**No. 11-**

IN THE

# Supreme Court of the United States

BULLDOG INVESTORS GENERAL PARTNERSHIP; OPPORTUNITY PARTNERS, L.P.; FULL VALUE PARTNERS, L.P.; OPPORTUNITY INCOME PLUS FUND, L.P.; KIMBALL & WINTHROP, INC.; FULL VALUE ADVISORS, LLC; SPAR ADVISORS, LLC; PHILLIP GOLDSTEIN; STEVEN SAMUELS; ANDREW DAKOS; AND RAJEEV DAS,

*Petitioners*,

*v.*

SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## PETITION FOR WRIT OF CERTIORARI


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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTIONS PRESENTED

1. Whether a state ban on speech by an issuer of unregistered securities to members of the public based upon their financial status violates the First Amendment, where the speech is concededly truthful and non-misleading, and where the state characterizes the speech ban as a "disclosure rule" to further an objective that federal law does not permit the state to achieve directly.

2. Whether the Due Process Clause of the Fourteenth Amendment permits a forum state to exercise personal jurisdiction over a non-resident business solely because the business operated a website accessible from the state (and from any other location in the world) and sent a single concededly truthful and non-misleading e-mail responding to a resident's inquiry, when the business did not enter (and, based upon these communications, could not have entered) into a transaction with the resident.

## PARTIES AND RULE 29.6 STATEMENT

Respondent, defendant below, is the Secretary of the Commonwealth of Massachusetts. Petitioners, plaintiffs below, include the following partnerships: Bulldog Investors General Partnership, Opportunity Partners, L.P., Full Value Partners, L.P., and Opportunity Income Plus Fund, L.P. Petitioners also include Kimball & Winthrop, Inc. (a corporation), Full Value Advisors, LLC, and Spar Advisors, LLC. Kimball & Winthrop, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock. Petitioners also include four individuals: Phillip Goldstein, Steven Samuels, Andrew Dakos, and Rajeev Das. Leonard Bloness was also a plaintiff in the proceeding below and is a respondent in this Court.

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Petitioners Bulldog Investors General Partnership, Opportunity Partners, L.P., Full Value Partners, L.P., Opportunity Income Plus Fund, L.P., Kimball & Winthrop, Inc., Full Value Advisors, LLC, Spar Advisors, LLC, Phillip Goldstein, Steven Samuels, Andrew Dakos, and Rajeev Das (collectively, "Bulldog") respectfully petition for a Writ of Certiorari to review the judgments of the Supreme Judicial Court of Massachusetts ("SJC") in this case.

## OPINIONS BELOW

The opinion of the SJC (Pet. App. 1a-53a) is reported at 460 Mass. 647, 953 N.E.2d 691 (2011). The opinion of the Superior Court, Suffolk County (Pet. App. 54a-84a), is reported at 2009 WL 3199193. A prior opinion of the SJC in a related proceeding (Pet. App. 85a-101a) is reported at 457 Mass. 210, 929 N.E.2d 293 (2010).

## JURISDICTION

The SJC issued its decision on September 22, 2011. Pet. App. 1a. The SJC denied Bulldog's timely petition for rehearing on November 3, 2011. *Id.* at 102a. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## STATUTORY PROVISIONS INVOLVED

Section 301 of G.L. c. 110A of the Massachusetts Uniform Securities Act provides:

> It is unlawful for any person to offer or sell any security in the commonwealth unless:--
>
> (1) the security is registered under this chapter;
>
> (2) the security or transaction is exempted under section 402; or
>
> (3) the security is a federal covered security.

The Act defines an offer to sell to include "every attempt or offer to dispose of or solicitation of an offer to buy a security or interest in a security for value." G.L. c. 110A, § 401(2).

## STATEMENT

This case involves a state regulation prohibiting an issuer of unregistered securities that are sold only to sophisticated investors from operating a publicly accessible website and sending a truthful e-mail response to a request from a Massachusetts visitor to its website for information about its business without determining that the visitor is eligible to purchase its securities. This Court should grant review to hold that the regulation violates the First Amendment as applied to Bulldog and that the

assertion of jurisdiction over a non-resident in such a circumstance violates due process.

**1. Bulldog's speech.** Bulldog maintained a website that provided information about its activities and investment products. Pet. App. 4a-5a. The website made certain information available to any visitor, including press articles and a printable brochure describing Bulldog's three investment vehicles, Opportunity Partners, Full Value Partners, and Opportunity Income Plus Fund. *Id.* at 5a. The website provided additional information to a visitor who would click "I Agree" to a disclaimer that expressly provided in relevant part:

> The information is available for information purposes only and does not constitute solicitation as to any investment service or product and is not an invitation to subscribe for shares or units in any fund herein. For the avoidance of doubt this website may not be used for the purpose of an offer or solicitation in any jurisdiction or in any circumstances in which such offer or solicitation is unlawful or not authorized.

*Id.* A website visitor seeking more specific information about Bulldog's funds and their performance could request such information by clicking on a button labeled "send feedback," which would lead to a registration screen seeking personal identifying information, including the visitor's address. *Id.* at 59a. To register, a visitor would be required to acknowledge having read and agreed to the foregoing disclaimer. *Id.*

On November 10, 2006, Brendan Hickey ("Hickey") registered on the Bulldog website, entering his Massachusetts address. *Id.* The parties have stipulated that "Hickey did not intend to purchase any securities when he registered with the Website, and he did not purchase any securities following his registration." Rather, Hickey was an employee of a law firm that was representing a client in unrelated litigation against Bulldog, and he acted at the direction of his employer. Pet. App. 59a. Petitioner Samuels responded to Hickey, by e-mail, attaching additional materials including information about the funds' investment strategy and philosophy, the backgrounds of their managers, performance and recent successes, and news articles. *Id.* Samuels' e-mail stated:

> While we are proud to have one of the best long term records in the business, it is very difficult to adequately describe what, why, and how we do what we do in a quick response to an e-mail inquiry. Performance numbers for example show nothing of the risk taken to achieve those returns. I have attached some basic information on our management including performance and philosophy. I would be happy to spend a few minutes on the phone if you wish to discuss in more detail. Please contact me at [a telephone number provided].

*Id.* Samuels attached to his e-mail a copy of a letter, dated July 13, 2006, directed to investors in Bulldog's funds. *Id.* The letter discussed the funds' returns as compared to the Standard & Poor 500 Index, current investments in particular companies,

and a successful lawsuit against the SEC challenging a rule requiring registration of certain hedge fund managers. *Id.* at 60a. It then stated:

> We don't need a nanny regulator to tell us right from wrong. And unlike most mutual fund managers, we put our money where our mouths are. Since day one a significant portion of our net worth has been invested in Full Value Partners so you can be sure that our interests are closely aligned with yours. In our opinion that is more important than all the cosmetic rules and regulations any regulator can dream up.

*Id.*

**2. The state enforcement action.** In 2007, the Enforcement Section of the Securities Division of the office of the Secretary of the Commonwealth (the "Secretary") filed an administrative complaint alleging that Bulldog had violated § 301 of G.L. c. 110A of the Massachusetts Uniform Securities Act (the "Act") by "offering" unregistered securities to a Massachusetts resident. Pet. App. 60a. The Secretary issued a cease-and-desist order and ordered Bulldog to pay an administrative fine of $25,000, the maximum allowable under the Act. *Id.* at 63a.

**3. Bulldog's § 1983 action.** Bulldog filed two actions challenging the administrative decision. One

action sought judicial review pursuant to Massachusetts law.[1] The second action, from which this Petition arises, sought relief under 42 U.S.C. § 1983, from what Bulldog contended was the violation of free speech and due process rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. Respondent Leonard Bloness (Bloness) was also a plaintiff in the § 1983 action. The parties have stipulated that Bloness "does not, and has never intended or attempted to, invest in any Bulldog hedge fund" (Stip. 27), but merely wishes to receive information about Bulldog's activities.

**4. The Superior Court's decision.** In the § 1983 case, the Superior Court dismissed Bulldog's due process claims, which were based on an asserted lack of personal jurisdiction, and rejected plaintiffs' First Amendment claims after a bench trial. Pet. App. 54a-84a. The Court concluded that the communications were commercial speech (*id.* at 71a) and applied the four-part test set forth in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

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[1] In the action seeking review of the administrative decision under state law, the Superior Court entered judgment affirming the Secretary's final order and the SJC affirmed that judgment, concluding that personal jurisdiction over the plaintiffs was both statutorily authorized and consistent with due process, and that the Secretary correctly determined that the plaintiffs violated the Act. Pet. App. 85a-101a. The SJC concluded that Bulldog's First Amendment claim was not properly before it inasmuch as the plaintiffs had chosen to bring a separate § 1983 action in order to raise that claim. *Id.* at 99a.

The parties stipulated, for purposes of the *Central Hudson* test, that "Bulldog's communications through the combination of its website and the e-mail were not misleading and did not relate to any unlawful transaction" such as attempting to sell unregistered securities to an ineligible investor. Pet. App. 68a; *see also* Stip. 38 ("did not concern the unlawful sale of unregistered securities"). The Court further noted that Bulldog proposed eleven (11) alternatives for regulating unregistered securities that would not involve the infringement of speech. Pet. App. 69a n.7. The Court also cited two documents submitted as stipulated exhibits: (i) an April 23, 2006 report to the Securities and Exchange Commission (SEC) from its Advisory Committee on Smaller Public Companies, recommending to the SEC that it relax prohibitions on general solicitation and advertising in certain respects, and (ii) a letter to the SEC, dated April 3, 2006, from the Committee on Securities Regulation of the New York City Bar, explaining that the majority of states permit a greater degree of general solicitation and advertising of unregistered securities than Massachusetts:

> The North American Securities Administrators Association, Inc. has adopted a resolution relating to Internet offers of securities and a model accredited investor exemption ("MAIE") each of which permits general solicitation and advertising. ... As of January 2006, thirty-one states had adopted the MAIE or a similar provision. It appears that these states have determined that permitting at least some form of general

> solicitation and advertising is not necessarily contrary to investor protection.

*Id.* at 83a n.15.

Nevertheless, the Superior Court held that the Secretary's enforcement of the Act was narrowly tailored to the state's interest in protecting the integrity of capital markets, "by ensuring that investors make decisions based on full and accurate information." *Id.* at 75a. The Court pointed to the testimony of Professor Joseph Franco of Suffolk University Law School, who opined that "[t]he ban on general advertising of unregistered securities ... provides a powerful incentive for issuers to register, despite the substantial costs of doing so, thereby maximizing the benefits of the registration system to the public as a whole." *Id.* at 78a. The Court acknowledged that "Professor Franco's opinion is based not on empirical research, but on economic theory and regulatory experience." *Id.* at 78a n.14. The Court also stated that "Professor Franco does not purport to quantify the effectiveness of the regulatory scheme, and the Court is not in a position to do so." *Id.* at 78a.

**5. The Supreme Judicial Court's decision.** The SJC affirmed. With respect to Bulldog's due process objection to the exercise of personal jurisdiction, the SJC noted that it had resolved Bulldog's argument in a previous decision. *Id.* at 4a n.4 ("We do not consider again the plaintiffs' personal jurisdiction arguments, which were resolved in favor of the Secretary in *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 219, 929 N.E.2d 293

(2010) (*Bulldog I*).") In that prior opinion, the SJC concluded that, "[b]y contacting Hickey, the plaintiffs purposefully availed themselves of the privilege of conducting business activities in Massachusetts and invoked the protection of Massachusetts law." *Id.* at 95a. The Court added that "exercising personal jurisdiction in these circumstances comports with fair play and substantial justice." *Id.*

With respect to Bulldog's First Amendment claim, the SJC began its analysis by agreeing with the Superior Court that "the principal type of expression at issue is commercial speech." *Id.* at 20a (internal quotation marks omitted). Further, the SJC recognized that "the parties have stipulated that the speech in this case concerns lawful activity and is not misleading." *Id.* at 34a.

However, the SJC held that the Secretary's action was consistent with the First Amendment, for two reasons. First, the SJC opined that the Secretary's action should be reviewed under the "reasonable relationship" test for disclosure requirements articulated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), rather than the four-part test for restrictions on commercial speech set forth in *Central Hudson*. The SJC concluded that "the prohibition on speech at issue in this case is incorporated into a disclosure regime that is designed to encourage, not suppress, full and fair disclosure." *Id.* at 28a. The SJC acknowledged that the Commonwealth was forbidden by federal law from achieving its goal directly, because federal law preempted Massachusetts from prohibiting sales of

unregistered securities to Massachusetts residents. *Id.* 40a n.19. But the SJC held that the speech prohibition nevertheless could survive the *Zauderer* reasonable relationship test. *Id*. at 32a.

Next, the SJC explained that, even under the *Central Hudson* test, the Secretary's action was constitutional because (quoting Professor Franco) "[t]he ban on general advertising of unregistered securities ... provides a powerful incentive for issuers to register" with government securities regulators. *Id*. at 37a. The SJC credited Professor Franco's testimony even though it acknowledged that he "did not base his conclusions on empirical evidence, but rather on experience and economic theory." *Id*. at 38a n.17.

With respect to the alternative regulations proposed by Bulldog that would achieve the government's interest without suppressing speech, the SJC again relied on Professor Franco's testimony to conclude that "Bulldog's proposal to concentrate enforcement at the point of sale rather than at the offer stage increases the risk that enforcement will come too late to prevent the harm or permit monetary recovery." *Id*. at 41a.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT REVIEW OF THE IMPORTANT FIRST AMENDMENT QUESTIONS PRESENTED BY THE STATE'S BAN ON SPEECH REGARDING UNREGISTERED SECURITIES TO SOME AUDIENCES BUT NOT OTHERS.

The SJC held that concededly truthful and non-misleading speech regarding Bulldog's financial products may be banned supposedly in order to provide an incentive for the speaker to register with securities regulators – even though federal law would not permit the state to achieve that result directly by prohibiting the sale of its products to state residents.

The SJC's decision conflicts with this Court's precedent in several respects and warrants plenary review. Although this Court has made clear that governments may prohibit false or misleading speech and may impose rules requiring the disclosure of specific facts to consumers to prevent deception, this case is remarkable because the Commonwealth stipulated below that the speech in question is *not* misleading and because the ban on speech is the *opposite* of a disclosure requirement – it flatly suppresses truthful speech in which consumers and non-consumers have an important interest. The prohibition on speech denies the public and press access to information published by issuers of unregistered securities. The ban operates as a "rich readers only" rule because it allows companies like Bulldog to speak only to financially sophisticated investors. It keeps members of the

public in the dark about these businesses, supposedly because they cannot be trusted to read what the rich can read.

This Court has repeatedly rejected the "highly paternalistic approach" that consumers should be "kept in ignorance." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976). "Broad prophylactic rules in the area of free expression are suspect." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (citation and internal quotation marks omitted). Thus, in recently overturning a Vermont law that restricted the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors, this Court stressed that "[t]he State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents." *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2672 (2011).

Accordingly, the SJC struggled to uphold this ban by asserting a post hoc rationalization (supported by no official pronouncements of state legislative or regulatory bodies but solely by the idiosyncratic testimony of a law professor known for his pro-regulatory stance) that runs afoul of decisions of this Court. The state's attempt to portray its ban on speech as a "disclosure" rule, its creation of an audience-based censorship regime (in which only some members of the public are allowed to receive Bulldog's speech), and its reliance on sheer speculation to satisfy the requirements of *Central Hudson*, all create conflicts with this Court's precedents that warrant plenary review.

### A. The State's Orwellian Attempt To Label Its Ban On Speech As A "Disclosure Rule" Warrants Review.

In *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court sustained a state court reprimand of an attorney for an advertisement that failed to disclose a contingent-fee client's potential liability for costs because it found that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule. *Id.* at 652. However, the Court overturned a reprimand for other advertisements that were neither false nor deceptive and indicated that the government was obliged to proceed with a scalpel rather than a sledgehammer – by "weed[ing] out accurate statements from those that are false or misleading," rather than by regulating speech generally. *Id.* at 644. The Court held that disclosure requirements are permissible only to the extent they "are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. and cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *Id.*

In this case, the SJC held that the ban on Bulldog's speech should be treated as a disclosure rule subject only to the *Zauderer* "reasonable relationship" test. This holding turns *Zauderer* upside down and conflicts with this Court's precedent in two respects.

### 1. This Court Has Never Held That A Ban On Truthful Speech May Be Treated As A Disclosure Rule.

Unlike *Zauderer*, this case concerns an outright ban on speech, not a "disclosure requirement." The direct effect of the Secretary's speech ban is to silence speech, not, as the SJC rationalized, to promote it. In truth, the ban is an anti-disclosure rule. The Secretary seeks to punish speech by companies like Bulldog, even where (as here) he concedes that it is not misleading. The SJC's baseless speculation, (which, in fact, has not come to pass), that coercing Bulldog to register its securities would bring it into a "superior" regulatory regime, does not change the form and structure of the state's ban on speech nor render it constitutional.

This Court has never treated such a prophylactic speech ban as a disclosure requirement. In *Zauderer*, this Court distinguished between restrictions on attorney speech (which it invalidated) and specific disclosure requirements (which it indicated could be upheld as a legitimate measure to avoid deception). The SJC's attempt to transmute a ban on truthful non-coercive speech into a disclosure rule conflicts with *Zauderer* itself.

The SJC's decision also conflicts with *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002), which held that the government may not use a prohibition on truthful speech as a condition to coerce individuals or companies to register or obtain a license. The speech ban in *Thompson* was conditional and intended to encourage pharmacies to comply with agency regulatory requirements from

which they are exempt. Indeed, the interest in *Thompson* went beyond encouraging mere registration; it included protecting consumers from unsafe and ineffective drugs. Even so, the Court held that a ban on expression could not be used to encourage submission to an administrative scheme, and it rejected the government's argument that "conditioning an exemption from the FDA approval process on refraining from advertising is an ideal way" of achieving the government's objective." *Id.* at 371. "If the First Amendment means anything, it means that regulating speech must be a last-not first-resort. Yet here it seems to have been the first strategy the Government thought to try." *Id.* at 373.

The SJC attempted to distinguish *Thompson* on the supposed ground that "[t]he ban on advertising at issue in *Thompson*, while theoretically conditional, was not designed to enforce a disclosure requirement imposed on drugs that obtain Federal approval." Pet. App. 29a. But the product licensing requirements in *Thompson* expressly included government-approved disclosures in labeling and advertising. 535 U.S. at 362-65. There is no relevant distinction between the two regulatory schemes.

Further, the Massachusetts scheme is hardly "designed" to enforce a disclosure requirement. The SJC could point to no official pronouncements by state legislative or regulatory bodies to the effect that enhanced disclosure was the aim of the Commonwealth's ban on speech – because there are none. The state court's after-the-fact invention of a disclosure-oriented governmental purpose was supported solely by the speculative testimony of one

law professor who acknowledged that his views were not shared by other respected practitioners.

Indeed, the SJC's assertion that disclosure was the purpose of the state's ban on speech was particularly problematic because of the stipulation that Bulldog's communications were not misleading and the court's acknowledgement that federal law precluded the state from directly achieving the goal of preventing the sale of unregistered securities. Pet. App. 40a n.19. The state's supposed objective of increased "disclosure" was simply a post hoc pretext for an unconstitutional speech restriction designed to coerce companies like Bulldog to register as a condition of selling securities – something that federal law concededly does not permit Massachusetts to mandate. This Court has never held that a state has an important or legitimate interest in pursuing an objective that federal law has ruled off-limits.

This Court's review is therefore manifestly required.

### 2. This Court Should Grant Review To Decide Whether The *Zauderer* Test Applies Where Prohibited Speech Is Not Misleading.

This Court should also grant review to address whether the *Zauderer* "reasonable relationship" standard governs disclosure requirements where speech is concededly truthful rather than inherently or even potentially misleading. *Zauderer* held that disclosures rules, justified by the need to "dissipate the possibility of consumer confusion or deception," are permissible if the "disclosure requirements are

reasonably related to the State's interest in preventing deception of customers." *Zauderer*, 471 U.S. at 651. In the *Zauderer* case itself, this Court described "the possibility of deception" as "self-evident." *Id*. at 652.

In contrast, this case involves speech that the Secretary stipulated was truthful and non-misleading. This Court has never applied *Zauderer* in such circumstances. In *Riley v. National Fed'n of the Blind of N.C., Inc*., 487 U.S. 781 (1988), for example, this Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions that were collected during the preceding year that were actually given to the charities for whom the fundraisers worked. This Court held that concerns about fraud and deception could be targeted directly. *Id.* at 800-01. Similarly, in *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994), the Court invalidated the punishment of a Certified Financial Planner ("CFP") under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State's "concern about the possibility of deception in hypothetical cases is not sufficient," *id.* at 145, and demanded actual evidence of harm. *Id.* at 145 n.10 ("Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled").

