Regulatory attitudes toward disclosure activities indicate broader regulatory goals, such as investor protection, market integrity and system stability. As a result, even regulations that do not specify disclosure requirements often contain provisions aimed at improving transparency and ensuring market participants have access to relevant information to make informed decisions. The government seeks to maintain public trust in the securities markets by increasing transparency and holding market participants accountable for providing accurate and timely disclosures. Regulatory oversight of disclosure activities is committed to implementing market regulation and ensuring that the securities markets operate in a fair, reliable and transparent manner. The key aspects of disclosure summarised in the preceding paragraph demonstrate that the nature of disclosure essentially establishes a fundamental and interactive connection; that is, through disclosure, market participants create externalities that affect their rights and the interests of others.

Disclosure activities involve enhancing trust among market participants to achieve market integrity and efficiency brought by such reliance interest. This is due to the purpose of disclosure. The primary aim of securities regulations, such as the Securities Act of 1933[139] (the Securities Act) and the Securities Exchange Act of 1934[140] (the Exchange Act), is to protect investors from fraud and ensure full disclosure in the markets, which allows investors

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efficient disclosure of information. In this integrated market, market participants can make informed decisions based on the information available to them. This process generates trust among different participants. This trust is essential for maintaining confidence in the market.

[138] See for example, Regulation M, 17 C.F.R. §§ 242.100–242.105 (2023), which demonstrates that while disclosure is a key focus of many securities regulations, there are other regulations that focus more on market conduct and fairness rather than direct disclosure. Regulation M is a set of rules adopted by the SEC under the Securities Exchange Act of 1934. It is primarily concerned with market manipulation during securities offerings. The regulation seeks to prevent individuals involved in the distribution of a security (such as underwriters or brokers) from artificially affecting the market price of that security. Unlike regulations that are disclosure-focused (such as Reg FD or Rule 10b-5), Regulation M does not primarily regulate what information must be disclosed to the public or investors. Instead, it governs the behaviour of those involved in distributing securities to ensure the market is not manipulated during such distributions.

[139] Supra note 10.

[140] Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (1934).

to make informed decisions.[141] Full disclosure shifts the burden of transparency onto sellers, promoting honest dealings within the securities market. Investors rely on the integrity of the information disclosed to them; when this trust is present, it reduces the perceived risk of engaging in market transactions.[142] The reliance on disclosed information creates a framework where market participants feel secure in their investments, encouraging market participation and liquidity.[143] Meanwhile, excessive disclosure could potentially harm the interests of market participants. Essentially, disclosure regulations require balancing the interaction of rights between asserting private rights and upholding the rights of others. The regulatory approach to disclosure activities reflects the government's efforts to effectively regulate securities markets and maintain the public's trust and confidence in its integrity. From a regulatory perspective, the private rights of market participants are essentially governed by governmental public power. Disclosure regulations are intricately correlated to government power over securities markets. Exploring the balance between private rights and public powers in disclosure provides insight into the regulatory landscape of securities markets. The reasonable limits of the intervention of regulatory bodies towards private rights can be solved through the discussion in the upcoming section 3.2.1, a theoretical study of the necessity and boundaries of the intervention of public power in private rights.

3.2 Theoretical Framework

3.2.1 A Theoretical Framework on the Necessity and Boundaries of Regulation

3.2.1.1 Locke's Limited Government Theory

John Locke's political philosophy, particularly his theories on limited government, has profoundly influenced modern governance structures. Central to Locke's philosophy is the belief that government authority should be limited and derived from the consent of the governed. Additionally, Locke emphasises the protection of natural rights, including property rights, as a primary function of government. This section also explores Locke's limited government theory in the context of securities market regulation. There are three key aspects: the authority of the government derived from the consent of the governed, the principle of

[141] See Matt Silverman, 'Fraud Created the Market: Presuming Reliance in Rule 10(b)-5' (2011) 79(4) Fordham Law Review 1787, 1793.
[142] Ibid at 1818.
[143] Ibid at 1803.

limited government intervention to protect natural rights, and the application of Locke's theory in the context of securities markets, including the separation of legislative and executive powers.

A. The Authority of the Government Is Derived from the Consent of the Governed

To examine Locke's theory of limited government and apply it to securities market regulations, it is essential to introduce Locke's concept of the social contract and the concept that the legitimacy of the authority ought to be generated from the consent of the governed. In his work Second Treatise of Government, Locke posits that government legitimacy stems from a social contract between rulers and the ruled, where individuals consent to be governed in exchange for the protection of their natural rights.[144] Locke suggests that consent is the foundation of authority. According to Locke, government authority is legitimate only when it is based on the consent of the governed. Individuals voluntarily enter into a hypothetical social contract, delegating certain powers to the government to secure their rights.[145] Among

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[144] Every individual is born with inherent freedom, equality, and independence, and cannot be controlled by others without consent. When people agree, they gain ownership of property created through their labour and industry, renouncing claims to others' possessions. The main purpose of societies and governments is to protect people's property. Transitioning from a state of nature occurs when individuals come together to form a community and establish political structures. By agreeing to limited power and obedience, conflicts like war and slavery are resolved, as long as the agreement is upheld. In civil society, agreements between individuals and authorities are temporary and focused on property preservation. "Men being, ..., by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent". Supra note 29 at 141. "By compact and agreement, settled the property which labour and industry began ... either expressly or tacitly disowning all claim and right to the land in the others possession, have, by common consent, given up their pretences to their natural common right ... and so have, by positive agreement, settled a property amongst themselves". ibid at 119. "It gives the master but a temporary power over him, and no greater than what is contained in the contract between them .... any part of civil society; the chief end whereof is the preservation of property". Ibid 136. "The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property". Ibid at 155. "For it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises, and compacts, men may make one with another, and yet still be in the state of nature". ibid at 106. "If once compact enter between them, and make an agreement for a limited power on the one side, and obedience on the other, the state of war and slavery ceases, as long as the compact endures". ibid at 110.

[145] In order to transition from a state of natural liberty to the bonds of civil society, individuals must mutually agree to come together to form a community where they can live comfortably, safely, and peacefully while secure in their property. The underpinning principle of a political society lies in the consent of individuals to unite and construct a cohesive social entity. The challenges encountered in the state of nature impel individuals to seek shelter within established ruling frameworks to protect their possessions. The origins of stable governments have been rooted in the consent of the governed. Individuals can only be subjected to public powers through their own consent. As such, it becomes imperative to delineate the parameters that signify an individual's consent to be governed by the authorities of a particular regime. This willingness to relinquish personal rights for the common good forms the basis for the development of legislative and executive powers, as well as the formation of governmental structures and societal frameworks. To be continued with ibid at 141, "the only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is

the natural rights which (with the consent of the governed) individuals entrusted to the government in exchange for their protection, property rights are essential. In Locke's words, "the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it".[146] Locke places significant emphasis on the concept of private property as a fundamental natural right, which governments are established to protect. Locke's argument begins with the idea that every individual has a right to their own body and, by extension, to the labour that it produces.

From this foundation, he argues that when one mixes their labour with resources from the common stock of nature, they create property, which becomes their own.[147] The principle that government exists primarily to protect private property[148] becomes the nature and protection of private property, hence, it forms the ground of his theory. Based on this ground, the principle of consent serves as a safeguard against tyranny and arbitrary rule, ensuring that government actions reflect the will and interests of the governed.[149] By establishing government through consent, individuals safeguard themselves against tyranny, arbitrary, oppressive rule and maintain the legitimacy of political authority. Consent forms the foundation of a just and accountable government that respects the rights and liberties of its citizens. The consent of the governed limits the authority of government. Rulers are entrusted with power only to the extent that they act in accordance with the will and interests of the people. Any attempt to exceed this authority or violate the terms of the social contract risks undermining the legitimacy of government and provoking resistance from the governed. As

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by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it". ibid at 142. "The beginning of politic society depends upon the consent of the individuals, to join into, and make one society". ibid at 146. "All peaceful beginnings of government have been laid in the consent of the people". ibid at 150. "Every man being, ..., naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent; it is to be considered, what shall be understood to be a sufficient declaration of a man's consent, to make him subject to the laws of any government. There is a common distinction of an express and a tacit consent". ibid at 152. "The inconveniencies that they (men) are therein exposed to (in the state of nature) ... make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing, to be exercised by such alone, as shall be appointed to it amongst them; and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we have the original right and rise of both the legislative and executive power, as well as of the governments and societies themselves". Ibid at 155.

[146] Ibid at 161.
[147] Ibid at 111.
[148] Ibid at 139.
[149] See ibid at 138-39, 146-47, 161-62, 177-80, 188-92.

such, in terms of the implications of Locke's theory for governance, he advocates for democratic governance structures where rulers are accountable to the people and govern with their consent.

B. Principles on Limited Government Intervention

Having discussed the significance of obtaining consent from the governed for legitimate authorities and the government's fundamental role in safeguarding the natural rights of its citizens, (specifically property rights) it is crucial to further explain Locke's advocacy for limited government intervention in private rights by introducing the principles of his theory, including negative liberty, minimal governmental role and checks and balances.

Locke promotes a notion of liberty known as negative liberty. Locke's principle of negative liberty emphasises freedom from external interference or coercion, enabling individuals to pursue their interests and objectives without arbitrary constraints. Accordingly, government intervention should be minimal.[150] In the principle of negative liberty, individuals should have the freedom to pursue their goals without unwarranted restrictions imposed by governmental authorities. In Locke's view, government intervention should be limited to the prevention of harm and the protection of individual rights rather than the imposition of limitations on personal behaviour. By advocating for a limited government role, it endorses restricting government functions to those necessary for maintaining social order and safeguarding natural rights.[151] An expansive or intrusive government could jeopardise individual liberty and property rights by potentially overstepping its boundaries and infringing upon citizens' freedoms. Furthermore, Locke underscores the importance of implementing a system of checks and balances within the government structure to prevent

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[150] In his work, Locke did not use the term negative liberty. However, the concept of negative liberty, which emphasizes freedom from interference or constraints, is reflected in Locke's view on natural rights and limitations of governmental authority. The purpose of law and government should be to protect individual freedoms rather than restrict them, which resonates with the principle of negative liberty "The end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, ... a liberty for every man to do what he lists ... but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own". ibid at 123-24.

[151] Also, "wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another". Ibid at 189.

abuses of power and establish accountability. He proposes the separation of powers among the legislative, executive and judicial branches to counteract the concentration of authority in any single entity, thereby safeguarding against tyranny and arbitrary rulings.[152] Individuals have the right to self-governance and decision-making without unwarranted government intrusion. Excessive government intervention in personal matters undermines individual autonomy. Government actions should respect the autonomy and agency of citizens, intervening only when necessary to uphold the rights and welfare of all members of society.

C. Examine Locke's Theory in the Securities Markets Regulations

Locke's principles advocating for limited government intervention and the protection of property rights hold relevance in the context of securities market regulation. His theory of limited government serves as a foundational framework for understanding the government's role in safeguarding individual rights and freedoms. The emphasis on the consent of the governed, constrained government involvement, and the separation of powers; retains significance in contemporary governance structures, including the regulation of securities markets. Regulatory authorities in this realm are responsible for upholding market integrity and transparency, safeguarding investors, and promoting fair and efficient markets, as stated in section 3.1. The authority in question primarily pertains to the SEC in this study.

[152] In Locke's work, he underscores that the legislative holds the highest power as it can establish laws and regulations for all members of society. People have the supreme power to replace or modify the legislative body if it neglects its fiduciary responsibilities. The governed maintains the authority to protect itself from the actions of any individual or group, including legislators. The executive power must be subordinate and accountable to the legislative branch to prevent the misuse of force, and therefore it is separated from the legislative power. The governed reserve the right to restore the legislative power in the scenario where any acts of force by the executive power without proper authority and against the governed occurs. "The legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators". Ibid at 166. "In all cases, whilst the government subsists, the legislative is the supreme power: for what can give laws to another, must needs be superior to him ... legislative ... right it has to make laws for all the parts, and for every member of the society, prescribing rules to their actions, and giving power of execution". Ibid. "The executive power, placed anywhere but in a person that has also a share in the legislative, is visibly subordinate and accountable to it, and may be at pleasure changed and displaced ... it is not the supreme executive power, that is exempt from subordination, but the supreme executive power vested in one". Ibid at 167. "Using force (of executive power) upon the people without authority, and contrary to the trust put in him that does so, is a state of war with the people, who have a right to reinstate their legislative in the exercise of their power". Ibid at 168.

Locke's protection of private property directly connects to the balance between individual rights and government intervention, particularly in the realm of securities regulation and disclosure laws. In relation to this research, the nature and protection of private property is particularly relevant when considering the boundaries of regulatory intervention. The principle that government exists primarily to protect private property resonates with the necessity of securities regulations, including disclosure regulations, which aim to ensure that the property rights of market participants (in this case, their investments) are protected from fraud, insider trading, and other market abuses. However, Locke's framework also suggests that such regulations must not overreach, infringing on the liberty or property rights of individuals beyond what is necessary to protect others' rights.

Locke's idea that private property is created through individual labour can be seen as a justification for limiting government intervention in market activities, unless such intervention is necessary to prevent harm. This aligns with the idea that disclosure regulations, whilst essential for fairness, should not impose unnecessary burdens that compromise the protection of property rights. For instance, if disclosure requirements are too extensive or vague, they could increase compliance costs, disproportionately affecting smaller firms or individual investors, in turn leading to a form of market inequality. Therefore, in considering Locke's concern for the protection of private property, my thesis can argue that disclosure regulation should be crafted carefully to safeguard investors' rights without imposing undue burdens that might infringe on the property rights Locke so strongly advocated for. This interpretation enhances the argument for balanced regulation, where fairness is achieved without overregulation, aligning with Locke's vision of a government that protects property and liberty within defined limits. Such views on private property contributes to a deeper understanding of how his theories can be applied to the regulatory landscape of the securities market, particularly in balancing regulatory goals with the protection of individual property rights.

On top of the protection of private property, Locke's theory posits that the legitimacy of public power derives from the consent of the governed. Individuals consent to governance in exchange for the protection of their natural rights, including property rights. Based on this premise, the SEC's interventions in securities markets are justified to prevent fraud, promote market integrity, and ensure investor confidence. Locke's emphasis on property rights aligns with the SEC's mission to safeguard investors' interests through the enforcement of regulations that prevent fraud, manipulation, and other unlawful activities in securities markets. Additionally, in line with Locke's social contract concept, individuals voluntarily enter into a social contract, delegating certain powers to the government to secure their rights. The principle of consent provides safeguards against tyranny and arbitrary rulings, ensuring that governmental actions reflect the will and interests of the governed. Simultaneously, the consent of the governed, limits the authority of the government and public power is only granted to rulers when they act in accordance with the will and interests of the people. Suppose the SEC's efforts are directed towards maintaining market integrity and efficiency by implementing regulations that foster fair competition, transparency, and equitable access to information, and these regulations do not exceed the necessary extent. In that scenario, the SEC's regulatory oversight of the securities market is normatively deemed reasonable according to Locke's theory. Conversely, should such regulation exceed the essential threshold – more specifically, exceed the boundaries of rights explicitly or implicitly relinquished by market participants to safeguard their fundamental property rights – then it would no longer be considered justified. And therefore not be supported by the market.

Locke's principles of limited government intervention also emphasise that individuals should have the freedom to pursue their goals without unnecessary restrictions imposed by government authorities. Government intervention should be limited to preventing harm and protecting individual rights. Excessive government interference could exceed its boundaries and infringe upon citizens' liberties, thereby jeopardising individual freedoms and property rights. In the context of securities market regulation, appropriate regulation should promote fairness and efficiency without unduly stifling market innovation and growth. Indeed, a reasonable pursuit of market transparency can mitigate information asymmetry risks. However, excessive pursuit of transparency in the securities market may lead to risks associated with the exposure of critical information, such as business secrets, potentially causing setbacks for market participants; this in turn could impede their development and hinder innovation and growth in a healthy market. In Locke's theory, government intervention should be limited to preventing harm and protecting individual rights. This principle applies to regulatory bodies, such as the SEC, when establishing regulations concerning information transparency. These regulatory bodies must ensure that their rules do not jeopardise the autonomy of market participants, including their operations, development, and innovative capabilities. The rules should strike a balance, effectively safeguarding the property rights of market participants without overstepping the scope of their explicit or implied consent. By adhering to this approach, regulatory bodies, exemplified by the SEC in securities markets, can uphold a stable and rational regulatory framework that promotes innovation and sustainable growth of the market participants.

Locke also underscores the significance of checks and balances in preventing the abuse of power. He advocates the separation of legislative and executive powers. The authority should adopt accountability measures to counteract the concentration of power in any single entity, and to avoid tyranny and arbitrary rulings. In this regard, the current management of the SEC may encounter certain challenges. Within the realm of regulating securities markets, the SEC possesses both rulemaking authority and enforcement powers, which raise concerns about potential conflicts of interest and abuses of power.[153] Despite its assertion of internal separation of functions, the mixture of enforcement and regulatory powers within a single agency raises unsettling issues of conflicts and policy choices. The dual role of the SEC as a rule-maker and enforcer could lead to regulatory capture, a situation in which the agency may be unduly influenced by industry interests or lack impartiality in enforcing regulations.[154] Concentrated regulatory power may also suppress innovation and competition in securities markets, hindering market efficiency and investor confidence.

In sum, basing regulatory frameworks on Locke's principles, policymakers can strive to strike a balance between regulatory oversight and individual freedoms, promoting fair and efficient securities markets that serve the interests of all market participants. By aligning with Locke's principles on property rights and the social contract, the SEC's regulatory actions can be deemed justified if they aim to uphold market fairness and transparency without overstepping the individual rights of its participants. Emphasising the limiting of government intervention and that public power stems from the consent of the governed, justifies the SEC's role in ensuring market integrity and maintaining investor confidence within the scope

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[153] See for example Harvey L Pitt and Karen L Shapiro, 'Securities Regulation by Enforcement: A Look Ahead at the Next Decade' (1990) 7 Yale Journal on Regulation 149-304.

[154] See George J. Stigler, 'The Theory of Economic Regulation' in Robert Dahl, Ian Shapiro, and Jose Antonio Cheibub (eds), *The Democracy Sourcebook* (MIT Press 2003) 393-97. Regulatory capture refers to a situation where a regulatory agency, which is supposed to act in the public interest, ends up being heavily influenced or controlled by the industry it is meant to regulate. This influence can lead to the regulatory agency making decisions that primarily benefit the industry rather than the public. It can manifest in various forms, such as industry insiders being appointed to key positions within the regulatory agency or the agency becoming overly reliant on industry expertise and perspectives. Powerful industry groups can influence the regulatory process. Regulatory capture can result in policies and regulations that favour the industry, limit competition, and hinder the efficient allocation of resources. It can also lead to ineffective oversight and enforcement, allowing the industry to operate with minimal accountability.

of the consent of the market participants. Moreover, Locke's advocation for minimal government interference to safeguard individual liberties applies to securities market regulation, where excessive regulatory measures could impede market growth and innovation. Locke's support for checks and balances to prevent power abuse underscores the importance of separating legislation and law enforcement functions within the regulatory bodies to mitigate conflicts of interest and maintain fairness. Concerns about the abuse of power highlight the need for a balanced regulatory approach to ensure market fairness, efficiency, integrity, and maximise market participants' interests within the confines of Locke's limited government theory.

3.2.1.2 Kant's Ethics as a Supplementary Theory to Locke on Restricting the Interference of Authority on Individual Behaviour

Immanuel Kant's ethical philosophy offers a unique perspective on the limitations of regulatory power, particularly concerning the interference of authority in personal behaviour. Kant places a significant emphasis on rationality as the foundation of moral action, whilst emphasising the inherent autonomy of individuals and the categorical imperative. This section explores how Kant's moral framework supplements the theory of Locke regarding the restriction of authority interference.

Kant argues that rational agents are capable of determining moral laws for themselves through the use of reason. This is essential to his concept of the categorical imperative, which is deeply rooted in the concept of rationality.[155] Kant asserts that rational beings are capable

[155] Supra note 30 408-414. "It is clear from what has been said that all moral concepts have their seat and origin completely a priori in reason, and indeed in the commonest human reason, just as in that which is speculative in the highest measure; that they cannot be abstracted from any empirical and hence merely contingent cognition; that their dignity to serve us as supreme practical principles lies just in this purity of their origin. … We must trace and distinctly present the practical rational faculty from its general rules of de- termination up to where there arises from it the concept of duty. … Only a rational being has the capacity to act according to the representation of laws, i.e. according to principles, or a will. … If, however, reason all by itself does not sufficiently determine the will, if it is also subject to subjective conditions (to certain incentives) that are not always in agreement with the objective ones; in a word, if the will does not in itself completely conform with reason (as is actually the case with human beings), then actions objectively recognized as necessary are subjectively contingent, and the determination of such a will, in conformity with objective laws, is necessitation; i.e. the relation of objective laws to a will not altogether good is represented as the determination of the will of a rational being by grounds of reason, to which this will is not, however, according to its nature necessarily obedient. … Practically good, however, is what determines the will by means of representations of reason, hence not from subjective causes, but objectively, i.e. from grounds that are valid for every rational being, as such." at 413. "that reason, in the consciousness of its dignity, regards the latter with contempt, and little by little can master them; in the place of which a mixed doctrine of morals, com- posed of incentives of feelings and inclinations and at the same time of rational concepts, must make the mind waver' between motives that can

of formulating universal laws based on reason, which underpins his moral philosophy. He explains that rationality is what allows individuals to determine their moral duties and act according to universal principles that can be applied consistently.[156] This rational capacity is what differentiates moral agents from beings driven solely by desires or inclinations. Rationality is key to understanding Kant's moral philosophy because it underpins the ability of individuals to act autonomously. For Kant, autonomy is not just freedom from external constraints, but the capacity of rational beings to legislate moral laws for themselves.[157] By applying reason, individuals can act autonomously, making choices that respect both their dignity and that of others. This idea directly influences Rawls, who integrates Kantian rationality into his own theory of justice. Rawls's concept of the original position and the veil of ignorance rely (section 3.2.2 below) on the assumption that individuals are rational agents capable of impartial reasoning. In the original position, parties use their rationality to determine principles of justice that they can accept universally, without knowing their own position in society. Kant's influence is central to Rawls's formulation of fairness as a guiding principle in creating just institutions.

Based on the role of rationality in Kant's ethical theory, his ethical framework begins with the principle of human dignity and categorical imperative. Kant's moral philosophy is grounded in the principle of human dignity, which holds that individuals possess inherent worth and should be treated with respect and consideration.[158] He articulates the categorical imperative as a universal moral law that commands individuals to act according to principles that could be universally applied without contradiction.[159] This principle underscores the

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be brought under no principle, that can lead only very contingently to what is good, but quite often also to what is evil." at 411. "If, then, there is no genuine supreme principle of morality that would not have to rest merely on pure reason independently of all experience, I believe it unnecessary even to ask whether it is a good thing to set forth these concepts in general … as they, along with the principles that belong to them." at 409. "Therefore imperatives are only formulae to express the relation of objective laws of willing as such to the subjective imperfection of the will of this or that rational being, e.g. of the human will." at 414.

[156] Ibid.

[157] Ibid.

[158] See supra note 30, 389-412. According to Kant, human beings possess inherent worth and dignity because they are rational beings capable of autonomous moral reasoning. This means that individuals have the capacity to make moral choices based on reason and universal principles rather than being driven solely by instinct or external influences. Kant argues that the moral worth of an action is determined by the intention behind it rather than the consequences. He emphasises the importance of acting in accordance with moral duty, which is derived from the rational capacity to recognise and adhere to universal moral laws. This emphasis on duty and moral law reflects Kant's belief in the inherent worth of individuals as rational beings capable of moral autonomy.

[159] See ibid 414-23. Individuals should only act in ways that they would be willing to see become a universal law, without leading to any logical contradictions. In other words, the principle behind an action should be such that if everyone followed it, there would be no contradiction or inconsistency. Together with the formulation of humanity (act in such a way that you treat humanity, whether in your own person or in the person of any other,

importance of ethical consistency and respect for individual autonomy. Central to Kant's ethical theory is the notion that individuals should be treated as ends in themselves, rather than mere means to an end.[160] This requires respecting their autonomy, agency, and moral worth in all interactions and decision-making processes. Additionally, Kant emphasises the importance of moral autonomy, wherein individuals can freely choose and act following rational moral principles, independent of external influences or coercion.[161]

Kant's ethical framework complements Locke's theory by providing a moral justification for limiting government intervention in personal behaviour. Both Kant and Locke emphasise the importance of protecting individual autonomy and rights against undue governmental interference. Both perspectives converge in their emphasis on respecting individual autonomy in governance and regulation. Regulatory actions undermining individuals' autonomy or treating them as mere means to an end are impermissible. Similarly, Kant's emphasis on treating individuals as ends in themselves aligns with Locke's advocacy for the protection of individual rights, including property rights and personal liberties. Kant's philosophy underscores the importance of respecting individuals' capacity for moral agency and rational decision-making. Kant's ethical framework provides a strong rationale for restricting the interference of authority in individual behaviour. Regulatory interventions must be justified by compelling public interests and respect for individual autonomy. However, when applying Kant's theory to specific fields, it is crucial to note that in situations necessitating regulatory intervention to prevent harm or promote social welfare, or in complex regulatory dilemmas

always at the same time as an end and never merely as a means to an end) and the formulation of autonomy (so act that your will can regard itself at the same time as making universal law through its maxims), the formulation of universal law forms the basis of Kant's moral philosophy, emphasising the importance of universalizability and consistency in ethical decision-making. "The imperative thus says which action possible by me would be good, and represents the practical rule in relation to a will that does not at once do an action just because it is good, partly because the subject does not always know that it is good, partly because, even if he knew this, his maxims could still be opposed to the objective principles of a practical reason". Ibid at 414. "There is therefore only a single categorical imperative, and it is this: act only according to that maxim through which you can at the same time will that it become a universal law". Ibid at 421.

[160] Every rational being should be respected and valued as an end in itself and not used merely for the benefit of others or for instrumental purposes. "For all rational beings stand under the law that each of them is to treat itself and all others never merely as a means, but always at the same time as an end in itself". Ibid at 432.

[161] See ibid 435-44. Moral autonomy is the characteristic of the will by which it is a law to itself, independent of external influences. This means that individuals have the ability to make moral choices based on rational principles rather than being driven by external factors such as fear or inclination. The principle of autonomy suggests that individuals should act in a way that they would want everyone else to act in similar circumstances, thereby making their choices based on rational and universal moral principles. "Autonomy of the will is the characteristic of the will by which it is a law to itself (independently of any characteristic of the objects of willing). The principle of autonomy is thus: not to choose in any other way than that the maxims of one's choice are also comprised as universal law in the same willing. ... For thereby we find that its principle must be a categorical imperative, and that it commands neither more nor less than just this autonomy". Ibid at 440.

involving competing values and interests, Kant’s theory exhibits limitations in effectively balancing individual autonomy and the public interest. Moreover, it may not offer practical guidance for navigating the complexities of decision-making in such circumstances.

Applying Kant’s theory to securities market regulation, particularly concerning disclosure requirements, involves balancing the need for transparency and market participants’ protection with respect for individual autonomy. Kant’s emphasis on treating individuals as ends in themselves and respecting their autonomy provides insights into the ethical considerations underlying disclosure regulations in securities markets.

When applied to securities regulation, Kant’s focus on rationality and autonomy suggests that regulators must ensure that rules respect the rational agency of both investors and companies. This raises the question of whether companies themselves possess rational agency, which is an essential consideration in justifying their ethical obligations. While Kant attributes agency to individuals and companies as collective entities, they exhibit rational agency through ethical governance and reasoned decision-making. Therefore, disclosure obligations are not merely regulatory constraints but a reflection of companies’ duty to treat stakeholders as ends in themselves. By ensuring transparency, proper disclosure preserves autonomy while promoting market fairness, aligning with Rawls’s theory. However, respecting rational agency extends beyond imposing disclosure requirements. It also necessitates a regulatory approach that avoids overburdening market participants. Disclosure regulations should not overwhelm market participants with excessive or unnecessary requirements that would diminish their ability to make informed decisions autonomously. Rather, regulations must balance transparency with the recognition of participants as rational agents, capable of understanding and acting on the information provided. This approach ties back to the ethical imperative to respect the moral worth and rational capacity of individuals, aligning with both Kant ethics and Rawls’s justice as fairness. Thus, integrating the role of rationality in Kant’s philosophy not only reinforces his ethical framework, but also highlights its influence on Rawls’s theory, providing a more comprehensive basis for understanding the ethical limits of regulatory authority in financial markets.

On top of the rationality, Kant’s theory primarily emphasises individual autonomy, asserting that individuals should have the freedom to make rational decisions based on complete and accurate information. Within the realm of securities markets, this principle highlights the significance of ensuring that investors are equipped with comprehensive and unbiased information to facilitate well-informed investment choices. Disclosure regulations are critical in safeguarding investors' autonomy by compelling companies to furnish timely and precise information regarding their financial status, operations and risks. This practice empowers investors to evaluate the potential risks and rewards, enabling decisions that align with their preferences and values. Moreover, disclosure activities have the inherent function of preventing fraud, market manipulation and information imbalances, thereby upholding investors' interests and fostering market integrity. By mandating companies to disclose material information influencing investment choices, these regulations strive to cultivate trust and confidence in the securities markets. This approach reflects Kant's principle of valuing individuals as ends in themselves through the promotion of fair and transparent market practices whilst respecting their rights.

Furthermore, Kant's theory underscores the significance of respecting the limits of regulatory intervention to prevent unwarranted encroachments on individual autonomy. Regulators are tasked with striking a delicate balance between mandating disclosure and the potential burdens imposed on companies. Excessive disclosure requirements might entail unnecessary costs for issuers, deter capital formation and impede market efficiency without proportional benefits for investors. Regulatory excess may also restrict individual freedom and impose undue hardships on market participants. This generates the need to justify regulatory measures by their positive impact on market efficiency and its participants' protection with a clarification for their necessity. Lastly, in terms of the regulatory bodies' enforcement power, authorities are responsible for ensuring compliance and addressing fraudulent conduct. Law enforcement must adhere to fairness and accountability to uphold the ethical standards inherent in the regulatory framework.

In conclusion, Kant's theory, which concentrates on the principle of treating individuals as ends in themselves and the categorical imperative, offers valuable insights into the limitations of regulatory power, particularly concerning individual behaviour regulation. Kant's emphasis on the rationality, moral autonomy and respect for individual rights provides a moral rationale for restricting authority interference in personal spheres of life. As a supplementary theory to Locke, Kant's theory enriches the understanding of the ethical foundations of governance and regulation. His role of rationality is deeply associated with the governed peoples' capability of decision-making whilst also influencing other aspects of regulatory concerns, such as Rawls's consideration of fairness. Moreover, Kant's principles provide ethical considerations for disclosure regulations in securities markets by emphasising individual autonomy, investor protection and the limits of regulatory intervention. Regulators must carefully consider the moral implications of disclosure regulations, ensuring that they promote fair and transparent market practices whilst respecting the autonomy and rights of market participants.

3.2.1.3 Mill's Harm Principle: Limiting Public Power in Private Affairs as a Supplementary Theory to Locke on Restricting Authority Interference

John Stuart Mill's harm principle, as laid out in his work *On Liberty* (1977)[162], provides valuable insights for understanding the limitations of public power in regulating private affairs. Mill's harm principle is closely associated with other concepts, such as individual autonomy and limits of government interference. The alignment of these principles provides grounding for Mill's theory to supplement the theoretical framework of regulatory bodies' necessity, and the boundaries that have been constructed upon the theories of Locke and Kant, examined in the previous sections of this chapter. Based on the established theoretical framework, Mill's harm principle emphasises individual liberty and the importance of limiting public power intervention in personal affairs unless there is a clear risk of harm to others. This section will discuss Mill's theory and address how Mill's principle supplements the theory of Locke regarding the restriction of authority interference in individual behaviours. It then applies Mill's theory to the regulation of securities markets, including considerations of the necessity of disclosure regulations and rational limits.

Mill's harm principle asserts that individuals should have the maximum possible freedom to pursue their interests and lifestyles, provided that they do not harm others. This principle prioritises individual autonomy and freedom of choice in personal matters.[163] It aligns with

[162] See supra note 31.
[163] Mill argues for the significant role of individual autonomy in personal matters and the boundaries of societal intervention. He elucidates the application of the harm principle to individual autonomy and freedom of choice. Emphasising the concept of individuality, Mill highlights the crucial aspect of personal autonomy in decision-making. When making choices that do not harm others, individuals bear a moral responsibility and autonomy in their actions. "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it". Ibid at 226. "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which

Locke's emphasis on protecting individual rights, including property rights and personal liberties, against unjustified interference by governmental authorities or other individuals. The central assertion of the harm principle is to prevent harm to others, emphasising that the restriction of individual liberties is only justified when it is necessary to protect others from harm.[164] The principle advocates for minimal interference by society or the government in individuals' activities, intervening only when there is direct harm to others, thereby setting clear limits on authority. In terms of such limits on public power intervening in private affairs, Mill argues that while damage or potential damage to the interests of others may justify society's intervention, it is not an automatic justification for such interference; individuals may inadvertently harm others while pursuing legitimate goals due to existing social institutions.[165] Mill acknowledges that certain conflicts of interest are inevitable and can result from competition or societal structures. Society should only intervene when individuals use illegitimate means such as fraud, treachery or force, to achieve their objectives.[166] Individuals should generally be free to pursue their goals without immunity from the natural consequences of competition to serve the general interest.

Meanwhile, as Feinberg points out in his refinement of Mill's harm principle, the concept of "harm" is often ambiguous and imprecise.[167] Feinberg critiques the broad interpretations of harm, narrowing the focus specifically to the harm that affects one's welfare interest, particularly in the sense of someone's advantage or benefit, which is crucial for assessing

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make it a living thing". Ibid at 263. "Over himself, over his own body and mind, the individual is sovereign". Ibid at 224.

[164] "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control... That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection". Ibid at 223.

[165] "In the first place, it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. Such oppositions of interest between individuals often arise from bad social institutions, but are unavoidable while those institutions last; and some would be unavoidable under any institutions. Whoever succeeds in an overcrowded profession, or in a competitive examination; whoever is preferred to another in any contest for an object which both desire, reaps benefit from the loss of others, from their wasted exertion and their disappointment. But it is, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering; and feels called on to interfere, only when means of success have been employed which it is contrary to the general interest to perminamely, fraud or treachery, and force". Ibid at 292-93.

[166] Ibid.

[167] Joel Feinberg, *Harm to Others* (Oxford University Press 1984).

whether government actions (like regulation) are justified.[168] This more specific understanding is helpful when assessing whether government actions, such as regulatory measures, are justified. By concentrating on harm that affects significant welfare interests, Feinberg provides a clearer basis for determining when regulatory intervention is appropriate and necessary.

Mill’s harm principle further complements Locke’s limited government theory by offering a moral foundation for restricting government interference. Both theories prioritise individual autonomy and advocate for a restrained use of public power. While Locke emphasises the protection of individual rights and the common good, Mill’s harm principle focuses specifically on preventing harm to others as the only valid justification for regulatory intervention. This principle provides an objective criterion for evaluating the legitimacy of governmental actions, ensuring that regulatory measures are not enacted merely to impose conformity or societal preferences, but are based on the necessity of preventing genuine harm. Together, these theories establish a solid foundation for understanding the limits of regulatory authority, particularly in fields such as securities regulation. They underscore the importance of balancing public power with respect for individual autonomy, ensuring that regulatory interventions are justified, targeted and aligned with the goal of preventing harm rather than excessively infringing on private rights.

In the context of securities market regulation, Mill’s harm principle serves as a key ethical framework for justifying regulatory interventions aimed at preventing harm to market participants. Disclosure regulations, for instance, should be focused on preventing significant harms such as fraud, misinformation or market manipulation that could undermine the integrity of the market and disadvantage investors. According to Mill's principle, these regulations are necessary to maintain transparency, fairness and trust in securities markets by ensuring that material information relevant to investment decisions is disclosed. Such information directly impacts investors’ interests and risk profiles, helping them to make informed decisions and protecting them from harm.

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[168] Ibid. Among the categorise of interests, it is the advantage or benefit of someone that is most relevant to understanding harm in this context. Feinberg highlights that not every setback to an interest qualifies as harm that necessitates legal intervention. He categorizes interests into various types, such as passing wants (which are too trivial for legal protection) versus welfare interests (which are fundamental and merit legal safeguards). Regarding Feinberg’s supplement to Mill’s harm principle, as well as other more semantic interests, see also Bruce Wardhaugh, ‘A Normative Approach to the Criminalisation of Cartel Activity’ (2012) 32(3) Legal Studies 369-95.

However, Mill's harm principle also advocates for rational limits on regulatory intervention. While disclosure regulations are necessary to protect investors, the requirements should be proportionate to the potential harm they seek to prevent. Regulations that impose excessive burdens on issuers or market participants without providing meaningful protection against real risks can create inefficiencies and increase costs. This can particularly affect smaller firms or less-resourced market participants thus leading to disadvantaged consequences, such as widening the gap between retail investors and institutional investors. Therefore, regulators must carefully assess the materiality and relevance of the information being mandated for disclosure. Information that is not crucial to investors' decision-making processes should not be required, as it imposes unnecessary burdens without offering real benefits to investor protection.

Feinberg's critique of Mill's harm principle offers additional insights, particularly regarding the need for specificity in identifying what constitutes harm. In securities regulation, this means focusing on preventing harms that have a clear and direct impact on investors' financial interests. For example, failing to disclose material information that affects stock prices would be a violation of the harm principle, as it compromises investors' ability to safeguard their financial interests. Applying Mill's principle requires a balanced approach: regulations should prevent significant harms but also avoid imposing excessive burdens that could stifle competition or create new forms of market inequality. Mill's principle is therefore essential in guiding the balance between necessary regulatory interventions and the avoidance of regulatory overreach. The focus should be on identifying risks that pose tangible harms to market participants, such as those that distort their ability to make informed decisions or undermine market confidence, and addressing these risks through proportionate regulations. Imposing arbitrary or excessive disclosure requirements risks creating inefficiencies that could inadvertently harm the market.

In summary, in the field of securities regulation, Locke's theory of limited government, Kant's notion of individual dignity and absolute commands, and Mill's harm principle collectively establish clear and mutually supportive boundaries for disclosure rules. Firstly, according to Locke's theory of limited government, the power of the government derives from the consent of the governed, with its primary purpose being to protect individual rights – particularly property rights. This means that regulation should avoid excessive interference with the freedom of market participants unless such intervention is necessary to ensure market fairness and investor protection. Kant's notion of absolute commands further emphasizes that individuals should be treated as ends in themselves, requiring regulators to respect the autonomy and rational decision-making abilities of market participants when establishing disclosure rules. Disclosure obligations should not merely serve the needs of regulatory authorities but should embody respect for each market participant, ensuring they have equal understanding of the true value of information to make rational choices. Simultaneously, Mill's harm principle provides a more operational boundary for regulation, stating that government intervention should only occur when market behaviours could cause substantial harm to others. In the context of disclosure rules, this means that the focus of regulation should be on preventing harm to investors caused by information asymmetry and market manipulation, among other factors, rather than imposing heavy compliance costs in pursuit of excessive transparency.

Therefore, these three theories work together to construct a balanced framework for disclosure rules: Locke limits the scope of government power to ensure that regulation does not become overly intrusive; Kant stresses the importance of respecting individual rationality and dignity within this framework; Mill specifically points out that disclosure rules should expand only when market behaviours may cause harm to others. As a result, these theories complement each other, ensuring that disclosure rules can promote fairness without unduly interfering with market operations.

3.2.2 Constructing a Normative Standard of Market Fairness

In Rawls's hypothetical social ideal, fairness is not merely a distributive mechanism, but serves as the means to realize justice through the allocation of rights, duties, and the division of advantages from social cooperation.[169] Consequently, the concept of justice, through the

[169] Supra note 26. Rawls emphasised on a standpoint that every conception of theories associated with social institution and public welfare should requires an initial situation, from which and through interpretations towards such situation, the establishment of a preferred solution will be able to explain its reasonableness. In line with such standpoint, he invoked Kant's mark of the hypothetical nature of the original agreement to make the point. ("The basic law, which can come only from the general, united will of the people, is called the original contract". Immanuel Kant, 'On the Common Saying: 'This May Be True in Theory but it Does not Apply in Practice' in Ricardo Blaug and John Schwarzmantel (eds), *Democracy: A Reader* (2nd edn, Columbia University Press 2016)) Logically, if the prerequisite of unity, which is the independence of the society members is not to be perfectly achieved, the necessitates of a general vote then would not be fulfilled, as freedom and equality are not presented adequately. However, in practice, such imperfectness and independence

application of principles selected to ensure fairness, will ultimately manifest in the structure and operation of social institutions. With this understanding of justice and its role in society, this section can now analyse how this fairness is constructed, specifically through Rawls's framework of justice as fairness. The foundation of this construction lies in Rawls's examination of the original position, which draws from the traditional social contract theory. Rawls explains that "the principles of justice for the basic structure of society are the object of the original agreement. These principles regulate all subsequent agreements"[170]. This foundational agreement, which Rawls refers to as justice as fairness, echoes the traditional approach of legitimizing justice theories through an initial position.[171] In Rawls's framework, fairness in the original agreement is crucial, as it ensures that all future agreements are built upon a fair foundation. This initial fairness is the conduit through which justice is realized within social institutions, enabling the equitable distribution of rights, duties and social advantages. Fairness in this context also aligns with the pursuit of equality. In Rawls's thought experiment, equality is not merely an abstract virtue but a practical necessity that emerges through the selection of principles that ensure fairness.[172] This fairness bridges the original position and the realization of justice within social institutions. The interplay between justice and fairness thus reinforces the role of justice as a guiding force in different societal institutions, where each institution's function complements the broader social structure.

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of free will with compromises are reality. Let alone the absolute "general, united will of the people". Therefore, the original contract is after all an ideal original position in theory. However, the hypothetical nature of such position does not wear down the truthfulness nor the justice of a theory. On the contrary, such disclaimer only makes the theory more comprehensive in its design and more cautious in its adoption into practice.

[170] Supra note 26 at 11.

[171] "We may conjecture that, for each traditional of conception of justice, there exists an interpretation of the initial situation in which its principles are preferred solution". Supra note 26 at 121.

[172] Rawls pointed out that the fairness of the principles of justice should be dated back to the fairness of the initial status quo. Fairness involves a matter of a state rather than a pure sense of feeling. Rawls also distinguished the nature of justice in his work when discussing the zest of pursuing goodness (see supra note 26 at pp395-445, 479-489, 504-512). However, his standpoint was to identify the sense of justice and the feeling of love, and the goal was ultimately directed to the conception of good. In terms of the development of the congruence through analogizing between love (feeling) and justice (sense), see also Susan Mendus, 'The Importance of Love in Rawls's Theory of Justice' (1999) 29(1) British Journal of Political Science pp. 57-75. As a feeling, love can serve as a comparable guidance principle of motivation, just as the function of the sense of justice. However, when the analogy comes to the concentration of fairness, distinguishing its nature and rendering it to be a state rather than a feeling secured that neither those who argued for nor against the comprehensiveness of the society member's pursuing of goodness (however much weight it carries in satisfying the conception of justice) could then invoke the relativity of fairness to attack the theoretical accessibility of fairness. The realization of fairness is then no longer a "mask for self-interest", as cynics criticized, but a stabilized status to be expected. See for example Peter Corning, 'A Review of the Fair Society: The Science of Human Nature and the Pursuit of Social Justice' (The Montréal Review, June 2011) <https://www.themontrealreview.com/2009/fairness-and-the-social-contract.php> accessed Dec 2022.

A. The Original Position

Unlike theories that might reduce fairness to a subjective feeling, Rawls posits that fairness represents a stable and expected condition. He asserts that the fairness of any subsequent principles of justice must trace back to the fairness of the original position itself. In other words, the fairness of the original agreement ensures the fairness of all ensuing agreements.[173] Therefore, establishing a fair initial situation is imperative. In *A Theory of Justice* (1973), Rawls outlines four key conditions that define the original position: the veil of ignorance, the formal constraints of the concept of right, the rationality of the contracting parties and the circumstances of justice.[174] These conditions work in tandem to create a fair initial situation. To ensure fairness in this context, it is essential to explore each of these four conditions. The veil of ignorance, in particular, plays a critical role by eliminating any advantages or disadvantages that parties may have when selecting principles.[175] This results in all parties being similarly situated in a position where a fair agreement can be reached. The contracting parties, sheltered from specific knowledge yet exposed to common considerations, are thus able to agree upon principles that ensure fairness. This foundational fairness not only guarantees equal rights and duties, but also provides the basis for social cooperation, ensuring that the advantages of cooperation are divided justly.

a. The veil of ignorance

To begin with, the fundamental requirement of the veil of ignorance is that the involved parties are unaware of the identities they represent. As a matter of fact, they know almost nothing about their own society politically, economically etc. Neither do they know anything about their place in society, their class position nor social status. They are unaware of their race, ethnicity, gender, age or natural contingents. These parties, who are unaware of their own identities, thus exhibit a disinterest in one another. In other words, each party is motivated solely by self-interest and certain ignorance of other's characteristics, without any particular desire to help or harm the other representatives. This creates a consensus among them that they are neither entirely benevolent nor malevolent. [176] It is to the parties' awareness that they live in a society that "subject to the circumstances of justice and

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[173] Supra note 26 at 17-22.
[174] Supra note 26 at 118-194.
[175] Supra note 26 at 136-142.
[176] See supra note 26 at 142-150.

whatever it implies"[177]. Therefore, to achieve what they want in such a society, they ought to adopt effective means to achieve their ends. This feature of veil of ignorance laid the foundation of the requirement of rationality of the parties in the original position that will be explored in the following writings. This veil also sheltered parties' knowledge of their "fortune in the distribution of natural assets and abilities" [178], their "intelligence and strength, and the like" [179]. Furthermore, the fact that representatives in the original position do not know which generation they belong to means they are unaware of whether previous generations have saved resources or not. This uncertainty might prevent the veil of ignorance from "securing the desired result"[180]. Therefore, the veil ensured that the representatives' identities were indistinguishable in front of the choice of principles[181] and, thus, this veil grounded all parties as equal because they are indistinguishable in the initial situation.

