Preface		
Acknowledgments		

1

The	e Fr	ame	work of Securities Regulation	1
А.	Sec	curit	ies Transactions	1
	1.	Issu	uer Transactions	1
	2.	Tra	ding Transactions	2
		a.	Introduction to Trading	2 3
		b.	The Structure of Trading Markets	3
B.	Th	e Le	gal Framework of Securities Regulation	4
	1.	Th	e Federal Securities Laws	5
		a.	The Securities Act of 1933	5
		b.	The Securities Exchange Act of 1934	$\overline{7}$
		с.	Federal Regulation Beyond Disclosure: The Sarbanes-	
			Oxley Act of 2002 and Dodd-Frank Wall Street Reform and	
			Consumer Protection Act of 2010	11
		d.	The Regulation of Investment Advisers and Investment	
			Companies	13
		e.	The Organizational Structure of the SEC	14
		f.	The Mediums Through Which the SEC Speaks	14
		g.	The SEC: Some Critical Perspectives	16
		ň.	Judging SEC Rulemaking	17
	2.	Blu	ie Sky Laws	18
	3.	Sel	f-Regulatory Organizations	20
С.	Fin	anci	ng Startups	21
		Ibr	ahim, The (Not So) Puzzling Behavior of Angel Investors	22
		No	tes and Questions	25

xxxi

xxxiii

Contents

лп

The	Definition of a Security	27
A.	Introduction	27
B.	The Development of a Framework for Defining an	
	Investment Contract	28
	SEC v. W.J. Howey Co.	29
	Notes and Questions	32
С.	Howey Applied	34
	1. Investment Versus Consumption	34
	United Housing Foundation, Inc. v. Forman	35
	Notes and Questions	38
	Problems	40
	2. Common Enterprise and Profits Solely from the	
	Efforts of Others	40
	SEC v. Edwards	40
	a. The Meaning of Common Enterprise	42
	Problems	43
	b. Profits from the Managerial Efforts of Others	44
	Problems	46
	3. Cryptocurrencies, ICOs, and Beyond	47
	Framework for "Investment Contract" Analysis of	
	Digital Assets	49
	Problem	54
D.	Associational Formalities: Interests in Corporations,	
	Partnerships, and LLCs as Securities	55
	1. Stock as a Security	55
	Notes and Questions	56
	Problems	57
	2. Partnership and Limited Liability Company Interests	
	as Securities	58
	United States v. Leonard	59
	Notes and Questions	61
	Problems	64
	3. The Policy Question: Should Investment Contract	
_	Status Be Elective?	65
E.	Real Estate as Securities	66
	Salameh v. Tarsadia Hotel	67
	Notes and Questions	69
_	Problems	70
F.	Notes as Securities	70
	Reves v. Ernst & Young	71
	Notes and Questions	77
~	Problems	82
G.	Separate Securities and Pass-Throughs	83
	Problem	85

3

Un	der	standing Investors	87
A.	Th	e Efficient Market Hypothesis: Implications and Limitations	87
	1.	The Meaning and Mechanisms of Market Efficiency	87
		Notes and Questions	90
		Problems	92
	2.	The Debate over Efficiency of the Market	93
		Young, Brief of Financial Économists as Amici Curae in Support	
		of Respondents, Halliburton, Inc. v. Erica P. John Fund, Inc.,	
		U.S. Supreme Court	93
	3.	Passive Investing and Market Efficiency	95
	4.	Considering Algorithmic Trading	97
B.	Be	havioral Economics and Decisions by Individual Investors	98
С.	Ins	titutionalization	100
D.	. Globalization 10		101

Th	e Pu	blic Offering	105
А.	Un	derwriting and Underwriters	106
	1.	Methods of Underwriting	106
		In re National Association of Securities Dealers, Inc.,	
		Exchange Act Release No. 17371	106
		Notes and Questions	108
	2.	Underwriters: Their Culture and Their Industry	115
		a. Cultural Hierarchy	115
		b. The Industry over Time	116
	3.	Underwriting Agreements: Contracting to Reduce Risk	119
		a. Agreement with the Issuer	119
		b. Agreement Among the Underwriters	122
	4.	Underwriters' Compensation	124
		a. Review by FINRA	124
		b. The Problems of Fixed Price Offerings	125
B.	Th	e Market for Initial Public Offerings	127
	1.	Irrational or Contrived Exuberance	127
	2.	Underpricing of Initial Public Offerings	130
	3.	Reforming the IPO Process	133
С.	ΑI	Panoramic View of the Registration Statement	134
D.	Re	gistration of the Unseasoned Issuer	138
	1.	Preparing the Registration Statement for Filing	139
		Schneider, Manko & Kant, Going Public: Practice, Procedure,	
		and Consequences	139
	2.	Regulatory Dispensations for Emerging Growth Companies	142
		a. Emerging Growth Companies	142
		b. Is It a Supply or a Demand Problem?	142

