

Notes

Chapter 1

NOTE: The style of endnotes is that utilized in law texts, which differs from other styles such as the Chicago Manual Style.

1. 17 U.S. (Wheat) 518 (1819).
2. 421 U.S. 809 (1975).
3. 410 U.S. 113 (1973).
4. 425 U.S. 748 (1976).
5. From a headnote prepared by the Reporter of Decisions—www.law.cornell.edu/supct/html/08-205.ZS.html.
6. The facts, in almost all of the cases in this text, are taken directly from the opinions in the said cases.
7. www.fsa.gov.uk/pubs/other/principles.pdf.
8. There are many commentaries concerning the subject including the following: Nick de la Mare, *Total Design: A multi-disciplinary look at the assumption and reality of a designed world*, available at <http://designmind.frogdesign.com/blog/rules-vs-principles.html>; Doug Macnamara & Banff Executive Leadership Inc., *Improving Governance Performance: Rules-Based vs. Principles-Based Approaches*, available at www.banffexeclead.com/.../Leadership%20Acumen%2016%20V1...; and Anita I. Anand, *Rules v. Principles as Approaches to Financial Market Regulation*, 49 HARV. INT. L.J., (April 7, 2009), available at www.harvardilj.org/attach.php?id=172.
9. Commissioner Roel C. Campos, *Principles v. Rules*, Address Before the Association Française des Entreprises Privées (June 14, 2007), available at www.sec.gov/news/speech/2007/spch061407rcc.htm.
10. This author was counsel to a New York State Senator in the early 1980s when proposals were made to unify the New York State Court system but the proposals were and continue to be rejected annually presumably because they would lessen the number of judges needed for the many Courts and, thus deprive political parties from disbursing these highly sought positions.
11. For an easy-to-read explanation of the U.S. Federal Court system, see *Understanding the Federal Courts*, <http://www.usCourts.gov/outreach/structure.jpg>.
12. In practical terms, the statement is correct. Article III, Section 2 (2) of the Constitution, does grant original jurisdiction to the U.S. Supreme Court “in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party” Such trials actually takes place before a Master appointed by the Court, who renders a report recommending a particular result, which report almost always becomes the decision of the Court.

13. 444 U.S. 286 (1980).
14. Pub. L. 104–167, 109 Stat. 737.
15. Celotex Corp. v. Catrek, 477 U.S. 317 (1986), 323, 325.
16. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
17. *Id.* at 247–249.
18. 809 F.2d 626, 631.
19. Matsushita v. Zenith Ratio Corp., 921 F.2d 1343, 1349 (6th Cir. 1991).
20. *Id.* at 251–252.
21. King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999).
22. Steinberg v. PRT Group, Inc., 88 F. Supp.2d 294 (S.D.N.Y. 2000).
23. Tarshis v. Riese Org. 211 F.3d 30, 35 (2d Cir. 2000).
24. www.law.cornell.edu/wex/declaratory_judgment.
25. 140 F. Supp. 2d 1088 (W.D. Wash. 2001).
26. No. 012761 (Va. Sup. Ct., November 1, 2002).
27. Tom Doherty Assoc. v. Saban Entertainment, Inc., 60 F.3d 27, 33 (2d Cir. 1995).

