AGENTS AS UNDERWRITERS: INCORPORATING AGENCY LAW TO MAKE SECTION 11 OF THE SECURITIES ACT BETTER APPLICABLE TO NON-TRADITIONAL IPOS

Ethan McCarthy

INTRODUCTION

In the run up to the Great Depression, the Dow Jones Industrial Average ("DJIA") fell over twelve percent on October 28, 1929.[1] The next day, known as Black Tuesday, it lost another almost twelve percent.[2] In total, the DJIA would drop eighty-nine percent during the Stock Market Crash of 1929.[3] The federal government responded to the crash and Great Depression by implementing increased regulation, including enacting the Securities Act of 1933 (Securities Act).[4]

The Securities Act, among other things, regulates the initial offering of securities to the public.[5] The legislation's purpose was to provide greater protection for consumers.[6] As part of this regulatory framework, those issuing securities must file a registration statement providing the information necessary for potential investors to properly evaluate the security.[7] The registration statement is filed with the Securities and Exchange Commission (SEC).[8] Part of this registration is a prospectus that is provided to investors.[9] Section 11 of the Securities Act holds strictly liable those that sign the registration or contribute to the registration statement as a director, expert, or underwriter if the statement "contained an untrue statement of a material fact or omitted to

1 Gary Richardson, Alejandro Komai, Michael Gou & Daniel Park, *Stock Market Crash of 1929*, FED. RES. HISTORY (Nov. 22. 2013), https://www.federalreservehistory.org/essays/stock-market-crash-of-1929#:~:text=On%20Black%20Monday%2C%20October%2028%2C%201929%2C%20the%20Dow%20declined,almost%20half%20of%20its%20value.

2 *Id.*

3 André Douglas Pond Cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 990 (2005).

4 Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 329 (1988).

5 *Id.* at 330.

6 *Id.*

7 *Id.*

8 Tayler Tanner, *Spotify's Direct Listing and Foreign Private Issuers: Protecting Investors When Foreign Private Issuers List on a U.S. Exchange But Not on Their Home Exchange*, 2019 B.Y.U. L. REV. 573, 579 (2019).

9 *Id.*

state a material fact required to be stated therein or necessary to make the statements therein not misleading."[10]

The Securities Act established the traditional initial public offering (IPO) process through which a company may go public.[11] During a standard IPO, a company will employ lawyers and investment bankers to develop the comprehensive financial reports that are required as part of the registration statement.[12] Investment bankers also market the shares, underwrite the offering, and usually take ownership of the shares for sale, which is called a firm-commitment underwriting.[13] The Securities Act's purpose in developing such a strenuous and time-consuming process is to best ensure that investors are provided all information necessary to safely invest in a newly offered security.[14]

Recently, however, companies have more frequently experimented with alternative means of going public,[15] and Section 11's applicability in these cases may not be clear. In 2018, Spotify went public on the New York Stock Exchange (NYSE) through a direct listing.[16] Additionally, in 2020, Special Purpose Acquisition Companies (SPACs) "accounted for more than 50% of new publicly listed U.S. companies."[17] The increased use of direct listings and SPACs have created two key issues with applying Section 11 liability. First, potential plaintiffs have greater difficulty establishing Section 11 standing when bringing claims arising from nontraditional IPO methods.[18] Second, it is not clear who can be liable as an "underwriter" under Section 11.[19] To address these two issues, Congress should amend Section 11 to include agency law definitions and concepts and to provide an easier means for plaintiffs to establish standing for their Section 11 claims. Incorporating agency law into the statute would enable plaintiffs to more easily establish standing while better defining those that may be liable for misstatements or omissions in a registration statement. Thus, this amended Section 11 would achieve both goals of protecting consumers while clearly identifying who may be held liable and when under the statute.

---

10 15 U.S.C.A. § 77k; *see also* Elisabeth Keller & Gregory A. Gehlmann, *supra* note 4, at 345–46.

11 Tayler Tanner, *supra* note 8, at 579.

12 *Id.* at 579–80.

13 *Id.* at 580.

14 *Id.* at 595.

15 Deloitte, *A CFO's Guide to Traditional and Nontraditional IPOs*, WALL ST. J.: CFO J. (Aug. 17, 2022, 3:00 PM), https://deloitte.wsj.com/articles/a-cfos-guide-to-traditional-and-nontraditional-ipos-01660679589.

16 Brent J. Horton, *Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failure?*, 72 SMU L. REV. 177, 179 (2019).

17 Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, July–Aug. 2021 HARV. BUS. REV. ¶ 1, ¶ 1 (2021), https://hbr.org/2021/07/spacs-what-you-need-to-know.

18 Anat Alon-Beck, Robert Rapp & John Livingstone, *Investment Bankers as Underwriters—Barbarians or Gatekeepers? A Response to Brent Horton on Direct Listings*, 73 SMU L. REV. F. 251, 255 (2020).

19 Benjamin J. Nickerson, *The Underlying Underwriter: An Analysis of the Spotify Direct Listing*, 86 U. CHI. L. REV. 985, 989 (2019).

Agency law enables plaintiffs to still bring claims against those who delegate authority to another but still retain some control over that other person's actions. In the context of initial offerings of securities, agency law principles can be used to classify certain parties as agents based solely on their relationship to the company issuing the securities. Including an agency law component in Section 11 would allow the statute to identify parties liable for registration statement errors or omissions without strictly needing to rely on the term "underwriter." Section 11 would thus be more flexible and more easily applicable to the changing landscape of firm public offerings.

Part One of this comment will explain how Section 11 regulates traditional IPOs, discuss increasingly popular IPO alternatives and the problems they pose regarding Section 11, and provide a brief overview of agency law. Part Two will provide a proposed amended Section 11 and analyze how an agency law framework and relaxed standing requirements can address the issues current Section 11 has with regulating non-traditional IPOs.

I. BACKGROUND

In analyzing the challenges that nontraditional IPOs present regarding Section 11, this section first details how Section 11 functions in the traditional IPO context. It then explains the direct listing and SPAC processes. Finally, this section provides an overview of the agency law provisions relevant to the proposed solution.