The concealing feature of the veil of ignorance prevents anyone from crafting rules that would unfairly benefit themselves. It is worth mentioning that the knowledge covered up by the veil of ignorance also includes one's "conception of the good, the particulars of his rational plan of life" [182], and "even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism" [183]. While Rawls builds on Kant's idea (which will be addressed in subsection c below) of rationality and universalizability, his focus shifts to rational agents in the original position seeking to maximise primary goods, moderated by the veil of ignorance. Although the veil covers personal life goals and tendencies, such as risk aversion, it does not erase the general understanding of justice or a basic theory of the good. This conception of fairness forms the public foundation for social cooperation. [184] Crucially, upholding this conception requires individuals to commit to its principles, even if doing so involves personal sacrifice or goes against their immediate interests. This commitment ensures that fairness prevails, benefiting all members of society, including those least advantaged. The general knowledge retained behind the veil, such as common facts and

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[177] See supra note 26 at 137.
[178] Ibid, including their income and wealth.
[179] Ibid.
[180] See supra note 26 at 140. "Since no one knows to which generation he belongs, the question is viewed from the standpoint of each and a fair accommodation is expressed by the principle adopted. All generations are virtually represented in the original position, since the same principle would always be chosen". Ibid at 288.
[181] "What seems fair to persons in the original position defines justice in this instance as in others". Supra note 26 at 289.
[182] Supra note 177.
[183] Ibid.
[184] Supra note 26 at 142.

scientific understanding, informs rational decisions without undermining fairness. This safeguards the impartiality needed to select just principles, ensuring that no one can exploit social or natural circumstances for personal gain.

The veil of ignorance, and the conditions that parties find themselves in whilst under it, are critical to understanding Rawls's conception of fairness. The essential element here is ignorance of their contingent features which they can use in bargaining. With the veil of ignorance that covers any contingencies of the parties in the original position, no one could use their contingencies to construct rules to their own advantage. Thus, the veil of ignorance is the foundation for analysing the fairness of any set of legal regimes. Chapter Five of this research will identify several contingencies that affect market participants' bargains. It will further analyse how such contingencies impact the achievement of market fairness.

b. The formal constraints of the concept of right

The original position imposes certain constraints on the concept of rights within the initial assumptions to secure a fair original agreement. A conception of rights can be understood as a set of principles, which must adhere to these constraints to be regarded as fair. These conditions define the role of the principles of rights in "adjusting the claims that individuals make on their institutions and one another" [185].

The first and second formal conditions are the generality and the universality requirements. The respect of these two constraints is distinct. The condition of generality justified its naturalness through its capability of "serving as a public charter of a well-ordered society in perpetuity"[186], which requests that the understanding of the principles should disregard the character of generations, the contingent particulars and any "reference to individuals of associations"[187]. This constrain of generality does not cancel out the condition of universality, nor should it be incorporated into the latter. In the case where principles are constructed for a group of representatives whose characters are distinguished from others, the principles must, in application, be set universally. Therefore, everyone in this group can not only understand

[185] Supra note 26 at 131.
[186] Ibid
[187] Supra note 26 at 132.

these principles but also use them at their discretion.[188] With the conditions of generality and universality, the principles framed later apply to everyone behind the veil of ignorance once the veil is lifted. Besides, general awareness of these parties' universal acceptance "should have desirable effects and support the stability of social cooperation".[189] Consequently, in order to achieve such "general awareness", the third condition is publicity.

The condition of publicity advocates that the principles will become public knowledge. Compared with the condition of universality, the condition of publicity concerns more from a contractarian perspective. This constrain of right emerged from its extensive spread and explicit recognition. With the condition of universality, each representative may understand and use principles in his deliberation. However, this universality fosters an awareness of shared recognition among all representatives. The universal condition may further involve the appraisement of the principles constructed by the representatives in the original position. To the concerns of the publicity condition, it cares more of the evaluation of "conceptions of justice as publicly acknowledged and fully effective moral constitutions of social life".[190] The public condition asks not only the representative but also others to behave in accordance with the later framed principles. Such commonwealth[191] constitutes and, in turn, contributes to the contractarian standpoint of Rawls's theory.

The fourth condition is ordering. This is a constrain of the concept of right in the scenario where there are conflict claims in terms of a conception of right. Achieving the end where principles resolve all claims, including the conflicting demands, requires a complete conception of justice which contains "all the claims that can arise"[192]. To avoid the dominance of force and cunning, it is necessary to impose an ordering to adjust competing claims. It may be difficult to determine a satisfactory ordering, but those "trials by combat"

[188] Rawls advocated that the conditional rationality should be ruled out from the application of universal condition. "Moreover, a principle is ruled out if it would be self-contradictory, or self-defeating, for everyone to act upon it. Similarly, should a principle be reasonable to follow only when others conform to a different one, it is also inadmissible". Ibid. He further emphasized that "Principles are to be chosen in view of the consequences of everyone's complying with them". Ibid.
[189] Supra note 26 at 133.
[190] Ibid.
[191] Here, Rawls extended the condition of publicity to Kant's doctrine. "The publicity condition is clearly implicit in Kant's doctrine of the categorical imperative insofar as it requires us to act in accordance with principles". ibid. "He thought of this kingdom as an ethical commonwealth, as it were, which has such moral principles for its public charter". ibid. A rational being, he continues, will be willing to "enact as law for a kingdom of ends". Ibid.
[192] Supra note 26 at 134.

that lead back to coercion is surely not a solution. Therefore, apart from transitiveness, it is also important to avoid "threat advantage" in constructing a desirable ordering. The ordering as such eliminates egoism in theory, as its nature of settling competing claims is against that of each advances the ends to his own interest.

The final condition is finality, which indicates that there is no appeal to higher principles. This determinative conclusion of these principles came from the arrangement and respect of social institutions raised from the conception of justice, which is a common acceptance and awareness of the whole theory. The conclusiveness of the final scheme has already taken the relevant concerns and their weights into consideration.[193] Therefore, representatives cannot claim an override of these principles out of their own interest as the veil being lifted, as their interest has been duly considered behind the veil in the original position.

c. The rationality of the contracting parties (and Kant's influence on Rawls)

As previously mentioned above in subsection 3.2.1.2, Kant's Ethics as a Supplementary Theory to Locke on Restricting the Interference of Authority on Individual Behaviour, Kant's influence on Rawls, particularly regarding the role of rationality in ethical theory, is profound. Kant asserts that rational agents are bound by moral laws derived from reason itself, encapsulated in his formulation of the categorical imperative.[194] Rationality, for Kant, is central to the moral decision-making process, where individuals are expected to act according to universalizable maxims that treat humanity as an end in itself and never merely as a means. This conception of rationality strongly influenced Rawls's own theoretical construction of justice as fairness, particularly in his description of the original position.

In Rawls's fairness theory, rationality is employed as a fundamental feature in the original position. Rational agents behind the veil of ignorance are tasked with selecting principles of justice that would govern a fair society.[195] Here, Rawls builds on Kant's notion that rational agents are capable of autonomous, impartial decision-making. However, Rawls diverges from Kant by focusing on self-interest within the confines of the original position, where rational

[193] See supra note 26 at 135.
[194] Supra note 152, note 154 and note 155.
[195] Supra note 26 at 124-125.

agents are primarily concerned with securing more primary goods rather than acting from a strict moral duty, as in Kant's ethical framework. The self-interested rationality in Rawls's framework is nevertheless moderated by the veil of ignorance, which ensures impartiality, much like Kant's demand for universalizability in ethical decision-making. Rawls's integration of Kantian rationality allows him to frame the original position as a hypothetical construct where rational individuals, stripped of their personal biases, would choose just principles for all.

Apart from one exception, the original position that Rawls established in serving his theory of justice as fairness adopts the conception of rationality. In general, a rational person behind the veil of ignorance has certain features set as default when constructing the principles to achieve the fair end. This rational person is self-interest. Meanwhile, "in the usual way, a rational person is thought to have a coherent set of preferences between the options open to him".[196] The characters of self-interest and coherent preferences enable him to advance his own interest to his best capacity.

Previously in the paragraph assessing the veil of ignorance, it has been mentioned that the veil covered up one's specific knowledge of his conception of good. There are no details regarding what a particular representative considers a rational plan of life that realize his interpretation of good. Collectively however, even with a thin theory of good, the conception of rationality ensures these representatives in the original position to prefer "more primary social goods rather than less"[197]. From a rational person's perspective, the discontent in the distribution of rights and duties, as well as the dividing of advantages from social cooperation, is not from scarcity but from inequality. Hence, Rawls's exception of the general conception of rationality is that he presumes that a rational person does not suffer from envy. This assumption is consistent with the disinterest feature mentioned previously at the beginning of subsection a. The parties behind the veil are motivated merely by their own interests and they have no particular interest in helping or hurting other representatives.[198] This indifference ensured that envy will then result in everyone's disadvantages because

[196] Supra note 26 at 143. A rational person will also rank his set of coherent preferences in carrying these options out. "He ranks these options according to how well they further his purposes. He follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed". Ibid.
[197] Supra note 26 at 142. See also supra note 177.
[198] See supra note 170.

parties do not know their status in the fair society in the original position and, given that the principles are subject to the condition of finality, they cannot alter any once the veil is lifted.

A final requirement of the rational person standard is that this person ought to respect the strains of commitment. A rational person cannot "enter into agreements they know they cannot keep"[199]. According to the condition of publicity examined in subsection b, the principles are spread to everyone's recognition. Besides, "the parties are presumed to be capable of a sense of justice".[200] It is reasonable to deduce that a rational person equipped with a sense of justice should expect others to abide by the agreement if it has already become a public knowledge. Collectively, these rational persons' respect of the strains of commitment in turn contributes to the main grounds of publicity and finality in achieving the justice of the society.[201]

d. The circumstances of justice

In the original position, the circumstances of justice were described as "the normal conditions under which human cooperation is both possible and necessary"[202]. In a mutually beneficial social cooperation, the setup for these circumstances makes it possible to achieve an alignment of interests that allows everyone in the society with a better off, despite the existence of conflict claims of their interest between individuals. The role of justice is defined through the arrangement of the distribution of advantages through social cooperation and the division of rights and duty. To satisfy a better off where each rational self-interest representative is able to obtain a preferrable larger primary goods rather than less, two premises respectively from the subjective and objective perspectives are required.

Subjectively speaking, in the original position, the veil of ignorance ensured the commonality among representatives. Physical conditions, mental conditions, race, gender, social status, natural asset contingents were all covered up. In spite of the fact that collaborating parties' true identities and arrangement of their respective rational plan towards their separate conception of good behind the veil may vary, social cooperation turns out to be possible and

[199] Supra note 26 at 145. See also supra note 26 at 176 where Rawls reaffirm the strict compliance under the concept of contract: "they cannot enter into agreements that may have consequences they cannot accept".
[200] Ibid.
[201] See supra note 26 at 175-178.
[202] Supra note 26 at 126.

necessary as it brings mutual advantages. In the objective standpoint, Rawls supplemented Hume's account of the constellation of conditions[203] in realizing justice where a society in which not all the needs of all the people are supplied and thus there is still a need calling for justice to consequently meet the needs of people which are not supplied in any other way.[204] His supplements were simplified of two conditions. One is a description of the extent of scarcity of the material resources in a society. Parties do not live in the Garden of Eden, where rules are unnecessary. Nor do these parties live in conditions of extreme scarcity, where no matter what social rules are applied, there are insufficient ways to get around. The moderate scarcity is the condition of the context of justice these parties live in. In the context of justice, material resources are objectively neither extremely scarce nor abundant. There is enough to get around, but not enough for each to reach their furthest interest.

The other one is a reiteration on a mutual disinterest among different representatives, which referring back to subsection a (veil of ignorance) and subsection c in the description of the exceptional assumption of ruling out envy from general conceptions of rational person. Parties in the original position take no interest in one another's interests. They are neither entirely benevolent nor malevolent. They are not interested in benefiting or hurting others' interests; thus, there formed an initial situation in which mutually disinterested parties "put forward conflicting claims to the division of social advantages under conditions of moderate scarcity"[205]. During this process, the circumstances of justice were obtained.

In conclusion, rather than having society members agree to enter a given society[206] nor adopt a given form of government[207], Rawls advocated the contract view expecting certain principles bargained from fair position of the parties to be imposed in a well-ordered society.[208] In the original position, parties behind a veil of ignorance have the same rights to choose principles to carry out a fair society. The original agreement gives parties in the initial position a fair platform to accomplish these same rights in choosing the principle. The veil of ignorance shielded any contingencies that parties could use to bargain for any advantages.

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[203] Rawls describe these conditions as "now this constellation of conditions I shall refer to as the circumstances of justice". Supra note 26 at 127.
[204] David Hume, *A Treatise of Human Nature* (David Fate Norton, Mary J. Norton eds, Oxford University Press 2007) pp 307-322.
[205] Supra note 26 at 128.
[206] Which nature has already contained an unequal voice of bargaining.
[207] See supra note 26 at 12-14.
[208] See supra note 26 at 14-15 and 453-462.

With these contingencies, the better-off and worse-off representatives have different interpretations of a fair end. Without the awareness of each other's contingencies, the pursuit of goodness can then be neutralised from a fair starting point.[209] This fair platform also eliminated coercion and the dominance of force and cunning, for one of the constraints of the conception of rights is to impose an order to adjust competing claims. Accordingly, parties in a fair platform to choose their desirable principles knew that there is no egoism as claims against other's interests will end in their own disadvantage. When the original agreement is counted as fair, and all the above conditions are considered satisfied, rational representatives are ready to select their principles of justice.[210][211] In choosing the principles, rules have to be made before the veil is lifted to ensure the original agreement maintains its effects on the parties. On the bridge from the original position to the choices of principles, "it is reasonable to suppose that the parties in the original position are equal and all have the same rights in the procedure of choosing principles, each can make proposals, submit reasons for their acceptance and so on".[212]

It is important to note that the equality of the parties in the original position includes the finality of their choices. This illustrates that whilst access to the original location is always available, it can only be entered once. It is consistent with the requirement of the application of the original position. The original position can only be entered once; thus, the principles decided from that position have the strength of finality. The strength of finality urged rational, self-interested parties to exercise their rights to the utmost possibilities and to cease

[209] Rawls set a formula for allocating conditions which help to build principles of justice on the original position. The rationale of such a formula dates back to the rational persons' standard in advancing their interests. These rational persons (one component to make the initial agreement fair, as explained in subsection 3.2.2 A c) consent to as equals with the veil of ignorance's shield (i.e., "when non are known to be advantaged or disadvantaged by social or natural contingencies" supra note 26 at 19-20). With the veil of ignorance, the formula works with a firm basis of equality. The basis of this equality in his theory refers to two parts. One is the same right to express, and the other is a combination of equal representation by moral persons. Contingent with rational contract parties' description, such representations possess the qualities of having "a conception of their good", being "capable of a sense of justice", having "the requisite ability to understand", and to "act upon whatever principles are adopted" (ibid).
[210] As the gist Professor Wardhaugh summarised: "Rawls argues that (1) rationality; (2) self-interest; (3) ignorance of contingent information about ourselves; and (4) knowledge of the existence of ultimate goals (though given the veil of ignorance there is unawareness of their content and how they coincide with ultimate goals of others) of those in the original position compel them to select the two principles of justice". Supra note 168 Wardhaugh (2012) at 379.
[211] As Rawls has previously claimed, the theory of justice as fairness was more of a social ideal. Partially, there are difficulties in realising the conditions of a fair initial situation. For example, the veil has to be lifted in exchange for some social reality to help choose principles; and to maintain a mutually satisfied standard of rationality.
[212] See supra note 26 at 19.

to be silent or to be represented. In the meanwhile, such requirements of rulemaking and finality of the principles came into place to prevent each representative from capriciously requiring changes to the principles due to one's actual social status and other contingencies during or after the gradual lifting of the veil of ignorance, when they take off the theoretical non-differential identities.

B. Principles of Justice as Fairness

a. The Two Principles of Justice

Thus far, the discussion has centred on the manner in which Rawls's theory established fairness within the framework of a fair original agreement, and the intricate delineation of the conditions within the original position and their respective functions. With these foundational aspects now established, the groundwork is laid for an analysis of Rawls's two-principle framework for the theory of justice as fairness. There are two principles primarily domain Rawls's theory of justice as fairness: 1) "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others"[213]; and 2) "social and economic inequalities are to be arranged so that they are both a) reasonably expected to be to everyone's advantage, and b) attached to positions and offices open to all"[214]. Holding the contingent sense of the first principle, Rawls further provided four possible interpretations in accordance with the two natural senses that are independent of one another of the second principle, in line with the understanding of "to everyone's interest".[215]

To the immediate intuition, "to everyone's advantage" appears as having fair distribution of the benefit from social cooperation in the way of having positions "open to those able and willing to strive for them".[216] This way of interpretation encounters the principle of efficiency in the process of distribution. From the philosophical preference, with the equal liberty being set plus the presumption of free market economy, the line of equal distribution has better applicability than the representation of the line of the most efficient choice in achieving justice. This choice is from of a judge of value of justice. It does not wear down the significance of efficiency itself, but it signed the basic structure where a society is seeking for fairness. Fairness is the mean to the end of justice. The flaw of this intuitive interpretation is

[213] Supra note 26 at 60.
[214] Ibid.
[215] In the serial order, they refer to the system of natural liberty, liberal equality, natural aristocracy, and democratic equality.
[216] Supra note 26 at 61.

equally obvious as its impressiveness: that any factors may improperly affect the distribution of benefits. To cover such a flaw, it was provided with an alternative way of looking at a fair distribution.

In the case where natural and social contingencies are permitted to influent divisions of advantages, one possible solution would be to have contractual parties with similar abilities and skills enjoying "similar life chances".[217] In this manner, the influence of contingency factors has been eliminated to the lowest that is possible. But at the same time, the determining force of natural distribution of talents superseded the shame. Wealth, opportunities and other sorts of social benefits are opened in the way of "careers open to talents".[218] Another alternative interpretation would be to import inventions manually, which is to have those with "greater natural endowments" limited to those that "further the food of the poorer sectors of society".[219] One has to admit that such approach of interpretation enabled the mitigation of natural lottery, but the downside is similar with the previous solution that both of them are not stable. The unstableness is reflected in the occasions where social contingencies or natural talent possessed still a sufficient power over the result. Meanwhile, the relocation of resource does not guarantee a fair opportunity of the kind for those worse-off representatives.[220] In the interpretation scenario of "careers opened to talents", the accumulation of natural wealth, social class, talents and abilities is still hard to be overcome. The ideal of "to everyone's benefit" still cannot be achieved. Therefore, Rawls provided another way of interpretation, in the first place it is to conquer the criterion that is not quite persuasive. He turned to the fair equality of opportunity as a destination. This end of understanding "to everyone's benefit" regardless of the competitor's wealth or talents, instead suggests an interpretation where none of the natural or social contingencies could shake an equal opportunity that is fair to all. This role of this fair equal opportunity assured a pure procedural justice of the system of social cooperation, which simplified the massive pool of potentiality in principle choices.

With the assistant of the fair equal opportunities, the fourth interpretation of the principles also requires the difference. This way of interpreting the second principle of justice as

[217] Supra note 26 at 73.
[218] Supra note 26 at 74.
[219] Ibid.
[220] See supra note 26 at 75.

fairness has a non-negligible relevancy with the following paragraphs dealing with the examination of current market fairness's status quo. In the context of fair equal opportunity, the difference principle was elicited to complement the proper arrangement of inequity when the veil of ignorance is lifted and thereby the uneven states of the parties' reality are taken into account. Therefore, the introduction of the difference principle achieves the goal of properly solving the social and economic inequality and helps eventually to realize the end of justice as fairness. To examine the difference principle, Rawls took three steps.

He firstly presumed a binary extreme of assumption to simplify the case for a more intuitive understanding of the difference principle. After assessing the arrangement of inequality in this extreme assumption and once this simplified assumption is understood, the principle can be extended to richer scenarios that are more in line with the real social situation. The second step is to import what he called a chain connection. In the first step, the difference principle was being understood in an abstractive assumption that there are only two statuses the representatives live in. However, in reality, any market or other social institution is consisted of far larger participants. The chain connection is to deal with such complicity of the reality when the more practical request occurs. Finally, different parties on the chain all have their particular considerations to achieve their respective best interests. When they were connected to be treated as different links in a chain within a social institution, ordering is requested, just as in the original position where the ordering condition serves as a constraint on the conception of rights. Therefore, a lexical structure will be examined to have the difference principle have a more practical meaning rather than just a theoretical usage.

To begin with, Rawls presumed a scenario where a person X1 represented a better off party whereas a person X3 represented a worse off party in any given society. Modelling through a linear system with X1's expectation as horizontal axis and X3's as its vertical axis, both started from the initial situation as the coordinate's original position; there resulted a parabola with a perfect satisfactory of difference principle as its highest point. This is to indicate that before reaching such perfect point, "the inequality in (X1 and X3's) expectation is permissible because lowing X1 ('s expectation) would make the X3 even more worse off".[221] Considering that in reality, there are a plethora of parties whose representatives are neither best off or the worse off, there comes a representative X2 who speaks for the contractual

[221] Supra note 26 at 76.

parties who are situated in between X1 and X3. Reflecting this X2's parabola in the existed coordinate, before the perfect satisfactory point of the difference principle, the parabola of X2 is always higher than of X3, and after which, X2 may go up or down but always of a "close-knitness".[222] Here, the linkage gear between the X2 and X3 formed a chain connection before reaching the perfect point, which results in the rising of X2 when X3's expectation risen.

So far, a comprehensive understanding of the components of the difference principle has been constructed. The comprehension includes an extreme assumption, how parties representing more complicated social advantages fall into the scheme, and the chain connection that describes the linkage of different representatives' rising and falling. To explain how this model works in the social institution's functions of distributing rights and duties, as well as dividing social benefits, Rawls introduced the lexical difference principle. To summarise, the outcomes of such an arrangement should result in rephrasing the understanding of the second principle of justice as fairness. Social and economic inequalities should be arranged to achieve two outcomes. The first outcome is to ensure "the greatest benefit of the least advantaged"[223]. The second outcome is to attach to "offices and positions open to all under conditions of fair equality of opportunity"[224].

While moving on from a theoretical fair initial situation, representatives behind the veil of ignorance will gradually lift the veil in exchange for the clear vision of the society they live in. In this gradually lifting process, the difference principle has achieved a practical purpose of properly solving the social and economic inequality, so as to contribute to the realization of justice and fairness. This contribution has other rationales to support its significance. As Rawls claimed, the difference principle "transforms the aims of society in fundamental respects".[225] It is evident to see from the difference principle that the rising of benefit division or expectation of different parties with different social positions are chained with each other. The expectation of common interest is a tool to assist them to realize everyone's benefit, if not the sum up (although it at the meanwhile is). "No one is to benefit from these contingencies except in ways that redound to the well-being of others"[226].

[222] See supra note 26 at 81-82. Close-knit ensures that "there are no flat stretches on the curves" for X2 and X3 after the perfect satisfactory point.
[223] Supra note 26 at 83.
[224] Ibid.
[225] Supra note 26 at 107.
[226] Supra note 26 at 100.

In terms of satisfying the mutual benefits of distinguished parties, Rawls's theory focused merely on the scenario before reaching the perfect satisfactory point of the difference principle. By far, the author is satisfied with the focus where social cooperation relies upon the scheme in which everyone's benefit is closely associated with others. If the more advantaged representatives are not allowed to be in a better situation, neither could the less advantaged and vice versa. Moreover, such social cooperation can only be initialised under the condition that the scheme of it is reasonable enough to lure rational people into cooperation. Again, it dates back to the rational contractual parties' premise in framing the original position of fairness.

b. The Principle of Redress

In the above discussion, the author has briefly touched one basic function of an important premise of the difference principle, the expectation of common interest. I remarked that it helped with ruling out a meritocratic society. The approach led to a result that embodied another significance of the difference principle: the consideration of someone's interest other than oneself rendered the principle of redress. The difference principle "gives some weight to the considerations singled out by the principle of redress".[227] The principle of redress thus "holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions".[228] To reiterate, the idea is to "redress the bias of contingencies in the direction of equality".[229] From this reference, Rawls has made the legitimacy of addressing the principle of redress from the difference principle sufficiently clear and reasonable.

If one quests the essence of the consideration of others or the consideration of common interest, it in fact draws a certain "attitudes of mind and forms of conduct". Such conveyance matched the political conception of fraternity.[230] In this sense, the difference principle assured

[227] Ibid.
[228] Supra note 26 at 100-101.
[229] Ibid.
[230] "In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept. Not in itself defining any of the democratic rights but conveying instead certain attitudes of mind and forms of conduct, without which we would lose sight of the values expressed by these rights. … Or closely related to this, fraternity is held to represent a certain equality of social esteem". Supra note 26 at 105-106.

its place in the democratic interpretation to politics. From both the societal perspective and the individual aim of realising one's fair share of social advantages, the consideration of common interests and concern for others restrains the emergence of egoism and meritocracy. Based on this context, the conception of fraternity in the interpretation of the principles of the justice as fairness theory supplemented and reassured that neither of the two unfavourable societies would come into place.

Fraternity holds a lesser place in the democratic theory compared with liberty and equality. Although it cannot define rights intuitively, it conveyed a "certain attitudes of mind and forms of conduct"[231] that made parties attach importance to the "values expressed by these rights".[232] In the context of the interpretations of the two principles of justice, the demand of fraternity corresponds to the difference principle and the principle of redress. These two interpretations are intended to resolve inequalities in rulemaking when the veil of ignorance is being lifted. It is because the difference principle and the principle of redress supplementally corrected the unequal reality after the original position that the public has a more reliable recognition of the two principles of justice. After lifting the veil of ignorance, parties in the original position are allowed more knowledge of the society they live in. It came with more realities of inequality settings. Parties' different (sometimes competing) interests lead to different demands for and understandings of fairness. The difference principle and the principle of redress guide parties to focused on their mutual benefits and the interests of the worse-off ones in order to achieve the end of justice. This affirms a "desirable feature of a conception of justice"[233] that "it should publicly express men's respect for one another".[234] That is to say that the realization of justice requires reciprocal self-respect.

"Self-respect is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out".[235] Extending from the rational person's requirement in the original position, the rational parties' conception of their interests is an indispensable component of their self-interest tendency. Hence, this sense that "one's plan is worth carrying out" cannot be separated from parties' pursuing of the means to maximize their primary social good.[236]

[231] Supra note 26 at 105.
[232] Ibid.
[233] Supra note 26 at 179.
[234] Ibid.
[235] Supra note 26 at 178.
[236] The pursuit relies on the parties' conceptions of goodness and rationality. Parties' concepts of goodness and rationality therefore ensured the reasonableness of taking the conception of reciprocal self-respect into account

Reciprocal self-respect renders parties to establish “a sense of their own worth”[237][238] Rational parties with reciprocal self-respect are able to direct the effectiveness of social cooperation.[239] Besides, reciprocal self-respect asserted a fundamental character of the two principles of justice – “In the design of the social system, we must treat persons solely as ends and not in any way as means”[240]. Therefore, in spite of the fact that it is quite abstract, it is still necessary to introduce the above benefits that the reciprocal self-respect and the parties’ conceptions of the goodness brought in an effective social cooperation, as a complement to the difference principle and the principle of redress in the context of interpretations of the two principles of justice. Just as the democratic principle of fraternity is used to supplement the demands for liberty and equality, these discussions reinforce the legitimacy of carrying out fairness as a mean to achieve justice as an end. These supplementary interpretations enriched the weight of Rawls theory as a whole.

In conclusion, Rawls’s two principles of justice seek to balance individual freedoms with societal and economic inequalities, ensuring fairness and justice within society. The first principle emphasises that everyone should enjoy the greatest basic liberties, provided these are compatible with similar liberties for others. The second principle addresses social and economic inequalities, advocating for their arrangement in a way that benefits everyone, particularly the least advantaged. Central to this is the difference principle, which permits inequalities as long as they improve the situation of the most disadvantaged. These principles are applied after the “veil of ignorance” is lifted, providing a framework for fairly allocating resources and ensuring equal opportunities.

The difference principle is closely connected to the principle of redress, which focuses on assisting those disadvantaged by natural or social factors, thereby correcting inequalities caused by chance. Together, these principles promote procedural fairness in social cooperation and highlight the importance of mutual respect and self-worth in achieving fairness. Ultimately, these principles demand that institutional design prioritises fairness, alongside efficiency, by ensuring that individuals are respected as ends in themselves, not

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in selecting principals, according to Rawls’s later section of his book A Theory of Justice (1973). See supra note 26 at 142-150.

237 Supra note 180.

238 “A sense of their own worth is necessary if they are to pursue their conception of good with zest and to delight in its fulfilment” Ibid.

239 See supra note 26 at 395-452.

240 Supra note 26 at 183.

merely as means to societal goals. This reinforces the legitimacy of fairness as the path to justice, ensuring that all members of society are treated with dignity and respect.

C. Conclusion

Rawls's theory of justice, centred on the idea of justice as fairness, offers a model for the equitable distribution of resources within society. A key concept in this theory is the veil of ignorance, which posits that when individuals create societal rules, they do so without any knowledge of their own social status, wealth, abilities or personal background. In this state of ignorance, people are more likely to choose the most just and fair rules, as they cannot predict their own position in society. This approach encourages the creation of systems that protect the interests of the most disadvantaged while ensuring overall fairness. In the context of securities regulation, Rawls's theory is particularly valuable for guiding the objectives of disclosure rules. The veil of ignorance emphasises the importance of informational fairness, requiring that rules be designed to ensure all market participants (for example, retail versus institutional investors) can access and understand market information on an equal footing. This means not only equal access to information, but also ensuring that the information's true value is comprehensible to all. Investors should have a fair opportunity to obtain critical information that impacts market decisions, thereby avoiding informational asymmetries. Moreover, the focus should not solely be on the availability of information, but on making sure that participants can reasonably understand and use this information. Complex or excessive disclosures should not hinder fair decision-making.

Thus, Rawls's theory offers a normative framework for shaping disclosure regulations, promoting fairness by ensuring that markets operate in a transparent and equitable manner. This impartiality directly supports the regulatory purpose of fairness in securities market regulation, as it mirrors the importance of creating (and applying) rules that do not disproportionately favour one group over another. The difference principle, which allows for social and economic inequalities only if they benefit the least advantaged, further reinforces the regulatory objective of fairness. In terms of disclosure rules, this principle suggests that a redress should be prepared in advance to ensure that those market participants at a disadvantage are not neglected in regulations adjusting market transparency. Rawls's theory provides a normative benchmark for structuring securities regulations. The concept of fairness, viewed through the veil of ignorance, is particularly applicable to developing rules that do not favour more powerful market participants at the expense of others. If Rawls' theory guides lawmakers to draft impartial rules before the veil is lifted, then the difference principle, applied after the veil is removed, ensures that regulations focus on benefiting the least advantaged. This approach highlights the importance of addressing information asymmetries and market imbalances.

In this way, whether before or after the veil of ignorance is lifted, lawmakers are equipped with consistent principles to respond to both anticipated and unforeseen events in the legislative process. The ideas presented here will underpin the following chapters, setting the normative standards against which current disclosure regulations and broader securities laws will be critically evaluated. By applying these principles, the study will offer insights into how fairness can be better integrated into securities regulation, particularly by balancing transparency with the practical needs of different market participants. This fairness framework will also be used to assess current regulations (for example, Reg FD [241] and Rule 10b-5[242]; both will be addressed in the following chapters of this research) to determine whether they were developed in line with the principles of fairness, and whether they genuinely benefit the least advantaged participants. This approach ensures a comprehensive and forward-looking perspective, not only critiquing the existing framework but also offering recommendations for how regulators can better meet the diverse needs of market participants.

3.3 A Literature Review

As fairness in securities regulation is a complex and multifaceted concept, it requires a thorough exploration of applications in securities market regulation. This structured literature review is designed to critically engage with the key aspects of fairness in securities regulation, beginning with an analysis of fairness itself, particularly its role in shaping disclosure regulations. The review then moves to compare fairness with other regulatory goals, such as efficiency and integrity, highlighting the tensions and trade-offs that arise in the regulatory framework. Next, a historical overview of the development of disclosure regulation is provided briefly (detailed historical research is in the next chapter), tracing how

[241] Supra note 13.
[242] Rule 10b-5, 17 C.F.R. § 240.10b-5 (2023)

regulatory responses have evolved in response to market failures and changing societal needs. Finally, this section identifies the gaps in the existing literature, particularly regarding the underexplored relationship between fairness and disclosure regulation, thereby setting the stage for the contributions of this research.

3.3.1 Fairness in Securities Regulation and Informational Asymmetry in Disclosure Regulations

Fairness in securities regulation is a cornerstone of capital market integrity and investor protection. It encompasses principles that ensure equitable treatment of all market participants, aiming to build investor confidence and maintain orderly markets. This literature review explores various dimensions of fairness within the realm of securities regulation (notably through the lens of Rawls's theory), the challenges posed by informational asymmetry, and the implications of market manipulation and insider trading. To start with, current literature has utilized Rawls's theory of fairness in securities regulation, but with different focuses compared with my research. Rawls's fairness theory is a prominent theoretical framework for securities regulation, providing a normative approach to assessing the fairness of disclosure regulations. Scholars have used this theory to explore fair distribution of information and market opportunities. Rawls proposed that societal structures should be arranged to benefit the least advantaged members of society. This principle is especially relevant when considering the regulation of securities markets, where disparities in information and market power often leave less-privileged participants at a disadvantage.

Schwartz (2010) provides a compelling application of Rawls's principles to securities regulation, arguing that regulatory frameworks should shift from a singular focus on efficiency to a more balanced approach that also considers fairness and risk management.[243] In Schwartz's analysis, the key Rawls's concept applied to securities regulation is the difference principle (introduced in the previous section of this chapter), which holds that social and economic inequalities are only justified if they benefit the least advantaged members of society. Schwartz juxtaposes this principle with the utilitarian perspective (this point was excluded from this research because it does not align closely enough with the normative standard I have established), particularly that of Harsanyi (2010), which prioritises

[243] Jeff Schwartz, 'Fairness, Utility, and Market Risk' (2010) 89 Oregon Law Review 175-262.

maximising overall societal utility, often at the expense of the less fortunate.[244] This contrast highlights the central tension in securities regulation: should it primarily seek to optimise overall market efficiency, or should it ensure that all participants, especially those at a disadvantage, are protected from undue risk? Schwartz advocates for a middle ground, suggesting that investor protection and market fairness must take precedence alongside efficiency in order to create a more equitable financial system.

A critical dimension of Schwartz's application of Rawls's theory is his emphasis on market risk. He argues that securities regulation should not only focus on promoting accurate stock pricing and market transparency but should also seek to manage market risk, particularly in the face of volatile financial environments. While traditional regulatory frameworks prioritise market efficiency, often assuming that more information leads to better outcomes for all investors, Schwartz suggests that accurate pricing alone is insufficient. This is where Rawls' principles are particularly relevant. Investors, especially those with limited resources or financial literacy, need protection from market volatility and the risk of poor decision-making, not just access to more information. This view aligns with Rawls's broader goal of creating systems that mitigate the disadvantages faced by the least privileged participants.

Furthermore, Schwartz extends his argument by addressing the concept of inequities in investor protection. He contends that current regulatory frameworks tend to favour sophisticated and well-informed institutional investors over retail investors, who often lack the resources and knowledge to effectively manage their market exposure. Drawing from Rawls, he highlights the societal responsibility to protect these less advantaged participants, advocating for reforms that promote diversification and risk-sharing mechanisms, such as financial products designed to cushion the impact of market downturns. Schwartz's work effectively applies Rawls's theory of fairness to the context of securities regulation, particularly in emphasising the importance of protecting less-advantaged investors from market volatility and ensuring that they can meaningfully engage with market information. This approach challenges the traditional prioritisation of efficiency in financial regulation and calls for a broader understanding of fairness, one that aligns regulatory efforts with Rawls's vision of a just society.

[244] John C. Harsanyi, 'Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory' (1975) 69(2) The American Political Science Review 594-606.

In terms of the protection of less-advantaged market participants, current literature places greater emphasis on reflecting upon the practical intricacies as opposed to theoretical explorations of fairness. Central to this is the exploration of asymmetric information and the pertinent regulations concerning fairness in disclosure. Information asymmetry, a key challenge in securities markets, occurs when one party in a transaction possesses superior information compared to another, leading to an unfair advantage. Legal scholars have extensively examined the role of disclosure regulations in mitigating information asymmetry within financial markets. These regulations, by mandating that companies disclose relevant information to the public, seek to enhance transparency and facilitate informed decision-making by investors. However, the effectiveness of these regulations is often debated.

Mandatory disclosure requires issuers of securities to file comprehensive registration statements with the SEC and provide investors with detailed prospectuses.[245] The rationale behind mandatory disclosure is rooted in the belief that, without such measures, there would be a significant undersupply of critical information, leading to suboptimal decision-making by economic agents (Enriques and Gilotta, 2014)[246]. Disclosure-based regulatory techniques are favoured for several reasons. They are considered cost-effective relative to alternative regulatory approaches.[247] They aim to protect investors by ensuring access to essential information, thereby safeguarding them from potential fraud. Besides, by increasing the availability of information, these regulations are believed to contribute to more accurate pricing in capital markets, enhancing overall market efficiency. However, the effectiveness of mandatory disclosure is frequently contested. Critics highlight several limitations. The costs associated with disclosure, both direct and indirect, can be substantial for companies, potentially outweighing the anticipated benefits.[248] Additionally, mandatory disclosure may fail to address underlying behavioural factors that perpetuate information asymmetry (Stephen M Bainbridge, 2000)[249]. Relying solely on mandatory disclosure may not

[245] Stephen M Bainbridge, 'Mandatory Disclosure: A Behavioral Analysis' (2000) 68(4) University of Cincinnati Law Review 1023-60.
[246] Luca Enriques and Sergio Gilotta, 'Disclosure and Financial Market Regulation' (2014) April 11 European Corporate Governance Institute (ECGI)-Law Working Paper 252.
[247] Ibid.
[248] Ibid.
[249] See supra note 244. As highlighted by developments in social norms and behavioural economics, due to factors such as social norms and behavioural biases, decision-makers may resist optimal disclosure practices. Non-legal norms governing behaviour and cognitive biases can lead to persistent market inefficiencies, which

comprehensively address the issue of capital costs; other strategies and considerations are needed to protect the interests of both companies and investors.[250] Mandatory disclosure has limitations as it is only one aspect of reducing information asymmetry in the cost of capital, not the sole factor influencing costs. Additionally, investors demanding lower returns solely based on sufficient disclosure may expose companies and management to risks.[251] Furthermore, concerns regarding the quality and reliability of disclosed information also persist, as unreliable disclosures may erode investor trust and undermine market stability (Coffee, 1984)[252].

The academic debate on the efficacy of mandatory disclosure has evolved over time, moving from initial enthusiasm to more nuanced and critical assessments. Earlier academic views often portrayed the introduction of securities laws as a moral imperative against fraud. Over time, revisionist perspectives emerged, questioning the tangible benefits of these laws, while recent analyses focus on the current market environment and investor needs, suggesting that the effectiveness of disclosure may vary based on market conditions [253] Moreover, the reliance on aggregate statistical evidence to assess the impact of disclosure has been critiqued, highlighting the complexity of drawing definitive conclusions about its effectiveness.[254] Although disclosure regulations aim to reduce information asymmetry by mandating transparency, their effectiveness remains subject to ongoing debate. While proponents argue for their benefits in improving market fairness and efficiency, critics underscore the potential costs and limitations, including the quality of information and behavioural factors that may undermine the intended outcomes. A balanced approach that takes into account the complex interplay of these factors is essential for developing effective disclosure regulations. There is a need to continue exploring these nuances to better inform policymaking in financial regulation.

3.3.2 Market Manipulation, Insider Trading, and Fairness

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challenging the effectiveness of mandatory disclosure regimes in advanced markets like the US. It suggests that that simply mandating disclosure may not fully mitigate these underlying issues in securities markets in the US.

[250] See also Christian Leuz and Robert E. Verrecchia, 'The Economic Consequences of Increased Disclosure' (2000) 38 Journal of Accounting Research 91-124.

[251] See also supra note 244 n 31 (Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1996) 276, 288.

[252] John C. Coffee Jr., 'Market Failure and the Economic Case for a Mandatory' (1984) May 1 Virginia Law Review 717-753.

[253] Ibid.

[254] Ibid.

Another main concern in the current research on the US securities law is the effects of the overall regulations in the area, more specifically those practices eroding investor confidence, distorting market efficiency and creating an uneven playing field; one that prioritizes those with access to privileged information. Both legal scholars and policymakers have emphasized the need for robust regulations to curb behaviours that bring critical challenges to the integrity and fairness of securities markets, such as market manipulation and insider trading.

Market manipulation involves deliberate actions to distort the market prices of securities, often through deceptive practices such as "pump and dump" schemes, spoofing, or wash trading.[255] The goal of these actions is typically to inflate or deflate stock prices artificially, allowing manipulators to profit at the expense of regular investors. A significant body of literature examines market manipulation, both from a theoretical and practical perspective. Allen and Gale (1992) provide a foundational framework for understanding market manipulation, suggesting that such activities can destabilize markets and lead to inefficiencies.[256] Their research indicates that manipulation distorts market prices, leading to suboptimal investment and allocation of resources, which harms both individual investors and the broader market. Another perspective is offered by Aggarwal and Wu (2006), who empirically examine instances of market manipulation in emerging markets.[257] They highlight how manipulative practices disproportionately affect less sophisticated investors, increasing market volatility and reducing liquidity. Their work underscores the importance of stringent regulatory enforcement to minimize manipulation, particularly in less regulated or developing markets.

The role of regulatory enforcement in mitigating manipulation is extensively discussed in the work of Black (2001).[258] He argues that strong legal frameworks, such as those provided by the SEC in the United States, are critical in preventing market manipulation. Black emphasizes the need for continuous oversight, transparency and the enforcement of legal

[255] See Janet Austin, 'Stock Markets Play 'Whack a Mole' with Pump and Dump Schemes' (2023) 23 UC Davis Business Law Journal 1-25.
[256] Franklin Allen and Douglas Gale, 'Stock-Price Manipulation' (1992) 5(3) The Review of Financial Studies 503-29.
[257] Rajesh K. Aggarwal and Guojun Wu, 'Stock Market Manipulations' (2006) 79(4) The Journal of Business 1915-53.
[258] Bernard S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 UCLA Law Review 781-855.

statutes like the Exchange Act, which plays a crucial role in maintaining market integrity. His analysis is particularly valuable for understanding how regulations like Rule 10b-5 function in preventing manipulation.[259] The Exchange Act, particularly Rule 10b-5, is central to U.S. securities law in addressing these issues that have the potential to undermine market fairness and integrity, particularly through the means of disclosure requirements. The analysis conducted by Langevoort and Gulati (2004) underscores that the primary objective of Rule 10b-5 is to proscribe fraudulent activities by establishing legal obligations for the truthful disclosure of information within securities transactions.[260] Operating under Section 10(b) of the Exchange Act[261], Rule 10b-5 is designed to counter fraud in securities markets by imposing a duty to disclose material information. This obligation assumes particular significance in instances of silence or omission, where the withholding of specific facts has the potential to mislead investors. The article highlights the convolution surrounding the determination of when precisely a duty to disclose emerges, particularly in the absence of active misrepresentation. A critical focal point illuminated is the role of fiduciary duties, particularly concerning insider trading cases. The courts have encountered challenges in delineating the extent of these obligations under Rule 10b-5, especially following the Supreme Court's pronouncement in *Chiarella v. United States* (1980)[262]; this restricted the duty to disclose solely to situations characterized by a fiduciary or akin trusted relationship between the involved parties. Consequently, this ruling has complicated the implementation of Rule 10b-5 across broader contexts, encompassing issuer disclosures and other non-insider trading scenarios.

The research delves into the disparities in judicial interpretations regarding nondisclosure. While some courts adopt a flexible stance towards identifying duties under Rule 10b-5, others confine the duty to disclose based on narrow, fiduciary-like associations. This legal ambiguity holds considerable weight in cases of market manipulation, where the demarcation between permissible silence and fraudulent nondisclosure often becomes blurred. Accordingly, Rule 10b-5 remains a contentious yet pivotal instrument in U.S. securities law, aimed at bolstering market integrity through the safeguarding of material information disclosure to preclude fraud and manipulation. Nevertheless, the application of this principle

[259] Supra note 242.
[260] Donald C. Langevoort and G. Mitu Gulati, 'The Muddled Duty to Disclose Under Rule 10b-5' (2004) 57(5) Vanderbilt Law Review 1639-86.
[261] Supra note 10.
[262] *Chiarella v. United States*, 445 U.S. 222, 230 (1980).

endures ongoing evolution amidst judicial deliberations. Concurrently, it is apparent that Rule 10b-5 not only combats manipulation concerns but also addresses market fairness issues through its fundamental emphasis on the disclosure function, consequently facilitating the resolution of broader regulatory challenges such as fraud.

The Securities Act and the Exchange Act were established to address the systemic failures of pre-Depression securities markets, where inadequate disclosure of material information facilitated widespread fraud and market manipulation (which will be addressed in the next chapter of this work).[263] Both Acts fundamentally emphasise transparency as the cornerstone of market fairness, mandating full and truthful disclosure to eliminate asymmetry of information among market participants. The Securities Act primarily governs the initial issuance of securities, requiring issuers to provide comprehensive and accurate information through registration statements.[264] This function is critical in preventing fraud at the point of sale, ensuring that investors are equipped with all relevant facts before making an investment decision. The *SEC v. Ralston Purina Co.* (1953) case underscores this principle by confirming that the public has a right to full disclosure before purchasing securities, as the failure to disclose material information in the registration process is inherently fraudulent.[265] The Exchange Act, in contrast, established a framework for ongoing disclosure obligations, covering the trading of securities in secondary markets. The evolution of Rule 10b-5 stemming from this Act, as already emphasised above, serves as a broad anti-fraud provision, prohibiting any act or omission resulting in fraud or deceit in connection with the sale or purchase of securities.[266] The rule is vital in ensuring that all market participants have equal access to material information.

A key case in the interpretation of Rule 10b-5 is *Basic Inc. v. Levinson* (1988), which addressed the "materiality" requirement for disclosures.[267] In this case, the Supreme Court held that information is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. The Court also established the "fraud-on-the-market" theory, allowing plaintiffs to allege that material

[263] Supra note 10. See also John C. Coffee, Jr., 'Law and the Market: The Impact of Enforcement' (2007) 156(2) University of Pennsylvania Law Review 229-311.
[264] See for example supra note 138 § 5, 15 U.S.C. § 77e; § 7, 15 U.S.C. § 77g; § 11 and 15 U.S.C. § 77k.
[265] *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).
[266] Supra note 242.
[267] *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

misstatements defrauded them by distorting stock prices, even if they did not directly rely on the misstatements. This ruling highlights the critical role of disclosures in maintaining market fairness, as failures to disclose or misrepresentations of material information directly distort market prices, harming the integrity of the market.