Chapter 2

1. McKinsey & Company, *Global Investor Opinion Survey 2002: Key Findings* (July, 2002), ftp://ftp.cba.uri.edu/classes/Tong/phd/mckinsey_survey_02.pdf.
2. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, 1932).
3. 116 Stat. 745.
4. Pub.L. 111–203 Stat. 124 Stat. 1376–2223.
5. PCAOB, *About PCAOB*, www.pcaobus.org/About/Pages/default.aspx.
6. Claudius B. Modesti, PCAOB Enforcement Actions Update, speech before the AICPA National Conference on SEC and PCAOB Developments (December 8, 2010), www.pcaobus.org/News/Speech/Pages/12082010_ModestiSpeech.aspx.
7. Director-General of the E.U., *Letter from the European Commission to the SEC* (December 12, 2002), www.sec.gov/rules/proposed/s74602/aschaub1.htm.
8. www.sec.gov/news/press/2012/2012-87.htm.
9. Todd Ross, *SEC Takes On Chinese Deloitte Unit over Audit Records*, THE AMERICAN LAWYER (May 11, 2012), www.law.com/jsp/cc/PubArticleCC.jsp?id=1202553099117.
10. Financial Executives International, *FEI Survey: Average 2007 SOX Compliance Cost \$1.7 Million* (April 30, 2008), [http://www.financialexecutives.org/KenticoCMS/News—Publications/Press-Room/2008-press-releases/FEI-Survey—Average-2007-SOX-Compliance-Cost-\\$1-7-.aspx](http://www.financialexecutives.org/KenticoCMS/News—Publications/Press-Room/2008-press-releases/FEI-Survey—Average-2007-SOX-Compliance-Cost-$1-7-.aspx).
11. Securities and Exchange Commission, *Study and Recommendations on Section 404(b) of the Sarbanes-Oxley Act of 2002 For Issuers With Public Float Between \$75 and \$250 Million* (April 2011), www.sec.gov/news/studies/2011/404bfloat-study.pdf.
12. Economist.com, *Sarbanes-Oxley: Five Years under the Thumb*, (July 26, 2007), www.economist.com/business/displaystory.cfm?story_id=9545905.
13. Examples include the Federal Deposit Insurance Corporation Improvement Act, 12 U.S.C. § 1831j(a)(1); USA Patriot Act, 31 U.S.C. §5328; and the Federal Credit Union Act, 12 U.S.C. §1709b(a)(1). For a list of these statutes and states statues and commentaries, see Heidi Goldstein Shepherd and James W. Nagle,

- Employee Whistleblower Claims—A Legal Overview*, Goodwin Procter LLP, www.goodwinprocter.com/.../6231A3817D27409FB7BD336035822...
14. McKenna, Francine, *DOL Continues To Ignore And Rewrite Sox's Whistleblower Law*, FULCRUM INQUIRY (September 2008), www.fulcrum.com/DOL-Ignores.htm.
 15. Dowling, Donald C. Jr., *Sarbanes-Oxley Whistleblower Hotlines across Europe: Directions through the Maze* (November 2007), White & Case, http://eb.whitecase.com/files/News/005738d8-0cf4-424c-8b1a-419393eab02d/Presentation/NewsAttachment/54486b2d-b48b-4337-a73c-3f7554c7f92f/Alert_GlobalHR_090808_whistleblower.pdf.
 16. See, for example, Wang, Marian, *Why No Financial Prosecutions? Ex-Justice Official Says It's Just Too Hard* (December 6, 2011), PRO PUBLICA, <http://www.propublica.org/article/why-no-financial-crisis-prosecutions-official-says-its-just-too-hard>.
 17. This section is indebted to numerous sources, both primary and secondary, especially to the numerous writings of Professor John C. Coffee, Jr., of Columbia University School of Law, whose contributions in this regard are immense in this area of the law.
 18. Andrew Moss, *Aviva CEO, Resigns After Shareholder Revolt On Compensation*, The Huffington Post (May 8, 2012) huffingtonpost.com/2012/05/08/andrew-moss-aviva-ceo-resigns_n_1499209.html; Mark Gongloff, *Bank Shareholders' Executive Pay Revolt No Match for Big Returns*, The Huffington Post (May 7, 2012), www.huffingtonpost.com/2012/05/07/say-on-banker-pay_n_1496133.html www.huffingtonpost.com/2012/05/07/say-on-banker-pay_n_1496133.html.
 19. Jessica Silver-Greenberg and Nelson D. Schwartz, *Citigroup's Chief Rebuffed on Pay by Shareholders*, NY Times (April 18, 2012), at 1.
 20. Mint Life, *Golden Parachutes: How the Bankers Went Down*, www.mint.com/blog/finance-core/golden-parachutes-how-the-bankers-went-down/.
 21. No. 11-cv-2271 (S.D. Cal. January 6, 2012).
 22. *Id.*
 23. For a discussion as well as a possible “playbook defense” to the lawsuits, see Dechert LLP, *United States: Defending Against Shareholder “Say-On-Pay” Suits* (September 13, 2011), www.dechert.com/Defending_Against_Shareholder_Say-On-Pay_Suits_09-06-2011/.
 24. SEC Rule 14a-11 including significant comments concerning pros and cons for the rule may be found at www.sec.gov/rules/final/2010/33-9136.pdf. The application of the Rule is at pp. 23–24.
 25. Husch Blackwell Sanders LLP, *SEC Approves Amendment to NYSE Rule 452*, www.welshkatz.com/newsDetail.aspx?id=554916c2-141c-481e-8627-01dff5dbf171.
 26. apps.americanbar.org/dch/committee.cfm?com=CL270000.
 27. David Lukens, *Benefits of Incorporation in Delaware*, www.fathom.com/feature/35627/index.html.
 28. Theodore Eisenberg, & Geoffrey P. Miller, *The Flight to New York and Choice of Forum Causes in Publicly-Held Companies* (N.Y.U. Law and Economics Working Paper No. 124). http://lsr.nellco.org/nyu_lewp/124.
 29. *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, C.A. No. 4473-VCN (Del. Ch. September 28, 2009).
 30. *Id.*
 31. Citing *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. Ch. 2006).
 32. *Pershing Square, L.P. v. Ceridian Corp.*, Civ. A 2780-CC (Del. Ch. May 11, 2007).
 33. No. 3447-CC (Del. Ch. March 13, 2008).