viv
 XIV

	3.	Review by the SEC's Staff: The Letter of Comment	143
		Poliakoff, SEC Review: Comfort or Illusion?	143
		Notes and Questions	146
E.	Gu	n-Jumping Concerns for the IPO	150
	1.	The Pre-Filing Period	151
		a. Conditioning the Market	152
		Securities Act Release No. 3844	152
		b. Safe Harbors for Permissible Communications	156
		c. Arrangements with and Among Underwriters	158
		Problems	159
	2.	The Waiting Period	161
		a. The Preliminary and Summary Prospectus	161
		b. Tombstone Ads and Identifying Statements	162
		c. Free Writing	163
		d. Hyperlinks to the Prospectus	165
		e. Road Shows	165
		f. Dealing with the Media	166
		g. Bookbuilding: Selling Practices During the Waiting Period	167
		h. Gap Filling with Exchange Act Rule 15c2-8	168
	0	Problems	169
	3.	The Post-Effective Period	171
		Notes and Questions	172
Б	D	Problems	$\begin{array}{c} 174 \\ 175 \end{array}$
F.		blic Offers by Seasoned and Well-Known Seasoned Issuers	$175 \\ 175$
	1.	Integrated Disclosure for the Seasoned Company Notes and Questions	175
	2.	Gun-Jumping Concerns for the Seasoned Issuer	180
	4.	a. Issuer Safe Harbors	180
		b. Free Writing Prospectus	180
		c. Research Reports	182
		Problems	184
G.	She	elf Registration Under Rule 415	185
0.	1.	The Regulatory Concerns and the "Traditional"	105
	1.	Shelf Registration	185
	2.	Catching Market Windows	186
	3.	Automatic Shelf Registration for Well-Known Seasoned Issuers	187
		Securities Offering Reform, Securities Act Release No. 8591	188
	4.	Can Disclosure Be a Bad Thing?	189
		Notes and Questions	190
		Problems	192
H.	Up	dating and Correcting the Registration Statement	193
		oblem	193
	1.	Refusal Orders and Stop Orders	193
	2.	Post-Effective Amendments	195
		a. Correcting Material Inaccuracy	195
		b. Supplementing Information That Is Permitted to Be	
		Omitted Prior to Effectiveness	196
	3.	Undertakings to Update	197
	4.	Withdrawal of the Registration Statement	198

I.	Th	e Trading Practice Rules	198
	1.	Purchases During a Distribution	198
		Notes and Questions	199
		Problems	200
	2.	Stabilization	200
		Problem	202
		Notes and Questions	202
J.	Th	e International Public Offering	203
5	1.	Accommodating Foreign Issuers' Offerings in the	
		United States	204
	2.	Offerings Outside the United States	205
		a. Regulation S	205
		Regulation S, Securities Act Release No. 6863	207
		Statement of the Commission Regarding Use of Internet	
		Web Sites to Offer Securities Offshore, Securities Act	
		Release No. 7516	213
		Notes and Questions	216
		Problems	218
		b. Offerings Falling Outside Regulation S	219
		Europe and Overseas Commodity Traders, S.A. v. Banque	
		Paribas London	219
	3.	How the Public Offering Is Regulated Elsewhere: Contrasting	
		Examples	220
		a. The United Kingdom	221
		b. The People's Republic of China	223
Κ.	Reg	gistration Under State Blue Sky Laws	223
	SEC	C, Report on the Uniformity of State Regulatory Requirements for	
	Off	erings of Securities That Are Not "Covered Securities"	225
	Pro	blems	227
L.	Th	e Debate over Mandatory Disclosure	227
	1.	How Strong Are the Incentives to Disclose Voluntarily?	227
		Problem	229
		Easterbrook & Fischel, Mandatory Disclosure and the Protection	
		of Investors	229
	2.	Regulatory Competition and Issuer Choice	232
	3.	Global Competitiveness of U.S. Capital Markets	234
	4.	Implications of Vanishing Listings	235
		Notes and Questions	236

Ex	xempt Transactions		239
A.	Int	roduction	239
B.	Th	e Private Offering Exemption: Section $4(a)(2)$	240
	1.	Mapping the Scope of the Exemption	241
		SEC v. Ralston Purina Co.	242
		Problem	244

