
TABLE OF CONTENTS

PREFACE.....	V
EDITORIAL NOTE AND ACKNOWLEDGMENTS.....	VII
TABLE OF CASES.....	XXIX
Chapter 1. Introduction to the Securities Markets and Securities Regulation.....	1
Motivating Hypothetical	1
I. The Basics.....	1
II. Types of Securities	2
A. Common Stock.....	3
B. Preferred Stock.....	5
C. Bonds.....	8
III. The Capital Market	9
A. Primary Transactions	10
B. Secondary Transactions.....	12
1. Traditional Securities Exchanges	13
2. The Nasdaq Market	14
3. Alternative Trading Systems	16
IV. Investment Decisions.....	16
A. Present Discount Valuation	17
1. Interest.....	17
2. Present Value	18
Hypothetical One.....	19
B. What Risks Matter.....	20
V. Who Provides Information to Investors?.....	22
A. The Incentive to Provide Information.....	22
B. The Argument for Mandatory Disclosure.....	26
1. Coordination Problems	26
2. Agency Costs.....	27
3. Positive Externalities.....	28
4. Duplicative Research	29
5. Costs of Mandatory Disclosure.....	30
C. How Does Disclosure Matter?	30
1. Filtering Mechanisms	31
2. The Efficient Capital Market Hypothesis.....	32
a. Weak ECMH	32
b. Semi-Strong ECMH.....	33
c. Strong ECMH	33
d. Implications of ECMH.....	34
VI. The Regulatory Apparatus	36
A. The Federal Securities Laws.....	36
1. Securities Exchange Act of 1934	36
2. Securities Act of 1933.....	38
3. Investment Company Act of 1940 and Investment Advisers Act of 1940	38
4. Trust Indenture Act of 1939	39

5. Williams Act of 1968	39
6. Sarbanes-Oxley Act of 2002.....	40
7. Jumpstart Our Business Startups Act of 2012	40
B. The Financial Crisis and the Dodd-Frank Act.....	41
C. The Securities and Exchange Commission	43
D. Self-Regulatory Organizations.....	46
Chapter 2. Materiality.....	49
Motivating Hypothetical	49
I. What Matters to Investors?.....	49
II. The Reasonable Investor	51
United States v. Litvak	52
Notes	60
Questions.....	60
III. Forward-Looking Information	60
Basic Inc. v. Levinson	61
Notes	67
Questions.....	67
Hypothetical One	68
IV. Objective Tests of Materiality	68
SEC Staff Accounting Bulletin No. 99.....	69
Litwin v. Blackstone Group, L.P.....	70
Questions.....	75
Hypothetical Two.....	75
In re Merck & Co., Inc. Securities Litigation.....	76
Questions.....	80
Matrixx Initiatives, Inc. v. Siracusano.....	82
Questions.....	88
Hypothetical Three	89
V. The “Total Mix”	89
Longman v. Food Lion, Inc.	89
Notes	97
Questions.....	97
Hypothetical Four	98
VI. Management Integrity.....	98
In the Matter of Franchard Corporation.....	99
Notes	106
Questions.....	107
Hypothetical Five.....	107
Questions.....	109
Hypothetical Six.....	109
Chapter 3. The Definition of a “Security”	111
Motivating Hypothetical	111
I. Do the Securities Laws Apply?	111
Hypothetical One	114
II. “Investment Contract”	114
SEC v. W. J. Howey Co.....	114
Notes	118

