

February 2017

## What Exactly is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation

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### Repository Citation

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# WHAT EXACTLY IS MARKET INTEGRITY? AN ANALYSIS OF ONE OF THE CORE OBJECTIVES OF SECURITIES REGULATION

JANET AUSTIN\*

## ABSTRACT

*One of the main objectives of securities regulation around the world is to protect the integrity or fairness of the markets. This, together with protecting investors, improving the efficiency of markets, and protecting the markets from systemic risk, form the four fundamental goals of securities regulation.*

*However, what exactly is envisaged by this concept of market integrity or fairness? Are these simply norms of behaviour incapable of further definition? Despite their importance, relatively little attention has been given to these concepts in the literature. Do they, for example, require securities regulators to just work towards eliminating dishonest trading practices such as market manipulation and insider trading? Or should regulators be required to go further and ensure, for example, transparency of corporate information, transparency of price information, and equality of access to the markets?*

*Examining what is encompassed by the objectives of protecting market integrity and fairness is critical for a number of reasons. First, if they are only normative concepts, they may be incapable of measurement. This is problematic because it may be impossible to assess the progress of securities regulators towards achieving these goals. In addition, if they are in fact incapable of further definition and measurement, then innovations which improve market efficiency, another key goal of securities regulation, are likely to be permitted even if the innovation in question actually detracts from the fairness or integrity of the market. This is because improvements in market efficiency are generally quantifiable, and, therefore, measured improvements in market efficiency create the momentum for those improvements to be permitted.*

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*This Article seeks to analyse the concepts of market integrity and market fairness. It examines how they became one of the core goals of securities regulation around the world. The Article then attempts to break down these concepts and provide further definition of them. It is hoped that this analysis will encourage the development of metrics that assess securities regulators' performance, as well as enable the assessment of whether or not new market innovations should be adopted.*

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## INTRODUCTION

Protecting the integrity or the fairness of the markets for securities is one of the key justifications for having securities regulators and securities regulation in the first place.<sup>1</sup> For example, the Securities and Exchange Commission's (SEC) stated mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."<sup>2</sup> Similarly, in Canada, the stated purpose of the Ontario Securities Act<sup>3</sup> includes "foster[ing] fair and efficient capital markets and confidence in capital markets."<sup>4</sup> The objectives of Germany's Securities Regulator, Bundesanstalt für Finanzdienstleistungsaufsicht (commonly known by its abbreviation "BaFin")<sup>5</sup> is "to ensure the transparency and integrity of the financial market and the protection of investors."<sup>6</sup>

The Oxford Dictionary defines fairness as "honesty, impartiality, fair dealing."<sup>7</sup> Integrity is defined in the Oxford Dictionary in a number of ways, namely:

- (1) The condition of having no part or element taken away or lacking; undivided state; completeness.
- (2) The condition of not being marred or violated; unimpaired or uncorrupted condition; original perfect state; soundness.
- (3) (a) Freedom from moral corruption; innocence, sinlessness  
(b) Soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity.<sup>8</sup>

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<sup>1</sup> See *About the SEC*, U.S. SEC. AND EXCH. COMM'N, <https://www.sec.gov/about/whatwedo.shtml> [<https://perma.cc/J5VT-FJPP>].

<sup>2</sup> *Id.*

<sup>3</sup> Securities Act, R.S.O. 1990, c. S.5 (Can.) [hereinafter Canada Securities Act].

<sup>4</sup> See *id.* § 1.1.

<sup>5</sup> See generally Bundesanstalt für Finanzdienstleistungsaufsicht [BaFin] [Act Establishing the Federal Financial Supervisory Authority], Apr. 22, 2002, FinDAG I at 1310, last amended Dec. 6, 2011 FinDAG I at 2481, art. 19 (Ger.), [http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/find\\_ag\\_aktuell\\_en.html](http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/find_ag_aktuell_en.html) [<https://perma.cc/5PFW-XUD9>].

<sup>6</sup> *Securities Supervision*, BAFIN (Oct. 17, 2003), [http://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/Wertpapieraufsicht/wertpapieraufsicht\\_node\\_en.html](http://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/Wertpapieraufsicht/wertpapieraufsicht_node_en.html) [<https://perma.cc/FD6R-HRQQ>].

<sup>7</sup> *Fairness*, OXFORD ENGLISH DICTIONARY (6th ed. 2007).

<sup>8</sup> *Integrity*, OXFORD ENGLISH DICTIONARY (6th ed. 2007).

With these definitions blending concepts of morality and honesty, “fairness” and “integrity” seem to be informal norms of behaviour, reflective perhaps of one’s own individual assessment of what is honest or moral.<sup>9</sup>

However, these concepts of integrity and fairness are not used by securities regulators in isolation.<sup>10</sup> They are qualified in that they are used in the context of constituting an achievable characteristic of a market for securities.<sup>11</sup> Accordingly, it seems that integrity in this context can be confined to ensuring that markets are “unimpaired,” “uncorrupted,” and “sound,” while fairness can be confined to ensuring that the markets have the characteristics of being impartial and equitable.<sup>12</sup>

Even contextualised in this way, it may be that the concepts are still normative. Indeed, some have criticised the concept of market fairness as being too vague and devoid of principled content.<sup>13</sup> However, governments, securities regulators, and even the G20 have adopted market integrity and market fairness as a core objective for securities regulation.<sup>14</sup> As such, it seems that these concepts should be capable of interpretation, predictability or, at least, contain within them some principles of general application.

In addition, consigning these concepts to the relatively vague status of being informal norms of understanding that govern the behaviour of individuals in society is problematic for a number of reasons. First, as they are one of the core objectives of securities regulation and one that securities regulators themselves strive to

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<sup>9</sup> For an attempt to develop a non-normative meaning of integrity in relation to individuals and organizations see Werner Erhard & Michael C. Jensen, *Putting Integrity Into Finance: A Purely Positive Approach* 3 (Harv. Bus. Sch. NOM, Unit Research Paper No. 12-074; European Corp. Governance Inst. (ECGI), No. 417/2014; Barb. Grp., Working Paper No. 12-01, 2015), <http://ssrn.com/abstract=1985594> [<https://perma.cc/ZJP5-ENZC>].

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4, 67.

<sup>13</sup> See generally Ian B. Lee, *Fairness and Insider Trading*, 2002 COLUM. BUS. L. REV. 119 (2002).

<sup>14</sup> *The G20 Seoul Summit Leaders’ Declaration*, WALL ST. J., (Nov. 11–12, 2010), <http://online.wsj.com/public/resources/documents/G20COMMUN1110.pdf> [<https://perma.cc/453C-PCUU>] (calling on IOSCO to make recommendations “to promote markets’ integrity and efficiency to mitigate the risks posed to the financial system by the latest technological developments”).

achieve, how can anyone, including the regulators themselves, measure or assess their progress towards achieving this goal?<sup>15</sup> Does it also mean that securities regulators can intervene in the markets with little or no justification except a bold assertion that a particular practice may be “unfair”?

