

LIST OF CHAPTERS

PREFACE	ix
INTRODUCTION	xxxv
CITATION FORM	xlvi
Chapter 1 OVERVIEW OF THE FEDERAL SECURITIES LAWS	1
Chapter 2 DEFINITION OF A "SECURITY"	21
Chapter 3 THE REGISTRATION PROCESS UNDER THE SECURITIES ACT OF 1933, INCLUDING THE INTEGRATED DISCLOSURE SYSTEM	61
Chapter 4 REGULATION D AND OTHER EXEMPTIVE PROVISIONS	127
Chapter 5 USE OF THE INTERNET IN SECURITIES TRANSACTIONS	185
Chapter 6 THE USE OF PROJECTIONS IN SECURITIES DISCLOSURE	213
Chapter 7 SPECIAL INDUSTRY REGULATION; LEGAL OPINIONS; ETHICAL CONSIDERATIONS	235
Chapter 8 UNORTHODOX SECURITIES TRANSACTIONS	263
Chapter 9 BROKER-DEALER REGULATION	299
Chapter 10 THE UNDERWRITING PROCESS AND REPRESENTATION OF UNDERWRITERS	327
Chapter 11 BLUE SKY QUALIFICATION	353
Chapter 12 SECONDARY TRADING OF SECURITIES, INCLUDING RULE 144	403
Chapter 13 COMMISSION ADMINISTRATIVE INVESTIGATIONS	439

Chapter 14	CIVIL LITIGATION AND ARBITRATION UNDER THE FEDERAL SECURITIES LAWS	517
Chapter 15	LITIGATION UNDER THE SECURITIES ACT OF 1933	565
Chapter 16	LITIGATION UNDER THE SECURITIES EXCHANGE ACT OF 1934	599
Chapter 17	OBLIGATIONS OF A COMPANY AND ITS PRINCIPALS UNDER THE SECURITIES EXCHANGE ACT OF 1934	717
	TABLE OF AUTHORITIES	813
	SUBJECT INDEX	863

TABLE OF CONTENTS

PREFACE	<i>ix</i>
----------------------	-----------

INTRODUCTION	<i>xxxv</i>
---------------------------	-------------

CITATION FORM	<i>xlvii</i>
----------------------------	--------------

Chapter 1	OVERVIEW OF THE FEDERAL SECURITIES LAWS	1
§ 1.1	THE SECURITIES ACT OF 1933	2
§ 1.2	THE SECURITIES EXCHANGE ACT OF 1934	3
§ 1.3	THE INVESTMENT ADVISERS ACT OF 1940	4
	§ 1.3.1—Introduction To The Advisers Act	4
	§ 1.3.2—Disclosure Obligations Under The Advisers Act	7
	§ 1.3.3—Record-Keeping Requirements	8
	§ 1.3.4—Delivery Of Disclosure To Clients	9
	§ 1.3.5—SEC Enforcement	9
	§ 1.3.6—State Investment Adviser Regulation	10
§ 1.4	THE INVESTMENT COMPANY ACT OF 1940	10
	§ 1.4.1—Introduction To The Company Act	10
	§ 1.4.2—Business Development Companies And Small Business Investment Companies	13
§ 1.5	OTHER LAWS	14
	§ 1.5.1—Public Utility Holding Company Act Of 1935	14
	§ 1.5.2—Trust Indenture Act Of 1939	14
	§ 1.5.3—Promotion Of Efficiency, Competition, And Capital Formation	15