Questions	119
Hypothetical Two	119
A. “A Person Invests His Money”	119
International Brotherhood of Teamsters v. Daniel	119
Notes	123
Questions	124
Hypothetical Three	125
B. “[I]n a Common Enterprise”	125
SEC v. SG Ltd.	125
Questions	132
Hypothetical Four	132
C. “[I]s Led to Expect Profits”	133
United Housing Foundation, Inc. v. Forman	133
Notes	139
Questions	140
Warfield v. Alaniz.....	140
Questions	145
Hypothetical Five	145
D. “[S]olely from the Efforts of the Promoter or a Third Party”	146
SEC v. Merchant Capital, LLC	147
Questions	154
Avenue Capital Management II, L.P. v. Schaden.....	154
Questions	157
SEC v. Mutual Benefits Corp.	158
Questions	162
Notes	162
Hypothetical Six	163
III. “Stock”	163
Landreth Timber Company v. Landreth	163
Questions	168
Hypothetical Seven	168
IV. “Note”	169
Reves v. Ernst & Young.....	169
Notes	178
Questions	178
Hypothetical Eight.....	178
V. Securitization	179
VI. Cryptocurrency.....	183
A. Is a Cryptocurrency Itself a Security?	187
B. Tokens on an Existing Cryptocurrency Blockchain.....	187
In the Matter of The DAO	188
Questions	195
Chapter 4. Disclosure and Accuracy	197
Motivating Hypothetical	197
I. Mandatory Disclosure and Accuracy	197
II. What Is a “Public Company?”	199
A. Public Company Status	200
B. Escaping Public Company Status	202

C.	Trading in the Stock of Private Companies	203
	Hypothetical One	206
III.	When Must a Public Company Disclose?	206
A.	Form 8-K.....	207
	In the Matter of Hewlett-Packard Company.....	210
	Questions	213
	Hypothetical Two	213
B.	Forms 10-K and 10-Q.....	214
	Notes	217
	Hypothetical Three	217
C.	Cybersecurity	217
	Questions	220
D.	Executive Compensation	221
E.	Emerging Growth & Smaller Reporting Companies	222
IV.	Accuracy of Disclosure	224
	In the Matter of BHP Billiton Ltd.	225
	Notes	230
	Questions.....	230
	Hypothetical Four.....	230
V.	The Problem of Selective Disclosure.....	231
	SEC v. Siebel Systems, Inc.....	232
	Questions.....	240
	Hypothetical Five.....	240
	Chapter 5. Rule 10b-5 Antifraud	241
	Motivating Hypothetical	241
I.	The Economics of Securities Fraud and Private Rights of Action	241
A.	The Rule 10b-5 Private Cause of Action	243
	1. Genesis	243
	2. Overlap with Other Causes of Action	244
	3. Section 9 of the Exchange Act	245
	4. Overlap with State Law Causes of Action	246
B.	The Class Action Mechanism	246
	Hypothetical One	247
C.	Sorting the Good from the Bad	247
	Questions	249
II.	Who Can Sue Under Rule 10b-5?.....	249
A.	The “in Connection with” Requirement.....	249
	Blue Chip Stamps, et al. v. Manor Drug Stores.....	250
	Notes	255
	Questions	255
	Hypothetical Two	256
	SEC v. Zandford	256
	Notes	259
	Questions	260
	Hypothetical Three	260
B.	The Lead Plaintiff in a Class Action.....	261
	In re Cendant Corp. Litigation.....	261
	Notes	271

Questions	273
III. Elements of the Cause of Action	273
A. Misstatement of a Material Fact.....	274
1. Deception	274
Santa Fe Industries, Inc., et al. v. Green et al.	274
Notes	279
Questions	279
2. Facts Versus Opinions	279
Virginia Bankshares, Inc. v. Sandberg	279
Notes	282
Questions	283
Hypothetical Four	283
3. The Duty to Update and the Duty to Correct.....	283
Gallagher v. Abbott Laboratories	283
Notes	286
Questions	286
4. Forward-Looking Statements.....	287
Asher v. Baxter International Inc.	287
Notes	293
Questions	294
Hypothetical Five	294
Indiana Public Retirement System v. SAIC, Inc.	295
Questions	300
B. Scienter	300
Ernst & Ernst v. Hochfelder.....	300
Questions	303
Hypothetical Six	303
Tellabs, Inc. v. Makor Issues & Rights, Ltd.	304
Notes	310
Questions	312
City of Livonia Employees' Retirement System v. The Boeing Co.	312
Questions	318
Hypothetical Seven	319
C. Reliance.....	320
Affiliated Ute Citizens of Utah v. United States	320
Questions	322
Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II") ..	324
Notes	339
Questions	340
In re Vivendi, S.A. Securities Litigation.....	341
Questions	348
Hypothetical Eight	348
D. Loss Causation	349
Dura Pharmaceuticals, Inc. v. Broudo.....	349
Notes	353
Questions	354
Mineworkers' Pension Scheme v. First Solar Inc.	355
Questions	357