Contents

278

279

279 282

282

2.	The Relevance of Numbers	244
3.	Offeree Qualification: Sophistication and Access to	
	Information	244
	Problem	244
	SEC v. Kenton Capital, Ltd.	247
	Notes and Questions	248
	Problems	252
4.	Resales of Securities Acquired in a Private Offering	252
Reg	gulation D and the Limited Offering Exemptions	253
1.	An Overview of Regulation D	254
	Problem	255
2.	Accredited Investors	255
	Notes and Questions	257
	Problems	260
3.	The Sophistication Standard of Rule 506(b)	261
	Mark v. FSC Securities Corp.	261
	Problems	263
4.	Calculating the Number of Purchasers	264
	Problems	264
5.	Limitations on the Manner and Scope of an Offering	264
	a. In General	264
	b. What Is "General Solicitation or General Advertising"?	265
	c. Activities by Broker-Dealers	266
	Problem	267
	d. The Internet and General Solicitations	267
	Problem	268
	e. Eliminating the Ban on General Solicitations: Rule 506	
		269
	f. A Recap: The Two Tracks of Rule 506	271
	Problems	271
6.	Determining the Aggregate Offering Price in Offerings	
	Under Rule 504	272
	a. Calculating the Aggregate Offering Price	272
	b. Relevant Amount and Time Period	273
	Problems	274
7.	Disclosure Obligations in Offerings Under Rule 506	274
	Notes and Questions	275
8.	Additional Regulation D Requirements and Features	276
	a. Limitations on Resale	276
	b. "Bad Actor" Disqualifiers	277
	c. Integration of Offerings: The Safe Harbor	277
	d. Form D	278
	e. FINRA Filing	278
	 3. 4. Reg 1. 2. 3. 4. 5. 6. 7. 	 Offeree Qualification: Sophistication and Access to Information Problem SEC v. Kenton Capital, Ltd. Notes and Questions Problems Resales of Securities Acquired in a Private Offering Regulation D and the Limited Offering Exemptions An Overview of Regulation D Problem Accredited Investors Notes and Questions Problems Accredited Investors Notes and Questions Problems The Sophistication Standard of Rule 506(b) Mark v. FSC Securities Corp. Problems Calculating the Number of Purchasers Problems Limitations on the Manner and Scope of an Offering a. In General What Is "General Solicitation or General Advertising"? Activities by Broker-Dealers Problem The Internet and General Solicitations Problem Eliminating the Ban on General Solicitations: Rule 506 Offerings Limited to Accredited Investors A Recap: The Two Tracks of Rule 506 Problems Determining the Aggregate Offering Price in Offerings Under Rule 504 a. Calculating the Aggregate Offering Price b. Relevant Amount and Time Period Problems Disclosure Obligations in Offerings Under Rule 506 Notes and Questions Additional Regulation D Requirements and Features a. Limitations on Resale b. "Bad Actor" Disqualifiers c. Integration of Offerings: The Safe Harbor d. Form D

Substantial Compliance

Securities Act Release No. 6825

SEC v. Ishopnomarkup.com, Inc.

g. Foreign Offerings, the Internet, and Regulation D

f.

Problem

l xvi

xvii 📘

Contents	
	ontents

	9. A Comparative Perspective on Private Placements	282
	10. Public Reforms of Regulation D?	283
D.	The Crowdfunding Exemption: Section 4(a)(6)	284
	Problems	289
E.	The Intrastate Offering Exemptions	290
	Exemptions to Facilitate Intrastate and Regional Securities	
	Offerings, Securities Act Release No. 10238	291
	Notes and Questions	296
	Problems	297
F.	Employee Benefit Plans and Contracts Relating to	
	Compensation: Rule 701	299
	Securities Act Release No. 33-7645	299
	Notes and Questions	300
	Problems	303
G.	Regulation A: Mini-Registration	304
	Notes and Questions	307
	Problems	308
H.	Integration of Offerings	309
	In the Matter of Kevin D. Kunz	311
	Notes and Questions	314
	Problems	316
I.	State Exemptions	317
	1. The Uniform Limited Offering Exemption (ULOE)	318
	2. Nonuniform State Exemptions	319

6 Second

Sec	on	lary Distributions	321
Set	JUIN		541
А.	Th	e Underwriter Concept and Sales for an Issuer	323
	SE	C v. Chinese Consolidated Benevolent Association	324
	No	otes and Questions	326
	Pr	oblem	328
B.	Pu	rchase from an Issuer	329
	1.	Investment Intent	329
		Notes and Questions	330
		Problems	332
	2.	Distributions and Trading Transactions Contrasted	332
		Problems	334
	3.	Private Investments in Public Equity (PIPEs)	334
		Sjostrom, Jr., PIPEs	334
		Notes and Questions	337
		Problems	338
С.	Co	ntrol Person Distributions	339
	Ur	nited States v. Wolfson	341
	No	otes and Questions	342
		oblems ~	345