However, proving fraud under Rule 10b-5 involves a significant burden of proof, particularly the scienter requirement, which demands that plaintiffs demonstrate that the defendant acted with intent to deceive, manipulate or defraud.[268] This was a pivotal issue in *Ernst & Ernst v. Hochfelder* (1976), where the Supreme Court ruled that mere negligence is insufficient to establish liability under Rule 10b-5.[269] The requirement for scienter makes securities fraud litigation more challenging for plaintiffs, as they must show a clear intent to deceive rather than simple oversight or misjudgement in disclosures. Another landmark case, *TSC Industries, Inc. v. Northway, Inc.* (1976), further elaborates on the concept of materiality, stating that an omitted fact must be significantly likely to alter the "total mix" of information available to investors.[270] This case clarified not all omissions constitute fraud, reinforcing that only significant omissions that mislead investors can be grounds for liability. This sets a high threshold for proving fraud based on nondisclosure, contributing to the difficulty plaintiffs face in Rule 10b-5 litigation. Beyond fraud cases, the application of disclosure rules also shows their role in regulating market manipulation. *SEC v. Texas Gulf Sulphur Co.* (1968) serves as a seminal case in which the Court held that insiders must immediately disclose any material, non-public information before trading on it.[271] The case reinforced that insiders cannot take advantage of market ignorance, and that fairness requires transparent and simultaneous access to information. These cases collectively demonstrate that the securities laws, particularly Rule 10b-5, play a pivotal role in ensuring fairness by mandating full disclosure of material information. However, the litigation burden associated with proving fraud under Rule 10b-5 complicates enforcement and investor recovery in fraud cases. As the cases indicate, although the regulatory framework prioritises transparency, practical challenges in litigation underscore the need for more flexible and responsive legal doctrines to better protect market fairness without imposing excessive burdens on market participants.

[268] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).
[269] Ibid at 203 and 217.
[270] *TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438 (1976).
[271] *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968).

3.3.3 The Role of Regulation Fair Disclosure

Apart from the traditional legal requirements concerning disclosure, including the application and analysis of market fairness within this specific legal framework, the turn of the millennium brought about more targeted legislative measures. Subsequently, current academic literature has evolved its understanding of the roles and impacts of this legislation in conjunction with the development of contemporary markets and societal norms. Reg FD, introduced by the SEC in 2000, was a response to apprehensions about selective disclosure practices prevalent in securities markets.[272] Prior to Reg FD, there existed a tendency for companies to disclose material information to institutional investors or analysts before disseminating such information to the broader public, thereby creating an inequitable landscape. Reg FD mandates that publicly traded entities must disclose material information to all investors simultaneously, with the overarching objective of fostering transparency and equity within the securities markets.[273] The review below delves into the discourse surrounding the role of Reg FD in advancing market fairness, with a specific emphasis on its effectiveness, critical viewpoints and persistent challenges encountered in practical application.

Early empirical evidence from studies such as those conducted by Irani and Karamanou (2004) indicated that the market reaction indicates a positive assessment of Reg FD's impact on the information environment.[274] Specifically, they find that firms with poorer information environments and a higher propensity to selectively disclose information experienced significantly positive abnormal returns, suggesting that the regulation has increased the quality and availability of information to all market participants. Bushee, Matsumoto, and

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[272] Supra note 13.

[273] Ibid at 17 C.F.R. § 243.100(a):
"(a) General rule. Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information: (1) Simultaneously, in the case of an intentional disclosure; and (2) Promptly, in the case of a non-intentional disclosure."

[274] Afshad J Irani and Irene Karamanou, 'A Study of the Economic Consequences of Regulation FD (Fair Disclosure)' (2004) 17 Research in Accounting Regulation 191-207. From another perspective, other research in this period of time believed that Reg FD positively impacted the information environment through other channels. See for example Chiyachantana et al. (2004). Their research suggests a greater prioritisation of providing that the Reg FD has positively impacted market dynamics by enhancing liquidity through narrower spreads and greater depth; reducing information asymmetry, particularly around earnings announcements; and shifting trading behaviour, with increased retail participation and decreased institutional trading prior to announcements. Chiraphol N. Chiyachantana, Christine X. Jiang, Nareerat Taechapiroontong and Robert A. Wood, 'The Impact of Regulation Fair Disclosure on Information Asymmetry and Trading: An Intraday Analysis' (2004) 39(4) Financial Review 549-577.

Miller (2004) offer specific insights regarding the influence of the regulation on conference calls, a significant channel of selective disclosure.[275] Their research indicates that Reg FD compelled numerous companies to adapt their disclosure practices, with some reducing the frequency or timing of their calls. Despite this, the overall effect on the information shared during such calls was modest. This contradicts the viewpoint of critics who suggested that the regulation would diminish the quality of disclosures due to companies being hesitant to disclose sensitive information.[276]

While Reg FD was aimed at fostering fairness, critics argue that it imposed significant compliance costs on firms, particularly smaller ones. Gomes et al. (2007) argue that the loss of selective disclosure channels disproportionately impacted smaller firms, which faced challenges in attracting analyst attention and suffered from higher information asymmetry post-Reg FD.[277] This was a key unintended consequence, as smaller firms were less able to compensate for the loss of direct, selective communication with analysts through other information channels such as earnings pre-announcements. On a broader level, Chen et al. (2010) found that Reg FD contributed to a decline in the cost of equity capital, particularly for larger firms.[278] In the study, while creating their portfolio according to firm size to analyse the differential effects of Reg FD on small, medium and large firms (firm-specific analysis), it reveals that the effective reduction over the cost of capital of Reg FD is primarily targeting those with prior selective disclosure practices. Additionally, the regulation has had mixed effects on smaller firms, indicating a need for ongoing research to understand the broader implications of such regulations on firm behaviour and market dynamics.

Kothari et al. (2009) contribute to the ongoing discussion by suggesting that although Reg FD has improved transparency, it may have also incentivised certain firms to postpone or suppress negative information due to considerations related to career progression or

[275] Brian J. Bushee, Dawn A. Matsumoto and Gregory S. Miller, 'Managerial and Investor Responses to Disclosure Regulation: The Case of Reg FD and Conference Calls' (2004) 79(3) The Accounting Review 617-43.
[276] See for example Securities Industry Association (SIA), 'Costs and Benefits of Regulation Fair Disclosure' (May 2001) New York, NY: SIA.
[277] Armando Gomes, Gary Gorton and Leonardo Madureira, 'SEC Regulation Fair Disclosure, Information, and the Cost of Capital' (2007) 13(2-3) Journal of Corporate Finance 300-334.
[278] Zhihong Chen, Dan S. Dhaliwal and Hong Xie, 'Regulation Fair Disclosure and the Cost of Equity Capital' (2010) 15 Review of Accounting Studies 106-144.

apprehension regarding investor reactions.[279] This points to the potential for unintended strategic behaviour that could detract from the regulation's aims. According to the optimal disclosure model proposed by Hermalin and Weisbach (2007), full transparency is often not achieved, particularly regarding bad news, as owners prefer to assess CEO performance based on available information.[280] Good news tends to be leaked, whereas bad news is withheld until it is unavoidable. The market reaction to bad news announcements is significantly more pronounced than to good news announcements.[281] In light of the asymmetric market reactions, the enactment of Reg FD has levelled the playing field, reducing manager's ability to selectively disclose good news while withholding bad news.[282]

Another significant economic consequence of Reg FD is reflected in the debate over overregulation and its broader impact on the economy, particularly regarding the other important financial regulatory goal: market efficiency. Leuz and Wysocki (2008) highlight that while regulation can help address information asymmetry, excessive regulation might repress communication between firms and investors, which in turn could reduce market efficiency.[283] They acknowledge the benefits of regulation, such as reducing information asymmetry by mandating the disclosure of key financial data, which allows investors to make more informed decisions. It aims to eliminate duplicative efforts in information acquisition, making firms the lowest-cost producers of corporate information. Meanwhile, they also highlight the potential drawbacks of over-regulation. Overly stringent rules may stifle communication between firms and investors, thereby reducing the efficiency of information

[279] Sabino P. Kothari, Susan Shu and Peter D. Wysocki, 'Do Managers Withhold Bad News?' (2009) 47(1) Journal of Accounting Research 241-276.
[280] Kothari et al. used Hermalin and Weisbach's 2007 NBER working paper research result, which was later published as Benjamin E. Hermalin and Michael S. Weisbach, 'Transparency and Corporate Governance' (Aug 2014) Enterprise Law, Edward Elgar Publishing 342-348.
[281] See for example Leonard C. Soffer, S. Ramu Thiagarajan and Beverly R. Walther, 'Earnings Preannouncement Strategies' (2000) 5 Review of Accounting Studies 5-26; Amy P. Hutton, Gregory S. Miller and Douglas J. Skinner, 'The Role of Supplementary Statements with Management Earnings Forecasts' (2003) 41(5) Journal of Accounting Research 867-90; and Douglas J. Skinner, 'Why Firms Voluntarily Disclose Bad News' (1994) 32(1) Journal of Accounting Research 38-60.
[282] See supra note 279. The asymmetric reactions to news disclosures can also be interpreted through the "torpedo effect", where bad news significantly impacts stock prices due to unanticipated earnings surprises. However, this effect is observed in both growth and value stocks, indicating a broader tendency of managers to withhold bad news. Post-Reg FD, the ability to withhold bad news has diminished, suggesting a shift toward more equitable disclosure practices, yet the overarching trend remains that managers typically prefer to delay the release of negative information.
[283] Christian Leuz and Peter D. Wysocki, 'Economic Consequences of Financial Reporting and Disclosure Regulation: A Review and Suggestions for Future Research' (March 2008) Available at <http://dx.doi.org/10.2139/ssrn.1105398> accessed June 2023.

flow in the market.[284] One firm's increased disclosure may unintentionally attract investors from other firms, undermining market-wide price efficiency. Furthermore, when regulators fail to set a socially optimal level of disclosure, the result is a misalignment of information production costs and benefits. This may also distort risk-sharing among investors, disproportionately burdening those with lower risk tolerance. Therefore, while regulation plays an essential role in mitigating information asymmetry, it is crucial that regulatory frameworks strike the right balance. Excessive intervention risks inhibiting market efficiency, illustrating the need for careful management of disclosure requirements to ensure market fairness, without compromising efficiency.

Reg FD aimed at fostering fairness in capital markets by prohibiting selective disclosure of material information; this has had a profound impact on both market fairness and market efficiency. Regarding its implementation outcomes, some perspectives argue that by significantly narrowing the information gap between institutional and retail investors, Reg FD has contributed to a more equitable dissemination of information.[285] Studies show that Reg FD has lowered bid-ask spreads, indicating reduced concerns among market participants regarding information advantages held by trading counterparts.[286] Furthermore, Reg FD has improved the quality and quantity of public disclosures, which helps all investors access the same information simultaneously.[287] Additionally, the regulation has curtailed analysts' ability to leverage personal connections for obtaining non-public information, thus further levelling the playing field.[288] In the post-Reg FD environment, stock prices have been observed to incorporate relevant information more swiftly, enhancing price efficiency.[289] For instance, abnormal returns around stock split announcements have diminished since the introduction of Reg FD, suggesting that stock prices more accurately reflect firms' underlying performance. Furthermore, announcement returns are now more closely aligned with future profitability changes, indicating that prices more effectively anticipate performance implications. The implementation of Reg FD has also led to an increase in

[284] Ibid at 13-16.
[285] Li Li Eng, Joohyung Ha and Sandeep Nabar, 'The Impact of Regulation FD on the Information Environment: Evidence from the Stock Market Response to Stock Split Announcements' (2014) 43 Review of Quantitative Finance and Accounting 829-53.
[286] Jill E. Fisch, 'Regulation FD: An Alternative Approach to Addressing Information Asymmetry' (2013) In Research Handbook on Insider Trading, Edward Elgar Publishing 112-29.
[287] Supra note 283.
[288] Supra note 286.
[289] Supra note 285.

trading volumes, reflecting a more engaged and informed investor base.[290] In summary, the primary objective behind the introduction of Reg FD is to foster market fairness through the mitigation of information asymmetry, thereby guaranteeing all investors equal access to critical information. To a certain degree, it has enhanced market efficiency by enabling quicker and more accurate price adjustments based on available information. This aspect has fairly contributed to meeting regulatory objectives whilst upholding confidence in securities markets.

The current literature surrounding Reg FD offers a detailed assessment of its efficacy in enhancing transparency and equity within the U.S. securities market. The studies affirm its inclination to a positive role in mitigating information asymmetry between institutional and retail investors, thereby fostering market fairness. Nevertheless, criticisms have arisen regarding the risk of excessive regulation, particularly for smaller enterprises, and the unintended consequences of heightened compliance expenses and reduced market efficiency. This ongoing discourse underscores the necessity of striking a balance between transparency and practical considerations such as communication effectiveness and market dynamics. It emphasises the crucial imperative of ensuring that regulatory frameworks do not impede economic activity whilst promoting fair access to information.

3.3.4 Gaps in the Literature

The extensive research on disclosure regulations and their impact on market fairness has undeniably contributed valuable insights. However, as with any academic inquiry, notable gaps persist, particularly concerning the intricate interplay between fairness and disclosure within the U.S. securities market. Current literature largely takes the general idea of fairness for granted, as discussed through adopted principles such as Rawls' theory of justice and their general application to financial regulation. Few studies, however, critically engage with the central question of this research, which is the extent to which disclosure regulation is necessary to achieve fair securities markets. This requires a systematic and targeted approach firmly rooted in the specific domain of the securities market. It calls for an analysis and construction of fairness criteria that are unique to this market by integrating the intrinsic characteristics of this research field. The discussion should move beyond abstract

[290] Supra note 283 and note 286.

philosophical interpretations of fairness and instead consider how fairness operates within the concrete realities of securities regulation. From this perspective, while existing research has well-documented discussions on informational asymmetry and the necessity of transparency, there remains a lack of studies that critically evaluate how fairness has been recognised or overlooked in shaping disclosure regulation. In particular, the essential role of disclosure regulation in fostering fair securities markets, as well as the ways in which poorly calibrated disclosure requirements may affect fairness outcomes, have not been sufficiently explored.

Existing scholarship has extensively discussed the economic and functional aspects of disclosure regulation, including its efficiency, cost implications and contribution to transparency. What remains underexplored is how fairness can be situated within these established dimensions as an analytical tool for evaluating regulatory adequacy. Rather than questioning the well-documented costs or benefits of disclosure, this research builds on these foundations to examine whether fairness can provide an additional layer of normative assessment. This approach shifts the focus from asking whether disclosure is efficient to asking whether it distributes informational advantages and regulatory obligations in a manner that can be regarded as fair. In this respect, fairness offers a framework through which existing regulatory mechanisms can be evaluated not only for their market outcomes, but also for their distributive implications among diverse market participants. Integrating fairness into this analysis does not replace efficiency or other regulatory goals. Rather, it reveals how fairness may complement these objectives and strengthen the legitimacy of securities regulation.

Another overlooked facet concerns the historical trajectory of disclosure regulations and how past regulatory responses to market malfunctions have shaped the present regulatory landscape. Despite some acknowledgment of historical contexts, there is a noticeable absence of detailed analysis of how each legislative phase addressed specific market deficiencies and social imperatives, as well as whether these frameworks continue to serve their intended purposes effectively in the contemporary environment. This research seeks to fill these gaps by examining the underexplored relationship between market fairness and disclosure regulation, and by providing a clearer understanding of how fairness can be made a more explicit and supportive element of regulatory design. It aims to contribute to the wider academic debate by clarifying the conceptual space that fairness occupies in securities regulation, and by offering insights that may inform future regulatory development.

Chapter Four
Historical Context and Evolution of Disclosure Regulation

The central research question of this thesis (to what extent is disclosure regulation necessary to achieve fair securities markets in the U.S.) can be deconstructed into three critical components: the necessity of disclosure rules within securities markets; the rational legal framework governing disclosures and its delineated boundaries; an evaluation of the current regulatory framework in upholding fairness. In the preceding chapter, the author explored these components by first constructing a theoretical framework grounded in philosophical theories of government intervention and market fairness. Drawing on Locke's theory of limited government and Rawls's justice as fairness, I examined the necessity and limitations of regulatory intervention to strike a balance between protecting private rights and achieving public market goals. Additionally, Kant's ethics and Mill's harm principle were employed to further contextualise the ethical boundaries of regulatory action in market operations, particularly in terms of disclosure. The normative methodology employed in the prior chapter explored the interplay between public authority and private market participants, concluding that while disclosure regulation is necessary, it must be carefully crafted to prevent regulatory overreach and protect private interests.

Building on the theoretical foundation established earlier, this chapter adopts a historical approach to trace the development of disclosure regulation within the U.S. securities markets. It aims to answer the central research question's three components pragmatically by assessing how market participants' demand for disclosure emerged, when and why it became a pivotal issue, and how it has evolved over time in response to market failures and regulatory interventions. By systematically reviewing the historical development of securities market regulations across different periods, this chapter seeks to determine whether the regulatory actions undertaken were consistent with the theoretical boundaries of rational regulation established earlier. Additionally, it examines the alignment, or lack thereof, between legislative objectives and actual implementation within the legal and economic contexts of their time.

Section 4.1 explores the early history of securities markets, specifically the chaotic period from 1864 to 1873 when there was no formal regulatory oversight. During this time, the securities markets were characterised by rampant manipulation, the absence of transparent information, and unchecked corporate malpractices. The Erie War, a conflict over control of the Erie Railway Company, serves as a case study illustrating the pervasive manipulation of stock prices and the practice of issuing "watered stocks" that diluted the real value of securities.[291] Judges were often "employed" by powerful financiers to protect the interests of insiders whilst fleecing outside investors. This period marks the origins of regulatory awareness, as it exposed the significant disadvantages of a market environment devoid of rational disclosure rules or legal protections for investors. The absence of transparency and fairness in the market led to widespread rent-seeking behaviour, underscoring the urgent need for regulatory reform. Section 4.1.2 introduces the first instance of formalising disclosure theory in 1913 when Judge Louis D. Brandeis proposed that publicity and disclosure were essential tools to correct market inefficiencies and protect investors.[292] His theory of disclosure, which focused on providing real, public information rather than merely reporting to authorities, laid the groundwork for modern securities regulation[293], even though it took decades for these ideas to be legislatively implemented. In Section 4.1.3, the discussion moves toward the analyses of the growing calls for transparency and fairness that emerged during this period. This section highlights the initial push for reforms that would eventually form the ground of disclosure regulations. The idea of disclosure as a tool for market fairness began to gain traction among market participants, who realised that without access to accurate and timely information, they were exposed to significant financial risks. This growing awareness among investors and regulators set the stage for more formal regulatory frameworks that would come in response to the economic crises of the twentieth century.

Section 4.2 shifts focus to the Great Depression and its critical role in shaping modern securities regulation, particularly the disclosure requirements that became enshrined in law during the New Deal era (1913-1938). The onset of the Depression in 1929 brought to light the severe limitations of an unregulated securities market, where inadequate information

[291] Charles F. Adams, Jr., 'A Chapter of Erie' (1869) 109(224) University of Northern Iowa: The North American Review 30- 106.
[292] Louis D. Brandeis, 'What Publicity Can Do' (December 1913) HAPPER's Weekly 10-13. Access <https://www.sechistorical.org/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf>. Accessed April 2022.
[293] J. Brandeis's theory of disclosure was later considered by the modern securities regulatory authority - the SEC chairman as the origin of the disclosure regulation philosophy in the United States. See David S. Ruder Chairman the 23rd Chairman of the United States Securities and Exchange Commission, 'The Evolution of Disclosure Regulation by the Securities and Exchange Commission' (March 10, 1988) United States Securities and Exchange Commission Remarks Before the 10th Annual Conference on Securities Regulation and Business Law Problems. Available at <https://www.sec.gov/news/speech/1988/031088ruder.pdf> accessed April 2022.

disclosure exacerbated market instability and fuelled widespread financial panic. Section 4.2.1 provides a detailed overview of the economic effects of U.S. monetary policy from 1913 to 1929, examining the Federal Reserve's early attempts to manage the business cycle and its impact on the securities markets. The section reviews how, on the eve of the Great Depression, the combination of speculative bubbles, poor market regulation, and economic contraction created a volatile market environment that ultimately collapsed in 1929. Section 4.2.2 delves into the specifics of the Depression, examining how the lack of adequate information in the securities markets contributed to one of the most severe economic contractions in U.S. history. This section highlights the inherent risks posed by market opacity and the failure of market participants to have access to reliable and complete information. The severe impact of the Great Depression led to the enactment of key securities regulations during the New Deal era, as outlined in Section 4.2.3. During this period, landmark legislation such as the Securities Act of 1933 (the Securities Act)[294] and the Securities Exchange Act of 1934 (the Exchange Act)[295] was introduced, mandating disclosure requirements for publicly traded companies and establishing the Securities and Exchange Commission (the SEC) to enforce these regulations. The legislative goals were clear: to set fair prices, protect the public interest and provide investors with legal recourse against fraudulent or misleading practices. These laws fundamentally reshaped the regulatory landscape, placing disclosure at the centre of securities market regulation.

In Section 4.2.4, the focus shifts to a critical reflection on the legislative process, particularly examining the distance between the intended legislative purposes and their practical applications in case law. This section evaluates how well the regulatory framework aligns with financial regulatory goals, specifically in terms of transparency and fair pricing. It also explores the costs and reasonable boundaries of disclosure regulation, analysing the effectiveness of these laws in achieving market fairness, without imposing undue burdens on businesses. A broader examination of the SEC's regulatory objectives during this period is also presented, assessing how these objectives were integrated into the legal and financial systems of the time.

[294] Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933).
[295] Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934).

Section 4.3 explores the more recent evolution of disclosure regulation, focusing on the introduction of the Reg FD in 2000, which was implemented to address issues of selective disclosure.[296] By the 1990s, it became evident that the securities laws enacted during the New Deal were no longer sufficient to regulate the complexities of the modern financial system. Selective disclosure (the practice of giving certain market participants privileged access to non-public information) was identified as a significant threat to market fairness. Section 4.3.1 provides a detailed overview of the rationale behind Reg FD, discussing how the SEC responded to growing concerns about information asymmetry by proposing and enacting rules that aimed to level the playing field for all investors. The SEC's Final Rule (2000) and the relevant provisions of the Exchange Act are examined to assess how these rules expanded upon the disclosure regime established in the 1930s.[297] Section 4.3.2 evaluates the successes and limitations of Reg FD in promoting market fairness. While the rule marked a significant step forward in ensuring that all investors had equal access to material information, challenges remain in balancing transparency with the protection of sensitive corporate information. This section discusses ongoing debates about the effectiveness of Reg FD and its impact on both institutional and retail investors. By examining the rule's implementation over the past two decades, this section assesses whether Reg FD has succeeded in addressing the issues it was designed to solve or whether further reforms are necessary.

Section 4.4 examines how successive episodes of market failure prompted distinct legislative and policy responses. It analyses how the Securities Act and the Exchange Act established mandatory disclosure as a mechanism for transparency and accountability, while also embedding fairness within broader goals of market regulation. The section also considers the later development of Reg FD, illustrating how the principle of equal access to information has continued to shape debates on fair market structures. Section 4.4.1 reflects on the interaction between securities legislation and wider economic conditions, highlighting how monetary and regulatory policies have historically complemented one another in maintaining stability and procedural fairness. It argues that fairness operates most effectively as a guiding principle situated within supportive economic frameworks, rather than as a substitute for efficiency. Section 4.4.2 then examines the enduring challenges of achieving fairness through disclosure regulation, addressing persistent issues such as; selective disclosure, unequal

[296] The United States Regulation Fair Disclosure, 17 CFR § 243.100 (2021).
[297] The Securities and Exchange Commission, 'Final Rule: Selective Disclosure and Insider Trading' Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99, RIN 3235-AH82 (Aug 21, 2000).

interpretive capacities, and the competitive risks of over-disclosure. These limitations underscore that fairness must function as a procedural guide within an adaptive and proportionate framework.

Finally, Section 4.5 concludes the chapter by synthesising these findings. It reviews how successive reforms from early unregulated markets to the New Deal legislation and Reg FD have progressively advanced transparency while leaving substantive disparities unresolved. The conclusion emphasises that although disclosure regulation has strengthened formal fairness, its practical capacity to achieve equitable outcomes remains limited, thereby setting the stage for the subsequent analysis of how fairness is operationalised within the modern disclosure regime.

4.1. Pre-1933: Market Chaos and the Need for Regulation

4.1.1 Non-Regulatory Securities Markets in the Early Years, 1864–1873

For people today, the binding force of legislation over market practitioners, the complementary function of judicial law-making and interpretation have already been commonly accepted. In today's securities market, certain transparency of some information has become accustomed to exchange members (such as brokers), customers (such as investors), and even the public. For instance, the transparency of such information can be the exact number and details of shares issued by listed companies or the details of the company issuing shares. But in the late nineteenth century, when companies' information was arbitrarily concealed, the securities markets were completely different. The public had no channels to obtain useful information regarding their investments. At that time, market integrity was never considered a worthy value to be fulfilled.

Across the Atlantic, Adam Smith had previously likened the free market system to an 'invisible hand', illustrating that the participants' pursuit of private interests could serve the purpose of promoting the public good.[298] Bernanke described the approach this 'invisible

[298] Adam Smith was the first one who explicitly mentioned the metaphor of the invisible hand in his book An Inquiry into the Nature and Causes of the Wealth of Nations (known as The Wealth of Nations) Book IV, Chapter II titled 'Of Restraints Upon the Importation from Foreign Countries of Such Goods as Can Be Produced at Home'. The Wealth of Nations was first published in 1776. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen and Co., Ltd, 1776, Cannan edited) Vol I. In Smith's book, he only briefly mentioned the metaphor of the invisible hand. In this original source, Smith advocated that

hand' took in the field of securities markets. He explained that the usual structure that the market itself creates incentives for its participants to monitor the risky activities of the securities markets, which forms discipline and thus recedes the need for direct government supervision.[299] However, the incentives of the market's 'invisible hand' were utterly ineffective in the pockets of dishonest and completely untransparent manipulators. Instead, it provides the convenience of freeing them from any legislative or judicial fetters so that they can manipulate the market however they desire. The Erie War in the 19th century took place against this background. The following subsections will explore three important phases of the Erie War; through the approaches of manipular dominating securities prices, bribing the judges, and diluting the value of securities, a historical experience of the securities markets with few regulations will be demonstrated.

A. Price depended on manipulation, not the securities' actual value.

The Erie War represents an era before the awareness of disclosure regulations appeared. One of the important approaches that made the Erie War so representative of the chaotic period in U.S. history, was its price manipulation of the securities. In the earlier years of the non-regulation of the securities market, the corruption of the government, including the legislature and judiciary, was rampant. With this background being introduced, it is easier to comprehend the stock warfare that took place over the control of the Erie Railroad and how its continued aftershocks profoundly impacted Wall Street's prosperity. The Erie War started with the widespread panic of Erie Railroad's stock breaking out in 1864 and ended in 1869

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the market's invisible hand's mechanism relied on the market participants being self-interested, and thus competition they framed would help with the economy. He did not provide any details beyond this general point. Since the theory of the invisible hand came out, the development of the theory has run through the field of economic studies for the next hundreds of years till today. It is through such development that Smith's metaphor of the invisible hand became widely acknowledgeable all over the economic world. However, misunderstanding and misuse of Smith's metaphor occurred during the development of the theory of the invisible hands. "For example, to interpret the invisible hand as the price mechanism, which it is not, is likely to make one overlook the numerous reservations Smith had about the price mechanism or what he called the simple system of natural liberty, which, on examination, is seen to be neither simple nor systematic". William D. Grampp, 'What Did Smith Mean by the Invisible Hand?' (2000) 108(3) Journal of Political Economy 441-465 at 442. For this research and to avoid discrepancies of the refined differences in the later development of the theory of the invisible hand, the reference here in this chapter adopts the original meaning of Smith's theory.

[299] See Chairman Ben S. Bernanke of the U.S. Board of Governors of the Federal Reserve System, 'Financial Regulation and the Invisible Hand' (April 2007). Access <https://www.federalreserve.gov/newsevents/speech/bernanke20070411a.htm>. Accessed Jan 2023. In the same speech, Bernanke concluded that "For market-based regulation to work, the incentives of investors and other private actors must align with the objectives of the government regulator. In particular, private investors must be sophisticated enough to understand and monitor the financial condition of the firm and be persuaded that they will experience significant losses in the event of a failure. When these conditions are met, market discipline is a powerful and proven tool for constraining excessive risk-taking". Ibid.

when the three major securities markets in New York merged into one exchange[300]. During those years, three railways, namely the New York Central Railroad, the Pennsylvania Railroad, and the Erie Railroad constituted the land transportation of the states that connected the Midwest and New York City. These three railways also supported commerce in the areas they covered, further highlighting their historical status. Daniel Drew was the de facto controller of the Erie Railroad. In November 1864, Drew provided loans to investors[301] at the peak of Erie's share price, $102 per share, and promised not to sell shares at a specified price to attract investment.[302] Soon after in the spring of 1865, in flagrant violation of his commitment to the debtors, Drew manipulated a short sale that dropped the Erie stock from its peak to a median price of 80 dollars per share. Not content with that and through means of bribery, Drew obtained an injunction banning dividends from Erie stock.[303] Many investors who bought on the median price thought they were taking advantage after the previous year's peak fell. However, the "advantage" they took was not solid. Along with the injunction, Drew called in his loans. A large number of investors involved had no choice but to sell their shares to pay off their loans when the Erie stock price fell to a new low of $45 per share after Erie stopped issuing dividends.[304] The widespread panic over Erie stock broke out. Eventually, later the same year in 1865, the Erie stock price finally bottomed out at $42 per share.[305]

B. "Employ" the judges to fleece the outsiders.

Another important participant in the Erie War was Cornelius Vanderbilt. Unlike Drew, whose interest was purely in making a fortune by manipulating the securities market, Vanderbilt's interest lies in operating the railway system. He tended to find a compromise between the fiercely competing railroads to form a cartel and preserve the price of the stocks in the railroad industry.[306]

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[300] "...When the Civil War ended, there existed three major securities markets in New York. In 1869 they merged to form one exchange combining the 533 members of the New York Stock Exchange with 354 from the Open Board and 173 from the Bond Room. The result was a stock exchange with 1,060 members, which was increased to 1,100 in 1879, when forty additional seats were sold to fund development". Ranald C. Michie, 'Exchanges and Networks: 1850–1900' in the book *The Global Securities Market: A History* (Oxford University Press 2006) 83-118.
[301] For example, John Tobin and Leonard Jerome, the famous speculators in the period. See, for example, Clifford Browder, *The Money Game in Old New York: Daniel Drew and His Times* (University Press of Kentucky 1986) 108-120.
[302] See John Steele Gordon, *The Great Game: The Emergence of Wall Street as a World Power, 1653-2000* (Scribner Book Company, 1999) 115-140.
[303] ibid
[304] ibid
[305] ibid
[306] The cartels were another issue that affected the markets in the late nineteen century besides corruption and non-regulation. Given the research purpose of this thesis, it will not be discussed here. For a study of the

The measure Vanderbilt took was to use his vast fortune to purchase securities and obtain control of the Erie Railroad.[307] As Vanderbilt prepared to take a prominent seat on the Erie Railroad board of directors in the October 1867 election to replace Drew, Drew heard the news and approached Vanderbilt. He assured Vanderbilt that he would become Vanderbilt's most loyal advocate and oversee Vanderbilt's previous ally, the Boston Group, which controlled significant Erie shares. The day after Drew lost his election on October 8, Levi Underwood, Erie Railroad's new director, was replaced by Drew again. Three months later, Drew flagrantly violated his promise to Vanderbilt, pushing Erie's stock price up in the way of the "pool" that Vanderbilt loathed. [308] Then in January 1868, just as the price of Erie stock had risen to 79 dollars per share, Drew immediately manipulated short selling, causing the price to fall to 71 dollars per share momentarily.

After Vanderbilt realised that he could not bypass Drew to direct Erie Railroad by controlling the board of directors, he decided to increase the stakes. To ensure his seven million dollars would be sufficient to purchase adequate shares to acquire Erie Railroad, Vanderbilt employed the New York State Supreme Court judge he had already bribed: Judge George G. Barnard. Accordingly, Vanderbilt asked Judge Barnard to issue an injunction on January 26, 1868. This injunction forbade the conversion of any Erie bonds into stocks. It also prohibited Drew from selling or delivering his Erie shares.[309] When Vanderbilt concentrated on his sophistication in determining the judicial power, he did not realise that Drew had already applied this trick far before him. Whilst Judge Barnard issued the injunction, the Brooklyn judge whom Drew had been bribing for years, Judge Jasper W. Gilbert, has already ordered

railroad cartel, see for example Thomas S. Ulen, 'Cartels and Regulation: Late Nineteenth-Century Railroad Collusion and the Creation of the Interstate Commerce Commission' (1980) 40(1) The Journal of Economic History 179-181.

[307] At the time, the New York Central Railroad was controlled by Vanderbilt, the Pennsylvania Railroad was controlled by Thomas Scott, and the Erie Railroad was controlled by Drew which was known for its volatility. For the development history of the board of the railway companies, see Christopher T. Baer, 'A General Chronology of The Pennsylvania Railroad Company: Its Predecessors and Successors and Its Historical Context: 1863, 1864, and 1865' (May 2015 edition) access <http://www.prrths.com/newprr_files/Hagley/PRR_hagley_intro.htm>. Accessed February 2023.

[308] Charles F. Adams summed up Drew's approach in his news research masterpiece. "The controller of the "pool" had actually lent the money of the "pool" to one of the members of the "pool" to enable him to buy up the stock of the "pool"; and having thus quietly saddled him with it, the controller proceeded to divide the profits, and calmly returned to the victim a portion of his own money as his share of the proceeds". Supra note 291 at 42.

[309] "Barnard quickly issued an injunction forbidding Daniel Drew as treasurer from converting bonds into stock and personally from selling any stock in his possession". John Steele Gordon, *An Empire of Wealth: The Epic History of American Economic Power* (Harper Perennial 2004) at 213.

Erie to keep converting bonds into stocks.[310] From 1857 to 1868, the spoils system had already pushed any legal challenge against bribery to its peak. During this period, corrupt judicial and legislative systems made it impossible for any laws regulating the securities markets or prohibiting fraud to be implemented even temporarily. Should there be any law advocating transparency drafted, the opponent of interest would immediately bribe other judges or legislators to enact new laws.[311]

C. Freely issue "watered stocks" to dilute the actual value of the securities.

As a result of Judge Gilbert overturning Judge Barnard's injunction, Drew and his allies converted a huge amount of Erie Railway convertible bonds into stocks whilst issuing tens of thousands of new Erie shares. These newly and freely issued shares were called "watered stocks".[312] Without any endorsement of the actual value and assets of the company, the arbitrary issuance of watered stocks diluted the share value, making the average price per share inflated. On January 29, 1868, before Vanderbilt could react, the circulation of Erie shares had increased by twenty per cent.

In doing so, Drew and his allies[313] stoked the fires of the Erie War. The Erie War revealed only a small part of the power-for-money deal phenomenon in the late nineteenth century. Many giant controllers of the industries sold their stocks at face value, which was often many

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[310] See supra note 291 at 52. See also Christopher T. Baer, "A General Chronology of The Pennsylvania Railroad Company: Its Predecessors and Successors and Its Historical Context: 1868" (June 2015 edition) at 18 access <http://www.prrths.com/newprr_files/Hagley/PRR1868.pdf>. Accessed February 2023.

[311] In 1857, the spoils system allowed a winning party to appoint its supporters as government officials. The incompetence and greed of the bureaucratic system became the norm. By 1868, bribery became most difficult to challenge from a legal perspective. "No Conviction shall be had under this act on the testimony of the other party to the offence, unless such evidence is corroborated in its material parts by other evidence". R. S. 683, §§9.14, The Statute Law of the State of New York: Comprising the Revised Statutes and All Other Laws of General Interest, Arranged Alphabetically According to Subjects · Volume 1, Division IV, Offenses Affecting the Administration of Justice, Punishable by Imprisonment in a State Prison, Chapter II, Bribery and Corrupting Jurors and Others (January 1881) G.S. Diossy Original from Harvard University at 316. John Steel Gordon commented on the problematic evidence requirements of bribery in the above Act in his book: "in that pre-electronic age meant that as long as the official took his bribe in private and in cash, there was no possibility of his being convicted". Supra note 300, Ranald C. Michie at 208. In the same book, he quoted the 1868 British Magazine Fraser's comment: "in New York, there is a custom among litigants as peculiar to that city, it is to be hoped, as it is supreme within it, of retaining a judge as well as a lawyer". Gordon commented, "nowhere was this truer than in what became known on Wall Street as the Erie Wars, the struggle for control of the Erie Railway ". ibid.

[312] See Cornell Law School Legal Information Institute, 'Watered Stock' (April 2022) access<https://www.law.cornell.edu/wex/watered_stock>. Accessed February 2023. See also H. S. Richards, 'Watered Stock and Blue Sky Legislation' (1922-1924) 2(2) Wisconsin Law Review 86-102.

[313] With the help of Jim Fisk and Jay Gould, the watered stock Drew newly printed had already been sold for eight times their actual value. See John F. Stover, *American Railroads* (The University of Chicago Press: Chicago and London 1974) 104-142.

times greater than their actual value. In that period, these giants from various industries[314] issued countless watered stocks that abused the securities markets. They bribed judges and legislators; the latter in turn gave those who took advantage of the investors with asymmetrical information the opportunity to make huge profits. Although Vanderbilt played a prominent role in the economic sphere during the Erie War, he still lacked sufficient access to the actual value of the shares in which he invested his substantial wealth. Information opacity was reflected in the insider manipulators converting outstanding convertible bonds into shares without any bar. If there were any limitations, those manipulators then bribed the authorities to clear the bars. When it comes to the issue of transferring controlling power or once a blunder appeared, they simply made efforts to print new shares to enlarge the bubble. Euphemistically put, they diluted their issued shares. The supplement of the diluted shares could be endless so long as the bubble never burst. However, the most probable result was that the bubble absorbed and made vanish all investments in the market. At the time when there were no securities regulations, high ratio watered stocks and the almost free "new shares printing press" held the non-disclosure markets firmly. Conspiring with corruption and bribery, the non-disclosure markets eliminated any gap between the real and surface value of any securities. The significant participants in various industries and the corrupt judges and legislators formed a close political and financial alliance. Such an alliance became the de facto rule makers of the securities market at the time. For these rule makers, the rest of the market participants were merely a working majority of supple tools and a hopeless minority of respectable investors.

The close political and financial alliance based on opaque markets and bribery drove the market and governmental discipline into an uncontrolled status. The entanglement of judicial unfairness and the rent-seeking space seemed endless. Financial and political powers manipulated judicial and legislative justice through bribes. Bribes allied the corrupted with those with vested interests. The parties with vested interests benefitted wildly from information asymmetry when they monopolised the market. The entire market and economic circumstances were sluggish under such conditions. Eventually, the market's demands for securities regulations and information transparency arose. However, a theory regarding

[314] According to Moody's calculation, in the late-nineteenth century, there were 318 crucial, active and highly concentrated industrial trusts "representing in consolidations of nearly 5,300 distinct plants (industrial sites) and covering practically every line of productive industry in the United States". See John Moody, *The Truth about the Trust: A Description and Analysis of the American Trust Movement* (New York: Moody Pub. Co. 1904) 485-489.

information transparency, which aroused a certain stimulation in the legal field, did not emerge until the beginning of the next century. The enactment of placing the rationale against information asymmetry in the form of law abodes took additional decades to come out. The following two sections will introduce the emergence of disclosure theory in the securities markets in 1913 and how it was implemented in the 1930s.

4.1.2 Emergence of the Theory of Disclosure in the Securities Markets, 1913

In 1913, Judge Brandeis wrote an article for Harper's Weekly magazine about bankers' disclosures of the securities markets in Money Trust situations at that time.[315] This article was well known for its metaphor of disclosure, which was considered the emergence of the disclosure theory in regulating securities markets: "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman"[316][317]. Brandeis emphasised that disclosure was instrumental in disclosing the statements made by securities listing publicly. Publicity, or disclosure, is a potent force. The force of information transparency, as a continuous remedy, can positively affect the markets. This effect can also address the problem of rent-seeking space between power and money introduced earlier in section 4.1.1.[318] The below subsections will examine Brandeis's theory of disclosure in two parts. The first part will demonstrate how the disclosure demands were developed. The second part will introduce an important feature contributing to a real disclosure. This feature will not be examined in detail in this section as practical and regulatory details are needed to best comprehend this part of the theory. Thus, an integrative discussion on this feature will be made in section 4.2.3 after introducing the enactments of the securities regulations, along with the legislative progress of the latest disclosure regulation.

A. Prudent investors' reluctance to invest drove the channel controllers to implement disclosure.

In his article, Brandeis discussed how substantial wealth possessors, such as bankers, obtained their wealth through controlling capital and investment channels in the early

[315] See supra note 292.
[316] Ibid at 10.
[317] This classic metaphor became wildly accepted among lawmakers and policymakers seeking a rationale for disclosure regulation and scholars studying the securities markets in the legal field. David Sturtevant Ruder, the 23rd Chairman of the SEC appointed by President Ronald Reagan, treated this famous remark as the origin of the disclosure regulation philosophy in the United States. Supra note 293.
[318] "Then power breeds wealth as wealth breeds power". Supra note 292 at 10.

twentieth century.[319] In the market conditions of that era, small investors were virtually entirely dependent on the financial leading characters' knowledge and judgement in determining the quality of securities. In the weakly regulated securities market environment at that time, having such public and disclosed information helped investors judge the safety of their investments. The lower the safety factor, the more motivated the bankers were to instigate the investors to free their debts.

If the market cannot achieve information transparency, the public will be reluctant to subscribe to stocks because people with absolute wealth and power would continuously control capital and investment channels.[320] Lack of information forces the public to be prudent. Prudent manners of the investors significantly increased one of the major risks in securities marketing: "to find ready purchasers for the bonds or stock at the issue price".[321] Investors' reluctance to invest more profoundly in the securities markets damaged the interest of stock exchanges, prominent fortune possessors and the authorities with which they are intimately allied. They had started to realise the public's attitude. The close political and financial alliances knew that the public's attitude became a barrier to the continued profits of vested interests, such as bankers. As a result, such alliances at that time had to take steps to permit some disclosure when issuing securities. These steps included requiring clarity in "every circular letter, prospectus or advertisement of a bond or stock[322], asking issuers to clarify "the commissions or profits they are receiving"[323], etc.[324] Such steps ensured that existing securities holders and prospective purchasers would possess the knowledge they were both entitled to. In the early twentieth century, although there was no sound law to regulate disclosures, it had become the rudiment of the securities regulations centred on disclosure.

[319] "The Money Trust is so powerful and so firmly entrenched that each of the sources of its undue power must be effectually stopped if we would attain the New Freedom". Supra note 292 at 11.
[320] "... the public has become loth to subscribe for stock ... by reason of the commission they (the underwriters) receive, (there were) to sell subsequently at a lower price than the issue price". Ibid.
[321] "In the marketing of securities, there are two classes of risks: One is the risk of whether the banker (or the corporation) will find ready purchasers for the bonds or stock at the issue price; the other is whether the investors will get a good article". Supra note 292 at 12.
[322] Ibid. "To be effective, knowledge of the facts must be actually brought home to the investor, and this can best be done by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase". ibid.
[323] ibid
[324] The two steps taken for example here were the most relevant to the general securities markets. Other measures, such as the clarification of *"what the banker received for his middleman services" (ibid), and "what the bonds and stocks net the issuing corporation" (ibid) were more specific to the Money Trust problems specifically. Hence, they are not displayed in the text.*

The close political and financial alliances dominating capital and investment channels was one problem to be solved. Another problem to be solved was information asymmetry. This was not a new issue, but one that was inherited from the era described in section one, the watered securities[325]. The disadvantage of watering securities, as mentioned in section one, was that investors could not see their actual value. This was particularly the case at the time without regulation concerning information transparency. On this issue, Brandeis suggested that the true value of the securities was to be revealed only after excluding the made-up portion it contained.[326] That amount of water in the securities value would only be exposed in a real disclosure.

B. A real disclosure was to the public, not the authorities.

Real disclosure, as in Brandeis's theory of publicity brought by 1913, should not only be made to the authorities, it should be made to the public, i.e., investors. It should be mandatory.[327] There is a considerable difference between the interest of the public and the interest of individuals or groups aggrieved.[328] The difference will be discussed in detail after the introduction of securities regulations in the 1930s, along with judicial interpretations of the two interests' differences. Details will be provided in Section 4.3.3 c. This section will also explain how the distinction and protection of the public interest legitimated the regulatory authority. So far, it only needed to be marked that a mere disclosure to the authorities was inadequate in pursuing information transparency or market fairness; the authorities could be equipped with rent-seeking space of close political and financial alliance, which firmly controlled the investment channels. With these channels being monopolised, a disclosure made to the authorities cannot directly reflect the essence of information transparency to the market. Although the disclosure theory directed at the public emerged in the 1910s, legislative development lagged behind the growing public awareness of the importance of transparency.

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[325] See section one. See also supra note 312.
[326] Supra note 292 at 12.
[327] "Compliance with this requirement should also be obligatory and not something which the investor could waive ... for the whole public is interested in putting an end to the banker's exactions". Ibid.
[328] See for example *Kokesh v. Securities and Exchange Commission*, 581 U.S. 455 (2017). "The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual - this is why, for example, security-enforcement action may proceed even if victims do not support or are not parties to the prosecution. As the Government concedes, "when the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of a particular brief for the United States".

When the theory of disclosure first emerged, the close political and financial alliances firmly held the capital and investment channels. Public and small investors (a company's outsiders) cannot identify the true value of the securities on the markets. They became reluctant to continue to be involved in the securities' speculative activities. The publicity theory arose in this context. It advocated that through implementing disclosure, the water contained in the securities' prices would be excluded and the investors' enthusiasm would be rekindled. Meanwhile, to dispel doubts about the investment channels being controlled by the alliances, the theory of disclosure promoted that a real disclosure should be made to the public, not merely to the authorities. These factors are composed of a rudiment of modern securities regulations that concentrate on disclosure requirements.

To understand the premise, necessity, expected role and effect of the implementation of disclosure theory in the field of securities market supervision, it is necessary to understand the difficulties faced by legislation in the field of securities and the problems that need to be solved urgently at each historical stage. Reviewing the specific difficulties brought by each legislative process, in light of the progression of the macroeconomic environment, allows a straightforward and accurate understanding of the importance a certain theory receives in legislation. At the time when the theory of disclosure first emerged, a vast amount of money was circulating in the market and the booming speculative activities were still going on. There was no law implementing the theory of disclosure and the frenzy was practically laissez-faire. Various markets and industries, driven by speculators, have been led to unprecedented prosperity. Driven by such a huge amount of circulating capital and speculative frenzy, the bubbles in the securities markets were also involved and growing larger.

