

Table of Contents

Volume 1

CHAPTER 1. GENERAL OVERVIEW

I. A HISTORICAL PERSPECTIVE

- § 1:1 The Securities Act of 1933
- § 1:2 The Securities Exchange Act of 1934
- § 1:3 The path to the integrated disclosure system
- § 1:4 Rationalizing the scheme of exemptions—Herein of Regulation D
- § 1:5 The fertile decade of the nineties
- § 1:6 Securities litigation reform and preemption of state securities laws
- § 1:7 The proposed securities offering regime
- § 1:8 Year of the accountant and audit committees
- § 1:9 Selective disclosure and Regulation FD

II. SARBANES-OXLEY—START OF A NEW ERA

A. BACKDROP TO ADOPTION OF SARBANES-OXLEY

- § 1:10 Enron demise, financial reporting fraud, capital market malaise
- § 1:11 WorldCom's startling financial confession
- § 1:12 The bush/pitt response
- § 1:13 Adoption of Sarbanes-Oxley Act of 2002
- § 1:14 Creation of Public Company Accounting Oversight Board

B. SARBANES-OXLEY ACT OVERVIEW

- § 1:15 Introduction
- § 1:16 Impact on accountants and accounting principles
- § 1:17 Impact on reporting under the '34 Act
- § 1:18 Impact on CEOs and CFOs
- § 1:19 Impact on boards of directors and corporate governance
- § 1:20 Impact on the SEC
- § 1:21 Impact on attorneys
- § 1:22 Impact on investment banks, research, and securities analysts
- § 1:23 Impact on private securities litigation
- § 1:24 Worthy of note
- § 1:24.02 Costs

C. TABLE OF SARBANES-OXLEY SIGNIFICANT PROVISIONS AND IMPLEMENTING RULES

- § 1:25 Table of Sarbanes-Oxley provisions and implementing rules
- § 1:26 *[Reserved]*

III. DODD-FRANK WALL STREET REFORM ACT

- § 1:27 The context of reform

- § 1:28 Legislative process
- § 1:29 Overview of Dodd-Frank
- § 1:29.02 Partisanship in Dodd-Frank rulemaking
- § 1:30 Financial Stability
- § 1:31 Additional Board authority for BHCs and nonbank financial companies
- § 1:31.10 The Volcker Rule
- § 1:32 Regulation of asset-backed securities prior to the financial crisis
- § 1:32.10 The role of asset-backed securities in the financial crisis
- § 1:32.12 Pre-Dodd Frank proposed amendments to Regulation AB
- § 1:32.14 Issuer pay conflict and Rule 17g-5
- § 1:32.16 Dodd-Frank and asset-backed securities: introduction; risk retention
- § 1:32.18 Basic risk retention requirement and permissible forms of risk retention
- § 1:32.20 Allocation of credit risk
- § 1:32.22 General exemptions and exceptions to credit risk retention
- § 1:32.24 Disclosure and reporting requirements
- § 1:32.26 Rules regarding the suspension of reporting for asset-backed securities
- § 1:32.28 Representations and warranties in asset-backed offerings: adopted rules
- § 1:32.30 Section 945: due diligence and disclosure and rules for issuer review of assets
- § 1:33 Resolution authority
- § 1:34 Credit ratings

IV. THE JOBS ACT

- § 1:35 Introduction
- § 1:36 JOBS Act Legislative History: Overview
- § 1:37 JOBS Act: the early returns

V. THE FAST ACT

- § 1:38 The FAST Act: Overview
- § 1:39 Legislative history of the securities provisions of the FAST Act

VI. CONTEMPORARY TOPICS IN SECURITIES REGULATION

- § 1:40 Public policy shift at the SEC
- § 1:41 Funding the Commission
- § 1:42 Focus on public companies, capital formation and U.S. markets
- § 1:43 Conflict minerals

VII. FILING, REPORTING AND OTHER ACCOMMODATIONS RELATING TO THE COVID-19 PANDEMIC

- § 1:44 SEC accommodations and guidance in response to the COVID-19 crisis: Introduction
- § 1:45 Changes to reporting and filing obligations and proxy delivery requirements
- § 1:46 Changes to the authentication document retention requirements of Regulation S-T
- § 1:47 Shelf takedowns during pendency of extension
- § 1:48 The COVID-19 reporting extension, S-3 eligibility, and the 10(a)(3) update
- § 1:49 Changes to paper filings under Form 144
- § 1:50 Changes to filing procedures for paper documents other than Form 144
- § 1:51 Changes to the requirements for certain paper submissions

TABLE OF CONTENTS

- § 1:52 Changes to conducting shareholder meetings GPPC
- § 1:53 Temporary, conditional relief for small businesses pursuing crowdfunding offerings
- § 1:54 NYSE waivers of certain shareholder approval requirements
- § 1:55 Nasdaq waivers of certain shareholder approval requirements GPPC
- § 1:56 Disclosure guidance from the Division of Corporation Finance GPPC
- § 1:57 Public statement on financial reporting from the chief accountant GPPC

VIII. SHORTENING THE SETTLEMENT CYCLE: SEC ADOPTS THE T+1 STANDARD

- § 1:58 Introduction: Adoption of a standard settlement cycle
- § 1:59 The move to a T+2 settlement cycle
- § 1:60 The move to a T+1 settlement cycle
- § 1:61 Exchange Act Rule 17Ad-27
- § 1:62 Rule 204-2
- § 1:63 Compliance dates and pathway forward to T+0

CHAPTER 2. EXEMPTIONS FROM SECURITIES ACT REGISTRATION AND DEFINITION OF A SECURITY

I. WHAT IS A SECURITY?

A. IN GENERAL

- § 2:1 Definition of a security
- § 2:2 *Reves* and promissory notes as a security

B. INVESTMENT CONTRACTS

- § 2:3 *Howey*—An introduction to investment contracts
- § 2:4 *Edwards*—Supreme Court takes a second look at investment contracts
- § 2:5 —The *Forman* opportunity
- § 2:6 —Justice O'Connor cuts to the quick
- § 2:7 —Where are we? Some unanswered questions
- § 2:8 —The *Reves* roadmap
- § 2:9 —The commonality conundrum
- § 2:10 —*Edwards* on remand and the commonality issue
- § 2:11 —Why discretionary securities/commodities accounts may be different

II. REGULATION D EXEMPTION

- § 2:12 Introduction
- § 2:13 Rule 504—Up to \$1,000,000
- § 2:13.10 The vanished Rule 507 exemption
- § 2:13.25 Disqualification provisions in Rule 506 offerings
- § 2:13.30 Integration safe harbor
- § 2:13.35 Form D
- § 2:13.40 Rule 504 offerings
- § 2:13.45 Miscellaneous amendments to Regulation D adopted in 2020

A. THE COMMON ELEMENTS—RULES 501 THROUGH 503

- § 2:14 Accredited investors—In general

- § 2:14.02 Significant expansion of the definition of accredited investor including accreditation based on professional certifications
- § 2:15 Purchaser representative
- § 2:16 Calculation of number of purchasers
- § 2:17 Disclosure requirements—Introduction
- § 2:18 —Reporting companies
- § 2:19 Non-reporting company—Non-financial statement disclosure
- § 2:20 —Financial statement disclosure
- § 2:21 Other disclosure requirements
- § 2:22 No general solicitation or general advertising
- § 2:22.05 General solicitation: 2007 interpretive guidance
- § 2:22.10 General solicitation: the Facebook placement and beyond
- § 2:22.12 Where the issuer does not have a pre-existing substantive relationship:
The case of angel investors
- § 2:22.14 Demo days and venture fairs
- § 2:22.16 Demo days, angel investors and Rule 148
- § 2:23 Limitations on transfer of securities
- § 2:24 Commissions
- § 2:25 Required filings
- § 2:26 Rule 135(c)
- § 2:27 Reporting Sales on Form 10-Q and Form 10-K
- § 2:28 Other

B. INTEGRATION

- § 2:29 Regulation D safe harbor
- § 2:30 Retroactive integration
- § 2:31 *[Reserved]*
- § 2:32 *[Reserved]*
- § 2:33 *[Reserved]*
- § 2:34 *[Reserved]*
- § 2:35 *[Reserved]*

C. RULE 506—UNLIMITED AMOUNT

- § 2:36 Number of purchasers
- § 2:37 Qualification of purchasers
- § 2:38 Disclosure requirements

D. GENERAL SOLICITATION IN RULE 506 OFFERINGS AFTER THE JOBS ACT

- § 2:38.10 Elimination of general solicitation prohibition in Rule 506(c) offerings:
introduction
- § 2:38.12 Overview of amended rules
- § 2:38.14 Amendment to allow general solicitation
- § 2:38.16 Verifying accredited investor status
- § 2:38.18 Non-exclusive methods of verifying accredited investor status
- § 2:38.19 Rule 506(c) verification based upon previous qualifying verification
- § 2:38.20 The reasonable belief standard
- § 2:38.22 Form D check box
- § 2:38.24 Privately offered funds
- § 2:38.26 Integration of 506(c) solicitation with prior solicitations under 506(b)

E. OTHER CONSIDERATIONS

- § 2:39 Rule 508 and insignificant failures to comply
- § 2:40 Rule 1001—The California exemption
- § 2:41 Exempt Rule 506 offerings on the internet
- § 2:41.10 Online funding portals under the JOBS Act: introduction
- § 2:41.12 Section 4(b)(1) platforms for Rule 506 offerings
- § 2:42 Exempt Rule 504 and Rule 1001 offerings

III. INTEGRATION

- § 2:43 Integration of offerings
- § 2:44 Integration re-imagined: background
- § 2:45 General principle of integration: Rule 152(a)
- § 2:46 General principles: Exempt offerings not allowing general solicitation
- § 2:47 General principles: Exempt offerings permitting general solicitation
- § 2:48 The thirty-day safe harbor
- § 2:49 Rule 701, Regulation S, and employee benefit plan safe harbor
- § 2:49.02 Registered offerings subsequent to terminated or completed offerings
- § 2:49.04 General solicitation exemptions following terminated or completed offerings
- § 2:49.06 Termination, completion and commencement
- § 2:49.08 Generic solicitations of interest in exempt offerings
- § 2:50 Privately placed warrants
- § 2:51 A/B exchanges
- § 2:52 The presumptive underwriter doctrine—Does it live on?

IV. COORDINATION WITH AND PREEMPTION OF STATE EXEMPTIONS

A. STATE COUNTERPART REGULATION D EXEMPTIONS

- § 2:53 Introduction
- § 2:54 Classification problems
- § 2:55 State exemptions—Incorporation of rules 505 and 506
- § 2:56 State exemptions: Rule 506 offerings only
- § 2:57 State exemptions based on number of purchasers
- § 2:58 Intrastate jurisdictions—New York and the District of Columbia
- § 2:59 Rule 505 only
- § 2:60 Combining the state accredited investor exemption with Rule 504
- § 2:61 Denial or revocation of the exemption
- § 2:62 Broker-dealer-agent registration requirements
- § 2:63 The California exemption

B. FEDERAL PREEMPTION

- § 2:64 Rule 506 offerings
- § 2:65 Sales to non-accredited investors under Rule 506, the impact of Rule 508 and the residual authority of the states
- § 2:66 Notice and fee requirements
- § 2:67 New York, New York
- § 2:68 Issuers and registration of agents after NSMIA
- § 2:69 Federally exempted securities as covered securities
- § 2:70 Qualified purchaser preemption

C. OTHER EXEMPTIONS/MATTERS

- § 2:71 The intrastate exemption and Rule 147
- § 2:72 Exemption for employee benefit plans of non-reporting companies—Rule 701
- § 2:73 Quantitative limitations and required disclosure
- § 2:74 Consultants
- § 2:75 Exempt transactions and exempt securities
- § 2:76 Blue sky and cyberspace

V. RESALE OF RESTRICTED SECURITIES, SECURITIES HELD BY AFFILIATES AND OTHER SECURITIES

- § 2:77 Generally
- § 2:78 Rule 144
- § 2:78.10 —A tabular approach
- § 2:79 The new Rule 144
- § 2:79.10 Application to affiliates
- § 2:79.15 Who will use Rule 144, and how?
- § 2:79.20 Meshing the Rule 701 Exemption and Rule 144
- § 2:79.25 Miscellany
- § 2:79.30 Hedging transactions and investment intent
- § 2:80 Section 3(a)(10) exemption and restricted securities
- § 2:81 The Section 4(1½) exemption
- § 2:81.02 Trading restricted securities
- § 2:81.04 Insider trading and the secondary markets for restricted stock
- § 2:81.06 Resales of Rule 145 and shell company securities

VI. RULE 144A

- § 2:82 Interrelationship of Rule 144A, PORTAL, private placements, Regulation S and Rule 144
- § 2:83 Qualified institutional buyer
- § 2:84 Eligible securities
- § 2:85 Informational requirements and other conditions
- § 2:86 Resales of Rule 144A securities
- § 2:87 Private placements after Rule 144A
- § 2:88 PORTAL
- § 2:88.02 PORTAL alliance
- § 2:89 Reporting transactions in 144A securities
- § 2:90 Role of the Depository Trust Company
- § 2:90.10 General solicitation and the JOBS Act
- § 2:90.11 Rule 144A and Section 12(a)(2)

VII. RULE 144A/REGULATION S OFFERINGS: CURRENT OFFERING AND CLOSING MECHANICS

- § 2:90.12 Rule 144A/Regulation S offering mechanics—Overview
- § 2:90.14 —Launch/pricing/closing timeline
- § 2:90.16 —Numbering systems: CUSIP AND ISIN
- § 2:90.18 —Transaction structure, clearing agencies and security codes
- § 2:90.20 —DTC mechanics: drilling down
- § 2:90.22 —Expiration of a restricted period: Participant option in DTC to retain a restricted security or receive an unrestricted security

TABLE OF CONTENTS

- § 2:90.24 —Expiration of a restricted period: Mandatory procedures in DTC for receipt of unrestricted securities in place of Rule 144A and/or Regulation S securities
- § 2:90.26 Selected dealers and sub-underwriters: Background
- § 2:90.28 Selected dealers and selling group members in Rule 144A/Regulation S offerings
- § 2:90.30 Sub-underwriters
- § 2:90.32 Disclosure of selling group members
- § 2:90.34 Disclosure of selling group compensation
- § 2:90.36 Selected dealers agreements
- § 2:90.38 Settlement T+X
- § 2:90.40 Fixed-price offerings and FINRA Rule 5141
- § 2:90.42 144A direct offerings
- § 2:90.44 Original issue discount