More recently, in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (2010), this Court sustained certain amendments to the

Bankruptcy Code, including provisions that require certain professionals providing debt-relief assistance to disclose in their advertisements that their help was related to bankruptcy relief and to identify themselves as debt-relief agencies. *Id.* at 1330. The Court observed that the relevant provisions targeted marketing claims that were inherently deceptive because they promised "debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs." *Id.* at 1340. Justice Thomas – in a statement with which no Member of the Court disagreed – explained that "a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, [are inherently likely to deceive or have in fact been deceptive]." *Id.* at 1339 (Thomas, J., concurring).

The SJC's judgment conflicts with these decisions, as well as with precedent in the federal courts of appeals.[2] In *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir.1996), for example, the Second Circuit invalidated a Vermont statute requiring dairy producers that used a synthetic growth hormone to disclose that fact on the label of their milk, in the absence of any evidence that the labeling was misleading or deceptive or that the mandated information was useful to consumers. The court of appeals held that the State's asserted

[2] The First Circuit Court of Appeals has sided with the SJC, making this Court's review all the more essential. *Pharmaceutical Care Mgt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006) ("we have found no cases limiting *Zauderer*" to interest in preventing consumer deception).

justifications for the statute – "strong consumer interest and the public's 'right to know'" – were "insufficient to justify compromising protected constitutional rights." *Id*. at 73. The court noted that, if the government were not required to adduce a factual predicate for a mandatory disclosure rule, there would be "no end to the information that states could require manufacturers to disclose." *Id*. at 74.

The SJC's decision also conflicts with decisions of the Eleventh Circuit applying the *Central Hudson* test rather than *Zauderer* to disclosure requirements in such circumstances. *See Borgner v. Brooks*, 284 F.3d 1204, 1210-13 (11th Cir. 2002) (applying *Central Hudson* to a statute requiring dentists to include disclaimers when advertising a specialty practice); *Mason v. Florida Bar*, 208 F.3d 952, 954-55 (11th Cir. 2000) (analyzing a Florida Bar disclosure requirement for "self laudatory" statements under the *Central Hudson* framework). Indeed, the Seventh Circuit has gone even further and applied strict scrutiny to a disclosure requirement. *See Entertainment Software Association v. Blagojevich*, 469 F.3d 641, 651-52 (7th Cir. 2006) (striking down a statute's requirement that video game retailers affix a four square-inch sticker reading "18" on any video game the state defined as "sexually explicit.).

This Court should grant review to make clear that the *Zauderer* test does not apply to disclosure requirements where the speech in question is not inherently coercive, deceptive or misleading.

### B. This Court Should Grant Review To Address The SJC's Holdings With Respect To The *Central Hudson* Test.

This Court should also grant review to address the SJC's aberrant and cavalier approach to the *Central Hudson* test. *Central Hudson* held that restrictions on non-misleading commercial speech regarding lawful activity are invalid unless the Government shows that they "directly advanc[e]" a substantial governmental interest and are narrowly tailored, i.e., "n[o] more extensive than is necessary to serve that interest." 447 U.S. at 566. The SJC's judgment upholding a prophylactic ban on speech raises important questions regarding the third and fourth prongs of the *Central Hudson* test, which require the state to prove that the speech restriction directly and materially advances the asserted governmental interest, as well as the existence of a reasonable fit.

#### 1. This Court Should Review The SJC's Reliance On Sheer Speculation.

The SJC held that the ban on Bulldog's speech is narrowly tailored to ensure the "integrity of capital markets," even though the speech is concededly truthful and therefore *enhances* integrity. Nor does Massachusetts deny that most states have already relaxed the ban on Internet advertising of unregistered securities, with no showing of ill effects.

Moreover, as the Secretary acknowledged, Bulldog's securities are not bought or sold on any public market. Bulldog's securities are limited partnership interests, the value of which is fixed as the proportionate share of the partnership's net

asset value. An investor may only buy them from and sell them to Bulldog at a fixed price, not a price set on any public market.

Nevertheless, the Commonwealth asserts that the ban on speech was somehow necessary to encourage companies like Bulldog to register their securities, even though the SJC found that federal law would preclude the state from achieving this interest directly. Pet. App. 40a n.19. The SJC declined to analyze in any detail any of the non-speech-suppressing alternatives proposed by Bulldog, and it uncritically accepted Professor Franco's assurance that the prophylactic ban on speech would be more effective. Pet. App. 40a-41a. Yet the SJC admitted that the state's justification for the prohibition on speech was unsupported by any empirical evidence – only unspecified "experience and economic theory." *Id.* at 38a n.17.

This Court should grant review to reiterate that such speculation and conjecture cannot provide an adequate basis for prophylactic prohibitions on speech. It is well established that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Further, this Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less

speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002).

This Court has previously rejected as inadequate the type of unsupported conjecture accepted by the SJC. In *Edenfield*, the Court stressed that the State had "present[ed] no studies that suggest personal solicitation ... creates the dangers ... the Board claims to fear." 507 U.S. at 771. Similarly, in *Ibanez*, this Court noted "the failure of the Board to point to any harm that is potentially real, not purely hypothetical." 512 U.S. at 146. *See also Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100-01 (1990) (plurality opinion) (reversing attorney punishment for "specialist" claim on letterhead because there was not "any factual finding of actual deception or misunderstanding").

In *Rubin v. Coors Brewing*, 514 U.S. 476 (1995), the Court held that a law prohibiting beer labels from displaying alcohol content was unconstitutional, explaining that "[b]oth the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars." 514 U.S. at 489. The Court noted the district court's comment that "'none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote ... strength wars.'" *Id.* (citations omitted). This Court also noted the availability of alternatives "such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength ..., or limiting the labeling ban only to malt liquors."

*Id.* at 490-91. The fact that "all of [these alternatives] could advance the Government's asserted interest in a manner less intrusive to ... First Amendment rights" indicated that the law was "more extensive than necessary." *Id.* at 491. *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance").

The SJC's decision conflicts with this solid wall of precedent, as well as with cases in federal courts of appeals holding that speculation cannot justify a restriction on speech under *Central Hudson*:

• *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (2010) (striking down a prohibition against the use of potentially misleading monikers in attorney advertising for want of evidence that such monikers actually mislead);

• *Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007) (striking down advertising restriction because *Central Hudson* requires at least "some evidence to establish that a speech regulation addresses actual harms with some basis in fact");

• *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir. 2005) (striking down bond requirement for advertisers where government failed to adduce sufficient supporting evidence).

### 2. This Court Should Review The Audience-Based Discrimination Contained In The Massachusetts Ban on Speech.

This Court should also grant certiorari to review the audience-based discrimination inherent in the Massachusetts ban as applied to Bulldog. There is no dispute that Bulldog is permitted to distribute the identical materials to accredited and financially sophisticated investors who certify themselves as such, or to investors with whom Bulldog has a prior relationship so that it is aware of their financial situation. Ironically, the *only* people to whom Bulldog is *not* permitted to supply the information are the very people who cannot act on it to buy securities (because Bulldog does not sell to them) – people like Hickey (an agent of a prominent law firm in litigation with Bulldog) and respondent Bloness (who sought the information for research, not to make purchases). Denying information to researchers, journalists, students, and other non-market participants cannot possibly promote the "integrity" of the market.

Moreover, the state's prohibition on speech discriminates according to the financial status of the audience. A selective "rich readers only" rule is precisely the kind of paternalistic snobbery that this Court has repeatedly condemned in commercial speech cases since *Virginia Pharmacy*.

The audience-based discrimination in this case parallels the content-based and speaker-based discrimination condemned in *Sorrell*, 131 S. Ct. at 2664-68, where this Court opined that a Vermont

law regulating physician prescription information failed constitutional scrutiny because "[t]he explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers." *Id.* at 2668. In *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999), this Court invalidated a prohibition on broadcasting "lottery information" that prevented some audiences but not others from hearing advertisements for gambling casinos. The Court explained that "[t]he operation of [the ban] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190.

This Court should similarly make clear that there is no room in the First Amendment for a selective "rich readers only" regulation of speech.

### C. The Question of Speech Rights In the Securities Context Is An Important Issue Warranting This Court's Review.

Speech relating to the sale of financial products is an important category of expression that has a palpable impact on the lives of millions of Americans – whether as investors, pension plan participants, journalists, scholars, social critics, or voters considering proposals for economic policies. *See Virginia Pharmacy*, 425 U.S. at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

Yet this Court has provided very little guidance on the constitutional standards governing regulation

of speech in the securities field. This case presents an excellent vehicle for this Court to address the First Amendment as it extends to laws restricting speech surrounding the marketing and sale of financial products and services.

Several decades ago, this Court made occasional and relatively oblique references to the application of the First Amendment in the context of the securities markets. For example, in *Lowe v. SEC*, 472 U.S. 181 (1985), the Court considered whether the SEC could enjoin the publication of an investment newsletter under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11)(D). Although originally granting certiorari to consider whether the SEC's prior restraint on speech violated the First Amendment, the Court construed the statute's language to afford an exemption to the publisher. 472 U.S. at 188-89, 211.

Otherwise, the Court has provided only indirect references to securities regulation. For example, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), an obscenity case, the Court opined "that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." *Id.* at 64. The Court has also stated in dictum (in a case involving attorneys' speech) that "the exchange of information about securities" is speech that is "regulated without offending the First Amendment" because it is a means of carrying out commercial activity. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). In

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (plurality opinion), a defamation action against a credit reporting agency, the Court cited *Ohralik* for the general proposition that certain types of speech fall outside the First Amendment's protective umbrella.[3]

Since these brief dicta were issued, this Court has clarified that the First Amendment does not contain blind-spots for particular categories of speech, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385-86 (1992), and does not permit the ad hoc addition of new categories even of presumptively unprotected expression. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (2011); *United States v. Stevens*, 130 S.Ct. 1577 (2010). This Court has also applied an invigorated form of the commercial speech doctrine to strike down restrictions involving the promotion of pharmaceuticals, alcohol, tobacco, and other products posing risks of bodily harm. *See Sorrell*, 131 S.Ct. 2653 (2011) (Vermont law that restricted the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual

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[3] *See also Riley*, 487 U.S. at 796 n.9 (referring to "the securities field" as involving "[p]urely commercial speech"); *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting from the dismissal of certiorari as improvidently granted) (securities regulation involves "a different balance of concerns" and "calls for different applications of First Amendment principles."). This Court's failure to address more directly the application of the First Amendment to securities regulations has led many regulators to believe that they enjoy a blanket exemption. Indeed, in this very case, the Secretary originally argued that because the challenged speech ban is a securities regulation, it did not implicate the First Amendment at all.

doctors); *Thompson*, 535 U.S. 357 (2002) (law banning advertising and promotion of certain compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (restrictions on tobacco advertising); *44 Liquormart*, 517 U.S. 484 (1996) (state ban on price advertising for alcoholic beverages); *Rubin*, 514 U.S. 476, 490 (1995) (restrictions on alcohol labeling).

The Court has invalidated restrictions on laws protecting consumers from financial risks, whether involving gambling, *Greater New Orleans Broadcasting Ass'n*, 527 U.S. 173 (1999) (striking down prohibition on broadcasting lottery information), or financial services. *Ibanez*, 512 U.S. 136 (1994) (invalidating reprimand of attorney who used CPA and CFP designations in advertising); *Edenfield*, 507 U.S. 761 (1993) (overturning ban on in-person solicitation by CPAs). Moreover, "several Members of the Court have expressed doubts about the *Central Hudson* analysis," *Lorillard*, 533 U.S. at 554, and have urged full First Amendment protection for commercial speech. *E.g., id.* at 572-75 (Thomas, J., concurring in part and concurring in judgment).

Given these developments in the law, it is important that this Court debunk the myth that securities regulation is categorically immune from First Amendment scrutiny, or that laws banning speech relating to financial products should be accorded more deference than laws regulating speech pertaining to legal and accounting services, pharmaceuticals, tobacco, or alcohol. This case presents an ideal vehicle for this Court to address the proper constitutional treatment of laws

governing speech in the securities context, because the speech at issue here is concededly truthful and the ban entirely prophylactic.

This Court's guidance is urgently needed. Scholars have predicted "an impending jurisprudential train wreck in the realm of securities regulation" and "the lack of any principled grounds for carving out securities regulation from the scope of the First Amendment." Michael Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WILLIAM & MARY L.REV. 613, 616, 619 (2006); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778 (2004) ("It might be hyperbole to describe the Securities and Exchange Commission as the Content Regulation Commission, but such a description would not be wholly inaccurate.").

## II. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THE PERSONAL JURISDICTION REQUIREMENTS FOR INTERNET "MINIMUM CONTACTS."

This Court has never decided how the personal jurisdiction test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), applies to "minimum contacts" created by the Internet. Last Term, in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2793-94 (2011), Justice Breyer, joined in a concurring opinion by Justice Alito, indicated that he would welcome an Internet case, particularly if the Solicitor General were asked to provide his views.

This case presents an excellent vehicle for addressing that legal question.[4] The SJC squarely held that the Due Process Clause of the Fourteenth Amendment permits a state to exercise personal jurisdiction over a non-resident defendant whose sole contacts consist of operating a website accessible from the state and sending a single concededly truthful and non-misleading e-mail to a resident of the state – even where the resident did not enter (and, in any event could never have entered) into a transaction with the defendant.[5]

Such fortuitous and attenuated contacts are even less significant than those found insufficient under the plurality opinion in *McIntyre*. *See* 131 S.Ct. at 2791 (plurality) (defendant company did not engage in conduct purposefully directed at New Jersey even though its products ended up in that state and allegedly caused injury there because "at no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the

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[4] The fact that, with respect to personal jurisdiction, the SJC adopted its views expressed in a previous proceeding involving Bulldog (Pet. App. 4a n.4), does not reduce the appropriateness of reviewing the question in this case. *Great Western Tel. Co. v. Burnham*, 162 U.S. 339 (1896); *Louisiana Nav. Co. v. Oyster Comm'n*, 226 U.S. 99, 102 (1912); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949).

[5] The extreme nature of the Massachusetts rule is illustrated by *LaFond v. Salomon North America, Inc.*, No. SUCV2008-01383-B (Mass. Super. Ct. Dec. 19, 2011), available at http://pdfserver.amlaw.com/nlj/LaFondvSalomonDec19Ruling.PDF, which found personal jurisdiction over a French ski equipment company based on a website accessible to Massachusetts residents through which consumers can locate area retail stores selling Salomon-branded products.

protection of its laws"). Similarly, there is no allegation or evidence that Bulldog advertised or promoted the existence of its website, or that the website contained any information specific to Massachusetts, let alone harmed any Massachusetts resident.

This Court should grant review to address the issue of Internet "minimum contacts." The question has percolated long enough, and the lower courts are deeply divided on the question. The most frequently cited lower-court decision on the subject was issued more than 14 years ago. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo* articulated a jurisdictional "sliding scale":

> At one end of the spectrum are situations where a defendant *clearly does business over the Internet*. ... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. ... The middle ground is occupied by *interactive* Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

*Id.* at 1124 (citations and footnotes omitted) (emphasis added).

The circuits are divided as to whether the Internet even requires new tests like *Zippo*. The Seventh and D.C. Circuits have squarely rejected an

Internet-specific approach like *Zippo* (*Illinois v. Hemi Group, LLC*, 622 F.3d 754, 758 (7th Cir. 2010); *GTE New Media Servs., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000)), while the Third Circuit has expressly adopted *Zippo* (*Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003)), and the Fourth Circuit has generated an Internet-specific body of personal jurisdiction doctrine even while disclaiming any technologically-motivated departure from traditional jurisdiction principles. *E.g.*, *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002).

Courts adopting *Zippo* have had difficulty applying it, especially in light of technological developments on the Internet. By 2011, virtually all websites have become "interactive" to some extent and are therefore governed by the hazy "middle ground" of *Zippo*, which offers little concrete guidance to courts. "[T]he vast middle area of the *Zippo* spectrum—where the website enables users to exchange information with the website operator—has created a black hole of doubt and confusion, as courts have struggled with the question of whether an interactive site constitutes purposeful availment ... compounding the problem is that, unlike the situation in 1997 when *Zippo* was decided, most websites today have interactive features." Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction,* 54 DEPAUL L. REV. 1147, 1166-67 (2005).

Courts have struggled with the significance of whether the defendant responded to an e-mail inquiry from the plaintiff (or vice-versa); whether the

recipient of e-mail, though a resident of the forum state, had the technical capacity to receive the e-mail anywhere in the country (or even abroad); whether the defendant's e-mail sought to and did create a business transaction (Bulldog's did not); and whether the defendant's e-mail was individually targeted or (as here) was little more than a form response by the company to a request from anyone, anywhere. *Cf. Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002) (despite e-mails between parties, "isolated nature of this transaction" precludes jurisdiction, especially when e-mails were initiated by plaintiff).

Accordingly, Internet personal jurisdiction is subject to widespread confusion in the lower courts. Scholars have identified "vast inconsistencies in the way that online activities are analyzed for purposes of determining personal jurisdiction," suggesting that "a split exists among the circuits as to whether minimum contacts online are analyzed according to the *Zippo* sliding scale test, the *Calder* [*v. Jones*, 465 U.S. 783 (1984)] effects test, or by a totality-of-the-circumstances test." Yasmin R. Tavakoli & David R. Yohannan, *Personal Jurisdiction in Cyberspace: Where Does it Begin, And Where Does it End?,* 23 NO. 1 INTELL. PROP. & TECH. L.J. 3 (Jan. 2011).

The uncertainty is debilitating for companies doing business on the Web, which cannot predict when and where they will be haled into remote jurisdictions based on tenuous connections. "[C]ourts, including the U.S. Courts of Appeals and state supreme courts, regularly interpret purposeful availment expansively to envelop a wide range of contacts," so that "would-be defendants —

particularly those using the Internet — cannot rely on [purposeful availment] to protect them from excessive exercise of jurisdiction." Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1832 (2003).

For example, a few courts, like the SJC, have held that a website and associated electronic contacts are enough to support personal jurisdiction. *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (website plus ability to register domain names); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 543, 555-56 (N.J. 2000) (defamatory statements on employer's electronic bulletin board).

Many other courts, in conflict with the SJC's judgment, have held that online activities in connection with a website do not support personal jurisdiction:

• *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (website that was interactive and commercial did not support jurisdiction because it was not directed at New Jersey and only two sales were consummated);

• *Carefirst of Maryland v. Carefirst Pregnancy Centers*, 334 F.3d 390, 400 (4th Cir. 2003) (no jurisdiction over "semi-interactive" website that accepted donations from Maryland because it "must have acted with the 'manifest intent' of targeting Marylanders") (citation omitted);

• *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (post on "interactive" site did not support jurisdiction in Texas because "the post to the bulletin

board here was presumably directed at the entire world, or perhaps just concerned U.S. citizens ... it was not directed especially at Texas");

• *BE2 LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) ("Even if these 20 people are active users who live in Illinois, the constitutional requirement of minimum contacts is not satisfied simply because a few residents have registered accounts on be2.net. To the contrary, these are attenuated contacts that could not give rise to personal jurisdiction without offending traditional notions of fair play and substantial justice.");

• *Lakin v. Prudential Securities*, 348 F.3d 704, 711 (8th Cir. 2003) (finding no jurisdiction and opining "[t]he circuits that have addressed which analytical model to apply to a case of general jurisdiction have split on whether to accept the *Zippo* 'sliding scale'");

• *Johnson v. Arden*, 614 F.3d 785, 797 (8th Cir. 2010) (no jurisdiction in absence of transaction: "whether specific personal jurisdiction could be conferred on the basis of an interactive website depends not just on the nature of the website but also on evidence that individuals in the forum state accessed the website in doing business with the defendant");

• *Boschett v. Hansings*, 539 F.3d 1011, 1019 (9th Cir. 2008) ("This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside, but otherwise created no 'substantial connection' or ongoing obligations there.");

• *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011) (no jurisdiction where defendant does not "intentionally direct[] his/her/its activity or operation *at* the forum state rather than just having the activity or operation accessible there");

• *Marschke v. Wratislaw*, 743 N.W.2d 402, 408 (S.D. 2007) (no jurisdiction based on e-Bay post, because "any contact created through the use of the Internet as an *advertising* medium is attenuated") (emphasis in original);

• *Hinners v. Robey*, 336 S.W.3d 891, 902 (Ky. 2011) ("a single eBay sale such as in the present case represents a quintessential example of a random, fortuitous, and attenuated contact");

• *Fenn v. MLeads Enterprises, Inc.*, 137 P.3d 706, 714 (Utah 2006) (single e-mail was not "substantial connection" and "is not the type of active contact that warrants automatic assertion of jurisdiction").