From the macroeconomy perspective at the time, the overall economic prosperity is believed by researchers to be closely linked to the monetary policy at that time.[329] From this

[329] See for example William R. White, 'Should Monetary Policy "Lean or Clean"?' (August 2009) Working Paper No. 34 Federal Reserve Bank of Dallas Globalization and Monetary Policy Institute 1-24. "A new macro-financial stability framework that would use both regulatory and monetary instruments ... would ... promote sustainable economic growth over time". See also for example Frederic S. Mishkin and Eugene N. White, 'US Stock Market Crashes and Their Aftermath: Implications for Monetary Policy' (June 2002) Working Paper 8992 National Bureau of Economic Research (NBER) Working Paper Series 1-55 at 39. "The key problem facing monetary policymakers is ... whether serious financial instability is present". For monetary policymakers, serious financial instability is highly relevant to disclosure regulations. When financial instability is present, it indicates a heightened level of systemic risk and the potential for destabilizing effects on the overall economy.

perspective, understanding monetary policies helped understand the economy's overall performance, which was directly relevant to the securities markets' performance. The implementation of disclosure theory in the securities market field is a part of the legislative response to the macroeconomic environment. To study the historical development of securities legislation, it is necessary to understand the timing when disclosure theory was introduced into legislation to counter the government's restraint policies in macroeconomics. Comprehending this timing helps to understand how introducing disclosure principles restricts the adverse consequences of contractionary policies. To learn the implementation of disclosure theory in the field of legislation in response to the economic environment at the time, it is necessary to understand its legislative background, namely the economic performance from 1913 to 1934. The following section will start by examining the economy's overall performance in 1913-1929 and 1929-1934 through the lens of monetary policies at different stages. The dividing of this period was the breakout of the Great Depression, for the last stock market pain in the Great Depression drew forth the enactment of modern securities regulations.

4.1.3 The Enlightenment on Legislation: Calls for Reform

The Erie War and the broader non-regulatory environment of the late 19th century provided clear lessons for legislators and reformers alike. First, the absence of transparency and the rampant manipulation of stock prices demonstrated the need for legal frameworks that prioritised the protection of investors. Second, the entanglement of financial and political power, as exemplified by the bribery and corruption of judges during the Erie War, underscored the importance of separating regulatory authority from market interests. These lessons, while painfully learned, laid the groundwork for the disclosure-based regulatory system that would eventually emerge in the twentieth century. By the early twentieth century,

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In such circumstances, disclosure regulations become crucial. The importance of disclosure regulations under such a scenario can be presented in three ways, namely early detection of risks and informed decision-making, market discipline, and policy effectiveness evaluation. Robust disclosure regulations ensure that financial institutions and market participants provide timely and comprehensive information about their financial health, risk exposure, and potential vulnerabilities. Accurate and transparent disclosure helps policymakers analyse and assess the overall health of the financial system. During this period, when the disclosure principle had just emerged and had not yet been applied in the field of securities law-making, policymakers were unable to detect signs of emerging financial instability and take appropriate action to mitigate risks due to the lack of a suitable disclosure regime. Without reliable information, rule-makers can hardly make informed decisions on monetary policy, regulatory interventions, and crisis management strategies. Transparent disclosure of information allows policymakers to evaluate the effectiveness of their policy interventions and regulatory measures. Again, at this stage of historical development, the absence of disclosure regulations that would enable policymakers to respond to emerging risks and to take accurate actions to maintain stability in the economy were out of the question.

the effects of unchecked market manipulation, insider trading, and the issuance of watered stocks had culminated in widespread public distrust of the financial markets. Investors, particularly small investors, had little to no access to reliable information about the true value of the securities they were purchasing. As a result, investment decisions were often based on the whims of market manipulators rather than sound financial analysis or transparent company disclosures.

The early calls for reform, including one of the most significant figures in the early push for market transparency, Louis Brandeis's advocacy for disclosure, were instrumental in shaping the modern understanding of securities regulation by encapsulating the need for openness in financial dealings. Brandeis argued that disclosure was a powerful tool for exposing the corruption and financial manipulation that characterised the securities markets at the time. His argument rested on the principle that if investors had access to accurate and timely information, they would be better equipped to make informed decisions which would, in turn, stabilise the market by reducing the scope for manipulative practices.

The emergence of Brandeis's argument for transparency was revolutionary because it shifted the focus of market regulation from direct intervention to information disclosure. Transparency and fairness, which were once abstract concepts, became concrete regulatory goals, fundamentally changing how financial markets operated. These reforms were not simply a response to the market failures of the nineteenth and early twentieth centuries; they were also a recognition that markets could only function efficiently and equitably if all participants had access to the same information and operated within a transparent framework. As the ideas of transparency and fairness gained traction, public pressure for reform began to mount. Investors, having witnessed the devastating effects of unregulated markets, increasingly demanded that the government take action to protect their interests. The widespread dissatisfaction with the financial system was not limited to individual investors; it also included public commentators, reformers and eventually politicians, who recognised that unchecked market abuses posed a serious threat to the broader economy. The increasing calls for transparency and fairness reached a tipping point in the years leading up to the Great Depression. By addressing the systemic issues of information asymmetry and market manipulation, the reforms of the 1930s sought to restore public confidence in the financial markets. This period marked a turning point in the relationship between government and the securities markets, as regulators began to recognise that transparency and fairness were not only necessary for protecting investors, but also essential for ensuring the long-term stability and integrity of the financial system.

4.2 The Great Depression and the Introduction of Disclosure Regulation, 1913–1938

From 1913 to the First New Deal phase, like many other industries and markets under the general economic environment, the securities markets produced many bubbles under the frenzy of speculators and great liquidity conditions. To examine the legislative purpose behind the securities regulations of the time, it is necessary to understand the history of the changes in the overall economic circumstances in which the securities markets were based. The defining event in such changes from 1913 to 1938 was the Great Depression. Critical studies on these changes in the general economic situations (encompassing the Great Depression period) are closely relevant to this chapter and are worth exploring.

The Great Depression stands as one of the most significant economic crises of the 20th century, fundamentally reshaping financial markets and regulatory frameworks. Friedman, Schwartz [330] and Temin[331] illustrated domestic research in the United States exploring the last century's research on the Great Depression. With the progress of internationalisation, Eichengreen[332], writing after the millennium, examined the crisis from a global perspective, highlighting the interconnectedness of financial systems and policy responses. These studies serve as the foundation for understanding how economic instability necessitated regulatory interventions. Building upon this, the following sections first examine the broader economic environment and the role of monetary policies before and during the Great Depression (4.2.1 and 4.2.2). By analysing the financial landscape from 1913–1933, this study explores how monetary policies, and policy missteps exacerbated market failures and deepened investor uncertainty. The discussion then shifts to the legislative response in the aftermath of the crisis, focusing on the enactment of securities regulations during the New Deal era (4.2.3)[333].

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[330] Milton Friedman and Anna Jacobson Schwartz, *A Monetary History of the United States 1867-1960* (Princeton University Press 1963).
[331] Peter Temin, 'The Great Depression' in the book *The Cambridge Economic History of the United States,* Volume III: The Twentieth Century (Cambridge University Press 1996, Stanley L. Engerman and Robert E. Gallman, edited).
[332] Barry Eichengreen, 'Viewpoint: Understanding the Great Depression' (2004) 37(1) The Canadian Journal of Economics 1-27.
[333] Thomas K. McCraw, *Prophets of Regulation* (Harvard University Press 2009).

This series of laws was considered necessary to rescue the nation's economy in general[334], as these regulatory measures, particularly the introduction of disclosure requirements, aimed to restore market confidence and prevent future financial instability. Finally, this chapter considers the reflections of legislators on the effectiveness of these reforms (4.2.4). While regulations were introduced to reduce systemic risk, the gap between legislative intent and practical application raises questions about the long-term impact of these measures. It is worth noting that the purpose of examining this historical period is to analyse the legislative intent behind key regulatory developments. It focuses on 1913–1938, as no significant securities legislation directly shaping disclosure practices emerged between 1934 and 1999. A detailed exploration of this period beyond judicial interpretations could shift focus from legislative progression. By maintaining a clear historical scope, this study ensures a precise analysis of the regulatory response to the Great Depression and its long-term implications for financial markets.

4.2.1 Economic Effects of Monetary Policy 1913–1929

The securities markets, as an integral component of the broader financial system, have historically been influenced by monetary policy decisions. The establishment of the Federal Reserve System (the Fed) [335] in 1913 marked a fundamental shift in U.S. financial governance, introducing new tools for managing liquidity, credit availability and economic stability [336]. While the direct relationship between monetary policy and market prosperity remains debated[337], there is clear evidence that fluctuations in monetary policy significantly affected market conditions, particularly in shaping investor confidence, liquidity and risk-taking behaviour. These macroeconomic dynamics are crucial for understanding the

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[334] Supra note 331.

[335] For the securities markets' volatility and macroeconomic activities, see for example Robert F. Engle, Eric Ghysels and Bumjean Sohn, 'Stock Market Volatility and Macroeconomic Fundamentals' (2013) 95(3) Review of Economics and Statistics 776-797.

[336] For the general policy trajectory for the Fed and the macroeconomic policies' changes, see for example supra note 331 at 314-18; see also Barry Eichengreen and Jeffrey Sachs, 'Competitive Devaluation in the Great Depression: A Theoretical Reassessment' (1986) 22(1) Economic Letters 22: 67-71 for monetary policies to "free domestic macroeconomic policies" and to "expand the economy".

[337] See for example Michael A. Bernstein, *The Great Depression: Delayed Recovery and Economic Change in America*, 1929-1939 (Cambridge University Press, 1987) 33-55, 101-124. See also Philip Arestis and Panicos Demetriades, 'Financial Development and Economic Growth: Assessing the Evidence' (1997) 107(442) The Economic Journal 783–799. See also Ben S. Bernanke and Ilian Mihov, 'Four Deflation and Monetary Contraction in the Great Depression' in the book *Essays on the Great Depression* (Princeton University Press 2000), 108-60. See also Jeffrey M. Lacker, 'Speech: Can Monetary Policy Affect Economic Growth?' (February 2016) access <https://www.richmondfed.org/press_room/speeches/jeffrey_m_lacker/2016/lacker_speech_20160224>. Accessed January 2023.

regulatory responses that followed, especially the role of disclosure regulation in mitigating financial instability. Examining monetary policies between 1913 and 1929 provides essential historical context for understanding the regulatory approaches that emerged in the aftermath of the Great Depression. The effectiveness of monetary tools, such as the discount rate, directly impacted securities market stability. By examining the effects of monetary contractions and broader financial pressures on market conditions, this study underscores the necessity of regulatory measures to address market failures.

A. The Fed's Early Monetary Interventions (1919–1921) and Market Stability

The Federal Reserve Act of 1913[338] established the Fed as the central authority overseeing monetary policy[339] , granting it the ability to regulate money supply and control liquidity. Early monetary policy, shaped by the gold standard, relied heavily on gold reserves[340] to determine money stock and bank credit. The post-war[341] period saw the U.S. transition from a net debtor to a net creditor[342], contributing to inflationary pressures [343] and price rises in the U.S. economic system[344]. However, the first real test of the Fed's regulatory capacity came with the 1919–1921 contraction[345], an episode that underscored the consequences of monetary tightening on securities markets.

Friedman and Schwartz noted that the 1920–1921 contraction led to declines in key economic indicators, including money stock and real income[346], while Fisher[347] observed a sharp drop

[338] The Federal Reserve Act of 1913, 12 CFR §201 et seq. Available at <https://www.federalreserve.gov/aboutthefed/fract.htm> accessed Dec 2023.
[339] See Sayre Ellen Dykes and Michael A. Whitehouse, 'The Establishment and Evolution of the Federal Reserve Board: 1913-23' (1989) 75(4) Federal Reserve Bulletin 227-243.
[340] See supra note 330 at 239. The gold reserve ratio refers to the percentage of a country's currency that is backed by gold reserves held by its central bank. It represents the proportion of gold reserves to the total currency in circulation. The gold reserve ratio is used as a measure of a country's ability to support its currency with physical gold and maintain stability in its monetary system. The formula to calculate the gold reserve ratio is Gold Reserve Ratio = (Gold Reserves (the amount of gold reserves held by the central bank)/ Total Currency in Circulation) * 100. A high ratio implies stability of a country's currency but not necessarily flexibility.
[341] World War I
[342] At the beginning of the 1910s and before WWI, the U.S. bore a net debtor of 3.5 billion dollars. Three years after WWI, it became a net creditor holding 7 billion of debt over other economic systems. See supra note 331 at 302.
[343] See supra note 330 at 221-26.
[344] For the implicit and wholesale price rises in the early years of the Federal Reserve from 1914 to 1921, see supra note 330 at 197 Chart 16.
[345] Ibid.
[346] See the money stock and income curve in Chart 16 of supra note 344. The fall continued until after the cycle through early 2022. See also supra note 330 at 231-39.
[347] Irving Fisher, 'Our Unstable Dollar and the So-Called Business Cycle' (1925) 20(150) Journal of the American Statistical Association 179-202.

in price levels and their rate of change[348]. The contraction's impact was particularly severe for the securities markets, as investor sentiment deteriorated and liquidity dried up. The discount rate, one of the Fed's key monetary tools[349], was instrumental in this period, shaping capital costs and credit availability.[350]

The discount rate, a critical component of monetary policy, affects the ability of commercial banks to access emergency funding from the central bank. Between 1919 and 1920, the Fed raised the discount rate from 4.75% to 7.0% [351] , a move designed to curb inflation but one that simultaneously restricted liquidity. At the end of the contraction in 1921[352], the rate ended at 4.5%, which was still the highest record until the outbreak of the Great Depression in 1929.[353] Higher borrowing costs constrained market participants, reduced speculative investments, and exacerbated the downturn in securities markets.[354] This dynamic highlights the interconnectedness of monetary policy and financial stability, demonstrating that market disruptions often arise not only from macroeconomic factors, but also from liquidity constraints and investor uncertainty. The failure of monetary tightening to stabilise domestic markets during this period provides a foundation for understanding later regulatory interventions. The reliance on discount rates to control capital flows demonstrated the limitations of monetary tools alone in ensuring market stability. This underscores the rationale for further regulations, which emerged as a necessary mechanism to reduce uncertainty and prevent excessive market volatility.

B. The Evolution of Monetary Policy (1922 – 1929) and Its Influence on Market Oversight

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348 See the actual price and the rapidity of the price change rate in Chart 1 at 183. Fisher believed his time's main research channels "scrutinised the price level but not its rate of change". Ibid at 181.

349 Christos Ioannidis and Alexandros Kontonikas, 'Monetary Policy and the Stock Market: Some International Evidence' (2006) Journal of Economic Literature 1-25.

350 The contraction of monetary policy led market participants to show negative feedback on the securities market because of the rate of future cash flow's capitalisation, which made the securities markets react poorly. See also ibid at 5.

351 Tallman Ellis, and Eugene White, 'Why Was There No Banking Panic in 1920-1921? The Federal Reserve Banks and the Recession' (2020) Unpublished manuscript, Federal Reserve Bank of Cleveland and Rutgers University 1-40 at 11.

352 A contraction of monetary policy is a macroeconomic tool that allows the central bank to reduce inflation, decrease the rate of demand for goods and services and result in dampening economic growth.

353 Ibid.

354 In terms of the U.S. securities markets, from 1919-21, the decline in industrial productivity and the stock market reached its lowest point in 1921.See Michael D. Bordo and David C. Wheelock, 'Monetary Policy and Asset Prices: A Look Back at Past U.S. Stock Market Boom' (August 2004) Working Paper 10704 National Bureau of Economic Research (NBER) 1-59. Figure 16 at 54 and 17 at 55.

As the U.S. economy rebounded from the 1920–1921 contraction, inflation and monetary supply became central to economic policy. Inflation control emerged as a key instrument for managing market conditions, influencing both interest rates and investor behaviour. By adjusting interest rates, the Fed could influence the demand for money, indirectly shaping securities market activity.

Today, the Fed considers that healthy inflation should be around 2%.[355] However, in the years between 1922 and October 1929, before the Great Depression, inflation did not approach this indicator except for a few brief periods in July and December 1923, February 1924 and the end of 1925.[356] According to the FRASER historical records of the U.S. Fed, from 1922 to 1929 interest rates peaked where several nodes were considered healthy inflation.[357] Simultaneously, prices and the velocity of money also fluctuated significantly. Gurley and Shaw highlighted the positive correlation between interest rates and money velocity, confirming that stable monetary conditions contributed to sustained market growth.[358] However, as Friedman and Schwartz documented, this period of expansion also set the stage for future vulnerabilities. In describing the market boom after the Great Contraction, Friedman and Schwartz stated that it was accompanied by a substantial expansion immediately after the recession of 1920–1921, like other earlier contractions.[359] During the years after 1921, until the outbreak of the Great Depression in 1929, the stabilisation of the velocity of money was evident.[360] According to Storer[361], the velocity of money changed

[355] This 2 per cent hypo is generally accepted worldwide. See the Board of Governors of the Federal Reserve System, 'Why does the Federal Reserve aim for inflation of 2 per cent over the longer run?' (August 2020). Access <https://www.federalreserve.gov/faqs/economy_14400.htm>. Accessed Feb 2023. See also Ben S. Bernanke (a member of the Board of Governors of the Federal Reserve System), 'Panel Discussion: Inflation Targeting' (2004) 86(4) Federal Reserve Bank of St. Louis Review 165-68. See also Lawrence H. Summers, David Wessel and John David Murray, 'Rethinking the Fed's 2 Percent Inflation Target: A Report from the Hutchins Center on Fiscal & Monetary Policy' (June 2008) The Brookings Institution. Access <https://www.sipotra.it/wp-content/uploads/2018/06/Rethinking-the-Fed's-2-percent-inflation-target.pdf>. Accessed Feb 2023.
[356] U.S. Inflation Calculator, 'Table of Historical Inflation Rates in Percent 1914-2023' (February 2023). Access <https://www.usinflationcalculator.com/inflation/historical-inflation-rates/>. Accessed March 2023.
[357] FRASER (a digital library of U.S. economic, financial, and banking history—particularly the history of the Federal Reserve System), 'Interest Rates, 1914-1965' (Oct 1965) 1-12 at 6. Access <*https://fraser.stlouisfed.org/files/docs/publications/frbslreview/pages/1965-1969/62472_1965-1969.pdf*>. Accessed March 2023.
[358] John G. Gurley and E. S. Shaw, 'Financial Aspects of Economic Development' (1955) 45(4) The American Economic Review 515- 38 at 533.
[359] See supra note 330 at 241-43.
[360] Ibid.
[361] Robert W. Storer, 'Money Velocity and the Business Cycle' (1956) 12(5) The Analysts Journal 89-96 at 92.

from 1.8501 in 1922 to 1.8370 in 1929, except for a few extreme ranges corresponding to interest rates and inflation.

YEAR TO YEAR INCREASES
(In billions of dollars)
As of June 30

YEAR	VELOCITY OF MONEY SUPPLY
1917	1.9393
1918	2.2070
1919	2.2820
1920	2.2103
1921	2.1381
1922	1.8501
1923	1.8247
1924	1.9164
1925	1.8490
1926	1.8924
1927	1.8534
1928	1.7749
1929	1.8370
1930	1.7972
1931	1.5827
1932	1.4841
1933	1.3736
1934	1.3163
1935	1.3783
1936	1.4096
1937	1.5151
1938	1.5557
1939	1.4587
1940	1.4772
1941	1.6560

[362]

The chart in this study presented how well the velocity of money performed compared to before and after.[363] The velocity of money refers to the rate at which money circulates within an economy. As a measurement of how quickly money is spent and re-spent in purchasing goods and services, the concept of velocity of money change relates to the fluctuations in this rate over time. Changes in the velocity of money can have significant implications for an economy. The stabilisation of the velocity of money sustained the prosperity of the market in general; such stabilisation symbolises the frequency of money changing hands, consumer and investor confidence, expectations of future economic conditions, and the tendency of the central bank to make monetary policy decisions. As an essential branch of the overall economy, securities markets also gained advantages from such stabilisation, as a stabilised velocity of money creates favourable conditions for economic expansion.

Bordo highlights that the downturns in the securities markets were directly related to economic recession in most cases.[364] Under the same logic, in most cases, only when the overall economy performs well can the securities market thrive. Combined with the studies

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[362] Data source, ibid at 90.
[363] ibid.
[364] Michael Bordo, 'Stock Market Crashes, Productivity Boom Busts and Recessions: Some Historical Evidence' (Jan 2003) Unpublished manuscript, Rutgers University.

discussed above, in the years of vigorous development after the recession in 1921, (with the relative easing of monetary policy, the rise in prices, the modest adjustment of inflation and the stable velocity of money) the overall economic environment showed an upward trend, so did the securities markets. This momentum lasted until October 1929. In October 1929, the interest rate fell instantly from six to three percentage points.[365] Inflation hit a low of 0.6% and was never positive again until 1934.[366] Price indicators, including the implicit price index and the wholesale price index, have been falling since.[367] The velocity of money had been falling thoroughly to record lows.[368]

In terms of the securities markets, the falling velocity of money indicates reduced trading activities, a decline in demand for securities and lower liquidity.[369] In times of economic uncertainty, investors hold onto assets, limiting capital availability. This leads to sell-offs, falling stock prices and weakened market stability. Additionally, lower money velocity constrains company revenues, reducing profitability and further driving market downturns. These effects reinforce Bordo's argument that securities market contractions are closely tied to broader economic recessions, with the market struggling through this instability until 1934. The eve of the Great Depression exposed the limitations of monetary policy in stabilising financial markets, demonstrating the need for regulatory intervention beyond liquidity management. The failures of monetary policy between 1913 and 1929 showed that financial crises were exacerbated by structural market vulnerabilities. When investors lack reliable financial policies mispricing and excessive speculation increase, as seen during the monetary contractions of 1919–1921 and the instability of 1929. On top of these limitations, investors operating in an environment of incomplete information heighten systemic risk. As money velocity declined and liquidity dried up, the lack of transparency can further erode market confidence, deepening the crisis. Uncertainty prevented investors from accurately assessing risk, exacerbating financial instability.

[365] See supra note 357.
[366] See supra note 356.
[367] See supra note 330 at 197 Chart 16.
[368] See supra note 361.
[369] In today's view, another effect of the velocity of money changes towards the securities markets is that in times of economic uncertainty and reduced economic activity, investors often seek safe-haven assets, which can result in capital moving away from riskier securities markets, causing further declines in prices. And the general consequences can vary depending on the specific circumstances and the overall market conditions. But here, for this writing, the safe-haven assets such as government bonds and gold were at an unsettled stage before and during the Great Depression. Hence, in discussing the central bank policies and government interventions and their outcomes in shaping further securities regulations, such influence will not be involved.

4.2.2 The Outbreak of the Great Depression 1929–1933

A. A severe contraction in economic activity

According to the research of the Federal Reserve History Institution (2013), the "Dow Jones Industrial Average (DJIA) increased six-fold from sixty-three in August 1921 to 381 in September 1929".[370] Irving Fisher, an important economist of the 1920s, claimed that "stock prices have reached 'what looks like a permanently high plateau'".[371] The great prosperity ended in a devastating Great Depression. From the week of October 28, 1929, the Dow Jones Industrial Average index continued to fall, losing half of its value by the middle of the following month.[372] The securities markets were not the only crisis zone of the Great Depression. The overall economic busts and the reactions to the monetary policies had debilitated various industries.[373]

Friedman and Schwartz believed that from 1929 to 1933, the Great Depression became the worst business-cycle contraction in American history.[374] It was longer and sharper than any other contractions.[375] Eichengreen argued that the characteristics pointed out by Friedman and Schwartz were not unique to the United States during the Great Depression.[376] Due to the uncoordinated gold standard and foreign exchange (and its reserves), problems of the major financial countries in the middle of the two world wars, currency crises in other countries also

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370 Gary Richardson, Alejandro Komai, Michael Gou and Daniel Park, 'Stock Market Crash of 1929' (November 2013) Federal Reserve History. Access <https://www.federalreservehistory.org/essays/stock-market-crash-of-1929#footnote1>. Accessed February 2023.

371 Irving Fisher, 'Fisher Sees Stocks Permanently High' (October 16, 1929) New York Times. Access <https://timesmachine.nytimes.com/timesmachine/1929/10/16/96000134.html?pageNumber=8>. Accessed March 2023.

372 "On Black Monday, October 28, 1929, the Dow declined nearly 13 percent. On the following day, Black Tuesday, the market dropped nearly 12 percent. By mid-November, the Dow had lost almost half of its value. The slide continued through the summer of 1932, when the Dow closed at 41.22, its lowest value of the twentieth century, 89 percent below its peak". Gary Richardson, supra note 370.

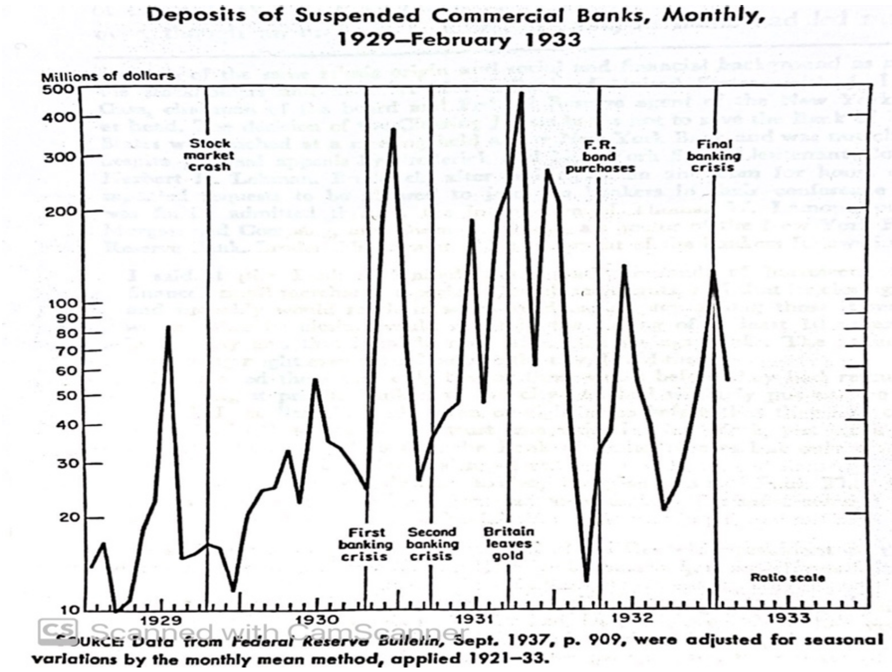
373 "Monetary behaviour during the contraction itself is even more striking. From the cyclical peak in August 1929 to the cyclical trough in March 1933, the stock of money fell by over a third". Supra note 330 at 299. "More than one-fifth of the commercial banks in the United States holding nearly one-tenth of the volume of deposits at the beginning of the contraction suspended operations because of financial difficulties". Benjamin Roth, *The Great Depression: A Diary* (New York, Public Affairs, 2010) 178.

374 See Ibid. "U.S. net national product in current prices fell by more than one-half from 1929 to 1933; net national product in constant prices, by more than one-third; implicit prices, by more than one-quarter; and monthly wholesale prices, by more than one-third". Ibid.

375 The falling of the stock of money from 1929 to 1933 "is more than triple the largest preceding declines recorded in our series, the 9 per cent declines from 1875 to 1879 and from 1920 to 1921". The President's Committee on the Securities Market, Ibid.

376 See supra note 332 at 1-6 and Figure 2 at 10.

indirectly aggravated the Great Depression in the United States.[377] Kaminsky and Reinhart proposed that currency crises are always accompanied by banking crises.[378] On the point of the two crises, Friedman and Schwartz gave a strong explanation.[379] They drew a line chart of suspended commercial bank deposits from 1929 to 1933. Such a line chart demonstrated the correlation between the downside and bottom of deposits and the outbreak of the bank crises.



[380]

In terms of chronological order, Friedman and Schwartz's research showed that the crash in the securities markets occurred almost a year before the two banking crises.[381] At the same time, whilst the securities markets crashed, total deposits of commercial banks surged to a peak.[382] This phenomenon suggested that the public tended to turn to deposits when the securities markets were extremely unstable.[383][384] This conversion in investment and savings

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[377] ibid Figure 2, also at 7 and 14-18. See also supra note 330 at 315-24. The gold standard and the later dual standard of gold and dollars (since the Bretton Woods System), along with the federal exchange (and its reserves) are important to the studies of the history of the Great Depression. This is the reason they are mentioned here. However, since they are not directly relevant to the legislative purpose of the securities laws, it will not be further discussed in this work.

[378] Graciela L. Kaminsky and Carmen M. Reinhart, 'The Twin Crises: The Causes of Banking and Balance-of-Payments Problems' 89(3) American Economic Review 473-500.

[379] See supra note 330 at 308-15.

[380] See Chart 30 at supra note 330 at 309.

[381] See Chart 27 at supra note 330 at 302.

[382] Ibid.

[383] "Whatever its magnitude, the downward pressure on income produced by the effects of the stock market crash on expectations and willingness to spend effects that can all be summarized in an independent decline in velocity was strongly reinforced by the behaviour of the stock of money". Supra note 330 at 307.

[384] In terms of the concerns of liquidity and stability, securities and deposits can have different levels of liquidity depending on the specific type and characteristics of each. However, deposits are generally considered more liquid than securities due to their ease of access and immediate availability for withdrawal or transfer (for both cash and bank deposits, which typically refer to funds held in a bank or financial institution, such as savings accounts or checking accounts). As described in this paragraph, the relevancy of a deposit's reaching a peak and

can demonstrate market confidence, but it cannot show the optimism of the overall economic environment. This is because from 1929 to 1933, the great contraction also included deflation and devaluation. During this period, a significant decline in economic activity, mass unemployment, deflation, and a severe contraction in industrial production characterised the broader economic downturn. The two factors mentioned, the deflation and devaluation that were included in the great construction, coupled with the shift in money velocity from stabilisation in the previous decade, to a non-optimistic pace[385], led to a rapid economic downturn starting from the securities markets' crises.[386] Friedman and Schwartz summarised the suffering of the securities markets and the overall economy was caused by the great contraction from the end of 1929 to 1933. During this period, the securities markets and the overall economy experienced suffering. This downturn in the securities markets, including stock market crashes and the collapse of financial institutions, further worsened the already challenging economic situation during the Great Depression. Friedman and Schwartz claimed that to a certain extent, the securities markets' crises "was a symptom of the underlying forces making for a severe contraction in economic activity", [387] and the former's occurrence "must have helped to deepen the contraction"[388].

a securities market crash is reflected in a flight to safety. During times of extreme market instability, such as a securities market crash, investors and the general public may become nervous about the value and safety of their investments in securities. In such situations, there is typically a flight to safety, where individuals tend to seek more secure and less volatile options for their funds. Cash and bank deposits are considered more liquid and stable compared to securities. Bank deposits, particularly in reputable and regulated institutions, are often insured by deposit insurance schemes, such as the Federal Deposit Insurance Corporation (FDIC) in the United States (which was established on June 16, 1933, as a response to the banking crises during the Great Depression. It was created as part of the Banking Act of 1933, also known as the Glass-Steagall Act, to restore confidence in the banking system and protect depositors' funds), which provides additional confidence to depositors. This insurance mitigates the risk of complete loss in the event of a bank failure. Hence, the surge in total deposits during a securities market crash can be attributed to the public's desire for greater liquidity and security. They may opt for cash or bank deposits rather than securities, viewing them as a safer alternative during market turbulence.

[385] "The sharp decline in velocity by 13 per cent from 1929 to 1930". Ibid. The decline of the monetary velocity (and the turnaround of interest rates) "represent fairly typical cyclical reactions". Ibid. "We have seen that velocity usually declines during contraction, and the more so, the sharper the contraction. For example, velocity declined by 10 per cent from 1907 to 1908, by 13 per cent from 1913 to 1914, and by 15 per cent from 1920 to 1921 …". Ibid. "If (part of the much sharper declines in velocity … was a consequence of the special events listed, rather than simply a reflection of unusually sharp declines in money income produced …), the stock market crash made the decline in income sharper than it otherwise would have been". Ibid. "Certainly, the coincidence in timing of the stock market crash and of the change in the severity of the contraction supports that view". Ibid.

[386] "During the two months from the cyclical peak in August 1929 to the crash, production, wholesale prices, and personal income fell at annual rates of 20 per cent, 7¼ per cent, and 5 per cent, respectively. In the next twelve months, all three series fell at appreciably higher rates: 27 per cent, 13⅛ per cent, and 17 per cent, respectively. All told, by October 1930, production had fallen 26 per cent, prices, 14 per cent, and personal income, 16 per cent. The trend of the money stock changed from horizontal to mildly downward". Supra note 330 at 306.

[387] Ibid.

[388] Ibid.

B. The problem of inadequate information in the securities markets' crises

As stated above, the mutual effects between the great contraction and the general economic downfall (e.g., price, money velocity, income, etc.) worsened the securities markets from 1929 to 1933. It implies that these effects exacerbated the already significant challenges and difficulties faced by the securities markets during that period. Specifically, declining economic activity, deflation, and slower money velocity curtailed consumer spending, decreased corporate profits, and contributed to a general slowdown in economic growth. These factors, coupled with the loss of investor confidence and the collapse of financial institutions, led to a significant deterioration in the securities markets. Stock prices plummeted, investors lost substantial amounts of money, and many companies went bankrupt. Apart from the contraction, other factors directed the inadequate result of the securities markets' performance. In the previous sections of this chapter, I have demonstrated broader external causes such as legislative and judicial corruption, power-money renting space, monetary policies, etc. In this section, I will discuss internal factors that limit the possibilities of the markets' prosperity from the perspective of information disclosure.

Studies in later decades on the securities markets over that period, revealed that one of the most significant causes of the securities depression was the inadequacy of disclosed information. Loss summarised that the breakout of the Great Depression was positively attributed to the absence of information.[389] He argues that during 1929 and 1933, the lack of information in the securities markets included, but was not limited to the failure to provide necessary information when potential investors were invited to buy securities.[390] Concurrently, the then-relevant information about companies that publicly held securities was seriously insufficient. The problem also involves corporate insiders, the de facto securities information holders who abused their position to trade the company's securities for their benefit. This particular point provided experience and theoretical support for the introduction of insider trading legislation in later eras. Back in the ages of the Great Depression, in such a setting, the public could not obtain concrete details on the actual value of securities.

[389] Louis Loss, *Fundamentals of Securities Regulation* (Little, Brown and Company 1985) at 7-10.
[390] Ibid.

The loss continues, noting that the nation's securities exchanges at that time evolved ultimately into a "private club".[391] With no information transparency at the time, the disastrous market effects in issuing and trading transactions were equally problematic. The value of all stocks listed on the New York Stock Exchange before the start of the Great Depression totalled 89 billion dollars.[392] In the days after Black Thursday in September 1929, when the market collapsed, that value fell by 18 billion dollars.[393] By 1932, the total figure had dropped to 15 billion dollars, reflecting a total loss of 74 billion dollars in two and a half years.[394] The chain reaction of margin trading also entered a vicious circle, with a causal sequence drying up the value of the securities markets.[395] These facts once again demonstrated how easy it was to disseminate the turmoil and apprehension brought about by the public not knowing the real value of securities. As mentioned earlier, the general economic environment and other social factors also affected this outcome. Information transparency is not the only factor that can dispel the inflammatory power of fear. But, despite this, it did not prevent the New Deal from taking information transparency seriously in the following years. More importantly, this time around, the idea of valuing disclosure rules was finally being implemented.

4.2.3 Enactments of Securities Regulations in the New Deal 1933–1938

When President Franklin D. Roosevelt came into office in 1933, he actively pursued the advancement of government centralism. The legislative packages enacted in the first hundred days of Roosevelt's first term greatly centralised the federal government's economic control. These legislative packages were included in a series of other programmes and reforms known today as the New Deal. Historically speaking, there were two phases of the New Deal. The first New Deal was considered to be carried out by the Seventy-Third Congress (1933–1935) in March 1933 for the "First Hundred Days".[396] The second New Deal was from June to August 1935.[397] Finally, the 1938 Congressional elections witnessed the end of the whole

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[391] Ibid.
[392] See SEC Commissioner James C. Sargent, 'Twenty-five Years of SEC Securities Regulation' (Before the Houston Downtown Rotary Club, Houston, Texas, 5 March 1959).
[393] Ibid.
[394] Ibid.
[395] Ibid.
[396] Supra note 331 at 317.
[397] See James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939 (*Lexington: University of Kentucky Press, 1967) at 37.

New Deal Chapter.[398] The First New Deal was initiated by President Franklin D. Roosevelt after he came into office in March 1933. At that time, the United States was in the midst of the Great Depression, with high unemployment rates, bank failures, and economic turmoil. Roosevelt recognised the urgent need for government intervention to address these issues and stimulate economic recovery. Therefore, he introduced a series of legislative packages and reforms in the first hundred days of his presidency, aimed at centralising the federal government's economic control and implementing various relief, recovery, and reform measures.

The Second New Deal was implemented from June to August 1935 as a continuation of Roosevelt's efforts to combat the Great Depression. The triggering event for the Second New Deal was the strong criticism faced by Roosevelt and his administration from several quarters. Critics argued that the First New Deal had not gone far enough in addressing the underlying economic issues and that additional action was needed. In response to these criticisms, Roosevelt proposed new legislation and programs to further strengthen economic recovery, provide greater social welfare, and increase the government's control over the economy. Notable programs implemented under the Second New Deal include the Social Security Act[399] and the Works Progress Administration (WPA). The New Deal, as a whole, consisted of numerous programs, reforms, and legislative acts. While the two phases mentioned above represent significant periods within the broader New Deal chapter, the initiatives and reforms introduced during the New Deal extended beyond the specific time frames of the first hundred days and the Second New Deal. In the context of such, the construction of the regulatory authorities and the enactment of the acts most relevant to this study were proposed and implemented during the first New Deal. Therefore, the following research will focus on regulatory measures during this period.

During the New Deal period, a series of regulations designed to eliminate certain abuses in the securities industry were created. This series of laws included the Securities Act of 1933[400], the Securities Exchange Act of 1934[401], the Public Utility Holding Company Act of

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[398] See ibid at 381-489. See also Nancy Beck Young, William D. Pederson and Byron W. Daynes, *Franklin D. Roosevelt and Congress: The New Deal and Its Aftermath (Volume II of The M.E. Sharpe Library of Franklin D. Roosevelt Studies)* (Taylor & Francis 2019) at 234-265.
[399] Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935).
[400] Supra note 294.
[401] Supra note 295.

1935 (PUHCA)[402], the Trust Indenture Act of 1939[403], and the Investment Company Act of 1940[404]. McCraw described this series of laws as "five major pieces of the New Deal legislation"[405] that "shaped the regulation (at the federal level) of the securities industry"[406]. Within this series of laws, the Securities Act and the Exchange Act provided an overall regime of regulating information disclosure in the securities markets. Hence, they were directly relevant to this research. Title I of the Exchange Act further created a Commission which exercised the laws regarding activities in the securities markets - the SEC. This commission still plays an essential role in the modern securities regulations.

Temin suggests that the enactment of the laws regulating economic branches saved the financial system from its collapse.[407] Such legislation at the federal level, brought clear benefits to the later securities markets. In the era of government centralism of 1933, more controversy came from the political perspective rather than from an economic view or the contents of the law itself.[408] During that period, the controversy surrounding the securities regulations was mainly driven by political considerations, rather than economic analysis or the specific provisions of the laws. In other words, the debate and disagreement surrounding these regulations were more influenced by political ideologies and power dynamics, rather than a careful examination of the economic impact or the technical aspects of the laws themselves. This highlights the larger political shift that was happening during that time, where power was transitioning from the bankers and promoters to the broader investing public. By stating that the controversy stemmed from the political perspective, rather than economic or legal considerations, it suggests that the focus was on the broader implications and symbolism of these regulations, as they represented a transfer of power and a new approach to investor protection, rather than a detailed analysis of their economic effects or the legal provisions they contained. Nevertheless, the legislature and scholars demonstrated several critical points of the market regulations per se, and the performance of the securities

402 Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (1935).
403 Trust Indenture Act of 1939, Pub. L. No. 41-345, 53 Stat. 1131 (1939).
404 Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (1940).
405 Supra note 333 at 169.
406 Ibid.
407 Supra note 331 at 318.
408 See William O. Douglas, 'Protecting the Investor' (1934) 23(3) Yale Review 1-9. "What the Act contains, what it actually does, the soundness of its method of protecting investors are not particularly important. The nature and quality of the arguments mean only that the Act is significant politically. It is symbolic of a shift of political power. That shift is from the bankers to the masses, from the promoter to the investor. It means that the government is taking the side of the helpless, the suckers, the underdogs" at 1.

markets within the overall economic development in the New Deal period. This also reveals the significance of these laws and the purposes behind them.

Justice Douglas detailed these points on securities regulations in an important article published in 1934.[409] Douglas provided two perspectives that can best demonstrate the views of the legal community at that time on the securities regulations that came with the New Deal. Subsections a and b below will analyse these two perspectives. The first perspective concerned the effects of disclosure per se, whilst the second examined the protection of the securities markets through the lens of monetary policies. In addition to these two perspectives, there were two important purposes behind the Securities Act and the Securities Exchange Act worth analysing. Subsections c and d below will discuss these two purposes. The first is the legislative purpose of protecting the public interest which was mentioned consistently in the two Acts. Previously in section 4.1.2 B, the first emergence of the disclosure theory had introduced that a real disclosure should be made to the public, not merely to the authority. The differentiation and protection of public interest were not only written in the two Acts, but also interpreted by the court. These will be discussed below. The final purpose of the two Acts was to provide the market participant with a litigative approach which involved securities fraud. Apart from the disadvantages of non-disclosure, misleading or fraudulent information also damages the market's integrity. The enactments of the two Acts enhanced causes of action for litigation and supplemented inadequate state laws. The judicial interpretation of fraud in the following years extended the edge of securities market regulations. These will be addressed at the end of this section.

A. Disclosure requirements in securities regulations helped set fair prices.

The first aspect was about the actual effects of disclosure requirements in securities regulations. The Securities Act of 1933 required registration statements to be made in the early months of a company. Douglas commented this requirement could "serve as a healthy conditioner of the market".[410] Douglas attributed the legality of federal intervention in the

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409 Ibid.
410 See Supra note 392 at 3. See also Section 5 of the Securities Act of 1933. Section 5 of the Securities Act of 1933 states that it is unlawful for any person to sell or offer to sell securities through interstate commerce unless a registration statement has been filed with the Securities and Exchange Commission (SEC). The purpose of this requirement is to ensure that investors have access to important information about the securities being offered, such as financial statements, business descriptions, and risks associated with the investment. Justice Douglas's perspective suggests that the disclosure requirements imposed by the Securities Act acted as a beneficial influence on the market by conditioning it positively. By requiring companies to provide detailed information

securities markets, known as disclosure requirements, to investors lacking the training or intelligence to absorb the information required by the rules and find their usefulness.[411] Under such circumstances, the Government should fully play its role as a market stabiliser. In other cases, investors were too concerned about speculative profits and thought that the information required to be disclosed by the Act was irrelevant to their immediate concerns.[412] In this case, the securities regulations highlight that even if investors who are solely focused on profits and may not be able to identify risks do not actively seek disclosure, the expert assessment of prices based on the disclosed information will offer investors a certain level of risk management.[413] On a positive note, the expert assessment has the potential to mitigate investors' risk to a certain degree based on the disclosed price. This advantage ensures that irrespective of the scale and magnitude of investors, they can reap the benefits of the disclosure regulations. However, there are additional considerations that arise when considering the cost and accessibility of information required for effective decision-making in securities markets. This matter will be explored in section 4.3 of this chapter, and subsequently in Chapter Five.

Douglas's discussion on the securities prices put forward the practical value of disclosure requirements in securities regulations. To be precise, the price reflected the information behind it. The legislative report from the Seventy-Third Congress also concentrated on the indices of actual securities value.[414] In the second session report, the Seventy-Third Congress raised the importance of publicity of the disclosure theory which was brought by Brandeis in the 1910s, as introduced in section 4.1.2. In its report, it emphasised that "there cannot be honest markets without honest publicity"[415]. A free and open public market should be based on a fair price judgement of securities, leading to a state where the market reflects as fair a price as possible.[416] No investor can safely buy and sell securities without a reliable foundation to develop a value judgement of securities.[417] Hidden and secret information

about their securities, it ensured that potential investors had access to relevant information to make informed decisions. This was seen as a way to enhance the overall transparency and integrity of the securities markets.

[411] See supra note 408 at 2-3.

[412] See supra note 408 at 2.

[413] See supra note 408 at 3.

[414] H.R. Rep. No. 1383, 73rd Cong., 2nd Sess. (1934). The indices that direct to the actual price included several sections from the Securities Act of 1933 and the Securities Exchange Act of 1934. For example, Regulation S-K requires the disclosure of the summary and the risk factors of the registrants; Regulation S-X, regarding various financial statements about the issuer. Details of these rules will be discussed in section 4.5.1 of this chapter.

[415] Ibid, Commissioner Rayburn at 7705.

[416] See ibid at 7701 - 06.

[417] Ibid.

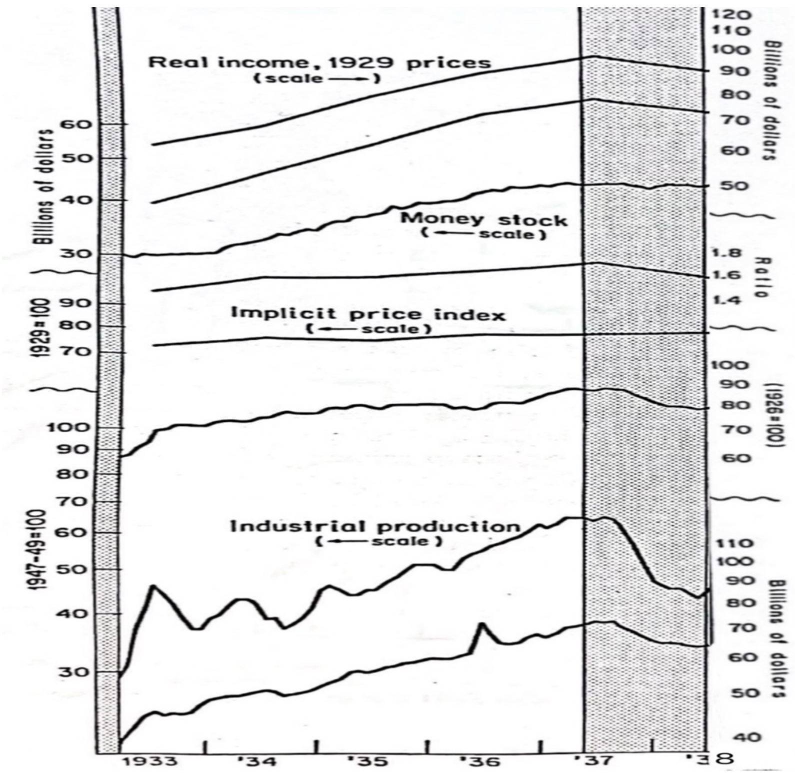
prevented the market from functioning as indices of the securities' actual value.[418] Therefore, disclosure regulations considerably enhanced the fairness of market prices in transactions of securities markets. As Brown summarised, the legislative history of securities rules once again demonstrated the importance of disclosure to the regulatory schemes.[419]

B. Wider protection of the securities markets requested economic policies.

The second perspective provided by Douglas, was that it was insufficient to rest the hope of substantial healthy market progress solely on the truth of securities.[420] Real protection must be based on a wider foundation.[421] This is consistent with the point made in the previous section that the securities markets' performance was to be included in the general economic environment. Regarding the general economic recovery brought about by the New Deal, Eichengreen's explanation[422] of the monetary policy of devaluation, and Temin's explanation[423] of asset hedging in the portfolios, help us understand the broader protection of the securities markets.