VIII. PRIVATE RESALES UNDER THE FAST ACT

- § 2:90.60 Private resales under the FAST Act

IX. ANNOUNCEMENTS OF AND REPORTING OF EXEMPT OFFERINGS AND SALES

- § 2:91 Rule 135(c) announcements
- § 2:92 Reporting sales of unregistered securities on Form 10-Q and Form 10-K

X. CROWDFUNDING

- § 2:92.02 Crowdfunding and the JOBS Act—Introduction
- § 2:92.04 2015 crowdfunding rules
- § 2:92.06 Offering and investment limitations under the 2020 amendments
- § 2:92.08 Temporary, conditional relief for small businesses pursuing crowdfunding offerings
- § 2:92.10 Integration and pre-emption
- § 2:92.12 Testing-the-waters and other communications
- § 2:92.14 Use of special purpose vehicles

XI. INVESTMENT COMPANY ISSUES

- § 2:93 Section 3(c)(7) of the 1940 Act—Background
- § 2:94 1999 and 2003 Model 3(c)(7) procedures
- § 2:95 2008 Model 3(c)(7) procedures for book-entry offerings

CHAPTER 3. THE UNDERWRITING-DISTRIBUTION PROCESS

I. OVERVIEW OF THE DISTRIBUTION PROCESS

- § 3:1 Overview
- § 3:2 Distribution markets
- § 3:3 Nasdaq stock market
- § 3:4 OTC Bulletin Board and the pink sheets
- § 3:5 Listed securities

II. REGISTRATION-DISTRIBUTION PROCESS

A. PRE-FILING PERIOD

- § 3:6 Introduction
- § 3:7 Negotiations with prospective underwriters
- § 3:8 Letter of intent with the underwriter
- § 3:8.10 Sub-underwriters
- § 3:9 The traditional lore
- § 3:10 Offers and sales during pre-filing period—Rule 135
- § 3:11 The SOR difference
- § 3:11.02 The JOBS Act
- § 3:11.04 Confidential filing

B. THE WAITING PERIOD—FROM FILING TO PRICING

- § 3:12 An overview
- § 3:13 The preliminary prospectus
- § 3:13.02 Conditional offers to buy
- § 3:14 Distribution of the preliminary prospectus
- § 3:15 Pricing and Rule 430A
- § 3:16 Best-efforts underwriting

III. SECURITIES OFFERING REFORM

A. INTRODUCTION

- § 3:17 Overview
- § 3:18 Classification of issuers—Non-reporting, unseasoned, seasoned, and well-known seasoned issuers
- § 3:19 Ineligible issuers
- § 3:20 Disfavored issuers

B. COMMUNICATIONS DURING THE PRE-FILING PERIOD

- § 3:21 Rule 163 and well-known seasoned issuers
- § 3:22 Rule 163A communications more than 30 days before filing

C. COMMUNICATIONS BEFORE AND AFTER FILING

- § 3:23 Rule 168 limited communications
- § 3:24 Rule 169 limited communications—Non-reporting issuers
- § 3:24.02 Testing the waters prior to or after filing a registered public offering

D. INTRODUCTION TO THE FREE WRITING PROSPECTUS

- § 3:25 Free writing prospectus—Innovation or common sense?
- § 3:26 Rule 433 and conditions to use of free writing prospectus

E. FILING OF A FREE WRITING PROSPECTUS

- § 3:27 The issuer's obligation to file a Rule 433 free writing prospectus
- § 3:28 Filing of the term sheet as a free writing prospectus
- § 3:29 Filing of free writing prospectus by underwriters and other offering participants
- § 3:30 The free writing prospectus in action

F. EXPANDING THE HORIZONS

- § 3:31 Written communication published or distributed by the media as a free writing prospectus
- § 3:32 Rule 433 and archived historical information on the web
- § 3:33 Rule 134 communications expanded

G. LIBERALIZING COMMUNICATIONS—ROAD SHOWS

- § 3:34 Conventional road show presentations
- § 3:35 Electronic road shows
- § 3:36 Electronic roadshows in action

H. ENHANCING THE ROLE OF THE PRELIMINARY PROSPECTUS AND MARGINALIZING THE FINAL PROSPECTUS

- § 3:37 Introduction
- § 3:38 Re-ordering the prospectus
- § 3:39 Final prospectus—Access equals delivery
- § 3:40 Closing and impact of T+1/T+2
- § 3:41 Delivery of a prospectus in the aftermarket
- § 3:42 Electronic public offering
- § 3:43 SOR and best-efforts underwritings
- § 3:44 OpenIPO modified Dutch auction

I. IMPACT OF SOR ON REGULATION FD

- § 3:45 Introduction
- § 3:46 SOR and the Regulation FD exclusion of registered securities offering disclosures

J. SOR AND RESEARCH REPORTS

- § 3:47 Rule 139 and research reports—Issuer specific reports
- § 3:48 Rule 139 and industry research reports
- § 3:49 Rule 138 research reports
- § 3:50 Rule 137 and research reports by broker-dealers not participating in a distribution
- § 3:50.02 The JOBS Act

IV. BUSINESS COMBINATIONS, EXCHANGE OFFERS, AND COMMUNICATING WITH SHAREHOLDERS OF THE ACQUIRED COMPANY

- § 3:51 Introduction
- § 3:52 Some differences between mergers and exchange offers
- § 3:53 Distribution of information prior to and after filing of registration statement—Mergers and other business combinations
- § 3:54 —Exchange offer
- § 3:55 Exchange tender offers vs. cash tender offers—Leveling the playing field

V. THE UNDERWRITING AGREEMENT

- § 3:56 Introduction
- § 3:57 Opinions of counsel

- § 3:58 Underwriting agreements after SOR and Sarbanes-Oxley
- § 3:59 Agreement among underwriters
- § 3:60 Selected dealers agreement

VI. ROLE OF FINRA

A. FINRA AND THE CORPORATE FINANCING RULE

- § 3:61 Introduction
- § 3:61.02 Background
- § 3:62 Offerings exempt from the rule and/or filing
- § 3:62.02 Offerings subject to rule but exempt from filing
- § 3:62.04 Shelf offerings
- § 3:62.06 Offerings for which a filing must be made
- § 3:63 Items deemed underwriting compensation
- § 3:64 Items deemed not to be underwriting compensation
- § 3:65 Venture capital transactions
- § 3:65.02 —Current treatment of venture capital transactions
- § 3:65.04 —Venture capital exceptions under the 2020 rules
- § 3:66 Valuation of non-cash compensation
- § 3:67 Compensation paid to related persons of the underwriter
- § 3:68 When is underwriting compensation unfair or unreasonable
- § 3:69 Lock-up requirements
- § 3:70 Disclosure
- § 3:71 Banned forms of underwriting compensation
- § 3:72 Filing and fee requirements

B. QUALIFIED INDEPENDENT UNDERWRITERS

- § 3:72.08 Offerings of securities of the dealer or affiliate of a dealer: Introduction
- § 3:72.10 Qualified independent underwriter

C. RULE 5130 (NEW ISSUES RULE)

- § 3:73 The basic strictures
- § 3:74 Exclusions
- § 3:75 Secondary offerings
- § 3:76 Eliminating the “conditionally restricted” status
- § 3:77 Categories of “restricted persons”
- § 3:78 Exemptions
- § 3:79 De minimis exemption
- § 3:80 Issuer-directed share programs
- § 3:81 Preconditions for sale

VII. THE CLOSING

- § 3:82 In general
- § 3:83 T+3, T+2, and T+1
- § 3:84 Miscellaneous notes on cold comfort letters

VIII. IPO ALLOCATIONS

- § 3:85 The IPO dot.com bubble
- § 3:86 The civil litigation

TABLE OF CONTENTS

- § 3:87 Staff Legal Bulletin No. 10
- § 3:88 SEC and NASDR initiated regulation
- § 3:89 The path to conflicting rule proposals
- §§ 3:90 to 3:93 *[Reserved]*
- § 3:94 Commission guidance on IPO allocations and book-building

IX. REGULATION M—RESTRICTIONS ON BIDS OR PURCHASES DURING A DISTRIBUTION BY DISTRIBUTION PARTICIPANTS, ISSUERS, AND OTHERS

A. KEY PROVISIONS

- § 3:95 Introduction
- § 3:96 Rule 101—Distribution participants
- § 3:97 Rule 102—Issuers, selling shareholders, and affiliated purchasers
- § 3:98 Exceptions applicable to both Rules 101 and 102
- § 3:99 Affiliated purchasers
- § 3:100 Agent independent of the issuer
- § 3:101 Covered and reference securities
- § 3:102 Passive market making
- § 3:103 Stabilizing transactions

B. IMPORTANT DEFINITIONS

- § 3:104 Average daily trading volume (ADTV)
- § 3:105 Restricted period
- § 3:106 What constitutes a distribution
- § 3:107 Completion of participation in a distribution

X. THE ROLE OF BLUE SKY LAWS

A. OVERVIEW

- § 3:108 Basic registration pattern
- § 3:109 Exchange listed securities
- § 3:110 Nasdaq national market securities
- § 3:111 Registered SEC offerings—Registration by coordination
- § 3:112 Blue sky laws and internet offerings

B. PREEMPTION OF STATE SECURITIES REGISTRATION LAWS

- § 3:113 Securities within the preemption
- § 3:114 Related NSMIA limits on state registration of securities
- § 3:115 NSMIA and state notice provisions relating to registered preempted securities
- § 3:116 The secondary trading preemption
- § 3:117 Preemption for Rule 144A offerings
- § 3:118 Offerings subject to state registration after NSMIA

C. COORDINATED EQUITY REVIEW PROCEDURES

- § 3:119 Introduction
- § 3:120 Form CER-1
- § 3:121 Coordinated equity review SOPs
- § 3:122 The Rule 506 alternative

D. MERIT REVIEW

- § 3:123 An introduction to merit requirements
- § 3:124 Separating out merit review states
- § 3:125 Role of NASAA
- § 3:126 The merit review uniformity (lack thereof) record

XI. ISSUER SELLING ITS OWN SECURITIES

- § 3:127 Introduction
- § 3:128 Prerequisites to the broker-dealer safe harbor
- § 3:129 Impact on small companies and tax shelters
- § 3:130 Sales to institutional investors and registered broker-dealers
- § 3:131 Other situations and other activities
- § 3:132 The internet alternative

XII. THE JOBS ACT AND FAST ACT: ON-RAMP

- § 3:133 The “On-Ramp” (Title I of the JOBS Act)
- § 3:134 Emerging growth companies
- § 3:135 Disclosure obligations: In general
- § 3:136 Disclosure obligations: executive compensation
- § 3:137 Disclosure obligations: financial information
- § 3:137.50 Omission of certain financial information prior to IPO
- § 3:138 Extension of time to comply with new financial accounting standards
- § 3:139 Audit of internal control over financial reporting
- § 3:140 Auditing standards
- § 3:141 Research reports and IPOs
- § 3:142 Research reports and Section 5
- § 3:143 Research reports and FINRA quiet periods
- § 3:144 Analyst conflicts of interest
- § 3:145 Other current rules governing analysts
- § 3:146 Test-the-waters communications
- § 3:147 Confidential submission of draft registration statement
- § 3:148 General staff comment; sample risk factor
- § 3:149 Regulation S-K and disclosure effectiveness
- §§ 3:150 to 3:154 *[Reserved]*

XIII. ALTERNATIVE FINANCING TECHNIQUES AND RELATED MATTERS

- § 3:155 Sponsor-backed IPOs
- § 3:156 At-the-market offerings
- § 3:157 Direct listings
- § 3:157.02 —NYSE rulemaking proceeding on direct listings: Registration under the Securities Act or the Exchange Act?
- § 3:157.04 —NYSE rulemaking proceeding: Which shares are registered in a direct listing?
- § 3:157.06 —The Spotify template for a direct listing
- § 3:157.08 —The Slack direct listing
- § 3:157.10 —Introduction to the *Slack* litigation
- § 3:157.12 —The practice of not registering all outstanding shares in a direct listing
- § 3:157.14 —Primary direct floor listings

TABLE OF CONTENTS

§ 3:157.16	—The Coinbase direct listing
§ 3:157.18	—Recent direct listings
§ 3:157.20	—Section 11 and the requirement to trace
§ 3:157.22	—The Ninth Circuit opinion in <i>Slack</i>
§ 3:157.24	— <i>Slack</i> , Section 11 and the matter of lockups
§ 3:157.26	— <i>Slack</i> : Disposition of the Section 11 claim in the Supreme Court
§ 3:157.28	—Justices’ uncertainty about § 12(a)(2) expressed at oral argument in <i>Slack</i>
§ 3:157.30	—“Disposition” in the Supreme Court of the 12(a)(2) claim in <i>Slack</i>
§ 3:158	Bought deals
§ 3:159	Registered direct offerings
§ 3:160	Wall-crossed offerings
§ 3:161	Unicorns and the IPO market—Introduction
§ 3:162	—Direct listings by unicorns and others
§ 3:163	—Unicorns: traditional IPOs
§ 3:164	—Traditional unicorn IPOs expected in 2019-2020
§ 3:165	—Other Shareholder Suits against Unicorns Related to Traditional IPO
§§ 3:166 to 3:169	[Reserved]

XIV. SPECIAL PURPOSE ACQUISITION COMPANIES

A. IN GENERAL

§ 3:170	Introduction
§ 3:171	What is a SPAC?
§ 3:172	The SPAC market prior to the SEC Rule proposals
§ 3:173	The SPAC market and the period following proposal of the SEC rules
§ 3:174	SPAC market developments in 2023–2024 and adoption of the final rules
§ 3:175	Additional statistical information about SPACs
§ 3:176	Digital World/Trump Media
§ 3:177	Financing the business combination: convertible securities
§ 3:178	Redemptions and tender offers
§ 3:179	[Reserved]
§ 3:180	SEC nixes Ackman novel SPAC structure; Ackman files for SPARC
§ 3:181	1940 Act litigation against Ackman SPAC and others
§ 3:182	Conflicts of interest litigation in state court
§ 3:183	Criminal litigation and alleged fraud proximate to the business combination
§ 3:184	The warrant imbroglio
§ 3:185	IPO prior to staff warrant guidance; issuers re-classified warrants and restated financial statements
§ 3:186	Merger agreement provision requiring SPAC to seek amendment of warrants to achieve favorable accounting
§ 3:187	Special meeting of warrant holders to amend outstanding warrants
§ 3:188	Bifurcated approach to classifying warrants
§ 3:189	IPOs post-staff guidance
§ 3:190	Post-guidance transactions that omit warrants from SPAC capital structure
§ 3:191	Warrants classified as equity (post-staff warrant guidance)
§ 3:192	Projections and the PSLRA safe harbor for forward-looking statements
§ 3:193	Background of the Commission’s rulemaking initiative on SPACs: SEC concerned about regulatory gaps and disparities