EXHIBIT

Exhibit 1A—Four Simple Rules For
1933 Act Compliance 19

Chapter 2 **DEFINITION OF A “SECURITY”** 21

§ 2.1 **WHAT IS A SECURITY?** 22

 § 2.1.1—The Statutory Definitions 22

 § 2.1.2—Investment Contracts — General 23

 § 2.1.3—Investment Contracts —
 Common Enterprise 23

 § 2.1.4—Investment Contracts — Profits
 From The Efforts Of Others 24

§ 2.2 **SALE OF A BUSINESS INVOLVING
A SECURITY** 25

 § 2.2.1—Rejection Of The Sale Of A
 Business Doctrine 25

 § 2.2.2—Rule 10b-5 In The Sale Of A
 Business Context 26

§ 2.3 **DEBT AS A SECURITY** 27

 § 2.3.1—Introduction 27

 § 2.3.2—The *Reves* Case 27

 § 2.3.3—Interpreting *Reves* 29

§ 2.4 **PENSION PLAN INTERESTS** 31

§ 2.5 **LIMITED LIABILITY COMPANIES** 31

§ 2.6 **VIATICAL SETTLEMENTS** 33

§ 2.7 **LEASING PROGRAMS** 34

§ 2.8 **GENERAL PARTNERSHIP INTERESTS AND
JOINT VENTURES** 35

§ 2.9 **EXAMPLES OF INSTRUMENTS FOUND
TO BE “SECURITIES”** 38

Table of Contents

§ 2.10	PYRAMID AND PONZI SCHEMES	41
§ 2.11	GUIDELINES FOR WHAT IS NOT A “SECURITY”	44
§ 2.12	CONCLUSION	47
EXHIBIT		
	Exhibit 2A—Stupid Human Investments	55
<hr/>		
Chapter 3	THE REGISTRATION PROCESS UNDER THE SECURITIES ACT OF 1933, INCLUDING THE INTEGRATED DISCLOSURE SYSTEM	61
<hr/>		
§ 3.1	THE REGISTRATION REQUIREMENT	63
	§ 3.1.1—Definition Of “Sale”	63
	§ 3.1.2—Definition Of “Offer”	64
§ 3.2	THE REGISTRATION PROCESS	65
	§ 3.2.1—Classification Of Issuers	65
§ 3.3	REGISTRATION STATEMENT FORMS	66
	§ 3.3.1—The Forms	66
	§ 3.3.2—Guidance For The Preparation Of Registration Statements	67
	§ 3.3.3—The Scaled Disclosure Requirements Of Regulation S-K	69
	§ 3.3.4—Electronic Filing — EDGAR	70
	§ 3.3.5—Title I — Emerging Growth Companies	70
	§ 3.3.6—Confidential Submissions	72
§ 3.4	THE PROSPECTUS	74
	§ 3.4.1—The Statutory Prospectus	74
	§ 3.4.2—Issuer Communications	75
	§ 3.4.3—Other Forms Of Communication	76
	§ 3.4.4—Communications By Broker-Dealers	77
	§ 3.4.5—Cases Regarding Communications	79

§ 3.4.6—Projections And Forward-Looking Information	80
§ 3.4.7—Free Writing Prospectuses	81
§ 3.5 ADDITIONAL REGISTRATION STATEMENT CONCEPTS	86
§ 3.5.1—The Effective Date	86
§ 3.5.2—Adding Shares To A Registration Statement	87
§ 3.5.3—Updating The Information In The Prospectus	89
§ 3.5.4—Form S-3 Issuers Who Lose Their Eligibility	91
§ 3.5.5—Communications By Participants In The Distribution	91
§ 3.6 THE “PRESUMPTIVE UNDERWRITER” DOCTRINE	94
§ 3.7 REGULATION A	94
§ 3.7.1—Regulation A — General	95
§ 3.7.2—Regulation A — § 3(b)(1) — Offers And Sales Not Exceeding \$5 Million	97
§ 3.7.3—New Regulation A — § 3(b)(2) — Offers And Sales Not Exceeding \$50 Million	98
§ 3.8 BLANK CHECK (BLIND POOL) OFFERINGS	101
§ 3.8.1—Introduction	101
§ 3.8.2—The Business Acquisition	102
§ 3.8.3—Abuses Of The Reverse Merger	103
§ 3.8.4—Special Regulation Of Blank Checks	104
§ 3.9 THE MULTI-JURISDICTIONAL DISCLOSURE SYSTEM	105
§ 3.9.1—MJDS, Generally	105
§ 3.9.2—Southbound Transactions	106
§ 3.9.3—Northbound Transactions	107
§ 3.9.4—Blue Sky Issues	107

Table of Contents

§ 3.10	DISCLOSURE	107
EXHIBIT		
	Exhibit 3A—"A Prospectus For The Rest Of Us" . . .	123
<hr/>		
Chapter 4	REGULATION D AND OTHER EXEMPTIVE PROVISIONS	127
<hr/>		
§ 4.1	EXEMPTIONS FROM REGISTRATION, IN GENERAL	128
§ 4.2	STATUTORY EXEMPTIONS	129
	§ 4.2.1—California Exemption	131
§ 4.3	SEC v. RALSTON PURINA CO.	132
§ 4.4	SECTION 4(a)(5) — ACCREDITED INVESTORS ONLY	133
§ 4.5	REGULATION D, RULES 501–508	134
	§ 4.5.1—Regulation D — Preliminary Notes	135
	§ 4.5.2—Rule 501 — Definitions	135
	§ 4.5.3—Rule 502	136
	§ 4.5.4—Information Requirements	136
	§ 4.5.5—Limitation On Manner Of Offering	139
	§ 4.5.6—Limitations On Resale	143
	§ 4.5.7—Rule 503 — Notice Of Sales	143
	§ 4.5.8—Rules 507 And 508	143
	§ 4.5.9—Rule 504	144
	§ 4.5.10—Rule 505	145
	§ 4.5.11—Rule 506	145
	§ 4.5.12—Other JOBS Act Impact On Exempt Offerings	150
§ 4.6	INTRASTATE OFFERING EXEMPTION; RULE 147 AND 147A	150
	§ 4.6.1—Requirements Of Rule 147	151
	§ 4.6.2—Differences In Rule 147A	152
	§ 4.6.3—Intrastate Offerings — Conclusion	153