Eichengreen and Sachs demonstrate that devaluation benefited trade effects and also unleashed domestic macroeconomic policies to expand the economy.[424] According to the line charts of the critical factors of the general economy (such as price, income and money velocity) from 1933 to 1938 produced by Friedman and Schwartz, compared with the data provided in 3.3.2 b during the Great Depression, the expanding of the general economy was comprehensive.

[418] Ibid.
[419] James Robert Brown, *The Regulation of Corporate Disclosure* (3rd edn Aspen Law & Business 1999) at §§2.01 2-5.
[420] See supra note 408 at 5.
[421] Ibid.
[422] See Eichengreen (2004) in supra note 332 at 19-20. See also Barry Eichengreen and Jeffrey Sachs, 'Exchange Rates and Economic Recovery in the 1930s' (1985) 45 Journal of Economic History 925-46.
[423] See supra note 331.
[424] See Eichengreen and Sachs (1985) in supra note 422.



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During the New Deal period, the regulatory scheme of the securities markets was immersed in such expansion, which contributed to constructing market protections. Temin shares the same view.[426] He argues that the expansion brought about by the New Deal allowed stable investment to achieve the desired results.[427] In addition, Temin also suggests that the return on the investment portfolio depends on the change in different asset prices and the trends' correlation.[428] Any price changes would result in the portfolio prices' alterations.[429] Therefore, although it was impossible to secure the desired outcome of a portfolio, which refers to the ability to achieve the expected results or objectives of an investment portfolio, and implies the goal of attaining the desired level of returns or performance from the investments in the portfolio, pursuing a fair price to be revealed for each investment in the portfolio was of great significance in achieving the expected result. Besides setting fair prices and unleashing economic policies for expansion, the two Acts came with other considerations

[425] See supra note 330 at 494, chart 37.
[426] "During Roosevelt's First Hundred Days, the passive, deflationary policy of Hoover was replaced by an aggressive, interventionist, expansionary approach. ... a steadily expansionary bias in policy that added up to a marked change from the Hoover administration". Supra note 331 at 316.
[427] See supra note 331 at 316-19.
[428] Ibid.
[429] Ibid.

behind them. Two of the important considerations that are the most relevant to this research are the public interest and the litigation cause of action of fraud.

C. Legislative purpose of protecting the public interest.

The Seventy-Third Congress confirmed its central pursuit of the Acts governing securities disclosure for increasing corporate responsibility to investors and the public.[430] As established under the Exchange Act, the SEC should practice its authority to achieve such a central pursuit of protecting the investors and the public interest.[431] Williams, in interpreting the language that Congress used, noticed that there should be a distinction between the power of the SEC granted by the public interest and investor protection.[432] She explained that from the literal meaning, the power the SEC was granted by the public interest should be broader than protection.[433]

The provisions contained within the aforementioned Acts, along with subsequent amendments, clearly demonstrate the commitment of the SEC to safeguarding the public interest by ensuring the disclosure of information.[434] Notably, §2 of the Securities Act grants the SEC a measure of discretion in formulating rules pertaining to prospectuses, particularly when public interest is at stake.[435] This provision recognises the paramount importance of considering the broader welfare of the public in determining the appropriate classification of prospectuses. The 1954 amendment to the Securities Act, further highlights the significance of incorporating public interest into the form and content of prospectuses. This amendment underscores the notion that prospectuses serve as vital informational tools for investors in

[430] See Representative Rayburn's statement on May 5th, 1933, H.R. Rep. No. 2910, 73rd Cong., 1st Sess. (1933). See also President Roosevelt, "the purpose of the legislation … is to protect the public with the least possible interference to honest business". S. Rep. No. 47, at 6-7 (1933).
[431] See Exchange Act Section 4 and 14(a).
[432] Cynthia A. Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112(6) Harvard Law Review 1197-1312, at 1235-38.
[433] She further said that such authority was an appropriate broader power to regulate the public interest. See ibid.
[434] Securities Act § 2. See for example, "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". §§2.a (4). "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". §2.b.
[435] See the official compilation of federal session laws of the eighty-third Congress, Securities Act of 1933 and the Securities Exchange Act of 1934 and Amendments, Pub. L. No. 577, 68 Stat. 683 - 89 (1954). "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" at 686.

making well-informed decisions regarding potential investments. By categorising prospectuses in a manner that takes public interest into due consideration, the SEC ensures that investors are equipped with precise, pertinent, and transparent information concerning the securities being offered. Therefore, these provisions underscore the crucial role played by the SEC in protecting the interests of the public through diligent oversight and regulation of the disclosure requirements pertaining to prospectuses. The SEC's adherence to such provisions reflects a commitment to maintaining the integrity of the securities market, ensuring that investors are equipped with the necessary information for making sound investment choices.

Considering the public interest in the classification process, aligns with the SEC's mandate to protect the public interest and safeguard investor interests. It helps prevent fraudulent or misleading information from being disseminated, thereby promoting market integrity and investor confidence. The provision grants the SEC the authority to classify prospectuses based on factors such as the nature of the security, issue, issuer, and other relevant circumstances. By promulgating rules and regulations, the SEC can establish the appropriate form and contents for each class of prospectus, ensuring that they are suitable and consistent with both the public interest and the protection of investors. Furthermore, it is important to note that Section 10 of the Securities Exchange Act 1934 grants the SEC the power to regulate short sales. [436] This provision allows the SEC to impose permissions or restrictions on short-selling activities when it determines it is necessary or appropriate in the public interest or for the protection of investors. While there may be debates about how extensively the SEC has prioritised the public interest mandate[437], it is clear that both the legislative purpose and the provisions of the two Acts underscore the significance of considering the public interest in fulfilling the SEC's responsibility to enforce disclosure requirements. Ultimately, this function serves to protect the public interest by promoting transparency, fairness, and investor protection in the securities markets.

Over the decades following the enactment of the two Acts, the SEC was faced with legal challenges regarding its role in protecting the public interest. Two main criticisms emerged: first, the SEC did not provide practical definitions for the public interest within the Acts, and

[436] See Exchange Act Section 10(b).
[437] See for example Faith Stevelman Kahn, 'Legislatures, Courts, and the SEC: Reflections on Silence and Power in Corporate and Securities Law' (1997) 41(3) New York Law School Law Review, 1107-1146.

second, it was accused of deviating from its mandate in certain instances. As discussed earlier between the interest of the public and the interest of individuals or groups aggrieved in specific cases, there is a difference to be identified. The important case that provided the public with a clear identification of such differences was the 2017 case *Kokesh v. SEC*.[438]

Kokesh was an appeal case (then certiorari granted) to the U.S. Supreme Court brought by the petitioner Charles R. Kokesh. The basis of the original case stemmed from enforcement actions initiated by the SEC in 2009 against the petitioner's firms for the alleged misappropriation of funds from business development companies, thereby violating federal securities law. The District Court[439] ruled that the defendant permanently enjoined violating several federal securities law provisions, ordering profit disgorgement, and imposing prejudgment interest, attached with a civil penalty. The defendant appealed. The Tenth Circuit of the U.S. Court of Appeals affirmed, and certiorari was granted. The main issue of the review was whether a statute of limitations applies to claims for disgorgement imposed as a sanction of securities laws. Justice Sotomayor held that it applied, reasoning that the sanction of disgorgement constitutes a penalty to the law's concerns. In the process of addressing the main issue and explaining disgorgement was a penalty, the SEC's function of protecting the public interest was affirmed several times.

Justice Sotomayor first interpreted the Exchange Act from the standpoint of the SEC in seeking sanction that it should act "in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties". She then quoted the Congressional Record and a precedent case, *Blue Chip Stamps v. Manor Drug Stores* (1975), to reassure the power of the SEC that was granted by Congress to "rule and regulate ... as necessary or appropriate in the public interest or for the protection of investors".[440] In demonstrating disgorgement constitutes a penalty, Sotomayor J. reasoned

[438] *Kokesh v. SEC.*, 581 U.S. 455 (2017)
[439] The United States District Court for the District of New Mexico. The reference for this information can be found in the official U.S. Supreme Court opinion of *Kokesh v. SEC*, 581 U.S. (2017), particularly in the "Opinion of the Court" section, where it discusses the procedural history of the case.
[440] See Senator Fletcher, 78 Cong. Rec. 2271 (1934) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728 (1975). The *Blue Chip Stamps* case was quoted by Justice Sotomayor in *Kokesh v. SEC* to support the power of the SEC granted by Congress to "rule and regulate ... as necessary or appropriate in the public interest or for the protection of investors". The reference for this information can be found in the "Opinion of the Court" section of *Kokesh v. SEC*, 581 U.S. (2017) in supra note 438, particularly where the interpretation of the Exchange Act and the justification for disgorgement as a penalty are discussed.

that "the SEC disgorgement is imposed by the courts as a consequence for violating ... public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual - this is why, for example, a securities enforcement action may proceed even if victims do not support or are not parties to the prosecution". [441] She continued that the "disgorgement actions further the SEC's public policy mission of protecting investors and safeguarding the integrity of the markets".[442] "The SEC pursues disgorgement independent of the claims of individual investors in order to promote economic and social policies".[443]

From the Court's interpretation, the SEC's function of protecting the public interest is intended for the benefit of the general public, rather than solely addressing the grievances of specific individuals or groups. This requirement also sheds light on the rationale behind certain provisions in the Securities Act and the Exchange Act. The disclosure requirements outlined in these Acts should be designed to serve the public interest. To achieve this objective, it is crucial to provide terms that enable disclosure to be accessible to the public, not solely limited to the SEC. This approach aligns with the perspective of Brandeis disclosure theory, as discussed in section 4.1.2. Moreover, the SEC's role in acting for the public interest expands the scope of federal litigation, particularly in tackling fraud within the securities markets. Before the enactment of the Securities and Exchanges Acts, instances of fraud raised by individual investors could only be pursued in state courts through common law fraud claims. For anti-fraud provisions, federal access was only limited to certain officials.[444] The provisions within the two Acts, aimed at safeguarding the public interest, effectively resolved this limitation. The subsequent subsection will explore the fraud litigations permitted by these Acts in federal courts.

D. New Acts provided the public with a cause of action for litigation.

The drafters of the Securities Act, James Landis, Benjamin Cohen, and Thomas Corcoran identified several principles underlying the legislation of the securities regulations.[445] Two of

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[441] Supra note 438 at 464.
[442] See also *SEC v. Rind*, 991 F.2d 1486, 1491 (1993).
[443] See also *SEC v. Teo,* 746 F.3d 90, 102 (2014).
[444] For example, in New York before the two Acts, under New York's Securities Law (aka the Martin Act), only the Attorney General could bring a suit for violations.
[445] See supra note 333 at 153-209.

these principles are particularly relevant to fraud litigation. The first principle relates to full disclosure, and the second one concerns the elevated trusteeship standards. Firstly, the full disclosure principle. This principle emphasises the importance of disclosing all essential information related to the issuance of new securities. It aims to eliminate any room for misrepresentation and fraud by ensuring that investors have access to complete and accurate information.[446] Secondly, it highlighted the standards of trusteeship. According to this principle, individuals such as directors, experts, or underwriters who facilitate the investment of other people's money should be held to high ethical standards.[447] This recognises their responsibility to act in the best interests of investors and maintain the highest standards of integrity.

§11 of the Securities Act provided a private right of action for materially false statements. §12 of the Securities Act allowed plausible claims to be pled.[448] These provisions reflect the principle of full disclosure by eliminating potential space for misrepresentation and fraudulent statements. Similar provisions were carried over into the Exchange Act[449], such as

[446] See supra note 432 at 1128 (citing H. R. Rep. No. 73-85, at 2 (1933)).
[447] Ibid. The other principle was "a recognition that the government, in regulating securities, is not engaged in guaranteeing or approving the worth of the securities". Ibid.
[448] Section 11(a) of the Securities Act states: "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; and (5) every underwriter with respect to such security". Section 12(a)(1) of the Securities Act states: "Any person who...offers or sells a security in violation of section 77e of this title...shall be liable to the person purchasing such security from him, who may sue...for damages if he (unless the defendant proves that he did not know, and in the exercise of reasonable care could not have known, of such part of the registration statement, or such omission, but who shall not be entitled to recover more than the difference between the amount paid for the security...and (A) the value thereof as of the time of such suit, or (B) the price at which such security shall have been disposed of in the market before suit, or (C) 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...and (A) the value thereof as of the time of such suit, or (B) the price at which such security shall have been disposed of in the market before suit, or (C) the price at which such security shall have been disposed of after suit but before judgment)". See also, "Section 11(a) gave a right of action by reason of a false registration statement to any person acquiring the security, and section 12 of that Act gave a right to sue the seller of a security who had engaged in proscribed practices with respect to prospectuses and communication to the person purchasing such security from him". Supra note 440 *Blue Chip Stamps v. Manor Drug Stores* (1975) at 729.
[449] See for example John E. Tracy and Alfred Brunson MacChesney, 'The Securities Exchange Act of 1934' (1934) 32(8) Michigan Law Review 1025-1068. See for another example Elisabeth Keller, 'Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934' (1988) 49 Ohio State Law Journal 329-352.

§10(b)[450], which established liability for materially false statements. The second principle of elevated standards of trusteeship has been upheld in many U.S. Supreme Court cases, such as *Chiarella v. United States* (1980)[451], *Dirks v. SEC* (1983)[452], and *United States v. O'Hagan* (1997)[453], where high ethical standards were emphasised in the securities industry.[454]

The anti-fraud provisions of the Securities Act and the Exchange Act gave investors and other interested groups the right to bring cases involving fraud to federal courts. This established a more comprehensive regulatory regime for the securities markets. In the 2022 case of *Slack Technologies, LLC et al. v. Pirani*[455], former Commissioners and Senior officials of the SEC[456] filed an *amicus curiae* brief with the Supreme Court. The brief, titled

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[450] §10(b) of the Exchange Act states: "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) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security".

[451] *Chiarella v. U. S.,* 445 U.S. 222 (1980). The Supreme Court ruled that an individual who possessed non-public information, but who was not under a fiduciary duty to disclose that information, did not violate the securities laws by trading on that information. This case reiterates the importance of ethical standards and clarifies the standards for insider trading liability.

[452] *Dirks v. S.E.C.*, 463 U.S. 646 (1983). In this case, the Supreme Court held that a person who discloses material non-public information breaches a fiduciary duty unless he/she receives no personal benefit from the disclosure and the disclosure is made to further corporate objectives. This case emphasises the importance of fiduciary duty and ethical standards in securities trading.

[453] *United States v. O'Hagan*, 521 U.S. 642, 650 (1997). The Supreme Court held that a person who misappropriates material non-public information in breach of a duty to keep the information confidential and trades on it can be held liable for insider trading. This case underscores the need for ethical conduct and the protection of confidential information in the securities industry.

[454] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (Douglas, J., majority opinion) ("The nature of the responsibility demands from trustees, and directors of companies which issue securities to the public, a higher duty than the morals of the marketplace".). See also for example the *Kokesh v. SEC* case analysed above in subsection c, supra note 438 at 458.

[455] *Slack Technologies, LLC et al. v. Pirani*, 143 S.Ct. 542 (2022). The case involved a securities class action brought by an investor against the issuer of common stock, its executives, and three venture capital firms, alleging violations of the Securities Act. The District Court partially granted motions to dismiss while denying others. The Court of Appeals determined that unregistered shares sold in the direct listing fell within the statutory definition of false registration statements. Additionally, the Court of Appeals held that all shares in the direct listing were sold "by means of a prospectus" as part of the registration statement and prospectus, which authorised the sale of shares to the public. Slack Technologies, Inc. et al. petitioned for a writ of certiorari, which was granted by the Supreme Court. The primary issues presented in the petition were whether private enforcement of sections 11 and 12 of the Securities Act complements SEC efforts and whether the SEC intended for sections 11 and 12 to apply when approving direct listings.

[456] The participating individuals in the brief include Luis A. Aguilar (SEC Commissioner from 2008 to 2015), Roberta Karmel (SEC Commissioner from 1977 to 1980), Allison Herren Lee (SEC Commissioner from 2019 to 2022 and Acting Chair in 2021), Bevis Longstreth (SEC Commissioner from 1981 to 1984), John Coates (former General Counsel and Acting Director for the Division of Corporation Finance of the SEC), Jane B. Adams (former Acting Chief Accountant and Deputy Chief Accountant of the SEC), Tyler Gellasch (former counsel to Commissioner Kara Stein), and Matthew Cain (advisor to Commissioner Robert J. Jackson and former SEC financial economist).

"Brief for Former Commissioners and Senior Officials of the SEC as Amici Curiae Supporting Respondent"[457], supports the respondent's position in the case.

In this amicus curiae brief, two pivotal issues were discussed. First, the brief examined the impact of private enforcement of the Exchange Act provisions. Second, it addressed the SEC's expectations concerning the fulfilment of full disclosure through these provisions. The brief emphasised the essential role of truthful public disclosures in maintaining the integrity of securities regulations and markets.[458] When untruthful disclosures occur, the two Acts provide the public with a cause of action to seek justice. §11 and §12 of the Acts establish civil liability as a means of protecting investors and deterring fraud.[459] These sections, along with §10(b) of the Exchange Act discussed earlier, serve as crucial tools for private litigants. The amicus curiae brief highlighted that the availability of private enforcement through civil litigation is a necessary complement to the SEC's enforcement efforts, particularly considering the resource constraints faced by the SEC.[460] Market participants, including investors and professionals of all sizes, have relied on various forms of disclosures (such as registration statements and prospectuses) that are free from fraud and misrepresentations. These disclosures, coupled with the litigation provisions outlined in the two Acts, have reshaped the regulatory framework of securities markets. Thus far, it is evident that the New Deal era Acts have provided the public with cause of action and litigation bases, leading to a transformation of the regulatory regime governing securities markets.

From the four subsections of 4.2.3, it is possible to see that the four perspectives of securities regulations enacted during the New Deal period are interrelated with each other, although they each have their significance. Disclosure requirements helped establish fair prices for the securities products. The actual and fair price depends on the information that was made transparent to the public. The usage of the disclosed information was subject to the market's economic features. Such features should be interpreted according to other economic policies. All these benefits were set to help with the fulfilment of public interest. The securities regulations had their principles to ensure that the public interest was being protected, and

[457] Slack Technologies, LLC et al. v. Pirani: Brief for Former Commissioners and Senior Officials of the SEC as Amici Curiae Supporting Respondent, No. 22-200, 143 S.Ct. 542 (2022).
[458] "Over the years, these requirements and incentives have collectively fostered integrity in U.S. markets". Ibid at 4.
[459] Ibid.
[460] Ibid.

meanwhile, had their provisions to give access to the public to achieve the public interest. In the decades following the 1930s, courts continued to interpret the essence of the public interest, adopting approaches such as prohibiting fraud and deceit. Both the legislative and judicial branches put their efforts into saving the financial system from its collapse after the Great Depression, as described by Temin earlier in this section. The effects of these regulations have continued ever since their enactment and they have become a fundamental element of the present disclosure regime of U.S. securities markets. While the abovementioned regulations have consistently proven their efficacy in protecting the financial system from collapse following the Great Depression, the evolving dynamics of the securities markets have introduced additional practical considerations over time. As the new century approached, these emerging concerns necessitated the implementation of another significant milestone in securities law. The following section will give a historical background and legislative details of the last piece of the modern securities legal regime – the Regulation Fair Disclosure of 2000.

4.2.4 Reflections of the Legislators: The Distance Between Legislative Purpose and Applications, and Financial Regulatory Goals

In today's climate of research, it has become a common viewpoint that at the heart of the legislative response to market failures is the principle that transparent information is essential for fair pricing. Legislators have consistently recognised that without reliable and accessible information, securities markets are vulnerable to manipulation, misrepresentation, and inefficiency. In theory, full transparency promotes price accuracy, allowing all investors to make informed decisions, which, in turn, is expected to bolster investor confidence and stabilise markets. From this historical research, it becomes more evident that early legislation, particularly the Securities Act of 1933, aimed to counteract the information asymmetries that plagued the market before the Great Depression. By mandating disclosure, Congress intended to create a market where securities prices genuinely reflected their underlying value, theoretically ensuring that both retail and institutional investors would have equal access to essential financial information. However, implementing these ideals in practice revealed limitations. Compliance costs associated with disclosure requirements, particularly for smaller entities, have led to an unintended consequence: a market environment where only larger firms can sustain these regulatory burdens without significant economic strain. This practical discrepancy challenges the goal of fair competition.

The emphasis on transparency has not come without costs. Mandating extensive disclosures has significantly increased compliance expenses, which disproportionately impact smaller firms. Legislators envisioned a fairer market but inadvertently limited market access for some participants due to the financial burden of compliance. The forthcoming section of this historical study will delve into an examination of the Regulation Fair Disclosure, finalised in 2000, which was conceived as a measure to prevent selective dissemination of information in order to bolster market equity principles. Nonetheless, Reg FD has led to a cautious disclosure approach from companies, where firms may withhold potentially valuable information to avoid violating disclosure standards. While this regulation is intended to prevent information disparity, it has also been criticised for creating communication constraints that can inadvertently reduce market efficiency. Thus far, with regard to the historical epoch post-Great Depression, understanding the legislative intent and execution of strategies aimed at rectifying market failures and informational disparities, including appraising the transparency framework and assessing the costs and limitations of disclosure regulations during this phase, can be approached utilising the philosophical framework on regulatory theoretical boundaries introduced in Chapter Three.

From a theoretical standpoint, John Locke's limited government theory provides a framework for understanding these boundaries. Locke argued for limited government intervention, especially where regulations might unduly burden private rights or commercial freedom. In securities markets, this principle suggests that while disclosure is crucial for market fairness, it must be balanced to avoid overreach. A nuanced approach that considers the diversity among market participants, including small entities and retail investors, may better align regulatory efforts with fairness goals. Locke's philosophy underscores the need for boundaries in legislative intervention, supporting a system where regulations achieve transparency without stifling market activity or imposing unsustainable costs. As evidenced in the implementation of the acts enacted in the discussed historical period, the theoretical ideal of transparent markets quickly encounters the complex realities of regulatory costs and practical boundaries. These concerns translate into significant financial costs associated with compliance. For example, creating and filing detailed disclosures often requires companies to engage legal and financial experts; a process that can be prohibitively expensive, especially for smaller entities. Moreover, Locke's principles suggest that while disclosure serves a public good by promoting market transparency, it must not stifle economic liberty or place disproportionate strain on specific market players. This perspective invites an analysis of whether current regulations have been implemented in ways that reflect a balanced approach to the theoretical ideal of fair pricing.

In modern times, the Efficient Market Hypothesis (EMH) posits that markets function best when information is freely available, enabling securities prices to reflect all known information.[461] However, the practical application of disclosure regulations has sometimes created a drag on market efficiency by imposing extensive compliance requirements that may hinder the timely flow of information. To the concerns of the SEC, while fair pricing and transparency remain central to securities regulation, achieving these objectives should not come at the expense of market efficiency. It is true that the choices and decision-making surrounding legislative purposes carry both historical significance and limitations, especially from the Great Depression until the year before the millennium. At that time, particularly after the Erie War, there was an urgent need for theoretical development to address market failures, and the legislative decisions made should not be overly criticised. However, from today's perspective, it would be unfortunate if modern legislators failed to recognise that they should not apply the same legislative measures unchanged simply because the underlying goals have remained the same. Instead, they should more flexibly and thoughtfully consider how to achieve similar legislative purposes. This understanding is the aim of this historical study, which seeks to help today's legislators strike a better position in the regulation of markets.

From the analysis of the challenge of achieving comprehensive fairness, it can be observed from the above historical research that judicial interpretations and rulings have also played a significant role in shaping the application of securities laws. In cases like *Kokesh v. SEC* (2017) and *Slack Technologies, LLC v. Pirani* (2022), the courts have examined the SEC's authority and the scope of its mandate to protect the public interest. These cases underscore the evolving judicial perspective on the SEC's role in balancing regulatory objectives. For example, the ruling in *Kokesh* emphasised the SEC's duty to act in the public interest rather than solely as a representative of aggrieved parties, underscoring the agency's broader social obligations. Such judicial interpretations illustrate the complex interaction between legislative intent, regulatory enforcement, and judicial oversight. Judging from the judicial interpretations of the post-Great Depression legislation in recent years, the broader regulatory

[461] Supra note 6.

tendency of the SEC reflects an evolving understanding of the role of disclosure in achieving market fairness. While early disclosure regulations focused on providing a baseline of information to prevent fraud, the SEC has increasingly recognised the need to address more nuanced aspects of information asymmetry and market dynamics. This shift is consistent with Locke's emphasis on the role of government as a protector of public welfare, rather than an overbearing force. By refining disclosure regulations, the SEC has sought to empower investors with the knowledge needed to make autonomous decisions while preserving the essential freedoms of market participants.

From today's perspective, the shifting regulatory priorities mean that the SEC must now address responsibilities related to systemic risks and market supervision, which extends beyond the traditional focus on investor protection. This evolution highlights a broader trend in securities regulation, where the authority's focus has expanded, sometimes at the expense of the original goal of ensuring that all market participants have access to fair information. Compared with the historical stage studied in this section, even today, some information asymmetry such as institutional investors can usually obtain superior resources and analytical tools still exists, which will be discussed in the next chapter. This indicates that simply improving transparency may not be sufficient to achieve the fairness that the market expects. Additionally, the introduction of complex financial products and high-frequency trading creates new dynamics that traditional disclosure rules struggle to address, raising questions about the effectiveness of the regulatory framework enacted at that stage of history. In terms of purposes' reflection on the boundaries of regulation and the SEC's responsibilities, the SEC's mandate can also be examined through the lens of Kant's categorical imperative and Mill's harm principle. Kant's principle suggests that the SEC should operate in a way that respects individual autonomy and treats all market participants as ends rather than means. This ethical perspective supports the SEC's role in ensuring fairness and avoiding practices that privilege certain investors over others. Mill's harm principle, meanwhile, aligns with the SEC's objective to prevent practices that could harm market integrity. However, both principles suggest limits to regulation, implying that the SEC should intervene only to prevent significant harm to market participants, thus avoiding overregulation.

In conclusion, this section illustrates the distance between the legislative intent behind securities laws and their real-world application. Legislators initially envisioned a securities market governed by transparency, where fair pricing and accessible information would foster confidence and protect investors. However, the evolution of securities markets, along with the SEC's expanding role, has introduced new challenges that complicate the realisation of these ideals. The persistent tension between fairness and efficiency, coupled with judicial interpretations and ethical considerations, underscores the complex dynamics that shape securities regulation today. This reflection on legislative purpose and application offers insight into the SEC's ongoing struggle to fulfil its multifaceted mandate; a theme that will be further explored in subsequent chapters as I examine modern regulatory challenges and the potential need for reform.

4.3 Evolution of Regulation Fair Disclosure, 1990-present

4.3.1 Rationale Behind Reg FD

In the early stages of the emergence of the disclosure theory, Brandeis advocated for the importance of making disclosures to the public, rather than limiting them solely to authorities. This assertion was made in 4.1.2 B. Drawing from historical experiences discussed in 4.1.1, it became evident that the presence of political and financial alliances, coupled with the influence of power and monetary considerations, created opportunities for corruption rather than promoting transparency within authoritative bodies. Unless disclosures were made public, regulatory frameworks could not ensure fairness in the market.

Section 4.2.3 provides a comprehensive illustration of Congress's response to the economic collapse witnessed in the 1930s. During this period, Congress enacted the Securities Act and the Exchange Act, leading to the establishment of the SEC. These acts were designed to safeguard the interests of investors and the broader public. Subsections C and D further elucidate the Supreme Court's interpretation of the public interest, affirming that the Securities Act, the Exchange Act, and the SEC were established to serve the greater good of the public, devoid of any specific interest group's influence. Transparency in disseminating information to the public plays a pivotal role in preventing fraud and deceit. Therefore, the provisions enshrined in these acts not only mandate the disclosure of information but also emphasise the need for truthful disclosures to promote the realisation of the public interest. Despite the continued efforts put forth by the SEC and the judicial system in subsequent years, aiming to uphold investor protection and safeguard the public interest, a new obstacle emerged: selective disclosures. This obstacle poses a significant barrier to maintaining market integrity and fairness.

Section 4.1.2 A emphasises that disclosure plays a crucial role in determining the fair price of securities. This is because the information disclosed after the price has been set reveals the true value of the issued products. However, not all types of information, especially remote or irrelevant ones, are significant in this context. Only material and relevant information is necessary to achieve the intended purpose. In line with the SEC's principles of protecting investors and the public interest, material information disclosure can only be considered effective when it is made to the general public, that is to say, all potential investors, rather than selectively to specific parties.

Nevertheless, in practice, material information has often been exclusively or predominantly disclosed to institutional investors and analysts for various reasons. Towards the end of section A, this piece briefly highlights that such selective disclosure may lead to fairness and integrity issues in the market. Therefore, subsection A aims to analyse this matter by examining the legislative background and purpose of the proposed rules known as the Reg FD. It will begin by exploring the judicial focus when addressing legal issues related to selective disclosure problems. Furthermore, it will analyse how the Reg FD complements existing laws in effectively addressing these legal concerns. Moving on to subsection B, specific provisions from the SEC's Final Rule (2000) of the Reg FD will be outlined to address the problems that compromise market integrity and fairness, such as concealed material information and filtered communications. This section will demonstrate how the Reg FD supplements and enhances existing laws, including the Exchange Act, by providing a more comprehensive perspective on how the Reg FD achieves its legislative objectives.

A. Selective Disclosure and the SEC's Proposed Rule (1999)

Despite the fact that the proposal for the Reg FD was made in 1999 (hereinafter the SEC's Proposed Rule (1999)), intended specifically to address the issue of selective disclosure in securities markets, it is important to acknowledge that this problem did not arise solely during that period. In fact, since the enactment of the Securities Act and the Exchange Act, which granted the SEC and investors the ability to bring litigation, federal courts have been grappling with legal issues concerning selective disclosures. [462] Although various forms of selective disclosure exist, they all share a common core problem – the delayed dissemination of material information to the investing public.

During the early days of regulation addressing such issues, the fraud provisions of the Securities Act (§17(a)[463]) and the Exchange Act (§§9(a)(4)[464] and §§15(c)(1)(2)[465]) were utilised. However, it was in 1942 that the SEC's legal staff, Milton Freeman, independently drafted Rule 10b-5[466] based on §17(a) of the Securities Act and §10(b) of the Exchange Act. This rule was unanimously approved by the SEC commissioners without engaging in collective discussions. [467] Rule 10b-5 made the situations illegal for anyone:

> (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[468]

Due to its precise language regarding anti-fraud provisions within the securities markets and its complementary nature to §10(b) of the Exchange Act, Rule 10b-5 emerged as the principal mechanism employed by Federal Courts to address cases involving selective disclosures. Notably, Rule 10b-5 was derived from §10(b) of the Exchange Act, enabling courts to interpret the terms of the Exchange Act directly when utilising this primary tool. The effectiveness of Rule 10b-5, predating the SEC's Proposed Rule in 1999, in targeting selective disclosures facilitated its prominent use by the courts. Thus, to comprehend the legislative purpose behind the SEC's proposal of the Reg FD, it is critical to understand the historical development of the federal courts' applying Rule 10b-5 and §10(b) of the Exchange Act applications. Before the SEC's Proposed Rules (1999), the federal courts' cases referring

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[462] Noteworthy cases related to selective disclosure include those pertaining to tipping under Section 10(b) of the Exchange Act, such as *SEC v. Texas Gulf Sulphur Co*., 401 F.2d 833 (2d Cir. 1986); cases involving misrepresentation, as exemplified by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); and those addressing manipulative or deceptive devices, as illustrated by *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).
[463] 15 U.S.C. § 77q(a).
[464] 15 U.S.C. §§ 78i(a)(4)
[465] 15 U.S.C. §§ 78o(c)(1)(2)
[466] Rule 10b-5, 17 CFR § 240.10b-5.
[467] Supra note 389 at 778-80.
[468] Supra note 466. This passage here does not provide any information regarding panel provisions or remedies associated with the discussed regulation and rule. It focuses on the historical development of regulations and the creation of Rule 10b-5 without delving into additional details about specific panel provisions or remedies.

to selective disclosure could be divided into three issue categories – tipping violations, misrepresentation or omissions of material information, and manipulative or deceptive devices. The problematic common natures of these three categories of cases lay either in material information being concealed and/or in communication being filtered. The U.S. Supreme Court's rulings on these legal issues have been through two phases. The most typical cases representing the two phases were *Chiarella v. U. S.*[469] and *Dirks v. S.E.C.*[470].

In the case of *Chiarella v. U.S.*, the petitioner was employed by a financial printer involved in the printing of corporate takeover bids. During his work, he gained access to material information related to these bids, albeit indirectly relevant to the bids themselves. The petitioner used this information to engage in trading activities and profited from it once the takeover attempts became public knowledge. The SEC subsequently found him guilty of violating §10(b) of the Exchange Act. The petitioner appealed the decision to the U.S. Court of Appeals for the Second Circuit, where his violation was upheld, but a writ of certiorari was granted. The case was then forwarded to the U.S. Supreme Court for review. In examining the case, Justice Powell focused on legal issues pertaining to manipulative or deceptive practices, disclosure obligations, violations related to the sharing of confidential information, and common law fraud.[471]

[469] Supra note 451, *Chiarella v. U. S.,* 445 U.S. 222 (1980)
[470] Supra note 452, *Dirks v. S.E.C.*, 463 U.S. 646 (1983).
[471] *Chiarella v. U.S.*, 445 U.S. 222 (1980) presented the Supreme Court with the opportunity to address several legal questions regarding manipulative practices, disclosure obligations, violations related to confidential information, and common law fraud. Justice Powell, writing for the Court, issued the following rulings:
1. On the issue of manipulative or deceptive practices: The Court held that to establish liability for insider trading under S. 10(b) of the Exchange Act, it is essential to prove that the accused party engaged in deceptive or manipulative conduct. Mere possession of material non-public information, without any deceptive act in connection with the purchase or sale of securities, does not establish liability.
2. Regarding disclosure obligations: The Court stated that there is no general duty under the federal securities laws for individuals to disclose material non-public information before engaging in securities transactions. The Court emphasised that the duty to disclose arises primarily in situations where a fiduciary or similar relationship exists, which entails a duty to either abstain or disclose material information.
3. Concerning violations related to sharing confidential information: The Court determined that absent a duty to disclose, trading based on material non-public information obtained indirectly through confidential information is not deemed fraudulent under the federal securities laws. Liability cannot be imposed solely based on the fact that the accused party had such information.
4. On the issue of common law fraud: The Court held that, while the securities laws may not directly cover certain acts, common law fraud is not automatically precluded. The Court noted that if a person has specifically agreed to maintain information in confidence but breaches their fiduciary duty by trading on that information without disclosing it, they could potentially be held liable for common law fraud.
In sum, *Chiarella v. U.S.* clarified that liability for insider trading under S. 10(b) of the Exchange Act requires evidence of manipulative or deceptive conduct, while disclosure obligations and violations related to sharing confidential information are subject to the presence of fiduciary duties. Moreover, common law fraud may still apply in cases where individuals breach their fiduciary duty by trading on confidential information without proper disclosure.

In the case of *Chiarella v. U.S.,* the Supreme Court affirmed the previous line of judicial interpretations concerning the violation of §10(b) of the Exchange Act as identified by the SEC under Rule 10b-5. These interpretations revolved around three key elements. Firstly, the SEC's prohibition of manipulative or deceptive devices served as a comprehensive measure to prevent fraudulent practices. These devices encompassed various approaches employed to achieve fraudulent outcomes in the securities market.[472] The inclusion of this provision within Rule 10b-5 was a legal strategy to combat fraud by explicitly prohibiting such manipulative or deceptive actions. In the specific matter before the Court, the petitioner was not found to have utilised any manipulative or deceptive devices to gain access to the material information at hand. Moreover, the petitioner did not engage in any fraudulent activities subsequent to acquiring the material information. Based on these findings, it was determined that the petitioner had not violated §10(b) of the Exchange Act, which pertains to manipulative or deceptive devices. It is important to note that the Court's ruling highlighted the requirement for the existence of manipulative or deceptive conduct to establish liability for a §10(b) violation. Mere possession of material non-public information (without any associated manipulative or deceptive acts connected to securities trading) does not meet the necessary threshold for liability under this provision. Therefore, in the present case, where the petitioner did not employ manipulative or deceptive practices and did not engage in fraudulent actions after obtaining the material information, it was determined that there was no violation of §10(b) of the Exchange Act. In summary, the Supreme Court's decision in *Chiarella v. U.S.* confirmed the SEC's articulation of the prohibition against manipulative or deceptive devices as a means to prevent fraudulent practices. In this case, the petitioner's actions did not meet the criteria for a §10(b) violation as there was no evidence of manipulative or deceptive conduct in obtaining or utilising the material information.

The second element was the most well-known judicial rule of this case. In determining whether the petitioner was obligated to disclose the material information he possessed to the company and its shareholders, the Court ruled that only those with fiduciary duties to

[472] The prohibition of manipulative or deceptive devices was SEC's "catchall clause to prevent fraudulent practices". See supra note 451 at 235.

the company bear the obligation to disclose. The information obtained by the petitioner "did not concern earning power or operations of the targets, but only plans of the acquiring company"[473]. He was not the company's insider or operator who had a fiduciary duty to the company. Hence, his trading shares immediately after takeover attempts were made public was not fraudulent under §10(b) of the Exchange Act.[474]

Thirdly, under §10(b), the violation of tipping occurs when individuals, known as tippees, benefit from or should have known that their gains stemmed from insider confidential information provided by tippers.[475] This provision aims to safeguard the fiduciary relationship between insiders possessing privileged information and the companies they serve by preventing these insiders from exploiting uninformed stockholders through unfair advantages.[476] In the present case, the Petitioner is not categorised as a tippee since he did not have any relationship with insiders who possessed confidential information. Additionally, no individuals in positions of privilege tipped him with confidential information. Therefore, there is no violation of tipping under Rule 10b-5. Furthermore, according to common law principles, a misrepresentation made to induce reliance on false statements is deemed fraudulent.[477] As previously stated, the Petitioner bore no obligation to disclose the material information to the company. Consequently, the Petitioner's failure to disclose did not induce reliance, nor did it occur before the completion of any transaction.[478] Hence, no fraudulent conduct took place in this particular case.

Within the context of cases involving selective disclosure, where the concealment of material information and/or filtering of communication falls under Rule 10b-5, the judicial interpretation during the phase of *Chiarella v. U.S.*[479] provided definitive resolutions. Regarding concealing material information, a conviction would be determined by whether the party has a duty to disclose. Legal elements to identify such duty can be relationships, for example, between a party and the company or shareholders

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[473] Supra note 451 at 231.
[474] Ibid.
[475] Supra note 451 at n 12 citing *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (1974).
[476] Supra note 451 at 229.
[477] Supra note 451 at 228.
[478] Ibid.
[479] Supra note 451 at 225-49.

and uninformed stakeholders.[480] It can also be the passive elements, such as a person's fiduciary duty to a company or a tipper-tippee's relationship.[481] Fraud, as understood within the purview of the law, is not invoked unless there exists a duty to disclose material information and the failure to fulfil this duty results in concealment. From another perspective, filtered communication was problematic because it disobeyed the duty of disclosure as non-public information was first made to prioritised persons and then the investment public. Hence, a breach of disclosure duty was made. The act of employing manipulative or deceptive devices to disseminate filtered communication is deemed fraudulent, thus contravening the fraud provisions stipulated in the Exchange Act. These interpretations constitute earlier judicial understandings of Rule 10b-5 as applied to cases involving selective disclosures, encompassing both the obligation to disclose and the determination of fraud. From the judicial perspective, the legal requirements of such cases changed when *Dirks v. S.E.C.*[482] emerged.

In *Dirks v. S.E.C.* [483], the Petitioner was the Vice President of a securities broker-dealer.[484] He obtained insider information from the former employees of an insurance holding company to reveal this company's fraudulent activities.[485] The Petitioner used the tipped information to aid and abetted his clients releasing their shares of the company. The District Court and the Court of Appeals found him to be in violation of Rule 10b-5. His petition for a writ of certiorari was granted. The case was reviewed by the Supreme Court.

Justice Powell's holdings were focused on the legal issue of tipping violation. In ruling on this issue, the Supreme Court made a significant interpretation of Rule 10b-5 which marked an important change in judicial ruling on selective disclosure, fraud and tipping. The court held that insiders who fail to disclose material non-public information before trading on it, could only be held liable when they breached their fiduciary duty to shareholders and directly or indirectly benefited ("secret profits") from such disclosure.[486]

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[480] Ibid 223-24, 227-29, 232-34.
[481] Ibid.
[482] Supra note 452.
[483] Ibid.
[484] Ibid at 649.
[485] Ibid.
[486] See supra note 452 at 662, 665 and 672 (see also n1 and n 9 at 647).

In terms of a tippee, besides requirements from standards set at the time of *Chiarella*, he may only assume fiduciary duties to a company when he knows or should know that there has been a breach of his tipper.[487] In the aforementioned instance, the petitioner received tipped material non-public information from a company's insiders. According to precedent from *Chiarella*, no relationship addressing fiduciary duty was formed between the tippers and the tippee. Thus, no fiduciary duty would the petitioner assume to the company and shareholders. He "had no duty to abstain from the use of the inside information that he obtained where the tippers, who were motivated by a desire to expose fraud, received no monetary or personal benefit from revealing the information".[488] Thus, no violation of the antifraud Rule 10b-5 and §10(b) was found.

From *Chiarella* to *Dirks*, the Supreme Court's interpretations of the securities regulations' anti-fraud provisions showed a pattern in regulating selective disclosure activities. Besides two essential compositions of information at stake – materiality and non-public feature, judicial interpretations added new elements in confirming fraud. During the initial stages, it was necessary to demonstrate relationships that uphold fiduciary duties. In the later phase, the alleged violators need to be benefitted from such disclosure for them to be a violation of Rule 10b-5 and §10(b). When applying these interpretations to the two aspects of the issue concerning selective disclosure, the problem is partially resolved. Regarding one of the fundamental characteristics of the issue concerning selective disclosure, specifically filtered communication, the judicial interpretations were constrained by the Court's determination regarding the establishment of relationships, which limited the means of obtaining information and hindered the conviction of violations under federal laws. Such interpretation highlighted the characteristic that the securities regulations established during the New Deal period and subsequently developed, imposed limitations on the extent to which insiders and those connected to them could benefit from the disclosure of information in the source context. The audiences of such disclosure benefited from the material information.

But for the general investment public, the judicial interpretation has its limits. The "limits" here refer to the restrictions imposed on the extent of benefit that the general investment public could obtain from the disclosure of material information. While the audiences who had

[487] See supra note 452 at 648, 661.
[488] Supra note 452 at 647, 667.

access to such disclosure directly derived benefits from it, the level of benefit for the general investment public was constrained due to certain judicial interpretations and regulatory mechanisms in place. These constraints may have included factors such as limited access to timely and comprehensive information, barriers to entry into the investment market, or inadequacies in the enforcement of regulations. The recognition of these limits served as one of the motivating factors behind the SEC's Proposed Rule in 1999, which aimed to address and improve upon these restrictions to enhance the protection and benefit for all investors.

Concerning the issue of selective disclosure, which entails the deliberate withholding of material information from pertinent audiences such as the general investment public or entities bound by fiduciary obligations, the inadequacies inherent in current judicial interpretations and the imperative for their rectification have become increasingly evident. Litigations presented before federal courts have predominantly revolved around instances where material information was concealed or inadequately communicated, seldom necessitating a court's determination as to the materiality of the information or its susceptibility to management's discretion. This situation arises due to the constraints elucidated in the preceding paragraph, wherein information is disseminated solely through fiduciary relationships and their extensions. The privileged individuals and entities who possess knowledge concerning the investment value of the information, assume the roles of both distributors and recipients of such material information. Consequently, for the wider investment public, accessing such privileged information and undertaking the analysis necessary to ascertain its investment value, presents significant obstacles prohibiting them from employing said information for making informed investment decisions. Consequently, in subsequent years, the SEC's Final Rule of 2000 endeavoured to redress the deficiencies of prior securities regulations and their corresponding interpretations through the inclusion of multiple provisions that extend beyond those primarily concerned with preventing fraudulent activities.

B. The SEC's Final Rule (2000) and Section 13, 15(d), and 23(a) of the Exchange Act

To solve the problems outlined in the last two paragraphs in 4.4 A, the SEC started to collect comment letters on the SEC's Proposed Rule (1999) from the public before finalising the Reg FD in 2000. No studies carried out at the time suggested that the enactment of the SEC's Final Rule (2000) was to be considered a supplement to the Supreme Court's decisions in solving the historically existing issues of concealing material information and filtered communication. However, it is not hard to notice that the efficacy of Reg FD, as articulated in the SEC's Final Rule (2000), heavily relies on a synergistic integration with various sections encompassed within the Exchange Act that are aligned in purpose and direction. The SEC's Final Rule (2000) was codified as 17 CFR §243.100-103. In particular, the sections from the Exchange Act working synergistically with the Reg FD are §13, §15(d), and §23(a). Focusing on the legislative purpose, the following paragraphs briefly introduce how they were designed to work together in solving the long-existing problems caused by selective disclosures. A more detailed discussion of these rules and how they served their purpose will be presented in the next chapter of this thesis.

To rectify the legal problem of material information being concealed, the Reg FD's purpose was to establish a basis for equal access to important non-public information. This purpose was set into 17 CFR § 243.100. This section establishes the general rule pertaining to selective disclosure. For the information holders (such as issuers, institutional investors' managers, dealers, etc.), the general rule requires a simultaneous disclosure for any intentional disclosures and a prompt disclosure for non-intentional disclosures.[489] This requirement pertains to §23(a) of the Exchange Act, which urges the Commission to evaluate the competitive implications of its adopted rules. [490] These competitive considerations specifically pertain to ensuring equitable access to material non-public information. Moreover, the same section employs a requirement for an annual report for the issuers to be made to the SEC. As described in this chapter, the disadvantage of such disclosure was that it was made to the authority and indirectly accessible to the public in general.
However, the general rule established by Reg FD did not specifically address the underlying issue at hand, as its focus primarily centred on the timing of disclosures. While timing is indeed a crucial aspect of fair disclosures, the legal objective of ensuring equal access to material information should be prioritised. Therefore, the adequacy of fulfilling this objective should be determined not solely based on the approach taken, but rather on the desired outcome.

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[489] 17 CFR § 243.100 General rule regarding selective disclosure.
[490] Securities Exchange Act of 1934 § 23(a).