34. We will discuss corporate defenses to takeovers in the chapter on mergers and acquisitions in a subsequent text entitled “Laws and Regulations in Global Financial Markets.
35. 813 A.2d 1118, 1121 (Del. Supr. 2003).
36. For a discussion of the business judgment rule, see Douglas M. Branson, *The Rule That Isn't a Rule—The Business Judgment Rule*, 36 VAL. U. L.REV., 631 (2002).
37. *MM Companies* at 1126 citing *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).
38. 564 A.2d 651 (Del. Ch. 1988).

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2. 12 U.S.C. Section 347a.
3. www.corporate-governance-code.de/index-e.html.
4. A survey of institutional investors found that the percentage of such investors who said that their laws and practices require corporations to disclose sufficient information to investors ranged from a high of 84 percent in Britain and 82 percent in the United States versus 53 percent in Germany to only 10 percent in Japan. *A Global Vote for U.S. Style of Corporate Openness*, N.Y.T., May 9, 1999, Sections 3 at 4.
5. Commission of the German Corporate Governance Code, <http://www.corporate-governance-code.de/index-e.html>.
6. Forms of Doing Business in China (Feb. 4, 2010, <http://cl-co.cn/en/dtshow.asp?id=34>).
7. Brian, R. Cheffins, *The History of Corporate Governance* (European Corporate Governance Institute, Working Paper, January 2012).
8. Yong Kang, Shi Lu & Elizabeth D. Brown, *Chinese Corporate Enterprise*, Rand Center for Corporate Ethics and Governance (2008), at 5–10, www.oecd.org/dataoecd/32/18/31557724.pdf.
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11. Chi Guotai, Yang Zhongyuan, Zhao Guangjun & Li Gang, *The Trends of Transparency, Laws and Regulations on Chinese Corporate Governance*, undated article, Dalian U. of Technology, School of Management, www.ethicsworld.org/.../ChinaCorporateGovernance.pdf.
12. Kang Yong, *op. cit.*, pp. 27–32.
13. Rado Bohinc, One or Two-Tier Corporate Governance Systems in Some EU and Non EU Countries, *Megatrend Rev.* (February 18, 2011), www.megatrendreview.com/files/articles/015/RadoBohinc.pdf.
14. For a discussion of French corporate governance and the rise of shareholder activism, see Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder*