Furthermore, if these concepts are incapable of further definition and measurement, innovations which improve market efficiency, another key goal of securities regulators, are likely to be permitted even if the practice may detract from what some may view as the integrity or fairness of the markets.<sup>16</sup> This is because improvements in market efficiency can usually be measured.<sup>17</sup> For instance, an innovation in the structure of a securities market may show a measurable reduction of the spread between the price at which securities are offered for sale and the price at which the same securities are offered for purchase.<sup>18</sup> This reduction of the buy-ask spread, referred to as an improvement in liquidity,<sup>19</sup> enhances the efficiency of the market because it makes it more likely that a trade will take place.<sup>20</sup> Innovations that create efficiency gains are likely to trump indefinite assertions of market unfairness because they can be measured.<sup>21</sup> For example, recently there has been controversy over whether securities regulators should intervene to prohibit high frequency traders being able to co-locate their computer servers with those of the exchanges.<sup>22</sup> This is a practice that can be shown to improve liquidity and, therefore, market efficiency, but that also seems to create an inequitable

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<sup>15</sup> See *About the SEC*, *supra* note 1; see also *Securities Supervision*, *supra* note 6; see generally *Canada Securities Act*, *supra* note 3.

<sup>16</sup> See Erhard & Jensen, *supra* note 9, at 5–6.

<sup>17</sup> See Alex Frino, Vito Mollica & Robert I. Webb, *The Impact of Co-Location of Securities Exchanges' and Traders' Computer Servers on Market Liquidity*, 34 J. OF FUTURES MKTS. 20, 26–27 (2014).

<sup>18</sup> *Id.* at 27.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.* at 28, 31.

<sup>21</sup> See Janet Austin, *Protecting Market Integrity in an Era of Fragmentation and Cross-Border Trading*, 46 OTTAWA L. REV. 25, 27–29 (2014–15).

<sup>22</sup> See Scott Patterson, *Hill Peers Into Market's Fast Lane*, WALL ST. J., Sept. 20, 2012, at C4; Geoffrey Rogrow, *Colocation: The Root of All High-Frequency Trading Evil?*, WALL ST. J. BLOG (Sept. 20, 2012, 1:57 PM), <http://blogs.wsj.com/marketbeat/2012/09/20/collocation-the-root-of-all-high-frequency-trading-evil/> [<https://perma.cc/5DBU-JQ39>].

playing field because as a result of such co-location some traders get market information a split second before other traders.<sup>23</sup>

The aim of this Article then, is to attempt to tease out what is incorporated within these concepts of market integrity and market fairness and to differentiate them from other key goals, namely market efficiency and investor protection.<sup>24</sup> It is hoped thereafter that further research can gradually develop metrics to determine the impact of new innovations on market integrity and fairness. Part I of this Article traces how market integrity and market fairness became a key goal of securities regulation. Part II moves on to survey how this goal is incorporated within the other goals of securities regulators of five countries, namely the United States, the United Kingdom, Germany, Canada, and Australia, which represent over 50 percent of the world's securities markets.<sup>25</sup> Part III examines how these terms have been defined in the existing literature. Drawing upon this examination, Part IV delineates some of the core attributes contained within the market integrity and market fairness requirements. The article concludes by calling for more research to measure these elements to better enable regulators to assess the impact of changes to securities regulation.

## I. HOW MARKET INTEGRITY AND MARKET FAIRNESS BECAME A KEY GOAL OF SECURITIES REGULATION

Market fairness seems to have started its course to becoming one of the key objectives of securities regulation around the world

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<sup>23</sup> See Frino et al., *supra* note 17, at 31 (finding that allowing traders to co-locate their computer servers with those of the Australian Securities Exchange resulted in increased liquidity as measured by a narrowing of bid-ask spreads and market depth); see also Patterson, *supra* note 22, at C1; Rogrow, *supra* note 22.

<sup>24</sup> See *About the SEC*, *supra* note 1.

<sup>25</sup> All of these jurisdictions are in the top twelve in the world in terms of market capitalization. *Market capitalization of listed domestic companies*, WORLD BANK, <http://wdi.worldbank.org/table/5.4> [<https://perma.cc/T6K7-M74A>] (specifically, in 2015 the United States made up 40.6 percent of the world markets in terms of market capitalization, the United Kingdom 3 percent, Canada 2.6 percent, Germany 2.8 percent, and Australia 2 percent (the United Kingdom figures reflect 2010 estimations)).

as a result of the enacting of the Securities Exchange Act<sup>26</sup> (Exchange Act) in the United States in 1934.<sup>27</sup>

The original text of the Exchange Act sets out the necessity for the establishment of the Securities Exchange Commission and the regulation of the exchanges and brokers.<sup>28</sup> Section 2(a) of that Act provided that regulation was necessary because transactions conducted on exchanges and over-the-counter markets are effected with “a national public interest.”<sup>29</sup> This provision states that regulation is necessary: “in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of *fair and honest* markets in such transactions.”<sup>30</sup>

The Act goes on to explain that regulation is necessary because securities transactions and the prices of securities directly influence the financing of interstate trade, international trade, and industry.<sup>31</sup> The price of securities also affects bank loans when securities are used as collateral.<sup>32</sup> Furthermore, manipulation, speculation, and unreasonable fluctuations of the price of securities adversely affect the volume of credit available to trade and industry.<sup>33</sup> This in turn impacts upon the level of unemployment, and increases in unemployment burden the Federal Government.<sup>34</sup> To this day, the justifications for the Exchange Act largely remain unchanged.<sup>35</sup>

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<sup>26</sup> See Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a (1934)).

<sup>27</sup> See *About the SEC*, *supra* note 1.

<sup>28</sup> See Securities Exchange Act of 1934 § 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> *Id.* § 2(1).

<sup>32</sup> *Id.* § 2(2).

<sup>33</sup> *Id.* § 2(3).

<sup>34</sup> *Id.* § 2(4).

<sup>35</sup> In 1975, the objects were amended to add the words “to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto,” before the words “and to impose requirements necessary to make such regulation and control reasonably complete and effective.” See Securities Act Amendments of 1975, Pub. L. No. 94-29, § 2, 89 Stat. 97 (1975). The Dodd-Frank Wall Street Reform and Consumer Protection Act also changed the word “affected” to “effected.” See Dodd-Frank Act, Pub. L. No. 111-203, § 985(b)(1), 124 Stat. 1933 (2010).