When examining the interplay between §100 of Reg FD and §23(a) of the Exchange Act, it becomes evident that achieving equal access proves challenging. §23(a) suffers from the limitation that disclosures are made exclusively to the SEC, rather than directly to the investment public as a whole. This discrepancy raises concerns regarding the potential influence of external factors such as political changes, corruption, or undue monetary influence (as elaborated in 4.1.2 B and 4.2.3 C), which may create unpredictability in the disparity between the authority's knowledge and that of the general public. Although §100 of Reg FD attempted to address this issue by introducing simultaneous and prompt disclosure rules, it falls short in resolving the aforementioned disparity. While these rules seemingly diminish prior channels, through which privileged parties gain access to material information before others, they still share the fundamental flaw of §23(a) by disclosing information solely to authorities, rather than directly to the public. Consequently, concerns regarding the actual effectiveness of disclosure in theory emerge.

To further advance the legislative objective of addressing the challenges associated with selective disclosures, it is necessary to examine the provisions outlined in 17 CFR § 243.101 and 103. [491] These provisions establish numerous definitions and requirements relating to the

[491] 17 CFR § 243.101 and 103. Here are the details of 17 CFR § 243.101 and 17 CFR § 243.103, including definitions and key provisions:
17 CFR § 243.101: This section of the Code of Federal Regulations pertains to the definition of terms used in Regulation Fair Disclosure. It provides clarity on certain key terms that are crucial to understanding the regulation's scope and application. Some of the definitions outlined in this section include:
1. Communications: This term refers to any oral or written communication made by an issuer or any person acting on its behalf; 2. Exchange Act: It refers to the Securities Exchange Act of 1934; 3. Insiders: This term defines individuals who hold a position with access to material non-public information about an issuer; 4. Issuer: It refers to any person who issues or proposes to issue any security; 5. Materiality: This definition pertains to information that a reasonable investor would consider important in making investment decisions.
17 CFR § 243.103: This section of the Code of Federal Regulations provides the main provisions of Regulation FD, focusing on the general requirements imposed on issuers. The key details and provisions of this section include:
1. Prohibition on Selective Disclosure: It prohibits issuers or persons acting on their behalf from making selective disclosures of material non-public information to certain individuals or entities. The regulation seeks to promote fair and equal access to information, ensuring that all investors have an equal opportunity to make informed investment decisions; 2. Public Disclosure Obligation: This provision imposes an obligation on issuers to make public disclosure of any material non-public information that they have selectively disclosed. The purpose is to ensure that investors in the market have equal access to information, preventing any potential unfair advantages to certain individuals or entities; 3. Timing of Public Disclosure: This provision establishes that an issuer must make the required public disclosure promptly, considering the circumstances. The intent is to minimize the time period during which select individuals possess an informational advantage over the broader investing public; 4. Exemptions: This section also outlines certain exemptions to the general requirements of Regulation FD. These exemptions include communications made to certain types of professionals, such as attorneys, accountants, and credit rating agencies, among others, or in connection with certain types of offerings, such as registered investment companies or offshore offerings.

concept of no effect on reports governed by multiple securities regulation provisions.[492] The defined guidelines within these regulations emphasise the importance of simultaneous and prompt disclosure, which is a fundamental principle in ensuring transparency and fairness within the financial markets. However, it should be noted that these rules cannot function in isolation to effectively resolve the issues related to selective disclosures. To fully comprehend the limitations of these rules, it is crucial to delve into the intricacies of selective disclosure problems and their underlying causes. Selective disclosure refers to the situation where certain individuals or entities gain access to material non-public information before it is made available to the general public. This inequitable dissemination of information can create unfair advantages and compromise market integrity. While the provisions of 17 CFR §243.101 and 103 play a significant role in promoting disclosure practices, their effectiveness is contingent upon complementary measures and a comprehensive regulatory framework. Addressing selective disclosure issues requires a holistic approach, encompassing various regulatory tools, enforcement mechanisms, and market surveillance. It is essential to recognise that the regulatory provisions outlined in 17 CFR §243.101 and 103 are only part of the broader solution to tackle selective disclosure concerns. These rules elucidate the concept of no effect on reports, ensuring that specific disclosures do not unduly influence the accuracy, completeness, or reliability of the reports governed by relevant securities regulations. To effectively combat selective disclosure challenges, regulatory authorities must implement a comprehensive framework that encompasses a wide range of measures, including proactive surveillance techniques, enhanced enforcement mechanisms, robust investor protection measures, and the promotion of fair and transparent markets. This multifaceted approach creates a level playing field, bolsters investor confidence, and upholds the integrity of financial markets.

The SEC introduced the Final Rule of the Reg FD in 2000 (the Final Rule (2000)), which provided a comprehensive framework for addressing the ongoing implications of Rule 10b-

[492] The notion of no effect implies that certain disclosures should not have any influence or impact on the reports subject to these regulations. The purpose of incorporating the concept of no effect within these sections is to mitigate the potential consequences or implications that specific disclosures may have on the affected reports. These provisions establish criteria and guidelines to ensure that the disclosed information does not unduly affect the accuracy, reliability, or completeness of the reports governed by the relevant securities regulations. By stipulating the definition and requirements associated with no effect, 17 CFR § 243.101 and 17 CFR § 243.103 aim to uphold the integrity and transparency of the regulatory framework while safeguarding against the selective dissemination of information. This approach ensures that the disclosures made in accordance with the outlined provisions do not undermine the overall integrity and reliability of the reports governed by the applicable securities regulations' provisions.

5.[493] The Final Rule (2000) encompasses prohibitions against fraudulent activities in connection with the purchase or sale of securities. Additionally, in response to concerns regarding selective disclosures, 17 CFR § 243.102 explicitly stated that Reg FD did not supersede or undermine the provisions of Rule 10b-5.[494] The SEC's Final Rule (2000), along with prior judicial interpretations of securities regulations, once again cooperatively worked towards resolving issues related to fraudulent practices and the enforcement of Rule 10b-5. However, it is important to note that these collaborative efforts primarily focus on combating the filtered communication associated with selective disclosures, rather than addressing the concealment of material information. To provide a more comprehensive understanding, it is necessary to explore the context in which these regulations were developed. The portrayal of background information in the SEC's Final Rule (2000) establishes a foundation for comprehending the underlying reasons for its implementation. This framework aims to manage the perpetual influence of Rule 10b-5, which serves as a crucial safeguard against fraudulent activities within the securities market. Furthermore, selective disclosures have aroused concerns regarding the potential for fraudulence. In recognition of these concerns, 17 CFR § 243.102 clarifies that Reg FD does not detract from the provisions outlined in Rule 10b-5. Reg FD provision serves to reinforce the importance of maintaining fair and transparent markets by preventing the unjust filtering of information to specific individuals or entities. The SEC's Final Rule (2000), and the judiciary's interpretations of securities regulations, both play a vital role in resolving concerns associated with fraudulent practices and the enforcement of Rule 10b-5. The synergy between these two rules reaffirms their commitment to countering fraudulent practices and enforcing Rule 10b-5. However, it is necessary to note, that the primary objective of the specific collaboration between these regulations is to address the problems originating from selective disclosures through targeted measures to regulate filtered communication, rather than solely concentrating on the concealment of material information.

The Final Rule (2000) encompasses prohibitions against fraudulent activities in connection with securities transactions. In response to concerns regarding selective disclosures, 17 CFR § 243.102 explicitly clarified that Reg FD does not supersede or undermine the provisions of

[493] See the Securities and Exchange Commission, 'Final Rule: Selective Disclosure and Insider Trading' Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99, RIN 3235-AH82 (Aug 21, 2000).
[494] See 17 CFR § 243.102. "No effect on antifraud liability. No failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of Rule 10b–5 (17 CFR §240.10b–5) under the Securities Exchange Act".

Rule 10(b)-5. This collaborative effort between the SEC's Final Rule (2000) and prior judicial interpretations of securities regulations, aims to combat filtered communication associated with selective disclosures. By reinforcing fair and transparent markets, Reg FD seeks to prevent the unjust filtering of information to specific individuals or entities. However, it is crucial to note that the reports submitted to the authority under Reg FD may not directly display the value of the disclosed information to the investing public, limiting the public's access and understanding of its investment potential. Part 3.3.1 A of this chapter highlighted that for the investment public at large, the use of the disclosed information was to first analyse and determine the investment value of such information. In extracting the investment value from the disclosed information, the main problem brought about by selective disclosure is that management (or other information possessors and rightful contributors) regard material non-public information as a commodity. Consequently, their information disclosures were not oriented towards fulfilling their fiduciary duty to the company nor their obligation to the public. Instead, they prioritise satisfying those who can put a higher value on material information as a commodity. These groups include, for example, familiar analysts who will give them favourable comments. The tools that extract investment value from material information will likely be up for sale in such a scenario. Affordability to these analysts or other groups with priority access to material non-public information and the ability to extract investment value from it may construct a barrier to the public at large's direct access. In this regard, whilst Reg FD claimed it was intended to solve the problem of selective disclosure, the reports submitted to the authority were not equivalent to directly displaying product value to the investing public.

The above sections A and B presented the legislative purpose of Reg FD, which was to solve the selective disclosures. More precisely, before the proposal in 1999 and the enactment of the final rules in 2000, the legal perspective in dealing with problems caused by the issues relevant to selective disclosures was Rule 10b-5 and the antifraud provisions of the securities regulations. The Supreme Court added its expectations in carrying out these provisions. The enactment of Reg FD was to echo such previous regulations and their judicial interpretations. Reg FD was a supplement to the earlier laws. It collaborated with the earlier rules in solving two primary legal issues of selective disclosure: concealing material information and filtered communication. However, the Reg FD's provisions did not break the limits of the previous rules. Apart from the fact that the Reg FD still depends on the reports made to the SEC, not directly to the investment public at large, some contingencies may cause market fairness issues. For instance, Reg FD provisions may lead to a failure to construct equal access to information. Or, it may result in overlooking the investor's affordability to extract the investment value from the disclosed information. These will be discussed in detail in chapter four of this thesis. In recent years, the SEC has also adopted active steps, such as allowing disclosures via social network platforms, to address these problems. However, in terms of its legislative purpose and the supplement of previous judicial interpretations, the two problems of selective disclosure have not been solved appropriately and satisfactorily. Lawmakers still have a long way to go in fulfilling their set purposes.

4.3.2 Impact on Market Fairness: Successes and Limitations of Reg FD in Promoting Market Fairness

Since Reg FD was finalised in 2000, one of its most significant achievements has been establishing a more transparent information-sharing environment. From this perspective, the direction of the SEC's efforts in formulating Reg FD parallels the purposes of the efforts introduced to enact the securities acts to save the collapse of securities from market failure in the post-Great Depression. By instituting rules around simultaneous or prompt disclosure for intentional and unintentional selective disclosures, Reg FD has aimed to eliminate the privilege previously held by analysts, institutional investors, and other select groups who could access critical information ahead of the broader public. The rule's emphasis on transparency has not only reduced the likelihood of insider advantages but also reinforced investor confidence by aligning the market with principles of fairness and openness. Before the enactment of Reg FD, companies often selectively disclosed information to preferred analysts, fostering a climate in which those analysts provided favourable coverage in exchange for access to information. Reg FD's restrictions have diminished this quid pro quo arrangement by necessitating that material information be made available to all investors at once, thereby promoting unbiased analysis and reducing potential conflicts of interest. The broader access to information has empowered retail investors, who can now access the same information as institutional analysts without relying on biased interpretations. This shift has had a positive impact on market fairness, supporting informed decision-making among a diverse group of market participants.

By promoting fairness and transparency, Reg FD has indirectly bolstered market integrity. Investors are more likely to trust a market that restricts selective disclosure and limits the potential for insider trading or other exploitative practices. Market integrity hinges on the perception that all investors operate with access to similar information, which Reg FD has striven to ensure. This equal access to information reinforces confidence in market mechanisms, potentially enhancing liquidity as more investors, particularly retail investors, feel secure in participating. As a result, Reg FD has contributed to a more robust and inclusive market by addressing fundamental fairness concerns and supporting an equitable environment.

Beyond the qualitative improvements discussed above, empirical research substantiates the claim that Reg FD achieved measurable advances in promoting market fairness through enhanced transparency. Studies show a statistically significant reduction in information asymmetry following the rule's introduction, particularly around earnings announcements, evidenced by narrower bid-ask spreads and lower adverse-selection components of trading costs.[495] The effect is most pronounced among small and less liquid firms, which historically suffered from selective disclosure practices that favoured large institutional investors. Other analyses find that analysts' forecast accuracy declined only marginally while the price impact of their reports fell sharply after Reg FD, suggesting a diminished advantage of private briefings and a transition towards a more democratised flow of information.[496] Moreover, the rule appears to have encouraged firms to widen public participation in conference calls and webcasts, extending real-time access to retail investors and financial media, rather than restricting it to preferred analysts.[497] In addition, market-based indicators support the conclusion that Reg FD enhanced informational equality. Research documents reduced stock-price volatility surrounding disclosure events, faster incorporation of earnings news into prices, and fewer abnormal returns prior to scheduled announcements; all of which point to lower levels of informed trading and leakage.[498] There is also market and firm-level evidence indicating that Reg FD has enhanced the overall credibility and inclusiveness of corporate

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[495] Venkat R Eleswarapu, Rex Thompson and Kumar Venkataraman, 'The Impact of Regulation Fair Disclosure: Trading Costs and Information Asymmetry' (2004) 39(2) Journal of Financial and Quantitative Analysis 209-25.
[496] Andreas Gintschel and Stanimir Markov, 'The Effectiveness of Regulation FD' (2004) 37(3) Journal of Accounting and Economics 293-314. See also Frank Heflin, K R Subramanyam and Yuan Zhang, 'Regulation FD and the Financial Information Environment' (2003) 78(1) The Accounting Review 1-37.
[497] Brian J Bushee, Dawn A Matsumoto and Gregory S Miller, 'Open versus Closed Conference Calls: The Determinants and Effects of Broadening Access to Disclosure' (2003) 34(1-3) Journal of Accounting and Economics 149-80. See also Brian J Bushee, Dawn A Matsumoto and Gregory S Miller, 'Managerial and Investor Responses to Disclosure Regulation: The Case of Reg FD and Conference Calls' (2004) 79(3) The Accounting Review 617-643.
[498] Supra note 496 Heflin et al. (2003).

communication, contributing to a more equitable informational environment.[499] Despite its successes, Reg FD has encountered notable limitations in fully realising its goal of market fairness. These limitations stem primarily from structural issues within the regulation itself and the complex, evolving landscape of information dissemination.

A fundamental limitation of Reg FD lies in its reliance on information being disclosed primarily to the SEC rather than directly to the general public. 4.1.2 B of this study has explained the drawbacks of such practice. As outlined in §23(a) of the Exchange Act, disclosures are made to the SEC, with subsequent indirect accessibility for the investing public. This indirect route creates a time lag, as investors must wait for the SEC to publish reports, creating a gap that privileged parties may exploit. Additionally, the process can lack clarity, as the presentation of information to the SEC does not necessarily guarantee that it will be immediately understandable or actionable for retail investors, who may lack the resources to decode complex disclosures promptly. This indirect accessibility compromises Reg FD's intent to create a fair, level playing field, especially given that direct access to timely, comprehensive information remains limited. Reg FD's framework assumes that simultaneous disclosure of information equates to equal access, yet this assumption is flawed when considering the diverse capabilities of market participants. While large institutional investors can employ advanced technology and analytical tools to parse disclosed information rapidly, retail investors are often disadvantaged by their limited access to such resources. This disparity can undermine market fairness, as institutional investors can act swiftly on disclosed information, while retail investors may struggle to interpret complex financial disclosures. The selective advantage persists, not through exclusive access, but through differential capacity to analyse information, revealing a significant limitation in Reg FD's approach to fairness.

Another limitation of Reg FD is its insufficient handling of the commoditisation of non-public information. Companies often approach disclosures with a focus on strategic information release, treating material information as a valuable commodity aimed at benefitting those who place a higher premium on it, such as influential analysts and large institutional investors. This prioritisation implicitly discriminates against retail investors, who

[499] See for example Robert B. Thompson and Ronald King, 'Credibility and Information in Securities Markets After Regulation FD' (2001) 79(2) Washington University Law Quarterly 615-38. See also supra note 98 Anantharaman and Zhang (2011).

may lack the financial or analytical means to derive equivalent value from disclosed information. Consequently, although Reg FD has improved transparency, the asymmetrical ability to monetise disclosed information persists, challenging the regulation's effectiveness in delivering market fairness. Reg FD has also encountered challenges related to filtered communication, wherein material information, while disclosed in compliance with regulatory requirements, is shared in a manner that remains more beneficial to certain groups. The use of complex language, legal jargon, and detailed financial terminologies in disclosures often favours institutional investors who have the expertise to interpret these disclosures swiftly. Retail investors, conversely, may find such information inaccessible or difficult to process in real time, which reinforces pre-existing inequalities within the market. Although Reg FD mandates simultaneous disclosure, it does not address the differential impact of information presentation, thereby limiting its ability to achieve comprehensive fairness.

Beyond direct access, Reg FD does not adequately account for the broader accessibility of investment-relevant information. Retail investors, in particular, may lack the financial means to access sophisticated tools or platforms that can aid in the rapid assessment of newly disclosed information. This limitation exacerbates inequity, as those with greater financial resources are inherently better positioned to derive actionable insights from disclosures. Consequently, although Reg FD reduces overt selective disclosure, it inadvertently reinforces economic divides within the market, falling short of ensuring fair treatment across all participant categories. While Reg FD represents a meaningful advancement in promoting transparency and equal access, its limitations indicate that market fairness remains an elusive goal within securities regulation. The successes of Reg FD in deterring selective disclosure, enhancing transparency, and supporting market integrity are worthy of recognition. Yet, persistent issues surrounding indirect access, affordability, and the commoditisation of information reveal gaps in the regulation's ability to create a truly equitable market environment.

Ultimately, from the perspective of historical development, while Reg FD has laid the groundwork for a fairer market, realising its full potential requires an evolution of both regulatory frameworks and market practices to genuinely uphold equal opportunity and market fairness. To move towards a fairer market environment, future regulatory developments could focus on enhancing direct accessibility of information for the investing public and implementing mechanisms to ensure that disclosures are presented in an understandable and actionable format for all participants. Moreover, policymakers might consider addressing the economic disparities that limit the ability of retail investors to benefit fully from disclosed information, potentially through subsidised access to analytical tools or investor education programmes.

4.4 Analysis of Historical Trends

This chapter critically examines how episodes of market failure across different historical periods stimulated distinct legislative responses that culminated in the creation of key securities laws. The analysis of the Securities Act reveals its foundational role in establishing mandatory disclosure as a mechanism to reshape market practices and embed transparency into the fabric of financial regulation. The discussion then turns to the Exchange Act, which institutionalised the SEC and promoted objectives centred on equitable market mechanisms and integrity safeguards. The evolution of these legislative frameworks reflects an ongoing effort to align investor protection with broader regulatory ambitions. Further consideration of the development of Reg FD illustrates its lasting implications for market equity and its continuing relevance to contemporary debates about fair market structures. This historical review not only exposes the achievements and constraints of disclosure regulation but also lays the foundation for subsequent chapters that evaluate the interaction between fairness and efficiency in modern contexts.

4.4.1 Integrating Disclosure Reform with Economic Policy: The Foundations of Procedural Fairness

Near the close of this chapter, it is necessary to reflect on how different legislative objectives within securities regulation have interacted with wider economic conditions. This reflection extends the philosophical analysis developed in this work, as long as section 4.2.4, by assessing both the strengths and shortcomings of earlier legislative attempts to achieve realistic goals. It is essential to recognise that the enactment of any securities law is linked to its economic and social environment. Even a single initiative can have broad effects on the entire financial system. In the context of securities regulation, reforms that appear to address disclosure alone have consequences that extend beyond transparency. They form the foundation linking fairness with efficiency. Enhanced disclosure improves information quality but also interacts with wider concerns, such as financial stability and market confidence. This interdependence underscores the need to consider economic and monetary policy alongside securities law, as highlighted in section 4.2.2 and exemplified by the Great Depression.

The Great Depression prompted not only the introduction of landmark securities regulation under the New Deal, but also major shifts in monetary policy that reinforced the importance of stability and fairness in market operations. The Federal Reserve's policy interventions sought to stabilise markets by restoring liquidity, preventing bank failures, and rebuilding public confidence. These initiatives demonstrated that monetary and regulatory measures are mutually reinforcing in sustaining integrity, trust, and transparency – elements essential for fairness. Through monetary easing, liquidity injections, and government securities purchases; the Federal Reserve aimed to revive credit availability and encourage investment participation. This coordination between economic and regulatory responses, highlighted the need for coherent policies linking monetary management with market oversight to prevent systemic collapse.

From a regulatory perspective, the integration of monetary policy and disclosure regulation revealed that effective oversight depends not only on transparency but also on a supportive economic environment. The SEC's mandate to enforce transparent financial disclosures reflected an understanding that market fairness relies on the overall stability. This alignment remains relevant today, as investor confidence still depends on both information accessibility and macroeconomic assurance. For the purposes of this research, two implications emerge from this historical context. First, the dual use of monetary and regulatory measures demonstrates that disclosure regulation functions best within a stable economic framework. Transparency operates effectively only when broader policy mitigates volatility and provides a predictable market environment. Secondly, the Federal Reserve's actions illustrate the limits of disclosure regulation in achieving fairness alone. Transparency must coexist with liquidity and stability. Otherwise, disclosure cannot sustain confidence during economic stress. This historical experience suggests that fairness in securities regulation is best achieved through complementary measures – monetary, fiscal, and regulatory – that address market failures holistically. In contemporary terms, fairness depends on both robust disclosure mechanisms and the macroeconomic conditions that make those mechanisms meaningful.

In the years leading up to the Great Depression, securities markets operated with minimal oversight, enabling manipulative practices and selective disclosure. Without mandatory transparency, issuers could withhold or selectively reveal material information, creating significant imbalances among investors and distorting price formation. The Erie War of the 1860s exemplified the consequences of unregulated speculation, where financiers exploited informational advantages, manipulating prices and eroding public trust. Following the 1929 crash and the subsequent Depression, widespread instability exposed the need for systemic reform to restore confidence and protect investors. In response, the United States government enacted the Securities Act and the Exchange Act as part of the New Deal reforms. Their objectives were to promote transparency, reduce fraud, and rebuild integrity by levelling the informational playing field. These measures addressed fairness deficits by requiring uniform access to material information, thereby counteracting the asymmetries that had previously favoured privileged actors.

The Securities Act required issuers to provide detailed disclosures regarding financial condition, operations, and management. This mandate sought to reduce information asymmetry and empower investors to make informed decisions. The Act's primary objective was to improve fairness by protecting the public from manipulative practices. Yet, this focus also carried implications for efficiency. Transparency enhanced price discovery but imposed additional compliance costs that slowed market activity as firms adapted to new rules. The Exchange Act complemented these reforms by establishing the SEC to supervise and enforce disclosure obligations. It extended fairness through anti-fraud provisions, while reinforcing efficiency through investor confidence. Rule 10b-5 became central in ensuring that fair access to information supported efficient and trustworthy market operations. The intention was to enable informed decisions without undermining the integrity of disclosure.

However, efforts to advance fairness through disclosure often face practical constraints. Excessive transparency can reduce operational flexibility and reveal strategic business information that affects competitiveness. This tension illustrates a persistent dilemma in securities regulation. Investor protection may limit corporate agility, while unrestricted flexibility risks eroding fairness. The trade-off, first negotiated in the 1930s, continues to define contemporary policy debates. Achieving a fair and efficient market requires calibration rather than replacement, ensuring that fairness functions as a guiding principle within a broader framework of financial regulatory goals.

4.4.2 Ongoing Challenges: Persistent Challenges in Achieving Fairness through Disclosure Regulation

The disclosure regime established in the 1930s created a foundation for fairness, but it has never resolved all inequalities within securities markets. Market evolution and financial innovation have continually tested its limits. One significant reform, Reg FD, directly addressed selective disclosure that persisted despite anti-fraud provisions. Selective disclosure allowed certain investors privileged access to material information before public release. Reg FD sought to eliminate this inequality by requiring simultaneous disclosure to all investors, reinforcing fairness through equal access. Nonetheless, it faced limitations. Equal release of information does not equalise the capacity to analyse it. Institutional investors, equipped with analytical expertise and technology, could still process information faster than retail participants. Thus, Reg FD improved formal fairness but left substantive disparities intact, highlighting the uneven interpretive and analytical capacities across investor classes. Balancing transparency with the protection of sensitive information remains another ongoing challenge. Mandatory disclosure can expose competitive strategies or financial details that may disadvantage firms. Such exposure, though intended to advance fairness, can reduce efficiency by constraining innovation and strategic flexibility. This enduring tension demonstrates the inherent limits of disclosure-based fairness. Striking a balance between investor protection and commercial viability continues to demand careful judgment.

Judicial interpretations have also shaped the contours of fairness in disclosure regulation. Cases such as *Chiarella v. United States* (1980) and *Dirks v. SEC* (1983) clarified the scope of liability under Rule 10b-5. In *Chiarella v. United States* (1980), the Court held that possession of material information without a fiduciary duty did not constitute fraud, signalling that not all informational asymmetries are unlawful. In *Dirks v. SEC* (1983), liability for tippees was limited to situations where they knew of the insider’s breach of duty. These precedents defined fairness as context-dependent, demonstrating the judiciary’s restraint in extending disclosure obligations beyond statutory intent. Such rulings underscored that regulation alone cannot remove every asymmetry and that fairness must coexist with practicable limits.

Modern market structures have introduced further challenges. High-frequency and algorithmic trading exploit minute informational advantages at speeds unattainable for retail investors.[500] These developments enhance liquidity, but deepen informational divides, questioning whether traditional disclosure regulation can maintain fairness in digital markets. When sophisticated participants act within milliseconds, the principle of simultaneous disclosure loses much of its practical significance. Thus, fairness in the modern marketplace depends on both regulatory adaptation and technological awareness.

Across history, disclosure regulation has sought to pursue multiple objectives, yet its outcomes have fallen short of satisfactory. Legislative reforms from the Securities Act to Reg FD have advanced fairness through equal access to information, but enduring disparities persist. The difficulty lies not in the principle itself, but in the evolving environment that constantly reshapes its application. Persistent issues such as selective disclosure, unequal interpretive ability, and the competitive risks of over-disclosure demonstrate that fairness must function as a procedural guide rather than a definitive solution. Recognising these structural and contextual limits allows regulators to design adaptive frameworks that maintain credibility, protect investors, and preserve efficient market operations. Only through such an approach can securities regulation sustain fairness as a visible, practical, and proportionate element of a resilient financial system to prevent legislative lag and remain responsive to evolving circumstances.

4.5 Conclusion

This chapter has examined the legislative evolution of disclosure regulation across major historical stages, showing how changing economic and social conditions shaped the purposes and mechanisms of securities law. The supervision of disclosure progressed through several phases: the emergence of public awareness, the development of disclosure theories, their incorporation into law, and the later refinement of rules to address specific issues. The early securities markets, exemplified by the Erie War, lacked transparency and were marked by manipulation and speculative excess. Unregulated issuance of valueless securities and the

[500] See for example Gregg E. Berman, 'Speech by SEC Staff: Market Participants and the May 6 Flash Crash' (Speech delivered at the 11th Annual SIFMA Market Structure Conference, New York, New York, October 13, 2010), available at https://www.sec.gov/news/speech/2010/spch101310geb.htm. See also Hilary J. Allen, 'The SEC as Financial Stability Regulator' (2018) 43(4) The Journal of Corporation Law 715-72.

close ties between financial and political interests created systemic instability that demanded reform. Awareness of these issues led to theoretical work such as Judge Brandeis's 1913 articulation of the publicity principle, which argued that disclosure should reach the public rather than only regulators. His insight remains relevant today, as even modern systems still focus primarily on filings with the SEC rather than direct public accessibility. Despite advances in technology, full realisation of this ideal remains incomplete.

Following the Great Depression, the establishment of the Federal Reserve and subsequent monetary policies aimed to stabilise prices, credit, and public confidence. Parallel to these macroeconomic reforms, the New Deal introduced the Securities Act and the Exchange Act, addressing both market failures and fairness deficits by enforcing transparency and reducing asymmetry. These Acts also provided a legal basis for investor protection through litigation, ensuring that disclosure rules had enforceable consequences. Over time, new challenges emerged; selective disclosure and insider trading revealed the limitations of existing frameworks, leading to the creation of Reg FD. However, Reg FD largely refined timing requirements rather than restructuring disclosure access, leaving questions about its adequacy in promoting true fairness. The chapter therefore concludes that while the current framework advances transparency, its effectiveness in realising fairness remains constrained. Further analysis in the following chapters will explore the legislative purposes behind market fairness and evaluate how existing disclosure mechanisms align, or fail to align, with the purposes within the evolving regulatory landscape.

Chapter Five
Analysis of Fairness in the Current Disclosure Legal Regime

Building upon the normative frameworks established in earlier chapters, particularly through the application of Rawls's principles of fairness (Chapter Three) and the historical evolution of securities regulation (Chapter Four), this chapter delves into the present disclosure regime in the U.S. financial markets. It seeks to examine whether existing legal structures genuinely address the persistent challenges of achieving fairness for all market participants, especially those with fewer resources and limited access to critical information. This analysis is particularly relevant considering the central research question of this thesis: to what extent is disclosure regulation necessary to achieve fair securities markets in the United States? The historical backdrop of financial regulations, notably the Securities Act and the Exchange Act of, as well as more contemporary rules such as the Reg FD finalized in 2000, reflects ongoing efforts to mitigate market failures. These legislative interventions were driven by the recognition that unchecked information asymmetry and selective disclosure practices could erode market fairness, compromise investor confidence, and destabilise the financial system. However, despite these regulatory advancements, the fundamental issue of equitable access to information persists.

In line with Rawls's concept of the veil of ignorance, an ideal disclosure regime should ensure that no market participant can exploit contingencies, such as privileged access to material information, for personal gain. However, this chapter argues that the current disclosure framework, while addressing certain aspects of selective disclosure, still leaves significant gaps that perpetuate unfair advantages, particularly for institutional investors and entities with substantial analytical resources. By examining the legislative intent and practical implications of key disclosure rules - such as Reg FD, Rule 10b-5, and sections of the Securities Act and the Exchange Act - this chapter explores whether these laws align with the principles of fairness established in the earlier theoretical discussions.

This chapter is structured into three sections. The first section focuses on how current regulations address (or fail to address) the issue of information asymmetry. Reg FD, particularly 17 CFR §243.100, was intended to curtail selective disclosure by ensuring that material non-public information is disseminated to all investors simultaneously. However, this rule is constrained by its reliance on disclosures made to the SEC rather than directly to the public, as mandated by §23(a) of the Exchange Act. This limitation means that institutional investors with access to high-level analysis and connections can still leverage informational advantages, effectively bypassing the intended equity that Reg FD sought to achieve. The normative analysis in Chapter Three highlighted that under Rawls's principles, any fair system should prevent contingencies such as exclusive access to information from benefiting select participants. However, the current regime does not fully eliminate such contingencies. The analysis in this section demonstrates that, despite the legislative intent behind Reg FD, market participants continue to exploit informational advantages, creating barriers to achieving true market fairness.

This chapter then examines the practical challenges of defining materiality and sustaining the quality of disclosed information. Fairness is used as a procedural principle that guides interpretation. Drawing on Rawls, the analysis asks how disclosure rules can be applied so that access to information is meaningful for less resourced investors. The current regime mandates disclosure of material information, but leaves room for issuer judgement under the reasonable investor standard. That flexibility is necessary, yet it can produce uneven practice where commercial considerations lead to inconsistent applications. Compliance costs and interpretive uncertainty tend to weigh more heavily on smaller issuers, which can entrench disparities in the ability to use disclosures. Institutional investors are better placed to process information through resources and tools, while retail investors face obstacles in interpretation and timely action. Rather than treating openness as a flaw, the chapter evaluates how clearer, workable guidance can make materiality more predictable without narrowing it rigidly. The focus is on readability, proportionality, and the calibration of discretion. The analysis considers how fairness can inform interpretive statements, safe harbours and exceptions that reduce chilling effects, improve comparability and preserve flexibility. Judicial standards remain the anchor, yet more granular articulation and consistent enforcement are needed to align affordability and utilisation of information with the aims of investor protection and efficient markets.

The final substantial section addresses the tension between mandatory disclosure requirements and the business judgment necessary for a company's long-term success. Drawing from the philosophical principles discussed earlier, particularly the concept of rationality in Rawls' original position, this section examines whether current disclosure mandates align with the interests of both the companies and the investing public. The SEC's stringent disclosure requirements, encapsulated in 17 CFR §243.101 and §243.103, aim to promote transparency but may inadvertently stifle business innovation and strategic discretion. Companies often face a dilemma between fulfilling their fiduciary duties to shareholders and adhering to rigid disclosure mandates that could reveal sensitive competitive information. This tension highlights the need for a disclosure regime that balances the fiduciary obligations of companies with their duty to ensure fair access to information. From Rawls's perspective, a fair disclosure regime would be one where the principles guiding disclosure are developed without knowledge of one's specific position in the market. However, the current regime, by focusing excessively on compliance and reporting to regulatory authorities, overlooks the broader market dynamics that influence long-term business strategies. To achieve true fairness, the regulatory framework must account for the rational business judgements of issuers while ensuring that these do not compromise the transparency necessary for maintaining market integrity.

5.1 The acquisition of information advantages and the exclusion of contingencies

In subsection 3.2.2 A a of Chapter Three, it has been emphasized that a crucial feature of a fair original position is eliminating any contingency from the parties behind the veil of ignorance. To reflect such a feature in the acquisition of information advantages in the securities markets, is to distinguish between two approaches to attain information advantages. Either to gain the advantages from the privileged access of the source of the enterprise and profit from that edge, or to gain from their skills, acumen and diligence[501].

The first article of the Reg FD (17 CFR § 243.100)[502] set general rules for disclosures in the securities markets. The most important provision is that this article set two principles of the timing of disclosure, known as the simultaneous and prompt principles. "Whenever an issuer, or any person acting on its behalf, discloses any material non-public information regarding that issuer or its securities to any person ... the issuer shall make public disclosure of that

[501] See D. Casey Kobi, 'Wall Street v. Main Street: The SEC's New Regulation FD and Its Impact on Market Participants' (2002) 77(3) Indiana Law Journal 551.
[502] Supra note 489.

information ...: (1) Simultaneously, in the case of an intentional disclosure; and (2) Promptly, in the case of a non-intentional disclosure".[503]

After the first article of the Reg FD, the selection of the process of obtaining information advantages is no longer oriented towards pursuing the privileged benefits but rather towards approaching fairness. By this logic, no market participant should sacrifice because of their information asymmetry. According to the theory described in Chapter Three section 2.2.2, establishing a fair market requires the fairness of the original position. In testing whether the requirements of the fair status of the original position are met, whether the market participants enjoy privilege is an influential contingency. As legislators presumably not taking sides and trying their best to maintain a fair original position, only by trying their best to eliminate such contingency, can all parties behind the veil of ignorance be assured to make choices that would be considered fair. This is the point of this section of the Reg FD. On this basis, the market participants who need to be considered whether they are in a privileged status as a contingency, include more than just direct investors. It also includes the market professionals who previously were not disciplined in selective disclosure, including analysts. Before rules prohibiting selective disclosure were introduced, privileged parties often gained informational advantages through superior corporate channels and profited from them. A clear example of this practice was the long-standing norm of analysts' preferential access and benefits.

In this old norm, analysts obtain information about return volatility, transaction volume and transaction scale through conference calls that are always more accurate and timelier than the public. According to Beyer et al., the impact of the analyst's prioritisation of obtaining information over the public on their reports includes "(i) whether to follow a firm and how many firms to follow; (ii) how much information to acquire/produce; (iii) whether and when to issue or revise a report; (iv) what kind of report to issue; and (v) whether and to what extent to issue a report that diverges from or is less precise than the analyst's private signal or beliefs".[504] These factors that affect analyst's reports will cause a phenomenon called

[503] Ibid. This article confirmed the simultaneous and prompt principles of disclosure in securities transactions, which build up the grounding of how proper disclosure rules may contribute to market fairness.
[504] Anne Beyer, Daniel A. Cohen, Thomas Z. Lys and Beverly R. Walther, 'The Financial Reporting Environment: Review of the Recent Literature' (2010) 50(2-3) Journal of Accounting and Economics pp 296-343 at 297.

forecasting optimism.[505] This phenomenon is manifested by analysts catering to the wishes of the management of the company they are responsible for because of their career considerations and conflicts of interest in the trading commissions etc.[506] Hence, analysts' obtaining earlier information and the phenomenon of forecasting optimism result in large investors who can generously afford the analyst's reports benefiting from such information asymmetry.[507] The contingency for obtaining the information advantages was not quite blocked in the old norm. With the new article being introduced, the simultaneous and prompt principles attempted to block such contingency. Under the general rule set of Reg FD, privileged parties' edge, such as analysts in the old norm, appeared to be diluted, and thus the fairness of the original position seemed to be satisfied.

Accompanied by this rule, § 23 (a) of the Exchange Act[508] required the Commission to consider the impact on competition of any rules it adopts. The SEC believes that the fair-competition impact of § 23 (a) of the Exchange Act covers the establishment of an equal ground for competition in obtaining material information. The collaboration between the Reg FD and the Exchange Act set a point that the current disclosure legal regime endeavours to create a fair competition, where the acquisition of information advantages depends on the parties' skills, acumen and diligence, rather than a privileged contingency. This also includes the analysts as a representative of the market professional groups. In this narrowed field of analysts' competition, SEC believed that a fair playing field is granted when the contingency of information acquisition is ruled out. "Analysts will continue to be able to use and benefit from superior diligence or acumen, without facing the prospect that other analysts will have a competitive edge simply because they have been favoured with selective disclosure".[509] Accordingly, the SEC believed that their rules jointly rendered the transition of the approach of the acquisition of information advantages in the securities markets from the privileged access of the source to the parties' skills, acumen and diligence.

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[505] See for example Yen-Cheng Chang, Alexander Ljungqvist and Kevin Tseng, 'Do Corporate Disclosures Constrain Strategic Analyst Behaviour?' (2023) (Jan 2023) The Review of Financial Studies pp 1-50.
[506] See for example Alexander Ljungqvist, Felicia Marston, and William J. Wilhelm Jr., 'Competing for Securities Underwriting Mandates: Banking Relationships and Analyst Recommendations' (2006) 61(1) The Journal of Finance pp 301-340. See also William J. Mayew, 'Evidence of Management Discrimination among Analysts during Earnings Conference Calls' (2008) 46(3) Journal of Accounting Research pp 627-659.
[507] See Richard M. Frankel, Marilyn F. Johnson, and Douglas J. Skinner, 'An Empirical Examination of Conference Calls as a Voluntary Disclosure Medium' (1997) 37(1) Journal of Accounting Research 133.
[508] Supra note 10.
[509] U.S. Securities and Exchange Commission, 'Final Rule: Selective Disclosure and Insider Trading, 17 CFR Parts 240, 243, and 249 - Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99' (SEC, 21 Aug 2000). Available at <https://www.sec.gov/rules/final/33-7881.htm#P382_147435> accessed Dec 2022.

With the two principles set in the first article of the Reg FD, privileged parties, such as analysts in the old norm, lost their advantaged approach to material information. In the view of the SEC, the transition of the privileged parties' approach to acquiring information advantages has been converted. Thus, eliminating contingencies in the original position is accomplished in this one stroke. However, this conversion cannot assure the elimination of all contingencies of information advantages. These contingencies may still cause unfairness in the original position. Take the small and representative group of analysts for instance. In the specimens of 17 CFR §243.100 and §23 (a) of the Exchange Act, the market value of most analysts is reduced because this community can no longer receive advanced information. However, the legal provisions of disclosure requirements mitigate one group's advantages whilst boosting others' value. Consequently, ensuring that the starting point of competition is fair is even more impossible. Take a 2004 study on the value of the three major rating agencies and analysts in the wake of the new law, for example.

Research has suggested that the Reg FD lowered "the quality of analyst forecasts, and thus dramatically impoverish the information environment"[510]. But the credit rating changes affected by the three major rating agencies that occupy a monopoly position, Moody's Investors Service, Standard & Poor's (S&P), and Fitch, Inc. [511], have a responsive effect on share prices.[512] It is understandable that a legislative progression in terms of eliminating contingency in acquiring information advantages cannot be achieved overnight. However, it is not significant in terms of the outcome, especially for individual investors who rely on the expertise of analysts and rating agencies. Such legislation did not touch the core of eradicating contingencies for the parties behind the veil of ignorance. Instead, it made the privileged contingencies work in a different way.

[510] Philippe Jorion, Zhu Liu, and Charles Shi, 'Informational Effects of Regulation FD: Evidence from Rating Agencies' (2005) 76 Journal of Financial Economics 309.
[511] "The major U.S. bond rating agencies are Moody's Investors Service, Standard & Poor's (S&P), and Fitch, Inc. These three agencies are the only nationally recognised statistical rating organisations (NRSROs) officially recognised by the Securities and Exchange Commission. For most U.S. corporate ratings, S&P and Moody's are the only firms used". Ibid at 313.
[512] "After Reg FD, rating agencies became privileged conduits of selective disclosure to the public. As a result, we find that the effect of rating changes on stock prices has become more pronounced. Both downgrades and upgrades now have a bigger effect on stock prices. Reg FD did more than preserve the "status quo ante", as argued by Moody's. Apparently, Reg FD conferred a strategic advantage to the rating agencies". Ibid at 329.

The SEC cannot refute this unfairness in the original position on the grounds of the openness of obtaining information advantages. For legislators to achieve the purpose of market fairness, they must not take sides with any parties in their original position. From the standpoint of taking no preference, shifting the traditional privilege of obtaining prior information advantages is only the first step. Further, mandatory disclosure and recognition of multi-platform disclosure can only help to confirm the breadth of the information disclosed.[513] In order to achieve the purpose of making the value of information widely available, it is also necessary to eliminate the monopoly of rating agencies. Ensuring the availability of investment value, contained in the disclosed information, is also significant in achieving the result that the lawmakers have no preference for the parties in the original position of market fairness. Here are the details. In response to the Letters of the Securities Industry Association and Joseph McLaughlin, the SEC cited reporters' access to information as an example to refute the criticism of value changes in analysts and rating agencies in public comments towards the Reg FD.[514] The SEC pointed out that the purpose of reporters acquiring information is dissemination, and dissemination is widespread. Rating agencies' reports are public and thus widespread. The analysts' analysis reports are different from the two. Their reports are paid and therefore delimited. The introduction of the above two rules eliminates the edges of analysts, and their delimited reports that used to be established on the privileged information advantages are further limited. Therefore, it is demonstrated that the present rules enabled information advantages to be broadly acquired. However, this logic excuses the monopoly of the three major agencies. Under the condition of simultaneously receiving the authentic original information, the initially disclosed information bears the nature of being broad and frequent.[515]

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[513] The SEC recognised social media disclosure as separate from the 8K rules in 2013. Since the permission of the multi-platform disclosure, the companies' disclosure commenced a more extensive and chaotic trend. See U.S. Securities and Exchange Commission, 'SEC Says Social Media OK for Company Announcements if Investors Are Alerted' (SEC, 2 Apr 2013). Available at <https://www.sec.gov/news/press-release/2013-2013-51htm> accessed Dec 2022. To address such an issue, in remarks to the SEC Investor Advisory Committee, SEC emphasised the connotations of the principle of materiality to prevent the company from submerging the public in the ocean of information when they circumvent disclosure liabilities. See U.S. Securities and Exchange Commission Chairman Jay Clayton, 'Remarks on Telephone Call with Investor Advisory Committee Members' (SEC, 6 Feb 2019). Available at <https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-call-020619> accessed Dec 2022. A detailed discussion of the materiality principle will be addressed in section 5.2 B.

[514] Supra note 510.

[515] In the SEC's interpretation of compliance costs for Reg FD, it is estimated five disclosures per issuer. "We believe that for a large group of issuers, five disclosures reflect the need to make one FD disclosure per quarter and allows for one additional miscellaneous FD disclosure. At the same time, however, we recognise that there will be a wide variation among disclosure practices at different issuers". ibid.

In section two of the publishing of the Reg FD, the SEC released several discussions in the proposal.[516] The rating agencies commented that "the regulation should not apply to disclosures made to ... rating agencies for purposes of securities ratings".[517] The purpose of these agencies is to exclude themselves from the scope of regulation. As it turns out, their purpose has been approved. Reg FD Rule 100 (a) specifies four categories of persons governed by the final rules. These categories include securities market professionals "broker-dealers and their associated persons; investment advisers, certain institutional investment managers and their associated persons; and investment companies, hedge funds, and affiliated persons." [518] Rating agencies have successfully been excluded from the restrictions for they are not persons "who regularly make or would reasonably be expected to make investment decisions involving the issuer's securities".[519] However, the three monopolistic rating agencies can only rate a limited number of indicators. The corresponding result is that the investors rely on the agencies to save on research costs[520], and the issuers rely on them to protect their reputations[521]. Although the rating agencies are not directly involved in the investment decisions of securities, in essence, their rating results profoundly affect the performance of securities issuers and analysts, thus increasing the favour of information advantages. According to Partnoy, credit rating agencies continue to thrive because they are so powerful and profitable[522]. With the assistance of these agencies, institutional investors can still attract a large number of professional analysts with the advantage of capital for specific information with investment and stock value. In contrast, individual investors are still subject to the threshold of the professional analysis' payments. The Reg FD aims to reduce the threshold for obtaining information advantages by strengthening mandatory disclosure. However, the attitude of excluding non-enumerated parties makes it clear that the authority has conceded to compromise. Hence, on the surface, the above regulations have shifted the traditional privilege of access to prior information advantages, levelling the playing field

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[516] Supra note 510 section II B.
[517] Ibid.
[518] Ibid.
[519] Ibid.
[520] For the rating agencies reducing investors' costs at the margin in conducting research, see for example Susan M. Phillips and Alan N. Rechtschaffen, 'International Banking Activities: The Role of the Federal Reserve Bank in Domestic Capital Markets' (1997) 21(5) Fordham International Law Journal 1754-63.
[521] Regarding the importance of the creditworthiness to the issuers resulting from the ratings, see for example H. Kent Baker and Sattar A. Mansi, 'Assessing Credit Rating Agencies by Bond Issuers and Institutional Investors' (2002) 29(9) Journal of Business Finance & Accounting 1367-98.
[522] See Frank Partnoy, 'The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies' (1999) 77(3) Washington University Law Quarterly 619-712. Partnoy even fundamentally questioned the role of credit rating agencies in providing credible and accurate information. He believes that these agencies are relatively incompetent in providing valuable information.

back to a fair original position. Fundamentally, it is just another way to rationalise the unfairness of contingencies among different market participants in the original position of fairness.