- Protection, Hostile Takeovers and the Evolving Corporate Environment in France, 18 CONN. J. INT'L L. 1 (Fall, 2002).
15. Greenmoney Journal, www.greenmoneyjournal.com/article.mpl?newsletterid=2&articleid=19.
 16. www.ecgi.org/codes/documents/revised_corporate_governance_principles.pdf.
 17. Columbia Business School, *Jumpstarting Japanese Boards* (June 12, 2012), http://www4.gsb.columbia.edu/ideasatwork/feature/7228940/Jumpstarting+Japan's+Boards?&layout=cbs_print&top.region=main.
 18. COM/2003/0284 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:NOT>.
 19. www.iosco.org/about/.
 20. WBCSD, <http://www.wbcd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx>.
 21. COM(2001)366.
 22. Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AMERICAN BUS. L.J. (January 2001), pp. 261–299.
 23. www.iso.org/iso/iso_14000_essentials/iso14000.
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 25. The Economist, *Just Good Business* (January 17, 2008), www.economist.com/node/10491077.
 26. The Leon H. Sullivan Foundation, <http://thesullivanfoundation.org/about/global-sullivan-principles>.
 27. E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003), [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En).
 28. www.unglobalcompact.org/.
 29. www.amnesty.org/en/library/info/ACT70/001/1998.
 30. www.workersrights.org/coc.asp.
 31. Voluntary Principle on Security and Human Rights, http://voluntaryprinciples.org/files/voluntary_principles_english.pdf.
 32. www.unglobalcompact.org/aboutthec/thetenprinciples/index.html.
 33. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, Brussels, October 25, 2011, COM(2011) 681 final, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf.
 34. OECD Principles of Corporate Governance (2004), <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

Chapter 4

1. 15 U.S.C. §§ 77a et. seq.
2. 15 U.S.C. §§ 78a et seq.
3. Throughout the text, we will identify the Securities and Exchange Commission as the “SEC” and other commissions by their respective acronyms even though court cases, statutes, rules, and regulations use the word “commission” for the particular agency. The reason is that the word “commission” is used for all of the agencies identified as

- “commissions” in their respective context. Thus, the specific acronym will be used to avoid confusion especially when two agencies are discussed in a particular subject.
4. 7 U.S.C. §§1 et seq.
 5. 15 U.S.C. §77aaa through 15 U.S.C. § 77bbbb.
 6. 15 U.S.C. §§80–1 et seq.
 7. 15 U.S.C. §§80b-1 et seq.
 8. 15 U.S.C. §§78aaa et seq.
 9. Pub. L. 107–204. 116 Stat. 745- July 30, 2002.
 10. Pub. L. 111–203 Stat. 124 Stat. 1376–2223.
 11. The act itself is 848 pages but expands to 2,319 pages when it is downloaded in larger print than the original text. Persons wishing to emphasize the complexity of the Act use the larger number.
 12. www.finra.org/AboutFINRA.rity
 13. Securities Regulatory Reform: Addressing FINRA’s Inherent Conflict and Moral Hazard, www.asensio.com/FINRAReportweb.pdf.
 14. 242 U.S. 539 (1917).
 15. HR 3606 (2012).
 16. www.sec.gov/litigation/admin/33-7879.htm.
 17. Securities and Exchange Commission, Quiet Period, www.sec.gov/answers/quiet.htm.
 18. Securities and Exchange Commission, *Final Rule: Nonpublic Offering Exemption*, Release No. 33–4552 (November 6, 1962), www.sec.gov/rules/final/33-4552.htm.
 19. Securities and Exchange Commission, *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 17 CFR Parts 230 and 239, Release No. 33–9354, <http://www.sec.gov/rules/proposed/2012/33-9354.pdf>.
 20. Securities and Exchange Commission, *Revisions to Rules 144 and 145*, 17 CFR Parts 230 and 239 [Release No. 33–8869; File No. S7-11-07], www.sec.gov/rules/final/2007/33-8869.pdf.
 21. Securities and Exchange Commission, *Rule 144: Selling Restricted and Control Securities*, www.sec.gov/investor/pubs/rule144.htm.
 22. 346 U.S. 427 (1953).