§ 4.7	CROWDFUNDING	153
	§ 4.7.1—Crowdfunding In General	153
	§ 4.7.2—Costs Of Crowdfunding Can Be Significant	155
	§ 4.7.3—Conclusion	157
§ 4.8	RULE 701	158
§ 4.9	REGULATION S (RULES 901–904)	160
§ 4.10	STRUCTURE OF REGULATION S	161
§ 4.11	RULE 144A	163
§ 4.12	INTEGRATION OF OFFERINGS	165
EXHIBIT		
	Exhibit 4A—Model Form Subscription Agreement . .	179

Chapter 5	USE OF THE INTERNET IN SECURITIES TRANSACTIONS	185
§ 5.1	INTRODUCTION	185
§ 5.2	COMMUNICATIONS	187
	§ 5.2.1—Websites And Social Media	187
	§ 5.2.2—Monitoring Internet Communications	192
	§ 5.2.3—Electronic Delivery Of Information	193
	§ 5.2.4—Websites And Securities Offerings	195
§ 5.3	OFFERING SECURITIES THROUGH THE INTERNET	196
	§ 5.3.1—Offshore Internet Offerings	196
	§ 5.3.2—Internet Public Offerings	196
	§ 5.3.3—Internet Road Shows	198

Table of Contents

	§ 5.3.4—Internet Private Offerings	199
	§ 5.3.5—Alternative Trading Systems (ATs), Including Electronic Communications Networks (ECNs)	201
§ 5.4	STATE REGULATION	203
§ 5.5	SEC ENFORCEMENT THROUGH THE INTERNET	204
	§ 5.5.1—Internet Fraud	205
	§ 5.5.2—“Free Stock”	206
	§ 5.5.3—Enforcement Complaints	207
<hr/>		
Chapter 6	THE USE OF PROJECTIONS IN SECURITIES DISCLOSURE	213
<hr/>		
§ 6.1	INTRODUCTION	213
§ 6.2	RULES 175 AND 3b-6	215
§ 6.3	JUDICIAL INTERPRETATIONS	216
	§ 6.3.1—The “Bespeaks Caution” Doctrine	216
	§ 6.3.2—Judicial Examples	220
§ 6.4	THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995	224
	§ 6.4.1—Persons Subject To The Safe Harbor	224
	§ 6.4.2—Definition Of Forward-Looking Statements	225
	§ 6.4.3—Requirements Of The Safe Harbor	226
	§ 6.4.4—Limitations On The PSLRA Safe Harbor	227
	§ 6.4.5—Further Regulation	229
§ 6.5	CONCLUSION	230

Chapter 7	SPECIAL INDUSTRY REGULATION; LEGAL OPINIONS; ETHICAL CONSIDERATIONS	235
§ 7.1	A SPECIAL SET OF RULES GOVERNING REAL ESTATE AND OIL AND GAS OFFERINGS	236
§ 7.2	COMMISSION GUIDELINES — OIL AND GAS	236
§ 7.3	COMMISSION GUIDELINES — REAL ESTATE	238
§ 7.4	NASAA GUIDELINES	240
§ 7.5	DISCLOSURE OF MINING OPERATIONS	243
	§ 7.5.1—Overview	243
	§ 7.5.2—Guide 7 — Definitions	243
	§ 7.5.3—Mining Operation Disclosures	244
§ 7.6	TAX AND OTHER LEGAL OPINIONS	245
	§ 7.6.1—Overview	245
	§ 7.6.2—Who May Practice Tax Law?	247
	§ 7.6.3—Current Status Of Circular 230	248
	§ 7.6.4—Potential Attorney Liability For Opinions	252
§ 7.7	ETHICAL ISSUES IN CLIENT REPRESENTATION	253
	§ 7.7.1—Multiple Party Representation	253
	§ 7.7.2—Who Is The Client?	254
	§ 7.7.3—Can An Attorney Take Shares In A Client As An Investment Or As Payment Of Fees?	255
Chapter 8	UNORTHODOX SECURITIES TRANSACTIONS	263
§ 8.1	UNORTHODOX SECURITIES TRANSACTIONS	264
§ 8.2	MERGERS	264
§ 8.3	RECLASSIFICATIONS	265
§ 8.4	SPIN-OFFS	266