A. *Traditional IPOs*

The traditional IPO process is time-consuming and costly.[20] The Securities Act requires that a firm issuing securities make a "full and fair disclosure of information" regarding the issuance so that investors are protected.[21] This is accomplished through the registration requirement, which mandates the issuing company file a registration statement that includes all material information regarding the company and the securities being offered.[22] Section 11 of the Securities Act enables purchasers of the securities to bring claims against specified participants in the issuance, such as directors, partners, and underwriters, if the registration statement contains material misstatements or omissions.[23]

---

20 Tayler Tanner, *supra* note 8, at 579.

21 Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175, 178 (2015) (quoting Pinter v. Dahl, 486 U.S. 622, 646 (1988)).

22 *Id.*

23 *Id.* at 179; 15 U.S.C.A. § 77k(a).

Through an IPO, a company raises equity financing by making its stock publicly available for the first time by selling it through an exchange.[24] To do so, the Securities Act requires that the firm develop a prospectus and file a registration statement with the SEC.[25] The purpose of the registration statement is to provide all necessary information about the company to potential investors.[26] Thus, the registration statement must include a description of the company, the company's audited financial statements from previous years, and an analysis of potential risks that could affect the company.[27]

To develop this registration statement, firms employ investment banks and lawyers.[28] The investment bank underwrites the IPO and generally commits to purchasing the entirety of the stock offering, which is known as a firm-commitment underwriting.[29] As the underwriter, once the registration statement is filed with the SEC and has been reviewed by the agency, the investment bank then markets the company's shares to large institutional investors, developing the initial offering price in the process.[30] The shares can be sold once the registration statement becomes effective, meaning that the shares are now registered in accordance with the Securities Act.[31] After issuance, the company must continue to file specified disclosures with the SEC, such as the annual 10-K and quarterly 10-Q financial reports.[32]

In an IPO, the investment bank makes money from (1) the difference in the price for which it purchases the stock from the issuing firm and the price at which it sells the stock to institutional investors, and (2) the industry standard seven percent commission on the total offering amount.[33] As the underwriter, the bank may also buy back shares as a price stabilization mechanism, as this reduces the share supply and thus helps prop-up the price.[34] Additionally, the investment bank imposes a lockup period on the issuing company's employees and previous investors.[35] These insiders may not sell their shares in the issuing company for a specified period after the IPO, typically six months.[36] This is another supply control measure.[37] Importantly, these shares

---

24 Benjamin J. Nickerson, *supra* note 19, at 990.

25 *Id.* at 991; 15 U.S.C.A. § 77e.

26 Benjamin J. Nickerson, *supra* note 19, at 991.

27 Tayler Tanner, *supra* note 8, at 579–80.

28 *Id.* at 580.

29 *Id.*

30 Benjamin J. Nickerson, *supra* note 19, at 991–92, 992 n.25 (quoting Securities and Exchange Commission Release No 33-8565, 70 Fed. Reg. 19672, 19674-75 (Apr. 13, 2005) explaining this process known as "book building.").

31 Tayler Tanner, *supra* note 8, at 581.

32 *Id.* at 581–82.

33 *Id.* at 580.

34 Benjamin J. Nickerson, *supra* note 19, at 993.

35 *Id.* at 993.

36 *Id.* at 993–94.

37 *Id.*

owned by the issuer's management and early investors are "unregistered" because they are not part of the offering to which the registrations statement applies.[38]

The investment bank is liable as an underwriter under Section 11.[39] Purchasers of the securities may therefore hold the bank strictly liable if the registration statement "contained an untrue statement of a material fact or omitted to state a material fact," making the statement misleading.[40] During the book building process, the investment bank must also comply with Section 5 of the Securities Act and SEC rules that regulate what actions it can take while the registration statement is not yet effective.[41]

B. *The Tracing Requirement*

Section 11 provides a cause of action for purchasers of a security when the registration statement under which "such security" is registered contains material misstatements or omissions.[42] In *Barnes v. Osofsky*, the Second Circuit interpreted the meaning of this phrase "such security" in § 77k(a).[43] In *Barnes*, Aileen, a women's sportswear company, publicly offered shares under a registration statement in 1963.[44] After the price fell upon the company missing its sales projections, purchasers of the company's stock comprising this sale brought claims under Section 11 arguing that the company failed to disclose known risks in the registration statement.[45] These claimants, however, could not establish that all their purchased shares were those issued under the registration statement for this offering and not shares previously issued under a different registration.[46]

The Second Circuit faced the question of whether to read the phrase "such security" to provide a cause of action for anyone purchasing a security of the same type as that issued under the registration statement, or for only those that purchase the specific shares issued under the registration statement.[47] The court, in its opinion authored by Judge Friendly, adopted the later, narrower reading.[48] The court stated that this is the more natural reading of Section 11's language, and noted that the statute imposes "stringent

38 *See* Pirani v. Slack Techs., 13 F.4th 940, 943 (9th Cir. 2021).

39 *Id.* at 990; 15 U.S.C.A. § 77k(a)(5).

40 15 U.S.C.A. § 77k(a); *see also* Benjamin J. Nickerson, *supra* note 19, at 990.

41 Tayler Tanner, *supra* note 8, at 581 (discussing these "gun-jumping rules" in place during a "quiet period" before there is an effective registration statement).

42 § 77k(a).

43 Barnes v. Osofsky, 373 F.2d 269, 271 (2d Cir. 1967).

44 *Id.* at 270.

45 *Id.*

46 *Id.* at 271.

47 *Id.*

48 *Id.* at 272.

penalties" on those found liable under it.[49] The other circuits agreed with Judge Friendly's interpretation of the language.[50]

The Ninth Circuit recently examined Section 11's tracing requirement in the context of a direct listing.[51] *Pirani* arises from the technology firm Slack's direct listing on the NYSE, where the plaintiff, Pirani, could not prove whether he purchased registered or unregistered shares.[52] The court ultimately had to decide whether the plaintiff had standing to bring the suit given the "such security" phrase in § 77k(a) and concluded that Pirani did have standing.[53]

As previously mentioned, direct listings, unlike IPOs, do not include a lockup period.[54] Therefore, when Slack's direct listing was executed on June 20, 2019, the process made 118 million registered shares and 165 million unregistered shares available through the public exchange.[55] The court portrayed this as a case of first impression.[56] After doing so, the court held that the reading of "such security" adopted by *Barnes* was not applicable in the direct listing context.[57] The Ninth Circuit based this conclusion on the fact that both the registered and unregistered shares could be sold in the manner they were because of the registration statement, thus eliminating any traceability concerns.[58]

Judge Miller disagreed.[59] He did not believe that *Pirani* was a case of first impression and argued in dissent that the court should have followed the precedent of *Barnes*, meaning Pirani's claim would fail because he could not demonstrate that he purchased shares registered under the challenged statement.[60]

---

49 *Barnes*, 373 F.2d at 272.