IV. Rule 10b–5 Defendants.....	357
A. Secondary Liability.....	357
Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.....	360
Notes.....	368
Questions.....	368
Janus Capital Group, Inc., et al. v. First Derivative Traders.....	369
Notes.....	374
Questions.....	375
Hypothetical Nine.....	375
B. Control Person Liability.....	375
Lustgraaf v. Behrens.....	376
Notes.....	380
Questions.....	381
V. Damages.....	381
A. Open Market Damages.....	381
Hypothetical Ten.....	383
B. Damages and Class Certification.....	383
C. Face-to-Face Damages.....	387
Garnatz v. Stifel, Nicolaus & Co., Inc.....	388
Notes.....	390
Questions.....	391
D. Proportionate Liability.....	391
Notes.....	391
Hypothetical Eleven.....	391
VI. Transnational Securities Fraud.....	392
Morrison v. National Australia Bank Ltd.....	394
Notes.....	401
Questions.....	403
Chapter 6. Insider Trading.....	405
Motivating Hypothetical.....	405
I. Economics of Insider Trading.....	405
II. Insider Trading at Common Law.....	407
Strong v. Repide.....	408
Notes.....	410
Questions.....	411
Hypothetical One.....	412
III. Rule 10b–5 and the Classical Theory of Insider Trading.....	412
A. Core Insiders.....	413
Chiarella v. United States.....	414
Notes.....	419
Questions.....	420
Hypothetical Two.....	420
B. Tipper/Tippee Liability.....	421
Dirks v. SEC.....	421
Notes.....	428
Questions.....	428
Salman v. United States.....	428

United States v. Martoma	434
Notes	447
Questions	448
Hypothetical Three	448
IV. The Misappropriation Theory	449
A. The Misappropriation Theory	450
United States v. O’Hagan	451
Notes	458
Questions	458
B. Duty of Confidentiality	459
SEC v. Rocklage	459
Questions	465
SEC v. Cuban	466
Notes	469
Questions	469
C. Remedies	469
Hypothetical Four	470
Hypothetical Five	471
D. Alternatives to the Misappropriation Theory	471
SEC v. Dorozhko	472
Questions	475
V. Section 16	475
A. Employee Compensation	476
B. Large Block Shareholders	477
Lowinger v. Morgan Stanley & Co.	479
Questions	484
C. Calculating Section 16(b) Damages	485
Questions	486
Chapter 7. Public Offerings	487
Motivating Hypothetical	487
I. Economics of Public Offerings	487
A. A Brief Description of the Public Offering Process	490
1. Different Types of Offerings	491
2. The Underwriters	493
3. The Underwriting Process	493
4. Underpricing	495
5. Capital Structure	496
B. Public Offering Disclosure	498
1. Plain English Disclosures	500
II. The Gun-Jumping Rules	501
Securities Offering Reform	502
A. Pre-Filing Period	507
1. What Is an “Offer”?	507
Securities Act Release No. 3844	509
Securities Act Release No. 5180	511
Notes	513
Questions	515
Hypothetical One	516

2.	Putting Together the Offering.....	517
	Hypothetical Two	517
	Hypothetical Three.....	519
3.	Emerging Growth Companies	519
	Hypothetical Four	520
B.	Waiting Period.....	520
1.	Gauging Market Sentiment.....	521
	a. The Preliminary Prospectus	522
	b. The Free Writing Prospectus.....	523
	c. The Roadshow and Other Oral Offers.....	523
	d. Regularly Released Information in the Ordinary Course of Business	523
	e. “Tombstone” Advertisements.....	523
	f. Solicitations of Interest	525
	Hypothetical Five	525
2.	Free Writing Prospectuses.....	526
	a. Definition of a Free Writing Prospectus	527
	b. Issuer Requirements	527
	c. Disclosure, Filing and Retention Requirements	528
	d. Antifraud Liability and Regulation FD Implications	531
	Hypothetical Six	531
	Notes.....	532
3.	The Process of Going Effective	533
4.	Analysts	535
	Hypothetical Seven	538
C.	Post-Effective Period.....	539
1.	Forms of the Final Prospectus.....	540
2.	Traditional Free Writing	542
3.	Prospectus Delivery Requirement.....	543
	a. The Traditional Delivery Requirement.....	543
	b. Prospectus Delivery Period.....	544
	c. Access Equals Delivery	546
	Hypothetical Eight	547
4.	Updating the Prospectus and Registration Statement.....	548
	a. Updating the Prospectus.....	549
	b. Updating the Registration Statement	550
	Hypothetical Nine	551
III.	Public Offering Trading Practices	552
A.	IPO Allocations.....	553
B.	Market Manipulation.....	554
	Hypothetical Ten.....	556
C.	Stabilization	557
	Hypothetical Eleven.....	558
IV.	Shelf Registration	558
A.	Automatic Shelf Registration.....	562
B.	The Base Prospectus	563
	Notes	565
	Hypothetical Twelve	566