Although this explanation of the need for regulation could be read as merely setting out the constitutional underpinning for the U.S. federal government to act, the objects of the Exchange Act and the associated Securities Act<sup>36</sup> reflect the historical impetus for regulation at the time. These Acts were a key part of the so-called “New Deal” legislation enacted in response to the stock market crash of 1929 and the Great Depression that followed.<sup>37</sup> President Franklin D. Roosevelt and Congress had two key concerns that necessitated this legislation. First, investors had been cheated because of market abuse; namely, there had been widespread manipulation of stocks in the markets.<sup>38</sup> Second, the Great Depression had been exacerbated by a lack of investor confidence in terms of returning to the markets after the crash, thereby, hindering the capacity of corporations to raise capital.<sup>39</sup>

Following the lead of the United States, during the latter part of the 20th century, other countries also adopted market fairness as a key objective of securities regulation.<sup>40</sup> Today, market fairness is promulgated as a key objective of securities regulation via the International Organization of Securities Commissions (IOSCO).<sup>41</sup> IOSCO’s main policy statement, the *Objectives and Principles of Securities Regulation*, sets out the objectives for securities regulation as:

- protecting investors;

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<sup>36</sup> Securities Act, 15 U.S.C. § 77 (1933).

<sup>37</sup> JOHN C. COFFEE, JR. & HILLARY A. SALE, *SECURITIES REGULATION CASES AND MATERIALS* 2 (11th ed. 2009).

<sup>38</sup> The House Report accompanying the Securities Act of 1933 examined the decade after World War I and concluded: “Fully half or \$25,000,000 worth of securities floated during this period have been proved to be worthless. These cold figures spell tragedy in the lives of thousands of individuals who invested their life savings, accumulated after years of effort, in these worthless securities.” *Id.* at 2 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933)).

<sup>39</sup> *See id.*

<sup>40</sup> For Japan in 1948 see Kin’yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Law No. 25 of 1948, art. 1, <http://www.fsa.go.jp/common/law/fie01.pdf> [<https://perma.cc/B3K5-3QPU>] (Japan). For Ontario, Canada, in 1994, see Securities Amendment Act, S.O. 1994, c. 33, s. 2 (Can.).

<sup>41</sup> INT’L ORG. OF SEC. COMM’N, *OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION* 3 (2010), <http://iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> [<https://perma.cc/BX34-ES35>].

- ensuring that markets are fair, efficient and transparent; and
- reducing systemic risk.<sup>42</sup>

The document also sets out thirty-eight principles which it states are based upon the three abovementioned objectives, though it does not state how each of the principles relates to each of the objectives.<sup>43</sup>

This key IOSCO policy statement, originally formulated in 1998, appears to be heavily influenced by U.S. securities regulators.<sup>44</sup> This is because IOSCO itself was formed in 1983 from an inter-American regional organization and, until recently, its governance structure was biased towards regulators from North America.<sup>45</sup> In fact, Kal Raustiala has argued that organizations such as IOSCO are essentially exploited by the SEC to spread the “regulatory gospel” of U.S. securities law.<sup>46</sup>

IOSCO’s membership has grown and its members now cover 115 jurisdictions representing over 95 percent of the world’s securities markets.<sup>47</sup> Since 2012, it has been governed by a board more reflective of this diverse membership.<sup>48</sup> Nevertheless, its core policy

<sup>42</sup> *Id.* These goals may conflict, which could cause difficulty in deciding on a regulatory solution. See generally Chester S. Spatt, *Regulatory Conflict: Market Integrity vs. Financial Stability*, 71 U. PITT. L. REV. 625 (2010).

<sup>43</sup> See INT’L ORG. OF SEC. COMM’N, *supra* note 41, at 3.

<sup>44</sup> Janet Austin, *The Power and Influence of IOSCO in Formulating and Enforcing Securities Regulations*, 15 ASPER REV. INT’L BUS. & TRADE L. 1, 14 (2015); compare INT’L ORG. OF SEC. COMM’N, *supra* note 41, at 1 (“IOSCO’s current goals and priorities are first to identify and address systemic risks to the fair and efficient functioning of markets.”), with *About the SEC*, *supra* note 1 (“The mission of the [SEC] is to protect investors, maintain fair, orderly, and efficient markets.”).

<sup>45</sup> Austin, *supra* note 44, at 3.

<sup>46</sup> Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 32 (2002).

<sup>47</sup> *About IOSCO*, IOSCO, [http://www.iosco.org/about/?subsection=about\\_iosco](http://www.iosco.org/about/?subsection=about_iosco) [<https://perma.cc/W33E-9RUC>].

<sup>48</sup> In 2012, IOSCO changed its governing structure to a governing Board. The governing Board consists of thirty-six members, eighteen of which are from the countries with the largest markets. IOSCO, RESOLUTION OF THE PRESIDENTS’ COMMITTEE ON THE COMPOSITION OF THE IOSCO BOARD, 1–3 (2013), <http://www.iosco.org/library/resolutions/pdf/IOSCORES49.pdf> [<https://perma.cc/RC3X-6DUJ>]. The other members consist of the Chair and Vice Chair of the Growth

document, the *Objectives and Principles of Securities Regulation*, largely remains unchanged.<sup>49</sup>

IOSCO's mission is to be the global standard setter of securities regulation, and IOSCO members have resolved to implement and adhere to consistent standards of regulation.<sup>50</sup> Part of IOSCO's strategy to achieve these consistent standards has been an evaluation process that tracks the level of implementation of the IOSCO *Objectives and Principles of Securities Regulation* by each country.<sup>51</sup> Initially, IOSCO instigated this process by way of a self-assessment exercise.<sup>52</sup> However, in 2011 IOSCO established an Assessment Committee to accelerate this evaluation exercise.<sup>53</sup> IOSCO envisages the assessment process as key to working towards harmonization and has stated that it is designed to identify

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and Emerging Markets Committee, the Chairs of the four Regional Committees, two members elected by the Growth and Emerging Markets Committee and two members elected by each of the four Regional Committees. *Id.*

<sup>49</sup> Compare INT'L ORG. OF SEC. COMM'N, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (1998), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf> [<https://perma.cc/TNQ3-9XRU>], with INT'L ORG. OF SEC. COMM'N, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> [<https://perma.cc/EA2W-ZFSN>]. In 2010, several principles were added as a result of the 2008 global financial crisis. See INT'L ORG. OF SEC. COMM'N, *supra* note 41, at 3.

<sup>50</sup> See *About IOSCO*, *supra* note 47.

<sup>51</sup> See generally INT'L ORG. OF SEC. COMM'N, METHODOLOGY FOR ASSESSING IMPLEMENTATION OF THE IOSCO OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2013), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD359.pdf> [<https://perma.cc/7Z3M-L6WK>] [hereinafter IOSCO 2013 METHOD] (guiding a self-assessment on the implementation level of IOSCO's principles). This 2013 methodology replaced INT'L ORG. OF SEC. COMM'N, METHODOLOGY FOR ASSESSING IMPLEMENTATION OF THE IOSCO OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD155.pdf> [<https://perma.cc/2US7-QVF8>].