I xviii

Contents

D.	Rule 144—Safe Harbor for Resales of Control and	
	Restricted Securities	346
	Revisions to Rule 144	347
	Notes and Questions	352
	Problems	357
E.	Resales to Qualified Institutional Buyers (QIBs) and Accredited	
	Investors	359
	1. Facilitating an Institutional Market for Unregistered Securities	
	with Rule 144A	359
	Resale of Restricted Securities, Securities Act Release No. 6862	359
	Notes and Questions	363
	Problems	365
F.	The Section 4(a) (1 ¹ / ₂) Exemption	366
	Ackerberg v. Johnson	367
	Notes and Questions	370
	Problems	372
G.	The Section 4(a)(7) Exemption	373
	Problem	374
H.	Registered Resales	374
I.	Resales Under the Blue Sky Laws	375
	1. Isolated Non-Issuer Resale	376
	2. The Manual Exemption	377
	3. Unsolicited Offer Exemption	378
	4. Small Offering Exemption	378
	Problem	379

	7	
Re	capitalizations, Reorganizations, and Acquisitions	381
А.	The "For Value" Requirement	381
	1. Value Is Not Always What It Seems	381
	Problems	386
	2. Shells and Spin-offs: Creating "Value"	387
	a. Spin-offs and the '33 Act	387
	SEC v. Datronics Engineers, Inc.	387
	Notes and Questions	389
	b. The Regulation of Spin-offs Under the '34 Act	391
	Exchange Act Release No. 27247	392
	Problems	395
В.	Mergers, Acquisitions, and Recapitalizations	395
	1. Rule 145	396
	2. Jumping the Gun in Business Combinations	397
	Excerpt from the Release Adopting Regulation M-A	397
	Notes and Questions	400
	3. Reverse Mergers	402
	Problems	404

С.	Exe	chan	ges Under Section 3(a) (9)	405
	No	tes a	nd Questions	408
	Pro	obler	ns	409
D.	Ree	orga	nizations Under Section 3(a)(10)	410
	1.	Ňo	n-Bankruptcy Reorganizations	410
	2.		e Bankruptcy Act's Collision with the Securities Laws	412
		a.	Disclosure in Chapter 11 Reorganizations	413
		b.	Exemption for Sale and Exchange of Securities	413
		с.	Resales of Securities Received in a Chapter 11	
			Reorganization	414
		d.	Resales from Debtor's Portfolio	415

Exempt Securities		417
A.	An Overview of Section 3	418
В.	Municipal Securities	423
	1. The Market and the Players	424
	Report on the Municipal Securities Market 1-7	424
	2. Credit-Enhancing Devices	426
	3. Disclosure Considerations	426
	4. Regulation of Offerings	428
	a. The SEC and Rule 15c2-12	428
	b. The MSRB and Rule G-17	431
	Notes and Questions	432
	Problems	434
	5. "Pay to Play" Practices and Rule G-37	434
	6. Secondary Markets	435
	7. Public Financing for the Private Sector	435
	Problem	438
С.	Securities Issued or Guaranteed by a Bank	438
	1. The Exemption in General	438
	2. Collateralized and Pass-Through Securities	439
	Problems	441
D.	Commercial Paper	442
	1. The Contours of Section 3(a) (3)	442
	Problems	445
	2. Securitization and Section $3(a)(3)$	445
	3. Section $4(a)(2)$ Versus Section $3(a)(3)$	446
E.	Securities of Nonprofit Issuers	446
	SEC v. Children's Hospital	447
	Notes and Questions	
	Problem	450
F.	Insurance and Annuities	451
	1. Insurance and Annuity Products as Securities	451
	2. Variable Annuities	452
	SEC v. Variable Annuity Life Insurance Co. of America	

Т	XX

3.	Beyond Variable Annuities	455
4.	Rule 151	456
	Otto v. Variable Annuity Life Insurance Co.	457
	Notes and Questions	459