Chapter 8. Civil Liability Under the Securities Act569

Motivating Hypothetical 569

I. Public Offerings, Uncertainty and Information Asymmetry 569

II. Section 11 Liability 570

 A. Standing..... 570

 Krim v. pcOrder.com, Inc..... 571

 Questions 577

 Hypothetical One 578

 B. Statutory Defendants..... 578

 Hypothetical Two 578

 Questions 579

 C. Elements of the Cause of Action 579

 Omnicare, Inc. v. Laborers Dist. Council Constr. Indus.
 Pension Fund..... 581

 Notes 593

 Questions 593

 Hypothetical Three 594

 D. Defenses 594

 1. Due Diligence Defense 596

 Escott v. BarChris Construction Corp. 597

 Notes 607

 Questions 607

 2. Due Diligence and Underwriters..... 608

 In re WorldCom, Inc. Securities Litigation 608

 Questions 619

 Hypothetical Four 620

 E. Damages 622

 1. Measuring § 11 Damages..... 622

 Beecher v. Able 622

 Notes 626

 Questions 626

 Hypothetical Five 626

 2. Indemnification, Contribution, and Joint and Several
 Liability..... 627

 Eichenholtz v. Brennan 627

 Questions 629

 Hypothetical Six 630

III. Section 12(a)(1)..... 630

 A. Standing and Defendants 631

 Pinter v. Dahl 631

 Notes 636

 Questions 636

 Hypothetical Seven 636

 B. Elements of the Cause of Action 637

 C. Damages and Defenses 638

 Hypothetical Eight 638

 D. Securities Act Claims Brought in State Court..... 638

 1. Actions Brought Under State Common Law Fraud..... 639

 2. Actions Brought Under the Federal Securities Laws 640

IV. Section 12(a)(2) Liability	641
A. The Scope of § 12(a)(2)	642
Gustafson v. Alloyd Co., Inc.	643
Questions	648
B. Implications of <i>Gustafson</i>	648
C. Elements of the Cause of Action	650
Hypothetical Nine	650
D. Defenses	651
Federal Housing Finance Agency v. Nomura Holding America, Inc. et al.	652
Questions	657
E. Damages and Loss Causation	658
Miller v. Thane International, Inc.	658
Questions	661
Hypothetical Ten	661
Chapter 9. Exempt Offerings.....	663
Motivating Hypothetical	663
I. Introduction.....	663
II. Section 4(a)(2) Offerings.....	665
SEC v. Ralston Purina Co.	665
Questions.....	667
Doran v. Petroleum Management Corp.....	668
Questions.....	674
Hypothetical One	674
III. Regulation D.....	674
A. Aggregate Offering Price	676
Hypothetical Two	677
B. Purchasers	677
Hypothetical Three	679
Hypothetical Four	681
C. General Solicitation	682
In the Matter of Kenman Corp.....	683
Questions	685
SEC No-Action Letter Mineral Lands Research & Marketing Corporation.....	685
Hypothetical Five	688
D. Disclosure	689
Hypothetical Six.....	691
E. Resale Restrictions.....	691
Hypothetical Seven	692
F. Integration.....	693
Hypothetical Eight.....	694
G. Innocent and Insignificant Mistakes	695
Hypothetical Nine	697
H. Disqualification	697
In the Matter of Bank of America, N.A. and Merrill Lynch, Pierce, Fenner & Smith, Inc.	700
Questions	701