B. THE 2024 RULES: SUBSTANTIVE PROVISIONS

- § 3:194 Major overhaul of SEC SPAC rules
- § 3:195 Minimum distribution period for prospectuses and proxy statements
- § 3:196 Target company as co-registrant on S-4/F-4
- § 3:197 Status of SPAC IPO underwriter as underwriter in de-SPAC transaction
- § 3:198 PSLRA safe harbor
- § 3:199 Smaller reporting company status
- § 3:200 Investment Company Act
- § 3:201 Business combinations involving shell companies: Rule 145a

C. THE 2024 RULES: DISCLOSURE STANDARDS

- § 3:202 S-K disclosure standards for SPACs
- § 3:203 SPAC offerings other than de-SPAC transactions: Forepart of the registration statement, prospectus cover page, and prospectus summary
- § 3:204 SPAC sponsor, affiliates, and promoters
- § 3:205 Conflicts of interest
- § 3:206 De-SPAC transactions
- § 3:207 Background of and reasons for the de-SPAC transaction; terms of the de-SPAC transaction; effects
- § 3:208 Board determination about the de-SPAC transaction
- § 3:209 Reports, opinions, appraisals, and negotiations
- § 3:210 Projections in de-SPAC transactions: Item 1609
- § 3:211 Enhanced projections disclosure
- § 3:212 Structured data requirement
- § 3:213 Non-financial disclosures in de-SPAC disclosure documents
- § 3:214 Financial statement requirements in business combination transactions involving shell companies

Appendix 3A. Sample Wall-Crossing Procedures—Investor

Appendix 3B. Sample IPO Timeline (Confidential Filing)

Appendix 3C. *[Reserved]*

Appendix 3D. Free Writing Prospectus—Digital Music Group

Appendix 3E. Free Writing Prospectus—Wellpoint, Inc.

CHAPTER 4. SMALL COMPANY OFFERINGS**I. PROLOGUE**

- § 4:1 The small issuer dichotomy
- § 4:2 A perspective
- § 4:3 *[Reserved]*
- § 4:4 Securities markets for small issuers

II. THE PENNY STOCK THERAPY**A. DEFINITION OF PENNY STOCKS**

- § 4:5 Definition of a penny stock under the PSRA
- § 4:6 Exclusion of securities selling for \$5 or more
- § 4:7 *[Reserved]*
- § 4:8 Exclusion of Nasdaq and listed securities

TABLE OF CONTENTS

§ 4:9 The substantial issuer and other exclusions

B. EXEMPTIONS FROM THE PENNY STOCK RULES

§ 4:10 Introduction

§ 4:11 Exemption for transactions not recommended by the broker-dealer

§ 4:12 Accredited investors; Exempt offerings

§ 4:13 De minimis exemption

§ 4:14 Limited established customer exemption

C. THE PENNY STOCK SUITABILITY RULE

§ 4:15 Introduction

§ 4:16 Procedure for determining suitability

§ 4:17 The written agreement

D. THE PENNY STOCK RISK DISCLOSURE RULE

§ 4:18 In context

§ 4:19 Rule 15g-2—The Risk Disclosure Document (“RDD”)

E. PENNY STOCK TRANSACTION DISCLOSURES

§ 4:20 Timing of the disclosures

§ 4:21 Rule 15g-3—Disclosure of bid and offer quotations in penny stocks

§ 4:22 Rule 15g-4—Disclosure of the dealer’s transaction-related compensation

§ 4:23 Rule 15g-5—Disclosure of transaction-related compensation of registered representatives

F. OTHER ASPECTS

§ 4:24 Rule 15g-6—The monthly penny stock account statement

§ 4:25 Use of electronic media in connection with penny stock transactions

§§ 4:26 to 4:37 *[Reserved]*

III. REGULATION A OFFERINGS

§ 4:38 Public offerings under Regulation A—Introduction

§ 4:39 JOBS Act and Regulation A

§ 4:39.02 Liberalization of Regulation A: the 2020 amendments

§ 4:40 Scope of exemption

§ 4:41 Eligible issuers

§ 4:42 Offers and sales

§ 4:43 Convertible and exchangeable securities

§ 4:44 Integration with other offerings: prior law

§ 4:45 Resales

§ 4:46 Offering statement

§ 4:47 Confidential submissions of the offering statement

§ 4:48 Preliminary offering circulars

§ 4:49 The offering circular

§ 4:50 The offering circular and financial statement requirements

§ 4:51 The offering circular and price-related information

§ 4:52 Delivery of final offering circular

§ 4:53 Delayed and continuous offerings

§ 4:54 Offering circular supplements

- § 4:55 Testing the waters
- § 4:56 Periodic and current reporting; exit report
- § 4:56.02 Termination or suspension of duty to file reports
- § 4:56.04 Suspension of the exemption
- § 4:56.06 Insignificant deviations from a term, condition, or requirement of Regulation A
- § 4:56.08 State securities law
- § 4:56.10 At-the-market offerings
- § 4:56.12 The Corporate Financing Rule
- § 4:56.14 Regulation A disqualification provisions
- § 4:56.16 Regulation A and Section 12(g) registration
- § 4:56.18 Exchange Act registration on Form 8-A
- § 4:56.20 Voting equity securities
- § 4:56.22 Civil liability

IV. REGISTRATION

- § 4:57 Registration on Form S-1
- § 4:58 Miscellany
- § 4:59 Regulation S-K
- § 4:60 Availability of S-3 and F-3 for smaller reporting companies
- § 4:61 The one-third of public float limitation
- § 4:62 An exercise in determining the one-third of public float limitation
- § 4:63 Smaller reporting companies and forward incorporation on Form S-1
- § 4:63.02 Voluntary submission of draft registration statements

V. RULE 504 OFFERINGS

- § 4:64 Introduction
- § 4:65 Amount of offering
- § 4:66 Information required
- § 4:67 Number of purchasers
- § 4:68 Qualification of purchasers
- § 4:69 The three alternative paths
- § 4:70 Filing of Form D
- § 4:71 Unavailable to a blank check company
- § 4:72 State registration—Rule 504, Regulation A, SCOR and Coordinated Regional Review

VI. BLANK CHECK OFFERINGS OF PENNY STOCK

- § 4:73 The Penny Stock Reform Act and blank check offerings
- § 4:74 Scope of Rule 419
- § 4:75 The Rule 419 account
- § 4:76 Deductions from the Rule 419 account
- § 4:77 Determining the acquisition threshold
- § 4:78 The post-effective amendment and the investor opt-out procedure
- § 4:79 Delivery of the prospectus and investor opt-out procedure
- § 4:80 Release of funds and securities from the Rule 419 account
- § 4:81 Post release requirements
- § 4:82 State regulation of blank checks/blind pools

VII. SOME OTHER MATTERS

- § 4:83 The way not to go public (herein of shell companies)

§ 4:84 Rules 10b-9/15c2-4 impoundments

CHAPTER 5. THE INTEGRATED DISCLOSURE SYSTEM

I. INTRODUCTION

A. THE ROAD TO INTEGRATION

§ 5:1 Disclosure systems under the Securities Act

§ 5:2 Shifting emphasis to '34 Act disclosure

§ 5:3 The necessary steps to integration

B. THE STANDARDIZATION OF INFORMATION

§ 5:4 Introduction

§ 5:5 Regulation S-K in outline

C. STANDARDIZED FINANCIAL REPORTING

§ 5:6 Basic financial statements

§ 5:7 The uniform financial statement aging requirements

§ 5:7.01 Financial statements of businesses acquired or to be acquired: pre-2021 rules

§ 5:7.02 Financial statements of businesses acquired or to be acquired: 2021 amendments

II. FINANCIAL REPORTING IN TRANSITION

A. PRE-ENRON STATE

§ 5:8 The Levitt alert—Focus on accounting irregularities, and managing earnings

§ 5:9 Materiality—Focus on qualitative aspects

§ 5:10 Changes in accounting for mergers and acquisitions and goodwill

§ 5:11 Elimination of pooling

§ 5:12 Treatment of goodwill

§ 5:13 Financial statements and probable acquisitions: pre-2021 rules

§ 5:14 Other initiatives—Scratching the surface

B. POST-ENRON

§ 5:15 Introduction

§ 5:16 SEC proposes to upgrade financial disclosures in MD & A

§ 5:17 The AICPA-inspired MD & A release

C. PRO FORMA FINANCIAL INFORMATION

§ 5:18 Introduction

§ 5:19 Sarbanes-Oxley and implementing rules—Regulation G and non-GAAP financial measures

§ 5:19.02 SEC increases scrutiny of Regulation G compliance; issues CDIs

§ 5:19.03 Enforcement actions involving non-GAAP measures

§ 5:19.04 Additional examples of compliance issues addressed by SEC comment letters

- § 5:20 SEC staff Compliance & Disclosure Interpretations about the use of NGFM

D. SPECIAL PURPOSE ENTITIES AND OFF-BALANCE SHEET DEBT

- § 5:21 Introduction
- § 5:22 The Sarbanes-Oxley Act—Disclosure of off-balance sheet transactions
- § 5:23 Sarbanes-Oxley required study of special purpose entities
- § 5:24 Establishing accounting standards

E. OTHER

- § 5:24.10 Impact of the 2017 tax legislation on financial reporting and disclosure
- § 5:24.12 Revenue recognition
- § 5:24.14 Flash financial information in Securities Act registration statements:
Stadnick

III. REGULATION S-K INTEGRATED DISCLOSURE

A. THE BASIC INFORMATION PACKAGE

- § 5:25 Introduction
- § 5:26 Selected financial information
- § 5:27 Market overhang, and dividend information
- § 5:28 Management's discussion and analysis (MD & A)
- § 5:29 MD & A financial disclosure catch-all
- § 5:30 The 1989 MD & A guidance
- § 5:31 The December 2003 MD & A guidelines
- § 5:31.10 MDA and liquidity
- § 5:32 The MD & A and the Euro
- § 5:32.10 Management's Discussion and Analysis—The 2019 amendments
- § 5:33 Auditor's attestation of the MD & A
- § 5:34 Supplementary financial information
- § 5:35 Oil and gas producers
- § 5:36 Business of registrant
- § 5:37 Changes in and disagreements with accountants
- § 5:37.02 The JOBS Act

B. IN-DEPTH DISCLOSURE

- § 5:38 Introduction
- § 5:39 Description of business
- § 5:40 Description of properties
- § 5:41 Legal proceedings
- § 5:42 Management—Executive officers and directors
- § 5:42.10 Description of securities
- § 5:42.12 Risk factors

C. EXECUTIVE COMPENSATION

- § 5:43 Background—Road to the 2006 rules
- § 5:44 The 2006 amendments
- § 5:44.10 Impact of the financial crisis on executive compensation

TABLE OF CONTENTS

§ 5:45	<i>[Reserved]</i>
§ 5:46	Compensation discussion and analysis
§ 5:46.10	Compensation and risk management
§ 5:47	Compensation tables
§ 5:48	The summary compensation table
§ 5:48.10	<i>[Reserved]</i>
§ 5:49	Supplemental grants of plan-based awards table
§ 5:50	Narrative disclosure to summary and supplemental tables
§ 5:51	Non-executive compensation
§ 5:52	Outstanding equity awards at fiscal year end
§ 5:53	Option exercises and stock vesting
§ 5:54	Post-employment compensation
§ 5:54.10	Nonqualified deferred compensation table
§ 5:54.20	Other potential post-employment payments
§ 5:54.30	Officers covered
§ 5:54.40	Miscellaneous
§ 5:54.50	Compensation of directors
§ 5:55	Approval of employee benefit plans
§§ 5:55.01 to 5:55.08	<i>[Reserved]</i>
§ 5:55.10	Other compensation disclosures
§ 5:55.11	Employee and director hedging
§ 5:55.15	Pay ratio rule-introduction
§ 5:55.16	Pay ratio rule—Overview of the rule
§ 5:55.17	—Dodd-Frank requirement
§ 5:55.18	—The ratio
§ 5:55.19	—Identifying the median employee
§ 5:55.20	—Triennial identification of the median employee
§ 5:55.21	—Calculating compensation for the median employee and the PEO
§ 5:55.22	—Defining the set of employees
§ 5:55.23	—Cost-of-living adjustments
§ 5:55.24	—Filing issues
§ 5:55.25	—Transition periods
§ 5:55.26	—Miscellaneous
§ 5:55.28	—Impact of political developments
§ 5:55.30	Pay versus performance—Overview
§ 5:55.32	Dodd-Frank Act section 953
§§ 5:55.34 to 5:55.36	<i>[Reserved]</i>

D. OTHER REGULATION S-K DISCLOSURE ITEMS

§ 5:56	Security holdings
§ 5:57	Financial schedules
§ 5:58	Sale of unregistered securities
§ 5:59	S-1 and Form 10 disclosures

E. GOVERNANCE DISCLOSURE

§ 5:59.10	Independent board chair
§ 5:59.12	Compensation committee and consultant disclosure
§ 5:59.14	Audit committee discussions with auditor