<sup>52</sup> This self-assessment exercise asked each member to answer a list of questions in relation to each principle and to reach a conclusion as to whether the principle was fully implemented, broadly implemented, partly implemented, or not implemented. See IOSCO 2013 METHOD, *supra* note 51, at 14, 18–19. Alternatively, a member could elect to have the International Monetary Fund (IMF) assess its compliance through what is called its Financial Sector Assessment Program. *Id.* at 14; see also *The Financial Sector Assessment Program (FSAP)*, IMF (Mar. 22, 2016), <http://www.imf.org/external/np/exr/facts/pdf/fsap.pdf> [<https://perma.cc/3CE7-FYKF>].

<sup>53</sup> See INT'L ORG. OF SEC. COMM'N ANNUAL REPORT 2011, 44 (2011), [http://iosco.org/annual\\_reports/2011/](http://iosco.org/annual_reports/2011/) [<https://perma.cc/5VQW-AKKQ>].

“potential gaps, inconsistencies, weaknesses, and areas where further powers or authorities may be necessary, and as a basis for framing priorities for enhancements or reforms to existing laws, rules, and procedures.”<sup>54</sup>

IOSCO therefore expects that once a member identifies gaps in its framework of securities regulation, it will take steps to adopt new laws to bring its securities regulation into line with IOSCO’s *Objectives and Principles*.<sup>55</sup> It seems then that over time it is likely that more regulators will adopt market fairness or what seems to be its equivalent, market integrity, as a key goal for their securities regulation.<sup>56</sup>

According to IOSCO, fairness is a broad concept, incorporating not only the elimination of dishonest practices but also encompassing a need to promote equal access to markets:

The fairness of the markets is closely linked to investor protection and, in particular, to the prevention of improper trading practices. Market structures should not unduly favor some market users over others. The regulator’s approval of exchange and trading system operators and of trading rules helps to ensure fair markets.

Regulation should detect, deter, and penalize market manipulation and other unfair trading practices. Regulation should aim to ensure that investors are given fair access to market facilities and market or price information. Regulation should also promote market practices that ensure fair treatment of orders and a price formation process that is reliable.<sup>57</sup>

## II. HOW MARKET INTEGRITY AND MARKET FAIRNESS ARE INCORPORATED WITHIN THE GOALS OF FIVE SECURITIES REGULATORS

Although IOSCO is encouraging the adoption of market fairness as a key goal, some countries, as demonstrated below, have placed the emphasis on what seems to be a very similar concept, market

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<sup>54</sup> IOSCO 2013 METHOD, *supra* note 51, at 15.

<sup>55</sup> *Id.* at 21, 24.

<sup>56</sup> *Id.* at 11–13.

<sup>57</sup> *Id.* at 11.

integrity.<sup>58</sup> Others stress the importance of the related concept of market confidence.<sup>59</sup>

In the United States context, market fairness is the goal and this is reflected in the wording of the Exchange Act.<sup>60</sup> As such, the SEC states that its mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>61</sup> The Exchange Act, focused on the secondary markets, as originally enacted had four basic purposes. First, it was to regulate the markets.<sup>62</sup> Second, it was to protect investors through disclosure.<sup>63</sup> Third, it was to prevent and provide remedies for manipulation and fraud in the markets.<sup>64</sup> Finally, it was designed to control the amount of the nation’s credit that goes into the markets.<sup>65</sup>

In Canada, each province currently has a separate securities act.<sup>66</sup> In some provinces the goal of fostering market “fairness” is clearly set out. For example, in Ontario, the purposes of the Ontario Securities Act are: “(a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets.”<sup>67</sup>

The Ontario Securities Commission, which administers and enforces this Act, is directed by the Act on how to achieve market

<sup>58</sup> See, e.g., *About the FCA*, FIN. CONDUCT AUTH. (June 12, 2016), <https://www.the-fca.org.uk/about/the-fca> [<https://perma.cc/YFY8-6JC8>]; *Securities Supervision*, BAFIN (Oct. 10, 2013), [http://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/Wertpapieraufsicht/wertpapieraufsicht\\_node\\_en.html](http://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/Wertpapieraufsicht/wertpapieraufsicht_node_en.html) [<https://perma.cc/KR4K-GEQW>].

<sup>59</sup> See, e.g., Securities Act, R.S.O. 1990, c. S.5 § 1.1 (Can.).

<sup>60</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, § 1, 48 Stat. 881, 881 (1934) (codified at 15 U.S.C. § 78a (1934)) (“[T]o prevent inequitable and unfair practices on such exchanges and markets”).

<sup>61</sup> *Investor’s Advocate*, SEC. AND EXCH. COMM’N (Jan. 20, 2010), <http://www.sec.gov/about/whatwedo.shtml> [<https://perma.cc/VKM8-VTLZ>].

<sup>62</sup> LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 226 (3d ed. 1989).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Although this may change soon as some provinces move towards adopting a uniform Securities Act, to be called the Capital Markets Act. See *The Cooperative Capital Markets Regulatory System*, COOP. CAPITAL MKTS. REGULATORY SYS., <http://ccmr-ocrmc.ca/about/> [<https://perma.cc/2SX6-27EB>].

<sup>67</sup> Securities Act, R.S.O. 1990, c. S.5. § 1.1 (Can.)

fairness. It is directed to set requirements for timely, accurate and efficient disclosure of information, to restrict fraudulent and unfair market practices and procedures, and to set requirements for the maintenance of high standards of fitness and business conduct in order to ensure honest and responsible conduct by market participants.<sup>68</sup>

In contrast, the British Columbia Securities Commission (BCSC) does not have a specific objective of market fairness or market integrity incorporated within its Securities Act.<sup>69</sup> Nevertheless, it has determined that its mission is “to protect and promote the public interest by fostering ... a securities market that is fair and warrants public confidence and ... a dynamic and competitive securities industry that provides investment opportunities and access to capital.”<sup>70</sup>

In Australia, the Australian Securities and Investment Commission Act (ASIC Act) provides that the securities regulator, the Australian Securities and Investment Commission (ASIC), must exercise its power to, inter alia, “(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and (b) promote the confident and informed participation of investors and consumers in the financial system.”<sup>71</sup> The emphasis seems then to be on market confidence and ASIC has interpreted this provision such that one of its strategic objectives is “[p]romoting investor and financial consumer trust and confidence.”<sup>72</sup> Nevertheless, despite no mention of fairness within the ASIC Act, ASIC states that another strategic objective is “ensuring fair, orderly and transparent markets.”<sup>73</sup>

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<sup>68</sup> *Id.* § 2.1.

<sup>69</sup> See generally Securities Act, R.S.B.C. 1996, c. 418 (Can.).