Chapter 5

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2. For an excellent review of the doctrine, see Allan Horwich, *Cleaning the Murky Safe Harbor for Forward-Looking Statements: An Inquiry into Whether Actual Knowledge of Falsity Precludes the Meaningful Cautionary Statement Defense*, 35 J. OF CORP. L. (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532934&rec=1&srcabs=1503513.
3. 15 U.S.C. § 78u-4.
4. Commission, *Final Rule: Selective Disclosure and Insider Trading*, may be found at www.sec.gov/rules/final/33-788+1.htm.
5. <http://s.wsj.net/public/resources/documents/Galleon-Web-0911.html>.
6. 7 U.S.C. 6c(a).
7. Bruce Carton, *Changes in Securities Enforcement Thanks to Dodd-Frank*, SECURITIES DOCKET (August 4, 2010), www.securitiesdocket.com/2010/08/04/changes-in-securities-enforcement-thanks-to-dodd-frank/.

8. 7 U.S.C. §§1 et seq.
9. For a discussion, see Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071-1134 (April 2010).
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11. IOSCO, *Objectives and Principles of Securities Regulation*, www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf.
12. Kyla Malcolm, Mark Tilden & Tim Wilsdon, FINAL REPORT: EVALUATION OF THE ECONOMIC IMPACTS OF THE FINANCIAL SERVICES PLAN (March 2009), http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf.
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15. COM(2011) 683 final, http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdfhttp://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf.
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21. Securities Law of the Peoples Republic of China, art. 179.

Chapter 6

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2. 7 U.S.C. § 1 et seq.
3. Comptroller of the Currency, *supra* Note 1.
4. 7 USC §§1 et seq.
5. Much of the material is taken from the Final Rules jointly issued by the Commodity Trading Commission, 17 CFR Part 1, and the Securities and Exchange Commission, 17 CFR Part 230, 240–241, 77 Fed. Reg. 48207 (August 13, 2012).
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7. Dodd-Frank Act, §761(a)(68).
8. *Id.* at §761(a)(33).
9. *Id.* at §761(a)(49).
10. Dodd-Frank Act, §761(a)(71).
11. Dodd-Frank Act, §731.

12. *Id.*
13. Dodd-Frank Act, §733.
14. Dodd-Frank Act, §753.
15. *Id.* Final Rules, *supra* at Note 1, at 48226.
16. *Id.* at 48247.
17. Dodd-Frank Act, §722 (h).
18. *Id.* § 1.6 at 48354.
19. *Id.* at 48302.
20. *Id.* at 48294.
21. *Id.*, §1.7 at 48354.
22. Commodity Exchange Act, §1(a)(47)(D).
23. SEC, *Clearing and Settlement*, www.sec.gov/spotlight/dodd-frank/clearing-settlement.shtml.
24. *Id.*
25. A copy of the Joint Report may be found at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_isr_013112.pdf. The comments made in the Chapter are from the report.
26. The G-20 consists of the finance ministers and Central Bank governors of 19 countries and the EU and also include ex officio representatives from the World Bank and the International Monetary Fund. The major nations in the financial world are all represented.
27. P.L. 95–213, 91 Stat. 1494, 15 U.S.C. §§ 78m(b), Id-1, Id-2, ff (1977), as amended 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78 ff (1988).
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29. SEC Litigation Release No. 20000/February 13, 2007, <http://www.sec.gov/litigation/litreleases/2007/lr20000.htm>.
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32. *Underhill v. Hernandez*, 168 U.S. 250 (1897).
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35. The convention may be found at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
36. See Ministry of Justice, *The Bribery Act: Guidance*, which also summarizes the act. <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. The text of the act may be found at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.
37. A copy of the Criminal Convention against Corruption may be found at <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>.

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