50 *See e.g.*, Krim v. pcOrder.com, Inc., 402 F.3d 489, 499 (5th Cir. 2005); Lee v. Ernst & Young, LLP, 294 F.3d 969, 976 (8th Cir. 2002); APA Excelsior III L.P. v. Premiere Techs, Inc., 476 F.3d 1261, 1271 (11th Cir. 2001); *see also* Pirani v. Slack Techs., 13 F.4th 940, 952 (9th Cir. 2021) (listing cases from other circuits that apply the same reading to the phrase "such security" in Section 11).

51 *Pirani*, 13 F.4th at 946.

52 *Id.* at 943.

53 *Id.*

54 *Id.* at 944.

55 *Id.*

56 *Id.* at 946.

57 *Pirani*, 13 F.4th at 946–47.

58 *Id.* at 947.

59 *See id.* at 950 (Miller, J., dissenting).

60 *Id.* at 951–52.

C. *Direct Listings*

"Unicorns," private startups with a valuation exceeding one billion dollars,[61] have recently been delaying conducting IPOs because they now have more options to raise capital.[62] For these firms, the value of being able to sell stock to the public is the liquidity it provides, not the capital that it can obtain .[63] In fact, direct listings initially could not be used to raise capital.[64] The direct listing process provides the liquidity unicorns desire without diluting the current shareholders' control and with costs lower than those associated with a traditional IPO.

Spotify, then a unicorn firm, was the first major company to go public through a direct listing and did so in 2018.[65] In 2020, the Securities and Exchange Commission (SEC) permitted the NYSE to begin allowing companies to raise capital by selling shares through direct listings, which could lead to increased use of direct listings in the future.[66]

In a direct listing, the company (directly) lists its stock on an exchange without going through the book building process that would result in specific institutional investors being the initial purchasers and establishing a determined price.[67] Once the shares are listed on the exchange, the market ultimately determines the price.[68] This also means that there can be none of the price stabilization measures underwriters may use in the IPO context.[69] The key benefit of a direct listing is the lower cost associated with it than with a traditional IPO.[70] In addition to there being no book building, the "roadshow" is often shorter, and there is no lockup period.[71]

When a company conducts a direct listing, it still must follow the same regulations for disclosing information as with an IPO.[72] Thus, firms conducting a direct listing still must file a registration statement with the SEC.[73]

---

61 James Chen, *Unicorn: What It Means in Investing, With Examples*, INVESTOPEDIA (May 31, 2022), https://www.investopedia.com/terms/u/unicorn.asp; Benjamin J. Nickerson, *supra* note 19, at 987 n.1.

62 Anat Alon-Beck, Robert Rapp & John Livingstone, *supra* note 18, at 259 (noting that companies backed by venture capital are now on average remaining public for in excess of eleven years as opposed to previously going public within four years).

63 *Id.* at 260.

64 *Id.* at 261.

65 Brent J. Horton, *supra* note 16, at 179.

66 James J. Park, *Investor Protection in an Age of Entrepreneurship*, 12 HARV. BUS. L. REV. 107, 138 (2022).

67 *Id.*

68 *Id.*

69 Benjamin J. Nickerson, *supra* note 19, at 994.

70 *Id.*

71 *Id.*

72 Tayler Tanner, *supra* note 8, at 583.

73 Benjamin J. Nickerson, *supra* note 19, at 994.

Direct listings, however, do not involve a typical "underwriter," and the issuing company instead works with "financial advisors." [74] It is unclear whether these financial advisors would qualify as "underwriters" under current Section 11.[75]

D. *SPACs*

A Special Purpose Acquisition Company (SPAC) is a company that goes public through its own IPO for the purpose of later acquiring a private company that becomes public itself through this acquisition.[76] When the SPAC merges with the targeted private company, the target company is now essentially public as an asset of the SPAC.[77] The entity that initially forms the SPAC and takes part in its IPO is called the "sponsor" and is generally a limited liability company.[78] The sponsor selects the SPAC's officers and directors, who are generally the people that own the sponsor.[79] During the IPO, the SPAC sells an offering consisting of a share, a warrant, and possibly a right to acquire a fraction of a share.[80] This offering is called a "unit," and the standard is to price them at $10.[81] The funds received from the SPAC's IPO are placed in a trust.[82] A SPAC's articles of incorporation typically provide that the SPAC has two years to complete a merger, or the SPAC must liquidate the funds in the trust and distribute the funds to the shareholders.[83] When the SPAC proposes a merger with a target private company, a shareholder can redeem her share for the initial ten-dollar price plus interest, instead of retaining the shares and retaining the equity interest in what is essentially the previously private company post-merger.[84]

The use of SPACs ballooned in 2020 and 2021.[85] This apparent bubble, though, burst in the Spring of 2021..[86] There is still debate over how popular SPACs will be in the future.[87] Generally, the number of SPACs each year will depend on market situations; the same is true for traditional IPOs. Regardless,

---

74 James J. Park, *supra* note 66, at 111, 138.

75 *Compare* Benjamin J. Nickerson, *supra* note 19, at 986 *with* James J. Park, *supra* note 66, at 140.

76 Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REG. 228, 235 (2022).

77 James J. Park, *supra* note 66, at 111, 133.

78 Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 236.

79 *Id.*

80 *Id.*

81 *Id.* at 247.

82 *Id.* at 237.

83 *Id.*

84 Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 237.

85 Max H. Bazerman & Paresh Patel, *supra* note 17, at ¶ 1.

86 Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 231.

87 *See* Max H. Bazerman & Paresh Patel, *supra* note 17, at ¶ 4.

the current use of SPACs has helped identify weaknesses in Section 11, which will be helpful in developing a framework that can be applied to an array of IPO alternatives beyond just SPACs.