Still other courts have held that a website alone is not enough to trigger personal jurisdiction.[6]

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[6] *McBee v. Delica Co.*, 417 F.3d 107, 124 (1st Cir. 2005); *ALS Scan v. Digital Service Consultants,* 293 F.3d 707, 712-15 (4th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002); *Mink v. AAAA Development, LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999); *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004); *Mobile Anesthesiologists v. Anesthesia Associates*, 623 F.3d 440, 446 (7th Cir. 2010); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-20 (9th Cir. 1997); *Pebble Beach Company v. Caddy*, 453 F.3d 1151, 1157 (9th Cir. 2006); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999); *Juelich v. Yamazaki Mazak Optonics Corporation*, 682 N.W.2d 565, 574 (Minn. 2004); *Coggeshall v. Reproductive Endocrine Associates of Charlotte (REACH)*, 665 S.E.2d 476, 479 (S.C. 2007).

Jurisdictional rules in particular should be clear and predictable. The law of Internet personal jurisdiction has proven to be neither. As Judge Gertner recently noted:

> The key issue, and one that has not been addressed by the First Circuit or the Supreme Court, is whether a website located outside of the forum and which forum residents can access satisfies the purposeful availment test for personal jurisdiction.
>
> *Zippo* and its progeny do not provide much guidance to courts in determining what kind of "something more" is required to render an interactive website subject to a court's personal jurisdiction. ... In the era of Facebook, where most websites now allow users to "share" an article, choose to "like" a particular page, add comments, and e-mail the site owners, the ... reasoning may now extend to moderately interactive sites as well. If virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum-unless Congress dictates otherwise. Interactivity alone cannot be the linchpin for personal jurisdiction.

*Sportschannel New England, LLP v. Fancaster, Inc.*, 2010 WL 3895177, *5 (D. Mass., Oct. 1, 2010).

Given the conflict and confusion in the lower courts with respect to Internet "minimum contacts," this Court's review is necessary to establish greater uniformity and certainty.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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Dated: February 1, 2012

## APPENDIX TABLE OF CONTENTS

# APPENDIX A

## Opinion of the Supreme Judicial Court

**SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK.**

BULLDOG INVESTORS GENERAL PARTNERSHIP & OTHERS[1]

*V.*

SECRETARY OF THE COMMONWEALTH.

SJC–10756.
Submitted Jan. 6, 2011.
Decided Sept. 22, 2011.

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, & GANTS, JJ.

GANTS, J.

On January 31, 2007, the Enforcement Section of the Securities Division of the office of the Secretary of the Commonwealth (Secretary) filed an administrative complaint alleging that three "hedge funds" offered by Bulldog Investors General Partnership operating under the trade name "Bulldog Investors" had violated § 301 of G.L. c. 110A of the Massachusetts Uniform Securities Act

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[1] Opportunity Partners, L.P.; Full Value Partners, L.P.; Opportunity Income Plus Fund, L.P.; Kimball & Winthrop, Inc.; Full Value Advisors, LLC; SPAR Advisors, LLC; Phillip Goldstein; Steven Samuels; Andrew Dakos; Rajeev Das; and Leonard Bloness.

(Massachusetts act) by offering unregistered securities to a Massachusetts resident through a publicly available Web site and an electronic mail (e-mail) message. The respondents to this enforcement action included the Bulldog Investors General Partnership and various general partners and principals (collectively, Bulldog).[2] The Secretary adopted the hearing officer's finding of a violation, and ordered Bulldog to cease and desist from committing any further violations of the Massachusetts act and to take all necessary actions to ensure that future offers and sales of securities complied with § 301 of the Massachusetts act.[3]

Bulldog filed two actions challenging the administrative decision. One action sought judicial

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[2] Among the general partners of Bulldog Investors General Partnership are the plaintiffs Opportunity Partners, L.P.; Full Value Partners, L.P.; and Opportunity Income Plus Fund, L.P., each of which is a hedge fund. The plaintiff Kimball & Winthrop, Inc., is the sole managing general partner of Bulldog Investors General Partnership and the sole general partner of Opportunity Partners, L.P. The plaintiff Full Value Advisors, LLC, is the sole general partner of Full Value Partners, L.P. The plaintiff SPAR Advisors, LLC, is the sole general partner of Opportunity Income Plus Fund, L.P. The plaintiffs Phillip Goldstein, Steven Samuels, Andrew Dakos, and Rajeev Das are each managing members of one or more of the above named limited liability corporations. In addition, Goldstein is president and Samuels is vice-president of Kimball & Winthrop, Inc. Each of these entities and individuals (collectively, Bulldog) was a respondent in the January 31, 2007, administrative complaint.

[3] The Secretary of the Commonwealth (Secretary) also ordered Bulldog to pay an administrative fine of $25,000, the maximum allowable under §407A(a) of G.L. c. 110A, the Massachusetts Uniform Securities Act (Massachusetts act).

review pursuant to G.L. c. 30A, § 14, claiming that Bulldog's contacts with the Commonwealth were insufficient to permit the Secretary to exercise personal jurisdiction, that Bulldog's communications with the Massachusetts resident did not offer unregistered securities in violation of the Massachusetts act, and that the Secretary's enforcement proceeding and order violated Bulldog's constitutional right to free speech. *See Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 213–214, 929 N.E.2d 293 (2010) (*Bulldog I*). The second action, the case now before us on appeal, sought relief under the Federal civil rights statute, 42 U.S.C. § 1983 (2006), from what Bulldog contends was the violation of free speech and due process rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. Leonard Bloness (Bloness), who has no interest in investing in any Bulldog security but wishes to read the information that was contained in Bulldog's Web site and receive other information about Bulldog's securities, is also a plaintiff in the § 1983 action.

In the G.L. c. 30A, § 14, action, a judge in the Superior Court entered judgment affirming the Secretary's final order and we affirmed that judgment, concluding that personal jurisdiction over the plaintiffs was both statutorily authorized and consistent with due process, and that the Secretary correctly determined that the plaintiffs violated the Massachusetts act by sending to a Massachusetts resident materials that constituted an offer of unregistered securities. *Bulldog I, supra* at 211, 929 N.E.2d 293. We also concluded that Bulldog's First

Amendment claim was not properly before us where the plaintiffs had chosen to bring a separate § 1983 action in order to raise that claim, rather than press it in their G.L. c. 30A, § 14, action. *Id*. at 211, 220, 929 N.E.2d 293.

In the § 1983 case, the judge dismissed the plaintiffs' due process claims, which were based on a claimed lack of personal jurisdiction, and conducted a bench trial on the First Amendment claims. The evidence at trial consisted of the parties' stipulations of fact; the administrative record and other agreed-on exhibits; and the testimony and report of the Secretary's expert witness, Joseph A. Franco, an expert on securities regulation. In a carefully reasoned decision, the judge concluded that the challenged statute, regulations, and enforcement action did not violate the First Amendment rights of Bulldog or Bloness, and entered judgment for the Secretary. The plaintiffs appealed, and we transferred the appeal to this court on our own motion. We now affirm.[4][5]

I. Factual background. The following facts were found by the judge or are undisputed in the record. From about June 9, 2005 to January 5, 2007, Bulldog maintained an interactive Web site that

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[4] We do not consider again the plaintiffs' personal jurisdiction arguments, which were resolved in favor of the Secretary in *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 219, 929 N.E.2d 293 (2010) (*Bulldog I*).

[5] We acknowledge the amicus brief submitted by John Berlau, James McRitchie, Antony Page, Andrew Weinman, and Deirdre Brennan.

provided information about its investment products. Any visitor to the Web site could view an opening home page, a "press room" containing links to various media articles, and a printable brochure that described the three hedge funds and gave a brief summary of each fund's approach to investment. For example, one of the hedge funds, Full Value Partners, L.P., was described in the brochure as "a fund that concentrates on taking substantial positions in undervalued operating companies and closed-end mutual funds [and] acts as a catalyst to 'unlock' these values through proprietary means." The brochure also stated that, "[s]ince its inception, Bulldog Investors has delivered a net average annual return significantly higher than that of the S & P [Standard & Poor's] 500 Index. Moreover, Bulldog has performed especially well in difficult investment periods like 2000 through 2002."

A visitor to the Web site could obtain additional information only by clicking the "I Agree" button to the following disclaimer on the opening screen:

> "The information is available for information purposes only and does not constitute solicitation as to any investment service or product and is not an invitation to subscribe for shares or units in any fund herein. For the avoidance of doubt this Web site may not be used for the purpose of an offer or solicitation in any jurisdiction or in any circumstances in which such offer or solicitation is unlawful or not authorized. Whilst every effort has been made to ensure the accuracy of the information herein, Bulldog Investors accepts no responsibility

> for the accuracy of information, nor the reasonableness of the conclusions based upon such information, which has been obtained from third parties. The pages referring specifically to investment products offered by Bulldog Investors are only available for view with a username and password, which can be obtained by contacting the company on the Registration Form provided. The value of investments and the income from them can fall as well as rise. Past performance is not a guarantee of future performance and investors may not get back the full amount invested. Changes in the rates of exchange may affect the value of investments."

A follow-up screen invited the visitor to fill out a registration form that asked for the visitor's name, address, telephone and facsimile machine numbers, and an e-mail address. This registration page contained the same disclaimer as appeared on the opening screen of the Bulldog Web site, and the visitor was once again required to indicate agreement.

On November 10, 2006, Brendan Hickey registered on the Bulldog Investors Web site by providing this information, including his Massachusetts address. Shortly after Hickey's registration, Steven Samuels, one of the managers of Bulldog Investors, sent an e-mail to Hickey that contained several attachments. Samuels's e-mail thanked Hickey for his interest in Bulldog and stated:

> "While we are proud to have one of the best long term records in the business, it is very

> difficult to adequately describe what, why, and how we do what we do in a quick response to an email inquiry.... I have attached some basic information on our management including performance and philosophy. I would be more than happy to spend a few minutes on the phone if you wish to discuss in more detail. Please contact me at [telephone number provided]."

The attachments to Samuels' e-mail included press articles, a presentation about Bulldog's investment philosophy, managers, investment vehicles, and performance, and a letter to "Dear Partner" from two fund managers. The letter compared one hedge fund's returns to the S & P 500, described several of the fund's investments, and discussed successful litigation by fund managers against the Securities and Exchange Commission (SEC). The parties have stipulated that, but for the administrative proceeding and the sanctions imposed, Bulldog would provide other Massachusetts residents, including Bloness, with access to the same type of information that was available to Hickey through the Web site and e-mail communication.

II. The Federal Securities Act of 1933. Congress enacted the Securities Act of 1933 (1933 act), 15 U.S.C. §§ 77a et seq. (2006), to address the problems that were thought to have caused the stock market crash of 1929 and the Great Depression that followed. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Securities & Exch. Comm'n v. Capital Gains Research Bur., Inc.*, 375 U.S. 180, 186–187, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963). The overarching strategy of the

1933 act was to protect investors by requiring the disclosures that were necessary for informed decision-making. *See Securities & Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 119, 124, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). *See also Pinter v. Dahl*, 486 U.S. 622, 638, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988); *Ernst & Ernst v. Hochfelder, supra* at 195, 96 S.Ct. 1375; *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40, 61 S.Ct. 414, 85 L.Ed. 500 (1941). As acknowledged in its preamble, the 1933 act aimed to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails." Pub.L. No. 73–22, 48 Stat. 74 (May 27, 1933), 15 U.S.C. §§ 77a et seq. In urging Congress to enact the legislation, President Franklin D. Roosevelt explained that, while the government should not be in the business of guaranteeing the soundness of any particular security, it had an obligation "to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public." Message from the President—Regulation of Security Issues, presented to the Senate, 77 Cong. Rec. 937 (March 29, 1933).

Under the 1933 act, an issuer of securities may not "offer" or sell a security unless the issuer has filed a registration statement as to that security with the SEC.[6] 15 U.S.C. § 77e(c). The registration

[6] No offer may be made before a registration statement is filed. 15 U.S.C. § 77e(c) (2006). After a registration statement has been filed, but before its effective date, certain offers may be made, but sales must await the effective date. *See* 15 U.S.C. §§

statement must provide detailed information about the security to be offered and the issuer's management and assets, including financial statements certified by an independent accountant. 15 U.S.C. §§ 77g, 77aa.

The 1933 act defines an "offer" broadly, encompassing "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(a)(3). Pursuant to the 1933 act, therefore, offers "are not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security. Rather, ... they include 'any document which is designed to procure orders for a security.' " *Matter of Carl M. Loeb, Rhoades & Co.*, 38 S.E.C. 843, 848 (1959), quoting Security Act Release No. 2623 (July 25, 1941). *See Securities & Exch. Comm'n v. Cavanagh*, 155 F.3d 129, 135 (2d Cir.1998); *Diskin v. Lomasney & Co.*, 452 F.2d 871, 875 (2d Cir.1971). Determining whether a communication is an offer may involve "[d]ifficult and close questions of fact," and "depends upon all the facts, and the surrounding circumstances including the nature, source, distribution, timing, and apparent purpose and effect of the published material." *Matter of Carl M. Loeb, Rhoades & Co., supra* at 853 & n. 20. Because an offer includes "every ... solicitation of an offer to buy," 15 U.S.C. § 77b(a)(3), the SEC has declared that the 1933 act "prohibits issuers ... from initiating a public sales campaign prior to the filing of a

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77e(b)(1), 77j (2006). *See also* 1 L. Loss, J. Seligman, & T. Parades, SECURITIES REGULATION 695–722 (4th ed. 2006).

registration statement by means of publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities." *Matter of Carl M. Loeb, Rhoades & Co., supra* at 850.

The 1933 act, however, exempts certain securities and transactions from the registration requirement, including "transactions by an issuer not involving any public offering," through what is known as the private offering exemption. *See* 15 U.S.C. § 77d(2). The meaning of this exemption has been developed through case law and SEC guidance. In *Securities & Exch. Comm'n v. Ralston Purina Co., supra* at 124–125, 73 S.Ct. 981, the United States Supreme Court determined that the "natural way to interpret the private offering exemption is in light of the statutory purpose," and concluded that a private offering is an offer of securities to those who have no practical need for the registration statement because they have been "shown to be able to fend for themselves." In evaluating whether an offering is public or private, the courts and the SEC have considered the number of offerees, their access to information, the size or circumstances of the offering, the "sophistication" of the offerees in financial matters, and whether there is a preexisting relationship between the issuer and the offerees. *See, e.g., Securities & Exch. Comm'n v. Continental Tobacco Co. of S.C.*, 463 F.2d 137, 158 (5th Cir.1972); *Securities & Exch. Comm'n v. Kenton Capital, Ltd.*, 69 F.Supp.2d 1, 11 (D.D.C.1998); *Use of Electronic Media*, SEC Release Nos. 33–7856, 34–42728, IC–24426, 65 Fed.Reg. 25,843, 25,852 (2000); 3 L. Loss, J. Seligman, & T. Parades, SECURITIES

REGULATION 270–293 (4th ed. 2008). Because public advertising that is designed to procure orders for a security constitutes a public "offer" under the 1933 act, "[p]ublic advertising ... would, of course, be incompatible with a claim of private offering." Non–Public Offering Exemption, SEC Release No. 33–4552, 27 Fed.Reg. 11,316, 11,316 (1962). *See Hill York Corp. v. American Int'l Franchises, Inc.*, 448 F.2d 680, 689 (5th Cir.1971).

To provide more certainty than the case law offers, the SEC promulgated regulation D, which provides a safe harbor for unregistered offerings that satisfy certain conditions. *See* 17 C.F.R. § 230.506 (2010). Among these, an issuer relying on regulation D may offer or sell only to "[a]ccredited investors"[7] and to no more than thirty-five nonaccredited but sophisticated investors who have "such knowledge and experience in financial and business matters that [they are] capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. §§ 230.501(e), 230.506(b)(2) (2010). The regulations further provide that an issuer relying on regulation D may not "offer or sell the securities by any form of general solicitation or general advertising." 17 C.F.R. §§ 230.502(c), 230.506(b)(1) (2010). Applying these principles in the context of Internet Web sites, the SEC has concluded that the use of a Web site to offer or sell unregistered securities constitutes a

[7] An "[a]ccredited investor" is defined to include, among others, banks, insurance companies, registered investment companies, registered broker-dealers, and natural persons with an individual net worth exceeding $1 million or with annual income exceeding $200,000. 17 C.F.R. § 230.501(a) (2010).

"general solicitation" that disqualifies the offering as "private" unless the solicitation is contained in a password-restricted Web page that becomes available to a prospective investor who has been reasonably determined to be "accredited" or "sophisticated" within the meaning of regulation D. *See* Use of Electronic Media, SEC Release Nos. 33–7856, 34–42728, IC–24426, supra at 25,851–25,852; Lamp Techs., Inc., SEC No–Action Letter, 1997 SEC No–Act. LEXIS 638, at *5–6 (May 29, 1997) (placement of private offering materials on Web site inconsistent with prohibition against general advertising, unless procedures limit access to accredited investors).

III. The Massachusetts act. Massachusetts has adopted the Uniform Securities Act, which largely tracks the requirements of Federal securities law. See St.1972, c. 694, § 1. *See* also G.L. c. 110A, § 415 (Massachusetts act "shall be so construed as to effectuate its general purpose ... to coordinate the interpretation and administration of this [act] with the related federal regulation"). The Massachusetts act prohibits the offer or sale of securities in the Commonwealth unless the securities are registered, the security or transaction is exempt, or the security is a Federal covered security, that is, a security exempt from State regulation by imposition of Federal law. G.L. c. 110A, § 301. *See* 15 U.S.C. § 77r; G.L. c. 110A, § 306. As under the 1933 act, an "offer" is not limited to the common-law definition of the term, *see Bulldog I, supra* at 220, 929 N.E.2d 293, but is defined to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security

or interest in a security for value." G.L. c. 110A, § 401 (i ) (2).

Massachusetts permits several exemptions from its registration requirement; some we mention here. *See* G.L. c. 110A, § 402. First, as required by Federal law, *see* 15 U.S.C. § 77r(b)(4)(D), Massachusetts exempts any securities transaction that falls within the safe harbor of rule 506 of the SEC's regulation D, which requires compliance with the prohibition against general advertising in rule 502(c) of regulation D. *See* 950 Code Mass. Regs. § 14.402(B)(13)(l ) (2000). A second exemption applies to certain transactions that follow an offer directed at no more than twenty-five people other than broker-dealers or banks and other financial institutions. G.L. c. 110A, § 402(b)(9). Like regulation D, this exemption is not available if the issuer or anyone on the issuer's behalf "offers or sells the securities by any form of general advertising." 950 Code Mass. Regs. § 14.402(B)(9)(e) (2000). Massachusetts also exempts an offer of securities from registration in Massachusetts where the offer is communicated through the Internet, is not directed specifically to any investors in the Commonwealth, and no unregistered, nonexempt sales are made in the Commonwealth. 950 Code Mass. Regs. § 14.402(B)(13)(m) (2000).[8]

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[8] Under 950 Code Mass. Regs. § 14.402(B)(13)(m) (2000), if an online offer "contains indications that the offer is not being made in jurisdictions where it is not registered or appropriately exempted, then it will be presumed that this offer is not being specifically directed to prospective investors in the Commonwealth." Here, even if the disclaimer on Bulldog's Web site entitled it to a presumption that it had complied with the

IV. Discussion. The plaintiffs argue that Massachusetts securities laws that prevent Bulldog from offering securities through general advertisements are overbroad and violate the First Amendment, applied to the States through the due process clause of the Fourteenth Amendment. They specifically challenge the constitutionality of the regulations that prohibit general solicitation and advertising by anyone offering unregistered securities. *See* 950 Code Mass. Regs. § 14.402(B)(9)(e), § 14.402(B)(13)(l); 17 C.F.R. § 230.502(c). Because 950 Code Mass. Regs. § 14.402(B)(13)(l ) incorporates the prohibition against general solicitation and advertising of unregistered securities in rule 502(c) of the SEC's regulation D, the plaintiffs' claims implicitly challenge the constitutionality of this provision of Federal regulation. In short, the plaintiffs contend that the injunctive relief and administrative sanctions issued against them must be vacated because they are constitutionally entitled to maintain their Web site and communicate with any interested person, such as Bloness. We first consider whether the challenged provisions of Massachusetts securities law are constitutionally valid as applied to the communications at issue in this case, and, if having determined that they are valid, proceed to the overbreadth challenge. *Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–485, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (*Fox*).

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Massachusetts exemption for Internet offers, Bulldog's electronic mail (e-mail) solicitation to Hickey after he provided a Massachusetts address rebutted that presumption. *See Bulldog I, supra* at 218, 221, 929 N.E.2d 293.

1. First Amendment protection. The Secretary argues that we need not consider the First Amendment questions because an issuer's statements about its securities do not implicate the First Amendment. However, we find no basis for any exception to the First Amendment for speech that is restricted as part of the regulation of securities. We recognize that "the State does not lose its power to regulate commercial activity ... whenever speech is a component of that activity," and note that the Supreme Court has stated in dicta that "the exchange of information about securities" is speech that is "regulated without offending the First Amendment" because it is a means of carrying out such commercial activity. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). But we do not equate the communications at issue here with commercial conduct of which speech is merely an incidental part. In *Bulldog I, supra*, we concluded that, viewed together, the e-mail to Hickey and the presentation, press articles, letter, and other materials that were attached to the e-mail constituted an offer of securities because they "were designed to stimulate interest in Bulldog's funds." The documents that comprised this offer are forms of expression akin to the advertising materials addressed in numerous First Amendment cases involving commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (direct-mail solicitations); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (informational pamphlets). Because such commercial advertising implicates the

First Amendment, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–765, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (*Virginia Bd. of Pharmacy*), we conclude that Bulldog's communications concerning its financial products, management, and investment philosophy are speech protected by the First Amendment.

