

The remedies matrix: a framework for assessing remedies
Securities Act of 1933

What are the highest-level policy goals of the regime?

Policy goals

=> To prohibit deceit, misrepresentations, and securities fraud.

Deterrence: How does the regime seek to deter bad behavior? Options may include direct punishment (fines), redress of harms (compensation), denial of benefits (disgorgement of profits or other benefits), and cost imposition (e.g., a tax or fee).

Direct punishment, such as fines paid to the government:

=> In case of any cease-and-desist proceeding under violation of any provision, or any rule or regulation, the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing, that such person:

(i) is violating or has violated any provision, or any rule or regulation; or (ii) is or was a cause of the violation of any provision, or any rule or regulation thereunder; and

such penalty is in the public interest. The maximum amount of penalty depends on the type of person (natural person or any other person) and the tier. For natural person it can be from \$ 7,500 to \$ 150,000; and for any other person it can be from \$75,000 to \$725,000. More details on Sec 8A.

In addition, it says that in any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the ability of the respondent to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest.

Redress remedies to individuals (which may include restitution or other money damages)

=> In case of material misstatements and omissions, a person who purchases a security in a transaction exempted by the provisions of section 4(6) may bring an action against an issuer that makes an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements not misleading. They must prove that the purchaser did not know of such untruth or omission; and does not sustain the burden of proof that such issuer did not know or could not have known, of such untruth or omission.

Under that action, the person can recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security. (Sec 4A)

=> In case of civil liabilities on account of false registration statement, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may sue. The suit may be to recover such damages as shall represent the difference between the amount paid for the security and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment

In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees. (Sec 11 (e))

=> In case of civil liabilities arising in connection with prospectuses and communications, any person can be sued to recover the consideration paid for the security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(Sec 5 and 12 (a))

=> Except as class action limitations, the rights and remedies shall be in addition to any and all other rights and remedies that may exist at law or in equity. (Sec 16)

=> Finally, there is liability for any person in the offer or sale of any securities or any security-based swap agreement by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. (Sec 17)

Denial of benefits (such as disgorgement of profits or data deletion)

=> In any cease-and-desist proceeding under Sec 8A(a), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest.

Cost imposition (including taxes or fees)

=> none

Does the regime include a mechanism to hold the bad actors' assets at risk?

=> It is not clear.

Does the regime contemplate the problem of over-deterrence?

=> There are ceilings on the amount of penalty in civil actions.

Is there a market for noncompliance?

=> There are penalties that impose fines for willful violations of the provisions of the Securities Act. The fines cannot exceed the \$ 10 000 and a prison term cannot exceed five years, or both.

Are attorney fees available to successful plaintiffs?

=> Yes (Sec 11 (e))

How does the regime seek to compel good behavior (carrots or sticks)?

Preapprovals (permits, licenses)

=> The registration depends on whether the company accomplish with all the requirements.

=> There is authority of a court to prohibit persons from participating in an offering of penny stock, and also authority of a court to prohibit persons from serving as officers and directors

Injunctive relief

=> If awarded by courts (temporary order). Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to Sec 8A, or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceeding. Temporary orders can be review by the Commission or have a Judicial review. More details on Sec 8A.

=> Also, whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or

practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. In these cases, there are money penalties in civil actions. The amount of penalty will depend on the type of tier and if it is a natural person or any other person. More details Sec 20

Safe harbors

=> Yes, the person shall not be liable if the forward-looking statement is identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or immaterial; or the plaintiff fails to prove that the forward-looking statement if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or if made by a business entity, was made by or with the approval of an executive officer of that entity, and made or approved by such officer with actual knowledge by that officer that the statement was false or misleading. More detail in Sec 27A

Role of Gatekeepers and Third Parties

Does the ecosystem for the sector/practice include gatekeepers (e.g., third party service providers) who regulate conduct? How does the regime address third parties who are involved in the underlying unwanted behavior?

=> Controlling persons, who, controls any person liable under section 11 (civil liabilities on account of false registration statement) or 12 (civil liabilities arising in connection with prospectuses and communications), shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

=> There is prosecution of persons who aid and abet violations. For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 20, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this Act, or of any rule or regulation issued under this Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided. Sec 15

Other Issues

How does the regime address the problem of guile?

=>The prosecution of persons who aid and abet violations (persons that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this Act, or of any rule or regulation issued under this Act) is to the same extent as the person to whom such assistance is provided. More details sec 15.

=>Finally, any person who willfully violates any of the provisions or the rules and regulations promulgated by the Commission, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$10,000 or imprisoned not more than five years, or both. More on sec 24.

How does the regime address collective wrongs (small injuries to many people)?

=> Class action, but there are class action limitations. More details in Sec 16.

How does the regime address power differentials among victims and wrongdoers?

=> The Securities Commission, District Courts and the United States courts of any Territory shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof, they also have the possibility of class actions.

How does the regime respond to technological change?

=> There is a broad language that can include the technological change. E.g. in the case of fraudulent interstate transactions, the act states that it shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement by **the use of any means or instruments of transportation or communication** in interstate commerce or by use of the mails, to employ any device, scheme, or artifice to defraud, or to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made not misleading; or to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. More details in Sec 17

Regulatory Structures

Is the regime complemented by an agency and what are that agency's powers?

=> The Securities Commission has broad powers to investigate, to amend rules and regulations, and to punish wrongdoers. More details Sec 19.

Monitoring or investigation?

=> Both