There are three main challenges to applying current Section 11 in the context of SPACs. The first is that some SPACs issue unregistered shares to their target shareholders as opposed to issuing registered shares, sometimes preventing shareholders from being able to bring claims under Section 11.[88] Second, establishing standing under Section 11 after SPAC shares have been sold to secondary parties is challenging given the tracing requirement.[89] Lastly, the SPAC process does not use underwriters, so there may be fewer parties from which plaintiffs can try to recover damages.[90]

E. *Agency Law*

Agency law applies when one person employs the assistance of another to achieve something for the first person's benefit.[91] The person who employs another person is the principal, while the person working on behalf of the principal is the agent.[92] The purpose of agency law is to properly categorize parties to a transaction or agreement completed using an agent or agents, so responsibilities and potential liabilities derived from these arrangements are correctly assigned.[93] Generally, agency law works to hold the principal responsible for her agent's actions done in furtherance of the principal's instructions and purpose.[94]

An agency relationship is a fiduciary relationship established when (1) one person, the principal, "manifests assent" to have another person, the agent, act on behalf of the principal, (2) the principal has some control over the agent, and (3) the agent "manifests assent" to act on principal's behalf.[95] A principal is liable for the agent's actions when the agent acts with express actual authority, implied actual authority, or apparent authority.[96] An agent has actual authority to act to bind the principal when the agent (1) reasonably believes that the principal wishes the agent to act in that way, and (2) that belief is based on a manifestation by the principal to the agent.[97] The agent has express actual authority when the principal instructs the agent to perform

---

88 Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 285–86.

89 *Id.* at 286.

90 *Id.*

91 *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

92 *See id.*

93 *See* Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 497 (2011).

94 *Id.*

95 RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

96 Salyers v. Metro. Life Ins. Co., 871 F.3d 934, 940 (9th Cir. 2017) (citing RESTATEMENT (THIRD) OF AGENCY § 2 intro. note (2006)).

97 RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

the specific act.[98] Additionally, the agent has the implied actual authority to take the steps that reasonably further the actions the principal expressly instructed the agent to complete or obtain.[99] An agent has apparent authority to bind a principal through the agent's actions when (1) a third party "reasonably believes the actor has authority to act on behalf of the principal," and (2) that belief derives from a manifestation by the principal.[100]

Agency law "restore[s] the status quo" of obligations and liability when someone employs an agent when doing business with another.[101] This is done so that a principal cannot avoid liability to which she would otherwise be subject solely because he chose to use an agent.[102] This comment argues that amending Section 11 to include these definitions would more clearly identify the parties liable under the provision and enable plaintiffs to more easily establish standing by tracing harm through specified agency relationships. In this context, the focus is holding people that may be defined as agents liable for the errors and omissions in a registration statement. Thus, the question that will be answered is how certain participants that aid a corporation in going public, like the financial advisors in direct listings, can be defined as agents of that corporation for that purpose.

What makes agency law so useful for addressing this problem is its uniformity and simplicity. The Supreme Court cites the Restatement of Agency in decisions when needing to analyze agency law.[103] Furthermore, the definitions of principal and agent can be applied in any situation in which a company enlists the aid of others in going public. Courts could therefore apply Section 11 more easily regardless of the specific methods companies may use to go public because they are not restricted by how the statute may define a term like "underwriter" but can apply the developed agency common law. In turn, Congress would not need to devise a liability-tracing framework from scratch and could refer to an established area of law. The fiduciary relationship between a principal and agent and the different types of authority under which an agent may act on behalf of the principal are relatively straightforward and clearly defined in the Restatement. Individuals and firms could thus more easily determine what was required of them in their roles in a going public process and what liability they may face. In general, connecting agency law to Section 11 creates a more workable framework that courts may apply and promotes fairness by providing greater clarity to parties to securities transactions regulated by Section 11.

---

98 Salyers, 871 F.3d at 940 (citing NLRB v. Dist. Council Iron Workers State Cal. & Vicinity, 124 F.3d 1094, 1098 (9th Cir. 1997)).

99 *Id.*

100 RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).

101 Paula J. Dalley, *supra* note 93, at 497.

102 *Id.* at 497–98. Dalley refers to this as the "cost-benefit internalization theory."

103 *Salyers*, 871 F.3d at 939–40.

F. *Strict Liability and the Need for Clarity*

Section 11 imposes strict liability for misstatements or omissions in a registration statement.[104] Likewise, Judge Friendly noted that the "stringent penalties" imposed on those who violate Section 11.[105] Strict liability is relevant in the criminal law context, and Congress should consider criminal law's principles regarding strict liability when amending Section 1. In criminal law, statutes that criminalize a certain behavior per se without any mens rea requirement, meaning laws imposing strict liability, are generally disfavored.[106] Additionally, the Supreme Court generally refrains from applying strict liability when criminal statutes contain ambiguous provisions.[107]

When considering whether someone may be liable under Section 11, the question arising from the statute's ambiguity differs from that typically asked in the criminal law context. Criminal laws, generally, prohibit specified conduct and apply to everyone. Contrastingly, the uncertainty regarding Section 11 is not what conduct is prohibited but who is liable under the statute. Those that contribute to a company going public should not be required to guess as to whether their level of involvement resultingly qualifies them as underwriters responsible for filing a complete and accurate registration statement.

G. *Rule 144*

SEC Rule 144 provides that, in specified circumstances, an owner of a company's shares of stock may sell those shares to the public without the company first needing to register these shares.[108] When an underwriter sells the securities it owns, the sale is treated like a public offering itself because of the extensive role the underwriter plays in introducing the securities to the public markets.[109] Furthermore, Section 4(1) of the Securities Act creates an exemption for shareholders that are not underwriters that permits these shareholders to sell their shares without the company first needing to register the shares.[110]

Section 2(a)(11) of the Securities Act defines the term "underwriter", and the definition is notably broad.[111] The broad definition of the term

---

104 Elisabeth Keller & Gregory A. Gehlmann, *supra* note 4, at 345–46.

105 *Barnes*, 373 F.2d at 272.

106 Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2432 (2006).

107 Leonid (Lenny) Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal law After Flores-Figueroa*, 112 COLUM. L. REV. 628, 628 (2012).

108 *Pirani*, 13 F.4th at 944; 17 C.F.R. § 230.144.