2. The nature of the speech at issue. Having determined that the communications at issue are protected under the First Amendment, we next must determine "whether the principal type of expression at issue is commercial speech." *Fox, supra* at 473, 109 S.Ct. 3028. This determination is of consequence because commercial speech has been said to occupy a "subordinate position in the scale of First Amendment values," where "modes of regulation [are allowed] that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Ass'n, supra*. Commercial speech is afforded less protection because it is "'linked inextricably' with the commercial arrangement that it proposes," such that "the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n. 9, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion).[9]

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[9] The United States Supreme Court has also noted that distinguishing commercial from noncommercial speech protects the latter because "parity of constitutional protection ... could

But commercial speech is still afforded significant constitutional protection because of its importance to consumers and society as a whole. *See Virginia Bd. of Pharmacy, supra.* Commercial *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y* speech "assists consumers and furthers the societal interest in the fullest possible dissemination of information,"., 447 U.S. 557, 561–562, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (*Central Hudson*), and serves an important "public interest" in ensuring that decisions about the allocation of resources in a free enterprise economy are "intelligent and well informed." *Virginia Bd. of Pharmacy, supra* at 765, 96 S.Ct. 1817. *See also Central Hudson, supra* at 567, 100 S.Ct. 2343 (protecting information available for consumers is "purpose of the First Amendment"); *Ohralik v. Ohio State Bar Ass'n, supra* at 454, 98 S.Ct. 1912 (First Amendment safeguards "society's interest ... in assuring the free flow of commercial information"). As such, the protection received by commercial speech is "qualified but nonetheless substantial." *Bolger v. Youngs Drug Prods. Corp., supra* at 68, 103 S.Ct. 2875.

Commercial speech is most commonly defined as that which "propose[s] a commercial transaction." *Fox, supra* at 473, 109 S.Ct. 3028, quoting *Virginia Bd. of Pharmacy, supra* at 762, 96 S.Ct. 1817. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United*

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invite dilution, simply by a leveling process, of the force of the Amendment's guarantee" as to noncommercial speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

*States*, —— U.S. ——, 130 S.Ct. 1324, 1339, 176 L.Ed.2d 79 (2010) (*Milavetz*) (advertising by debt relief agencies); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 366, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (*Thompson*) (advertising and solicitation of prescriptions for "compounded drugs"); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (broadcasting casino advertising); *Florida Bar v. Went For It, Inc., supra* (attorney direct-mail solicitations); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (publication of alcohol content on beer labels); *Ibanez v. Florida Dep't of Business & Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 138, 142, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994) (attorney's publication of professional certifications in "Yellow Pages" listings and on business cards and other materials). While it is difficult to delineate precisely the range of expression that falls into the commercial speech category, *see Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), speech "advertising the price of a product or arguing its merits" is a "typical" example of commercial speech. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988).

Some commercial speech may be so "inextricably intertwined" with noncommercial speech as to lose its commercial character, where "the nature of the speech taken as a whole" is non-commercial. *See Riley v. National Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669

(1988). But the mere presence of non-commercial speech in commercial materials does not alter the commercial character of the surrounding communications. *See Fox, supra* at 473–474, 109 S.Ct. 3028 ("Tupperware parties" were commercial speech even though they included discussion of financial responsibility and home economics, where "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares"). Communications may thus be categorized as commercial speech "notwithstanding the fact that they contain discussions of important public issues." *Bolger v. Youngs Drug Prods. Corp., supra* at 67–68, 103 S.Ct. 2875 (condom manufacturer's pamphlet discussing venereal disease and also promoting specific products was commercial speech). *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637–638 & n. 7, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (*Zauderer*) (attorney's advertisement offering representation and giving information about legal rights to women alleging injury caused by particular intrauterine device was commercial speech). Because "[a] company has the full panoply of protections available to its direct comments on public issues ... there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Bolger v. Youngs Drug Prods. Corp., supra* at 68, 103 S.Ct. 2875.

Here, having already concluded that the communications at issue were "designed to stimulate interest in Bulldog's funds," and "constituted a solicitation of an offer to buy unregistered

securities," *Bulldog I, supra* at 220, 929 N.E.2d 293, we think it plain that "the principal type of expression at issue is commercial speech." *Fox, supra* at 473, 109 S.Ct. 3028. Accordingly, we proceed to consider whether the challenged provisions of Massachusetts securities law are permissible regulations of commercial speech.

3. The two standards of review for commercial speech. The United States Supreme Court has articulated two distinct standards of review that are applicable in commercial speech cases. Where the government prohibits a category of commercial speech, the Supreme Court applies an intermediate scrutiny test articulated in *Central Hudson, supra* at 566, 100 S.Ct. 2343, requiring that restrictions "be tailored in a reasonable manner to serve a substantial state interest." *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (striking down ban on in-person solicitation by certified public accountants). *See Sorrell v. IMS Health Inc.*, ——U.S. ——, 131 S.Ct. 2653, 2667–2668, 180 L.Ed.2d 544 (2011) (State must show "statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest"). However, where the government requires the disclosure of commercial information, the Court applies a more generous test, upholding disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Zauderer, supra* at 650, 651, 105 S.Ct. 2265 (recognizing "material

differences between disclosure requirements and outright prohibitions on speech").[10]

In *Virginia Bd. of Pharmacy, supra* at 770, 96 S.Ct. 1817, the case in which commercial speech was first held to be protected by the First Amendment, the Court held unconstitutional a State statute that prohibited pharmacists from advertising the price of any prescription drug. The Court recognized that the State's justification for the advertising ban—the fear that price competition would diminish the professionalism of pharmacists and the quality of the services they provide—"rests in large measure on the advantages of [citizens] being kept in ignorance." *Id.* at 769, 96 S.Ct. 1817. The Court noted that the "alternative to this highly paternalistic approach ... is to assume that this information is not in itself harmful, that people will perceive their own best

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[10] By contrast, the content of noncommercial speech is fully protected under the First Amendment to the United States Constitution and may be regulated by the government only where such regulation is the least restrictive means to further a compelling State interest. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Strict scrutiny may also be applied to laws that compel particular noncommercial disclosures. *See Riley v. National Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796–797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Unlike laws requiring particular commercial speech disclosures, such laws attempt to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (*Zauderer*), quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id*. at 770, 96 S.Ct. 1817. Recognizing that the public interest is served where private economic decisions are "intelligent and well informed," the Court concluded that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id*. at 765, 770, 96 S.Ct. 1817.

Since then, the Supreme Court has consistently articulated two key principles in the commercial speech cases: it views "as dubious any justification that is based on the benefits of public ignorance," and it has prescribed that the "preferred remedy" for the risk to the public of inaccurate or incomplete information "is more disclosure, rather than less." *Bates v. State Bar of Ariz*., 433 U.S. 350, 375, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). *See Thompson, supra* at 374, 122 S.Ct. 1497 ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information").

Applying these principles, where the government has suppressed commercial speech and where its suppression has diminished consumers' ability to make informed and reliable decisions regarding lawful purchases, the Supreme Court has applied the intermediate scrutiny of the *Central Hudson* test (or, before *Central Hudson*, a variant of the test), and, with few exceptions, struck down laws suppressing

commercial speech. *See, e.g., Thompson, supra* (striking down provisions of Federal statute that prohibited pharmacists from advertising compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (striking down restrictions on outdoor and in-store advertising of cigarettes, smokeless tobacco, and cigars); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (striking down State statute prohibiting retail price advertising of alcoholic beverages); *Central Hudson, supra* (striking down ban on advertising by electric utilities that promoted use of electricity); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (striking down town ordinance prohibiting posting of "for sale" signs on homes in order to stem flight of white home owners from integrated community).[11] Consistent with the

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[11] Where the Court has applied the intermediate scrutiny test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (*Central Hudson*), and upheld a restriction on speech, the challenged restriction generally addressed concerns relating to the means of delivering the regulated speech, rather than the content of the speech itself. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), the Supreme Court held that a State bar could discipline an attorney for visiting an accident victim in her hospital room and asking her to sign a representation agreement. The Court reasoned that in-person solicitation inherently exerted pressure on the potential client to provide an immediate response to the offer of legal representation, and thereby encouraged "speedy and perhaps uninformed decisionmaking"; solicitation of this sort could well "disserve the individual and societal interest ... in facilitating 'informed and reliable decisionmaking.'" *Id*. at 457, 458, 98 S.Ct. 1912, quoting *Bates v. State Bar of Ariz*., 433 U.S. 350, 364, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). *See Florida*

disfavor that these cases demonstrate for laws that suppress information in an attempt to influence consumer choice, the Supreme Court recently struck down a State statute that burdened speech in order to "tilt public debate in a preferred direction" and discourage demand for a particular disfavored product (in this case, higher priced brand-name drugs). *See Sorrell v. IMS Health Inc., supra* at 2670–2671.[12]

By contrast, where a government has required particular commercial disclosures, the Supreme

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*Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding Florida bar rules prohibiting attorneys from sending targeted mail solicitations to victims and relatives for thirty days following accident or disaster, concluding that such solicitation is intrusion on privacy that reflects poorly on legal profession). The Court has also upheld a restriction on broadcast advertising where the services advertised were illegal in the broadcaster's State. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (upholding Federal statute barring broadcast of lottery advertising by broadcasters located in States that prohibit lotteries).

[12] In *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011), the Supreme Court declared that, where speech is restricted or burdened based on its content, "heightened judicial scrutiny is warranted." The Court explained, however, that heightened scrutiny is required "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Unlike the speech restriction at issue in *Sorrell v. IMS Health Inc., supra*, the regulation of securities offers at issue in this case is intended to ensure the availability of full and fair information about securities, and does not arise "because of disagreement with the message."

Court has recognized that laws that compel disclosure are consistent with the core principles that underlie the commercial speech doctrine because they are designed to diminish public ignorance and make accurate and complete information available. *See Zauderer, supra* at 651, 105 S.Ct. 2265. Where an advertiser is required to disclose "purely factual and uncontroversial information," the advertiser's rights "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id. See Milavetz, supra* at 1339–1340 (applying *Zauderer* reasonable relation test to requirement that agencies providing debt relief services disclose that debt relief may involve bankruptcy relief). In addition, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," *Zauderer, supra* at 651, 105 S.Ct. 2265, the Court has repeatedly stated in commercial speech cases that a disclosure requirement is a less burdensome and more appropriate alternative. *See Thompson, supra* at 376, 122 S.Ct. 1497; *Central Hudson, supra* at 570–571, 100 S.Ct. 2343; *Virginia Bd. of Pharmacy, supra* at 771–772 n. 24, 96 S.Ct. 1817. *See also Citizens United v. Federal Election Comm'n*, ——U.S. ——, 130 S.Ct. 876, 914–915, 175 L.Ed.2d 753 (2010) (upholding disclosure requirements in context of "electioneering communications," noting "disclosure is a less restrictive alternative to more comprehensive regulations of speech").

4. Application of *Zauderer* reasonable relation test. Because securities regulation since 1933 has

been designed to ensure the availability of adequate information about securities through the requirement of thorough disclosures, we analyze whether the challenged provisions satisfy the *Zauderer* reasonable relation test. In considering the applicability of this test, we note first that a disclosure requirement typically incorporates a prohibition on commercial speech (or conduct), because the commercial speaker is generally barred from advertising or engaging in particular conduct unless the speaker makes the disclosure. *See, e.g., Milavetz, supra* at 1330 (requirement that debt relief agencies make required disclosure in advertisements operates as ban on advertising unless disclosure is made); *Zauderer, supra* at 633, 105 S.Ct. 2265 (requirement that attorneys advertising contingent fee arrangements make required disclosures operates as ban on advertising contingent fee representation without disclosures). Thus, the existence of a conditional prohibition on commercial speech, which the speaker may avoid by making the disclosure, does not itself subject the disclosure requirement to the *Central Hudson* test. *See Zauderer*, supra at 651, 105 S.Ct. 2265. Rather, a typical disclosure requirement incorporates a ban on speech (or conduct) that defines and enforces the disclosure rule.

The fundamental principle woven into Massachusetts securities laws, as well as the 1933 act and its accompanying regulations, is complete and accurate disclosure in the sale of securities. This is not only clear from the purpose and history of the 1933 act, described in its preamble as an act to "provide full and fair disclosure," Pub.L. No. 73–22, 48 Stat.

74 (May 27, 1933), but is apparent from the plain language of the Federal and State provisions at issue in this case. By requiring the filing of a registration statement before a public offering can be made, the Massachusetts act ensures that potential buyers are provided with detailed information about the securities being offered and the entities offering them, including financial statements that have been certified by an independent accountant in accordance with generally accepted accounting principles. *See* G.L. c. 110A, §§ 301–303; 950 Code Mass. Regs. §§ 14.401, 14.412(C) (2000). The prohibition against public offerings that Bulldog challenges as a violation of the First Amendment right to free speech is simply the means to enforce the disclosure requirements for a public offering, specifically the filing of a registration statement. While a registration statement is not required for a private offering of securities, a private offering, as the name suggests, is a limited exemption from the general registration requirement, permitting offers to accredited and sophisticated investors who, precisely because they are accredited and sophisticated, are deemed able to fend for themselves. *See Securities & Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 119, 122 & n. 5, 124–125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

Neither the Federal nor the State government has prevented Bulldog from making information about its securities available to the general public, because nothing prevents Bulldog from filing a registration statement, with all its required disclosures, and advertising its securities to the general public. This is not a case in which the government seeks to "keep people in the dark for

what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion). *See Virginia Bd. of Pharmacy, supra* at 769, 96 S.Ct. 1817. Rather, the prohibition on speech at issue in this case is incorporated into a disclosure regime that is designed to encourage, not suppress, full and fair disclosure.

Bulldog argues that the Supreme Court's application of the *Central Hudson* test in *Thompson, supra* at 367, 122 S.Ct. 1497, demonstrates that this case should also be analyzed as a prohibition on speech where that test is applied. *Thompson, supra* at 360–361, 364–365, 122 S.Ct. 1497, involved three provisions of Federal law: a requirement that all new drugs submit to Federal new drug approval procedures, an exemption to these approval procedures for "compounded drugs" (created when a pharmacist combines or alters ingredients, such as to generate a medication tailored to a particular patient's needs), and a ban on advertising of compounded drugs that had not been approved through the new drug approval procedures. Bulldog argues that its decision not to file a registration statement is analogous to a compounder's decision not to seek Federal new drug approval, and that the ban on general solicitation should be reviewed under the *Central Hudson* test, as was the advertising ban in the *Thompson* case. However, none of the parties in *Thompson* challenged the appropriateness of applying the *Central Hudson* test, and the Court did not discuss how or under what circumstances a different test might be applicable. *Thompson, supra* at 367, 122 S.Ct. 1497. This is probably because it

was undisputed in *Thompson* that approval was too costly to be practicable for a small scale compounded drug designed for the needs of an individual patient, so that requiring Federal approval of all drug products compounded by pharmacies would effectively eliminate the practice of compounding. *Id.* at 369, 122 S.Ct. 1497.

The ban on advertising at issue in Thompson, while theoretically conditional, was not designed to enforce a disclosure requirement imposed on drugs that obtain Federal approval. Rather, the ban was enacted to prevent compounders from successfully marketing new drugs on a large scale without undergoing the Federal new drug approval process, a purpose that the Court found could be served by directly regulating compounded drug production rather than regulating speech. *Id.* at 370–372, 122 S.Ct. 1497. Thompson, supra, thus involved the type of speech ban that is typically analyzed under the *Central Hudson* test because it limits the information available to the public about lawful purchases and "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield v. Fane*, 507 U.S. 761, 766, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), and cases cited.

Bulldog further argues that, even if the prohibition on general solicitation is incidental to a disclosure scheme, the standard articulated in *Zauderer, supra* at 651, 105 S.Ct. 2265, is not applicable because that case asks whether a disclosure requirement is "reasonably related to the State's interest in preventing deception of

consumers," and no deception is alleged in this case; instead, the parties stipulated that the information on Bulldog's Web site and in its direct e-mail communication with Hickey was not misleading. We recognize that the disclosures required in *Milavetz* and *Zauderer* were intended to combat inherently misleading advertisements, but we do not agree that the more deferential review for required commercial disclosures applies only to disclosures designed to prevent deception and not to disclosures designed to ensure that consumers have full and fair information. Both *Milavetz* and *Zauderer* treat disclosures differently from restrictions on speech because of the commercial speaker's "minimal" constitutionally protected interest in not providing "factual and uncontroversial information," and because disclosure rules serve the social interest in increasing the information available to the public, an interest that undergirds the protection of commercial speech in the first place. *Zauderer, supra. See Milavetz, supra* at 1339; *Central Hudson, supra* at 567, 100 S.Ct. 2343; *Virginia Bd. of Pharmacy, supra* at 764–765, 96 S.Ct. 1817.[13] Because *Milavetz* and *Zauderer* do not expressly limit the reasonable

[13] We further note that in a recent Supreme Court case Justice Thomas invited the Court to state expressly that disclosure requirements are constitutional only where aimed at advertising that is "inherently likely to deceive" or "has in fact been deceptive ... (emphasis added)." *Milavetz, Gallop & Milavetz, P.A. v. United States*, —— U.S. ——, 130 S.Ct. 1324, 1344, 176 L.Ed.2d 79 (2010) (Thomas, J., concurring in part and concurring in the judgment), quoting *Matter of R.M.J.*, 455 U.S. 191, 202, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). The Court declined to articulate such a limitation, and no other Justice joined Justice Thomas.

relation test to the particular State interest in preventing consumer deception, and the rationales on which they rely are equally applicable to the State interest asserted here of ensuring full and accurate information to securities investors, we conclude that the appropriate First Amendment test in this case is the reasonable relation test in *Zauderer, supra*, not the *Central Hudson* test.[14] *Accord New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 132–133 (2d Cir.2009) (requirement that chain restaurants post calorie information analyzed pursuant to *Zauderer* test although State not acting to prevent consumer deception); *Pharmaceutical Care Mgt. Ass'n v. Rowe*, 429 F.3d 294, 310 n. 8 (1st Cir.2005), *cert. denied*, 547 U.S. 1179, 126 S.Ct. 2360, 165 L.Ed.2d 280 (2006) ("we have found no cases limiting *Zauderer*" to State interest in preventing consumer deception). *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion) ("When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according

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[14] We note that this conclusion accords with the Supreme Court's dicta indicating that the reasonable relation test articulated in *Zauderer, supra*, is appropriate where a securities regulation is challenged on First Amendment grounds. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 n. 9, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), citing *Zauderer, supra* ("[A]nalogy to the securities field entirely misses the point. Purely commercial speech is more susceptible to compelled disclosure requirements").

constitutional protection to commercial speech and therefore justifies less than strict review" [emphasis added]).

Applying the *Zauderer* reasonable relation test, we conclude that the disclosure requirement at issue here, a registration statement that must be in effect prior to a public offering of securities, is reasonably related to the State's interest in promoting the integrity of capital markets by ensuring that investors make decisions based on full and accurate information. Where the issuer has chosen not to file a registration statement and make the required disclosures, the incidental ban on general solicitation of unregistered securities is reasonably related to the same State interest.

5. Application of *Central Hudson* test. Even if we were to view the challenged regulations at issue as prohibitions on commercial speech, rather than as part of a broader disclosure requirement, we conclude that they withstand constitutional scrutiny under the *Central Hudson* test. In *Central Hudson, supra* at 566, 100 S.Ct. 2343, the Court established a four-pronged test to determine the constitutionality of restrictions on commercial speech:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the

> regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

*See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). The government bears the burden of proving the constitutionality of its regulation under this test. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).[15]

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[15] Although the Supreme Court has continued to apply the *Central Hudson* test, *see Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 2667–2668, 180 L.Ed.2d 544 (2011); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–555, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001), we recognize that a number of Supreme Court Justices have over the years expressed criticism of the test. *See id.* at 571–572, 121 S.Ct. 2404 (Kennedy, J., concurring in part and concurring in the judgment) (expressing "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech"); id. at 572, 121 S.Ct. 2404 (Thomas, J., concurring in part and concurring in the judgment) ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial'"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (Scalia, J., concurring in part and concurring in the judgment) (*Central Hudson* test "seems to me to have nothing more than policy intuition to support it"). The application of *Central Hudson* has generated the strongest doubts from members of the Court where advertising has been restricted to quell demand for a lawful advertised product (such as tobacco, alcohol, or gaming), not to preserve "the fair bargaining process." *Id.* at 501, 116 S.Ct. 1495 (plurality

Here, the first and second prongs are not at issue, because the parties have stipulated that the speech in this case concerns lawful activity and is not misleading, and that the Commonwealth has a substantial State interest in protecting the integrity of capital markets, and thereby preserving the overall health of the economy, by ensuring that investors make decisions based on full and accurate information. Thus, we need only determine whether the third and fourth prongs of *Central Hudson* are satisfied, that is, whether the challenged regulations "directly advance" the substantial government interest and are "not more extensive than is necessary to serve that interest." *Id*. at 564, 566, 100 S.Ct. 2343.