IV. CONFLICT MINERALS AND RESOURCE EXTRACTION

§ 5:60	Introduction
--------	--------------

- § 5:61 Overview of the Rule
- § 5:62 Definition of “conflict minerals”
- § 5:63 Minerals “necessary to functionality or production”
- § 5:64 Reasonable country of origin inquiry
- § 5:65 Conflict minerals report
- § 5:66 Due diligence and chain of custody
- § 5:66.02 Independent private sector audit
- § 5:66.04 Issuers subject to the reporting requirements
- § 5:66.06 Disclosure and filing of information
- § 5:66.08 Reporting period
- § 5:66.10 Minerals already in the supply chain
- § 5:66.12 Legal challenge: Background
- § 5:66.14 District Court upholds rule
- § 5:66.16 D.C. Circuit invalidates portion of rule on First Amendment grounds
- § 5:66.18 SEC stays portion of rule invalidated by court of appeals
- § 5:66.20 SEC files petition for rehearing or rehearing *en banc*
- § 5:66.22 Standard of review for compelled commercial speech
- § 5:66.24 D.C. Circuit reaffirms holding in *National Association of Manufacturers v. SEC*
- § 5:66.26 District court on remand (2017) sets aside portion of rule
- § 5:66.28 SEC actions (2017) following final judgment of the district court
- §§ 5:66.36 to 5:66.49 *[Reserved]*
- § 5:66.50 Resource extraction
- § 5:66.52 —“First” final rules on resource extraction
- § 5:66.54 —District court vacates the initial rules
- § 5:66.56 —Status 2014-2016
- § 5:66.58 —Congressional abrogation of the resource extraction rule
- § 5:66.60 Third time a charm? The resource extraction rule as adopted in 2020

V. INTEGRATED DISCLOSURE FOR FOREIGN PRIVATE ISSUERS

- § 5:67 The role of Form 20-F
- § 5:68 Eligibility for the F Forms
- § 5:69 Eligibility requirements for Forms F-1-2-3
- § 5:70 Structure of the F Forms
- § 5:71 Foreign issuers and shelf registration
- § 5:72 Conforming Form 20-F to international disclosure standards—Overview
- § 5:73 Form 20-F disclosure
- § 5:74 Age of financial statements
- § 5:75 Limited accommodation to International Accounting Standards
- § 5:76 International Accounting Standards, the European Union, and the SEC
- § 5:77 Disclosure relating to special enforcement problems

VI. SCALED DISCLOSURE FOR SMALLER REPORTING COMPANIES

- § 5:78 Background
- § 5:79 Introduction to SRC status determinations
- § 5:79.02 —Determinations and disclosure of status
- § 5:79.04 —Initial qualification thresholds: Qualification based upon public float
- § 5:79.06 —Subsequent qualification thresholds: Public float
- § 5:79.08 —Initial qualification thresholds: “Lower revenue” companies

TABLE OF CONTENTS

- § 5:79.10 —Subsequent qualification thresholds: Revenue
- § 5:79.12 —Interplay with emerging growth company rules
- § 5:80 *[Reserved]*
- § 5:81 Scaled disclosure for smaller reporting companies—Introduction
- § 5:82 Regulation S-X Article 8 financial statements for smaller reporting companies
- § 5:83 Scaled disclosure for smaller reporting companies—How it differs
- § 5:84 Scaled disclosure and foreign private issuers
- § 5:85 Smaller reporting companies and say-on-pay
- § 5:86 Smaller reporting companies and forward incorporation on Form S-1
- § 5:87 *[Reserved]*
- § 5:88 *[Reserved]*
- § 5:89 *[Reserved]*

VII. DEBT OFFERINGS, GUARANTORS AND COLLATERALIZED SECURITIES

- § 5:90 Guarantors and issuers of guaranteed securities
- § 5:90.02 —Guarantee by parent of subsidiary's securities
- § 5:90.04 —Guarantee by parent and one or more other subsidiaries of parent
- § 5:90.06 —Guarantee by sub of parent securities
- § 5:90.08 —Rule 3-10: Exemption from reporting requirements
- § 5:90.10 —Affiliates whose securities collateralize securities being registered
- § 5:90.12 Additional background and introduction to the 2020 amendments
- § 5:90.14 Amendments to Rule 3-10
- § 5:90.16 2020 amendments: recently acquired subsidiary issuers and guarantors
- § 5:90.18 2020 amendments: revised alternative disclosures: Rule 13-01
- § 5:90.20 Rules 3-16 and 13:02: Affiliates whose securities collateralize securities registered or being registered

VIII. OTHER MATTERS

- § 5:91 Limited partnership roll-ups
- § 5:92 EDGAR and the integrated disclosure system
- § 5:93 Regulation M-A—Mergers and acquisitions
- § 5:94 Projections and other forward-looking information
- § 5:95 Cautionary statements—A sampling
- § 5:96 Security ratings
- § 5:96.02 Brexit
- § 5:96.06 Climate
- § 5:97 The industry guides
- § 5:98 Exhibits
- § 5:98.10 —Omission of information from exhibits: Schedules and personally identifiable information
- § 5:98.12 —Redaction of information in material contract exhibits
- § 5:98.14 —Material contracts and the two-year look back
- § 5:98.16 —Exhibit and other filing requirements
- § 5:99 Incorporation by reference
- § 5:99.10 Incorporation of information from outside the financial statements
- § 5:99.12 Enhanced hyperlink requirement
- § 5:99.14 Cover page interactive data file: Inline XBRL tagging

IX. DISCLOSURE OF ISSUER REPURCHASES

- § 5:100 Repurchase disclosure rules

- § 5:101 —Background to the 2023 amendments
- § 5:102 —The vacated SEC repurchase rules
- § 5:103 —The political context and the appellate litigation
- § 5:104 —Quantitative repurchase disclosure requirements under the 2023 amendments
- § 5:105 —Narrative repurchase disclosures under the 2023 amendments
- § 5:106 —Officer or director transactions proximate to repurchase plan announcements under the 2023 amendments
- § 5:107 —Further discussion of repurchase disclosure requirements and related provisions under the 2023 amendments
- § 5:107.02 —Adoption or termination of 10b5-1 plans under the 2023 amendments

X. CLIMATE DISCLOSURE

A. BACKGROUND

- § 5:108 Climate change disclosure: the vanishing 2024 rules
- § 5:109 Political context and response to the 2024 rules
- § 5:110 Litigation over the climate rules
- § 5:111 How companies have been preparing for the potential rules
- § 5:112 Preparing for and setting a reporting strategy
- § 5:113 Preparing for litigation against the company
- § 5:114 Climate disclosures seen in annual filings prior to adoption of the final rules
- § 5:115 Investment management

B. PUBLIC COMMENT ON THE PROPOSED RULES

- § 5:116 2024 disclosure standards
- § 5:117 Governance (Item 1501)
- § 5:118 Strategy (Item 1502)
- § 5:119 Risk management (Item 1503)
- § 5:120 Targets and goals (Item 1504)
- § 5:121 GHG emissions (Item 1505)
- § 5:122 Attestation of Scope 1 and Scope 2 emissions disclosure (Item 1506)
- § 5:123 Safe harbor for certain climate-related disclosures (Item 1507)
- § 5:124 Interactive data requirement (Item 1508)

CHAPTER 6. EXCHANGE ACT REGISTRATION AND REPORTING

I. EXCHANGE ACT REPORTING: BACKGROUND

- § 6:1 From afterthought to central stage
- § 6:2 Enron/WorldCom
- § 6:3 Commission's response
- § 6:4 The Sarbanes-Oxley difference
- § 6:5 Regulation of companies with registered securities

II. EXCHANGE ACT REGISTRATION

A. SECURITIES LISTED ON AN EXCHANGE OR NASDAQ STOCK MARKET

- § 6:6 New York Stock Exchange and other national securities exchanges

TABLE OF CONTENTS

§ 6:7 Nasdaq stock market

B. REGISTRATION OF OVER-THE-COUNTER SECURITIES

- § 6:8 Background
- § 6:9 The basic statutory provision prior to the JOBS Act
- § 6:9.01 Basic statutory provision post-JOBS Act
- § 6:9.02 Section 12(g) amendments (JOBS Act)
- § 6:10 Limitation to equity securities
- § 6:11 Class of securities
- § 6:12 Shareholders of record
- § 6:12.05 Ownership of record revisited—Further considerations
- § 6:12.07 Background to Rule 12g5-1
- § 6:13 The asset test
- § 6:14 When to register?
- § 6:15 Deregistration
- § 6:16 Voluntary registration
- § 6:17 Bank, insurance, foreign and exempt securities
- § 6:17.02 Rule 12h-1 exemption for compensatory stock options—Introduction
- § 6:17.04 —Restrictions on transfer
- § 6:17.06 —Required disclosure
- § 6:17.08 —Documentation
- § 6:17.10 —Reporting companies
- § 6:17.14 Section 12(g): Private companies and transfer restrictions
- § 6:17.16 The Facebook placement and 12(g)
- § 6:17.18 Special purpose vehicles and section 12(g)
- § 6:17.20 Staff Report on Rule 12g5-1
- § 6:17.21 Staff remarks on record ownership
- § 6:17.22 Section 12(g) and private rights of action

C. SECTION 12(g) REGISTRATION AND THE JOBS ACT

- § 6:17.24 JOBS Act and Section 12(g): Statutory background
- § 6:17.25 Impact of the JOBS Act amendments to Section 12(g)
- § 6:17.26 Savings and loan holding companies, other depository institutions, and Section 12(g)/15(d)
- § 6:17.28 Registration of Securities; Exemption from Section 12(g)
- § 6:17.30 Accredited investor status
- § 6:17.32 Rule 12g-4: Certifications of termination of registration
- § 6:17.34 Employee holders and 12(g): Background and purposes of the Amendment
- § 6:17.36 Rule 12g5-1(a)(8): Exclusion of securities received from employee compensation plan
- § 6:17.38 Crowdfunding and Section 12(g)

D. REGISTRATION PROCEDURES UNDER THE EXCHANGE ACT

- § 6:18 Separate and distinctive registrations
- § 6:19 Registration on Form 10
- § 6:20 *[Reserved]*
- § 6:21 Form 8-A Simplified registration—Procedure and eligibility
- § 6:22 Simplified registration—Automatic effectiveness of Form 8-A
- § 6:23 The registration process—Over-the-counter securities

- § 6:24 —Listed securities
- § 6:25 Back-door registration via shell companies frowned upon

III. REPORTING UNDER THE EXCHANGE ACT—OVERVIEW

A. INTRODUCTION

- § 6:26 Reporting companies
- § 6:27 SRCs and the integrated disclosure systems
- § 6:28 Choices available to SRCs
- § 6:29 Additional note on smaller reporting companies

B. REPORTS

- § 6:30 The annual report to shareholders
- § 6:31 Form 10-K
- § 6:31.05 SOR amendments to Form 10- K and Form 10
- § 6:31.10 Proxy statement disclosure
- § 6:32 Summary page for Form 10-K
- § 6:33 The quarterly report on Form 10-Q
- § 6:34 Quarterly reporting, earnings releases and short-termism
- § 6:35 Form 8-K—Past and present

C. OTHER MATTERS

- § 6:36 Outside auditor’s quarterly review of financial information
- § 6:37 Prioritizing the review process
- § 6:38 Transition to accelerated filing of Form 10-K and 10-Q reports for accelerated filers

IV. ACCELERATED AND LARGE ACCELERATED FILERS

- § 6:38.10 Amendments to accelerated filer and large accelerated filer definitions; public commentary on Section 404(b) of SOX in response to 2016 request
- § 6:38.12 Commission amends accelerated/large accelerated filer definitions and curtails auditor attestations

V. CERTIFICATION OF PERIODIC REPORTS AND ASSESSMENT OF INTERNAL CONTROLS

A. CERTIFICATION OF PERIODIC REPORTS

- § 6:39 The superseded Commission certification proposal
- § 6:40 Sarbanes-Oxley § 302 certification
- § 6:41 —Overview of the commission’s task and approach
- § 6:42 —The certification form
- § 6:43 —Certification as to accuracy and completeness of periodic reports
- § 6:44 —Certification and process of disclosure controls and procedures
- § 6:45 —Certification of internal control over financial reporting
- § 6:46 —Certification of investment company reports
- § 6:47 —Foreign private issuers
- § 6:47.10 —SEC enforcement for certifications of false statements
- § 6:47.12 Private civil liability, scienter and certifications relating to internal control over financial reporting

TABLE OF CONTENTS

- § 6:47.14 Private civil liability and certifications relating to internal control over financial reporting: opinion statements

B. SECTION 906 CERTIFICATION

- § 6:48 Introduction
- § 6:49 SEC and Department of Justice make-do approach

C. SECTION 404 ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING

- § 6:50 Introduction
- § 6:51 Commission implements Section 404 and the assessment of internal control over financial reporting
- § 6:52 The COSO framework
- § 6:53 The auditor's attestation of internal control over financial reporting assessment
- § 6:53.10 Legislative exemption for non-accelerated filers
- § 6:53.12 JOBS Act, EGCs and Section 404(b)
- § 6:54 The quarterly evaluation of changes in internal control over financial reporting
- § 6:55 Other Section 404 related matters
- § 6:55.10 AU—Sec. 333 and management's representation letter to the auditors

D. THE SECTION 404 FUROR

- § 6:56 Section 404 compliance dates
- § 6:56.10 Second roundtable and the commission's response
- § 6:56.20 PCAOB response to the second roundtable
- § 6:56.30 Commission's Concept Release
- § 6:56.40 COSO's Guidance for Smaller Business Companies

E. SECTION 404(A) REFORM—SEC GUIDANCE AS A RULE

- § 6:56.41 Implementing Section 404 reform
- § 6:56.42 The two broad principles
- § 6:56.43 SEC Guidance in outline
- § 6:56.44 Identifying financial reporting risks
- § 6:56.45 Identifying controls that address financial reporting risks
- § 6:56.46 Entity-level controls and information technology general controls
- § 6:56.47 ICFR design assessment
- § 6:56.48 Operating effectiveness of ICFR
- § 6:56.49 Testing and monitoring of controls
- § 6:56.50 Documenting the assessment
- § 6:56.51 Determining whether deficiencies are a significant deficiency or a material weakness
- § 6:56.52 Foreign private issuers
- § 6:56.53 *[Reserved]*
- § 6:56.54 *[Reserved]*

F. CIVIL LITIGATION AND INTERNAL CONTROL OVER FINANCIAL REPORTING

- § 6:56.55 Introduction

- § 6:56.56 *Kandi* in federal court
- § 6:56.57 *Atlas Financial*: plaintiffs argue management's conclusion as to effectiveness ICFR was false and misleading
- § 6:56.58 Amtrust/New England Carpenters
- § 6:56.59 *In re GOL Linhas*: timing issues relating to disclosure of ineffective ICFR
- § 6:56.60 *Spirit Aerosystems*: potential for private civil liability arising from ICFR disclosure and certifications; dismissal based upon failure adequately to plead scienter
- § 6:56.61 *[Reserved]*
- § 6:56.62 *[Reserved]*
- § 6:56.63 *[Reserved]*