Table of Contents

§ 8.5	PARTNERSHIP “ROLL-UPS”	268
§ 8.6	SHELF REGISTRATIONS	270
	§ 8.6.1—Issuer Requirements For The Use Of Form S-3	271
	§ 8.6.2—Shelf Registration For Selling Security Holders (Rule 415(a)(1)(i))	273
	§ 8.6.3—Shelf Registration For A Cash Offering (Rule 415(a)(1)(x))	274
	§ 8.6.4—Shelf Registration For Acquisitions (Rule 415(a)(1)(viii))	275
§ 8.7	“PIGGY-BACK” REGISTRATION RIGHTS	276
§ 8.8	EMPLOYEE BENEFIT PLAN TRANSACTIONS	277
	§ 8.8.1—Do They Involve The Offer Or Sale Of A Security?	277
	§ 8.8.2—Registration On Form S-8	278
§ 8.9	STOCK BONUSES	279
§ 8.10	FORECLOSURE SALES	279
	§ 8.10.1—Foreclosure Sales In Stock Of A Privately Held Company	280
	§ 8.10.2—Foreclosure Sales In Stock Of A Publicly Held Company	281
§ 8.11	SECURITIES EXCHANGE AS A “FORCED SALE”	282
§ 8.12	CONCURRENT PUBLIC AND PRIVATE TRANSACTIONS	282
	§ 8.12.1—Integration	283
	§ 8.12.2—SEC Rules 152 And 155	284
	§ 8.12.3—SEC Release 33-8828 (Aug. 3, 2007)	286
	§ 8.12.4—PIPE Offerings	286
	§ 8.12.5— <i>Exxon Capital</i> And A/B Exchanges	288
§ 8.13	REVERSE MERGERS AND GOING PUBLIC	289
§ 8.14	ODD-LOT TENDER OFFERS	289

Chapter 9	BROKER-DEALER REGULATION	299
§ 9.1	REGISTRATION REQUIREMENTS	299
	§ 9.1.1—Engaged In The Business	299
	§ 9.1.2—Unlicensed Broker-Dealers	300
	§ 9.1.3—Issuer-Dealer Safe Harbor	302
	§ 9.1.4—FINRA Restrictions	303
	§ 9.1.5—State Regulation Of Finders	303
§ 9.2	FINDERS	304
	§ 9.2.1—Finders — General	304
	§ 9.2.2—Finders — Investment Transactions	306
	§ 9.2.3—Finders — M&A Transactions And Business Brokers	310
	§ 9.2.4—“Engaged In The Business”	314
	§ 9.2.5—Other Issues Relating To Finders	314
	§ 9.2.6—Consequences Of Using Finders	314
§ 9.3	BROKER-DEALER REGULATION	315
	§ 9.3.1—Overview	315
	§ 9.3.2—Operational Regulation Of Broker-Dealers	317
	§ 9.3.3—State Regulation Of Broker-Dealers	319
	§ 9.3.4—Actions Involving FINRA (Formerly The NASD)	319
Chapter 10	THE UNDERWRITING PROCESS AND REPRESENTATION OF UNDERWRITERS	327
§ 10.1	OVERVIEW OF THE UNDERWRITING PROCESS	328
§ 10.2	DEFINITIONS	328
§ 10.3	THE DECISION TO GO PUBLIC	331
§ 10.4	RELATIONSHIP BETWEEN THE ISSUER AND THE UNDERWRITER	333
§ 10.5	REGULATION OF THE DISTRIBUTION PROCESS	334