Under the third prong of *Central Hudson*, we must determine "whether the speech restriction directly and materially advances the asserted governmental interest." *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). *See Greater New Orleans Broadcasting Ass'n v. United States, supra*. Accordingly, a restriction on commercial speech will not be upheld "if it provides only

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opinion). The securities regulations at issue here, however, do not raise this concern.

ineffective or remote support for the government's purpose." *Central Hudson, supra* at 564, 100 S.Ct. 2343.

Bulldog asks us to construe this direct advancement prong of *Central Hudson* as a requirement that the connection between the regulation of speech and the State's interest not depend on intermediate steps. This reading, however, is unsupported by the Supreme Court's commercial speech jurisprudence, which has emphasized the reliability and effectiveness with which a regulatory mechanism advances the State's goal, rather than the presence or absence of intermediate steps. In *Central Hudson, supra* at 569, 100 S.Ct. 2343, the Court found that a regulation that prohibited an electric utility from promoting the use of electricity in advertisements had a "direct link" to the State interest in energy conservation and satisfied the third prong of the test, although it is clear that the effect of the regulation on the State interest depended on the choices of consumers. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). Similarly, where the Supreme Court has found the third prong of the *Central Hudson* test not to be satisfied, it has not highlighted the presence of intermediate causal steps, but rather has emphasized the ineffectiveness of the regulation at serving the State's objective. *See, e.g., Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 2669–2671, 180 L.Ed.2d 544 (2011) (law limiting use of prescriber information in connection with marketing efforts, but allowing "extensive use

of prescriber-identifying information" in other contexts, did not advance interest of protecting prescriber privacy, lowering costs of medical care, or promoting public health); *Greater New Orleans Broadcasting Ass'n v. United States, supra* at 193, 119 S.Ct. 1923, quoting *Rubin v. Coors Brewing Co., supra* at 489, 115 S.Ct. 1585 (finding "'little chance' that the speech restriction could have directly and materially advanced its aim, 'while other provisions of the same Act directly undermine[d] and counteract[ed] its effects'").

In this case, the Secretary offered in evidence the report and testimony of Franco, an expert witness who teaches and writes about securities regulation and who served as assistant general counsel in the SEC's office of general counsel.[16] Finding Franco's opinions to be "well-founded and highly credible," the trial judge adopted them in substance. On the issue of effectiveness, the judge found:

> "The public filing of a registration statement, conforming in both form and content to uniform regulatory requirements, serves to provide complete, balanced, and accurate information not only to those who might consider investing in a particular offering, but also to the public as a whole,

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[16] Also in evidence was a report of the International Organization of Securities Commissions, entitled Objectives and Principles of Securities Regulation (1998), which identified "[f]ull disclosure" as "the most important means for ensuring investor protection," and identified the timely and widespread dissemination of relevant information as fundamental to an efficient market. *Id.* at 6–7.

> including regulatory officials, private analysts, large investors, and the news media, whose review serves as a powerful check on the accuracy and completeness of the information provided. That process tends to result in market prices that accurately reflect value, for the benefit of all investors, both those purchasing the particular issue and those trading in other securities. The ban on general advertising of unregistered securities ... provides a powerful incentive for issuers to register, despite the substantial costs of doing so, thereby maximizing the benefits of the registration system to the public as a whole; ... it is vital to the effectiveness of the registration system."

We adopt these findings and agree that the public filing of a registration statement provides the best assurance that investors in publicly offered securities will make decisions based on full and accurate information. We also consider compelling the expert's conclusion that the registration system's ability to promote well-informed markets would be compromised if unregistered securities could be widely advertised using incomplete information selected by the issuer. Therefore, we conclude that the prohibition against publicly advertising an offer to sell unregistered securities about which the required disclosures have not been made available effectively, directly, and materially advances the State's interest in preserving the integrity of capital markets by ensuring that investors make decisions based on full and accurate information. *See Greater*

*New Orleans Broadcasting Ass'n v. United States, supra* at 188, 119 S.Ct. 1923.[17]

The fourth prong of *Central Hudson, supra* at 566, 100 S.Ct. 2343, asks whether a challenged regulation is "more extensive than is necessary" to serve the asserted government interest. In *Fox, supra* at 480, 109 S.Ct. 3028, the Supreme Court clarified that this prong does not require the regulatory scheme to be the least restrictive means of achieving the government's objective; rather, it analyzes the "fit" between governmental objectives and the regulatory means chosen, and requires that fit to be "not necessarily perfect, but reasonable." *See Sorrell v. IMS Health Inc., supra* at 2668, quoting *Fox, supra* at 480, 109 S.Ct. 3028 (regulation must be "drawn to achieve" the State interest and requires "fit between the legislature's ends and the means

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[17] We note that the Secretary's expert did not base his conclusions on empirical evidence, but rather on experience and economic theory. However, the Supreme Court has not required a regulator to put forth empirical evidence of a regulation's effectiveness at addressing a State interest, and has itself relied on common sense and economic reasoning in finding effectiveness. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428–429, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). See also *Lorillard Tobacco Co. v. Reilly, supra* at 555, 121 S.Ct. 2404; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Only where common sense or evidence in the record suggests a regulation would be ineffective has the Court required more concrete evidence of a regulation's effectiveness. *See Edenfield v. Fane*, 507 U.S. 761, 771–773, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (State regulatory board failed to prove effectiveness of regulation barring in-person solicitation by accountants where evidence in record undercut asserted dangers and board did not supply any evidence, anecdotal or otherwise, about need for ban).

chosen to accomplish those ends"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (fourth prong "requires a reasonable fit between the means and ends of the regulatory scheme"). The fourth prong of *Central Hudson* is, therefore, an inquiry into whether the scope of the restriction on speech is in proportion to the interest served by the restriction. *See Sorrell v. IMS Health Inc., supra*; *Greater New Orleans Broadcasting Ass'n v. United States, supra*; *Fox, supra*. Although the costs to free speech must be "carefully calculated," governments have "leeway" to "judge what manner of regulation may best be employed." *Id.* at 480, 481, 109 S.Ct. 3028.[18]

In this case, Bulldog has offered eleven alternative measures that they suggest would serve the asserted State interest with less restriction on speech, and the parties have stipulated that these are the only alternative means that are at issue in

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[18] Although the Court stated in *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (*Thompson*), that its previous cases "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so," the Court's recent decision in *Sorrell v. IMS Health Inc., supra* at 2667–2668, confirms that *Thompson* did not overturn *Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (*Fox*), or create a least restrictive means test. *See also Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) ("Government is not required to employ the least restrictive means conceivable"); *Florida Bar v. Went For It, Inc., supra* at 632, 115 S.Ct. 2371 ("we made clear that the 'least restrictive means' test has no role in the commercial speech context").

this litigation. These alternatives propose to shift regulation from the offer stage to the point of sale by preserving the restrictions on the sale of unregistered securities while permitting solicitation of offers from the general public. Instead of regulating offers, the alternatives would provide additional regulation at the point of sale, such as extra reporting requirements, additional controls on the accreditation of investors, a waiting period before transactions be-came final, or authorization to the Secretary to rescind transactions that fail to comply with applicable law.[19]

The judge, relying on Franco's expert opinion, found that these alternatives "would decrease the protection of investors and impair market integrity." The judge declared:

> "[A]ll of the plaintiffs' proposals would reduce the incentive to register, and encourage issuers to make unregistered offerings, sacrificing lawful access to some potential buyers in favor of saving the costs of registration.... [A]ll of the proposals would likely result in increased 'distortive' (that is, unbalanced) communications, increased incidence of unlawful transactions (such as sales to unaccredited investors), and

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[19] Another alternative proposed by Bulldog was to prohibit all sales of unregistered securities to Massachusetts residents. This alternative, however, would violate preemption provisions in the 1933 act, 15 U.S.C. §§ 77a *et seq*., which require States to exempt securities that fall under the safe harbor of rule 506 of regulation D from any State registration requirement. *See* 15 U.S.C. § 77r(b)(4)(D).

> proliferation of scams. Those proposals that rely on increased enforcement activity in connection with sales would suffer from the problem of coming after, rather than before transactions, when dissipation of assets may prevent effective remedies."

We agree. The proposed alternatives will certainly decrease the quality of, and will likely decrease the quantity of, information in the marketplace, will increase the likelihood of securities scams and of unlawful sales of unregistered securities to unsophisticated investors, and will weaken the market's efficiency overall. Bulldog's proposal to concentrate enforcement at the point of sale rather than at the offer stage increases the risk that enforcement will come too late to prevent the harm or permit monetary recovery. We note that State securities regulation before 1933 largely focused on the regulation of transactions at the point of sale, and that the failure of this patchwork of State laws to achieve their regulatory aims demonstrated the need for the Federal 1933 act. Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934: Symposium on Current Issues in Securities Regulation*, 49 OHIO ST. L.J. 329, 331, 336 (1988). The framers of the 1933 act contemplated the drawbacks of after-the-fact enforcement and determined that these measures "lock[] the door after the horse is gone" and prevent regulators from effectively protecting investors from economic harm. Hon. Huston Thompson, Federal Securities Act Hearings before the House Interstate and Foreign Commerce Committee, 73d Cong., 1st Sess., on H.R.

4314, at 102 (1933), quoting statement of Hon. Clarence F. Lee, of California, Hearings before Committee on Interstate and Foreign Commerce on H.R. 7215, 67th Cong., 1st Sess.

In concluding that the challenged restriction on the public advertising of unregistered securities represents a reasonable fit between the regulatory ends and the means chosen, we recognize that this restriction is not a "blanket ban" on speech, *Central Hudson, supra* at 566 n. 9, 100 S.Ct. 2343, that can be considered in isolation, but an integral part of a broader regulatory scheme that mandates public disclosures and permits limited exemptions for private offerings directed at those investors who can be relied on adequately to inform themselves. *See Thompson, supra* at 376, 122 S.Ct. 1497 (recognizing disclosure as "far less restrictive alternative" to a restriction on commercial speech). We also recognize that, if we were to declare the restriction unconstitutional in the name of freedom of speech, the foreseeable consequence would be less speech, not more. *See Citizens United v. Federal Election Comm'n*, ___ U.S. ___, 130 S.Ct. 876, 911, 175 L.Ed.2d 753 (2010) ("it is our law and our tradition that more speech, not less, is the governing rule"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (Stevens, J., concurring in the judgment) ("more speech and a better informed citizenry are among the central goals of the Free Speech Clause"). In addition, we consider that the burden on First Amendment rights is diminished in this case because alternative channels of communication are available to Bulldog through the registration system and through the

exemptions that permit communication with a limited group of investors. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ("Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation"). By providing exemptions for private offerings, designed to lessen the burdens of securities laws when the protections of the regulatory system are not needed, *see Securities & Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 119, 122 & n. 5, 124–125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953), the Secretary has "carefully calculated" the benefits and burdens of securities regulation, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), rather than proceed by "wholesale suppression of truthful, nonmisleading information." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion). *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

Finally, we recognize that a measure of judicial restraint is appropriate where a court is asked to intrude on a system of securities regulation that has served the nation and this Commonwealth well since 1933, and to cut a stitch in the patchwork of regulatory enforcement that risks its unraveling and predictably will diminish its effectiveness. If any reminder was needed, the financial collapse in the autumn of 2008 that led to our persistent recession illustrates the extent to which unregulated and poorly regulated securities have the potential to

become "financial weapons of mass destruction." The Great Derivatives Smackdown, Forbes, May 9, 2003, quoting Warren Buffett's Annual Letter to Shareholder of Berkshire Hathaway (March 8, 2003).

In light of these considerations and the judge's findings, supported by credible expert testimony, that none of the proposed alternatives would adequately achieve the State interest, we are persuaded that the Secretary has found a fit between its regulatory means and its goal of promoting full and accurate information in the sale of securities "that is not necessarily perfect, but reasonable." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). We, therefore, conclude that the Secretary has met his burden of satisfying the *Central Hudson* test.

6. The overbreadth doctrine. Having found that the speech at issue in this case is commercial, and that the challenged provisions of Massachusetts securities law constitutionally regulate that speech, we now consider Bulldog's claim that the regulations should nonetheless be found unconstitutional because they also restrict fully protected, non-commercial speech in violation of the First Amendment. The overbreadth doctrine allows an individual whose speech may be constitutionally regulated to argue that a law is unconstitutional because it infringes on the speech of others. *See Fox, supra* at 482–483, 109 S.Ct. 3028. *See also United States v. Stevens*, ——U.S. ——, 130 S.Ct. 1577, 1591–1592, 176 L.Ed.2d 435 (2010). Overbreadth has thus been described as an exception to the general principle that litigants only have standing to assert their own rights and not the rights of others; in the free speech

context, such challenges have been permitted in order "to prevent [a] statute from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957, 958, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). *See Eisenstadt v. Baird*, 405 U.S. 438, 445 n. 5, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).[20] Despite the doctrine's origin as an exception to standing requirements, overbreadth challenges can also be brought, as here, where a law's application to the "principal type of expression at issue" in the case is constitutional, but the plaintiffs argue that their own First Amendment rights will be violated by other applications of the same law. *Fox, supra* at 473, 484, 109 S.Ct. 3028.

The Supreme Court has recognized the overbreadth doctrine as "strong medicine" and has limited its application to instances where a law "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), quoting *Los Angeles Police Dep't v. United Reporting Publ. Corp.*, 528 U.S. 32, 39, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999). Substantial overbreadth demands a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City*

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[20] The overbreadth doctrine, which allows a litigant to address a statute's application to parties and scenarios outside the case, should not be confused with the requirement of *Central Hudson's* fourth prong that restrictions on commercial speech be narrowly drawn. *See Central Hudson, supra* at 565 n. 8, 100 S.Ct. 2343 (noting distinction). *See also Fox, supra* at 482, 109 S.Ct. 3028 (same).

*Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800–802, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (declining to entertain overbreadth claim where such danger not shown). Further, the overbreadth must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams, supra* at 292, 128 S.Ct. 1830.

The overbreadth doctrine is not applied in commercial speech cases because the concern that speech will be chilled is much weaker in the case of a commercial speaker. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 380–381, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ("Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation"). *See also Waters v. Churchill*, 511 U.S. 661, 670, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion); *Fox, supra* at 481, 109 S.Ct. 3028. However, this limitation is only relevant in cases where the speech restricted by the overbroad application is itself commercial speech; an over-breadth challenge may be raised by a commercial speaker claiming, as here, that a regulation unconstitutionally restricts non-commercial speech. *Id.*

We turn, therefore, to the question whether the relevant provisions of Massachusetts securities law reach a "substantial amount" of noncommercial speech. *United States v. Williams, supra.* Bulldog alleges, for example, that they are prevented from communicating about their unregistered securities "with anyone, including journalists, students, academics and others," even though these individuals

are not interested in buying or selling securities. However, under the challenged provisions of Massachusetts securities law, an issuer's speech is restricted only where it is designed to solicit an offer to purchase securities. *See* G.L. c. 110A, §§ 301, 401(i)(2). *See also Matter of Carl M. Loeb, Rhoades & Co.*, 38 SEC 843, 853 (1959) (allowing for "flow of normal corporate news, unrelated to a selling effort for an issue of securities"); Interpretive Release on Regulation D, SEC Release No. 33–6455, 48 Fed.Reg. 10,045, 10,052 (1983) (if communication not "being used by the issuer or by someone on the issuer's behalf to offer or sell the securities ... then the issuer will not be in violation of Rule 502[c]"); G.F. Gerstenfeld, SEC No–Action Letter, 1985 SEC No–Act. LEXIS 2790, *2 (Dec. 3, 1985) ("relevant question ... is whether publication of the advertisement constitutes an offer to sell securities"); Bateman Eichler, Hill Richards, Inc., SEC No–Action Letter, 1985 SEC No–Act. LEXIS 2918, *1 (Dec. 3, 1985) (limited mailing of solicitation "generic in nature" and not making reference to any specific investment not an offer); G.L. c. 110A, § 415 (interpretation of Massachusetts act should be coordinated with related Federal law).

Bulldog can raise an overbreadth challenge, therefore, only if a substantial amount of speech included within the term "offer," is outside that which is categorized as commercial speech.[21] While

[21] Although the Secretary concedes that he would have no authority to enforce a prohibition against noncommercial speech under the Massachusetts act, this concession is of little comfort if the act in fact allows the suppression of such speech. *See United States v. Stevens*, —— U.S. ——, 130 S.Ct. 1577,

"the precise bounds of the category of expression that may be termed commercial speech" are uncertain, *Zauderer, supra* at 637, 105 S.Ct. 2265, the definition of an offer in securities law as a communication "designed to procure orders for a security," *Matter of Carl M. Loeb, Rhoades & Co., supra* at 848, Securities Act Release No. 2623 (July 25, 1941), is close to the common definition of commercial speech as that which "propose[s] a commercial transaction." *Fox, supra* at 473–474, 109 S.Ct. 3028, quoting *Virginia Bd. of Pharmacy, supra* at 762, 96 S.Ct. 1817. Although the outer limits of the two terms may not be identical, we conclude that the category of "offers" regulated by the Secretary and the SEC does not include a substantial amount of noncommercial speech relative to the plainly legitimate sweep of the statute and regulations. *See United States v. Williams, supra.* As a result, Bulldog's overbreadth challenge fails.

7. Bloness's right to listen. Bloness alleges that his First Amendment rights are independently violated by the Secretary's enforcement of securities laws and regulations that prevent him from receiving information that Bulldog would otherwise make available, unless he first identifies himself and demonstrates he is an accredited or sophisticated investor.[22] We agree with Bloness that the interests

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1591, 176 L.Ed.2d 435 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly").

[22] The parties have stipulated that Bloness is an accredited investor within the meaning of 17 C.F.R. § 230.501(a). *See* note 7, *supra.*

of consumers in receiving commercial information, and the interests of society in the free flow of such information, have been the foundation of commercial speech doctrine from its inception. *See Central Hudson, supra* at 567, 100 S.Ct. 2343 ("suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment"); *Virginia Bd. of Pharmacy, supra* at 763, 96 S.Ct. 1817 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate"). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) ("The First Amendment ... constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information").

We also agree that the Supreme Court has in certain cases recognized the rights of listeners regardless whether the rights of the speakers were protected. *See Kleindienst v. Mandel*, 408 U.S. 753, 764, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (First Amendment rights of listeners implicated where Federal government denied visa to foreign lecturer because of his advocacy of communism); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (First Amendment rights of recipient violated by postal service requirement that "communist political propaganda" originating in foreign country be delivered only if addressee filled

out reply card indicating desire to receive such mail). *See also Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas"). And we agree that, in certain circumstances, a listener's First Amendment rights may be infringed if he is required affirmatively to declare a desire to receive controversial communications, where the requirement may deter him from requesting these communications because of the risk to reputation, employment, or prospects for future employment. *See Lamont v. Postmaster Gen., supra* at 307, 85 S.Ct. 1493. *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 753–755, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (striking down Federal requirement that "patently offensive" cable television programming be blocked and made available on separate channel only to subscribers who requested in writing to view the offensive content). But nothing in the cases Bloness cites requires independent consideration of his claim in this case, where we have already concluded that the government has permissibly regulated the communications of a commercial speaker. The consequence of recognizing the First Amendment rights of listeners is to give standing to listeners to assert that free speech has been unconstitutionally infringed, not to grant listeners a different standard of review or a greater right to listen to commercial speech than a speaker has to say it. *See Fox, supra* at 472–473, 475, 485–486, 109 S.Ct. 3028 (*Central Hudson* was applicable standard where State university students claimed that violation of their

First Amendment rights resulted from university's restriction of outside commercial speakers); *Virginia Bd. of Pharmacy, supra* at 757 ("If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by [consumers]"); *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir.2003), *cert. denied*, 541 U.S. 1085, 124 S.Ct. 2812, 159 L.Ed.2d 247 (2004) (listeners "may claim no greater First Amendment protection" than speaker); *National Ass'n for the Advancement of Colored People v. Jones*, 131 F.3d 1317, 1322 (9th Cir.1997), *cert. denied*, 525 U.S. 813, 119 S.Ct. 48, 142 L.Ed.2d 37 (1998) ("no precedent exists for the proposition that the listener's rights are greater than those of the speaker"). Where, as here, a State permissibly regulates commercial speech in a manner consistent with the First Amendment, its regulation will be upheld, regardless whether the challenge is brought by a speaker or by a would-be listener. *See Fox, supra. See also American Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 862 (3d Cir.1984), *cert. denied sub nom. Johnson v. Pennsylvania State Univ.*, 473 U.S. 911, 105 S.Ct. 3537, 87 L.Ed.2d 660 (1985) ("the essential nature of the speech remains unchanged regardless of whose rights are being adjudicated, and the same test should be used whether it is the speaker's or the listeners' rights that are at stake"). Having found that Bulldog's First Amendment rights were not violated by the Secretary's enforcement of Massachusetts securities laws, we need undergo no further analysis to conclude that the rights of Bloness to receive information were not violated.