G. OTHER

- § 6:56.64 Disclosure controls and social media

VI. REGULATION FD

A. FAIR DISCLOSURE IN OUTLINE

- § 6:57 Introduction to selective disclosure and Regulation FD
- § 6:58 Precluded recipients and excluded recipients
- § 6:59 When disclosure of material nonpublic information is made on behalf of the issuer
- § 6:60 Timing of the disclosure—Intentional and non-intentional selective disclosure
- § 6:61 How to make public disclosure

B. OTHER MATTERS

- § 6:62 The materiality issue—Chilling guidance on earnings forecasts
- § 6:63 Some questions and answers from the SEC staff
- § 6:64 Exclusivity of SEC enforcement—Elements of a violation
- § 6:65 Application to securities offerings
- § 6:66 Reg FD fallout
- § 6:67 Internet conference calls—Growing accessibility

VII. REAL-TIME DISCLOSURE AND THE MAKEOVER OF FORM 8-K

A. BACKGROUND

- § 6:68 SOA real-time disclosures
- § 6:69 An overview

B. FORM 8-K—SECTION 1—REGISTRANT'S BUSINESS AND OPERATIONS

- § 6:70 Item 1.01. Entry into a material definitive agreement
- § 6:71 Item 1.02. Termination of a material definitive agreement
- § 6:72 Item 1.03. Bankruptcy or receivership

C. FORM 8-K—SECTION 2—FINANCIAL INFORMATION

- § 6:73 Item 2.01. Completion of acquisition or disposition of assets

TABLE OF CONTENTS

- § 6:74 Item 2.02. Results of operations and financial condition
- § 6:75 Item 2.03. Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement of a registrant
- § 6:76 Item 2.04. Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement
- § 6:77 Item 2.05. Costs associated with exit or disposal activities
- § 6:78 Item 2.06. Material impairments

D. FORM 8-K—SECTION 3—SECURITIES AND TRADING MARKETS

- § 6:79 Item 3.01. Notice of delisting or failure to satisfy a continued listing rule or standard; Transfer of listing
- § 6:80 Item 3.02. Unregistered sales of equity securities
- § 6:81 Item 3.03. Material modification to rights of security holders

E. FORM 8-K—SECTION 4—MATTERS RELATED TO ACCOUNTANTS AND FINANCIAL STATEMENTS

- § 6:82 Item 4.01. Changes in registrant's certifying accountant
- § 6:83 Item 4.02. Non-Reliance on previously issued financial statements or a related audit report or a completed interim

F. FORM 8-K—SECTION 5—CORPORATE GOVERNANCE AND MANAGEMENT

- § 6:84 Item 5.01. Changes in control of registrant
- § 6:85 Item 5.02. Departure of directors or certain officers; Election of directors; Appointment of principal officers, compensatory arrangements of certain officers
- § 6:86 Item 5.03. Amendments to articles of incorporation or bylaws; Change in fiscal year
- § 6:86.10 Reverse merger into a shell company and Form 8-K
- § 6:86.20 Back door merger with reporting shell company
- § 6:87 Item 5.04. Temporary suspension of trading under registrant's employee benefit plans
- § 6:88 Item 5.05. Amendments to the registrant's code of ethics, or waiver of a provision of the code of ethics
- § 6:88.10 Item 5.06. Change in shell company status
- § 6:88.12 Item 5.07. Submission of matters to a vote of security holders

G. SECTION 7—REGULATION FD; SECTION 8—OTHER EVENTS, AND SECTION 9—FINANCIAL STATEMENTS AND EXHIBITS

- § 6:89 Item 7.01. Regulation FD Disclosure
- § 6:90 Item 8.01. Other events
- § 6:91 Item 9.01. Financial statements and exhibits

VIII. OTHER MATTERS

- § 6:92 Incorporation by reference
- § 6:93 Disclosure by non-reporting companies—Rule 15c2-11

CHAPTER 7. SECURITIES ACT REGISTRATION

I. OVERVIEW OF THE REGISTRATION PROCESS

A. INTRODUCTION

- § 7:1 Basic strictures
- § 7:2 Impact of SOR on the registration process
- § 7:2.10 Overview of the registration process, including Clayton-era reforms
- § 7:3 Outline of the review process
- § 7:4 Public availability of comment letters and responses
- § 7:5 The nuts and bolts of registration
- § 7:6 SEC objection to appropriateness of form
- § 7:7 Amendments and requests for acceleration
- § 7:7.02 Voluntary submission of draft registration statements
- § 7:7.04 Draft registration statements and the 2025 accommodations

B. SIZING OF THE OFFERING

- § 7:8 Change in price range or decrease in size of the offering
- § 7:9 Increase in size of offering—Flexibility by setting the aggregate offering price
- § 7:10 Registering additional shares with an abbreviated registration statement

C. CONTENTS OF THE REGISTRATION STATEMENT

- § 7:11 The facing page
- § 7:12 The prospectus
- § 7:13 Part II of the registration statement
- § 7:14 Undertakings
- § 7:15 Signature page
- § 7:16 Consents
- § 7:17 Exhibits

D. PLAIN ENGLISH

- § 7:18 Introduction
- § 7:19 Plain English for certain sections of prospectus
- § 7:20 Clear writing for entire prospectus
- § 7:21 Plain English Handbook
- § 7:22 SEC as pedagogue
- § 7:23 Document design
- § 7:24 Cover page of prospectus
- § 7:25 Inside front and outside back cover page of prospectus
- § 7:26 Item 503: summary, risk factors, fixed charges
- § 7:27 Staff Legal Bulletin No. 7 and you

II. FORMS S-1 AND S-3

A. ELIGIBILITY REQUIREMENTS

- § 7:28 Form S-1
- § 7:29 Form S-3
- § 7:29.12 Section 10(a)(3) and updating a Form S-3 registration statement GPPC

TABLE OF CONTENTS

B. CONTENT OF THE PROSPECTUS

- § 7:30 Introduction
- § 7:31 The standard registration items
- § 7:32 Cover page
- § 7:33 Inside front cover page and back cover page
- § 7:34 Summary, risk factors, mailing address, fixed charges
- § 7:35 Other standard registration items
- § 7:36 A tabular overview
- § 7:37 Same Regulation S-K item, but different disclosure for some registrants
- § 7:38 Mechanics of incorporating by reference '34 Act filings
- § 7:39 SOR in action—Form S-1 and reliance on General Instruction VII

III. DELAYED AND UNALLOCATED PRIMARY SHELF OFFERINGS

A. BEFORE SOR AND RULE 430B

- § 7:40 Overview
- § 7:41 Conceptual framework
- § 7:42 Practice prior to SOR
- § 7:43 An unallocated shelf walkthrough
- § 7:44 Marketing of a delayed unallocated primary shelf-offering

B. RULE 430B AND CONTENT OF SHELF PROSPECTUS

- § 7:45 Primary shelf-offerings on Form S-3 or F-3
- § 7:46 Critique of Rule 430B as applicable to delayed shelf offering by a seasoned issuer

C. AUTOMATIC SHELF-REGISTRATION—THE PROMISE OF TOMORROW

- § 7:47 Overview and opportunities
- § 7:48 Automatic shelf registration in action

D. SECONDARY SHELF OFFERINGS SUBJECT TO RULE 430B AND ITEM 512

- § 7:49 Introduction
- § 7:50 PIPE resale offerings
- § 7:51 Secondary shelf offerings on Form S-3
- § 7:52 Rule 430B and the addition or substitution of selling security holders
- § 7:53 Delayed primary shelf and concurrent or alternative secondary shelf offering

E. OTHER SECONDARY SHELF OFFERINGS

- § 7:54 Form S-1 secondary shelf offering
- § 7:55 Rule 430C and the Form S-1 secondary shelf offerings
- § 7:56 *[Reserved]*
- § 7:57 *[Reserved]*
- § 7:58 *[Reserved]*
- § 7:59 *[Reserved]*
- § 7:60 *[Reserved]*

- § 7:61 *[Reserved]*
- § 7:62 *[Reserved]*
- § 7:63 *[Reserved]*
- § 7:64 *[Reserved]*

IV. CORPORATE COMBINATIONS

- § 7:65 Form S-4—Introduction
- § 7:66 —The long-form version for S-1 level disclosure
- § 7:67 —The short-form version for S-3 level disclosure
- § 7:68 Mandatory prospectus disclosure
- § 7:69 Impact of the liberalized business combinations regime on the Form S-4
- § 7:70 Form F-4 for foreign private issuers

V. FORM S-8—EMPLOYEE BENEFIT PLANS

A. ELIGIBILITY

- § 7:71 In general; eligibility
- § 7:72 Employee eligibility with emphasis on consultants and advisors
- § 7:73 Effectiveness of Form S-8; policing the eligibility requirements

B. THE PROSPECTUS

- § 7:74 What constitutes
- § 7:75 Updating the prospectus
- § 7:76 Civil liability

C. OTHER MATTERS

- § 7:77 The registration statement
- § 7:78 Reporting under the Exchange Act
- § 7:79 Small business issuers and Form S-8

VI. OTHER MATTERS

- § 7:80 Form S-11—Real estate companies
- § 7:81 Incorporation by reference
- § 7:82 Form for updating stale prospectus
- § 7:83 Securities Act Reform

VII. TRUST INDENTURES AND THE TRUST INDENTURE ACT

A. OVERVIEW

- § 7:84 Scope
- § 7:85 Exemptions
- § 7:86 Qualification and qualification procedure
- § 7:87 Mandatory inclusion of indenture provisions

B. INDENTURE TRUSTEE

- § 7:88 In general
- § 7:89 Foreign trustees
- § 7:90 Delayed determination of trustee eligibility
- § 7:91 Conflicts of interest

TABLE OF CONTENTS

§ 7:92 Rights and responsibilities

C. OTHER MATTERS

§ 7:93 Debtholder rights

§ 7:94 Retroactivity of 1990 amendments

§ 7:95 Implementing rules and forms

CHAPTER 8. LISTING ON TRADING MARKETS (SROS) AND SRO REGULATION

I. LISTING ON NASDAQ STOCK MARKET

A. QUANTITATIVE LISTING STANDARDS

§ 8:1 Introduction

§ 8:2 Quantitative standards for listing on Nasdaq National Capital Market

§ 8:3 Quantitative standards for listing as Nasdaq Global Market security

§ 8:4 Global Select securities

§ 8:5 The OTC Bulletin Board

B. CORPORATE GOVERNANCE STANDARDS

§ 8:6 Corporate governance standards—In general

§ 8:7 Shareholder approval of equity compensation plans

C. OTHER MATTERS

§ 8:8 Qualitative criteria

§ 8:9 Listing and delisting procedure

§ 8:10 Administrative review process

§ 8:11 Commission review

§ 8:12 Non-quantitative and policy factors

II. LISTING ON THE NEW YORK STOCK EXCHANGE

A. QUANTITATIVE LISTING STANDARDS

§ 8:13 U.S. issuers listing standards

§ 8:14 Fees for U.S. issuers

§ 8:15 Foreign issuers listing standards

§ 8:16 Foreign issuers fees

B. CORPORATE GOVERNANCE STANDARDS

§ 8:17 Corporate governance requirements in general

§ 8:18 Shareholder approval of equity compensation plans

III. REGULATION OF ANALYSTS' CONFLICTS OF INTEREST

A. PROLOGUE

§ 8:19 Introduction

§ 8:20 Focus on conflicted analysts and research departments

§ 8:21 Conflicted analysts and the SEC bully pulpit

§ 8:22 NYSE and NASD adopt rules regulating research and analysts

- § 8:23 Sarbanes-Oxley directive to the SEC
- § 8:24 SEC adopts Regulation AC
- § 8:25 NYSE and NASD compliance with Sarbanes-Oxley
- § 8:25.02 The JOBS Act

B. RESEARCH ANALYSTS AND RESEARCH REPORTS

- § 8:26 Research analysts and research reports—Introduction
- § 8:27 Conflicts of Interest Policies & Procedures
- § 8:28 Content of research reports and disclosure of conflicts
- § 8:29 Distribution of Research Reports

C. DEBT RESEARCH ANALYSTS AND DEBT RESEARCH REPORTS

- § 8:30 Debt research analysts and debt research reports
- § 8:31 Conflicts of Interest Policies & Procedures
- § 8:32 Content and Disclosure in Debt Research Reports
- § 8:33 Distribution of Research Reports

D. REGULATION BY LITIGATION

- § 8:34 Introduction to the global settlement
- § 8:35 Regulatory aspect of the global settlement
- § 8:36 Independent third party research
- § 8:37 Penalties, disgorgement, and other costs to settling firms
- § 8:38 Private actions and aftermath of the global settlement
- § 8:39 *[Reserved]*

IV. THE PINK SHEETS

- § 8:40 The electronic pink sheets
- § 8:41 Electronic pink sheets and the new “listing” categories

Volume 2

CHAPTER 9. TRANSNATIONAL ASPECTS

I. FOREIGN ISSUERS AND THE SECURITIES ACTS

A. INTRODUCTION

- § 9:1 Introduction
- § 9:2 Registration on the F Forms
- § 9:2.01 Definition of foreign private issuer
- § 9:2.02 Definition of foreign private issuer: Redux
- § 9:2.03 Definition of foreign private issuer: 2025 concept release
- § 9:3 Foreign issuers and shelf registration
- § 9:4 Offerings by foreign governmental issuers
- § 9:4.02 Submission of draft registration statements by foreign private issuers