Table of Contents

§ 10.6	THE UNDERWRITING AGREEMENT	335
§ 10.7	REGULATION BY THE FINANCIAL INDUSTRY REGULATORY AUTHORITY AND THE CORPORATE FINANCING RULE	336
§ 10.8	UNDERWRITER'S LIABILITY	338
	§ 10.8.1—Section 11	338
	§ 10.8.2—Section 12(a)(2)	339
	§ 10.8.3—Rule 10b-5	340
§ 10.9	ESTABLISHING THE DUE DILIGENCE DEFENSE	340
§ 10.10	UNDERWRITER'S PROCEDURES	341
§ 10.11	ANALYST RESEARCH REPORTS	343
	§ 10.11.1—Research Analysts Associated With Or Employed By Broker-Dealers	344
	§ 10.11.2—Other Research Analysts	346
	§ 10.11.3—Risk Of Company Liability For Research Reports	346
	§ 10.11.4—Rules Of The Self-Regulatory Organizations	348
<hr/>		
Chapter 11	BLUE SKY QUALIFICATION	353
§ 11.1	GENERAL	354
§ 11.2	SECONDARY TRADING UNDER THE BLUE SKY LAWS	354
§ 11.3	SECURITIES REGISTRATION REQUIREMENTS	355
	§ 11.3.1—Covered Securities	355
	§ 11.3.2—Filing Requirements	356
	§ 11.3.3—State Regulation For Securities Other Than Covered Securities	357
§ 11.4	STATE EXEMPTIONS	358

§ 11.5	STATE REGULATION OF BROKER-DEALERS	358
§ 11.6	CIVIL LITIGATION UNDER STATE LAW	359
§ 11.7	DISCUSSION OF COLORADO LAW	360
	§ 11.7.1—Overview Of The Colorado Securities Act	360
	§ 11.7.2—Enforcement Of The Colorado Securities Act	363
	§ 11.7.3—Civil And Criminal Enforcement Actions	364
	§ 11.7.4—Cease And Desist Authority	364
	§ 11.7.5—Registration Requirements And Exemptions	367
	§ 11.7.6—Rescission Offer	371
§ 11.8	OTHER STATES	372
 EXHIBIT		
	Exhibit 11A—Blue Sky Memorandum	379
<hr/>		
Chapter 12	SECONDARY TRADING OF SECURITIES, INCLUDING RULE 144	403
<hr/>		
§ 12.1	DEFINITION OF “SECONDARY TRADING” AND REGISTRATION REQUIREMENT	404
§ 12.2	DEFINITION OF “AFFILIATE”	405
§ 12.3	REGISTRATION OF SECURITIES ON BEHALF OF A SELLING SECURITY HOLDER	406
§ 12.4	SECTION 4(a)(1) EXEMPTION FOR SECONDARY TRADING — RULE 144	406
	§ 12.4.1—Current Public Information	408
	§ 12.4.2—Holding Period	408
	§ 12.4.3—Tacking Of The Holding Period	409
	§ 12.4.4—Volume Limitations And Aggregation	411
	§ 12.4.5—Manner Of Sale	412
	§ 12.4.6—Form 144	412
	§ 12.4.7—The “Blown Trade”	413
	§ 12.4.8—Removal Of The Restrictive Legend	414

Table of Contents

§ 12.5	SECTION 4(1½) EXEMPTION AND SECTION 4(a)(7)	420
§ 12.6	THE STOCK MARKET — NASDAQ AND THE EXCHANGES	422
§ 12.7	DUTY TO PERMIT THE TRANSFER OF SHARES	426
§ 12.8	NASDAQ DE-LISTING	427
	§ 12.8.1—The De-listing Process	428
	§ 12.8.2—The Aftermath Of De-listing	428
	§ 12.8.3—Avoiding De-listing	429
	§ 12.8.4—Public Disclosure	431
<hr/>		
Chapter 13	COMMISSION ADMINISTRATIVE INVESTIGATIONS	439
<hr/>		
§ 13.1	SEC INVESTIGATIVE POWERS	440
	§ 13.1.1—The Preliminary (Informal) Inquiry	441
	§ 13.1.2—The Formal Investigation	443
	§ 13.1.3—Wells Submission — The Target’s Opportunity To Respond	445
	§ 13.1.4—Reliance On Counsel	449
	§ 13.1.5—Settlement	449
	§ 13.1.6—Appeal Of Sanctions	454
	§ 13.1.7—An Insolvent Defendant	455
	§ 13.1.8—SEC’s Statute Of Limitations	455
	§ 13.1.9—The SEC’s Burden Of Proof	457
	§ 13.1.10—Ongoing Review Of Open Enforcement Investigations And Termination Of Investigations	457
	§ 13.1.11—Communications With Senior Enforcement Officials	458
	§ 13.1.12—Witness Assurance Letters And Contacting Employees Of Issuers	459
	§ 13.1.13—Cooperation Credit Under The Enforcement Manual	459