V. Conclusion. The Supreme Court has on numerous occasions suggested that Federal and State securities laws do not run afoul of the First Amendment.[23] Although these statements have been dicta, they have also been consistent with the Court's recognition of a State's lawful ability to ensure that "the stream of commercial information flow[s] cleanly as well as freely." *Virginia Bd. of Pharmacy, supra* at 772, 96 S.Ct. 1817. By encouraging the submission of comprehensive registration statements and allowing those who choose not to file them to advertise their securities to accredited and sophisticated investors but not to the public as a whole, the Secretary does not "threaten[ ] societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield v. Fane*, 507 U.S. 761, 766, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Massachusetts securities regulation is not motivated by the supposed advantages of consumers "being kept in

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[23] *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 n. 9, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (striking down disclosure requirement in noncommercial speech context but assuring that result had no bearing on securities law); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities ..."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) ("neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares"). *See also Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc.*, 472 U.S. 749, 758–759 n. 5, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

ignorance," *Virginia Bd. of Pharmacy, supra* at 769, 96 S.Ct. 1817, or designed to "entirely suppress commercial speech in order to pursue a non-speech-related policy." *Central Hudson, supra* at 566 n. 9, 100 S.Ct. 2343. Nor has Massachusetts "burdened a form of protected expression that it found too persuasive," while leaving "unburdened" speech that is "in accord with its own views." *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653, 2672, 180 L.Ed.2d 544 (2011). Rather, the Massachusetts act and accompanying regulations aid the "preservation of a fair bargaining process," *44 Liquor-mart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality opinion), by ensuring the broad availability of accurate and balanced commercial information.

For the reasons discussed above, we hold that the challenged provisions of Massachusetts law are part of a constitutionally permissible disclosure scheme, and, to the extent that they restrict speech, are tailored in a reasonable manner to serve a substantial State interest in promoting the integrity of capital markets by ensuring a fully informed investing public.

Judgment affirmed.

## APPENDIX B

## Opinion of the Superior Court, Suffolk County

**Superior Court of Massachusetts,**
**Suffolk County**

BULLDOG INVESTORS GENERAL PARTNERSHIP
& OTHERS[1]

*V.*

SECRETARY OF THE COMMONWEALTH.

Civil Action No. 07–1261–BLS2.

### FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

JUDITH FABRICANT, Justice.

INTRODUCTION

This action arises from activities of the Office of the Secretary of the Commonwealth in enforcing Massachusetts securities laws with respect to certain communications regarding hedge funds, particularly a website operated by the group of plaintiffs who will be referred to herein collectively

[1] Opportunity Partners, L.P.; Full Value Partners, L.P.; Opportunity Income Plus Fund, L.P.; Kimball & Winthrop, Inc.; Full Value Advisors, LLC; SPAR Advisors, LLC; Phillip Goldstein; Steven Samuels; Andrew Dakos; Rajeev Das; and Leonard Bloness.

as "Bulldog Investors," or "Bulldog," and associated e-mail communication. The plaintiffs contend that the Secretary's enforcement activities have violated their rights under the First Amendment to the United States Constitution. This Court has issued two previous decisions in this action, one on the plaintiffs' motion for preliminary injunction, dated December 21, 2007, and one on the defendant's partial motion to dismiss, dated July 28, 2008.[2] After a jury-waived trial on July 31, 2009, the Court now enters the following findings of fact, rulings of law, and order for judgment.

BACKGROUND

The stipulation of the parties, along with exhibits admitted by stipulation, provide the following factual background. Plaintiff Bulldog Investors General Partnership is a general partnership. Three of its general partners are private investment partnerships known as hedge funds: the plaintiffs Opportunity Partners, L.P., Full Value Partners, L. P., and Opportunity Income Plus Fund, L.P. The fourth general partner, and managing partner, is the plaintiff Kimball & Winthrop, Inc., which is the sole general partner of Opportunity Partners. Plaintiffs Full Value Advisors, LLC, and Spar Advisors, LLC, are the sole general partner and investment advisor to Full

[2] The Court has also issued a memorandum of decision and entered final judgment in a related action, no. 07–05038–BLS2, the plaintiffs' petition for judicial review of the Secretary's final decision pursuant to G.L. c.30A, § 14. Plaintiffs' appeal from the judgment in that case is now pending before the Appeals Court.

Value Partners, and Opportunity Income Plus Fund, respectively. Plaintiffs Steven Samuels, Phillip Goldstein, Andrew Dakos, and Rajeev Das are principals of one or more of the above-described entities. These entities and individuals will be referred to herein collectively as Bulldog Investors, or Bulldog. Bulldog Investors has not registered any offering of securities with the Securities and Exchange Commission ("SEC"). In 1992 and 2001, respectively, Opportunity Partners and Full Value Fund filed "Form D" with the SEC, claiming exemption from registration requirements.[3]

Plaintiff Leonard Bloness ("Bloness"), a resident of Sheffield, Massachusetts, is not affiliated with Bulldog Investors. Bloness desires to have access to information about Bulldog Investors, including the information conveyed through the communications in issue in this case. He does not intend to, and has never intended to or attempted to, invest in any Bulldog fund. Bloness is an accredited investor for the purposes of 17 C.F.R. § 230.501(a).

From about June 9, 2005, to January 5, 2007, Bulldog Investors maintained an interactive website that provided information about the investment

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[3] Form D refers to a filing under Rule 506 of SEC Regulation D. Under that rule, companies are permitted to raise unlimited funds through private offerings without registration, provided they follow certain requirements, including selling only to so-called "accredited investors," and refraining from general advertising or solicitation of offers to buy securities. Accredited investors are those whose income or assets exceed levels specified by regulation. *See* 17 C.F.R. §§ 230.501–508. Massachusetts regulation 950 C.M.R. § 14.402(B)(13)(I) requires compliance with Rule 506.

products it offered. The website made certain information available to any visitor, including press articles and a printable brochure describing Bulldog's three investment vehicles, Opportunity Partners, Full Value Partners, and Opportunity Income Plus Fund. The brochure gave a brief summary of each fund's approach. It described Opportunity Partners as "a highly diversified fund primarily invested in publicly-traded closed-end mutual funds and operating companies that are selling substantially below their intrinsic values ... [that] applies the firm's proprietary investment methodology to 'unlock' these values." Full Value Partners was described as "a fund that concentrates on taking substantial positions in undervalued operating companies and closed-end mutual funds," and that "acts as a catalyst to 'unlock' these values through proprietary means." Income Plus Funds, according to the brochure, "is a low-risk fund that primarily invests in undervalued income producing closed-end funds, real estate investment trusts, and other investments ... attempts to produce better current returns with less risk than is achievable in the bond markets ... [and] anticipates compounding of capital in addition to generating high current income." Each fund, the brochure stated, "will hedge when deemed appropriate." A link on the site available to any visitor provided the statement that "Bulldog Investors has delivered a net average annual return significantly higher than that of the S & P 500 Index. Moreover Bulldog has performed especially well in difficult investment periods like 2000 through 2002."

The website provided additional information to a visitor who would click "I Agree" to the following disclaimer:

> The information is available for information purposes only and does not constitute solicitation as to any investment service or product and is not an invitation to subscribe for shares or units in any fund herein. For the avoidance of doubt this website may not be used for the purpose of an offer or solicitation in any jurisdiction or in any circumstances in which such offer or solicitation is unlawful or not authorized. Whilst every effort has been made to ensure the accuracy of the information herein, Bulldog Investors accepts no responsibility for the accuracy of information, nor the reasonableness of conclusions based upon such information, which has been obtained from third parties. The Rates referring specifically to investment products offered by Bulldog Investors are only available for view with a username and password, which can be obtained by contacting the company on the Registration Form provided. The value of investments and the income from them can fall as well as rise. Past performance is not a guarantee of future performance and investors may not get back the full amount invested. Changes in the rates of exchange may affect the value of investments.

A website visitor seeking more specific information about the funds and their performance could request such information by clicking on a

button labeled "send feedback," which would lead to a registration screen seeking personal identifying information, including the visitor's address. To register, a visitor would be required to acknowledge having read and agreed to the foregoing disclaimer.

On November 10, 2006, Brendan Hickey ("Hickey"), registered on the Bulldog website, entering his Massachusetts address. Hickey was an employee of a law firm that was representing a client in litigation with Bulldog, and acted at the direction of his employer. He was not an accredited investor. Samuels responded to Hickey, by e-mail, attaching additional materials including information about the funds' investment strategy and philosophy, the backgrounds of their managers, performance and recent successes, and news articles. Samuels's e-mail stated,

> While we are proud to have one of the best long term records in the business, it is very difficult to adequately describe what, why, and how we do what we do in a quick response to an e-mail inquiry. Performance numbers for example show nothing of the risk taken to achieve those returns. I have attached some basic information on our management including performance and philosophy. I would be happy to spend a few minutes on the phone if you wish to discuss in more detail. Please contact me at [a telephone number provided].

Among the materials Samuels attached to his e-mail to Hickey was a copy of a letter, dated July 13, 2006, directed to investors in Bulldog's funds. The

letter discussed the funds' returns as compared to the Standard & Poor 500 Index, current investments in particular companies, and a lawsuit against the SEC challenging a rule requiring registration of certain hedge fund managers. It then stated:

> We don't need a nanny regulator to tell us right from wrong. And unlike most mutual fund managers, we put our money where our mouths are. Since day one a significant portion of our net worth has been invested in Full Value Partners so you can be sure that our interests are closely aligned with yours. In our opinion that is more important than all the cosmetic rules and regulations any regulator can dream up.

On January 31, 2007, the enforcement section of the Massachusetts Securities Division filed an administrative complaint with the Acting Director of the Securities Division against Bulldog, alleging that Bulldog had offered securities for sale in the Commonwealth that were not properly registered or exempt, in violation of G.L. c.110A, the Massachusetts Uniform Securities Act, and regulations thereunder, 950 C.M.R. § 10 *et seq*., by means of the communications appearing in the website. The enforcement section sought a cease and desist order, an administrative fine, and other relief. Bulldog answered the administrative complaint on February 21, 2007, denying the allegations and raising as a defense that the administrative complaint abridged its rights under the First Amendment to the United States Constitution.

On March 23, 2007, while the administrative proceeding was pending, the plaintiffs filed this action against the Secretary, seeking relief pursuant to 42 U.S.C. § 1983 from the alleged violation of their First amendment Rights.[4] Contemporaneously with the filing of the Complaint, the plaintiffs moved for a preliminary injunction. The Court (Gants, J.) declined to hear the motion at that time, preferring to await the Secretary's action on the pending administrative complaint. When the administrative complaint remained pending several months later, after proceedings on cross-motions for summary disposition in the administrative forum, the plaintiffs here renewed their request for preliminary injunctive relief, and this Court set a briefing schedule and scheduled a hearing for October 23, 2007.

On October 17, 2006, the Acting Director of the Securities Division issued a final order, on behalf of the Secretary, concluding the administrative proceeding. The Secretary's final order adopted the hearing officer's findings of fact, consistent with the stipulated facts set forth supra, and her rulings of law, in substance, as follows. The Massachusetts Uniform Securities Act, G.L. c.110A, § 301, makes it

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[4] The original complaint also named Patrick Ahearn, the Chief of Enforcement, asserted a claim under G.L. c.12, § 11I, and alleged that the Secretary's action violated the plaintiffs' rights under the Massachusetts Declaration of Rights and under the Commerce Clause of the United States Constitution, as well as the First Amendment. The plaintiffs' amended complaint, filed on March 28, 2008, names only the Secretary. The plaintiffs no longer press either the Commerce Clause claim or any claim under Massachusetts law in this action.

unlawful for any person to offer securities for sale in the Commonwealth unless the securities are registered, the transaction is exempt, or the security is "federally covered." The Act defines an offer to sell to include "every attempt or offer to dispose of or solicitation of an offer to buy a security or interest in a security for value." G.L. c.110A, § 401(2). The Act further provides that it should be construed so as to coordinate its interpretation and administration consistently with federal securities law. G.L. c.110A, § 415. Under federal case law and SEC decisions, an offer extends beyond the common law contract concept, to include information that "conditions the public interest in particular securities." *See SEC v. Cavanaugh*, 155 F.3d 129, 135 (2d Cir.1988); *Carl M. Loeb, Rhodes & Co.*, 38 S.E.C. 843, 850 (1959).

Under that definition, the hearing officer ruled, "it is clear respondents have offered securities for sale in the Commonwealth," by disseminating the information on the website, in combination with the e-mail communication directed to Mr. Hickey. Citing SEC decisions, the hearing officer rejected the contention that the website material did not constitute an offer because a visitor to the site who sought specific information about funds would have to register, indicating agreement to the disclaimer. The hearing officer went on to rule that Bulldog had not proved that it was exempt from registration requirements. The only exemption invoked was that under 950 C.M.R. § 14.02(b)(13)(m), which exempts offers communicated through the internet if not "directed toward any investor or group of investors in the Commonwealth," and presumes that such an offer is not so directed if it "contains indications that

the offer is not being made in jurisdictions where it is not registered or appropriately exempted." That exemption did not apply, the hearing officer ruled, because of the e-mail, with attached material, directed specifically at a Massachusetts resident. The hearing officer also ruled that Bulldog's activities were not exempt under other specified regulatory provisions that condition exemption on compliance with a ban on general advertising. Based on those findings and rulings, the Securities Division ordered that Bulldog cease and desist from further violations, comply with the act, and pay an administrative fine of $25,000.

This Court heard argument on the plaintiffs' motion for preliminary injunction on October 23, 2007. After receiving supplemental briefs addressed to the Secretary's final decision, the Court issued its decision on the motion on December 21, 2007. The Court denied the motion for preliminary injunction, concluding that the plaintiffs had failed to establish a likelihood of success on the merits.

In reaching that conclusion, the Court noted at the outset that the plaintiffs had not identified any court decision, at any level, striking down on First Amendment grounds any statute, regulation, or application of either with respect to the conduct of issuers in offering or advertising securities.[5] The

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[5] The Court noted and distinguished the line of cases applying First Amendment protections to publication of opinions by commentators and analysts who are not issuers of securities, and do not advise individual investors. *E.g. Lowe v. S.E. C.*, 472 U.S. 181, 210 (1985); *Commodity Trend Serv. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 682 (7th Cir.1998); *S.E.C. v. Wall St. Pub. Inst., Inc.*, 851 F.2d 365, 373

Court noted further that the United States Supreme Court has, on a number of occasions, cited the securities area as an example of speech regulation that does not violate the First Amendment. *See Dun & Bradstreet, Inc., v. Greenmoss Builders*, 472 U.S. 749, 758 n.5 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 64 (1973); *see also National Association for Adv. of Psychoanalysis v. California. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir.2000); *Securities & Exchange Commission v. Wall Street Pub. Inst., Inc.*, 851 F.2d 365, 372–373 (D.C.Cir.1988); *Bangor & Arrostook R.R. Company v. Interstate Commerce Comm'n*, 574 F.2d 1096, 1107 (1st Cir.1978); *European Connections & Tours, Inc., v. Gonzales*, 480 F.Supp.2d 1355, 1370 (N. D.Ga.2007); *see generally* Michael Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WILLIAM & MARY L.REV. 613, 618, 641–645 (2006). The Court observed that although the Supreme Court's comments on this subject were dicta, their repetition provided strong guidance to this Court in its task of predicting how appellate courts would resolve the question. *See Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir.2006); *Harbury v. Dench*, 233 F.3d 596, 604 (D.D. C.2000).

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(D.C.Cir.1988); *Taucher v. Born*, 53 F.Supp.2d 464, 479–482 (D.C.1999). The Court also distinguished *Blount v. S.E. C.*, 61 F.3d 938, 939 (D.C.Cir.1995), involving regulation of campaign contributions.

The Court proceeded to determine the nature of the conduct affected by the regulation—that is, whether it is speech, and if so, what kind, commercial or non-commercial. The Court noted the plaintiffs' contention that the communications in issue are non-commercial speech, because they do not propose any commercial transaction, and the defendant's opposing contention that the conduct in issue is not speech at all, but is merely incidental to a regulable transaction, that is, the sale of securities. *See Lowe*, 472 U.S. at 232 ("offer and acceptance are communications incidental to the regulable transaction called a contract"). The Court rejected both arguments, relying on the content of the website materials and e-mail attachments to conclude that they were neither acts of offer and acceptance, in a direct contract sense, nor merely information about hedge funds in general or Bulldog funds in particular, but rather communications in the nature of advertising, calculated to generate interest in investment in Bulldog's funds, directly analogous to the advertising in issue in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). On that basis, the Court concluded that the communications were commercial speech, in the sense that the expression is "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Accordingly, the Court applied the four-part test set forth in that decision to evaluate the validity of the Secretary's enforcement of the Massachusetts statute and regulations.

With respect to the first prong of the test, the Court concluded that the speech provided truthful information about lawful activities—that is, operation of hedge funds, and investment in them. On the second prong, the Court identified the state interest advanced as justification for the regulatory scheme: to protect the integrity of capital markets, and thereby to preserve the overall health of the economy, by ensuring that investors make decisions based on full and accurate material information. The Court concluded that this interest is substantial, noting the catastrophic consequences of the absence of effective regulation manifested during the Great Depression, following which Congress enacted the Federal Securities Act of 1933, and states, including Massachusetts, enacted various corresponding provisions. *See S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186–187 (1963); *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 124–125 (1953); *In the matter of Carl M. Loeb, Rhoades & Co.*, 38 S.E.C. at 848; *Smith v. Fishback*, 123 S.W.2d 771, 778 (Tex.Civ.App.1938); *In re Leach*, 215 Cal. 536, 543 (1932); *Stewart v. Brady*, 300 Ill. 425, 430 (1921); *Kneeland v. Emerton*, 280 Mass. at 387–388; *see also Merrick v. Halsey & Co.*, 242 U.S. 568, 586–588 (1917); *Hall v. Geiger–Jones Company*, 242 U.S. 539, 539–540 (1916); *compare* G.L. c.110A, § 301 *with* 15 U.S.C. § 77e; *compare* G.L. c.110A, § 101 *with* 15 U.S.C. § 78(b); *see also* G.L. c.110A, § 302.

The Court then turned to the third and fourth prongs of the *Central Hudson* test, which, together, determine whether the regulation is "in proportion to that interest." These prongs ask whether a challenged regulation directly advances the state

interest, and whether the interest "could be served as well by a more limited restriction on commercial speech...." 447 U.S. at 564. The Court concluded, based on the limited record available at the preliminary injunction stage, that the Secretary was likely to succeed in showing that the regulatory scheme satisfies both prongs. As to the third prong, the Court expressed the view that the statute and regulations serve the state's interest directly by limiting solicitation of offers to those who have made full disclosure in connection with registration. *See* G.L. c.110A, § 301.

The Court identified the fourth prong of the *Central Hudson* test as the most difficult to apply, but found it likely that the Secretary would succeed in showing "a 'fit' between the legislature's ends and the means chosen to accomplish those ends,... 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of the St. Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1980), quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986), and *In re R.M.J.*, 455 U.S. 191, 203 (1982). In reaching that conclusion, the Court noted particularly that the essence of the regulatory scheme was the requirement of disclosure, and that disclosure requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," so that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary*

*Counsel*, 471 U.S. 626, 651 (1985). *See also Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir.2005). Based on these conclusions, the Court denied the motion for preliminary injunction.