9

Liability Under the Securities Act		463	
A.	See	ction 11	463
	1.	Persons Bringing Suit	464
		Hertzberg v. Dignity Partners, Inc.	464
		Notes and Questions	466
	2.	The Defendants and Their Defenses	466
		a. Registered Offerings Generally	466
		Escott v. BarChris Construction Co.	469
		Notes and Questions	480
		Problems	484
		b. Shelf Registrations and Other Seasoned Offerings	485
		In re WorldCom, Inc. Securities Litigation	486
		Notes and Questions	489
		Problem	491
	3.	Opinions and Half-Truths	491
	4.	Damages	492
		Akerman v. Oryx Communications Inc.	492
		Notes and Questions	495
		Problems	497
B.	See	ction $12(a)(1)$	498 498
	Pinter v. Dahl		
	Notes and Questions		501
	Problem		502
С.	See	ction $12(a)(2)$	502
	1.	By Means of a "Prospectus or Oral Communication"	502
		Gustafson v. Alloyd Co.	503
		Hyer v. Malouf	509
		Notes and Questions	510
		Problems	515
	2.	Liability Defense	515
		Notes and Questions	517
D.		ction 17(a)	518
	Aaron v. SEC		518
	No	tes and Questions	519

| 10 |

Fin	ancial Innovation: Trading Markets, Derivatives, and Securitization	523
А.	Technology and the Transformation of Securities Markets	523
	SEC Concept Release on Equity Market Structure	523

	Sto	oll, Electronic Trading in Stock Markets	526
		otes and Questions	528
B.		rivatives and Synthetic Investments	532
	1.	Why Derivatives?	532
	2.	Basic Forms of Derivatives	533
		a. Options	533
		b. Futures	533
		c. Swaps	534
	3.	Clearing	537
	4.	The Regulation of Derivatives	537
		a. Swaps and Security-Based Swaps Defined	538
		b. Overview of Regulation of Swap Transactions and Their	
		Participants	539
	5.	The Volcker Rule	540
С.	Str	ructured Financial Products	542
	1.	An Overview of Securitization	542
	2.	Public Offerings of Securitized Products: Residential	
		Mortgage-Backed Securities	545
		Federal Housing Finance Agency for Federal National	
		Mortgage Ass'n v. Nomura Holding America, Inc.	545
		Notes and Questions	548

xxi 💵

|| 11 ||

Contents

Fin	anc	ial Reporting: Mechanisms, Duties, and Culture	553
A.	Th	e Disclosure Requirements of Public Companies	554
	1.	The Origins and Metrics for Financial Information	554
	2.	The Exchange Act's Periodic Reporting Obligations	556
		a. Domestic Issuers	556
		Problems	560
		b. Foreign Issuers	560
		c. Compelling Honesty in Mandated Reports Through Private	
		Actions	562
B.	Th	e "Fairly Presents" Requirement	563
	Un	ited States v. Simon	563
	No	tes and Questions	566
С.	Internal Controls		567
	1.	The Meaning and Mandate for Internal Controls	567
		SEC v. World-Wide Coin Investments Ltd.	568
		Notes and Questions	572
	2.	Reporting on Internal Controls: SOX 404	573
		Problems	575
D.	Str	engthening the Integrity of the Financial Reporting Process: The	
	Ma	urriage of the SEC and Governance	576
	1.	Audit Committees	576
		Problem	577
	2.	Buttressing the Auditor's Independence	578
		Problem	579
	3.	Executive Certifications and Directors' Signature Requirement	579

X xii

	4.	Reconstructing History with Pro Forma Financial Statements	580
		Problem	581
E.	The	e Management Discussion and Analysis Section of SEC Filings: Is	
	Pas	t Prologue?	581
	1.	The Scope of Item 303 Disclosure Obligation	581
		Panther Partners Inc. v. Ikanos Communications, Inc.	581
		Notes and Questions	584
		Problem	586
	2.	Enron's Contribution to the MD&A and Other Disclosures	586
	3.	The SEC, MD&A, and the Environment	587
		Prospective Information, Financial Reporting Release No. 36	588
		Problem	589

Inq	uiries into the Materiality of Information	591
A.	Materiality Orthodoxy	592
	Notes and Questions	593
	Problem	597
B.	Speculative Information and Materiality	597
	Basic Inc. v. Levinson	597
	Notes and Questions	601
	Problem	604
С.	The "Total Mix" of Information and Market Efficiency	604
	1. Truth on the Market	605
	Wielgos v. Commonwealth Edison Co.	605
	Notes and Questions	608
	Problems	611
	2. "Puffery"	611
	Eisenstadt v. Centel Corp.	612
	Note and Questions	613
	3. Opinion Statements and Half-Truths	613
	Omnicare, Inc. v. Laborers' Dist. Council Const. Ind. Pension	
	Fund	614
	Notes and Questions	620
	Problems	621
D.	Forward-Looking Information	621
	1. The "Bespeaks Caution" Doctrine	624
	Kaufman v. Trump's Castle Funding	624
	Notes and Questions	627
	2. Statutory Safe Harbor for Forward-Looking Statements	628
	Asher v. Baxter International, Inc.	630
	Notes and Questions	635
-	Problems	638
E.	The SEC and Corporate Governance	639
	1. Integrity and the Incentives of Managers	639
	In the Matter of Franchard Corp.	639
	Notes and Questions	645
	Problem	650