§ 13.2	SEC'S RULES OF PRACTICE AND RULE 102(e)	463
	§ 13.2.1—Rules Of Practice — Administrative Proceedings	463
	§ 13.2.2—Rule 102(e)	464
	§ 13.2.3—SEC's Rules Governing Accountants	465
	§ 13.2.4—SEC's Rules Governing Attorneys	469
	§ 13.2.5—Examples Of Rule 102(e) Proceedings	472
§ 13.3	PENALTIES FOR VIOLATIONS	474
	§ 13.3.1—Penalties Under SERPSRA	474
	§ 13.3.2—Imposing Monetary Sanctions On Corporations	476
	§ 13.3.3—Penalties For Aiding And Abetting	478
§ 13.4	INTERNAL INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE	479
	§ 13.4.1—Internal Investigations	479
	§ 13.4.2—Attorney-Client Privilege	481
	§ 13.4.3—Waiver Of The Attorney-Client Privilege	483
	§ 13.4.4—Crime-Fraud Exception To The Attorney-Client Privilege	485
	§ 13.4.5—Cooperation With The Investigators	485
	§ 13.4.6—Employees, Internal Investigations, And The Corporate Miranda Warning	490
	§ 13.4.7—The Importance Of Internal Investigations	490
§ 13.5	SEC INTERPRETIVE PROCESSES	491
§ 13.6	HOW SARBANES-OXLEY IMPACTS THE PRACTICE OF LAW	493
	§ 13.6.1—How Sarbanes-Oxley Affects Attorneys	493
	§ 13.6.2—Minimum Standards Of Professional Conduct	494
	§ 13.6.3—Material Violation	495

Table of Contents

	§ 13.6.4—Duty Of Confidentiality And The Attorney’s Obligation To Report	496
	§ 13.6.5—Potential Sanctions	498
	§ 13.6.6—What This Means To “Non-Securities” Lawyers	498
§ 13.7	HOW SARBANES-OXLEY AFFECTS PRIVATE COMPANIES	500
§ 13.8	ADMINISTRATIVE ACTION OR CIVIL ACTION — THE SEC’S CHOICE	501
§ 13.9	CONCLUSION	502
<hr/>		
Chapter 14	CIVIL LITIGATION AND ARBITRATION UNDER THE FEDERAL SECURITIES LAWS	517
<hr/>		
§ 14.1	INTRODUCTION	518
§ 14.2	LITIGATE OR ARBITRATE	519
§ 14.3	ENFORCEABILITY OF PRE-DISPUTE ARBITRATION AGREEMENTS	520
§ 14.4	ENFORCEABILITY OF ARBITRATION AWARDS	521
§ 14.5	JURISDICTION, VENUE, AND SERVICE OF PROCESS	523
	§ 14.5.1—Jurisdiction — General	523
	§ 14.5.2—Jurisdiction Over Foreign Defendants	523
	§ 14.5.3—Jurisdiction Over Foreign Defendants — The SEC	526
	§ 14.5.4—Venue	527
	§ 14.5.5—Service Of Process	529
§ 14.6	CHOICE OF LAW PROVISIONS BINDING	529

§ 14.7	THE PRIVATE SECURITIES LITIGATION REFORM ACT	531
§ 14.7.1	—Lead Plaintiffs And The “Most Adequate Plaintiff”	532
§ 14.7.2	—Proportionate Liability And Joint And Several Liability	534
§ 14.7.3	—Rule 11 Court Review	535
§ 14.7.4	—Pleading With Particularity	538
§ 14.8	DAMAGES	540
§ 14.9	FORWARD-LOOKING STATEMENTS	540
§ 14.10	RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT	541
§ 14.11	THE CONCEPT OF MATERIALITY	541
§ 14.11.1	—General	541
§ 14.11.2	—The Balancing Test For Materiality; <i>Basic Inc. v. Levinson</i>	543
§ 14.11.3	—Staff Accounting Bulletin 99 And Other Accounting Guidance	545
§ 14.11.4	—Regulatory Actions	547
§ 14.11.5	—Examples Of Material Statements And Omissions	550
§ 14.11.6	—Not All Information Is Material	551
§ 14.11.7	—No Bright Line Test For Determining Materiality	554

Chapter 15 LITIGATION UNDER THE SECURITIES ACT OF 1933 565

§ 15.1	CONCURRENT JURISDICTION	566
§ 15.2	BASIS FOR 1933 ACT LIABILITY	567
§ 15.3	SECTION 12(a)(1)	567
§ 15.3.1	—Elements Of The Cause Of Action	567
§ 15.3.2	—Defenses	568