To summarise, according to the fairness theory introduced in Chapter Three section 3.2.2, parties in the original position should be shielded with a veil of ignorance. The veil's purpose is to ensure that no contingencies would affect the parties' choices. The present section focuses on the contingency of the acquisition of information advantages. From this perspective alone, the veil is riddled with holes. The current rules emphasize the timing for different parties to obtain information. This does not solve the problem of inequality between different investors, from using analysts to extract the information value to excluding credit rating agencies from legal restrictions. The problem of these contingencies not being completely avoided is that the veil worn by the parties in their original situation is not ignorant. These parties in the original position are perfectly aware of their respective situations in reality. Lawmakers can consider that the absolute veil of ignorance cannot practically be achieved, but they cannot be deliberately deceptive. The SEC should pay attention to the new information barriers that the promulgation of the rules brings to different investors whilst combatting selective disclosure. It should also respond to the corresponding redresses of these barriers rather than continuing to pretend that the approach to acquire information advantages has been addressed and the original position of fairness has been achieved. Such selective neglect will only aggravate the unfairness in the securities markets brought by the disclosure rules.

5.2 Cognition of materiality, information quality, and the contingency of affordability

The acquisition of informational advantages is not the only contingency that must be screened from the parties in the original position in order to protect the veil of ignorance. The timing and manner of disclosure also introduce contingencies that can influence the bargaining of advantages. Three sets of participants shape these contingencies. The first, are the recipients of disclosed information. Investors vary in their capacity to extract investment value once information is available. That capacity is itself a contingency. The second, are the providers of information. Issuers and other insiders differ in the affordability of compliance costs, and they hold varied intentions when interpreting the materiality of information before disclosure. The third participant is the market regulator. The legislative purposes of the Securities Act, the Exchange Act and Reg FD include the promotion of market prosperity and the creation of a fair starting point for competition. Whether the rules give clear guidance on the exercise of corporate discretion over disclosure is a critical factor for fairness in the original position. This requirement also relates to the formal constraints of the concept of rights. Satisfaction of those constraints adds an additional condition for fairness beyond the veil of ignorance. This section therefore considers the present position of each participant with reference to the fairness of the original position. The discussion covers the contingency of investors' ability to refine value from disclosed information, the contingency introduced by interpretations of materiality, the contingency created by corporate discretion, and the extent to which the current rules satisfy the formal constraints of rights.

An important aim of Reg FD is to regulate how management uses information that it intends to disclose. From the perspective of the SEC, a significant motivation for Reg FD was to prevent management from treating important information as a commodity.[523] The SEC considered that this tendency reflected efforts to please particular analysts and institutional investors.[524] The preference sometimes extended to information gatekeepers such as lawyers, investment dealers and their approvers.[525] Such a preference poses a threat to market integrity and to fairness. The premise is that analysts who face these pressures may produce favourable reports or tilt their analysis to retain access. As explained in section 4.3, the first provision of Reg FD, 17 CFR § 243.100, sets out principles of simultaneous and prompt disclosure. The second provision, 17 CFR § 243.101, supplies definitions and further detail, with the stated aim of reducing selective disclosure.[526] [527]

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[523] This thesis does not intend to consider this issue from the commercial law perspective of information and commercialisation. To demonstrate the usage of information from a commercial law perspective, please refer to Raymond T. Nimmer and Patricia Ann Krauthaus, 'Information as A Commodity: New Imperatives of Commercial Law' (1992) 55 Law & Contemp. Probs. 103. This thesis only looks at this issue from the perspective of disclosure regulations in the field of securities markets.
[524] Supra note 510.
[525] See for example Jerry Duggan, 'Regulation FD: SEC Tells Corporate Insiders to "Chill Out"' (2001) 7 Washington University Journal of Law & Policy 159.
[526] Supra note 491.
[527] For instance, it provides definitions of "intentional" and "promptly", which clarifies the elements of applying the simultaneous and prompt principles. "(a) Intentional. A selective disclosure of material non-public information is "intentional" when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and non-public. ... (d) Promptly. "Promptly" means as soon as reasonably practicable…after a senior official of the issuer … learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and non-public". Ibid.

On its face, the requirement to disclose intentional communications simultaneously, and non-intentional communications promptly, appears to remove priority advantages for every recipient. If priority advantages are neutralised, the preference described above is weakened, and the threat to integrity and fair competition appears to be addressed. Yet the parties who formerly benefited from unregulated environments, including selective disclosure, entered the market on the basis of professional capability. Their analysis and reports are already instrumental to securities markets. Information released by companies is not a direct instruction for investment decisions. The investment value that can be drawn from information is the key. Tools that extract value carry a price. Possession of such tools creates contingencies that affect fairness for the parties in the original position.

Rawls identifies the natural lottery as a contingency that should be excluded in justice as fairness. In a hypothetical scenario, if a genius knows his or her status and a fool knows his or her status, the veil of ignorance erodes. Even if other features remain hidden, such as social environment, financial resources and practical access to wealth; the recognition of personal capacity would shape divergent understandings of fairness. Instrumental characteristics can be treated as the grounds on which geniuses become geniuses. Fools remain fools because they lack usable tools or affordable instruments. In the market context, those with access to analysts and dealers mirror the geniuses in the hypothetical original position. They know that they can extract value quickly and accurately, and they can act on that value. Individual investors often lack such access. They appreciate that information as such is only information, and that investment value is decisive. They are comparatively constrained in refining value through the same instruments that institutional investors routinely employ. The capacity to use tools that extract value from information is a contingency that generates inequality among the parties in the original position. The initial inequality among investors is therefore difficult to remove, and the contingencies are not fully eliminated.

One response would be to require companies to disclose, not only information, but also the extraction of value from that information. Such a response would push the responsibility for disclosure to an excessive and unsustainable extreme. It would be irrational to require companies to convert all informational inputs into explicit statements of value. Even taken together, 17 CFR § 243.102[528] and Exchange Act § 10b[529] already impose a heavy combination of disclosure obligations, anti-fraud liability and interpretive discretion regarding materiality. Understanding why it is irrational to push further requires close attention to material information and to managerial discretion. It also requires an account of how fairness should operate in practice. It is worth noting that this work does not intend to treat the open texture of materiality as a defect and expects fairness to repair the standard. On the contrary, this thesis deems that fairness can operate as a procedural principle that guides the interpretation of materiality and supports legitimate and consistent decision-making.

In enacting Reg FD, the SEC did not clarify or emphasise the definition of materiality. As a result, interpretation relies on judicial precedents and on other rules. The judicial definition stems from *TSC Industries, Inc. v. Northway, Inc.* (1976)[530] and *Basic, Inc. v. Levinson* (1988).[531] The Supreme Court stated that materiality turns on a substantial likelihood that a reasonable shareholder would consider the information important.[532] The shareholder must also believe that there is a significant alteration in the total mix of information available.[533] For contingent events, assessment depends on a balance between the probability of occurrence and the magnitude of the event in light of the company's activities as a whole.[534]

Alongside the case law, the SEC released a non-exclusive list of items that are commonly material. These items include:

> (1) earnings information; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries, or developments regarding customers or suppliers (e.g., the acquisition or loss of a contract); (4) changes in control or in management; (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report; (6) events regarding the issuer's securities – e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the

[528] 17 CFR § 243.102, No effect on antifraud liability, see supra note 494.
[529] See supra note 509 at 89-101.
[530] *TSC Industries, Inc. v. Northway, Inc*. 426 U.S. 438 (1976)
[531] *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)
[532] Supra note 530 at 449.
[533] See supra note 532 at 231-32.
[534] See supra note 532 at 238. (Citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968))

rights of security holders, public or private sales of additional securities; and (7) bankruptcies or receiverships.[535]

The list is illustrative and not exhaustive. The case law and the list therefore leave a considerable share of discretion in the hands of management when determining materiality.[536]

In the two decades since Regulation FD, issuers have often adopted an expansive approach to materiality. The SEC's 2019 summary of corporate disclosure practices under the current regime expressed concerns about disclosure quality and about overload.[537][538] Expansive reliance on materiality has contributed to redundant disclosure. For instance, Uber's 2019 registration statement ran to 420 pages.[539] By contrast, Walmart's 1970 prospectus had 36 pages.[540] Information overload is now a visible problem. It can make it difficult to identify what matters most.[541] Redundant disclosure reduces readability and comprehensibility.[542]

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[535] Supra note 510 under section II B. 2 Disclosures of Material Non-public Information.

[536] Apart from the judicial interpretation, the Securities Act, the Exchange Act and Reg FD, other supplementary rules help in determine materiality as well. Since the alternative rules only supplement the understanding of material information and not sealed the definition, this chapter will not go into details. For reference, "the term 'material', when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered". Dale A. Oesterle, 'The Overused and Under-Defined Notion of "Material" in Securities Law' (2011) 14(1) University of Pennsylvania Journal of Business Law pp 167-207 at 170 note 24. "The S.E.C. takes a strategic approach to defining the term. The agency writes hundreds of pages of confusing, cross-referenced disclosure requirements in schedules and rules, backstopped by an additional requirement of a disclosure of all other material information, and then does not define the term. Federal courts, left to define the general term in application in multiple settings, produce holdings that are maddeningly imprecise and often fickle. While the securities markets and their regulators seem content with the imprecision, academics have long been critical of the vagueness of the standard". Oesterle (2011), at 168.

[537] See Eva Su, 'Securities Disclosure: Background and Policy Issues '(June 2019) Congressional Research Service Report IF11256. Available at <https://sgp.fas.org/crs/misc/IF11256.pdf> accessed May 2023.

[538] The SEC also presented its issuing of the 2018 "Final Rule regarding "Disclosure Update and Simplification" as a step to simplify disclosure and enhance materiality. This document also simplified compliance whilst requiring more accounting. But so far, there is no direct evidence that suggests that these changes fully addressed the market demand to centralise information flow and improve information quality. Besides, different companies may react differently in their implications of financial reports according to the simplification rules. Moreover, there is currently no research indicating that the SEC's 2018 solution to concentrate information flow and increase information quality has been widely approved by the public. Hence, this rule is not included in the main discussion of this chapter.

[539] U.S. Securities and Exchange Commission Record, 'Uber Technologies, Inc. Form S-1 Registration Statement' (April 2019) File D.C. 20549 Registration No. 333 pp 1-420. Available at <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm> accessed March 2023.

[540] U.S. Securities and Exchange Commission Record, 'Wal-Mart Stores, Inc. Final Prospectus Statement' (Dec 2005) File No. 333-13056 pp 1-36. <https://www.sec.gov/Archives/edgar/data/104169/000119312507186781/d424b2.htm> accessed March 2023.

[541] See also the 31st Chairwoman of the SEC, Mary Jo White, 'The Path Forward on Disclosure' (Oct 2013) National Association of Corporate Directors - Leadership Conference. Available at <https://www.sec.gov/news/speech/spch101513mjw> accessed March 2023.

[542] See also Travis Dyer, Mark Lang and Lorien Stice-Lawrence, 'The Evolution of 10-K Textual Disclosure: Evidence from Latent Dirichlet Allocation' (2017) 64(2-3) Journal of Accounting and Economics pp 221-245.

Low readability raises the barriers to extracting value from disclosure. The contingency faced by investors at the original position is therefore reinforced. In 2019, the SEC restated the importance of materiality as a filter against overload and confusion.[543] The principle should support readability and comprehensibility. It should operate alongside flexibility in corporate discretion and with attention to investor practicality. Discretion should not become a means to avoid regulation, yet the exercise of discretion carries risk and responsibility for the company. In the application of annual and quarterly reporting through Forms 10-K and 10-Q there are settled practices for materiality.[544] [545] Risks increase for Form 8-K and for occasional disclosures prompted by major events.[546] These challenges have prompted regulatory and empirical responses that seek to improve clarity and reduce confusion.

Some studies respond to overload in 10-K by exploring quantitative proxies for materiality that might guide practice. D'Adduzio measures the ratio of disclosed monetary amounts to total assets and calculates median values in each annual report, with the aim of generating an indicator of material weight.[547] The analysis includes macroeconomic uncertainty, firm-level litigation risk and managerial risk aversion in order to explain how the level of material disclosure affects investors' understanding. The findings indicate that pruning non-material items without tackling the underlying drivers of disclosure does not remove confusion. The work corroborates regulatory concerns about overload and suggests that the SEC could reduce one size fits all obligations and expand safe harbours for managers who in good faith

543 Supra note 538.
544 U.S. Securities and Exchange Commission, 'Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934'. Avail at <https://www.sec.gov/files/form10-k.pdf> accessed March 2023.
545 Form 10-Q is for "quarterly reports for the first three fiscal quarters of the year that include a company's unaudited financial statements and financial conditions". (See supra note 538). Official U.S. Securities and Exchange Commission, Form 10-Q Rules. Available at <https://www.sec.gov/files/form10-q.pdf> accessed March 2023.
546 U.S. Securities and Exchange Commission, 'Form 8-K: Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934'. Available at <https://www.sec.gov/files/form8-k.pdf> accessed April 2023.
547 Jenna D'Adduzio, 'The Magnitude of Quantitative Disclosure in Annual Reports' (Dec 2022). SSRN Website pp 1-59. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3705513> accessed April 2023. In this research, D'Adduzio adopted Python (Programming Language) data to extract all dollar amounts disclosed in firms' Form 10-K annual reports. "For example, if a firm has total assets of $10 million, and discloses capital expenditures of $800,000, the ratio is 0.08". She then calculated the median value of these ratios in each company's annual report. A higher value for the measure indicates a higher importance disclosure. (See also Jenna D'Adduzio, 'How Material Are Disclosures in Annual Reports?' (Jan 2021) The Columbia Law School Blue Sky Blog. Available at <https://clsbluesky.law.columbia.edu/2021/01/22/how-material-are-disclosures-in-annual-reports/> accessed May 2023.)

do not disclose information that is immaterial at the time.[548] From the perspective of materiality, this aligns with the view advanced in this thesis.

Section 3.2.2 A b introduced the formal constraints of rights that are necessary for fairness in the original position. Universality, generality and publicity require a general awareness among the parties.[549] They also require that universal acceptance supports the stability of social cooperation.[550] Ambiguity in the SEC's treatment of materiality does not meet the requirement of general awareness and does not secure the desirable effects that the constraints are intended to promote. In the absence of a commonly understood and public rule, issuers bear unreasonable compliance costs created by regulatory ambiguity in guidance on discretion. The transfer of such costs undermines fairness in two ways. This analysis connects the formal constraints to practical outcomes. It shows how regulatory ambiguity permits contingencies to persist through disparities in compliance affordability.

The first consequence is a chilling effect that falls unevenly. The veil of ignorance should prevent parties from knowing their own affordability of the costs and duties of compliance. In practice, smaller issuers bear a heavier burden when the veil is lifted. They face stricter consequences from errors, higher marginal costs, and a stronger deterrent against timely disclosure. Michael Blumstein of Morgan Stanley described a climate of corporate paranoia.[551] Companies struggle to judge whether their practice aligns with norms, so they prefer to disclose less in order to avoid mistakes. No firm wishes to be the first to be punished.[552] Truthful and effective disclosure should stabilise prices and reduce volatility. When guidance on materiality is unclear, firms disclose according to their own capacity and their own estimate of trial-and-error costs. That tendency undermines market prosperity and reproduces the contingency of compliance affordability, which impairs fairness at the original position. The second consequence concerns exceptions to mandatory disclosure. The absence

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548 Ibid D'Adduzio (Jan 2021).
549 Referring to the parties behind the veil of ignorance in the original position.
550 Supra note 26 at 133.
551 See Jeff D. Opdyke, 'SEC May Revisit Regulation FD as Confusion Runs Rampant' (The Wall Street Journal, 25 Apr 2001). Available at <https://www.wsj.com/articles/SB988141648575709482> accessed Dec 2022. In the same report, Commissioner Unger described the difficulty to the market as "the spectre of enforcement has caused companies to overreact and become ultraconservative". See also International Financial Law Review News Report, 'Unger Faces Critics over Disclosure Regulation' (2001) 20(5) Int'l Fin. L. Rev. 3.
552 See also Ole-Kristian Hope, Congcong Li, Mark Shuai Ma, and Xijiang Su, 'Is Silence Golden Sometimes? Management Guidance Withdrawals during the COVID-19 Pandemic' (June 2022) Review of Accounting Studies 1.

of clear exceptions to Form 8-K and similar rules indicates a lack of guidance on the legitimate use of discretion. Without an explicit account of exceptions, firms face significant constraints when disclosing major events. These constraints sit uneasily with the conditions for a fair original position and with the desirable effects required by the formal constraints. Form 8-K requires timely disclosure once a major event is known. It does not evaluate which exceptions should be available. Without recognised exceptions, universal acceptance that promotes social cooperation is difficult to achieve. The next section considers the obstacles to fair outcomes when companies exercise discretion in light of fiduciary duties owed by information holders to the company.

Against this background, the thesis adopts a practical stance. It does not treat materiality's openness as a flaw. Nor does it propose that an abstract idea of fairness should repair the standard. The claim is that fairness can be made explicit as a procedural principle that guides interpretation within the current regime. The aim is to render fairness visible in a way that enhances legitimacy and consistency. Fairness serves as a foundation from which existing doctrines, including materiality, proportionality, and disclosure duties, can be interpreted more coherently and equitably. In practice, regulators could issue interpretive statements that clarify how equitable access to information should shape assessments of materiality. Such statements would reduce interpretive disparity while preserving flexibility. They would not narrow the standard rigidly. They would improve predictability for issuers with different compliance affordability. Explicit articulation of fairness in this procedural way would turn materiality from a vague evaluative threshold into a structured test of informational justice. It would align disclosure obligations with transparency and equal participation, while respecting the understanding that links materiality to proportionate imposition of obligations in the work of Locke and Mill. The thesis therefore advises using materiality as the main channel through which a normative standard of market fairness can be operationalised.

5.3 Mandatory disclosure rule without exceptions, the long-term benefit of a company, and the rationality of the contracting parties in a fair original position

A company's insiders who possess material information, for example the issuers, need to consider factors that impact the status of different investors when directing disclosures. Of course, these considerations are also in turn relevant to the responsibilities of those who possess this information inside the company. Thus, this part of the discussion involves the wrestling between the company's decision-makers and markets. From the perspective of the regulators, it is to discuss the burdens placed on different companies' decision-makers and whether such burdens will affect promoting market prosperity and the initial situation of fair competition. From the perspective of the securities markets, it is to discuss the ability of investors to employ the disclosed information to make decisions. The previous two sections have discussed the current disclosure regulations' effect on the market integrity and fairness and the investor's acquiring and using information advantages. In the last section, the perspective of a company's decision-makers has been mentioned, which is to discuss the connotations of the materiality principle and the allowance and limits to their discretion. This section carries on a further examination of the companies' carrying out discretion from this perspective.

As mentioned above, failing to set explicit exceptions to mandatory disclosure will discourage companies from enthusiastically disclosing information. No exemption rules suggest no general awareness of how entities can exercise their discretion over material information. Consequently, one of the main conditions of a fair original position – the formal constraints of the concept of rights – is not fulfilled. The third article of the Reg FD (17 CFR § 243.103[553]) has clarified that it does not affect the Exchange Act is reporting status. The latter covered the occasional major event's disclosure. The disclosure rules in this regard are thus subject to the coordination of the Reg FD and the Exchange Act. In other words, the mandatory disclosure requirement of major events is still in accordance with the 8K[554] disclosure rules. In terms of evaluating a company's usage of its discretion in the scenario of a major event, the present disclosure regulations created two problems affecting market prosperity, integrity and fairness. One is the balance between the information possessors' fiduciary duty to the company and their disclosure duty to the shareholders and other investors. Corresponding to the theory of justice as fairness, it is the discussion of subsection 3.2.2 A c from Chapter Three – the rationality of the contracting parties in the original position. The other problem is the intensification of the compliance costs affordability between large and small entities. The current legal regime needs a supplementing set of rules

[553] 17 CFR § 243.103, No effect on Exchange Act reporting status. Available at <https://www.law.cornell.edu/cfr/text/17/243.103> accessed Jan 2023.
[554] Supra note 547.

to make up the contingency of different affordabilities to realise the fairness for parties behind the veil of ignorance. Suggestions will be made at the end of this section.

In the wake of the COVID-19 pandemic in 2020, many companies had to carefully disclose the pandemic's impact on their finances, cash flows and revenue capacity to sustain their responsibilities to shareholders and other investors, whilst maintaining the viabilities of the companies themselves. In the Cheesecake Factory[555] case, which the SEC treated as a typical charge for short information disclosures, this chain company made selective disclosure to preserve company survival and financial flexibility. Accordingly, this company's measure violated Reg FD regulations on the simultaneous disclosure rules of intentionally disclosed information. "As set forth in the SEC's order, in its SEC filings on March 23 and April 3, 2020, The Cheesecake Factory stated that its restaurants were "operating sustainably" during the COVID-19 pandemic".[556] SEC determined that the company's filings were "materially false and misleading".[557] According to the later findings of the company's internal documents, the company was "losing approximately $6 million in cash per week"[558] and had "only 16 weeks of cash remaining"[559]. The findings also revealed that the company failed to disclose that it "had already informed its landlords that it would not pay rent in April due to the impacts that COVID-19 inflicted on its business"[560]. To survive the COVID-19 pandemic and address the urgent cash flow problem caused by it, "the company did share this information with potential private equity investors or lenders in connection with an effort to seek additional liquidity"[561]. From the disclosure legal requirements perspective, 8K mandates companies to disclose it immediately when material information becomes known or available. The SEC determined that Cheesecake Factory had abused its discretion in the major events disclosures, leaving other shareholders at a disadvantage. Therefore, such a conduct deserved penalties.

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[555] U.S. Securities and Exchange Commission, 'SEC Charges the Cheesecake Factory for Misleading COVID-19 Disclosures' (SEC 2020) 306. Available at < https://www.sec.gov/news/press-release/2020-306> accessed May 2023.

[556] Ibid. See also Michelle Price, 'U.S. Regulator Fines the Cheesecake Factory for Misleading COVID-19 Impact Disclosures', (Reuters Dec 2020). Available at <https://1.next.westlaw.com/Document/I287d73a0363c11eb833efae3e6dfd874/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&OWSessionId=a115d229136e4462be55a3c543bf5480&fromAnonymous=true> accessed May 2023.

[557] Ibid.

[558] Ibid.

[559] Ibid.

[560] Ibid.

[561] Ibid.

At the prima facie level, the SEC is committed to strictly enforcing its mandatory disclosure rules, which are supposed to be sound and fair to investors. But this superficial impression needs to be prudently reconsidered. In terms of the affordability of the company's management at the expense of compliance to maintain corporate survival and financial flexibility, SEC's charge for this Cheesecake Factory case is not actually typical. The most prominent impact is to deter large companies with a similar scale of this case and to signal the SEC's policy attitude towards the disclosures relevant to the effects of the pandemic. When a company disclosed the information to particular parties and not to the public, it did share its drawbacks and difficulties with potential private equity and lenders for quick financial rescue de facto. Accordingly, the penalty was pronounced. This penalty, or to be more accurate, the violation of mandatory disclosure, was for such "additional liquidation". This additional liquidation referred to the quick money in a decent amount to support the company through a sudden global pandemic attack, an unpredictable one for how long its impact on corporate financial status will last. The manners the company's management took to maximise the company's interests in response to massive cash flow risk and unpredictable disadvantaged effects formed a typical balance of duties.

The above case classically involves the balance between fiduciary duty and disclosure responsibility. The critical information the company's managements disclosed to a small group of investors was for the company's survival, not for their personal profit.[562] This is not inconsistent with the point of 10b-5 anti-fraud regulations.[563] From the perspective of corporate purpose, the company's management has fiduciary duties of loyalty and care to the company. The scope of such duties contained that the management's measures are responsible for the corporate's long-term developments. A company's management's fiduciary duties of loyalty and care to the company are ruled and protected by a standard of review called the Business Judgement Rules (BJR). BJR was first set in the milestone case

[562] Here, for comparison, the situation can refer to the personal interest standard set by *Dirks v. SEC*, 463 U.S. 646, 103 S. Ct. 3255 (1983) in insider tipping scenario. "A duty to disclose arises from the relationship between parties, and not merely from one's ability to acquire information because of his position in the market". 463 U. S. 655-659. "There must also be "manipulation or deception" to bring a breach of fiduciary duty in connection with a securities transaction within the ambit of Rule 10b-5". 463 U. S. 653-654. "A purpose of the securities laws was to eliminate 'use of inside information for personal advantage". 463 U. S. 662-663. And an insider breaches his fiduciary duty only if he "personally will benefit, directly or indirectly, from his disclosure". 463 U. S. 662-663.

[563] See supra note 509.

Grobow v. Perot (1988)[564]. BJR protects directors who "make business decisions, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in corporation's best interest"[565]. In other words, if the directors' business decisions satisfied the BJR, they fulfilled their fiduciary duties to the company. Even if their decisions caused damage to the company, they are still free from responsibilities from the company law's view. Because of the existence of the BJR, there is a reasonable probability to realise the balance between a management's fiduciary duty and its disclosure responsibility. With this balance, there is a certain extent of rationality to exercise discretion in carrying out the disclosure rule of the simultaneous requirement of intentional disclosure.

As mentioned earlier, certain reasonable exceptions to the mandatory disclosure rules that should be made to a general awareness among all parties can promote desirable effects and social cooperation. And such effects and social cooperation are essential to fulfil fairness for the parties in the original position. These suggestions include that if the company can quickly eliminate major adverse effects in the short term, or if the company has a full response to deal with these effects, then under the protection of BJR, the management will have more space to exercise discretion. In such cases, the information possessors who bear fiduciary duties to the company shall ensure that such disclosure does not harm the company's best interest when determining to disclose material information and meets the compliance requirements. However, in the absence of mandatory disclosure exceptions, in order to avoid the liability for non-compliance, management may turn out to produce redundant disclosure. These redundant disclosures not only cause the side effects of information overload as described in the last section but also harm the company's long-term development. This is a breach of fiduciary duty. Suppose the present defective mandatory disclosure rules allow the exception of omitted disclosure in the case where issuers can prove that major adverse effects can be quickly eliminated in the short term or the company has a full response to these effects, the management can better exercise its discretion without fearing violations of its fiduciary duties. In this case, the information possessors' approach to balancing fiduciary duty and discretion in making disclosure decisions will be more effective. Such an approach will not undermine fairness, for parties in the original position of fairness may reasonably and equally expect such exceptions to be adjusted as part of the social cooperation. In this sense, issuing

[564] *Grobow v. Perot*, 539 A.2d 180 (Del. 1988)
[565] Ibid at 187.

explicit exceptions of mandatory disclosure rules can at least indicate a way for further practice in balancing fiduciary duty and disclosure responsibilities.

The point behind the SEC's prohibition of selective disclosure is to resolve information asymmetry. The reason is that such asymmetry will impair the fairness of the original position. But the asymmetry cannot be accounted for on the surface. In the field of securities markets, the common pursuit of companies and investors is to be profitable. In addition to the veil of ignorance, the fairness of the original position also requires the rationality of the contracting parties. As discussed in subsection 3.2.2 A c in Chapter Three, Rawls's exception of rationality is that he presumes that a rational person does not suffer from envy. This assumption is consistent with the disinterest feature of the parties in the original position. Parties shielded behind the veil of ignorance are motivated merely by their own interests and have no particular interest in hurting others. The parties in the original position are rational. These rational parties are self-interest. From the perspective of the markets, this self-interest rationality includes profit pursuit. If the cash flow is not replenished within a limited period of time, losing investment benefits is then reasonably expected. Such benefits can be in the long run. Parties in the original position only have demands to suppress unfairness when their interests are unequally shared. Behind the veil of ignorance, if everyone knows that a certain course of action will lead to the loss of everyone and that the loss will be long-term and irreparable, then the rational person will care only for the loss of his own interests because he is not envious. No matter where he will be situated after the veil of ignorance is lifted, he cannot alter the choices made from the original position. Thus, driven by his rationality, wherever his situation will be after the unveiling, parties in the original position always care only that his own interest is not damaged. And preferably to be benefitted. The exceptions assumed here are for mandatory disclosure rules. Hence, the task for exceptions is to ensure that everyone does not lose their investment from the company's bankruptcy.

One thing that must be made clear is that these suggested exceptions to the mandatory disclosure rules, or more precisely, the proposed compromises between the company's management's duties, are not exceptions to unveil contingencies in the original position. On the very opposite, the compromise between fiduciary duty and disclosure responsibility is to ensure that the original position of fairness can actually be achieved, or at least possibly be achieved. What is disapproved of is superficial information symmetry, which breaks a rational person's long-term interests and neglects the original position's fairness. It is precisely because of consideration of the actual rather than alleged status of the fairness in the original position to the rational parties that the balance between fiduciary duty and the duty of disclosure becomes possible. However, there should be other supporting measures if any generally recognized exceptions of mandatory disclosure are to be carried out. This is to prevent the information possessors from falling back into concealment or fraud under the guise of the long-term interests of the company and shareholders. More importantly, it is to prevent these information possessors from taking personal interests in it. A delicate balance therefore requires more research in the future on the theme of market fairness.

The second point mentioned at the beginning of this section is in terms of exercising discretion in disclosing material information. As far as such usage of discretion is concerned, the present disclosure rules imposed different burdens on the compliance-costs affordabilities of the large and small companies. The differences in affordability of compliance costs among large and small firms are one of the contingencies that contribute to unfairness in the original position. It should also be pointed out here that when legislators consider any exceptions to the mandatory disclosure rules, this contingency should be shielded with a veil of ignorance. The best approach to cover contingencies is not to block all exceptions, for reasons explained in the above paragraphs. A wise approach, is to comprehensively consider different companies' different affordabilities of compliance costs. And to allocate different needs in stages and tiers. In this approach, in the original position of fairness, no matter what situations the parties find themselves in after the veil is lifted, there is always a corresponding solution. The configuration, after comprehensive consideration, should be more detailed in evaluating the information quality to be disclosed to avoid rating problems mentioned in section 5.1.

5.4 Conclusion and implications for future research

This chapter presents a fairness analysis of the current legal system governing disclosure in the US securities markets, building on the theoretical and historical foundations established in earlier chapters. Specifically, it examines current disclosure practices through the lens of an ideal framework proposed in Chapter Three, which is guided by Rawls's theory in shaping fair disclosure rules. This chapter evaluates the effectiveness of existing disclosure practices in promoting fairness. Through a detailed analysis of existing laws and regulations from this fresh and concrete perspective, this chapter expands the preliminary discussion in Chapter Three by further addressing the challenges and risks related to disclosure regulation.

Reviewing Rawls's theoretical framework on fairness from Chapter Three, it introduced the four conditions to establish a fair original position. To start with, it raised a veil of ignorance. It requires parties to shield their contingencies behind the veil. They cannot use their contingencies to contribute an advantaged bargain. To reflect in law-making, the legislators cannot take a side to benefit one party over the other. Consequently, the rules made behind the veil should be fair to both the better-off and the worse-off parties. There are also several formal constraints on the conception of rights. This is to guarantee the generality, universality and publicity of the rules made behind the veil of ignorance. Furthermore, when competing claims occur, these claims have to be ordered to avoid a threat advantage.

Parties in the original position are presumed as people with rationality. They do not suffer from envy, as they know that blocking others from their entitled interests would ultimately result in losing their own. The circumstances of the original position involve a moderate scarcity of material resources within a society – resources are neither overly scarce nor excessively abundant. When these conditions are met, parties enter a fair original position from which they can select principles of justice. In this process, they must remain mindful that their decisions carry a weight of finality. Although access to the original position is theoretically possible at any time, once parties engage with it, their decisions are binding and cannot be revisited. This finality is crucial to prevent parties, upon lifting their veil of ignorance; from leveraging their newfound awareness of contingencies to alter the agreed-upon rules. Thus, principles chosen within this framework, backed by the strength of finality, are immutable. In this carefully constructed original position, the selection of principles is not only a matter of fairness, but also serves as a safeguard against retrospective bias. This ensures that all parties are equally positioned when determining the foundational rules of justice, aligning with the overarching goal of securing social cooperation.

The two principles of justice as fairness entail both the requirement of equality and the arrangement of social inequalities to benefit everyone, especially when these inequalities are tied to positions open to all under conditions of fair competition. These principles are further elucidated by incorporating the difference principle and the principle of redress, which address how societal structures should manage disparities to improve the well-being of the least advantaged. Here, it emphasises that while absolute equality may be impractical, a just system must still correct for disadvantages caused by arbitrary contingencies. In the context of securities regulation, as examined in the preceding historical chapters, these principles translate into a framework where law-making should operate under a metaphorical veil of ignorance. This ensures that regulators and lawmakers do not favour specific market participants over others, thereby upholding both procedural and substantive fairness. For this research, this theoretical underpinning highlights the critical role of disclosure regulations. By adhering to a Rawls's approach, lawmakers are urged to develop disclosure rules that do not disproportionately burden smaller entities or less-informed individual investors. The goal is to create a level playing field where comprehension to material information is equitable, thus fostering an environment where market integrity and investor confidence can thrive.

This chapter applies such a set of normative fairness standards in the analysis and review of the current disclosure regulations in the securities markets from several aspects. It examined the market participant's contingency of acquiring information advantages. Rule 17 CFR§243.100 of Reg FD and § 23 (a) of the Exchange Act helped eliminate analyses' edges from selective disclosure. But the present rules did not consider the monopoly of the new rating agencies. As it turns out, institutional investors can still benefit from the paid analysis, only in an alternative indirect approach. The contingency of information advantages' acquisition was not shielded behind a veil of ignorance when the SEC made its disclosure rules. And thus, a fair original position cannot be claimed.

Combining the previously mentioned set of rules with CFR§243.101 and 10b-5 of the Exchange Act, it then analysed the effect of another contingency of the usage of the disclosed information. The discussion of the different affordabilities of compliance costs, between institutional and individual investors, shows that the current disclosure legal regime instrumentalised the professionals' work on extracting investment values from the disclosed information. Such instrumentalization created bars for individual investors in using the disclosed information. Such contingency was neglected in the rulemaking of the SEC. Thus, it added to the unfairness of the original position. Further, from the company's perspective, the unclear rules directing their usage of discretion in determining material information reduced the enthusiasm of the company's discloser to avoid penalties. The judicial interpretation of materiality is inadequate for companies to exercise discretion. There is no general awareness of how to perform and the shortage of such contradicts the formal constraints of the concept of rights, which is essential to the original position's fairness.

Lastly, considering that CFR§243.103 did not alter the Exchange Act's reporting status, this chapter suggested several reasonable exceptions to the mandatory disclosure rules. It emphasised that the SEC should consider de facto, not superficial, information symmetry. There are measures to be taken to improve disclosed information's quality and help balance the information possessor's fiduciary duty and disclosure responsibilities. The rational parties in the original position do not care about hurting or benefiting others. Rather, they are indifferent to others' interests. According to the rationality requirement of the original position and the second principle of justice as fairness, the promotion of market integrity and fairness is to ensure everyone's interest is not lost. Current rules, therefore, cannot satisfy this and further research needs to consider fairness comprehensively to provide solutions to the present problems.

In conclusion, this chapter has highlighted the complexities and persistent challenges inherent in the current disclosure regime within the U.S. securities markets. Despite the intended objective of reducing information asymmetry by addressing certain market participants' contingencies, the practical implementation has revealed significant gaps. While the SEC's efforts, particularly through initiatives like the Reg FD, have made strides towards promoting fairness, there remains a tension between the principles of efficiency and market fairness. The existing legal framework has, at times, inadvertently favoured institutional players, thereby reinforcing disparities rather than eliminating them. This outcome underscores the need for a more nuanced approach to structuring disclosure regulations that genuinely reflect the principles of a fair original position, as outlined in Rawls's theory. This chapter's analysis reveals that the SEC must be cautious in its regulatory interventions to avoid recklessly privileging well-resourced entities. Instead, a balanced approach is required - one that maintains market integrity and fairness without stifling the market's vitality. By prioritizing the equitable distribution of information, regulators can work towards a securities market that upholds both the efficiency needed for economic growth and the fairness necessary for inclusive participation. Building on the theoretical frameworks established in earlier chapters, particularly the necessary constraints and principles essential in facilitating market fairness and integrity constructed in Chapter Three, and the historical evolution of disclosure laws examined in Chapter Four, this chapter's findings emphasize the importance of aligning disclosure regulations with the foundational ideals of social justice. The practical examples and legislative assessments outlined here point to the need for future reforms aimed at optimizing the disclosure regime to address both entrenched and emerging issues in market dynamics.

The findings of this chapter open avenues for further research into ways of making fairness more explicit and operable within the existing disclosure framework. Future studies should focus on developing regulatory approaches that align with Rawls's principles, particularly the difference principle and the protection of the least advantaged, without displacing other regulatory objectives such as efficiency or market integrity. With the growth of technological platforms such as social media and blockchain, there is increasing potential to enhance information accessibility and transparency. Research should examine how these technologies can help narrow the information gap between institutional and retail investors. It should also evaluate whether current materiality thresholds remain appropriate in an era of rapid digitalisation. The next chapter will explore the practical implications of these findings, through corporate control and insider trading, identifying targeted reforms that could strengthen fairness and support other regulatory goals.

Chapter Six
Findings and Analysis – Rethink Disclosure and Fairness: An Extended Discussion Integrating Moral and Practical Perspectives

In the previous chapters, I examined the theoretical foundations of regulatory boundaries and market fairness, while also exploring the historical development of the disclosure legal regime in the United States. The current chapter integrates those theoretical and historical insights to evaluate how optimising disclosure regulations can address persistent challenges in specific practical areas. This analysis seeks to extend the understanding of how the principles and frameworks explored in the previous chapters, can be applied to improve the current regulatory landscape. By focusing on practical implications, it bridges the gap between theoretical constructs and real-world applications, thereby offering fresh insights into enhancing regulatory effectiveness. Building on the findings from Chapters Three, Four and Five, this chapter focuses on the specific field of insider trading, which is closely related to the exploration of the development of disclosure regulations and the legislative purpose behind. Additionally, the chapter discusses the relationship between disclosure and market equity, as well as its reflection on directions of legislative optimization. It examines existing legal frameworks and investigates alternative explanations of fairness, that are less systematic than those suggested by Rawls in the previous chapters of this work but remain relevant and influential. Ultimately, by incorporating these practical thoughts and applications, this chapter improves the analysis of how various purposes and tendencies in disclosure lawmaking influence different perceptions of fairness in securities markets, thereby contributing to the central research question of this study.

6.1 Fairness and Morality in the Securities Markets in the Context of Insider Trading

In Chapters Three and Five, I explore the essence of interpreting disclosure from the perspective of market fairness. I have shared my view that the market operates according to its own rules and processes. Although these measures do not fully satisfy all demands in terms of realising market fairness, the legislation should refrain from extensive intervention at an early stage, particularly in the absence of substantive evidence supporting such actions. The same train of thought was previously adopted by Judge Friendly in the seventies regarding the SEC's increasing regulatory activity: "An attempt at specification would be taken by the investment community to mean that anything else went. It would be a sad reflection on the capable draftsmen of the SEC... But I truly think there are many subjects where an agency doesn't know enough at the start to do a useful job in rulemaking and where it is much better to feel its way awhile".[566] Schotland (1967), refuting Manne's (1966) arguments, posed the definitive question: "What's so bad about insider trading?"[567]

After accumulating market experience and understanding regulations for over half a century, Scotland's question remains relevant today. An opinion was expressed that "Manne at nothing less than changing the conventional view of morality in the stock market and reversing some of the key aims and assumptions of our securities laws"[568]. It was further noted that "…when we engage in economic analysis, we do not banish permanently the legal and moral aspects of the problem analysed. It is precisely in order to make sounder legal and moral judgments, and to evaluate their cost, that we bring economic analysis to a problem like an insider trading"[569]. Additionally, it was stated, "Even if we found that unfettered insider trading would bring an economic gain, we might still forego that gain in order to secure a stock market and intercorporate relationships that satisfy such noneconomic goals as fairness just rewards and integrity"[570]. The consideration of fairness, if not overriding, at least appears to be one relatively paramount concern to the SEC. "The Exchange Act calls for "fair dealing" in no fewer than six sections, several of them directly relevant to our problem, and twice it calls for a "fair and orderly market". Also, "protection of investors" is one of the two dominant goals of the act, receiving the same prominence as the boilerplate, "in the public interest", and with a repetition that rises to the level of a legislative litany".[571] It appears that with appropriate regulations, fairness can finally achieve a balance between moral and legal requirements. However, in the SEC's announcement regarding the final rules on selective disclosure and insider trading, the authority acknowledged that "it is, of course, difficult to quantify precisely the amount of selective disclosure – just as it is difficult to quantify

[566] R Garrett, 'Conference on Codification of the Federal Securities Laws' (1967) 22(3) Business Lawyer 793-793.
[567] Roy A. Schotland, 'Unsafe at any Price: A Reply to Manne, Insider Trading and the Stock Market' (1967) 53(7) Virginia Law Review 1425-1478 at 1425. See also Henry G. Manne, *Insider Trading and the Stock Market* (Free Press 1966) 110; See also Henry G. Manne, 'Defense of Insider Trading' (1966) 44(6) Harvard Business Review 113-122.
[568] Supra note 567 Schotland at 1425.
[569] Ibid.
[570] Supra note 567 Schotland at 1438-1439.
[571] Supra note 567 Schotland at 1438.

precisely the amount of ordinary insider trading".[572] Furthermore, the reference to "fairness" was so ambiguous that it could be interpreted either as a principle-led uncertainty or, more accurately, as a complete lack of definitive approaches.[573]

While Chapter Three examines the principles for constructing fair rules of disclosure within a normative framework, and Chapter Five applies this proposed structure to specific examinations within vertical markets, it is imperative to delve deeper into the ambiguity surrounding the understanding and usage of fairness in practice. In light of the characteristics of the market and the intersection, which at times can be contradictory, of various financial regulatory goals, this section aims to explore a more nuanced understanding of fairness that better aligns with the complex and often fragmented scenarios encountered in practice. The current regulations governing the securities market indeed exhibit a lack of clarity and specificity. In each discourse relating to fairness, debates consistently reveal an inclination among participants to avoid the pursuit of a unified understanding of this concept. Conversely, there exists a tacit acceptance and utilisation of this ambiguity in order to sidestep potential disapproval arising from uncertainty. For instance, the debate between Bebchuk and Jackson and Emmerich et al. focuses on the impact of §13(d) of the Exchange Act on management dynamics and blockholders.[574] Opposing views arise regarding resistance to change versus the need for detailed analysis, balancing benefits of transparency with the advantages of undisclosed accumulations. There is also a contradiction about whether current rules enable stealth accumulation and if that conflicts with the intent of §13(d). While it may seem there is a conflict between fairness and efficiency, a deeper examination reveals fundamental differences in interpreting fairness, particularly in the context of cost-benefit analysis and market efficiency.

[572] The U.S. Securities and Exchange Commission, 'Final Rule: Selective Disclosure and Insider Trading (17 CFR Parts 240, 243, and 249)' (Aug 2000) SEC Rules Announcement File No. S7-31-99. Available at <https://www.sec.gov/rules/final/33-7881.htm>. Accessed May 2023. Further proposed rules on the same topic, SEC, 'Proposed Rule: Rule 10b5-1 and Insider Trading (17 CFR Parts 229, 232, 240 and 249)' (Jan 2022) SEC Rules Announcement File No. S7-20-21. Available at <https://www.sec.gov/rules/proposed/2022/33-11013.pdf>. Accessed May 2023. The further proposal did not address the issue of the difficulty of quantifying the volume of insider trading or selective disclosure.
[573] For instance, the reference to fairness in proposed rule comments (see for example File No. S7-31-99) exemplifies this ambiguity.
[574] Adam O. Emmerich, Theodore N. Mirvis, Eric S. Robinson, and William Savitt, 'Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, And the Use and Abuse of Shareholder Power' (2013) 3 Harvard Business Law Review 135-56.

My argument is supported by extensive engagement with previous literature. Notably, one of the significant critiques of the ambiguous application of the term "fairness" in the context of disclosure obligations comes from Easterbrook (1981).[575] He highlights the problematic nature of using "fairness" as a basis for imposing such obligations. In his critique, Easterbrook addresses the perspective of Justice Blackmun, who argued that insider trading is inherently "unfair" and advocated for a flexible interpretation of securities laws to lead a "movement" towards enhancing fairness in the securities markets.[576] According to Easterbrook, while Justice Blackmun's stance is bolstered by several distinguished commentators who have characterised insider trading as a form of manipulation, one that is "fraught with sufficient possibility of abuse" and inherently "unfair", these assertions often lack a substantive explanation.[577] Easterbrook points out that without a clear definition of what constitutes fairness, it remains unclear how far such fairness principles should extend. He questions whether the term "unfair" applies universally, such as in scenarios beyond the securities markets. For instance, he raises the example of a geologist who, after assessing the geological features of farmland, purchases the land without disclosing the potential presence of valuable mineral deposits. If one were to argue that this action is unfair, it would imply that no individual may derive value from information they have personally acquired or developed. Thus, Easterbrook contends that invoking "fairness" to justify regulatory obligations often sidesteps a thorough analysis of the underlying issues. Instead, it relies on assumptions that are not fully examined. As he succinctly observes, the invocation of fairness seems to resolve the tension between the optimal use of information and its optimal creation by simply assuming a particular outcome rather than critically analysing the underlying principles. It suggests that those who rely on fairness arguments may often lack a clear and specific definition of what the term actually entails within the context of securities regulation.

Moreover, Lee (2002) [578], drawing on Scott (1980)[579], observed that a common criticism of invoking the concept of fairness is that it often lacks principled content. Critics argue that accusations of unfairness in cases of insider trading are frequently made without a clear

[575] Frank H. Easterbrook, 'Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information' (1981) 1981 Supreme Court Review 309-366.
[576] Ibid at 323-24, 327.
[577] Supra note 575 at 324.
[578] Ian B. Lee, 'Fairness and Insider Trading' (2002) 2002(1) Columbia Business Law Review 119-192 at 121-122.
[579] Kenneth E. Scott, 'Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy' (1980) 9(4) Journal of Legal Studies 801-818.

explanation of what constitutes unfairness in this context; one of the challenges being to clarify what fairness in the context of the securities market might specifically require. Lee aims to demonstrate that there are substantive reasons rooted in the principle of fairness, which justify the pursuit of equality of information among market participants. Other objectives, such as the pursuit of economic efficiency, may at times warrant a deviation from the ideal of fairness; however, they do not render the principle of fairness irrelevant. This not only involves how fairness is defined, but also concerns how its implementation can be measured in practice. Against this backdrop, Scott further highlights the ambiguity of the concept of fairness in securities laws. He points out that, in regulating insider trading, the approach often relies on a "fair game" perspective to interpret the application of Rule 10b-5.