109 Marina Petrova, *Capital Formation for Internet Companies: Why Facebook Stayed Private for So Long and What that Means for Investors*, 12 J. BUS. & SEC. L. 305, 317 (2012).

110 *Id.*; 15 U.S.C.A. § 77(a)(7), (d).

111 17 C.F.R. § 230.144; 15 U.S.C.A. § 77b (defining an underwriter as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of

"underwriter" would seemingly include any investor who purchased the stock with the intention of then reselling, or "distributing," the shares for a profit, imposing additional costs on purchasing these shares and therefore reducing the demand for them.[112] In response to this market issue, the SEC promulgated Rule 144.[113] Rule 144 provides an analytical framework to establish that a particular investor is not an underwriter by determining that the investor is "not engaged in distribution."[114]

The first question under Rule 144 is whether the company that issued the securities is required to file reports in accordance with the Exchange Act.[115] In Rule 144, The SEC included fewer requirements for selling unrecorded shares of a company that files public reports because investors have clear access to the financial information regarding the company and the securities themselves.[116]

The second question is whether the securities' owner is an "affiliate" of the issuer; Rule 144 includes more requirements that an affiliate must satisfy before she can sell her shares than are imposed on non-affiliates.[117] A person is an affiliate of an issuer if the issuer has some control over her or she has some control over the issuer.[118] This term therefore includes members of the issuer's board of directors, the issuer's executives, and the issuer's stockholders that have voting rights.[119] Affiliates may only sell their shares under Rule 144 if the company publicly discloses the financial information required by the Exchange Act.[120] Additionally, they must file a Form 144 with the SEC when selling the securities, and Rule 144 limits the number of securities they can sell and how widely they can advertise their sale.[121] Lastly, affiliates cannot sell their securities until six months after acquiring them if the company reports financial disclosures or until after one year if the company does not formally report.[122] Non-affiliates cannot sell their securities until after they have owned them for one year but face none of the other limitations imposed on affiliates.[123]

As was seen in *Pirani*, these provisions become relevant in the direct listing context because some shares being sold upon the filing of a

any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking").

112 Petrova, *supra* note 109, at 318.
113 *Id.*
114 17 C.F.R. § 230.144, Preliminary Note; Petrova, *supra* note 109, at 318.
115 Petrova, *supra* note 109, at 318.
116 *Id.*
117 *Id.* at 318–319.
118 *Id.* at fn. 57; 17 C.F.R. § 230.144(a)(1).
119 Petrova, *supra* note, 109 at 318.
120 *Id.* at 319.
121 *Id.*
122 *Id.*
123 *Id.*

registration statement will be registered shares while others may be unregistered shares.[124] The majority in *Pirani* argued that both Slack's registered and unregistered shares could only be sold publicly as a result of the registration statement filed in accordance with the direct listing.[125] Based on this assertion, the majority ruled that both those that purchased registered shares and those that purchased unregistered shares (and therefore those plaintiffs that could not determine which category of shares they purchased) could bring claims under Section 11 relating to that registration statement.[126]

Under Rule 144 and the provisions referenced in its preliminary note, however, unregistered shares may sometimes lawfully be sold publicly without the need for a registration statement.[127] Thus, concluding that a registration statement filed in the course of a direct listing alone enables all the company's shares to be sold publicly may not always be correct. In a situation where a plaintiff knows that she purchased unregistered shares, it also necessitates determining if the seller of those unregistered shares satisfies the requirements of Rule 144 that would permit the seller to sell those shares with the company filing a registration statement. If the seller does not meet these requirements, she would only be permitted to sell those shares under the company's registration statement, so the purchaser would have standing to bring claims related to errors in the registration statement pursuant to Section 11. Congress, however, can and should amend Section 11 to make this distinction in unregistered shares clearer and to provide standing for purchasers of unregistered shares that may have been sold without the filing of a registration statement but are nonetheless sold in such proximity with the filing of a registration statement that the purchaser would have reasonably relied on the registration statement's assertions when evaluating the purchase of the securities.

II. ANALYSIS

Section 11's current language does not clearly define who can be held liable as an underwriter in nontraditional IPO settings, and plaintiffs face troublesome difficulty in establishing standing under this provision in these settings. Congress should amend Section 11 to include an agency law framework to clarify liability and enable plaintiffs to establish standing more easily.

Because Section 11 necessarily imposes strict liability for consumer protection, its language must be clear as to who is liable under it. This agency law framework solution provides that. Establishing agency relationships

---

124 *See Pirani*, 13 F.4th at 944.

125 *Id.* at 947.

126 *Id.* at 943.

127 *Id.* at 944; 17 C.F.R. § 230.144.

within the alternative processes of going public also helps plaintiffs show standing, which is a problem under current Section 11 language. Section 11 only offers a remedy to a plaintiff who relies on a misleading registration statement filed to sell a security and purchases "such security."[128] In *Pirani*, the Ninth Circuit held that the plaintiff had standing even though he could not prove that he had purchased registered shares, and not unregistered shares, under Slack's direct listing.[129] This may be the desired result, but the current language of Section 11 does not support it. *Pirani* thus demonstrates that Section 11 should be amended to include the proposed agency framework to effectively protect investors. Lastly, this solution is a framework that can be used proactively if other nontraditional IPO methods arise.

A. *Proposed Additional Section 11 Framework*

Current Section 11 enumerates those that purchasers of securities registered under a registration statement may sue based on errors or omissions in the registration statement.[130] Congress should not alter or remove any of the current text within Section 11. The current statute applies liability in the traditional IPO context, and that understanding should not be changed. Therefore, the language of 15 U.S.C.A. § 77k(a)(1)-(5), including holding liable any "underwriter," should remain the same. Instead, a § 77k(a)(6) should be added. The relevant definitions of an agency relationship and the different types of authority could also be added to the amended Securities Act, or the statute could simply provide that courts should interpret agency law terms and concepts using the Restatement of Agency.

The proposed amended Section 11 would thus read in relevant part:

> **(a) Persons possessing cause of action; persons liable**
> In case any part of the registration statement, when such part became effective, contained an untrue statement of a

[128] 15 U.S.C. § 77(k); *Pirani*, 13 F.4th at 946.

[129] *See Pirani*, 13 F.4th at 948–49.