Table of Contents

§ 15.4	SECTION 12(a)(2)	568
	§ 15.4.1—There Must Be A Seller	569
	§ 15.4.2—A Lender As A Seller	569
	§ 15.4.3—Were The Securities Offered And Sold By A Prospectus?	570
	§ 15.4.4—There Must Be A Material Misstatement Or Omission	571
	§ 15.4.5—Statements Of Opinion	572
	§ 15.4.6—Defenses	575
§ 15.5	DAMAGES	575
§ 15.6	STATUTE OF LIMITATIONS, § 13	576
	§ 15.6.1—The Statute	576
	§ 15.6.2—No Tolling Of The Limitations Period	576
	§ 15.6.3—Storm Warnings Commence The Limitations Period — Inquiry Notice	576
§ 15.7	LIABILITY UNDER REGISTRATION STATEMENTS, § 11	578
	§ 15.7.1—Background	578
	§ 15.7.2—Elements Of A § 11 Claim	579
	§ 15.7.3—Damages Under § 11	580
	§ 15.7.4—Defenses — Issuer	581
	§ 15.7.5—Defenses — Persons Other Than The Issuer	582
	§ 15.7.6—Cases Discussing § 11 Liability	583
	§ 15.7.7—Statute Of Limitations For § 11	584
§ 15.8	LIABILITY RESULTING FROM INCORPORATION BY REFERENCE	585
§ 15.9	CONTROL PERSON LIABILITY, § 15	586
	§ 15.9.1—Control Persons — Generally; A Factual Question	586
	§ 15.9.2—Officers And Directors As Control Persons	587

§ 15.9.3—Control Persons In The
 Broker-Dealer Context 588

§ 15.9.4—Defenses To Control Person Liability 590

§ 15.10 RETENTION OF STATE REMEDIES, § 16 590

§ 15.11 ANTI-FRAUD LIABILITY; IS THERE A
 PRIVATE RIGHT OF ACTION? 591

**Chapter 16 LITIGATION UNDER THE SECURITIES
 EXCHANGE ACT OF 1934 599**

§ 16.1 GENERAL 601

§ 16.2 MANIPULATION UNDER § 9(e) 601

§ 16.3 GENERAL LIABILITY PROVISIONS OF § 10 602

§ 16.4 ELEMENTS OF RULE 10b-5 603

 § 16.4.1—Plaintiff Is A Purchaser Or
 Seller Of Securities 603

 § 16.4.2—Securities Are Offered Or Sold
 By Fraudulent Scheme Or Material
 Misstatement Or Omission 605

 § 16.4.3—Reliance By Plaintiff 608

 § 16.4.4—Plaintiff Exercises “Due Care” 612

 § 16.4.5—The Media Defense 613

 § 16.4.6—Defendant Must Have
 Acted With *Scienter* 615

 § 16.4.7—Causation 620

§ 16.5 RULES 10b5-1 AND 10b5-2 622

§ 16.6 BURDEN OF PROOF 624

§ 16.7 DAMAGES UNDER RULE 10b-5 626

§ 16.8 CONTRIBUTION 627

Table of Contents

§ 16.9	DEFENSES TO CLAIMS UNDER RULE 10b-5	628
	§ 16.9.1—Requirement To Plead With Particularity	628
	§ 16.9.2—Waiver	629
	§ 16.9.3—Mitigation Of Damages	629
	§ 16.9.4— <i>In Pari Delicto</i>	629
§ 16.10	STATUTE OF LIMITATIONS	630
§ 16.11	AIDING AND ABETTING LIABILITY UNDER RULE 10b-5	632
	§ 16.11.1—The <i>Central Bank Of Denver</i> Case	632
	§ 16.11.2—Liability As Primary Participants	634
	§ 16.11.3—Secondary Liability — A Reprise	636
§ 16.12	ATTORNEY LIABILITY UNDER RULE 10b-5	638
§ 16.13	CASES IMPOSING LIABILITY UNDER RULE 10b-5	640
	§ 16.13.1—Unsuitability	642
	§ 16.13.2—Churning	642
	§ 16.13.3—Trading On Non-public Information	644
	§ 16.13.4—Rule 10b-5 In The Context Of A Private Placement	651
	§ 16.13.5—Insider Trading And Criminal Liability	652
§ 16.14	STATUTORY DAMAGES — ITSA AND ITSFEA	654
§ 16.15	THE FRAUD-ON-THE-MARKET THEORY	655
	§ 16.15.1—Need For An Efficient Market	656
	§ 16.15.2—Elements Of The Fraud-On-The- Market Theory	657
	§ 16.15.3—Transaction Causation	660
	§ 16.15.4—Loss Causation	662
§ 16.16	FREEZE-OUT MERGERS, § 13(e)	664