xxiii 📘

Contents

2.	Materiality Links to Corporate Governance	651
	Notes and Questions	653
	Problems	654
3.	Materiality of Social Matters	655
4.	Disclosure Bearing on Sustainability	656
	SEC Concept Release, Business and Financial Disclosure	
	Required by Regulation S-K, 205-210	656
	Notes and Questions	658
	Problem	661
Th	e Materiality of Being a "Bad" Citizen: Violations of State or	
Fee	leral Law	661
	SEC v. Jos. Schlitz Brewing Co.	662
	Notes and Questions	665
	Problems	668
	3. 4.	 Notes and Questions Problems Materiality of Social Matters Disclosure Bearing on Sustainability SEC Concept Release, Business and Financial Disclosure Required by Regulation S-K, 205-210 Notes and Questions Problem The Materiality of Being a "Bad" Citizen: Violations of State or Federal Law SEC v. Jos. Schlitz Brewing Co. Notes and Questions

Fra	ud in Connection with the Purchase or Sale of a Security	669
А.	Fraud "in Connection with" the Purchase or Sale of a Security	670
	Problem	672
B.	Private Rights of Action Under Rule 10b-5	672
	1. Creation and Controversy	672
	H.R. Rep. No. 104-50	673
	2. Standing to Sue	676
	Blue Chip Stamps v. Manor Drug Stores	676
	Notes and Questions	678
	Problem	679
С.	Scienter: Hochfelder and Beyond	679
	1. Defining Scienter	679
	Problem	681
	2. Pleading Scienter	682
	Tellabs, Inc. v. Makor Issues & Rights, Ltd.	682
	Makor Issues & Rights, Ltd. v. Tellabs Inc.	685
	Notes and Questions	687
	Problem	689
D.	The Affirmative Duty to Disclose	690
	Gallagher v. Abbott Laboratories, Inc.	690
	Notes and Questions	693
	Problems	697
E.	Who Is Liable?	698
	Janus Capital Group Inc. v. First Derivative Traders	699
	Lorenzo v. SEC	703
	Notes and Questions	706
	Problems	707
F.	Reliance	708
	1. Face-to-Face Transactions	708
	Affiliated Ute Citizens v. United States	708
	Notes and Questions	708

xxiv	
2.	Open Market

	2.	Open Market Frauds: The Fraud-on-the-Market Theory	709
		Halliburton Co. v. Erica P. John Fund, Inc.	710
		Notes and Questions	716
		Problems	719
	3.	Fraud on the Market: Some Variations	720
	4.	The Reasonableness of the Reliance: Due Care	721
		Problem	722
G.	Los	ss Causation and Damages	723
	1.	Face-to-Face Transactions	723
		AUSA Life Insurance Co. v. Ernst & Young	723
		Notes and Questions	727
		Problem	729
	2.	Open Market Transactions	729
		In re Vivendi, S.A. Securities Litigation	730
		Notes and Questions	733
		Problem	735
	3.	Proportionate Liability	735
		Problem	736
	4.	Securities Litigation Reform	736
H.	Fee	leralism and Rule 10b-5: The Problem of Corporate	
	Mismanagement		738
		blem	740
I.	Ma	nipulation	740
	1.	Defining Manipulation	742
		United States v. Mulheren	742
		Notes and Questions	746
		Problem	747
	2.	Issuer Repurchases	747
	3.	Short Selling	749

The	The Enforcement of the Securities Laws		
A.	More on the Private Enforcement of the Securities Laws		
	1.	Champion of the Little Guy: The Class Action	755
	2.	Securities Actions After the Private Securities Litigation Reform	
		Act of 1995	755
		Notes and Questions	757
	3.	Closing the Bypass: The Securities Litigation Uniform	
		Standards Act	760
		Problems	762
B.	Secondary Liability Under the Securities Laws		762
	1.	Aiding and Abetting	764
		SEC v. Apuzzo	764
		Notes and Questions	768
		Problem	769
	2. 0	Control Person and Respondeat Superior Liability	769