B. REGISTRATION AND REPORTING UNDER THE EXCHANGE ACT

- § 9:5 Registration and reporting by foreign companies

TABLE OF CONTENTS

- § 9:5.01 Rule 12g3-2(b) (2008 amendments)
- § 9:5.02 Non-reporting status
- § 9:5.03 Foreign listing
- § 9:5.04 Electronic publication of disclosure documents
- § 9:5.05 Duration of the exemption
- § 9:5.06 The multijurisdictional disclosure system
- § 9:5.10 The internet alternative for Rule 12g3-2(b) “Filings”
- § 9:6 Foreign securities traded on Nasdaq
- § 9:6.10 Deregistration; suspension of reporting
- § 9:6.20 Foreign opposition to U.S. deregistration rules
- § 9:6.30 Listed foreign private issuers exiting '34 Act reporting—Introduction
- § 9:6.40 Delisting securities of foreign private issuers and barriers to '34 Act deregistration
- § 9:6.50 The Form 15F deregistration of FPI securities solution
- § 9:6.60 Rule 12g3-2(b) exemption conditioned on availability of English translations of “filings” on the Internet
- § 9:6.70 Other FPIs accessing U.S. trading market

C. INTEGRATED DISCLOSURE FOR FOREIGN PRIVATE ISSUERS

- § 9:7 The role of Form 20-F
- § 9:8 Financial statements of foreign private issuers
- § 9:8.10 FPIs and IFRSs as published by IASB
- § 9:8.20 Elimination of reconciliation: General parameters
- § 9:8.30 Interim period financial statements
- § 9:8.40 Disclosure and related issues
- § 9:8.50 Regulation S-X issues
- § 9:8.60 Permanent and temporary relief
- § 9:8.70 Miscellaneous
- § 9:9 IOSCO disclosure standards
- § 9:10 Amending Form 20-F to conform to IOSCO non-financial disclosure requirements
- § 9:11 Limited application to financial statements of FPIs
- § 9:12 The SEC, International Accounting Standards, and the European Union
- § 9:12.05 SEC accommodation for foreign issuers
- § 9:12.10 Changes in and disagreements with accountants
- § 9:12.15 Roadmap for U.S. issuers

II. SARBANES-OXLEY ACT AND FOREIGN ISSUERS

- § 9:13 Introduction
- § 9:14 Sections 302 and 906 certifications
- § 9:15 Section 404 assessment of internal control over financial reporting; disclosure controls
- § 9:16 Auditor’s attestation of management’s assessment
- § 9:17 Audit committee responsibility/independence
- § 9:18 Disclosure of audit committee financial expertise
- § 9:19 Code of ethics for senior financial officers
- § 9:20 Disclosure of off-balance sheet arrangements and non-GAAP financial measures
- § 9:21 Rules of professional responsibility for attorneys
- § 9:22 Insider trading during pension fund blackout periods
- § 9:23 Auditor independence; disclosures concerning auditors

- § 9:24 Retention of records relevant to audits and reviews by accountants
- § 9:25 Rules not applicable to foreign issuers
- § 9:26 Sarbanes-Oxley and foreign accountants

III. OFFSHORE DISTRIBUTIONS

A. INTRODUCTION TO REGULATION S

- § 9:27 Securities Act Release 4708
- § 9:28 Distributions pursuant to Regulation S—Introduction
- § 9:29 Section 12(1) actions and Regulation S
- § 9:30 The general statement (non-safe harbor) approach
- § 9:31 Definition of a U.S. person

B. GENERAL CONDITIONS

- § 9:32 Offshore transactions
- § 9:33 Directed selling efforts
- § 9:33.10 General solicitation, offshore offerings and the withdrawn amendment to Regulation S

C. THE ISSUER-DISTRIBUTOR SAFE HARBORS

- § 9:34 Introduction—Herein of the distribution compliance period and domestic equity securities
- § 9:35 Category 1—Offerings of foreign securities and overseas directed offerings
- § 9:36 Category 1 offering restrictions
- § 9:37 Category 2—Debt securities of a reporting issuer, equity securities of a foreign private issuer, debt, preferred, and asset-backed securities of non-reporting foreign issuers
- § 9:37.02 Electronic pricing and allocation platforms and Categories 1 and 2
- § 9:38 Category 3 safe harbor—Equity securities of domestic issuers, debt securities of non-reporting domestic issuers and equity securities with SUSMI of non-reporting foreign issuers
- § 9:38.02 EU Central Depositories Regulation, the London Stock Exchange, Euroclear and Category 3 Securities
- § 9:39 Warrants
- § 9:40 Convertibles
- § 9:41 Failure to comply with a safe harbor condition or restriction

D. RESALES

- § 9:42 Rule 904 safe harbor for resales—Securities distributed pursuant to Regulation S
- § 9:43 Resale of securities issued in reliance on an exemption
- § 9:43.02 Resales of privately placed foreign securities: Comparison of exit strategies
- § 9:43.04 Advantages of obtaining DOSM status
- § 9:44 Resales in the United States or to U.S. persons
- § 9:45 The Rule 144 restricted securities solution for domestic equity securities

E. CLEARANCE AND SETTLEMENT

- § 9:45.10 Selected offering and settlement mechanics in offshore offerings

TABLE OF CONTENTS

§ 9:45.12	New issues distribution services: Euroclear and Clearstream
§ 9:45.14	New issues draft documentation flows, note structure, and ISINs
§ 9:45.16	New issue final documentation flows
§ 9:45.18	Syndicated new issue distribution—against payment
§ 9:45.20	Syndicated free of payment distribution in Euroclear
§ 9:45.22	Letters of representation and additional information
§ 9:45.24	International Capital Markets Association Guidance
§ 9:45.26	Links with domestic markets; cross-market settlement
§ 9:45.28	Clearstream
§ 9:45.30	Illustration of cross-border settlement
§ 9:45.32	Interplay of closing mechanics and extraterritorial application of fraud provisions: <i>Morrison</i>

F. STOCK EXCHANGE LISTING OF RESTRICTED SECURITIES

§ 9:46	In general
§ 9:47	Special situation no-action letters
§ 9:48	Documentation and settlement

G. OFFSHORE PRESS INFORMATION

§ 9:49	Background
§ 9:50	Securities Act safe harbor
§ 9:51	Williams Act safe harbor

H. OFFSHORE OFFERS OF SECURITIES ON THE INTERNET

§ 9:52	Overview
§ 9:53	General precautionary procedures
§ 9:54	Regulation S offerings by foreign issuers
§ 9:55	U.S. exempt tranche
§ 9:56	Concurrent U.S. registered offering
§ 9:57	Offshore offerings by U.S. issuers
§ 9:58	Offerings by investment companies
§ 9:59	Third-party providers

I. ADMISSION TO AIM

§ 9:59.10	Overview
§ 9:59.20	Transaction structure
§ 9:59.30	Recent AIM admissions by U.S. companies
§ 9:59.40	Non-UK issuers and depositary interests
§ 9:59.50	Relationship to prospectus directive
§ 9:59.60	Dematerialization
§ 9:59.70	Dematerialization: sample disclosures

IV. MULTIJURISDICTIONAL DISCLOSURE SYSTEMS

A. U.S. MULTIJURISDICTIONAL DISCLOSURE SYSTEM

§ 9:60	Introduction
§ 9:61	Some common definitions
§ 9:62	Foreign private issuer
§ 9:63	Basic MJDS forms

- § 9:64 Form F-3 alternative
- § 9:65 Accounting under MJDS
- § 9:66 Form F-10 reconciliation requirements
- § 9:67 MJDS prospectus
- § 9:68 The legends
- § 9:69 Registration process
- § 9:70 Form F-X
- § 9:71 Filing and effective dates
- § 9:72 Exchange Act reporting
- § 9:73 Exchange Act registration
- § 9:74 Form 40-F

B. THE CANADIAN MULTIJURISDICTIONAL DISCLOSURE SYSTEM

- § 9:75 Introduction
- § 9:76 Offering requirements
- § 9:77 Business combinations and securities exchange bids
- § 9:78 Other substantive and disclosure requirements
- § 9:79 Tender offers
- § 9:80 Liability and continuous disclosure
- § 9:81 The exempt offering alternatives

V. CROSS-BORDER EXEMPTIONS

A. NATURE OF THE PROBLEM

- § 9:82 Foreign private issuers and U.S. investors
- § 9:83 Shutting out U.S. security holders from rights offerings by, acquisitions of, exchange, and tender offers for foreign private issuers
- § 9:84 The road to the cross-border exemptions

B. THE EXEMPTIONS

- § 9:85 Definitions and common aspects
- § 9:86 Rule 801 exemption for rights offerings
- § 9:87 Rule 802 exemption for business combinations and exchange offers

C. CROSS-BORDER TENDER OFFERS

- § 9:88 Overview
- § 9:89 Tier I tender offer exemption
- § 9:90 Tier II partial tender offer exemption
- § 9:91 Rule 13e-3

VI. OTHER MATTERS

- § 9:92 Sale by registered investment companies and offshore funds
- § 9:93 Trading practices rules
- § 9:94 144A transactions
- § 9:95 Class exemptions
- § 9:96 Offshore offers of advisory services on the Internet
- § 9:97 Offshore broker-dealer services on the Internet
- § 9:97.02 Mutual recognition

TABLE OF CONTENTS

- § 9:97.04 Special purpose acquisition corporations
- § 9:97.06 Registered offshore distributions

VII. EXTRATERRITORIAL APPLICATION OF THE ANTIFRAUD AND REGISTRATION PROVISIONS: HEREIN OF *MORRISON*

- § 9:98 Extraterritorial application of the antifraud provisions: Overview
- § 9:98.02 Emerging principles post-*Morrison*
- § 9:98.04 Background: *Morrison v. National Australia Bank*
- § 9:98.06 Purchases by U.S. investors on foreign stock exchange
- § 9:98.08 Purchases on foreign exchange, dual listing in U.S.; rejection of “listing theory”
- § 9:98.09 U.S. issuer, U.S. exchange-listed securities, purchase by foreign investor in off-exchange transaction: District courts distinguish *Pontiac*, partially revive listing theory
- § 9:98.10 Purchases of ADRs on U.S. markets
- § 9:98.11 Applicability of antifraud rules to purchases of unsponsored ADRs: *Stoyas v. Toshiba*
- § 9:98.12 Foreign issuer, dual-listed securities (ADSs/ordinary shares), foreign recognition regime, purchase on foreign securities exchange
- § 9:98.13 Domestic market manipulation
- § 9:98.14 Development of the “irrevocable liability/transfer of title” standard
- § 9:98.16 Foreign investors, U.S. issuer; irrevocable liability in the United States (*Absolute Activist*)
- § 9:98.18 Incurring irrevocable liability; delivery of subscription price in the U.S. as final act
- § 9:98.20 Delivery of stock transfer documents or closing funds in U.S.
- § 9:98.22 Irrevocable liability established notwithstanding closing conditions
- § 9:98.24 Acquisition of beneficial ownership through DTC book entries
- § 9:98.25 Impact of U.S. intermediation
- § 9:98.26 Offers and Section 17(a): *SEC v. Tourre*
- § 9:98.28 U.S. investors, securities-based swaps on foreign reference securities (*Parkcentral*)
- § 9:98.29 Private placement between two foreign parties held “predominantly foreign” under *Parkcentral* despite signature of subscription agreement in New York by agent of issuer
- § 9:98.30 Foreign investors, U.S.-listed reference security
- § 9:98.32 Extraterritoriality and the antifraud provisions of the Securities Act
- § 9:98.34 Extraterritoriality, *Morrison* and the registration provisions of the Securities Act
- § 9:98.35 Extraterritoriality and the registration provisions of the Securities Act—*Ripple*
- § 9:98.36 Distinguishing *Pontiac*, district court largely allows enforcement action against Binance to proceed—*SEC v. Binance*; subsequently, Atkins Commission sought dismissal of the case
- § 9:98.38 Second Circuit considers a platform purporting to exist solely in cyberspace: *Williams v. Binance*
- § 9:98.40 Dodd-Frank § 929P(b) and extraterritoriality: the remedies phase of *Terraform*
- § 9:98.42 Irrevocable liability in cryptocurrency transactions and the location of the first verifying node: *Block.one*
- § 9:99 Extraterritoriality and Dodd-Frank
- § 9:99.02 RICO

- § 9:99.04 Lanham Act
- § 9:99.06 Extraterritoriality and Rule 105 of Regulation M

VIII. CASE STUDIES

- § 9:100 U.S. issuer going public in Dubai
- § 9:101 U.S. issuer going public on Frankfurt Stock Exchange
- § 9:102 Investment funds
- § 9:103 Quasi-sovereign debt
- § 9:104 Special purpose acquisition corporations
- § 9:105 Mexican issuer/London Stock Exchange
- § 9:106 Dual-listed Chinese issuer (Hong Kong and Shanghai)
- § 9:107 Chinese issuer (Cayman holding company), Hong Kong listing
- § 9:108 Hong Kong issuer, Hong Kong listing

CHAPTER 10. CRYPTOCURRENCY

PART I. INTRODUCTION

- § 10:1 Introduction
- § 10:1.02 Introduction to significant recent cases
- § 10:2 Already functional utility tokens
- § 10:3 The “efforts of others” prong of *Howey*
- § 10:4 FinHub’s April 2019 Framework for “Investment Contract” Analysis of Digital Assets
- § 10:5 FinHub Framework: Reliance on the efforts of others
- § 10:6 FinHub Framework: Reasonable expectation of profits
- § 10:7 FinHub Framework: *Forman* considerations
- § 10:8 *TurnKey Jet*: First token offering no-action letter
- § 10:9 *Pocketful of Quarters*
- § 10:10 Applications
- § 10:11 Transitioning from security to non-security status
- § 10:12 Terminology primer

PART II. INITIAL COIN OFFERINGS

- § 10:13 The DAO: SEC’s Section 21(a) Report
- § 10:14 In the Matter of Munchee
- § 10:15 *Paragon Coin*
- § 10:16 *Rensel v. Centra Tech*
- § 10:17 *United States v. Zaslavskiy*
- § 10:18 *SEC v. Blockvest*: SEC loses motion for preliminary injunction
- § 10:19 *SEC v. Blockvest*: Court reconsiders and grants preliminary, then permanent, injunction
- § 10:20 The Tezos private civil litigation
- § 10:21 *Barksdale*

PART III. THE SAFT

- § 10:22 The SAFT
- § 10:23 The SAFT: “Metaphysical” considerations
- § 10:24 *Telegram*
- § 10:25 Kik Interactive, Inc. Wells submission

TABLE OF CONTENTS

- § 10:26 Kik: SEC complaint
- § 10:27 KIK: SEC wins summary judgment and the SAFT structure fails

PART IV. OTHER GENSLER-ERA ENFORCEMENT ACTIONS

- § 10:28 LBRY, Inc.
- § 10:29 Terraform Labs PTE Ltd.
- § 10:30 —SEC prevails on motion to dismiss in *Terraform*
- § 10:31 —SEC prevails on *Howey* and registration claims in summary judgment motion in *Terraform*
- § 10:32 —*Terraform*: postscript
- § 10:33 *SEC v. Ripple*
- § 10:34 —The Speech
- § 10:35 —Summary judgment motions granted in part and denied in part
- § 10:36 —Institutional sales
- § 10:37 —Programmatic sales
- § 10:38 —Other distributions
- § 10:39 —Larsen and Garlinghouse
- § 10:40 —Secondary market transactions
- § 10:40.02 —Postscript

PART V. CRYPTO-ASSET PLATFORMS

- § 10:41 Crypto-asset platforms: Introduction
- § 10:42 *SEC v. Binance Holdings Limited*: district court largely allows case to proceed, despite objections based on *Howey* and *Morrison*; Atkins Commission filed to dismiss case
- § 10:43 Williams v. Binance
- § 10:44 SEC v. Coinbase; Atkins Commission sought and obtained a dismissal of this case
- § 10:44.02 *Kraken*: Exchange of third-party tokens on secondary platforms; Atkins Commission filed to dismiss this case
- § 10:45 Custodial services for crypto assets

PART VI. CRYPTO-ASSET LENDING PLATFORMS

- § 10:46 BlockFi: Crypto Lending Platforms
- § 10:47 *SEC v. Genesis Global Capital LLC*

PART VII. MISCELLANEOUS

- § 10:48 *SEC v. Sun*
- § 10:49 Non-fungible tokens
- § 10:49.02 XRP futures
- § 10:50 Staking-as-a-service: *Kraken*
- § 10:51 Definition of “dealer” in connection with certain liquidity providers
- § 10:52 Alleged insider trading in crypto assets: The Wahi brothers
- § 10:53 Bankman-Fried, Ellison and Wang
- § 10:54 Financial Innovation and Technology for the 21st Century Act
- § 10:55 The *Ripple* class action: summary judgment ruling pyrrhic victory for Ripple?