<sup>70</sup> B.C. SEC. COMM’N, GOVERNANCE POLICY 4 (May 5, 2016), [http://www.bcsc.bc.ca/uploadedFiles/About\\_Us/Who\\_We\\_Are/Governance/Governance\\_Policy\\_May\\_16\\_2016.pdf?t=1466530708894](http://www.bcsc.bc.ca/uploadedFiles/About_Us/Who_We_Are/Governance/Governance_Policy_May_16_2016.pdf?t=1466530708894) [<https://perma.cc/M6XN-BR47>].

<sup>71</sup> *Australian Securities and Investment Commission Act 2001* (Cth) s 1(2) (Austl.).

<sup>72</sup> *Our Role*, AUSTL. SEC. & INV. COMM’N, (Apr. 20, 2016), <http://asic.gov.au/about-asic/what-we-do/our-role/#priorities> [<https://perma.cc/75EQ-WZRE>].

<sup>73</sup> *Id.*

The Act administered by the securities regulator for the United Kingdom, the Financial Conduct Authority (FCA), requires it to work towards maintaining market confidence, maintaining financial stability, protecting consumers, and reducing financial crime.<sup>74</sup> The FCA states that “[f]inancial markets need to be honest, fair, and effective so that consumers get a fair deal.”<sup>75</sup> It states that its operational objectives are to “[p]rotect consumers ... protect and enhance the integrity of the U.K. financial system ... [and] [p]romote competition.”<sup>76</sup>

Germany’s securities regulator, BaFin, frames its objectives as “to ensure the transparency and integrity of the financial market and the protection of investors.”<sup>77</sup> Specifically, the Act that BaFin administers and enforces gives BaFin wide powers.<sup>78</sup> This includes the power to issue orders that are appropriate and necessary to eliminate or prevent undesirable developments that may be detrimental to the stability of financial markets or undermine confidence in the proper functioning of financial markets.<sup>79</sup>

It seems therefore that while some regulators set the goal as market fairness, for others the goal is market integrity or even market confidence.<sup>80</sup> There also seems to be a degree of fluidity between regulators in declaring that their mission is to promote market fairness, market integrity, or market confidence even if they are not specifically directed by law to consider these concepts while exercising the powers vested in the governing legislation.<sup>81</sup> The securities regulators referred to above also do not specifically explain what is meant by market integrity, market confidence,

<sup>74</sup> Financial Services and Markets Act 2000, c. 8, § 2 (U.K.).

<sup>75</sup> See *About the FCA*, *supra* note 58.

<sup>76</sup> *Id.*

<sup>77</sup> See *Securities Supervision*, *supra* note 6.

<sup>78</sup> See, e.g., Wertpapierhandelsgesetz—WpHG [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], June 22, 2011, BGBl I at 1126, art. 3, § 4(a) (Ger.), [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html) [<https://perma.cc/WUS8-JN9X>].

<sup>79</sup> *Id.*

<sup>80</sup> Compare Securities Act, R.S.O. 1990, c. S.5. (Can.) with *Australian Securities and Investment Commission Act 2001* (Cth) s 1(2) (Austl.), and *About the FCA*, *supra* note 58.

<sup>81</sup> See, e.g., *Our Role*, *supra* note 72; Securities Act R.S.B.C. 1996, c. 418 (Can.).

and market fairness.<sup>82</sup> This may be because the regulator views the concept as normative.<sup>83</sup> Alternatively, it may be deliberate in order to give regulators the flexibility to tackle a wide range of problems under an umbrella of market fairness/market integrity/market confidence. Of course, such flexibility is advantageous as it would enable regulators to easily justify that many issues fall within their domain. However, leaving these concepts fluid is also problematic because it makes the measurement of a given regulators' progress towards achieving these goals uncertain. It also gives rise to the possibility of allegations of regulatory overreach.<sup>84</sup>

What perhaps is clear is that the regulators view the goals as being similar and the concepts of market fairness, market integrity, and market confidence as being intertwined.<sup>85</sup> This is consistent with IOSCO's definition of market fairness referred to above and a definition given by IOSCO's Technical Committee of market integrity in 2011.<sup>86</sup> In this report, the Committee defined market integrity as: "the extent to which a market operates in a manner that is, and is perceived to be, fair and orderly and where effective rules are in place and enforced by regulators so that confidence and participation in the market is fostered."<sup>87</sup>

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<sup>82</sup> See, e.g. *Securities Act*, R.S.O. 1990, c. S.5 (Can.); *About the FCA*, *supra* note 58; *Australian Securities and Investment Commission Act 2001* (Cth) s 12BG (Austl.).

<sup>83</sup> See generally *Securities Act* R.S.B.C. 1996, c. 418 (Can.); *Wertpapierhandelsgesetz—WpHG* [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], June 22, 2011, BGBl I at 1126, art. 3, § 4(a) (Ger.), [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html) [<https://perma.cc/WUS8-JN9X>]; B.C. SEC. COMM'N, *supra* note 70.

<sup>84</sup> See, e.g., *Wertpapierhandelsgesetz—WpHG* [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], June 22, 2011, BGBl I at 1126, art. 3, § 4(a) (Ger.), [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html) [<https://perma.cc/WUS8-JN9X>].

<sup>85</sup> See generally *id.*

<sup>86</sup> INT'L ORG. OF SEC. COMM'N, REGULATORY ISSUES RAISED BY THE IMPACT OF TECHNOLOGICAL CHANGES ON MARKET INTEGRITY AND EFFICIENCY 9 (2011), <http://iosco.org/library/pubdocs/pdf/IOSCOPD361.pdf> [<https://perma.cc/42E9-X8NS>].

<sup>87</sup> *Id.* The same document defined "market efficiency" as "the ability of market participants to transact business easily and at a price that reflects all available market information. Factors considered when determining if a market is efficient include liquidity, price discovery and transparency." *Id.* See also a definition given in 2006 by a task force set up the Canadian Investment Dealers

It is arguable then that markets which are “fair” also have “integrity,” and that this is what instils market confidence. Therefore, it could also be argued that any structural adjustments which enhance fairness also enhance integrity, which in turn enhances confidence in those markets.

### III. HOW HAVE MARKET INTEGRITY AND MARKET FAIRNESS BEEN DEFINED?

The limited attention given to what constitutes market fairness and market integrity in scholarly literature is consistent with the lack of regulatory definition.<sup>88</sup>

Within the finance discipline, market integrity is often discussed but not often defined. When it is defined it tends to be defined relatively narrowly, as a market where information is equal or a market free from insider trading and market manipulation.<sup>89</sup> For example, in 2000, Utpal Bhattacharya, Hazem Daouk, Brian Jorgenson, and Carl-Heinrich Kehr described market integrity as “the disadvantages outsiders face vis-a-vis insiders when trading in the market. We expect that market integrity changes over time.”<sup>90</sup> This definition was given in the context of an event study measuring the incorporation of information into prices in a capital market where insider trading laws were not enforced.<sup>91</sup> In 2006, Carole Comerton-Forde and James Rydge, in considering the

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Association of Canada to examine Canadian securities regulation: “Capital market integrity can be thought of as a level of general confidence in the functioning of the market. Integrity is closely related to investors’ perception of the fairness of the markets.” TASKFORCE TO MODERNIZE SEC. LEGIS. IN CAN., CANADA STEPS UP 29 (2006), [http://www.tfmsl.ca/docs/Volume1\\_en.pdf](http://www.tfmsl.ca/docs/Volume1_en.pdf) [<https://perma.cc/2HSB-M22J>].

