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第三版 Third Edition

证券管理法

SECURITIES REGULATION

案例与资料

Cases and Materials

詹姆斯·D·考克斯 (James D. Cox)

[美] 罗伯特·W·希尔曼 (Robert W. Hillman) / 著

唐纳德·C·兰格沃特 (Donald C. Langevoort)



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证券管理法: 案例与资料

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。



Securities Regulation



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To Bonnie, Olympia, and Joni



Preface

Earlier editions of *Securities Regulations: Cases and Materials* identified three distinct forces that affect the content of securities regulation: institutionalization, internationalization, and new product developments. Although these forces continue to affect markets and guide the hand of policymakers, a significant new force has arisen since the 1991 publication of the First Edition — the Internet. The most pervasive changes in the Third Edition of *Securities Regulations* is our incorporation of Internet developments throughout the book. In doing so, we maintain the pedagogical choices that have made earlier editions so successful. The emphasis on the problem method remains; we have added many new problems and revised old problems to reflect contemporary developments, especially the ever-broadening use of electronic communications. We have also preserved the modular quality of the book, thus permitting each of its users to arrange the sequence in which topics are covered according to the users' preferences rather than how the topics have been assembled in the book. Throughout the book we examine issues posed by state blue sky laws and the globalization of securities offerings and trading. In the end, we have committed ourselves to provide careful coverage of the doctrinal fundamentals of securities regulation with text and questions that expose the students to a good bit of theory and academic insight as well as push their development of sharp analytical skills.

Some important organizational changes are introduced in the Third Edition. The most significant is advancing to Chapter 12 the discussion of a range of topics related to the private and public enforcement of the securities laws. This material previously appeared in Chapter 15. These various enforcement-related topics — meaning of primary participant, scope of control person liability, SEC enforcement procedures and powers, and criminal prosecutions — now appear immediately after the coverage of what constitutes fraud. Moreover, the order in which these enforcement

topics are presented has been rearranged within the chapter so that private enforcement issues are discussed first in Chapter 12, followed by an examination of SEC procedures and sanctions for addressing violations and, finally, criminal enforcement.

A further organizational change is condensing the introductory material in Chapter 1. Some of the shortening of Chapter 1 is accomplished by shifting the discussion of the debate on mandatory disclosure requirement to Chapter 4 so that the new dimension to this debate, namely the role of regulatory competition, can be introduced.

Throughout the third edition we incorporate the regulatory changes introduced by the Private Securities Litigation Reform Act, the National Securities Markets Improvement Act, and the Securities Litigation Uniform Standards Act. The Third Edition also fully reflects significant effects of the various SEC electronic communication releases, Regulation M-A and Regulation FD; we also question what future regulatory changes can be extrapolated from these recent SEC initiatives.

We promised in earlier editions not only to keep the book current but to do so without committing the error of some casebooks to layer references to new developments on an unchanging conceptual framework that gradually grows more and more dated with successive editions. To this end, we have incorporated the many changes in this edition, as previously described, by removing unnecessary material and condensing other material so that this edition's length is no greater than the last edition.

As with earlier editions, we have been helped by many people. We are grateful to our colleagues at scores of law schools who have made *Securities Regulations: Cases and Materials* one of the most widely adopted securities books in the market, and who have so generously shared their compliments and encouragement. Many have also offered us thoughtful suggestions and criticisms, all of which have been considered, and most of which have been incorporated in one way or another. We and others have benefitted from the commentary provided in prior editions, and we genuinely hope we will continue to receive suggestions from our fellow securities regulations professors. Our research assistants — Adam Arkel and Carl Carl at Duke, Heather Hathaway at Georgetown, Veronica Jordan at U.C. Davis — were of great help to us in the preparation of this edition. We also appreciate Anna Selden's help in preparing the Table of Cases and Index.

As in prior editions, occasional case and statute citations have been omitted from quoted material without indication. Most footnotes have been omitted from quoted material without indication, but those that remain retain their original numbers.