		Notes	bhoe v. Consolidated Operating & Production Corp. s and Questions	$770 \\ 773 \\ 777$
C	Das	Probl		777
С.			and Restitution of Contracts in Violation of the Securities	770
	Lav			778
			y Inv. Group, Ltd. v. Colkitt	778
			1 Questions	785
D		blem		786
D.			pility and Its Costs	786
	1.		table Bars to the Plaintiff's Recovery	786
	2.		mnity and Contribution	789
Б	C.	Probl		792
E.			f Limitations	793 705
г		blem		795 705
F.			nent Actions by the SEC	795 705
	1.		tigations	795
			The Investigatory Process	795
			Responding to the Investigation: White Papers and Wells	202
			Notices	797
			Notes and Questions	799
	0		Problems	801
	2.		tioning in SEC Enforcement Proceedings	801
			The Administrative Enforcement Proceeding	801
			The Panoply of SEC Enforcement Sanctions	803
			XPMG, LLP v. SEC	804
	0		Notes and Questions	808
	3.		actions	812
			s and Questions	813
	4	Probl		816
	4.		etion in SEC Enforcement	816
			Whether to Charge, Who to Charge, and Waivers	816
			Report of Investigation Pursuant to Section 21(a)	
			of the Securities Exchange Act of 1934 and	
			Commission Statement on the Relationship	
			of Cooperation to Agency Enforcement	
			Decisions, Securities Exchange Act of 1934	010
			Release No. 44969 (Oct. 23, 2001)	816
			Notes and Questions	819
			Problems	821
			Settlements	822
			SEC v. Citigroup Global Mkts.	823
C	T E1.		Problem	828
G.	110		s Power to Discipline Professionals	828
ττ	тĿ		Problems	831
H.			es of the Securities Lawyer	832
	1.		storic Step Toward Socializing the Securities Lawyer	833
			v. National Student Marketing Corp.	833
			s and Questions	843 845
		Probl	10111	040

		846
	1	847
		853
	•	857
The	Criminal Provisions of the Federal Securities Laws	859
Unite	ed States v. Dixon	861
Prob	lem	863
Note	s and Questions	864
	I A I The Unite Prob	 The SEC's Rules of Professional Conduct for Attorneys Implementation of Standards of Professional Conduct for Attorneys Notes and Questions Problems The Criminal Provisions of the Federal Securities Laws United States v. Dixon Problem Notes and Questions

The	e Regulation of Insider Trading	867
A.	Introduction	867
B.	The Source of a Duty to Abstain or Disclose	869
	Chiarella v. United States	869
	Notes and Questions	872
С.	"Outsider" Trading: Corporate Connections	875
	Problem	875
D.	The Misappropriation Theory	876
	United States v. O'Hagan	876
	Notes and Questions	881
	Problems	884
E.	Tippers and Tippees	885
	1. Tipper/Tippee Liability Defined	885
	Dirks v. SEC	885
	Salman v. United States	889
	Notes and Questions	891
	Problems	892
	2. Selective Disclosure: Regulation FD	893
	Securities Act Release No. 33-7881	893
	Notes and Questions	896
	Problems	898
F.	Rule 14e-3	898
	Problem	900
G.	Enforcement of the Insider Trading Prohibition	900
	Problem	903
H.	Insider Trading and Section 16	903
	1. The Scope of Section 16(b)	904
	Huppe v. WPCS Int'l Inc.	904
	Notes and Questions	907
	Problem	909
	2. Executive Compensation	910
	3. Pension Blackout Periods	911
	4. Is There a Need for Reform?	911
	Notes and Questions	912
I.	Insider Trading Abroad	912

16

Sha	915	
A.	The Election of Directors and Other Routine Matters	916
	1. Mandatory Disclosure	916
	2. Proposals, Recommendations, and Elections	918
	Business Roundtable v. SEC	920
	Notes and Questions	924
	Problem	926
B.	The Reach of the Proxy Rules	926
С.	"Solicitations"	928
	Notes and Questions	930
	Problem	931
D.	Proxy Fraud	932
	Virginia Bankshares, Inc. v. Sandberg	933
	Notes and Questions	935
	Problem	937

Corporate Takeovers			
А.	Introduction: The Policy Dilemma	939	
B.	The Early Warning System: Section 13(d)	940	
	Wellman v. Dickinson	942	
	Notes and Questions	945	
	Problem		
С.	Tender Offer Regulation: Controlling the Bidder	949	
	Problem	950	
	1. Disclosure by Bidders and the Antifraud Prohibition	951	
	2. Substantive Regulation	952	
	a. Duration	953	
	b. Withdrawal and Proration	954	
	c. The All-Holders/Best-Price Rule	954	
	Epstein v. MCA Corp.	954	
	Notes and Questions	957	
	Problem	960	
	3. "Tender Offer"	960	
	Problem	961	
D.	The Williams Act and the Global Tender Offer	961	
E.	Tender Offer Defense: Controlling Target Management	962	
	1. Disclosure and Enforcement	962	
	Varjabedian v. Emulex Corp.	963	
	Notes and Questions	967	
	2. Purchases by (or for) the Issuer of Its		
	Own Securities	967	