<sup>88</sup> See generally Securities Act R.S.C. 1996, c. 418 (Can.); Wertpapierhandelsgesetz—WpHG [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], June 22, 2011, BGBl I at 1126, art. 3, § 4(a) (Ger.), [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html) [<https://perma.cc/WUS8-JN9X>]; B.C. SEC. COMM’N, *supra* note 70.

<sup>89</sup> But see Carole Comerton-Forde & James Rydge, *Market Integrity and Surveillance Effort*, 29 J. FIN. SERV. RES. 149, 149 (2006).

<sup>90</sup> Utpal Bhattacharya et al., *When an Event is Not an Event: The Curious Case of an Emerging Market*, 55 J. FIN. ECON. 69, 72 n.4 (2000).

<sup>91</sup> See *id.* at 69–70.

market microstructure of ten Asia-Pacific stock exchanges, defined market integrity as “the ability of investors to transact in a fair and informed market where prices reflect information.”<sup>92</sup> In 2011, Donald Margotta stated that “[m]arket integrity exists when stock prices are set in a market free from misinformation.”<sup>93</sup>

Such narrow definitions of market integrity conceptually link it to market efficiency, in that a market of high integrity should also be efficient because prices will reflect their fundamental value.<sup>94</sup> To finance scholars, the influence of the Capital Asset Pricing Model (CAPM) and the Efficient Capital Market Hypothesis (ECMH) leads to “a prediction that, in a[n] ‘informationally efficient’ market, prices will reflect as closely as possible the asset’s ‘fundamental value.’”<sup>95</sup> If prices reflect an asset’s fundamental value, this will result in the most efficient allocation of capital, as investors will pay no more for securities than their inherent value.<sup>96</sup> As such, market integrity seems to mean eliminating practices that may interfere with the ability of prices to reflect the asset’s fundamental value.<sup>97</sup> If all material information in relation to a security has been publically disclosed, prices should reflect the asset’s fundamental value due to the incorporation of all this information.<sup>98</sup>

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<sup>92</sup> Carole Comerton-Forde & James Rydge, *The Current State of Asia-Pacific Stock Exchanges: A Critical Review of Market Design*, 14 PACIFIC-BASIN FIN. J. 1, 2 (2006).

<sup>93</sup> Donald Margotta, *Market Integrity, Market Efficiency, Market Accuracy*, 17 BUS. REV., CAMBRIDGE 14, 14 (2011).

<sup>94</sup> See generally Bhattacharya et al., *supra* note 90; Comerton-Forde & Rydge, *supra* note 92; Margotta, *supra* note 93.

<sup>95</sup> EMILIOS AVGOULEAS, THE MECHANICS AND REGULATION OF MARKET ABUSE, A LEGAL AND ECONOMIC ANALYSIS 53 (2005).

<sup>96</sup> See *id.*

<sup>97</sup> See generally *id.*

<sup>98</sup> Using CAPM and ECMH, finance academics construct “event” studies: the difference between the price of a security that has been the subject of an abnormal occurrence and what it would have been without such an event. *Id.* For example, as insider dealing is illegal, in theory prices before significant announcements should reflect their fundamental value incorporating all publically available information. After the announcement, the prices should almost immediately reflect their fundamental value by incorporating this new information. *Id.* at 53–54. If price movements are “abnormal” before significant announcements, this may be an indication of insider trading. *Id.* at 54.

Michael Aitken has defined market integrity, in part, as “the extent to which market participants engage in prohibited trading behaviors.”<sup>99</sup> Taking this further he and the Capital Markets Cooperative Research Centre have designed empirical proxies and systems to assist regulators in measuring the impact of their activities on market integrity, but only to the extent to which the regulators’ activities impact upon the level of three types of prohibited behaviours in the markets they supervise: market manipulation, insider trading, and broker-agency conflict in the form of front running.<sup>100</sup>

Behavioural finance academics Hersh Shefrin and Meir Statman also attempted to define fairness in the context of financial markets.<sup>101</sup> While stating that it could be defined narrowly as equal access to information relevant to asset valuation, they developed a much broader definition by incorporating a claim to entitlements.<sup>102</sup> Shefrin and Statman identified seven types of entitlements that they state form the basis of these entitlement claims. These are:

- (1) freedom from coercion (people enter transactions voluntarily and are not coerced into or prevented from entering transactions);
- (2) freedom from misrepresentation (people are entitled to rely on information which is disclosed);

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<sup>99</sup> Frederick H. deB. Harris et al., *Evidence-Based Regulatory Policy Making for Financial Markets: A Panel Discussion of a Proposed Framework for Assessing Market Quality*, J. TRADING, 69, 71 (2011).

<sup>100</sup> *Id.* at 69–70. See generally CAPITAL MKTS. COOP. RES. CTR., (Aug. 27, 2016, 10:05 PM), <http://www.cmcrc.com/development/finance-tools> [<https://perma.cc/CR9G-384J>]; SMARTS Trade Surveillance for the Sell-Side, NASDAQ (Aug. 27, 2016, 10:11 PM), <http://business.nasdaq.com/market-tech/market-participants/SMARTS-trade-surveillance-sell-side> [<https://perma.cc/M3SL-PHEB>]; B-NEXT (Aug. 26, 2016, 10:21 PM), <https://www.b-next.com/about/references> [<https://perma.cc/SEM3-L64P>] (noting that some commercial corporations provide surveillance systems to regulators, securities markets, and self-regulatory organizations, such as the Financial Industry Regulatory Authority (FINRA) and the Investment Industry Regulatory Organization of Canada (IRROC), to monitor the securities markets for market abuse).

<sup>101</sup> See generally Hersh Shefrin & Meir Statman, *Ethics, Fairness and Efficiency in Financial Markets*, 49 FIN. ANALYSTS J., 21 (Nov./Dec. 1993).

<sup>102</sup> *Id.* at 21–22.