James D. Cox
Robert W. Hillman
Donald C. Langevoort

March 2001

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- Campbell, Rutherford B., Jr. The Impact of NSMIA on Small Issuers, 53 Bus. Law. 575, 582-583 (1998). Copyright © 1998 by the American Bar Association. Reprinted with permission of The Business Lawyer and the author.
- Carney, William, Limits of the Fraud on the Market Doctrine, 44 Bus. Law. 1259 (1989). Copyright © 1989 by the American Bar Association. Reprinted with the permission of The Business Lawyer and the author.
- Coffee, John C., Jr. Privatization and Corporate Governance: The Lessons From Securities Market Failures, 25 J. Corp. L. 9-10 (1999). Copyright © 1999 by John C. Coffee, Jr.
- Cohn, Stuart R., Securities Markets for Small Issuers: The Barrier of Federal Solicitation and Advertising Prohibitions, 38 U. Fla. L. Rev. 1, 4-7 (1986). Copyright © 1986 by the University of Florida Law Review. Reprinted with the permission of the University of Florida Law Review.
- Cox, James, Insider Trading Regulation and the Production of Information: Theory and Evidence, 64 Wash. U. L.Q. 475, 493-495 (1986). Copyright © 1986 by the Washington University Law Quarterly. Reprinted with the permission of the Washington University Law Quarterly.
- Cox, James D., Regulatory Duopoly in U.S. Securities Markets, 99 Colum. L. Rev. 1200 (1999). Reprinted with the permission of the Columbia Law Review and the author.
- Easterbrook, Frank, and Daniel Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 682-684 (1984). Copyright © 1984 by the Virginia Law Review Association. Reprinted with the permission of the Virginia Law Review Association and Fred B. Rothman & Co.
- Gellis, Ann, Mandatory Disclosure for Municipal Securities: A Reevaluation, 36 Buff. L. Rev. 21-24 (1987). Copyright © 1987 by the Buffalo Law Review. Reprinted with the permission of Buffalo Law Review.

- Gordon, James D., *Interplanetary Intelligence about Promissory Notes as Securities*, 69 *Tex. L. Rev.* 383-404 (1990). Copyright © 1990 by the Texas Law Review Association. Reprinted by permission.
- Ip, Greg. *Stock Prices Switch to Decimals from Fractions, Raising Concern About 'Front Running' by Pros*, *Wall St. J.*, Aug. 28, 2000, at §C-1. Copyright © 2000 by The Wall Street Journal. Reprinted by permission.
- Kadish, Sanford, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 *U. Chi. L. Rev.* 423, 436-437 (1963). Copyright © 1963 by the University of Chicago. Reprinted with the permission of the University of Chicago Law Review and the author.
- Karjala, Dennis S., *Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law*, 80 *Nw. L. Rev.* 1508, 1511-1512 (1986). Copyright © 1986 by the Northwestern University Law Review. Reprinted with the permission of the Northwestern University Law Review and the author.
- Lowenstein, Louis, *Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson*, 89 *Colum. L. Rev.* 979-1014 (1989). Copyright © 1989 by the Directors of the Columbia Law Review Association, Inc. All rights reserved. Reprinted by permission.
- Pittman, Edward L., *Economic and Regulatory Developments Affecting Mortgage Related Securities*, 64 *Notre Dame L. Rev.* 501-502 (1989). Reprinted with permission. Copyright © by Notre Dame Law Review, University of Notre Dame. Aspen Publishers, Inc. bears responsibility for any error that may have occurred in reprinting or editing.
- Poliakoff, Abba, *SEC Review: Comfort or Illusion*, 17 *U. Balt. L. Rev.* 40, 43-47 (1987). Copyright © 1987 by Abba David Poliakoff and Gordon, Feinblatt, Rothman, Hoffberger & Hollander. Reprinted with the permission of the University of Baltimore Law Review and the author.
- Poser, Norman, *Restructuring the Stock Market: A Critical Look at the SEC's National Market System*, 56 *N.Y.U. L. Rev.* 884, 886-896 (1981). Copyright © 1981 by the New York University Law Review. Reprinted with the permission of the New York University Law Review and the author.
- Rutledge, G. Philip, *NSMIA . . . One Year Later: The States' Response*, 53 *Bus. Law* 563, 571-72 (1998) Copyright © 1998 by the American Bar Association. Reprinted with permission of The Business Lawyer and the author.
- Schneider, Carl, Joseph Manko, and Robert Kant, *Going Public: Practice, Procedure and Consequences*, 22-23 (Bowne & Co. 1999). Copyright © 1999 by Carl Schneider, Joseph Manko, and Robert Kant. Reprinted with permission of the authors.
- Williams, Cynthia, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *Harv. Rev.* 1197, 1294-1296 (1999). Copyright © 1999 by The Harvard Law Review Association.

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