After that ruling, the parties conducted discovery, exchanged information, and negotiated a comprehensive stipulation. In addition to the factual background as set forth supra, the parties stipulated to certain matters of mixed fact and law, and to certain limitations on the issues to be litigated. The parties agreed, for purposes of the *Central Hudson* test, that Bulldog's communications through the combination of its website and the e-mail were not misleading and did not relate to any unlawful transaction. The parties also agreed that "it is a substantial state interest" of Massachusetts "to protect the integrity of capital markets, and thereby to preserve the overall health of the economy, by ensuring that investors make decisions based on full and accurate information." Thus, the parties agreed, the only disputed issues under the *Central Hudson* test are the third and fourth prongs:[6] whether the statute and regulations directly advance that interest, and whether they intrude on speech more than necessary to achieve the government's interest. *See Central Hudson*, 447 U.S. at 564. The parties further stipulated that, for the purposes of determining whether the regulatory scheme is more intrusive than necessary, the Court need not

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[6] Both sides reserved the right to argue, and do argue on different grounds, that the Court should not apply the *Central Hudson* test.

consider any alternatives other than the eleven proposals suggested by Bulldog and set forth in the stipulation.[7]

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[7] Bulldog's suggested alternatives, as set forth in the Stipulations of Fact, are as follows:

> (a) regulate unregistered securities transactions (e.g., by imposing eligibility requirements to invest, by requiring the issuer to make disclosures, or by imposing other requirements) as of the time of sale of the unregistered securities by an issuer, rather than as preconditions to the issuer making information about the unregistered securities available to the public; (b) require issuers (and re-sellers) of unregistered securities to examine and keep records of financial documentation such as tax returns and net worth statements submitted by prospective investors in order to verify that they are eligible investors within the meaning of 17 CFR 230.501(a)(5)-(6), 17 CFR 230.506 (including 230.506(b)(2)(ii)), and 950 CMR 14.402(B)(13)(i) and (l), as they incorporate 17 CFR 230.506, who can fend for themselves with respect to the proposed unregistered securities transaction prior to or at the point of sale of securities, rather than prior to making information available to the public; (c) require a person who intends to invest in unregistered securities to be licensed as an eligible investor within the meaning of 17 CFR 230.501(a)(5)-(6), 17 CFR 230.506 (including 230.506(b)(2)(ii)), and 950 CMR 14.402(B)(13)(i) and (l), as they incorporate 17 CFR 230.506, by complying with standards set by regulation and require issuers of unregistered securities to verify that a prospective investor is licensed to invest in unregistered securities at the time a person invests in the issuer's unregistered securities; (d) with respect to unregistered securities, limit the definition of an "offer" under the securities law to "an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it

The evidence at trial, held on July 31, 2009, consisted of a set of agreed exhibits, and the expert testimony of Professor Joseph Franco of Suffolk University Law School, a law professor with specialized training and experience in economics and securities regulation. Among the exhibits is an

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is accepted by the person to whom it is addressed, the "offeree;" (e) require a professional intermediary such as an NASD-licensed broker-dealer or a certified financial adviser or planner to certify that he or she has determined that the investor is an eligible investor who understands and can bear the risk of the purchase of the particular unregistered securities before an un-registered securities transaction involving that investor occurs; (f) require issuers (and re-sellers) of unregistered securities to report to the Secretary not later than a waiting period set by regulation each proposed unregistered securities investment by a Massachusetts resident and provide that either the Secretary or the prospective investor, or both, may cancel the transaction during said waiting period for reasons to be established by regulation; (g) require issuers (and re-sellers) of unregistered securities to report each actual investment by a Massachusetts resident to the Secretary within ten days of the transaction; (h) permit a Massachusetts investor to rescind his purchase if an issuer (or re-seller) sells unregistered securities without complying with requirements (a) through (c) and (e) through (g);(i) prohibit the sale or resale of unregistered securities to Massachusetts residents; (j) fully and effectively enforce all of the existing laws and regulations prohibiting and remedying fraud and increase penalties for violations; and (k) fully and effectively enforce all of the existing laws and regulations regarding who is eligible and who is ineligible to invest in unregistered securities and increase penalties for violations.

extensive written report of Professor Franco, expressing opinions consistent with his trial testimony, and addressing in detail each of the plaintiffs' proposed alternatives. Professor Franco's opinion, in substance, is that the regulatory scheme directly serves the identified governmental interest, and that none of the alternatives would do so as effectively.

## FINDINGS, RULINGS, AND DISCUSSION

As a threshold matter, each side contends that it is entitled to judgment as a matter of law, without the need for any findings of fact, and without application of the *Central Hudson* test. The Secretary, as he did at the preliminary injunction stage, and citing the same authorities, argues that advertising of securities is not speech and does not implicate the first amendment at all. The Court rejects that contention for the same reasons stated in its preliminary injunction decision.[8]

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[8] As a first fallback position, the Secretary urges the Court to apply a rational basis test, on the theory that the regulatory scheme does not restrict speech, but instead merely compels disclosure. The Secretary cites *Zauderer*, 471 U.S. at 650–653, and *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–116 (2nd Cir.2001). As will be discussed further infra, the regulatory scheme in issue here is principally one of disclosure rather than restraint, and that overall characteristic certainly bears on the Court's evaluation of its effect on speech. Nevertheless, in the Court's view, the regulatory scheme does restrict speech to a degree that requires more than a rational basis analysis.

The plaintiffs raise an argument the Court has not previously addressed. Citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001),[9] plaintiffs argue that, regardless of what facts might appear in the record with respect to the interest served by the regulatory scheme and the effectiveness of it in serving that interest, a court must strike down a regulation affecting speech unless the government shows that, prior to adopting the challenged regulation, the regulatory official actually conducted an evaluation of its effect on speech and weighed that effect against alternative, less restrictive methods to protect the governmental interest. Because the Secretary is unable to make such a showing, the plaintiffs argue, they are entitled to prevail.

The Court does not read *Lorillard*, and the other cases cited, as establishing the rule the plaintiffs propose. Indeed, the Supreme Court did not actually apply such a standard in *Lorillard* itself. Although the record there did not indicate that the Massachusetts Attorney General had actually conducted a cost benefit analysis before adopting the regulations, the Court did not treat that failure as determinative. Rather, the Court applied the standards established in *Central Hudson* to the evidentiary record developed in the litigation as

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[9] The plaintiffs focus on this language in *Lorillard*, 533 U.S. at 561: "The broad sweep of the regulations indicates that the Attorney General did not 'carefully calculate the costs and benefits associated with the burden on speech imposed' by the regulations. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)."

justification for the regulations.[10] The Court applied the same type of analysis a year later in Thompson v. Western States Medical Center, 535 U.S. 357, 372 (2002), where it considered the legislative history of the statute underlying the challenged regulations, but also looked to the justification advanced in the evidentiary record developed in the course of the litigation, as well as justifications advanced in briefs before the Court. Indeed, plaintiffs have not identified any case in which a court has struck down regulations on the ground the plaintiffs urge this Court to apply, based solely on the government's inability to prove that the regulatory authority actually engaged in a balancing process before adopting the regulations, without regard to evidence offered in the litigation as to the justification for the regulations.[11]

The approach the courts have taken, in contrast to the one the plaintiffs propose, reflects the realities

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[10] Noteworthy in particular is the Court's evaluation of evidence the Attorney General had offered in the form of studies conducted by the Food and Drug Administration in connection with regulations it had proposed. Although the Court deemed those studies inadequate to show a fit between the Massachusetts regulations and the interest the Massachusetts Attorney General sought to serve, it did not suggest that anything turned on the question of whether the Attorney General had actually considered those studies, or other evidence, before adopting the regulation. *Lorillard*, 533 U.S. at 562.

[11] The plaintiffs cite *Utah Licensed Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1075 (10th Cir.2001). The Court in that case, like the Supreme Court in *Lorillard* and *Thompson*, considered the full record of evidence developed during the litigation to justify the regulation.

of the regulatory process at the state level, which may not involve recorded legislative or regulatory history of the sort compiled at the federal level. It reflects also the presumption of regularity that Courts properly grant to acts of the other branches. Further, the approach the Courts have applied avoids the formalistic results that would flow from rulings issued on the basis the plaintiffs propose.[12]

The Court therefore concludes, as it did at the preliminary injunction stage, that *Central Hudson* provides the test by which the Court must evaluate the Secretary's action.[13] The first step in applying that test is to determine that the commercial speech at issue concerns lawful activity and is not misleading. *Central Hudson*, 447 U.S. at 564. Here, as stated *supra*, the parties have so stipulated.

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[12] Here, for example, the plaintiffs' theory would require the Court to strike down a statute and regulations that have been in effect for decades because the Secretary is unable to show that his long-ago predecessor engaged in a particular thought process at the time of enactment. Thereafter, the Secretary could proceed to conduct and document the required analysis, and then adopt the same regulations, which would then withstand challenge if, at trial, the Commonwealth could prove facts sufficient meet the *Central Hudson* test. Such an artificial exercise would do little to protect First Amendment interests, while severely undermining the interests the regulatory scheme serves.

[13] Courts at all levels have applied the *Central Hudson* test to regulation of commercial speech with dependable regularity for nearly three decades. *See e. g., Thompson v. Western States Med. Ctr.*, 535 U.S. at 367, and cases cited; *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir.2005).

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

*Id.* at 564. As indicated *supra*, the parties have stipulated to the second prong as well as the first: the governmental interest to be served by the regulations, "to protect the integrity of capital markets, and thereby to preserve the overall health of the economy, by ensuring that investors make decisions based on full and accurate material information," is substantial. The dispute centers on the third and fourth prongs.

Before addressing the evidence relating to those issues, it bears noting that, what the parties and other courts have referred to as the third and fourth prongs are not so labeled in *Central Hudson* itself. Rather, *Central Hudson* refers to these as criteria by which to measure compliance with the requirement

of proportionality. As the Supreme Court said, "the regulatory technique must be in proportion to [the substantial state interest asserted]. The limitation on expression must be designed carefully to achieve the State's goal." The so-called third and fourth prongs are not independent requirements, to be applied mechanically; they are a means of evaluating the proportional relationship between the challenged regulation and the substantial interest it seeks to serve.

The so-called third prong requires that the restriction "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." The plaintiffs seize on the word "directly" to argue that the relationship between the regulation and its purpose must be direct in a literal sense, in that the effectiveness of the regulation to achieve its goals does not depend on any intermediate steps or incentives. The Court does not adopt that interpretation, which is not supported either by the language of *Central Hudson* or by any other identified authority. *Central Hudson* explains the meaning of "direct": "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." The requirement of direct support obligates the government to show that the challenged regulation will not only advance the government's stated interest, "but also that it will do so 'to a material degree.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996), quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). *See also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S.

173, 188 (1999) (the third prong of the *Central Hudson* inquiry "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

To establish the effectiveness of the regulatory scheme in issue here, the Secretary has offered the expert opinion of Professor Franco. Having considered Professor Franco's credentials, his reasoning, and his demeanor, the Court finds his opinions well-founded and highly credible, and adopts them in substance. On the issue of effectiveness, Professor Franco emphasizes that the ban on general advertising of unregistered securities must be considered in conjunction with the general requirement of registration, which mandates disclosure of all material information about securities offered to the public. The public filing of a registration statement, conforming in both form and content to uniform regulatory requirements, serves to provide complete, balanced, and accurate information not only to those who might consider investing in a particular offering, but also to the public as a whole, including regulatory officials, private analysts, large investors, and the news media, whose review serves as a powerful check on the accuracy and completeness of the information provided. That process tends to result in market prices that accurately reflect value, for the benefit of all investors, both those purchasing the particular issue and those trading in other securities. The ban on general advertising of unregistered securities,

Professor Franco opines, provides a powerful incentive for issuers to register, despite the substantial costs of doing so, thereby maximizing the benefits of the registration system to the public as a whole; indeed, in his view, it is vital to the effectiveness of the registration system. The Court adopts this opinion, and so finds.[14]

It follows that the ban on general solicitation of unregistered securities effectively promotes registration, which, in turn, effectively serves the state interest in market integrity. Professor Franco does not purport to quantify the effectiveness of the regulatory scheme, and the Court is not in a position to do so. The case law does not establish a precise level of effectiveness that must be achieved; *Central Hudson* indicates only that the regulation must effect something more than "remote" support for the state interest served. The Court is satisfied that that standard is met here.

The Court therefore turns to the fourth prong of the *Central Hudson* Test: whether "the

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[14] As the plaintiffs point out, Professor Franco's opinion is based not on empirical research, but on economic theory and regulatory experience. Nothing in *Central Hudson*, or in any other authority cited, requires evidence derived from empirical research. *See Lorillard*, 533 U.S. at 555, quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("we have permitted litigants ... even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense'"). Nor is it apparent how such research could be conducted by any practical means with respect to the regulations in issue here, without the risk of substantial harm that would arise from wholesale dismantling of the existing regulatory system.

governmental interest could be served as well by a more limited restriction on commercial speech." The phrase "as well" bears noting; the test is not whether some less restrictive approach might also serve the state's interest, but whether it would do so as well as the challenged regulation. *Central Hudson* does not elaborate on what is meant by "as well." The Court construes the phrase as referring to effectiveness in relation to the cost and burden of the regulatory scheme to the public—that is, could a less restrictive regulatory approach serve the state interest as effectively, at the same or approximately the same cost, both in public resources expended for administration and enforcement, and in private resources required for compliance?

To satisfy the fourth prong of the *Central Hudson* inquiry, the government must show "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Florida Bar v. Went for It*, 515 U.S. at 632. In evaluating the "fit," courts have been "loath to second-guess the Government's judgment," relying on the state's judgment "so long as its judgment was reasonable." *Board of Trustees*, 492 U.S. at 479. That deference serves to "provide the Legislative and Executive Branches needed lee-way in a field (commercial speech) 'traditionally subject to governmental regulation.'" *Id*. at 480, quoting *Ohralik*, 436 U.S. at 455–456. *See Board of Trustees*, 492 U.S. at 480–481 ("By declining to impose ... a least-restrictive-means requirement, we

take account of the difficulty of establishing with precision the point at which restrictions become more restrictive than their objective requires, and provide the Legislative and Executive branches needed leeway in a field ... traditionally subject to governmental regulation").

"A regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the fit between ends and means is reasonable." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (internal quotation omitted). "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. at 371; *see Lorillard Tobacco Co.*, 533 U.S. at 566. What is required is that "the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Board of Trustees*, 492 U.S. at 478, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

The Court also keeps in mind that the crux of the overall scheme established by both the state and federal securities laws is the requirement of registration. Registration serves not to restrict speech, but to expand it, by ensuring that any public offer to sell securities is accompanied by full disclosure of all material information. *See Ralston Purina*, 346 U.S. at 124 n.10 (quoting preamble to Federal Securities Act of 1933, "An Act to provide

full and fair disclosure of the character of securities sold in interstate and foreign commerce ... and to prevent frauds in the sale thereof"); *see also Wall Street Pub. Inst.*, 851 F.2d at 372. Disclosure requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Zauderer*, 471 U.S. at 651. For that reason, the high Court has held, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id. See Florida Bar v. Went for It*, 515 U.S. at 634 (remarking on the "many alternative channels" available to commercial speakers).

To evaluate the eleven alternative approaches the plaintiffs propose, the Secretary again offers Professor Franco's opinions. As Professor Franco explained, the plaintiffs' proposals overlap. All of them would eliminate the prohibition on general advertising of unregistered securities. Some would replace it with provisions of various kinds that would focus on the point of sale, such as requirements of notice of sales to the Secretary of State and of a right to rescind within a specified time; increased requirements of verification, documentation and record keeping to confirm accredited status of purchasers; licensing of accredited investors; and the like. Others offer no regulatory replacement, proposing merely more intensive enforcement of anti-fraud prohibitions or of prohibitions on sales to unaccredited investors.

In Professor Franco's view, all of the plaintiffs' proposals would reduce the incentive to register, and encourage issuers to make unregistered offerings,

sacrificing lawful access to some potential buyers in favor of saving the costs of registration. In addition, all of the proposals would likely result in increased "distortive" (that is, unbalanced) communications, increased incidence of unlawful transactions (such as sales to unaccredited investors), and proliferation of scams. Those proposals that rely on increased enforcement activity in connection with sales would suffer from the problem of coming after, rather than before transactions, when dissipation of assets may prevent effective remedies. In addition, proposals requiring increased enforcement, to be effective, would require expenditure of increased public resources. Some would also raise issues of federal preemption, to the extent that they are inconsistent with the existing federal scheme of securities regulation. In all of these respects, Professor Franco opined, the plaintiffs' proposals would decrease the protection of investors and impair market integrity. For the reasons already explained, the Court credits Professor Franco's opinions. On that basis, the Court finds that none of the proposed alternatives would serve the governmental interest in market integrity as well as the existing regulatory scheme.

To counter Professor Franco's opinions, the plaintiffs rely on two documents, submitted as stipulated exhibits at trial: A report to the Securities and Exchange Commission (SEC) from its Advisory Committee on Smaller Public Companies, dated April 23, 2006; and a letter to the SEC, dated April 3, 2006, from the Committee on Securities Regulation of the New York City Bar, commenting on an "exposure draft" of that report. The Advisory Committee Report recommends to the SEC that it

relax prohibitions on general solicitation and advertising in certain respects. The New York City Bar expresses support for that recommendation.[15] Both documents identify the rationale and purpose for the authors' position as the promotion of capital formation.

Capital formation is, of course, an important goal, which is to some degree in tension with investor protection and market integrity. Regulatory constraints that protect market integrity impose burdens on issuers and sellers of securities. In that respect, they may tend to impede capital formation. It follows that relaxation of such regulatory restraints might ease capital formation. The state regulatory scheme in issue here, and the corresponding federal scheme, reflect a regulatory choice to emphasize market integrity over capital formation. This Court has no authority to second-guess that choice. Rather, once it has been

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[15] Among its arguments, the Bar letter includes the following statement: "The North American Securities Administrators Association, Inc. has adopted a resolution relating to Internet offers of securities and a model accredited investor exemption ("MAIE") each of which permits general solicitation and advertising.... As of January 2006, thirty-one states had adopted the MAIE or a similar provision. It appears that these states have determined that permitting at least some form of general solicitation and advertising is not necessarily contrary to investor protection." The record before this Court provides no further information on the MAIE resolution or on the provisions adopted by other states in response to it. The Court is not in a position to compare whatever changes have occurred in the laws of other states with current Massachusetts law, and does not draw any conclusion based on this statement in the Bar letter.

established (as it has been here by stipulation), that the interest the regulator seeks to serve is a substantial one, the Court's role is to determine whether the means the Secretary has chosen to effectuate that choice is proportional to that interest, as measured by the criteria articulated in *Central Hudson*. Neither the Advisory Committee's report nor the New York City Bar's letter purports to address that issue, and neither sheds any light on it.

The Court concludes, based on the stipulated facts and the evidence presented at trial, that the statute and regulations in issue, and the Secretary's enforcement action against Bulldog Investors, meet the test of *Central Hudson*, and do not violate the First Amendment rights either of Bulldog or of Mr. Bloness. A declaration will enter to that effect.

CONCLUSION AND ORDER

For the reasons stated, the Court orders that JUDGMENT enter for the defendant, declaring that the challenged statute, regulations and enforcement action do not violate the plaintiffs' rights under the First Amendment. Counsel are directed to submit a proposed form of Judgment forthwith.

# APPENDIX C

## 2010 Opinion of the Supreme Judicial Court on personal jurisdiction

**SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK.**

BULLDOG INVESTORS GENERAL PARTNERSHIP & OTHERS[1]

*V.*

SECRETARY OF THE COMMONWEALTH.

SJC–10589.
Argued April 6, 2010.
Decided July 2, 2010.

Present: MARSHALL, C.J., IRELAND, SPINA, COWIN, CORDY, & GANTS, JJ.

COWIN, J.

A hearing officer in the Securities Division (division) of the office of the Secretary of the Commonwealth (Secretary) found that the plaintiffs violated G.L. c. 110A, the Massachusetts Uniform Securities Act (act), by offering unregistered securities to a Massachusetts resident via electronic

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[1] Opportunity Partners, L.P.; Full Value Partners, L.P.; Opportunity Income Plus Fund, L.P.; Kimball & Winthrop, Inc.; Full Value Advisors, LLC; SPAR Advisors, LLC; Phillip Goldstein; Steven Samuels; Andrew Dakos; Rajeev Das; and Leonard Bloness.

mail (e-mail). The plaintiffs sought judicial review of this ruling, and a judge in the Superior Court affirmed. The plaintiffs contend that their contacts with the Commonwealth were insufficient to permit the Secretary to exercise personal jurisdiction over them, that the act violates their constitutional right to free speech, and that the communication did not constitute an offer within the meaning of the act. We conclude that personal jurisdiction over the plaintiffs was both statutorily authorized and consistent with due process, that the constitutional claim is not properly before us, and that the Secretary determined correctly that the plaintiffs violated the act. Unlike at common law, where the definition of an offer includes only communications to which an offeree's affirmative response would conclude a bargain, the act defines an "offer" more broadly to include the "solicitation of an offer." See G.L. c. 110A, § 401 (i ) (2). Thus, the plaintiffs violated the act by sending to a Massachusetts resident materials soliciting an offer to purchase unregistered securities.

1. Facts and procedural history. We summarize the facts found by the hearing officer, supplemented with undisputed facts from the record. From approximately June 9, 2005, through January 5, 2007, Bulldog Investors General Partnership (Bulldog) operated an interactive Web site that provided information about investment products it offered for sale. Users could obtain more specific information about Bulldog's "hedge funds" by registering with the site.

On November 10, 2006, Brendan Hickey, a Massachusetts resident, registered by providing

Bulldog with his name, address, telephone number, and e-mail address. Steven Samuels, a Bulldog employee, responded to Hickey's registration with an e-mail message to which documents were attached that contained detailed information regarding the performance of the plaintiffs' hedge funds, the returns the funds had earned, background information on Bulldog's partners, news articles about the funds, and a description of the plaintiffs' investment philosophy and strategy. Samuels also invited Hickey to contact him by telephone to discuss Bulldog's funds in greater detail.