- (3) information (people are entitled to equal access to a particular set of information);
- (4) equal processing power (people are entitled to a “competency floor” of information-processing skills, requiring either compulsory disclosures or prohibition on information that may be misinterpreted);
- (5) freedom from impulse (people are protected from possible imperfect decisions);
- (6) efficient prices (people are entitled to prices that they perceive to be efficient in that intervention is permitted to correct imbalances); and
- (7) equal bargaining power (people have equal power in negotiations leading to transactions).<sup>103</sup>

Although not entirely clear, it appears that the source of Shefrin and Statman’s entitlement claims were based on adopting a deontological view of rights as intrinsic and fundamental.<sup>104</sup> This is in contrast to a utilitarian view of rights as being derived from that which results from the optimal overall welfare across individuals in society.<sup>105</sup>

This uncoupling of market fairness and market integrity from market efficiency and the efficient capital market hypothesis is more pronounced in a definition of fairness developed by Ian Lee, a legal academic.<sup>106</sup> His emphasis is on a much broader definition, independent of any issues of economic efficiency.<sup>107</sup> Lee elucidates the meaning of fairness in the context of the securities market, although his focus in developing a definition is on justifying the prohibition against insider trading.<sup>108</sup> Lee sees fairness as:

[A] brake upon self-interest. It is the normative basis for a variety of social conventions that prevent individuals from doing

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<sup>103</sup> *Id.* at 23.

<sup>104</sup> *See id.* at 22.

<sup>105</sup> *Id.*; see also James J. Angel & Douglas McCabe, *Fairness in Financial Markets: The Case of High Frequency Trading*, 112 J. BUS. ETHICS 585, 592–93 (2013) (noting Shefrin and Statman’s fairness definition has been used in considering high frequency trading).

<sup>106</sup> *See* Lee, *supra* note 13, at 141.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 140.

that which would otherwise be in their own respective interest. Some conventions that could be grounded in fairness might include promise-keeping and truthfulness, which many people feel obligated to observe even where they might gain through deceit.<sup>109</sup>

Like Shefrin and Statman, Lee suggests that the normative force of fairness may come from a deontological obligation to treat others as equals.<sup>110</sup> Alternatively, from the point of view of utilitarian and other consequentialists, the normative force of fairness is a condition for the possibility of welfare-improving cooperative action as a solution to the classic Prisoner's Dilemma.<sup>111</sup>

Lee postulates that the content of fairness will depend upon the context in which it is used and argues that a market which is attractive to engage in is that which contains an internal morality characterized by fair ground rules.<sup>112</sup> This is because markets are cooperative institutions whereby resources are reallocated through voluntary exchange, with the market respecting individual preferences and individual choice.<sup>113</sup> Fairness-related rules are necessary for the market to be one which is faithful to its vocation as a means of cooperative interaction and, as such, they must respect neutrality and autonomy for all.<sup>114</sup> Lee suggests that fairness requires rules which operate against coercion, deception, and dishonesty, and rules requiring those who have made promises to keep them.<sup>115</sup> Furthermore, Lee suggests that a fair market requires parity of information on the basis that exploiting a party's informational disadvantage is inconsistent with respect for another's autonomy.<sup>116</sup>

#### IV. SOME KEY FEATURES OF MARKET INTEGRITY AND MARKET FAIRNESS

It seems that the concepts of market integrity and market fairness may be equivalent. Both seem to require a level playing

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<sup>109</sup> *Id.* at 141.

<sup>110</sup> *Id.* at 142.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 142–43.

<sup>114</sup> *Id.* at 146–47.

<sup>115</sup> *Id.* at 147.

<sup>116</sup> *Id.* at 150.

field.<sup>117</sup> Both are justified largely by referring to the need to maintain confidence and trust in the markets.<sup>118</sup> As one of the main ways in which capital resources are allocated within an economy, the securities markets are critical to a nation as a whole.<sup>119</sup> Therefore, it can be argued that trust and confidence in the markets is critical to the welfare of a given nation. One of the key ways in which securities regulators and securities regulation maintain such confidence is to ensure that the markets are, or are at least perceived to be, of high integrity or fair by market participants and the public at large.<sup>120</sup>

What then is incorporated within the securities regulators' responsibility to maintain market integrity and market fairness? Whether or not these concepts are described as normative, it seems clear that contained within them are some core components. Clearly, it requires the elimination of market abuse practices whereby one person has a discriminatory informational advantage over another.<sup>121</sup> As such, securities regulation and securities regulators must work towards eliminating market abuse practices, such as insider trading, market manipulation, and front running. Eliminating market abuse can also be justified on utilitarian and efficiency grounds, as such practices interfere with the accuracy of the prices of securities.<sup>122</sup>

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<sup>117</sup> Kristen A. Truver, Note, *Cutting the Party Line: How the SEC Can Silence Persisting Phone Call Tips*, 39 HOFSTRA L. REV. 447, 448–49 (2010).

<sup>118</sup> See generally Luigi Guiso, Paola Sapienza & Luigi Zingales, *Trusting the Stock Market*, 63 J. FIN. 2557 (2008) (finding that trust, defined as the subjective probability individuals attribute to the possibility of being cheated, had a positive and large effect on stock market participation as well as on the share of an individual's wealth invested in stocks. Also finding that cultural differences impacted the level of trust).

<sup>119</sup> Carlyle H. Dauenhauer, Note, *Justice in Equity: Newman and Egalitarian Reconciliation for Insider-Trading Theory*, 12 RUTGERS BUS. L. J. 41, 48 (2015).

<sup>120</sup> James Harlan Koenig, Comment, *The Basics of Disclosure: The Market for Information in the Market for Corporate Control*, 43 U. MIAMI L. REV. 1021, 1059 (1989); see also Philip J. McConnaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L L. 595, 647 (2001).

<sup>121</sup> Bruce W. Klaw, *Why Now is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 WM. & MARY BUS. L. REV. 275, 333 (2016); see also Austin, *supra* note 21, at 28.

<sup>122</sup> Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 OR. L. REV. 175, 184–85 (2010).

However, it also seems that market fairness and market integrity incorporate ideas that are broader than just the elimination of market abuse.<sup>123</sup> As such, any definition of market integrity and market fairness that is limited to the elimination of market abuse or ensuring equal access to information is arguably too narrow. The elimination of market abuse was one of the original justifications behind the introduction of the Exchange Act in 1934, but it was not the only justification.<sup>124</sup> As the Exchange Act states, the markets are imbued with “a national public interest” requiring the intervention of a government regulatory agency in the form of the SEC.<sup>125</sup> Furthermore, the powers granted to the SEC to regulate the markets were much broader than just enhancing disclosure and preventing market abuse.<sup>126</sup> The original Act gave the SEC powers such as setting the rules of procedure of exchanges and the ability to suspend trading of securities.<sup>127</sup> Over the years, the powers of the SEC under this Act have been significantly expanded to include, *inter alia*, the regulation of tender offers and clearance and settlement procedures.<sup>128</sup>

In keeping with this national public interest, it seems that there is an argument that there are intrinsic rights from both the perspective of individuals and the public that the securities markets will be fair if the public is able to access these markets, and participants in the market will be treated as equals. This requires that there be nondiscriminatory equal access to the markets for all those wishing to trade.<sup>129</sup> It also requires that markets be free from coercion and that regulators facilitate the ability of all market participants to be able to trade their securities easily and at the same cost.<sup>130</sup>

To ensure such equality there must also be transparency in terms of the price of securities for everyone, which would include

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<sup>123</sup> Roberta S. Karmel, *IOSCO's Response to the Financial Crisis*, 37 J. CORP. L. 849, 897 (2012).