[130] 15 U.S.C. § 77(k). The portion of this section that this comment proposes to amend reads:
(a) Persons possessing cause of action; persons liable
In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—
(1) every person who signed the registration statement;
(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
…
(5) every underwriter with respect to such security.

> material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security or, if in such temporal proximity to the registration statement becoming effective that justifies the person's reliance on the registration statement, the same type of security issued by the same issuer (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 similarfunctions) 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;
>
> …
>
> (5) every underwriter with respect to such security;
>
> (6) every person who otherwise acts as an agent on behalf of the issuer having prepared or certified all or any portion of the registration statementwith respect to that portion or all the registration statement the agent prepared or certified.

This proposed version of Section 11 makes two substantial changes. The first is the additional language following the phrase "such security." The federal courts interpret that phrase as requiring plaintiffs to have purchased securities registered under that specific registration statement.[131] The additional language is meant to expand the number of plaintiffs who can successfully plead suits under Section 11 for material misstatements or omissions from registration statements. The second substantial change is the addition of sub-subsection (6). This is the agency law framework that provides that those that play certain roles in helping companies go public may still be held liable even if they do not fit the strict definition of "underwriter" in 15 U.S.C. § 77(k)(a)(5).

B. *The Effects on Standing*

The addition of the language following "such security" in 15 U.S.C. § 77(k)(a) resolves Section 11's standing issues by broadening what investors may effectively bring claims. Because potential plaintiffs currently must be able to prove that the securities they purchased were those specifically registered for public distribution under the registration statement, The Ninth Circuit reasoning is incorrect, or at least other courts including the Supreme

---

131 *Barnes*, 373 F.2d at 271–72.

Court could conclude so. The best course of action is therefore for Congress to amend Section 11 to better protect potential plaintiffs.

Another relevant consideration is that owners of unregistered shares are sometimes permitted to sell these shares publicly when the shareholders meet certain conditions under SEC Rule 144.[132] The agency law framework also functions in this case. The premise of Rule 144 is to provide a method by which owners of unregistered shares may sell their shares to public buyers without needing the issuing company to first file a registration statement covering the shares.[133] If the firm conducts a direct listing, the person looking to sell the unregistered shares of that firm no longer needs to take those additional steps outlined in Rule 144. Thus, the direct listing's registration statement enables the public sale of these shares. This is essentially the controversial holding in *Pirani*.[134]

The Ninth Circuit, however, oversimplified this in *Pirani*. The Ninth Circuit held that the plaintiff had standing regardless of whether the shares he purchased were registered or unregistered because, in the context of a direct listing, the filed registration statement is what enabled both categories of shares to be sold publicly.[135] This may not always be true because certain shareholders may have met the requirements of Rule 144, which would have enabled these shareholders to sell the shares without needing Slack to first file the registration statement.[136] Plaintiffs would therefore not have standing even under *Pirani* because the broad holding in *Pirani* is that plaintiffs may sue whenever they purchase shares, even unregistered ones, that they could only purchase as a result of the registration statement becoming effective.[137] *Pirani* thus fails to provide standing for those that purchase unregistered shares that could have been sold under Rule 144, even if the potential plaintiffs purchased the shares the same day the registrations statement became active.

The Ninth Circuit in *Pirani* also limited its holding to the direct listing context, emphasizing current Section 11's inability to provide a framework that can be applied to other methods of going public. The Ninth Circuit stated that the question it was answering was "what does 'such security' mean under Section 11 in the context of a direct listing."[138] The holding thus suggests a court must treat the first instance of filing a registration statement for each new IPO alternative that may arise as a matter of first impression and that the court must determine how it is to apply the meaning of "such security" to each of the new methods individually. This would surely prevent firms from trying to conduct new means of going public beyond the traditional IPO

---

132 *See* 17 C.F.R. § 230.144A.
133 *See generally*, 17 C.F.R. § 230.144.
134 *Pirani*, 13 F.4th at 947.
135 *Id.* at 943.
136 17 C.F.R. § 230.144.
137 *Pirani*, 13 F.4th at 943.
138 *Id.* at 946.

because they and those individuals or entities that would attempt to help would face too great a risk by surrendering themselves to the unknown will of a court.

Applying this new language to the facts in *Pirani*, the plaintiff can establish standing under Section 11 without the court having to resort to the questionable application of the statute found in the Ninth Circuit's opinion. According to precedent, the meaning of "such security" in Section 11 is that a plaintiff may only bring a claim if she purchased shares specifically registered under the registration statement she is challenging. This definition has no room to include unregistered securities of any type. Moreover, the court could not have known whether the shares Pirani purchased, assuming they were unregistered, could not otherwise be sold under Rule 144. If they were unregistered shares that could be sold without Slack filing a registration statement, then *Pirani*'s holding is incorrect because the registration statement did not initially enable the shareholder to sell these unregistered shares.

To solve this issue, the proposed additional language to Section 11 considers the time a buyer purchases shares in relation to when the registration statement at issue in a matter becomes effective. This takes the focus away from the potentially overly formalistic tracing requirement and looks to what the investor reasonably expected when purchasing the securities. Imagine a situation where two people, (A) and (B), learn that a corporation, who has already publicly issued stock previously, is going to publicly issue new shares of its stock. The corporation will sell new shares under a registration statement filed for this offering, but a past investor, (X), who had previously purchased unregistered shares pursuant to Rule 144 decides he also wishes to sell his unregistered shares. On the day that the registration statement becomes effective, (A) and (B) both review the financial information made in the disclosure related to the issuing corporation and the shares themselves. Both decide to purchase shares the next day, but (A) purchases shares registered under the registration statement while (B) purchases unregistered shares from (X). Neither (A) nor (B) know what type of shares they purchased. Unfortunately for them, there was a material mistake in the registration statement both viewed, and the shares greatly decreased in value.

Under current Section 11, (A) would have standing to bring a claim because (A) purchased registered shares. (B) would not have standing to bring a claim even though (B) took the same steps in reviewing the registration statement as (A) but unknowingly purchased unregistered shares. This is the form of unfair outcome that can result from overly formalistic requirements. The proposed Section 11, however, would allow both (A) and (B) to establish standing because they both purchased shares in the corporation in reliance on the registration statement the corporation filed only a day before they bought their shares.