On January 31, 2007, the Secretary filed an administrative complaint against the plaintiffs[2] alleging that Bulldog's Web site and e-mail contact with Hickey constituted an offer of securities that were neither registered nor exempt from registration, in violation of the act. *See* G.L. c. 110A, § 301. In their answer, the plaintiffs denied violating the act and asserted as affirmative defenses (1) that the act and the Secretary's regulations violated the plaintiffs' right to free speech under the First Amendment to the United States Constitution and

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[2] Plaintiffs Opportunity Partners L.P.; Full Value Partners L.P.; and Opportunity Income Plus Fund L.P., are general partners of Bulldog Investors General Partnership (Bulldog). Plaintiff Kimball & Winthrop, Inc., is a managing general partner of Bulldog. Plaintiff Full Value Advisors, LLC, is the sole general partner of Full Value Partners L.P. Plaintiff Spar Advisors, LLC, is the sole general partner of Opportunity Income Plus Fund L.P. Plaintiffs Andrew Dakos, Rajeev Das, and Steven Samuels are principals of Bulldog. Plaintiff Phillip Goldstein is the president of Kimball & Winthrop, Inc., and a cofounder of Bulldog.

art. 16 of the Massachusetts Declaration of Rights; and (2) that in any event the Secretary lacked personal jurisdiction over the plaintiffs. The Secretary appointed a hearing officer pursuant to 950 Code Mass. Regs. § 10.02(b)(8) (1993).

The Secretary moved for summary decision, arguing that the hearing officer lacked the authority to decide the plaintiffs' constitutional claims. In response, the plaintiffs filed a complaint in the Superior Court pursuant to 42 U.S.C. § 1983 and G.L. c. 12, § 11I, asserting their constitutional claim regarding free speech.[3] The plaintiffs sought a stay of the administrative proceeding pending resolution of the First Amendment claim in the Superior Court; the hearing officer denied the request. She stated that the only issue before her was whether the plaintiffs violated the act and that she was required to make a finding regarding liability before a court could decide whether there had been an abridgement of the plaintiffs' First Amendment right.[4]

The hearing officer concluded that the plaintiffs had offered unregistered securities for sale in the Commonwealth. In addition, she determined that

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[3] In the 42 U.S.C. § 1983 action, the plaintiffs did not initially assert their contention that the exercise of personal jurisdiction by the Secretary of the Commonwealth (Secretary) violated due process. They later amended their complaint to include this claim.

[4] From this point forward, the plaintiffs did not argue the First Amendment claim before the hearing officer. Instead, they asserted that claim without argument in their opposition to the motion for summary decision and stated that they agreed with the Secretary that a court should address that claim.

the plaintiffs did not qualify for various exemptions to the registration requirement. Finally, the hearing officer concluded that the plaintiffs were subject to personal jurisdiction in Massachusetts because their violation of the act constituted a sufficient nexus to permit personal jurisdiction. She recommended the issuance of a cease and desist order and a $25,000 fine.

The acting director of the Securities Division (acting director) adopted the hearing officer's recommended findings of fact and rulings of law and imposed the recommended sanctions.[5] The plaintiffs sought judicial review of the acting director's determination in the Superior Court and moved for judgment on the pleadings. *See* G.L. c. 30A, § 14; G.L. c. 110A, § 411. *See also* Standing Order 1–96(4) of the Rules of the Superior Court (2002) ("A claim for judicial review shall be resolved through a motion for judgment on the pleadings ..."). In a thoughtful memorandum of decision, a judge in the Superior Court[6] denied the motion and affirmed the acting director's ruling. The judge concluded that personal jurisdiction over the plaintiffs was both statutorily authorized and consonant with due process. In addition, she held that, after having chosen to use the separate 42 U.S.C. § 1983 action as

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[5] The acting director of the Securities Division stayed the imposition of sanctions until the Superior Court ruled on a motion for a preliminary injunction in the 42 U.S.C. § 1983 action. A judge in the Superior Court later denied this motion.

[6] The judge who decided the plaintiffs' G.L. c. 30A, § 14, action was the same judge who had earlier denied the plaintiffs' motion for a preliminary injunction in the 42 U.S.C. § 1983 action.

the vehicle to obtain relief on their First Amendment claim, the plaintiffs could not raise that claim in the action pursuant to G.L. c. 30A, § 14. The plaintiffs appealed, and we transferred the case from the Appeals Court on our own motion.

2. Standard of review. Pursuant to G.L. c. 110A, § 411, "[a]ny person aggrieved by a final decision of the Secretary in an adjudicatory proceeding may obtain judicial review." *See* G.L. c. 30A, § 14. We reverse the Secretary's decision only if it was "(a) [i]n violation of constitutional provisions"; "(b) [i]n excess of the statutory authority or jurisdiction" of the Secretary; "(c) [b]ased upon an error of law"; "(d) [m]ade upon unlawful procedure"; "(e) [u]nsupported by substantial evidence"; "(f) [u]nwarranted by facts found by the court ... where the court is constitutionally required to make independent findings of fact"; or "(g) [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *See* G.L. c. 30A, § 14(7).

3. Discussion. The plaintiffs contend that the Web site and the single e-mail message to Hickey were insufficient contacts with the Commonwealth to subject them to personal jurisdiction before the Secretary. They claim that the act does not authorize the Secretary to subject nonresidents to administrative enforcement proceedings. Furthermore, they argue that exercising personal jurisdiction in this case violated the due process clause of the Fourteenth Amendment to the United States Constitution because the plaintiffs did not purposefully avail themselves of the benefits of Massachusetts law.

The plaintiffs contend also that "[t]he Secretary's order is an unconstitutional prior restraint on truthful, non-misleading speech that does not concern an illegal transaction," in violation of the First Amendment and art. 16. They argue in addition that their Web site and e-mail message did not constitute an "offer" within the meaning of the act. *See* G.L. c. 110A, § 401 (i ) (2). They contend that the communication to Hickey was not an offer because he could not have purchased securities merely by responding to the e-mail message. In addition, they contend that Hickey agreed to a disclaimer posted on the Web site stating that the information contained therein did not constitute a solicitation.

The Secretary responds that the broad enforcement powers granted him under the act authorized personal jurisdiction in this case. He argues also that his exercise of jurisdiction comported with due process because the plaintiffs purposefully availed themselves of the privilege of conducting activities in Massachusetts. Furthermore, he contends that they could have reasonably anticipated being the subject of an enforcement proceeding by virtue of their violation of the act. Additionally, the Secretary contends that the plaintiffs' First Amendment claim is waived, and that, even if not waived, the claim fails because there is no constitutional prohibition on requiring that a seller of securities disclose information about its products through registration before being allowed to offer or advertise them. Finally, the Secretary argues that the plaintiffs' communication with Hickey constituted a solicitation that falls

within the act's definition of an offer; he notes that the act's definition of the term "offer" is not limited to its common-law definition.

a. Personal jurisdiction. For a nonresident to be subject to personal jurisdiction in Massachusetts, there must be a statute authorizing jurisdiction and the exercise of jurisdiction must be "consistent with basic due process requirements mandated by the United States Constitution." *Intech, Inc. v. Triple "C" Marine Salvage, Inc.*, 444 Mass. 122, 125, 826 N.E.2d 194 (2005), quoting *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767, 625 N.E.2d 549 (1994). We analyze each requirement separately.

i. Statutory authorization of personal jurisdiction. In court proceedings, personal jurisdiction in Massachusetts over a nonresident is authorized when one of the provisions of our long-arm statute, G.L. c. 223A, § 3, is satisfied. *See Roberts v. Legen-dary Marine Sales*, 447 Mass. 860, 862–863, 857 N.E.2d 1089 (2006). By its terms, the long-arm sta-tute applies only to courts and cannot authorize an agency to exercise personal jurisdiction over nonresi-dents. *See* G.L. c. 223A, § 3.[7] However,

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[7] General Laws c. 223A, § 3, authorizes a court to exercise personal jurisdiction over a person when a cause of action arises from, inter alia, "the person's ... transacting any business in this commonwealth, ... contracting to supply services or things in this commonwealth, ... causing tortious injury by an act or omission in this commonwealth, ... [or] causing tortious injury in this common-wealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth."

the long-arm statute is not the only source for the exercise of personal jurisdiction over nonresidents. The text and purposes of the act itself establish that it authorizes the Secretary to exercise personal jurisdiction over nonresidents in an administrative proceeding.

The act prohibits the offering or selling of unregistered securities in the Commonwealth unless the securities are exempt from the registration requirement or are Federal "covered" securities. *See* G.L. c. 110A, § 301. The definition of "offer" includes not only offers that originate within the Commonwealth but also ones directed into the Commonwealth and received at the place to which they are directed. *See* G.L. c. 110A, § 414(c). The Secretary possesses the authority to conduct investigations inside or outside the Commonwealth to determine if a violation has occurred. *See* G.L. c. 110A, § 407(a). He also has broad authority to remedy "a violation of any provision" of the act by "any person" by imposing cease and desist orders or fines. *See* G.L. c. 110A, § 407A(a). These provisions establish that one of the purposes of the act is to protect Massachusetts residents from offers and sales of unregistered securities directed at them from other jurisdictions. These protections and the Secretary's authority to conduct investigations outside the Commonwealth would be meaningless without authorization to subject nonresidents to enforcement proceedings.

Furthermore, the act provides that, where personal jurisdiction "cannot otherwise be obtained in the Commonwealth," any nonresident who has violated the act is deemed to have appointed the

Secretary as his agent to receive process in any noncriminal proceeding arising out of that conduct. *See* G.L. c. 110A, § 414 (h). This authority to serve process would be ineffective in enforcing the act through administrative proceedings unless accompanied by the power to bring a respondent before a tribunal to adjudicate whether a violation occurred. Interpreting the statute to authorize service of process without authorizing personal jurisdiction would transform the substituted service provision into a nullity. *See Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375–376, 727 N.E.2d 1147 (2000) ("If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results").[8]

ii. Due process. "'The constitutional touchstone' of the determination whether an exercise of personal

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[8] In other contexts, courts have recognized that substituted service provisions authorize personal jurisdiction. *See Hess v. Pawloski*, 274 U.S. 352, 355–357, 47 S.Ct. 632, 71 L.Ed. 1091 (1927) (statute considering operation of motor vehicle on public highway to be appointment of state official as agent for receiving process confers personal jurisdiction). *See also LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1371 (Fed.Cir.2000); *Renfro v. Adkins*, 323 Ark. 288, 294, 914 S.W.2d 306 (1996); *Cherokee v. Parsons*, 944 So.2d 886, 889–890 (Miss.2006). The plaintiffs point out that the court in *MFS Series Trust III v. Grainger*, 96 P.3d 927, 934 (Utah 2004), interpreted the substituted service provision of Utah's securities act as authorizing service of process but not personal jurisdiction. We decline to follow this interpretation because it relies on cases analyzing whether a defendant possessed minimum contacts sufficient to satisfy due process, rather than whether personal jurisdiction was statutorily authorized. *See id.*

jurisdiction comports with due process 'remains whether the defendant established "minimum contacts" in the forum state.'" *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 772, 625 N.E.2d 549 (1994), quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The due process analysis entails three requirements. First, minimum contacts must arise from some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Tatro v. Manor Care, Inc., supra*, quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108–109, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). Second, the claim must arise out of or relate to the defendant's contacts with the forum. *See Tatro v. Manor Care, Inc., supra.* Third, "the assertion of jurisdiction over the defendant must not offend 'traditional notions of fair play and substantial justice.' " *Tatro v. Manor Care, Inc.*, *supra* at 773, 625 N.E.2d 549, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

By contacting Hickey, the plaintiffs purposefully availed themselves of the privilege of conducting business activities in Massachusetts and invoked the protection of Massachusetts law. *See Tatro v. Manor Care, Inc., supra* (solicitation of business in Massachusetts invokes benefits and protection of Massachusetts law). Because the plaintiffs operated a Web site accessible in Massachusetts and sent a solicitation that is prohibited by Massachusetts law to a Massachusetts resident, it was reasonable for the plaintiffs to anticipate being held responsible in

Massachusetts. *See World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) ("the foreseeability that is critical to due process analysis ... is [whether] the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there").

At the time of their communication with Hickey, the plaintiffs were on notice that Hickey was a resident of Massachusetts. Additionally, the act placed the plaintiffs on notice that directing offers of unre-gistered securities into Massachusetts is unlawful. *See* G.L. c. 110A, §§ 301, 414 (a), (c). By soliciting purchases of their hedge funds, the plaintiffs sought to derive commercial benefit from their interaction with Hickey. Therefore, it would be unfair "to escape having to account in [Massachusetts] for conse-quences that arise proximately from such activities." *Burger King Corp. v. Rudzewicz, supra* at 473–474, 105 S.Ct. 2174.

The plaintiffs suggest that we have ruled in prior cases that contacts more substantial than those existing here were insufficient to sustain personal jurisdiction. *See Roberts v. Legendary Marine Sales*, 447 Mass. 860, 861–862, 865, 857 N.E.2d 1089 (2006); *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 151, 157, 376 N.E.2d 548 (1978). These cases are inapposite because they considered only whether personal jurisdiction was statutorily authorized by the long-arm statute. They did not address the due process question.

The second and third prongs of the due process analysis are also satisfied in this case. It is

undisputed that the Secretary's enforcement proceedings arose out of the plaintiffs' contacts with Massachusetts. Finally, exercising personal jurisdiction in these circumstances comports with fair play and substantial justice. In determining whether fair play and substantial justice are satisfied, we weigh the Commonwealth's interest in adjudicating the dispute, the burden on the out-of-State party of litigating in Massachusetts, and the Commonwealth's interest in obtaining convenient and effective relief. *See Burger King Corp. v. Rudzewicz, supra* at 476–477, 105 S.Ct. 2174. Massachusetts has a strong interest in adjudicating violations of Massachusetts securities law. *See Tatro v. Manor Care, Inc., supra*. Although there may be some inconvenience to the plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh the Commonwealth's interest in enforcing its laws in a Massachusetts forum.

The plaintiffs contend that, even if the Secretary possessed personal jurisdiction over Bulldog, he could not exert personal jurisdiction over the individual plaintiffs. The Secretary has the burden of proving facts sufficient to establish that personal jurisdiction is permissible. *See Miller v. Miller*, 448 Mass. 320, 325, 861 N.E.2d 393 (2007). Because the facts in the record are sufficient to establish personal jurisdiction over each individual plaintiff, that burden has been met here.

In the administrative complaint, the Secretary alleged that Hickey was sent advertising and offering materials through e-mail. In their answer to the administrative complaint, each individual plaintiff admitted that he provided information via

e-mail to Hickey. While some of the individual plaintiffs later filed affidavits stating that they were not involved in sending this communication, the Secretary was entitled to credit the facts admitted in the answer rather than the affidavits. *See Walker v. Georgetown Housing Auth.*, 424 Mass. 671, 672 n. 3, 677 N.E.2d 1125 (1997).[9] Because each individual plaintiff admitted to facts sufficient to form a basis for personal jurisdiction, the Secretary's finding that he possessed personal jurisdiction over all the plaintiffs is supported by substantial evidence.[10]

b. First Amendment claim. The plaintiffs argue that "[t]he Secretary's order is an unconstitutional prior restraint on truthful, non-misleading speech that does not concern an illegal transaction." The Secretary contends that the plaintiffs' First Amendment claim has been waived, and that, even if it has not been waived, the cease and desist order and the act itself do not violate the constitutional protection of freedom of speech.

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[9] The cases cited by the plaintiffs, stating that personal jurisdiction cannot be exercised over corporate officers based on the contacts of their corporation, are also inapposite. Because Bulldog is a partnership, not a corporation, these principles are not applicable to this case. Even if these cases were applicable, they would be unavailing. In this case, personal jurisdiction was based on the admission each individual plaintiff made in the answer, not the contacts of the corporation. As stated, the Secretary was entitled to rely on this admission.

[10] The plaintiffs assert that Hickey's inquiry to Bulldog was made at the request of a competitor with whom Bulldog was involved in a legal dispute and was a "sham." It is irrelevant whether Hickey contacted Bulldog without the intention of actually purchasing securities.

The plaintiffs initially asserted their First Amendment defense in their answer to the administrative complaint. The hearing officer declined to rule on this issue; instead, she agreed that the constitutional defense should be decided by a court. The hearing officer apparently viewed the constitutional claim as a challenge to the enabling statute and, as such, beyond the authority of the Secretary to adjudicate. *See Gurry v. Board of Public Accountancy*, 394 Mass. 118, 126, 474 N.E.2d 1085 (1985).

In response to the hearing officer's position, the plaintiffs litigated the First Amendment issue in a separate action in the Superior Court in which they asserted violations of 42 U.S.C. § 1983.[11] The plaintiffs did not raise the First Amendment issue in their complaint for judicial review in the instant case, brought pursuant to G.L. c. 30A, § 14. They did plead the issue and litigate it in the 42 U.S.C. § 1983 action. In these unusual circumstances, the 42 U.S.C. § 1983 action is the proper forum for resolving the plaintiffs' First Amendment claim.

c. Violation of the act. The Secretary determined properly that the plaintiffs' e-mail message to Hickey violated the act. The act defines an offer to include the "solicitation of an offer." *See* G.L. c. 110A, § 401(i)(2). Thus, as stated, for the purposes of the act, the term "offer" is not limited to its common-law

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[11] Judgment was entered in favor of the Secretary in the 42 U.S.C. § 1983 action. The plaintiffs appealed that decision, and their appeal is now pending in the Appeals Court.

definition.[12] The e-mail message sent to Hickey, and the materials attached to it, contained detailed information regarding the performance of the plaintiffs' hedge funds, the returns the funds had earned, background information on Bulldog's partners, news articles about the funds, and a description of the plaintiffs' investment philosophy and strategy. It is clear that these materials were designed to stimulate interest in Bulldog's funds. Thus, the communication constituted a solicitation of an offer to buy unregistered securities. *See I & R Mechanical, Inc. v. Hazelton Mfg. Co.*, 62 Mass.App.Ct. 452, 455, 817 N.E.2d 799 (2004) (advertisements are usually considered requests for offers). *See also* 1 Williston, Contracts § 4:10, at 475 (4th ed.2007).

The plaintiffs contend that because Hickey would have needed to take additional steps before being permitted to purchase Bulldog's securities, the e-mail communication cannot constitute an offer. Because in this context the term "offer" is not limited to its common-law definition, see G.L. c. 110A, § 401(i)(2), it is not required that the plaintiffs' communication be such that Hickey's assent would have concluded a bargain. *See* note 12, *supra*.

Additionally, the disclaimers posted on the Web site do not defeat liability. In order to access certain

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[12] At common law, an offer is "the manifestation of willingness to enter into a bargain made in such a way as to justify the other person in understanding that his assent will conclude the agreement." *I & R Mechanical, Inc. v. Hazelton Mfg. Co.*, 62 Mass.App.Ct. 452, 455, 817 N.E.2d 799 (2004), citing Restatement (Second) of Contracts § 24 (1981).

parts of the Web site, users are required to acknowledge disclaimers stating that the Web site does not constitute a solicitation and the Web site cannot be used for the purpose of an offer or solicitation in any circumstances where such an offer or solicitation would be unlawful. However, the plaintiffs cannot escape liability for offering unregistered securities merely by stating to the users of their Web site that their conduct does not constitute an offer. The presence of a disclaimer asserting that the Web site was not an offer or a solicitation is not dispositive; the disclaimer is only one factor in determining whether the plaintiffs' communication with Hickey was an offer or a solicitation. *Cf. LeMaitre v. Massachusetts Turnpike Auth.*, 452 Mass. 753, 756, 897 N.E.2d 1218 (2008); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 744, 729 N.E.2d 1113 (2000). Here, as stated, the materials sent to Hickey were designed to stimulate interest in purchasing Bulldog's securities. Most importantly, the e-mail message sent to Hickey and the attachments therein did not contain the disclaimer that was posted on the Web site. For these reasons, the e-mail message sent to Hickey was an offer within the meaning of the act.

4. Conclusion. The Secretary possessed personal jurisdiction over the plaintiffs, and his determination that the plaintiffs violated the act was correct. Therefore, the decision of the Superior Court, affirming the issuance of the cease and desist order and the imposition of the fine, was also correct.

Judgment affirmed.

## APPENDIX D

## Order of the Supreme Judicial Court Denying Rehearing

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: No. SJC-10756

BULLDOG INVESTORS GENERAL PARTNERSHIP & others

vs.

SECRETARY OF THE COMMONWEALTH

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Susan Mellen, Clerk

Dated: November 3, 2011

To: Andrew Good, Esquire
Alan Lewis, Esquire
Pierce O. Cray, A.A.G.
Alan S. Lewis
Suffolk Superior Court Dept.
Adam J. Kessel, Esquire
Atty. Lee Tien