I.	Other Aspects of Regulation D	702
1.	State Securities Regulation	702
2.	Rule 504	703
3.	Form D	704
4.	Exchange Act Filing	704
J.	The Private Placement Process	704
IV.	Regulation A	706
A.	Eligible Issuers and Securities	708
B.	“Bad Actor” Disqualification	709
	Hypothetical Ten	711
C.	Aggregate Offering Price	711
	Hypothetical Eleven	712
D.	Investors	713
E.	Disclosure	714
1.	Offering	714
	Hypothetical Twelve	715
2.	Periodic Reporting	716
F.	Regulation A Gun Jumping	718
1.	Pre-Filing Period	718
	Hypothetical Thirteen	719
2.	Waiting Period	720
	Hypothetical Fourteen	720
3.	Post-Qualification Period	720
	Hypothetical Fifteen	721
G.	Continuous Offerings	721
H.	Insignificant Deviations	722
	Hypothetical Sixteen	723
I.	Antifraud Liability	723
J.	Integration	723
	Hypothetical Seventeen	725
K.	State Securities Law Requirements	725
V.	Crowdfunding	726
A.	Aggregate Offering Limits	726
B.	Integration	728
C.	Investors	728
D.	Intermediaries	729
E.	Disclosure	732
1.	Offering Statement and Progress Updates	732
2.	Ongoing Reporting	734
F.	Limits on Issuer Communication	734
G.	Antifraud Liability	735
H.	Resales	736
I.	“Bad Actor” Disqualification	736
J.	Insignificant Deviations	737
K.	Public Company Status	738
	Hypothetical Eighteen	738
VI.	Intrastate Offerings	739
A.	Section 3(a)(11) Offerings	739
	Securities Act Release No. 4434	739

	Busch v. Carpenter	742
	Questions	747
	Hypothetical Nineteen.....	747
B.	Rules 147 and 147A	748
	Exchange Act Release No. 5450	748
	1. Manner of Offering.....	749
	2. Residence Requirement	750
	3. Limitation on Resales	752
	4. Precautions Against Interstate Sales	753
	5. Disclosure.....	754
	6. Integration Safe Harbor.....	754
	7. State Securities Law	755
	Hypothetical Twenty	755
VII.	Regulation S	756
A.	Basic Regulation S Requirements.....	757
	1. Offshore Transaction.....	758
	Hypothetical Twenty-One.....	759
	2. No Directed Selling Efforts.....	760
	Hypothetical Twenty-Two.....	761
B.	Categories of Regulation S Offerings.....	761
	1. Category 1 (Rule 903(b)(1)).....	762
	Hypothetical Twenty-Three.....	762
	2. Category 2 Offerings (Rule 903(b)(2))	763
	Hypothetical Twenty-Four.....	765
	3. Category 3 Offerings (Rule 903(b)(3))	765
	Hypothetical Twenty-Five	767
C.	Integration.....	768
D.	Resales	768
E.	Global Regulation S Offerings.....	771
	Chapter 10. Secondary Market Transactions.....	773
	Motivating Hypothetical	773
I.	Introduction.....	773
II.	Transaction and Underwriter?.....	775
	Gilligan, Will & Co. v. SEC	777
	Notes	780
	Questions	780
	Hypothetical One	781
	SEC v. Chinese Consolidated Benevolent Ass'n, Inc.	782
	Questions.....	784
III.	Control Persons' Resales	785
A.	Underwriters for Control Persons.....	786
	Hypothetical Two	787
	United States v. Wolfson	787
	Questions	788
B.	Section 4(a)(1 1/2) Exemption.....	789
	Hypothetical Three	791
IV.	Rule 144.....	791
A.	Holding Period for Restricted Securities	794