The proposed new Section 11 addresses the traceability problem by considering when an investor purchases securities in relation to a registration statement that covers them or that type of security. Purchasing securities registered under the specific registration statement obviously still provides standing. The crucial portion of the new language is that even purchasing unregistered shares, regardless of whether these unregistered shares could otherwise be sold under Rule 144, would provide standing for a plaintiff to challenge the registration statement so long as the purchase was made within a reasonable time of the statement becoming effective. This would largely alleviate tracing issues because plaintiffs would only need to demonstrate that they purchased the same type of security as was covered by the registration statement and that the purchase was made within a time suggesting that the investor would have reasonably relied on the registration statement when evaluating the security.

This result may seem to negatively impact owners of unregistered shares, but most owners of unregistered shares are generally the issuing firm's management and early investors.[139] They therefore would likely have control over the registration statement over which they would potentially be held liable. The filing of a registration statement may also increase the value of their unregistered shares because more investors may be willing to purchase the shares with greater access to information and greater trading volume. The proposed additional language to follow "such security" ultimately better promotes consumer protection by allowing purchasers of certain securities to seek remedies based on reasonable reliance on a registration statement filed shortly before the time of purchase. Additionally, fewer plaintiffs will have their complaints dismissed simply because the plaintiffs could not accurately trace their shares to a specific registration statement.

Technology may develop that will enable the easy tracing of previous owners of specified securities.[140] This could alleviate the traceability issues hindering Section 11's usefulness.[141] That shares will one day be perfectly traceable is however in no way ensured or imminent. Amending Section 11 thus offers a solution that can be implemented now. Additionally, the new proposed Section 11 language would allow even plaintiffs who could trace their shares and determine that they were unregistered to still bring claims related to a registration statement in reasonable circumstances. This proposal better protects public market participants now and in the future.

C. *The Effects on Who Is Held Liable*

Adding an agency law framework to Section 11 in a new sub-subsection (e) addresses the concern about alternatives to the traditional IPO enabling those that contribute to a registration statement avoiding liability for any

---

139 *Id.* at 943.

140 *See generally* George S. Geis, *Traceable Shares and Corporate Law*, 113 NW. U. L. REV. 227 (2018).

141 *Id.* at 238–39.

errors or omissions the statement may have. IPO alternatives, like the direct listing and its use of a financial advisor, may not have an investment bank acting as an underwriter for the offering as there would be if the company were going public through a traditional IPO.[142] Current Section 11 imposes liability on underwriters but may not do so for financial advisors or others who do not strictly fit into the underwriter classification.[143] The concern is that investment banks or other participants in a non-traditional IPO will intentionally classify themselves as something other than underwriters to avoid potential liability under Section 11 and thus not have the appropriate incentive to conduct sufficient due diligence related to the offering.[144] This could then harm those who purchase securities because the filings pertaining to the offering would be lower quality and more likely to contain errors.[145]

Expanding Section 11 to include a provision providing that an issuer's agents who assist the issuer in registering or distributing securities ensures that harmed purchasers of the securities can recover from these agents for wrongdoing in their work on behalf of the issuer. Purchasers could rely on standard agency law to first establish that one of the parties, like a financial advisor, was in an agency relationship with the issuer. This requires establishing the three elements of an agency relationship, namely that (1) the principal manifests assent to have the agent act on her behalf, (2) the principal has some control over the agent, and (3) the agent manifests assent to act on principal's behalf.[146] The relationship between the issuing firm and the financial advisor in a direct listing satisfies these elements for an agency relationship. In a direct listing, financial advisors must value the company going public and certify this valuation to the NYSE.[147] The financial advisor also helps determine an initial selling price for the shares, helps file necessary forms, and creates investor presentations.[148] The issuing firm and the investment bank acting as financial advisor enter a contract with one another for this work, so both parties agree to enter the principal-agent relationship with one another. The issuing firm necessarily controls the financial advisor regarding drafting and submitting filings, creating marketing presentations, and ultimately establishing a price for the shares. Thus, all elements of an agency relationship are met. Financial advisors would therefore be liable under the amended Section 11 for mistakes or omissions in the portions of filings to which they contribute.

The greatest benefit of this added agency framework is that it can be readily applied to other IPO alternatives. The same analysis of agency

142 Brent J. Horton, *supra* note 16, at 195.
143 *See id.* at 206–07.
144 *See id.*
145 *See id.*
146 RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).
147 Brent J. Horton, *supra* note 16, at 195.
148 *Id.*

relationships done above for financial advisors in direct listings can be done for other parties in other contexts. It removes the concern that investment banks may skirt Section 11 liability simply by avoiding classifying themselves as underwriters because they would be acting as the issuer's agent under standard agency law. SPACs provide another example of this because they likewise do not use traditional underwriters.[149]

On the reverse side, a hypothetical can demonstrate that the amended Section 11 would not be overinclusive and improperly hold certain parties liable. In the traditional IPO and the direct listing, both the investment bank and the financial advisor play instrumental roles in developing the registration statement and ultimately enabling the shares to be sold to the public market. In contrast, imagine the issuing company hires a consulting firm to help identify potential risks the issuing company may face in a certain segment and draft an overview of this risk in its disclosure documents relating to a public offering of new securities. The Securities Act requires companies issuing securities to publicly disclose these risks.[150] Now imagine the registration statement contains a factual error relating to the firm's financial performance during the previous two years. An investor, in reliance on this error, purchases the company's securities and then wishes to recover damages when the security loses value and upon learning of this error. The desirable result would include the investor being able to recover from the issuing company, which would be easy enough under both the current and proposed Section 11. The desired result would also include that the consulting firm would only be liable for errors or omissions in the part of the registration statement to which it contributed, so it therefore should not be liable in this hypothetical.

Current Section 11 would desirably not make the consulting firm liable for errors in historical financial information. As long as the consulting firm did not take ownership of the shares registered under the statement, it would not be deemed an underwriter under Section 11.[151] Subsection 15 U.S.C.A. § 77k(a)(4) would make the consulting firm liable for the portion of the registration statement it completed and certified.[152] The concern would be that the introduction of agency law would then improperly make the consulting firm liable for this error to which it did not contribute. The proposed agency law framework, however, would maintain this desired result because the consulting firm would only be deemed an agent of the issuing company with respect to the actions the issuing company gave the consulting firm authority to complete.