> The fair game approach to rule 10b-5, which seems to have some kinship with the layman's attitude that the stock market is just another form of gambling, focuses on the individual parties to a particular trade and asks whether one has an "unfair advantage" over the other in some respect. If pushed far enough, of course, it will always be found that the parties are not on parity in all regards; there will be disparities in knowledge or intelligence or experience or capital or whatever. Among all these advantages and disadvantages, which are "unfair" and why? Judging by the opinions and commentaries, unfairness is one of those qualities that exist in the eye of the beholder and elicit little effort at explanation.[580]

The practical market advantages possessed by certain participants, as noted in the preceding statements, directly correspond to some of my key discussions presented in earlier chapters, particularly Chapters Three and Five. These chapters emphasise the examination and application of Rawls's principles of fairness, underscoring that the elimination of contingencies behind the veil of ignorance in the original position is fundamental to fulfilling the purpose of fairness. By aligning the theoretical framework with real-world regulatory challenges and drawing upon insights from various schools of legal philosophy, this section synthesises deontological obligations to reveal how such challenges undermine the equitable principles envisioned within a just securities market.

[580] Ibid at 805.

In this context, refer to Schmidtz's interpretation of Rawls's assertion that a free society does not operate as a zero-sum game.[581] Here, the normative force driving fairness in the securities markets is not derived from utopian ideals, but rather emerges from a voluntary compromise among participants. This aligns with Lee's observation that "markets contain an internal morality, which both supplies the normative justification for market transactions and suggests that a successful market will be characterised by fairground rules".[582] It is precisely this internal morality that Schotland feared would be disrupted by Manne's proposed alterations to the securities markets' established moral and legal order. However, as argued earlier in Chapter Three, the authority of regulators fundamentally stems from the consent of those governed. It is the free will and bargaining power of all participants that form the bedrock of fairness in securities markets. Without clear and demonstrable evidence of harm, which extends beyond the theoretical arguments presented in regulatory reports or academic literature, it becomes difficult to justify regulatory interventions solely on the basis of assumed benefits for the so-called "public" or weaker investors. The legitimacy of regulatory actions must be grounded in tangible proof of harm, rather than assumptions about protecting vulnerable market participants. In this regard, I have previously argued that regulators' authority is predicated on a consensual delegation of rights. However, when attempting to recover losses or rectify perceived injustices, without concrete evidence quantifying the extent of victimisation and clearly establishing a causal link to the harm suffered by retail investors, such regulatory actions risk becoming overly paternalistic. This can be considered as a conditional addition to my discussion of the theories of Locke and Mill presented in Chapter Four.

To borrow an analogy from criminal law, if we were to apply the rigorous standard of proof required for criminal convictions, one would need to establish harm beyond a reasonable doubt before imposing regulatory penalties. The invocation of vague or speculative damage, even if well-intentioned, cannot substitute for the burden of proof necessary to justify intervention. Thus, while the prevention of knowing or reckless conduct remains a legitimate regulatory aim, the absence of precise evidence to substantiate claims of harm undermines the normative justification for regulatory overreach in the name of market fairness. However, in

[581] David Schmidtz, *Elements of Justice* (Cambridge University Press, 2006) pp 196. "Rawls's most central, most luminously undeniable point is that a free society is not a zero-sum game. It is a mutually advantageous cooperative venture".
[582] Supra note 578 at 142.

the context of securities regulation, this rigorous threshold raises a critical consideration regarding whether current enforcement practices genuinely align with the broader goal of market fairness, or if there is a risk that they may unjustly tilt the scales. Analysing whether the current disclosure regime disproportionately disadvantages smaller investors actually requires examining who genuinely benefits from regulatory measures against insider trading. In the context of securities markets, it is essential to critically evaluate whether the restrictions on the use of material non-public information truly benefit the general public or predominantly serve the interests of large-scale institutional investors. This analysis does not advocate for a return to a laissez-faire approach (or the pre-1933 era described in Section 4.1 of Chapter Four), nor does it suggest that regulators should entirely overlook the potential harm to market confidence caused by insider trading or selective disclosures. Instead, it calls for a nuanced balance. While recognising the validity of the misappropriation theory in the enforcement of insider trading regulations – particularly given its role in curbing securities fraud – there remains a need to consider the broader implications beyond mere market efficiency.[583] The purely efficiency-driven economic analyses, which often prioritise market liquidity and the optimisation of resource allocation, risk sidelining the protection of smaller, less-resourced investors. It is therefore vital that regulatory measures not only address the risks associated with unfair informational advantage, but also uphold principles of fairness, ensuring equitable treatment across all categories of market participants.

Taking all these factors into account, if striving for fairness in a practical and achievable manner rather than in an idealistic way, it is necessary to revisit Easterbrook's description of "the tension between optimal use and optimal creation of information" to understand market fairness, particularly in the context of insider trading.[584] The challenges in this area of practice are complex, especially considering the moral conflicts it contains. One of the common tricks is that the proponents tend to bind all kinds of investors in the same group and use it to fire upon the shorts of insider trading. Comparing the previous literature at the beginning of the new millennium, stronger arguments for restricting insider trading suggest that requiring immediate public disclosure of material non-public information – similar to the

[583] Cox disagreed with the "free-market proponents" represented by Fischel. In answering the incentives to market efficiency, Cox wrote that "(proponents) do not consider market-based forces when they promote insider trading as a necessary incentive for valuable entrepreneurial activity". James D. Cox, 'Insider Trading and Contracting: A Critical Response to the "Chicago School"' (1986) 1986(628) Duke Law Journal 628-659 at 651. See also Daniel R. Fischel, 'Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers' (1978) 57(1) Texas Law Review 1-46.
[584] Supra note 575 at 324.

SEC's final rule on selective disclosure – serves the public interest by reducing insider trading advantages. A prevailing view has shifted to support stricter regulations, moving away from the idea that "insider trading is a victimless crime", which reflects a consensus that increased transparency and limited insider trading are necessary to maintain the integrity of financial markets and ensure fairness for all participants.[585]

In this policy contraction trend, Kim (2014) pointed out that "the impersonal nature of securities markets makes it difficult to demonstrate injury in the traditional sense".[586] The difficulty in identifying victims of insider trading presents a compelling reason for policymakers to intervene and tighten regulations against it. They believe that reducing the opportunities for insider trading will help stabilize the market, ultimately benefiting the majority of participants. However, criticism directed at the Chicago School mainly focuses on questioning the impact of market efficiency, supposedly affected by insider trading, rather than addressing the fluctuations in prices.[587] In this regard, Fischel and Carlton argued that "if insiders trade, the share price will move closer to what it would have been had the information been disclosed. How close will depend on the amount of "noise" surrounding the trade".[588] In their argument against complete disclosure, they stated that:

> Complete disclosure, however, would not be optimal. Disclosure is costly, and at some point, the costs will outweigh the benefits of increased disclosure. Moreover, in some cases, disclosure might destroy the information's value. It would not be in the investors' interest to disclose, for example, that a confidential study revealed the presence of valuable mineral ore deposits on land the firm intends to purchase. ... Thus, insider trading gives firms a tool either to increase or to decrease the amount of information that is contained in share prices.[589]

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[585] See for example, supra note 578 at 159-167. See also Amelia Thomson-DeVeaux, 'What's So Wrong with Insider Trading Anyway?' (Oct 2016) Five Thirty Eight 1-4. Available at <http://faculty.haas.berkeley.edu/ross_levine/Other/What%E2%80%99s%20So%20Wrong%20With%20Insider%20Trading%20Anyway_FiveThirtyEight_5OCT2016.pdf>. Accessed May 2023. See also Bruce W. Klaw and Don Mayer, 'Ethics, Markets, and the Legalization of Insider Trading' (2019) 168 Journal of Business Ethics 55–70.
[586] Sung Hui Kim, 'Insider Trading as Private Corruption' (2014) 61(4) UCLA Law Review 928-1009 at 946.
[587] See for example supra note 583 Cox (1986).
[588] Daniel R. Fischel and Dennis W. Carlton, 'The Regulation of Insider Trading' (1982) 35 Stanford Law Review 857-896 at 868.
[589] Ibid at 867-868.

Opponents of the idea that insider trading is victimless have diminished, while the impersonal nature of trading has expanded the regulatory reach to combat these invisible crimes. However, Fischel and Carlton's analysis reinforces the challenges posed by disclosure legal regime – who should see what information.[590] Combining Easterbrook's theory of optimal use and optimal creation with the requirement for immediate disclosure of non-public material information, in addition to the existing challenges surrounding the definition of materiality as discussed in previous chapters, will primarily benefit those who are positioned for strategic financial gain. This approach may not serve the interests of the majority of individual, smaller-scale or retail investors.[591] Big brokers, large institutional investors, and other market participants who stand to gain from insider information, have strategically leveraged the morality complexities surrounding companies' concealing or delaying the release of information. By exploiting these moral ambiguities, they are able to maintain information asymmetry to their advantage, thereby reinforcing their privileged position within the market so that they could pressure policymakers for shorter windows and more fully disclosure. However, they, along with their law firms, rarely acknowledge the speed or effectiveness of responses available to less privileged investors.

In reality, the concept of market fairness is often used to justify the authority of policymakers or to legitimize interventions directed at specific participants. However, the inherent relativity of fairness limits how effectively this concept can be applied in practice.[592] This raises the importance of understanding whose interests are actually served by invoking fairness and at what cost. The solution often hinges on which participants' rights are prioritised within the regulatory framework. From this perspective, McGee provides a counterpoint to Levmore's

[590] Ibid.
[591] Fischel and Carlton also addressed a similar question, only their perspective was focused on the participants whose roles were next to the "insider" group but tied closely with the "insider" information, rather than the individual investors as I argue in this work. "... The more general question of why the uninformed ever trade in individual stocks, (is) a question to which theory provides no convincing answer. Suffice it to say that no obvious logic indicates that insider trading has any substantial effect on liquidity. If insiders could not trade, the gains to noninsiders from discovering nonpublic information would be higher and investors would have an incentive to expend resources to uncover such information. In fact, the only effect a ban on insider trading might have is that those with better access to information, such as brokers, would reap some of the gains from inside information. While this may be inefficient because brokers can become informed only at a higher cost, the informed-uninformed trader problem remains. Smart brokers, in other words, cause the same problem as smart insiders. Uninformed traders who know they are uninformed should not trade in either situation. That trade occurs suggests that traders either do not believe they are uninformed or realize that enough informed trading occurs for the prevailing prices to reflect most material information". Supra note 588 at 880.
[592] See for example, "Perhaps the main problem with any fairness argument is the inability to define fairness. What is fair to one person may be seen as unfair to another". Robert W. McGee, 'Analysing Insider Trading from the Perspectives of Utilitarian Ethics and Rights Theory' (2009) 91 Journal of Business Ethics 65–82 at 74.

assertion that fairness is achieved when insiders and outsiders are on equal footing - specifically, that a system can be considered fair if no group would envy the position of another. [593] McGee argues that such an approach overlooks the rights of information creators and believes that maintaining market incentives and recognising natural inequalities are prerequisites for protecting individual rights. It is the embodiment of respect for property rights, and it can cultivate a competitive and efficient market environment.[594] However, this approach to addressing fairness cannot be applied to the wider group of "outsiders." If we accept Strudler and Orts's argument that – "what makes an act morally justifiable is the respect it expresses for the autonomy, rights, and dignity of those persons affected by it, and not merely the social welfare or the utility that the act produces"[595]– then the law regulating insider trading should prioritize the respect towards the vulnerability of the retail and other small-scale investors.

Investors who are already disadvantaged in the competitive landscape - due to their limited awareness of which information to seek and their constrained ability to interpret the data that is disclosed - should not be treated identically to those with privileged proximity to inside information. If moral principles are to underpin the justification for disclosure regulations, it is essential to acknowledge that these less advantaged investors require additional protections. Treating them on par with larger, more informed market participants who are significantly closer to inside information would only perpetuate existing inequalities, thereby undermining the principles of fairness and transparency that such regulations aim to uphold. This finding is consistent with the detailed examination of Rawls's difference principle and the principle of redress presented in Chapter Three of this research. This further corroborates the efficacy and accuracy of the theoretical foundation of this study in identifying and addressing practical issues within the relevant field.

6.2 Asymmetric Information and Reflections on the Parity of Information

[593] Saul Levmore, 'Securities and Secrets: Insider Trading and the Law of Contracts." (1982) Virginia Law Review 117-160 at 122.
[594] Supra note 592.
[595] Alan Strudler and Eric W. Orts, 'Moral Principle in the Law of Insider Trading' (1999) 78(2) Texas Law Review 375-438 at 381.

Building upon the previous discussion regarding the differing positions of insiders and outsiders, one of the prevailing theories underpinning the legitimacy of insider trading regulation asserts that unequal access to information, which is essentially information asymmetry, undermines the integrity of securities markets. This theory is often framed within the classic categorisation that distinguishes between "insiders" and the broader group of "outsiders". Advocates for maintaining market integrity argue that it is essential to prohibit situations in which privileged individuals gain access to non-public information, such as through a newspaper column, that has the potential to significantly influence market movements.[596] To a certain extent, it reached a significant drawback of asymmetric information. Nevertheless, the traditional categorization methods do not fully meet the moral requirements of all "outsiders". When it comes to market integrity, combining different groups of investors presents challenges in defining the legitimacy of regulations. Park (2018) argued that "insider trading regulation is best understood in the context of public company disclosure regulation. As disclosure requirements have expanded and become more demanding, insider trading has become increasingly inconsistent with efforts to provide access to the most reliable information for all investors. ... Insider trading undermines the basic purpose of such disclosure, to provide investors with equal access to the most important company developments"[597]. In assessing the permissibility of selective disclosures, he concludes that "selective disclosure of information that allows prediction of short-term results is most likely to undermine the integrity of mandatory disclosure. Rather than police all trading that affects market integrity and property rights, insider trading regulation should focus on ensuring equal access to the information an issuer files to satisfy disclosure mandates"[598].

[596] James J. Park, 'Insider Trading and the Integrity of Mandatory Disclosure' (2018) Wisconsin Law Review 1133-1191 at 1185. In this article, Park examined two crucial theories that supported insider trading regulations – the market integrity and the misappropriation theory – under the background of the disclosure regime in the current American securities markets, trying to establish the inefficiency and inadequacy of the periodical disclosure system. Here, this work underlines flaws in the current disclosure regime and how they impact information optimization. It aims to enhance fairness and address both practical and theoretical inequities. Therefore, it will specifically focus on market integrity instead of misappropriation or property rights theories.
[597] Ibid at 1191.
[598] Ibid. In terms of selective disclosure, compared with insider trading, SEC's tolerability was considerably more extensive in terms of the liability obliged. "Nevertheless, to provide even greater protection against the possibility of inappropriate liability, and to guard further against the likelihood of any chilling effect resulting from the regulation, we have modified Regulation FD in several respects". "… we have narrowed the scope of the regulation so that it does not apply to all communications with persons outside the issuer". "… we have narrowed the types of issuer personnel covered by the regulation to senior officials and those persons who regularly communicate with securities market professionals or with security holders". "… to remove any doubt that private liability will not result from a Regulation FD violation, we have revised Regulation FD to make absolutely clear that it does not establish a duty for purposes of Rule 10b-5 under the Securities Exchange Act of 1934 ("Exchange Act")". "… we have made clear that where the regulation speaks of "knowing or reckless"

With respect to the potential abuses stemming from excessive information disclosure, the ambiguity inherent in principle-directed disclosure rules has increased the burdens faced by businesses, as it introduces uncertainty concerning compliance costs and obscures the comprehension and identification of the materiality of information (addressed previously in this research). This lack of clarity further undermines investors' decision-making processes. It is crucial to recognise that the mandatory disclosure regime alone is insufficient to address such abuses effectively. Additionally, it is also helpful to note the distinctive understanding of market integrity and regulation integrity of the securities markets. Market integrity theory dates back to *SEC v. Tex. Gulf Sulphur Co.* (1968), where the sabotage of market integrity was interpreted as "based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges has relatively equal access to material information"[599]. The regulations governing insider trading should be considered in the context of this understanding. Even so, the interpretation cannot define the legitimacy of all-inclusive mandates. Proponents of both market integrity and mandatory disclosure argue that these concepts share a common foundation, specifically the principle of legislative egalitarian or parity of information.

Advocates of market integrity (differ from Easterbrook's argument regarding the optimal use and creation of information) support prohibiting unequal access to non-public information to uphold fairness. However, critics, as exemplified in the case of *United States v. Chiarella* (1978)[600], have consistently rejected the notion of "parity of information" unless a fiduciary duty or a relationship of trust and confidence exists. They argue that requiring all market participants to possess the same information could undermine the efficient functioning of the market, thereby decreasing investor confidence.[601] These critics, however, seldom address the distinctions between those with privileged, yet indirect access (closer outsiders) and those without any such access (remote outsiders) in their claims that such information disparities

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conduct, liability will arise only when an issuer's personnel knows or is reckless in not knowing that the information selectively disclosed is both material and nonpublic". … "With these changes, we believe Regulation FD strikes an appropriate balance. It establishes a clear rule prohibiting unfair selective disclosure and encourages broad public disclosure. Yet it should not impede ordinary-course business communications or expose issuers to liability for non-intentional selective disclosure unless the issuer fails to make public disclosure after it learns of it". Supra note 572 File No. S7-31-99 6-7. About *Dirks* test's application, see also Michael Guttentag, 'Selective Disclosure and Insider Trading' (2017) 2(69) Florida Law Review 519-570.

[599] *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968).

[600] *United States v. Chiarella*, 588 F.2d 1358, 1365 (2d Cir. 1978).

[601] See also Louis Loss, *Fundamentals of Securities Regulation* (Aspen Publishers Online 1988) 978.

ultimately enhance market confidence. While there is now widespread recognition that information asymmetry poses challenges to market integrity by limiting the trust investors place in the system, the principle of achieving full information parity – outside the context of fiduciary obligations – remains fraught with practical difficulties.

To understand the issue under debate, it is essential to examine the theoretical foundations of the parity of information. This doctrine is primarily based on fairness. "Each of these theories is a function of the policy objectives it aims to achieve. The parity of information theory is a fairness-based doctrine centred on the idea that trading on informational advantages shall undermine investor confidence and the integrity of capital markets".[602] Regardless of the rewards of the "creation of information" and merely to discuss the theory from a market fairness perspective, Fischel's judgement that "(the proponents of insider trading laws) rather, (will put) the focus ... on considerations of fairness, particularly the perceived unfairness of one group of investors having access to valuable information in advance of others. ... however, this is a very strange notion of fairness"[603] is a complex concept, as it remains relevant in today's context, but should be approached from a very different perspective.[604] To bridge the gap between the theoretical underpinnings of fairness in information parity and the practical implications of disclosure demands, it becomes crucial to assess how these doctrines translate into regulatory strategies. While the theory advocates for levelling the playing field,

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602 Ana Taleska, 'European Insider Trading Theory Revisited: The Limits of the Parity-of-Information Theory and the Application of the Property Rights in Information Theory to Activist Investment Strategies' (2020) 17(5) European Company and Financial Law Review 558-600. at 560.

603 Daniel R. Fischel, 'Insider Trading and Investment Analysts: An Economic Analysis of Dirks v. Securities and Exchange Commission' (1984) 13 Hofstra Law Review 127-146 at 145-146. His argument primarily focused on investment analysts. "At least in the context of investment analysts, however, this is a very strange notion of fairness. We can view the hiring of an analyst as the purchase of superior product information. Other market participants may decline to purchase superior information and simply accept the market price as given. They earn lower returns, but they also save the costs of becoming informed. Neither group of participants is better off than the other". Ibid. See also Daniel R. Fischel, 'Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities' (1982) 38(1) Business Lawyer 1-20. Here, as stated in the previous section, this chapter recognizes that analysts, brokers, and other "outsiders" with closer access to inside information can benefit from insider trading laws, but their interests do not align with those of other market participants, leading to differing views on fairness. However, the reasons for perceived unfairness are similar across groups, which is why this work references Fischel's analyses.

604 "A more intuitively compelling theory of fairness would treat … classes of investors differently rather than allowing those who are free riders to obtain the same benefit from the information as those who pay for it". Supra note 603 Fischel (1984) at 146. Retail investors, often unable or unwilling to seek non-public material information, are sometimes labeled as "free riders." As Chapter Four of this thesis shows, while markets follow their own rules, regulations are essential for fairness. To achieve this, we should limit regulations rather than adhere to arbitrary standards. Access to information is a means to empower investors to make informed choices. If the pursuit of fairness is genuine, financial incentives should not dominate decision-making processes, as doing so risks fostering conditions conducive to bribery and breaches of fiduciary duty, raising concerns about repeating the mistakes of the Great Depression.

the mechanisms used to achieve this often create unintended consequences, especially when disclosure obligations become excessively stringent.

That is to say, in addressing the issue of information asymmetry, the prevailing approach often leans towards an extensive and relentless demand for ever-increasing disclosures. However, such an overzealous strategy risks undermining the foundational principles of materiality, flexibility, and efficiency that underpin the disclosure regime within securities markets. These excessive disclosure requirements not only impose significant compliance burdens, but also dilute the relevance of disclosed information, thereby hindering the effective operation of the regulatory framework designed to protect market integrity and fairness. Meanwhile, "investors will have to pay more to obtain the same information. Alternatively, they may engage in wasteful searches themselves, to distinguish between high and low-quality firms. These are real cash outflows that will decrease the net return on investment"[605]. The short-term and long-term costs and paybacks of information access differ between retail and institutional investors.

When addressing the challenges of information asymmetry, it is essential to consider the real-world effects on all retail and institutional investors. Imposing excessive disclosure requirements can lead to higher compliance costs and lower investment returns, particularly for smaller investors who may lack the resources to navigate an overwhelming amount of information. This situation reveals a deeper issue: if not structured thoughtfully, transparency can worsen existing inequalities. Therefore, in addition to the sheer volume of disclosures, it is crucial to examine the conception of transparency, which in the context of financial markets, if not properly defined, may inadvertently benefit those with proximity to insider information rather than the broader public. Without clear distinctions regarding who should have access to what information, transparency can become a tool that primarily benefits those who are already in relatively privileged positions. Critics of the concept of information parity argue that it is crucial to differentiate between two distinct approaches: a rule of parity of information, which would prohibit any transactions between parties who possess unequal levels of information, and a rule of equality of access, which focuses on prohibiting transactions where one party holds information that the other cannot reasonably acquire, even

[605] Supra note 603 Fischel (1984) at 145.

with significant effort.[606] The failure to draw these distinctions may result in regulatory measures that fall short of achieving genuine market fairness.

To navigate this complex landscape, it is essential to recognise that achieving information parity is not an absolute solution but rather a subtle objective that requires balancing various interests. Although, in its most extreme form, a strict parity of information regime would prohibit anyone from legally trading on insider information without prior public disclosure, such a comprehensive rule has never been seriously considered a viable option in modern law.[607] The ongoing debates among proponents and critics of insider trading regulations highlight two potential outcomes: on one hand, completely removing liability for insider trading would create incentives for insiders and exacerbate information asymmetry; on the other hand, enforcing absolute information parity would essentially treat all material business information as a public resource, potentially stifling market exchanges and liquidity. Policymakers must carefully balance these competing concerns, keeping in mind that the ultimate aim of reducing information asymmetry is to empower investors to make more informed decisions. The suppression of the "moral suspicion" surrounding trades based on informational advantages is intended not only to promote fairness but also to enhance commercial efficiency.[608] Thus, the design of the disclosure regime should focus on achieving substantive outcomes rather than merely fulfilling regulatory checklists. Fairness, likewise, should be seen as an actionable goal rather than merely an abstract principle.

6.3 Conclusion and the Limitations of Implementations

The previous sections of this chapter explored the prevailing debates in the field of insider trading and selective disclosures, particularly from a moral perspective focused on fairness. These discussions also highlighted the increasing academic and practical emphasis on information asymmetries, along with the proposed regulatory solutions and the inherent shortcomings of such proposals. It became evident that defining the concept of fairness

[606] Kimberly D. Krawiec, 'Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age' (2001) 95(2) Northwestern University Law Review 443-503 at note 102.
[607] Ibid at 466. See also "a rule of law invalidating all trades based on asymmetrical information would have substantial effects on incentives to produce valuable information". Gary Lawson, 'The Ethics of Insider Trading' (1988) 11 Harvard Journal of Law & Public Policy 727-783 at 737.
[608] Supra note 607 Lawson.

within the context of securities market regulations remains challenging, as it resists precise and universally accepted definitions. Any attempt to delineate a feasible and practical understanding of fairness must strive to align with its fundamental principles while also accommodating the diverse perspectives of different market participants. For this reason, the alternative normative construction of market fairness proposed in Chapter Three, analysed and applied in Chapter Five, and integrated with other discussions in the present chapter is both timely and necessary. In examining those practical debates that are in a piece-meal fashion, it is clear that disclosure requirements play a crucial role; ensuring that these obligations align with market fairness is an inherently difficult endeavour. Even when setting aside the idealistic pursuit of an absolute standard of fairness, determining the extent of disclosure obligations remains closely tied to the regulatory landscape. The SEC's regulatory approach, particularly its perception of the severity and potential consequences of information asymmetry, significantly influences the industry's direction. The degree to which the SEC acknowledges and addresses these issues directly shapes the scope and orientation of disclosure regulations, thereby impacting the overall pursuit of market fairness.

Due to space limitations and the need to maintain the consistency and integrity of the entire thesis, some important and influential insider trading theories are either not referenced in this chapter or are mentioned only briefly without further elaboration. For instance, the *United States v. O'Hagan* (1997) and the misappropriation theory[609]; the property rights theory in insider trading[610]; compensation and recourse allocation train of thoughts in restricting insider trading[611]; and the arguments of whether it is genuinely a "victimless crime", etc. Given the existing limitations, it remains challenging to formulate a perfect solution that fully addresses all concerns related to the disclosure-based regulation of insider trading. Nevertheless, valuable insights can be gained from previous developments.

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609 *United States v. O'Hagan*, 521 U.S. 642 (1997)

610 See for example Richard J. Morgan, 'Insider Trading and the Infringements of Property Rights' (1987) 48 Ohio State Law Journal 79-116; Anthony T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7(1) Journal of Legal Studies 1-34; Johnatan R. Macey, 'From Fairness to Contract: The New Direction of the Rules Against Insider Trading", (1984) 13(1) Hofstra Law Review 9-56; Roberta S. Karmel, 'Outside Trading on Confidential Information: A Breach in Search of a Duty' (1998) 20 Cardozo Law Review 83-133. See also Zohar Goshen and Gideon Parchomovsky, 'On Insider Trading, Markets, and "Negative" Property Rights in Information' (2001) 87(7) Virginial Law Review 1229-1277.

611 See for example supra note 588 Fischel and Carlton at 894–895, "allocate property rights in information to the highest-valuing user". See in general Naveen Khanna, Steve L Slezak and Michael Bradley, 'Insider Trading, Outside Search and Resource Allocation: Why Firms and Society may Disagree on Insider Trading Restrictions' (1994) 7(3) The Review of Financial Studies 575-608; Ian Ayres and Stephen Choi, 'Internalizing Outsider Trading' (2002) 101(2) Michigan Law Review 314-408.

Over the past two decades, two predominant regulatory tendencies have shaped the discourse. Firstly, there is a widely held assumption that increasing the volume of information required through filings such as 10-K, 10-Q, and 8-K reports correlates positively with investor confidence and, essentially, the presumption that more information is inherently better. Considering that practice and legislation influence each other and cannot be entirely overseen by one side, it's crucial to end the misconception and imprudent presumptions. However, this approach has frequently resulted in overwhelming information that can obscure rather than clarify, particularly for retail investors and those with limited analytical capabilities (as detailed analysis provided in the precedent chapter). This issue underscores the growing focus on principle-oriented disclosure frameworks, which have recently been highlighted in discussions within the latest congressional debates, as explored in earlier chapters. However, one of the most significant principles among them, theories and conversations regarding materiality, has not yet been fully developed during this process.

Furthermore, references were made to the inefficiencies and inadequacies of the periodical disclosure system revealed by Park (2018) in the preceding sections, but such arguments were not fully developed.[612] This raises concerns about what is often perceived as a neutral stance but, in reality, may reflect an overreaction by policymakers. The core issue here is that fundamental characteristics of information disclosure in the securities markets, such as adequacy, immediacy, accuracy, and comprehensibility, have not been sufficiently met. Addressing this issue does not necessarily entail overwhelming the system with excessive volumes of information. Instead, from the perspective of relevance, it is essential to ensure that the disclosure of information is aimed primarily at the investing public rather than the authorities. This approach helps to mitigate issues related to analysis costs, as discussed in Chapter Four. Conversely, from the perspective of content delivery, it requires a more refined approach involving the classification of data, targeted extraction, and strategic dissemination. This approach benefits both entities and investors by ensuring that only relevant information is released, aligning with the principles of fairness and optimisation of the existing disclosure legal framework, as previously explored in earlier chapters of this work. While information transparency is crucial in mitigating the risks associated with insider trading, it is equally important to recognise the boundaries necessary to preserve market confidence. Moreover,

[612] Supra note 596.

advancing towards a more equitable market requires a deliberate consideration of the diverse interests and needs of various market participants, ensuring that fairness is not merely theoretically ideal but is able to be effectively realised in practice.

Chapter Seven
Conclusion, Contribution, Limitations and Recommendations

This concluding chapter synthesises the key findings and contributions of the research, addressing the central research question: to what extent is disclosure regulation necessary in order to achieve fair securities markets in the United States? It builds upon the comprehensive and cohesive structure established in Chapter One and developed across the substantive chapters, systematically linking the normative frameworks explored with the practical realities of implementing disclosure regulations. By doing so, this chapter not only revisits the central research question, but also demonstrates how the analysis advances understanding in the field of financial regulation by clarifying the role of fairness as an insufficiently explicit objective within U.S. securities regulation and by situating it more clearly alongside existing goals. Section 7.1 reflects on the structured progression of this research, emphasising how the sub-issues introduced in Chapter One have been cohesively addressed to create a logical and analytical narrative. This section demonstrates how the study bridges the gap between the theoretical aspirations of financial regulation and the practical challenges of policy implementation, offering a significant contribution to the academic discourse. Section 7.2 focuses on the practical implications of this research, presenting actionable policy recommendations for regulators. It demonstrates how these recommendations clarify and operationalise fairness as a clearer and more actionable regulatory purpose within U.S. securities regulation, situating it within the practical realities of contemporary rulemaking. Section 7.3 acknowledges the limitations of the study, offering a candid reflection on its scope and boundaries. It identifies areas where further exploration is required, providing a foundation for future research to build upon the theoretical and practical insights developed here. Finally, Section 7.4 concludes with a reflection on the broader implications of this research, reinforcing its contribution to advancing the understanding of regulatory concerns and its role in promoting fairness in a more expansive economy.

7.1. Advance Understanding in the Research Field Through a Cohesive Structure

The central research question of this thesis has been structured around a series of sub-questions that collectively address the normative foundations, institutional boundaries, and practical implications of disclosure regulation in achieving fairness within U.S. securities markets. At its core, the study seeks to explain why fairness remains insufficiently explicit as a regulatory purpose and to develop a coherent framework through which it can be better articulated and operationalised.

The first step in this inquiry is the establishment of normative standards for legislation grounded in Rawls's theory of justice as fairness. In the regulatory design of securities markets, fairness is formally recognised alongside efficiency and integrity, yet its meaning and evaluative standards remain vague and inconsistently applied, leaving its normative content underdeveloped. This conceptual uncertainty contributes to interpretive ambiguity and uneven application of disclosure rules. By applying Rawls's principles, particularly the original position and difference principles, this study clarifies fairness as a procedural commitment that requires, securing rules of participation, access to information, and interpretive transparency before pursuing efficiency or other objectives. In this sense, fairness is not a competing end but the normative condition that makes other goals credible and reviewable. As discussed in Chapter Six, debates that appear unrelated to fairness often mask divergent understandings of what fairness actually entails. Treating it as an abstract or isolated concept detached from the market's practical realities, leads to confusion and inconsistency. At times, participants in regulatory debates obscure the meaning of fairness to justify opposing claims, rendering discussions about securities legislation ineffective. Even without deliberate distortion, the coexistence of multiple and sometimes conflicting objectives complicates the regulatory landscape. To address these challenges, this study applies Rawls's framework to securities regulation, ensuring that fairness is interpreted and implemented in a systematic, transparent, and reviewable manner that remains attentive to those most disadvantaged once the veil is lifted.

A related line of inquiry concerns the proper limits of regulatory intervention. The study argues that these limits cannot be derived solely from instrumental outcomes but must rest on principled boundaries grounded in legitimate public authority. To this end, the thesis draws on Locke's conception of limited government, Kant's categorical imperative, and Mill's harm principle to define the scope within which public power may legitimately operate. Together, these philosophical perspectives support a framework that restrains excessive intervention while ensuring that regulation remains responsive to genuine market needs. Historical and doctrinal analyses further reinforce this argument. The evolution of disclosure regulation, from the Securities Act to the Exchange Act and Reg FD, shows how legislative responses have repeatedly followed crises, revealing a persistent pattern of reactive law-making. This study uses that history, not simply to critique such reactivity, but to propose a more systematic approach in which the boundaries of public authority are defined in advance and fairness is adopted as an ex ante rule-design criterion, thereby mitigating the very factors that give rise to regulatory lag and legislative overreach.

Advocating for a forward-looking approach to legislation is indeed a bold proposition, as it challenges the conventional understanding held by legal practitioners. The prevailing expectation of the law, both in its operation and its role in society, has traditionally been shaped within a reactive framework. Under this model, legislation is typically introduced in response to societal problems that demand legal intervention or to emerging phenomena that provoke public debate. Even in common law jurisdictions, where case law offers flexibility, the judicial process largely remains confined within this reactive paradigm. This tendency is particularly evident in federal securities law, where courts are often constrained to interpreting statutory provisions, such as those found in the Code of Federal Regulations. However, as shown in the historical review of Chapter Four, the evolution of disclosure regulation reveals a solid foundation for forward-looking legislative practice, suggesting that anticipation, rather than reaction has always been latent within securities regulation.

Building upon this foundation, this study argues that each legislative response to specific market failures embodies, not only explicit statutory aims, but also deeper regulatory logics and value orientations, particularly the normative purposes that reveal how financial regulatory objectives have been weighted and ordered over time. Uncovering these underlying purposes is not straightforward, as the historical events that prompted legislative intervention often arose from a complex interplay of economic, political, and moral considerations. Nevertheless, recognising this complexity, this study contends that nearly a century of legislative and judicial experience in disclosure regulation provides a coherent basis for engaging in forward-looking regulatory reasoning. In light of the evolution of trading mechanisms, the global interconnection of markets, and the wealth of accumulated lessons, there is now greater scope for legislation that anticipates rather than merely reacts to market failures.

To address the risks of regulatory lag revealed in this history, the study proposes a systematic normative framework for regulatory intervention. This framework, informed by market characteristics, regulatory objectives, and historical experience, aims to delineate the legitimate boundaries of public authority. It seeks a balance that neither unduly restricts lawmakers from exercising their mandate, nor allows intervention to exceed the market's actual needs and dynamics. In developing this framework, the study integrates the philosophical insights of Locke, Kant, and Mill; each of whom contributes to defining the upper and lower limits of regulatory power. Locke establishes the legitimacy of government through consent and the protection of property rights; Kant introduces a moral constraint, requiring regulators to treat participants as ends in themselves; and Mill permits intervention only where necessary to prevent harm. These theories jointly form a principled foundation for proportionate and ethically grounded regulation.

The discussion of fairness and regulatory boundaries in this study is therefore mutually reinforcing. Rawls's theory of justice as fairness provides a unifying normative structure that bridges these dimensions, integrating both the contingencies obscured by the veil of ignorance and the corrective commitments embedded in the difference principle and the principle of redress. The combined use of normative, doctrinal, and historical methods allows this research to translate fairness from a theoretical ideal into a practical principle of governance, clarifying its role without exaggerating its scope. Rather than displacing efficiency or other financial regulatory goals, fairness is reframed as the explicit procedural condition that enhances the legitimacy and accountability of other regulatory objectives. Section 7.2 builds on these insights by turning from theoretical foundations to practical implications. It sets out policy recommendations for regulators, showing how fairness can be operationalised within the existing U.S. framework to enhance transparency, consistency, and investor protection in a realistic and proportionate manner.

7.2 Policy Recommendations

The practical contribution of this study lies in demonstrating how fairness can be made explicit and operational within the existing U.S. disclosure regime. The purpose is not to substitute fairness for other objectives, but to render it visible as a procedural principle that strengthens regulatory legitimacy and consistency. Fairness, properly understood, provides a vocabulary through which existing doctrines, particularly materiality, proportionality, and disclosure duties, can be interpreted in a more coherent and equitable way. The following recommendations illustrate how this can be achieved in practice.

The first recommendation concerns the principle of materiality, which has long served as the anchor of U.S. disclosure regulation. This study does not challenge its openness as a defect. Rather, it identifies that the ambiguity surrounding materiality often obscures how fairness should guide its application. Materiality, by design, rests on the notion of what a reasonable investor would consider significant. Yet the absence of clear fairness-oriented guidance has resulted in inconsistent enforcement and disproportionate compliance costs, particularly for smaller issuers. Regulators could address this by issuing interpretive statements that clarify how equitable access to information should shape the assessment of materiality. Such guidance should aim to reduce interpretive disparity without rigidly narrowing the standard, thereby preserving flexibility while improving predictability. Explicitly articulating fairness in this way would transform materiality from a vague evaluative threshold into a structured test of informational justice, aligning disclosure obligations more closely with the principles of transparency and equal participation.

A second recommendation addresses legislative calibration of disclosure duties to prevent conflicts between transparency and fiduciary responsibility. Disclosure rules should not compel actions that undermine the duty of loyalty or compromise proprietary interests, as these tensions generate both inefficiency and perceived unfairness. Current reliance on the BJR as a post hoc corrective mechanism is inadequate for anticipating such conflicts. Instead, fairness should operate ex ante, guiding the drafting of disclosure provisions to ensure that transparency obligations are proportionate to company size, market influence, and risk exposure. This approach does not weaken investor protection. It strengthens it by preventing over-disclosure that obscures key information and burdens participants unequally. A more coherent legislative design would therefore preserve firms' legitimate interests while ensuring that disclosures remain substantively meaningful to investors.

The third recommendation concerns tailored regulation as a reflection of Rawlsian fairness. Fairness, in the Rawlsian sense, requires that the rules of market participation be constructed as if legislators operated behind a veil of ignorance, unaware of which position they might occupy. Applied to securities law, this implies that disclosure obligations should account for disparities in access, capacity, and sophistication. Regulators should therefore differentiate disclosure requirements between retail and institutional investors, ensuring that the information provided is both comprehensible and decision relevant. Similarly, smaller issuers should not bear the same procedural burdens as large public corporations. Tailored regulation, grounded in fairness, allows disclosure to function as a means of equalising informational opportunities without imposing uniform obligations that entrench inequality. Where conflicts of interest are unavoidable, compensatory measures, such as simplified reporting or phased compliance, can provide procedural redress consistent with fairness.

Finally, fairness should also inform regulatory enforcement and oversight. Proportionality must serve as the central enforcement principle, consistent with Locke's vision of limited and legitimate authority. Sanctions should correspond to the gravity of non-compliance rather than operate as deterrence by excess. In parallel, regulators should consider carefully structured self-regulation in low-risk areas, under SEC supervision. Organisations such as FINRA, NYSE, and NASDAQ already complement federal oversight by developing rules and ensuring compliance. Their delegated role could be refined to handle non-material or low-impact disclosures, reducing unnecessary administrative friction and compliance costs. However, the delegation of oversight must remain transparent and accountable, ensuring that self-regulatory bodies do not privilege member interests over public fairness. True disclosure, as this research maintains, should serve the investing public, not merely satisfy the authorities. Through these measures, fairness becomes not an abstract ideal, but an explicit procedural criterion embedded in the interpretation, enforcement, and design of disclosure regulation. Clarifying fairness in this manner enhances the coherence and legitimacy of the existing U.S. framework, equipping it to respond more effectively to contemporary regulatory challenges while remaining faithful to its foundational objectives of transparency and trust.

7.3 Limitations of the Study and Future Research Directions

This study has sought to clarify how fairness can be made explicit and operational within the existing framework of U.S. disclosure regulation. By adopting a set of qualitative approaches, it has reinterpreted key regulatory concepts through the lens of fairness as a procedural principle. This conceptual focus necessarily defines the scope of the research. The parameters examined in this work, while intentionally delimited to preserve analytical depth and theoretical clarity, also suggest fruitful directions for future inquiry.

The focus of this research is confined to the United States securities market, which operates within a unique legal, cultural, and historical regulatory framework. The findings are inherently shaped by this specific context and may not fully account for the dynamics of disclosure regulation in other jurisdictions. For instance, markets governed by the European Union's regulatory frameworks or those in emerging economies face different priorities, challenges, and cultural expectations regarding fairness. The US market's emphasis on materiality and transparency differs, for example, from the EU's growing focus on sustainability through the Environmental, Social, and Governance Reporting (ESG) disclosures or the balancing of capital flow priorities in developing economies. Future research could expand this investigation to a comparative analysis of disclosure regulations across jurisdictions, exploring how fairness is interpreted and operationalised in varied legal and economic environments.

Apart from the geographical and jurisdictional limitations, this study narrows its exploration of practical implications to a few regulatory mechanisms, including Reg FD, Rule 10b-5, and a brief discussion of insider trading laws. These choices, while illustrative, exclude significant areas of regulatory practice that also intersect with fairness. Corporate governance, for example, represents a critical area where disclosure rules influence and are influenced by other principles, such as shareholder rights and fiduciary duties. While this study acknowledges tensions between disclosure rules and other governance objectives - such as the protection of trade secrets and the costs of compliance - it does not delve deeply into these conflicts. Moreover, this study focuses more (especially when applying normative standards into practical fields) on disclosure regulation from the perspective of information recipients, particularly investors, but largely sidesteps the experiences and challenges faced by information providers, such as issuers or corporate executives, who must navigate conflicting demands of transparency and confidentiality. Future research could examine these tensions in greater detail, providing a more holistic understanding of the implications of disclosure regulation for all market participants.

To consider the limitations in practical application, it is also worth noting arguments that remain underdeveloped due to the various constraints mentioned earlier. While this study explores fairness as a guiding principle for disclosure regulation, it primarily addresses fairness from the viewpoints of retail and institutional investors, emphasising the necessity of equal access to the genuine value embedded within disclosed information. However, it merely provides a brief discussion and limited illustrations in identifying the interpretive openness of materiality as a potential channel through which fairness can be operationalised. It does not fully explore how issuers, under this evolving standard, can exercise regulatory discretion responsibly by balancing the flexibility that materiality allows with the risk of other department laws. These practical tensions, particularly concerning smaller companies or those operating in highly competitive industries, represent significant avenues for future research. Additionally, this study touches on Brandeis's theory but does not investigate the political barriers to implementing disclosure requirements that inevitably reach all investors equally. Similarly, while the limitations of Reg FD and Rule 10b-5 are acknowledged, the study does not thoroughly engage with the modern systemic factors, such as the rise of algorithmic trading or globalisation, that complicate their effectiveness in modern markets. These historical and practical challenges merit further investigation, particularly in light of emerging technologies and evolving market dynamics.

In addition to the limitations of practical application, the primary components of this research – the normative approach employed in addressing the central research question – also present areas that can use further exploration to enhance their theoretical depth and breadth. This research draws upon a set of theoretical frameworks, including Rawls's theory of fairness, Locke's principles of limited government, Kant's categorical imperative, and Mill's harm principle. While each theory is indispensably instrumental in building the argument and framing the cohesive structure, functional limitations have restricted the depth of their exploration. For instance, Mill's harm principle is employed to argue that regulatory intervention is permitted only to prevent harm between market participants. However, the present study does not fully explore Feinberg's elaboration on Mill's concept of harm in criminal laws or its application to complex financial interactions, such as the indirect harms caused by market manipulation or inadequate disclosure. Similarly, Locke's emphasis on property rights is referenced in the context of over-disclosure and the protection of participants' interests, but a profounder exploration of his theory - particularly how it reconciles public interest with individual rights in a modern market in the future - could benefit from further research.

Furthermore, Rawls's veil of ignorance and the principle of redress are used to argue for disclosure regulation as a means of achieving fairness in securities markets. While this alignment is persuasive, it is not possible for this study to deeply engage with every challenge of implementing the explored Rawls's standards in a real-world context, such as explicitly applying boundaries of the equal office principle when the veil is lifted (e.g. creating conditions for less sophisticated investors to compete effectively with cross-comparison and collaboration with other departments); or to extend the application of Rawls's principles to other areas of financial regulation, such as corporate governance or ESG disclosure. These theoretical explorations that are grounded in and are closely interconnected with the essence of this research, could be extended in future research to refine their application in securities regulations. It should also be noted that if this study can provide a framework for approach and avenues for exploration in future research within similar fields, then research operating in related domains may fully extend the boundaries of the philosophical theories employed in this study to suit the specific context of those examinations. Research in the same field can then delve deeper into the empirical studies on an optimised disclosure legal regime based on this research's results, particularly in addressing the practical effectiveness of these regimes, such as when conducting comparative studies across broader jurisdictions or in light of technological advancements.

7.4 Final Thoughts

This research underscores the critical role of disclosure regulation in creating fair securities markets in the United States, addressing not only a technical legal issue, but also a broader societal challenge. At its core, the study has sought to coordinate fairness, a fundamental principle of justice, with the practical realities of disclosure regulation, offering both theoretical insights and forward-looking recommendations. By doing so, it demonstrates the irreplaceable role of fairness in fostering trust, stability, and inclusivity within the financial system, which is a fundamental essence of contemporary economic life.

Within the academic landscape, this research contributes to a renewed understanding of fairness as a foundational principle that underpins and gives coherence to other regulatory objectives, offering a theoretical and practical framework for navigating regulatory boundaries. By grounding my arguments in a series of philosophical insights from Rawls, Locke, Kant, and Mill, this study bridges the normative approach with practical insights and historical analysis. It invites future scholars to refine these frameworks further, exploring their application in other jurisdictions, sectors, or emerging financial technologies. The importance of this inquiry transcends academic interest. Fairness in securities markets is not merely a regulatory goal. It is a moral imperative that underpins the integrity of market economies. In a world increasingly characterised by financial complexity and rapid technological innovation, ensuring equal access to information value is essential to safeguard the rights of all market participants. The systemic risks associated with neglecting fairness, such as erosion of investor confidence and market inefficiencies, extend beyond the financial sector. They have a cascading effect on the broader economy and society. In practice, this work provides a foundation for policymakers and regulators to rethink the design of disclosure rules and the lag of legislation.

Looking ahead to the future, this study leaves unanswered questions that call for further exploration. Emerging technologies might reshape disclosure practices and redefine the boundaries of fairness. Disclosure regulations can evolve to address the growing prominence of global markets and cross-border investments. These issues, while beyond the scope of this thesis, represent significant potential for future research and innovation. Ultimately, fairness in securities markets is a dynamic and evolving goal that reflects the broader values in society. By promoting fairness and approaching regulatory boundaries with caution, disclosure regulation will not only strengthen the foundation of securities markets but also uphold the principles that sustain trust and shared prosperity in a globalised world. As this research concludes, it is with the conviction that fairness is not just a regulatory necessity, but a societal obligation, which demands continuous reflection, vigilance, and adaptation in the face of new challenges.

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