| 18 |

Regulation of Broker-Dealers97			971
A.	Reg	gulation of the Broker-Dealer Industry: Structure and Oversight	972
	1.	Entry	972
		Problems	973
	2.	Supervising the Conduct of Broker-Dealers and Their	
		Associated Persons	974
		a. Self-Regulation	974
		b. Direct SEC Supervision of Brokers and Dealers	975
		In the Matter of John Gutfreund et al.	976
		Notes and Questions	978
		Problem	979
В.	Th	e Responsibilities of Brokers to Their Customers	979
	1.	Acting in the Customer's Best Interest	979
		a. Best Execution	979
		b. Advice and Recommendations	981
		Regulation Best Interest: The Broker-Dealer Standard of	
		Conduct	982
		Notes and Questions	984
	0	Problems	986
	2.	Sales Practices: Litigation and Enforcement	986
		a. "Know Your Security"	987
		Hanly v. SEC	987 989
		Notes and Questions Problem	989 990
			990 990
		b. Investment Analysts and Their Conflicts of Interest Problem	990 992
		c. Suitability	992 992
		i. The Basic Obligation	992 992
		Brown v. E.F. Hutton Group Inc.	992
		Notes and Questions	995
		Problem	999
		ii. Suitability, Risk Disclosure, and the Sophisticated	000
		Investor	999
		Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.	999
		Notes and Questions	1002
		Problem	1003
	3.	Churning and Other "Relational" Frauds	1004
		Merrill Lynch, Pierce, Fenner & Smith v. Arceneaux	1004
		Notes and Questions	1006
		Problem	1008
	4.	Price Protection: Markups and Other Matters	1008
	5.	Arbitration	1010
С.	Sul	ostantive Regulation: Credit and Financial Soundness	1012
	1.	Margin Requirements	1012
	2.	The Financial Soundness of Broker-Dealers	1014
	3.	Dodd-Frank and Systemic Risk	1015

xxix |

Contents

19

Inv	Investment Advisers and Investment Companies		
A.	Th	e Regulation of Investment Advisers	1020
	1.	The Registration Requirement	1020
	2.	Substantive Regulation	1022
	3.	Conduct Regulation: Section 206	1023
		SEC v. Capital Gains Research Bureau Inc.	1023
		Notes and Questions	1026
	4.	Investment Advice, Investment Information, and the First	
		Amendment	1029
		Lowe v. SEC	1029
		Notes and Questions	1032
		Problem	1033
B.	Cr	edit Rating Agencies	1034
С.	Mutual Funds and Other Investment Companies		1035
	1.	The Structure and Governance of a Mutual Fund	1037
		Investment Company Act Release No. 24082	1037
		Problem	1039
	2.	Sales and Redemptions of Mutual Fund Shares	1040
		a. Prices and Distribution Charges	1040
		b. Abusive Trading Practices	1041
		Problem	1042
		c. Money Market Funds	1043
	3.	The Compensation of Investment Company Affiliates	1043
		Jones v. Harris Associates L.P.	1043
		Notes and Questions	1046
		Problem	1047
	4.		1047
	5.	The Definitional Problem	1049
		Problem	1050
	6.	ETFs	1050
D.	He	edge Funds and Other Private Investment Vehicles	1051

Transnational Fraud and the Reach of U.S. Securities Laws			1053
A.	Th	e Extraterritorial Application of U.S. Securities Laws	1053
	1.	In General	1053
	2.	Limiting the Reach of Securities Law: The Morrison Decision	1054
		Morrison v. National Australia Bank, Ltd.	1054
		Notes and Questions	1061
		Problems	1063
	3.	Morrison Applied	1064
		Absolute Activist Value Master Fund Ltd. v. Ficeto	1064
		Notes and Questions	1066
		Problems	1070

	4.	Choice of Law Options: The Relevance of Foreign Law in	
		Securities Litigation	1071
		Bonny v. The Society of Lloyd's	1072
		Notes and Questions	1073
		Problem	1076
B.	En	forcement Challenges Presented by an Internationalized	
	See	curities Market	1076
	1.	Unilateral Enforcement Efforts	1076
		a. Discovery Sanctions	1076
		b. The Reach for Assets	1077
	2.	Bilateral and Multilateral Enforcement Efforts	1078
Tal	ble of	Cases	1081
Ind			1093