B.	Current Public Information.....	795
1.	Applicability.....	795
2.	Information Required.....	796
	Hypothetical Four	797
C.	Additional Requirements for Affiliate Resales.....	799
1.	Limitation on Amount of Securities Sold.....	799
	Hypothetical Five	800
2.	Manner of Sale.....	801
	Hypothetical Six	802
3.	Notice of Proposed Sale.....	802
D.	Other Considerations.....	802
E.	Implications.....	803
V.	Rule 144A	803
A.	Sales to a Qualified Institutional Buyer.....	804
B.	Purchaser Awareness of Exemption	805
C.	Fungibility	806
D.	Disclosure	806
	Hypothetical Seven	807
E.	Resales	808
	Hypothetical Eight.....	809
F.	Rule 144A and Registration	810
 Chapter 11. Federal Regulation of Shareholder Voting.....		 813
	Motivating Hypothetical	813
I.	Introduction.....	813
II.	Solicitation of Proxies	815
A.	What Is a “Solicitation”?	816
	Hypothetical One	818
B.	Proxy Disclosure.....	819
1.	Disclosure and Filing Requirements.....	819
2.	Testing the Waters.....	821
	Hypothetical Two	823
C.	Rule 14a–9 Antifraud Liability	824
	J.I. Case Co. v. Borak.....	824
	Questions	826
	Mills v. Electric Auto-Lite Co.	827
	Notes	831
	Questions	831
D.	Managing the Costs of Proxy Solicitations.....	832
	Hypothetical Three	832
1.	Communicating with Shareholders	832
2.	Management Defensive Tactics.....	836
3.	Reimbursement of Expenses	837
III.	Shareholder Democracy.....	838
A.	Shareholder Proposals	839
1.	Eligibility and Procedural Requirements	839
2.	Substantive Exclusions.....	840
	Hypothetical Four	843
	Lovenheim v. Iroquois Brands Ltd.....	844

Notes	847
Questions	847
Apache Corp. v. New York City Employees' Retirement System	848
Questions	853
Hypothetical Five	853
B. SEC Authority over Shareholder Voting	854
1. Proxy Access	854
2. Say on Pay	855
Questions	856
Chapter 12. Public Enforcement	857
Motivating Hypothetical	857
I. SEC Enforcement.....	857
II. Scope of SEC Enforcement.....	858
III. SEC Investigations	860
A. Investigations and Strategy	860
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.....	862
Questions	865
Lucent Settles SEC Enforcement Action Charging the Company With \$1.1 Billion Accounting Fraud	865
Questions	867
Hypothetical One	867
B. Formal Investigations and Subpoenas	867
RNR Enterprises, Inc. v. SEC	868
Questions	872
SEC v. Dresser Industries, Inc.....	873
Notes	879
Questions	880
Hypothetical Two	880
IV. Enforcement Proceedings.....	881
A. Administrative Proceedings	882
1. Section 21C.....	883
Lucia v. SEC	883
Questions	889
Questions	890
2. Section 15(c)(4)	891
Questions	891
3. Section 21(a)	891
4. Sections 12(j) & 12(k).....	892
B. Judicial Review of Administrative Remedies.....	893
WHX Corp. v. SEC	894
Questions	900
Hypothetical Three	900
C. Judicial Remedies	900

1. Injunctions	901
Aaron v. SEC	901
Notes	904
Questions	904
2. Other Civil Remedies	905
SEC v. Sargent	905
Questions	908
SEC v. First Pac. Bancorp	909
Questions	913
Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC	913
Questions	917
Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge	918
Questions	919
SEC v. Jensen	919
Notes	926
Questions	927
Hypothetical Four	927
D. Criminal Enforcement	927
United States v. Tarallo	928
Notes	934
Questions	935
Chapter 13. Gatekeepers	937
Motivating Hypothetical	937
I. Gatekeeping	937
II. Outside Directors	939
In the Matter of W. R. Grace & Co.	941
Questions	948
Hypothetical One	948
III. The Independent Auditor	949
Hypothetical Two	952
IV. Lawyers	952
Altman v. SEC	953
Notes	957
Questions	958
Hypothetical Three	958
Pacific Inv. Management Co. v. Mayer Brown LLP	959
Questions	964
V. Credit Rating Agencies	964
Securities Fraud Liability of Secondary Actors, GAO–11–664	964
A. Liability	966
In re Lehman Brothers Mortgage-Backed Securities Litigation	966
Notes	972
Questions	973
B. Regulation of Credit Rating Agencies	973
Questions	974

VI. Whistleblowers 974
 Digital Realty Trust, Inc. v. Somers 976
 Questions 982
 Hypothetical Four 982
INDEX 985