§ 16.17	TENDER OFFER REGULATION AND RISK OF LIABILITY	665
§ 16.18	SECTION 16(b)	669
§ 16.19	PRIVATE RIGHTS OF ACTION UNDER THE RULES OF SELF-REGULATORY ORGANIZATIONS	675
	§ 16.19.1—Financial Industry Regulatory Authority, Inc.	675
	§ 16.19.2—The New York Stock Exchange	678
	§ 16.19.3—Application Of Rule 10b-5 To Suitability Issues	679
§ 16.20	PRIVATE ACTIONS VERSUS THE SEC'S CIVIL ENFORCEMENT PROCEEDINGS	682
§ 16.21	RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)	684
§ 16.22	FINRA DISCIPLINARY ACTIONS	689
§ 16.23	ACTIONS AGAINST FINRA (FORMERLY THE NASD)	691
<hr/>		
Chapter 17	OBLIGATIONS OF A COMPANY AND ITS PRINCIPALS UNDER THE SECURITIES EXCHANGE ACT OF 1934	717
<hr/>		
§ 17.1	CONSEQUENCES OF BEING PUBLICLY OWNED	718
§ 17.2	NEW OBLIGATIONS ON COMPLETION OF INITIAL PUBLIC OFFERING	721
	§ 17.2.1—Duty To Disclose Material Information	721
	§ 17.2.2—Amending The Prospectus	722
	§ 17.2.3—Continuing Obligations	723
	§ 17.2.4—What Is Material?	723
	§ 17.2.5—When Should Disclosure Be Made?	724
	§ 17.2.6—How Much Should Be Disclosed?	726

Table of Contents

§ 17.2.7—To Whom Should Disclosure Be Made? . . .	726
§ 17.2.8—Have Releases Ready	727
§ 17.2.9—Stock Exchange Notification	727
§ 17.2.10—Use Of Media	728
§ 17.3 REPORTING REQUIREMENTS UNDER THE 1934 ACT	732
§ 17.3.1—Annual Report On Form 10-K	738
§ 17.3.2—Quarterly Report On Form 10-Q	739
§ 17.3.3—Timing For Filing Forms 10-K And 10-Q . .	740
§ 17.3.4—Current Report On Form 8-K	741
§ 17.4 REPORTS TO SHAREHOLDERS	744
§ 17.5 PROXY RULES	745
§ 17.5.1—General Discussion	745
§ 17.5.2—The Proxy Rules And Corporate Law	750
§ 17.5.3—Additional Requirements For A Contested Meeting	752
§ 17.5.4—Proxy Access	753
§ 17.5.5—Communication With Beneficial Owners And Voting	754
§ 17.5.6—Potential Liability Under The Proxy Rules	756
§ 17.6 FOREIGN CORRUPT PRACTICES ACT	756
§ 17.7 CONTROL PERSON OBLIGATIONS	759
§ 17.7.1—Reports Of Beneficial Ownership	759
§ 17.7.2—“Short Swing Profit” Liability	762
§ 17.7.3—Short Sale Prohibition	762
§ 17.7.4—Tender Offer Rules And Related Matters	763
§ 17.7.5—Rule 10b-18 And Issuer Stock Buybacks	765
§ 17.8 SECURITIES TRANSFERS	767
§ 17.9 CORPORATE ACCOUNTABILITY AND GOVERNANCE REQUIREMENTS	769

§ 17.10 EXECUTIVE COMPENSATION 774

§ 17.11 SELECTIVE FINANCIAL DISCLOSURE —
SEC REGULATION FD 775

§ 17.12 FOREIGN PRIVATE ISSUERS UNDER
THE 1934 ACT 782

 § 17.12.1—International Disclosure Standards 783

 § 17.12.2—Trading Of Foreign Stocks In
 The United States 784

 § 17.12.3—Form 10 — Full 1934 Act Registration . . . 784

 § 17.12.4—Form 20-F — Foreign Private Issuers . . . 784

 § 17.12.5—Loss Of Foreign Private Issuer Status . . . 786

 § 17.12.6—Foreign Private Issuer Deregistration . . . 786

 § 17.12.7—Conclusion 787

§ 17.13 DELISTING AND DEREGISTRATION,
OR “GOING DARK” 787

§ 17.14 SMALLER REPORTING COMPANIES
IN BRIEF 789

TABLE OF AUTHORITIES 813

SUBJECT INDEX 863