<sup>124</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, §§ 1–2, 48 Stat. 881, 881–82 (1934) (codified at 15 U.S.C. § 78a (1934)).

<sup>125</sup> *Id.* § 2.

<sup>126</sup> *See id.* § 19.

<sup>127</sup> *Id.*

<sup>128</sup> LOSS & SELIGMAN, *supra* note 62, at 227.

<sup>129</sup> Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. PENN. L. REV. 663, 691 (1983).

<sup>130</sup> Lee, *supra* note 13, at 149.

pre-trade information such as the prices at which securities have traded, as well as the depth of demand and supply at each price.<sup>131</sup> This need for transparency of pricing information suggests that regulators resist markets for securities, such as “dark pools,” which limit transparency and discriminate between traders in relation to pre-trade information.<sup>132</sup> Ensuring full transparency would ensure that prices are accurate.<sup>133</sup> This may also require that securities regulators intervene if an event disrupts the accuracy of prices as occurred, for example, during the flash crash of 2010.<sup>134</sup>

Ensuring equality of treatment requires that all participants have free access, at exactly the same time, to accurate information from issuers from which the value of securities can be determined.<sup>135</sup> This would require periodic filings as well as information, which would materially impact price.<sup>136</sup>

Protecting market fairness and market integrity by ensuring equality does not seem to require “freedom from impulse,” as suggested by Shefrin and Statman, in that securities regulators protect

<sup>131</sup> Nicholas Crudele, Note, *Dark Pool Regulation: Fostering Innovation and Competition While Protecting Investors*, 9 BROOK. J. CORP. FIN. COM. L. 569, 579 (2015).

<sup>132</sup> *Id.* “Dark Pools” are execution facilities where orders are entered but there is limited order information displayed to some or all market participants. See generally CFA INST. PUBL’NS, DARK POOLS AND INTERNALIZATION, AND EQUITY AND MARKET QUALITY, (Oct. 2012), <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2012.n5.1> [<https://perma.cc/WUC9-856D>].

<sup>133</sup> Jonas Monast, *Climate Change and Financial Markets: Regulating the Trade Side of Cap and Trade*, 40 ENVTL. L. REP. 10,051, 10,062 (2010).

<sup>134</sup> See COMMODITY FUTURES TRADING COMM’N & SEC. AND EXCH. COMM’N, FINDINGS REGARDING THE MARKET EVENTS OF MAY 6, 2010 at 7 (2010), <http://www.sec.gov/news/studies/2010/marketevents-report.pdf> [<https://perma.cc/PC68-LWKR>] (reporting that the “Flash Crash” occurred on May 6, 2010, when the prices of many U.S.-based equity products experienced an extraordinarily rapid decline and then recovered); see also Linette Lopez, *A Trader Faces Charges in Connection with the 2010 ‘Flash Crash,’* BUS. INSIDER, (Apr. 21, 2015), <http://www.businessinsider.com/a-trader-has-been-arrested-for-contributing-to-the-2010-flash-crash-2015-4> [<https://perma.cc/GV2K-HND6>] (noting that the cause of this event was manipulation by a commodities trader in the United Kingdom).

<sup>135</sup> Monast, *supra* note 133, at 10,062.

<sup>136</sup> See Tom C. W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE L. REV. 325, 329 (2011). But see Aden R. Pavkov, *Ghouls and Godsenders? A Critique of “Reverse Merger” Policy*, 3 BERKELEY BUS. L. REV. 475, 478 (2006) (stating that there could be an “intermediate disclosure” regime that required standards between stringent periodic reports and minimal disclosure).

people from possible imperfect decisions.<sup>137</sup> Whilst securities regulators may be justified in regulating in order to protect unsophisticated investors from investing in particular securities, this power is derived from another goal of regulators, investor protection, rather than the goal of ensuring market integrity and market fairness.<sup>138</sup> Nor does market integrity and market fairness require regulators to work towards enhancing liquidity or reducing transaction costs.<sup>139</sup> Again, such regulations may be desirable but would be classified as those that enhance another goal of securities regulation, namely market efficiency.<sup>140</sup>

### CONCLUSION

It could be argued that the concepts of market fairness and market integrity have been used by securities regulators for too long without sufficient analysis of what these concepts actually require, while at the same time, without sufficiently distinguishing them from other key goals such as market efficiency and investor protection. Although such a stance may give regulators maximum flexibility to deal with what they perceive as challenges when they arise, this also gives rise to issues in terms of measuring regulators' effectiveness as well as exposing them to allegations of excessive use of their powers.

Whilst it may not be possible to definitively set out once and for all what is encompassed by these concepts, it appears that at their core is a requirement that securities regulators enhance the ability of all participants to access the markets and to ensure that participants in the market are treated as equals. As such, it seems that market fairness and market integrity require:

- (1) the elimination of market abuse activities, which are behaviours whereby one person takes advantage of his

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<sup>137</sup> See Mark Klock, *The SEC's New Regulation ATS: Placing the Myth of Market Fragmentation Ahead of Economic Theory and Evidence*, 51 FLA. L. REV. 753, 789 (1999).

<sup>138</sup> See S.M. Solaiman, *The Enron Collapse and Criminal Liabilities of Auditors and Lawyers for Defective Prospectuses in the United States, Australia and Canada: A Review*, 26 J.L. & COM. 81, 83 (2008).

<sup>139</sup> Lee, *supra* note 13, at 138.

<sup>140</sup> See *id.* at 139.

or her position to gain an unmerited advantage over another; this includes insider trading, market manipulation, and front running;

(2) non-discriminatory access to the market for all those wishing to participate;

(3) transparent and accurate information about the prices of securities available to all participants at the same time; and

(4) accurate information about issuers of securities available to all participants at the same time.

Of course, market fairness/market integrity is just one of the core goals of securities regulators. Regulators are required to balance this with their other objectives, namely investor protection, market efficiency, and the reduction of systemic risk. This may require trade-offs, and as such, market integrity and market fairness concerns may need to yield to these other goals. However, to ensure a proper balance is made, a clear delineation is required between each of the goals as well as a clear definition as to what each of these goals encompass. Furthermore, to properly measure changes and proposed developments and to be able to properly assess and balance these goals, a range of metrics should be developed that is applicable to each. Significant progress has been made in measuring changes in market efficiency. Some progress has been made, and is continuing to be made, to measure changes in market fairness and market integrity in terms of the level of market abuse. However, metrics also need to be developed to ensure that the other components of market fairness and market integrity, as set out in this Article, are also properly assessed by securities regulators in the exercise of their functions.