PART VIII. SEC AND ADMINISTRATION POLICY ON CRYPTO ASSETS JANUARY 20, 2025 - Q3 2025

- § 10:56 Trump 2.0, Atkins, Peirce, and the pursuit of a new world order

- § 10:57 Staff of Atkins Commission quickly begins to liberalize crypto asset regulation in niche areas
- § 10:58 President’s Working Group on Digital Asset Markets (July 2025)
- § 10:59 A dissenting view

PART IX. LEGISLATION

A. STABLECOINS

- § 10:60 GENIUS Act (Stablecoins)

B. MARKET STRUCTURE

- § 10:61 Digital Market Clarity Act
- § 10:62 —Overview
- § 10:63 —Defined terms under the Securities Act
- § 10:64 —“Digital commodities” under the Commodity Exchange Act
- § 10:65 —Other defined terms under the Commodity Exchange Act
- § 10:66 —Investment contract assets
- § 10:67 —Securities Act exemption for primary transactions in digital commodities
- § 10:68 —SEC rulemaking for non-4(a)(8) primary offerings
- § 10:69 —Secondary transactions in digital commodities that originally involved investment contracts
- § 10:70 —End user distributions
- § 10:71 —Offers and sales of digital commodities by related and affiliated persons
- § 10:72 —Mature blockchain system requirements
- § 10:73 —Dual-registered entities
- § 10:74 —Registration for digital commodity intermediaries at the CFTC
- § 10:75 —Preemption
- § 10:76 —Antifraud provisions

CHAPTER 11. *[Reserved]*

CHAPTER 12. THE RULE 10B5-1(C) AFFIRMATIVE DEFENSE

- § 12:1 The Rule 10b5-1(c)(1) affirmative defense as initially adopted
- § 12:2 Rule 10b5-1(c) and the 2022 amendments
- § 12:3 Cooling-off periods
- § 12:4 Officer/director certifications/representations
- § 12:5 Multiple overlapping trading arrangements
- § 12:6 Sell-to-cover plans and instructions
- § 12:7 Single-trade arrangements: only one qualifying single trade plan per twelve-month period
- § 12:8 Modifications and cancellations under the proposed and final rules
- § 12:9 Requirement to act in good faith with respect to the plan
- § 12:10 Additional disclosure requirements
- § 12:11 Disclosure regarding insider trading policies
- § 12:12 Interplay of equity grants and release of MNPI
- § 12:13 Staff Accounting Bulletin No. 120
- § 12:14 Reporting gifts of securities under Section 16
- § 12:15 Checkbox on Forms 4 and 5 to identify transactions pursuant to trading arrangements

CHAPTER 13. CYBERSECURITY

- § 13:1 Introduction
- § 13:2 March 2025 hearing and correspondence presage likely house action
- § 13:3 Recent dissents by Republican Commissioners may presage SEC action
- § 13:4 Cybersecurity Disclosure in the 10-K and 20-F: risk management, strategy, and governance
- § 13:5 Reporting material cybersecurity incidents on Form 8-K
- § 13:6 Foreign private issuers
- § 13:7 Petition for rescission of SEC incident reporting rule
- § 13:8 Court largely credits company disclosure in aftermath of malware attack (*SolarWinds*)
- § 13:9 Fate of the SEC enforcement action against SolarWinds
- § 13:10 Gensler-era settled enforcement actions against companies impacted by the SolarWinds cyberattack
- § 13:11 Settled enforcement action for incomplete disclosures following ransomware attack
- § 13:12 Ransomware, internal controls and disclosure controls
- § 13:13 SEC sanctions foreign issuer after finding delayed and misleading disclosure following cyber breach
- § 13:14 SEC finds disclosure failures arising from massive data breach

CHAPTER 14. BENEFICIAL OWNERSHIP DISCLOSURE

- § 14:1 Amendments to Regulation 13D-G: introduction and background
- § 14:2 Accelerated timetable for filing initial 13D: Rule 13d-1(a)
- § 14:3 Acceleration of initial 13G filing deadlines for Qualified Institutional Investors, Exempt Investors and Passive Investors: Rules 13d-1(b), (c) and (d)
- § 14:4 Deadline for filing upon loss of 13G eligibility: Rule 13d-1(e), (f), and (g)
- § 14:5 13D and 13G amendments reflecting material changes: rules 13d-2(a) and (b)
- § 14:6 13G deadlines when beneficial ownership exceeds 10%: Rule 13d-2(c) and (d)
- § 14:7 13D-G deadline extended from 5:30 pm to 10 pm—Rule 13(a)(4) and 201(a) of Regulation S-T
- § 14:8 Cash-settled equity-based derivative securities
- § 14:9 Proposed carve-out for security-based swaps: further considerations
- § 14:10 Large trader position reporting rule for security-based swaps
- § 14:11 Groups: Amendments to Rule 13d-5
- § 14:12 Imputing post-formation acquisitions by individual group members to the group: rule 13d-5(b)(1)(iii) AND (b)(2)(ii)
- § 14:13 Tipping the impending filing of a schedule 13D: proposed rule 13d-5(b)(1)(ii)
- § 14:14 Rule 13d-6: exemptions
- § 14:15 Schedule 13D disclosure requirements

CHAPTER 15. CORPORATE GOVERNANCE AND THE FEDERAL SECURITIES LAWS

I. AUDIT AND OTHER BOARD COMMITTEES PRIOR TO SARBANES-OXLEY

A. CORPORATE GOVERNANCE AS AN INCIDENTAL CONCERN

- § 15:1 The structure of the corporate board

- § 15:2 Director's attendance and integrity
- § 15:2.10 Disclosure responsibilities of the directors

B. FOCUS ON THE AUDIT COMMITTEE

- § 15:3 Introduction
- § 15:4 Report of the blue ribbon panel
- § 15:5 Response of New York Stock Exchange and Nasdaq to the blue ribbon panel's recommendations
- § 15:6 Response of the AICPA
- § 15:7 Response of the Commission—Expanding the audit committee report

II. SARBANES-OXLEY AUDIT COMMITTEE REQUIREMENTS

A. PROVISIONS APPLICABLE TO ALL PUBLIC COMPANIES

- § 15:8 Audit committee administration of the engagement
- § 15:9 Auditors' report to the audit committee
- § 15:10 Disclosing expertise (or lack thereof) of members of audit committee

B. AUDIT COMMITTEE PROVISIONS APPLICABLE TO SROS LISTING STANDARDS

- § 15:11 Sarbanes-Oxley directive to the SEC
- § 15:12 Rule 10A-3—Composition and independence of audit committees of listed companies
- § 15:13 The affiliate aspect of independence under Rule 10A-3
- § 15:14 Commercial and family relationships
- § 15:15 Foreign private issuers
- § 15:16 Are the Rule 10A-3 independence standards all encompassing?
- § 15:17 Empowering the audit committee of listed companies
- § 15:18 Delisting and the opportunity to cure defects
- § 15:19 General exemptions

III. SRO COMPLIANCE WITH RULE 10A-3

- § 15:20 Introduction
- § 15:21 NYSE definition of independent director
- § 15:22 Nasdaq definition of independent director
- § 15:23 Audit committee responsibility and authority
- § 15:24 Status of other SROs

IV. OTHER CORPORATE GOVERNANCE INITIATIVES

A. COMPENSATION COMMITTEES, ADVISERS AND DODD-FRANK

- § 15:24.02 Compensation committees: overview
- § 15:24.04 Effective and compliance dates
- § 15:24.06 Compensation, compensation committees and independence
- § 15:24.08 Compensation advisers

B. NEW YORK STOCK EXCHANGE OTHER CORPORATE INITIATIVES

- § 15:25 Introduction

TABLE OF CONTENTS

- § 15:26 Majority of board to consist of independent directors
- § 15:27 Nominating/corporate governance and compensation committees
- § 15:27.02 Changes to NYSE's rules regarding compensation committees as a result of Dodd-Frank
- § 15:28 Executive sessions of non-management directors
- § 15:29 Required disclosures, CEO certification, and other matters
- § 15:29.02 ESG

C. NASDAQ OTHER CORPORATE GOVERNANCE INITIATIVES

- § 15:30 Majority of board to consist of independent directors
- § 15:31 Role of independent directors in nomination and compensation process
- § 15:31.02 Proposed changes to Nasdaq compensation rules
- § 15:32 Executive sessions of independent directors and other initiatives
- § 15:33 Foreign issuers
- § 15:33.02 The vacated Nasdaq Board Diversity Rule

D. OTHER CORPORATE GOVERNANCE PROVISIONS

- § 15:34 Disclosure of code of ethics or lack thereof
- § 15:35 Restricting loans to officers and directors
- § 15:35.02 Continuing emphasis on the role of the audit committee
- § 15:35.04 Employee and Director Hedging

V. SHAREHOLDER PROPOSALS AND CORPORATE DEMOCRACY

A. INTRODUCTION

- § 15:36 Rule 14a-8 and shareholder proposals
- § 15:37 Commission directs Division of Corporation finance to review and report on proxy rules and corporate democracy
- § 15:38 Commission adopts rules affecting proxy statements
- § 15:39 Shareholder communications to the board
- § 15:39.05 Division of Corporation Finance Staff Legal Bulletins 14A-14H

B. PROXY ACCESS

- § 15:40 SEC adopts proxy access; challenge in the D.C. Circuit
- § 15:41 Proxy access and shareholder proposals
- § 15:42 The Business Roundtable decision
- § 15:42.10 Aftermath of Business Roundtable
- § 15:43 *[Reserved]*

C. PROXY ACCESS SHAREHOLDER PROPOSALS FOLLOWING *BUSINESS ROUNDTABLE*

- § 15:43.50 Proxy access proposals post-*Business Roundtable*
- § 15:43.52 —Proxy access and shareholder proposals: further developments
- § 15:43.54 —2017 proxy season

D. SHORT SLATE EXPENSE REIMBURSEMENT PROPOSALS

- § 15:44 Introduction
- § 15:45 SEC reaches out to Delaware Supreme Court
- § 15:46 *[Reserved]*

§ 15:47 *[Reserved]*

E. OTHER AREAS

§ 15:48 *[Reserved]*

§ 15:49 *[Reserved]*

§ 15:50 “Say on pay” proposals in the limelight

§ 15:50.10 Clawbacks

§ 15:50.15 Auditor rotation

§ 15:50.20 Other corporate governance proposals

§ 15:50.22 Voting rights

VI. DODD-FRANK COMPENSATION AND GOVERNANCE PROVISIONS

§ 15:51 Overview

§ 15:51.02 Introduction to the SEC implementing rules

§ 15:51.04 Shareholder approval of executive compensation

§ 15:51.06 Say-on-frequency

§ 15:51.08 Shareholder proposals on pay and frequency

§ 15:51.10 Form 8-K and issuer decision on frequency

§ 15:51.12 Preliminary vs. definitive filing: Rule 14a-6

§ 15:51.14 Discretionary voting

§ 15:51.16 Disclosure and shareholder approval of golden parachute compensation

§ 15:51.18 Other features of Item 402(t)

§ 15:51.20 Other transactional disclosures

§ 15:51.22 Shareholder vote on golden parachutes

§ 15:51.24 Treatment of smaller reporting companies

§ 15:51.26 Say-on-pay in practice

§ 15:51.28 Say-on-pay litigation

§ 15:51.30 The JOBS Act

§ 15:52 Compensation committee independence

§ 15:53 Compensation consultants

§ 15:54 Executive compensation at financial institutions

§ 15:55 Reform Act—Discretionary voting

§ 15:56 Majority vote standard in uncontested director elections

§ 15:57 *[Reserved]*

§ 15:58 Independent board chair

§ 15:59 Clawbacks

§§ 15:60 to 15:69 *[Reserved]*

PART VII. PROXY ADVISORY FIRMS

§ 15:70 Proxy advisors: legislative and regulatory activity—Background

§ 15:71 Clayton Commission in 2020 adopts rules governing status of proxy advisers under the proxy rules

§ 15:72 Gensler Commission in 2022 largely overrides Clayton’s 2020 amendments

§ 15:73 Proxy advisor litigation filed by pro-industry groups

§ 15:74 —The Fifth Circuit decision

§ 15:75 —The Sixth Circuit opinion

§ 15:76 Court challenge to the definition of “solicitation” filed by ISS

TABLE OF CONTENTS

§§ 15:77 to 15:103 [*Reserved*]

VIII. RECOVERY OF EXECUTIVE COMPENSATION

A. SARBANES-OXLEY: SECTION 304 REIMBURSEMENT

§ 15:104 Section 304 reimbursement in the event of restatements—Who can bring an action

§ 15:105 What are the elements of a Section 304 action?