The consulting firm would only have the actual authority to complete the actions the issuing company explicitly instructed it to complete or those

149 Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 286.
150 Benjamin J. Nickerson, *supra* note 19, at 988.
151 15 U.S.C.A. § 77k(a)(5).
152 15 U.S.C.A. § 77k(a)(4).

actions taken in furtherance of completing what the issuing company instructed.[153] In the hypothetical, that would only include the portion relating to the potential future risks because that is the only issue the company hired the consulting firm to address. The issuing company would have explicitly asked the consulting firm to analyze and summarize this specific risk and would not have asked the consulting firm to audit past company financial statements for accuracy. Moreover, there would be no implied actual authority for the consulting firm to audit and then reproduce past company financial reports into the registration statement because this would not contribute to the completion of the portion relating to future risk.

Apparent authority arises from manifestations made from the principal to the third party to the agency relationship that the third party reasonably believes indicate that the principal has given the agent the authority to act in a certain way.[154] In the present hypothetical, this would mean that the issuing company indicated to the investor who purchased the shares that the consulting firm had the authority to review and certify historical financial information in the registration statement and that the investor reasonably believed these indications. There would be no manifestations like this from the issuing company to the investor that could establish apparent authority. Certain professions may be hired in a limited capacity, and Section 11 acknowledges this regarding the lengthy process of completing a registration statement.[155] The issuing company would have its agreement with the consulting firm limit the scope of the consulting firm's work to the specified risk analysis. The issuing company could announce this limited agreement, but the company would not be making any indications that the consulting firm has authority to complete assignments on the issuing company's behalf that do not relate to analyzing certain future risks. The result would be no different than how accountants who contribute to only a portion of the registration statement are liable for errors or omissions in only that portion under current 15 U.S.C.A. § 77k(a)(4).

Any solution to the threat to consumer protection that an IPO alternative may pose must go beyond requiring the issuer to make additional disclosures. Most importantly, this practice would not establish a statutory framework that can be consistently applied to multiple methods of going public. It requires specific tailoring for each method. Thus, when new methods first appear, consumers may be left unprotected during these initial periods. Additionally, there is no clear way of determining what disclosures should be required or at what point the costs associated with increased disclosures imposed on companies exceed the benefit to consumers. A solution that only addresses the alternative methods one at a time is untenable, especially if further innovation in the area is expected.

---

153 RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).
154 RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).
155 *See* 15 U.S.C.A. § 77k(a)(4).

As was done in *Pirani*, an alternative solution could be to completely distinguish alternatives like direct listings from the traditional IPO.[156] The problem with this alternative is that Section 11 imposes strict liability on those found guilty of violating it. The statute should therefore clearly indicate what conduct it prohibits and when someone can be held liable under it to best promote fairness for those assisting firms in going public. If courts were to treat each variation to how firms may go public as matter of first impression, the risk to those who would play a similar role to that of the financial advisor in a direct listing would present a cost barrier too high to warrant that participation and would thus stifle innovation in the going public process. Adding the proposed agency framework would establish the clarity that is necessary for the imposition of strict liability to be appropriate while also achieving Section 11's goal of maintaining consumer protection.

A wholesale rejection of an IPO alternative like the direct listing is not necessary and is potentially harmful. Unicorns have not universally opted to use a direct listing as opposed to the traditional IPO. This is because the direct listing process, like all corporate endeavors, has its own risks and benefits. A company like Spotify may be in a better position to realize the benefits while another firm is not. That does not mean a firm like Spotify should be prohibited from making use of an innovative means of going public, so long as appropriate consumer protections remain in place.

The proposed agency law framework addition to Section 11 is best suited to addressing the need for a flexible procedure that can be used to ensure that investors are protected and that issuers and those that work with them understand what obligations they have and what consequences they face for not meeting those obligations. Much of the concern with applying Section 11 to non-traditional IPO procedures is the emphasis on the word "underwriter."[157] Expanding the range of parties plaintiffs may sue for flawed registration statements to include those that act as the issuer's agents provides a framework that can be applied to these relationships, regardless of how they specifically function or what terms people choose to describe them. Unlike in *Pirani*, courts will not need to decide whether they should reinterpret Section 11 when faced with a new IPO alternative. Agency law likewise provides clarity in a statute that imposes strict liability and uses a well-established area of law. This solution properly balances consumer protection, clarity, and proactivity. That is the goal that can and should be achieved through amending Section 11.

---

156 *Pirani*, 13 F.4th at 946.

157 *See* Brent J. Horton, *supra* note 16, at 206–07; Michael Klausner, Michael Ohlrogge & Emily Ruan, *supra* note 76, at 286.

CONCLUSION

Current Section 11 of the Securities Act does not properly define liability or provide standing when companies go public through nontraditional IPOs. The increase in popularity in these non-traditional IPOs has given rise to situations that demonstrate this. Direct listings and SPACs have been particularly popular in this space and pose obstacles to Section 11 achieving its purpose by complicating tracing issues for plaintiffs and moving away from the standard practice of employing underwriters.

Innovation and greater choice in how companies go public can be economically beneficial and foster growth. The proper consumer protections, however, must remain in place. Lack of this protection would cause damage to the public in the short term and erode confidence in the long run. Because Section 11 is a crucial provision for protection of securities purchasers, it is important that it achieves its consumer protection purpose while clearly specifying when someone is liable under it. Congress should therefore amend Section 11 to alleviate the challenges plaintiffs may face with needing to trace their shares to a specific registration statement outside of the IPO, and to ensure that entities, like investment banks that help companies go public, cannot skirt liability under Section 11.

Incorporating an agency law framework into Section 11 and permitting standing to also be established by demonstrating the purchase of securities around the time a registration statement covering that type of security becomes effective would alleviate these problems and can be broadly applied to different means by which a company may go public. The agency law framework would more clearly identify who is liable for misstatements or omissions in a registration statement and allow potential plaintiffs to establish standing more easily by tracing liability through agency relationships. Adding additional language after the mention of "such security" in Section 11 to include a temporal proximity consideration would likewise allow plaintiffs to more easily establish standing. This proposed amended Section 11 is better than other solutions because it can be applied in multiple situations and helps establish the clarity that should be in place when a statute imposes strict liability. Thus, Congress amending Section 11 in this manner would help achieve the Security Act's goal of consumer protection in the financial markets.