

[Securities Regulation Daily Wrap Up, TOP STORY—9th Cir.: Purchaser in selling shareholder direct floor listing had standing to sue under Section 11, \(Sept. 20, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

A majority of the Ninth Circuit looked to the text of Securities Act Section 11 instead of following broader language the district court had cited that came from a Second Circuit opinion authored by Judge Henry Friendly.

A divided Ninth Circuit panel upheld the district court's partial denial of Slack Technologies, Inc.'s motion to dismiss claims that certain disclosures made in a registration statement associated with a selling shareholder direct floor listing were misleading. The majority opinion affirmed the district court's conclusion that plaintiff Fiyyaz Pirani had standing to bring claims under Securities Act Sections 11 and 12(a)(2), albeit for reasons somewhat narrower than the theory posited by the district court. Standing likewise existed for Pirani's related controlling person claims. The dissenting judge argued for a much narrower view of Section 11 standing ([Pirani v. Slack Technologies, Inc.](#), Restani, J., September 20, 2021).

Direct listing. Slack had issued shares via a selling shareholder direct floor listing in which no new shares were issued, there was no bank underwriter, and the traditional lock-up period for unregistered shares did not apply. Slack issued a combination of registered shares (118 million) and unregistered shares (165 million) through the direct listing. Plaintiff Pirani initially purchased 30,000 Slack shares but eventually purchased 220,000 more Slack shares.

After the direct listing, Slack's share price declined from around \$38 to \$25. Pirani sued, claiming violations by Slack under Securities Act Sections 11, 12, and 15 on the theory that Slack failed to adequately disclose information about credits paid to customers for service outages and of the frequency of those outages. Pirani also claimed that Slack failed to disclose the extent to which it would be impacted by competition from Microsoft. The ensuing interlocutory appeal of the district court's decision in favor of Pirani on the Securities Act Section 11 standing issue drew a number of [amici](#) in Slack's defense.

Section 11 claim. The majority opinion held that Slack's registered and unregistered shares offered via the direct selling shareholder floor listing were "such securities" as that phrase is used in Securities Act Section 11. The majority began by noting that the Ninth Circuit historically had applied this language within Section 11 to mean securities offered via a specified registration statement, a point the dissenting judge would later emphasize.

But the majority concluded that the nature of the Slack offering could fit within the language of Section 11 and, thus, potentially result in liability for a misleading registration statement, although not for the reasons stated by the [district court](#), which had held that Pirani had standing to sue under a broader theory of standing. The majority explained that the district court's reliance on a broader theory of Section 11 standing was misplaced. That theory had been set forth in a Second Circuit opinion by Judge Henry Friendly, a jurist well known for his expertise in securities law, in which Judge Friendly applied a narrow interpretation to the case at hand but also had explained an equally plausible, and broader, interpretation of the phrase "such securities."

Instead, asserting that it had looked exclusively at the text of Section 11, the majority concluded that Slack's unregistered shares were "such securities" because their public sale required the existence of an effective registration statement. Moreover, the Slack case presented only one registration statement, unlike many other cases in which multiple registration statements make traceability potentially even more challenging because of the need to trace shares to a particular registration statement. (In a footnote, the court took judicial notice of

Slack's Form S-1 and its Form S-8, which Slack argued was a second registration statement, but noted that the Form S-8 was not part of the record and that, in any event, the forms referenced each other and any misleading statements in the Form S-1 would be part of the Form S-8).

The majority opinion also rejected Slack's argument that Section 11 liability should be limited to claims regarding registered shares. According to the majority, Slack's argument could open a liability loophole sufficiently large that it could undermine Section 11 altogether.

Lastly, the majority opinion concluded that because Pirani had standing to bring the Section 11 claims, he also had standing to assert controlling person claims under Securities Act Section 15 against certain defendants. The majority further noted that Slack had not disputed the district court's finding that the complaint adequately alleged controlling person claims against the individual defendants and the venture capital defendants.

Section 12 claim. The majority opinion also concluded that Pirani met the sold "by means of a prospectus" requirement of Securities Act Section 12 for the same reasons that the registered and/or unregistered shares Pirani had purchased in Slack's direct listing were "such shares" under Section 11. However, the court declined to address Slack's argument that privity may be lacking under Section 12 because the individual defendants may not be statutory sellers. According to the court, the interlocutory appeal did not contemplate decision of the privity issue and that issue was not sufficiently novel or controlling to address at this stage of the case.

The dissent and the statutory text. Both the majority and the dissenting judge claimed to have relied on the statutory text of Securities Act Section 11 and yet they reached opposite conclusions. Judge Miller dissented, in part, because, in his view, the successive registration statement scenario that arises in many cases is no different than the direct listing scenario presented by Pirani's complaint with respect to Section 11's text.

Judge Miller also viewed the majority opinion as having relied too much on the New York Stock Exchange's direct listing rule, which he opined cannot be found in the text of Section 11. Said Judge Miller: "Because those rules did not allow Slack to sell its unregistered shares until the registration statement was filed, the court concludes that 'such security' in section 11 must encompass any security whose 'public sale cannot occur without the only operative registration in existence.'"

Lastly, Judge Miller said the majority opinion made a policy choice based on its concerns that liability might never apply to direct listings absent an interpretation of the relevant statutes. In Judge Miller's view, that policy choice more appropriately belongs to Congress.

The case is [No. 20-16419](#).

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Companies: Slack Technologies, Inc.

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