B. RECOVERY OF EXECUTIVE COMPENSATION UNDER DODD-FRANK

§ 15:106 Recovery of executive compensation under Dodd-Frank: Introduction

§ 15:107 Overview of Rule 10D-1

§ 15:108 The recovery policy

§ 15:109 Applicable time period

§ 15:110 Amount recoverable

§ 15:111 Issuer obligation to recover

§ 15:112 Inclusions and exclusions

§ 15:113 Compensation subject to recovery

§ 15:114 Disclosure

§ 15:115 Foreign private issuers

§ 15:116 Exhibits

§ 15:117 Transition issues

§ 15:117.02 NYSE listing rule on erroneously awarded compensation

§ 15:117.04 Nasdaq listing rule on erroneously awarded compensation

C. EXTRA-STATUTORY CLAWBACKS

§ 15:118 Corporate activity

IX. FEDERAL FORUM PROVISIONS; ARBITRATION CLAUSES

§ 15:119 Federal forum provisions and Securities Act claims: *Sciabacucchi v. Salzberg*—the lower court opinion

§ 15:120 Delaware Supreme Court in *Salzberg* recognizes the facial validity of federal forum charter provisions for claims under the Securities Act

§ 15:121 California upholds federal forum provision in Delaware charter requiring Securities Act claims to be brought in federal court: *Wong v. Restoration*

§ 15:122 Forum selection clauses and derivative actions—Seventh Circuit declines to enforce bylaw: *Seafarers Pension Plan*

§ 15:123 —Ninth Circuit determines bylaw is enforceable in *Lee v. Fisher*, creating circuit split

§ 15:124 California enforces forum selection clause even though investor would lose right to jury trial in the forum (Delaware) selected by the company

§ 15:125 Mandatory arbitration provisions and requests for acceleration

CHAPTER 16. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, SEC, FASB AND REGULATION OF ACCOUNTANTS

I. THE ROAD TO AN ACCOUNTING OVERSIGHT BOARD

A. PRELUDE

§ 16:1 Enron/WorldCom and financial fraud at Fortune 500 companies

- § 16:2 Prosecution of Arthur Andersen LLP for obstruction of justice
- § 16:3 SEC's short-lived proposal to create a public accounting board
- § 16:4 Adoption of Sarbanes-Oxley

B. END OF THE ROAD?

- § 16:4.25 Attack on Constitutionality of the PCAOB
- § 16:4.50 Majority holds two levels of for-cause removal unconstitutional
- § 16:4.75 Court saves PCAOB by making second level removable at will

II. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

A. STRUCTURE AND ORGANIZATION OF THE PCAOB

- § 16:5 Getting organized
- § 16:6 Steps to being declared organized and functioning
- § 16:7 SEC declares PCAOB organized and functioning
- § 16:8 By-laws and code of ethics
- § 16:9 Rule-making authority and procedures
- § 16:10 Funding of PCAOB and standard setting body
- § 16:11 Annual accounting support fee

B. REGISTRATION OF PUBLIC ACCOUNTING FIRMS

- § 16:12 Who has to register
- § 16:13 Foreign accounting firms
- § 16:14 Broker-dealer auditors and voluntary registrants
- § 16:15 The registration process and ramification
- § 16:16 Online registration/Form 1 registration application
- § 16:17 Frequently asked questions relating to registration

C. AUDITING, ATTESTATION, QUALITY CONTROL AND ETHICS STANDARDS

- § 16:18 Establishing auditing, attestation, quality control and ethics standards
- § 16:19 Adoption of interim professional standards
- § 16:20 Procedure for adopting professional standards
- § 16:20.02 Auditing Standard No. 1
- § 16:21 Audit documentation standard (Auditing Standard No. 3, AS 1215) and references in auditor's report to PCAOB auditing standards standard
- § 16:22 Testing for auditing, attestation, quality control and ethics standards
- § 16:22.02 The JOBS Act
- § 16:22.04 Proposed other information standard
- § 16:22.06 Framework for reorganization of PCAOB auditing standards—
Overview
- § 16:22.08 Update relating to Dodd-Frank and other miscellaneous updates
- § 16:22.10 —Related amendments to PCAOB standards

D. REORGANIZATION OF PCAOB AUDITING STANDARDS AND RELATED AMENDMENTS TO PCAOB AUDITING STANDARDS AND RULES

- § 16:22.14 Reorganization of PCAOB auditing standards: Introduction
- § 16:22.16 Reorganization of PCAOB auditing standards—Reorganized standards

TABLE OF CONTENTS

- § 16:22.18 —Changes to PCAOB standards and rules
- § 16:22.20 —Interim auditing standards
- § 16:22.22 —Interpretive publications
- § 16:22.24 —Other changes to PCAOB standards
- § 16:22.26 —Changes to PCAOB rules
- § 16:22.28 —Effective date

E. THE AUDITOR'S REPORT

- § 16:22.40 Introduction to the new auditor reporting standard
- § 16:22.42 Rulemaking history
- § 16:22.44 Critical audit matters
- § 16:22.46 Applicability of critical audit matter requirements
- § 16:22.48 Additional changes to the auditor's report
- § 16:22.50 Explanatory language required by other PCAOB standards
- § 16:22.52 Emphasis of a matter
- § 16:22.54 Amendments to other PCAOB standards
- § 16:22.56 Effective date
- § 16:22.58 The Effect of the Auditor Report Standards on Audit Committees
- § 16:22.60 PCAOB guidance on critical audit matters

F. AUDIT OF AND REPORT ON REGISTRANT'S INTERNAL CONTROL OVER FINANCIAL REPORTING

- § 16:23 The superseded Auditing Standard No. 2
- § 16:23.10 The Auditing Standard No. 2 crisis
- § 16:23.20 Compliance dates
- § 16:23.30 Newly public companies

G. AUDITING STANDARD NO. 5 (AS 2201)

- § 16:24 Introduction
- § 16:24.10 Integrating the audits of ICFR and financial statements
- § 16:24.20 Using a top-down approach
- § 16:24.30 Risk assessment
- § 16:25 Fraud assessment
- § 16:25.10 Scaling the audit
- § 16:25.20 Materiality and some other planning aspects
- § 16:25.30 Using work of others
- § 16:26 Identifying significant accounts and disclosures, and understanding likely sources of misstatement
- § 16:26.10 The ubiquitous walkthroughs
- § 16:26.20 Testing design and effectiveness of controls
- § 16:26.30 Definition of material weakness, deficiency, and significant deficiency
- § 16:27 Evaluating deficiencies and indicators of a material weakness
- § 16:27.10 Management's representation letter and communications by auditor to management
- § 16:27.20 The auditor's opinion
- § 16:28 Subsequent developments
- § 16:29 Quarterly changes in the company's ICFR and Section 302 certification
- § 16:29.10 PCAOB adopts Auditing Standard No. 4—Reporting on the elimination of material weaknesses
- § 16:30 Scope of the inspection

§ 16:31 Report of the inspection

§ 16:32 *[Reserved]*

H. PCAOB INVESTIGATIONS, DISCIPLINARY PROCEEDINGS AND SANCTIONS

§ 16:33 Investigations

§ 16:34 PCAOB disciplinary proceedings

§ 16:35 Disciplinary sanctions

§ 16:36 SEC review of disciplinary sanctions

§ 16:37 The stealth board

§ 16:37.01 Inspection of foreign accounting firms

§ 16:37.02 The Holding Foreign Companies Accountable Act and regulatory follow-up

§ 16:37.04 PCAOB and China reach agreement on audit inspections and investigations: problem solved?

III. AUDITOR INDEPENDENCE AND NON-AUDIT SERVICES

§ 16:38 SEC oversight and overlap with the PCAOB

§ 16:39 The SEC-Levitt reforms

§ 16:40 SOA proscription of non-audit services

§ 16:41 Commission defines proscribed non-audit services

§ 16:42 Wavering on tax services

§ 16:43 PCAOB adopts rules on auditors performing tax services for audit clients

§ 16:44 Administration of the engagement

§ 16:45 Disclosure of fees

§ 16:46 Rotation of partners on the audit engagement

§ 16:46.10 Ex-auditors as financial employees

§ 16:46.20 2020 amendments to auditor independence requirements

IV. OTHER ACCOUNTANT-RELATED SARBANES-OXLEY PROVISIONS

§ 16:47 SEC oversight of the PCAOB

§ 16:48 Rule 13b2-2(b)—Improper influence on conduct of audits

§ 16:49 Dealing with preservation of audit work papers, shredding documents and obstruction of justice

§ 16:49.02 Supreme Court construes SOX Section 802: *Yates*

V. SETTING ACCOUNTING STANDARDS

§ 16:50 The standard setting board and establishing accounting standards

§ 16:51 Commission designates FASB as the Sarbanes-Oxley standard setting board

§ 16:52 Will principles-based accounting standards reduce financial fraud?

APPENDICES

Appendix A. *[Reserved]*

Appendix B. *[Reserved]*

Appendix C. *[Reserved]*

TABLE OF CONTENTS

Appendix D. *[Reserved]*

Appendix E. *[Reserved]*

Appendix F. *[Reserved]*

Appendix G. *[Reserved]*

Appendix H. *[Reserved]*

Appendix I. *[Reserved]*

Appendix J. *[Reserved]*

Appendix K. *[Reserved]*

Appendix L. Sample SEC Plain English Comments

Appendix M. Offshore Offering Documentation

Appendix M-1. Sample Notice to Investors from Offshore Offering Memorandum

Appendix M-2. Sample Disclosure Concerning Book-Entry Procedures from
Offshore Offering Memorandum (Domestic Debt)

Appendix M-3. Sample Disclosure Concerning Book-Entry Procedures from
Offshore Offering Memorandum (Convertible Bonds)

Appendix M-4. Sample Disclosure From Offering Memorandum (Foreign
Sovereign Debt)

Appendix M-5. Cross-Border Transfer Restrictions

Appendix M-6. Transfer Restrictions Global Offering (Sample)

Appendix M-7. Transfer Restrictions (Sample)—Offering restrictions relating to
the U.S. and U.S. Persons

Appendix M-8. Transferee Letter (Sample) Section XI: U.S. Purchaser's Letter

Appendix N. Exxon-Capital Transaction Agreements

Appendix N-1. Purchase Agreement for Exxon-Capital Transaction

Appendix N-2. Registration Rights Agreement For Exxon-Capital Transaction

Appendix 1. *[Reserved]*

Appendix 2. *[Reserved]*

Appendix 2-1. Underwriting Agreement

Appendix 2-2. Underwriting Agreement (post-SORP)

Appendix 3. Agreement Among Underwriters

Appendix 3-1. SIFMA—Master Agreement Among Underwriters

Appendix 4. Selected Dealers Agreement

Appendix 4-1. Selected Dealer's Agreement

Appendix 5. SIFMA—Master Selected Dealers Agreement

Appendix 6. *[Reserved]*

Appendix 7. Underwriter's Warrant

Appendix 8. Lock-up Agreement

Appendix 9. Closing Memorandum

Appendix 10. *[Reserved]*

Appendix 11. *[Reserved]*

Appendix 12. Transmittal Letter to SEC for S-1 Filing Letterhead of Israel
Pincus LLP

- Appendix 13-1. Initial SEC Comment Letter on Form S-1
- Appendix 13-2. Registration Response to Initial Comment Letter and Transmittal Letter for Amendment No. 1
- Appendix 14. Sample SEC Comment Letter Re: Testing-the-Waters Under § 5(d); Forum Selection Clause; Cheap Stock
- Appendix 15. Sample Cheap Stock Letter
- Appendix 16. Sample “Blood Letter”
- Appendix 17. *[Reserved]*
- Appendix 18. *[Reserved]*
- Appendix 18-1. Response to SEC Comment Letter on Form S-1
- Appendix 18-2. Follow-up SEC Comment Letter
- Appendix 18-3. *[Reserved]*
- Appendix 18-4. Follow-up SEC Comment Letter
- Appendix 19-1. Request for Acceleration
- Appendix 19-2. Underwriters’ Request for Acceleration
- Appendix 19-3. Exchange Certification for Approval of Listing
- Appendix 19-4. Company’s Post-effective Letter to Underwriters
- Appendix 19-5. SEC Effectiveness Order
- Appendix 19-6. Press Release—IPO Launch
- Appendix 19-7. Press Release—IPO Pricing
- Appendix 19-8. Press Release—IPO Closing
- Appendix 20. Directors’ and Officers’ Questionnaire
- Appendix 21. Blue-Sky Memorandum
- Appendix 22. Sample Disclosures for At-the-Market Offering
- Appendix 23. Sales Agreement for At-the-Market Offering: Selected Provisions
- Appendix 24. *[Reserved]*
- Appendix 25. NASAA Statement of Policy Regarding Underwriting Expenses, Underwriter’s Warrants, Selling Expenses, and Selling Security Holders (*link*)
- Appendix 26. Statement of Policy Regarding Corporate Securities Definitions (*link*)
- Appendix 27. Cold Comfort Letter (for Reg S / 144A Offering)
- Appendix 28. Sample Auditor’s Report Reflecting Revised Standard (AS 3101)
- Appendix 29. *[Reserved]*
- Appendix 30. *[Reserved]*
- Appendix 31. *[Reserved]*
- Appendix 32. *[Reserved]*
- Appendix 33. *[Reserved]*
- Appendix 34. Regulation D—Subscription Agreement
- Appendix 35. Regulation D—Purchaser’s Questionnaire
- Appendix 36. Penny Stock Agreement (Public Offering)
- Appendix 37. Penny Stock Confirmation (Trading Transaction)
- Appendix 38. *[Reserved]*

TABLE OF CONTENTS

Appendix 39. *[Reserved]*

Appendix 40. *[Reserved]*

Appendix 41. *[Reserved]*

Appendix 41A. Rule 5110—Corporate Financing Rule ([link](#))

Appendix 42. FINRA No Objections Letter

Appendix 43. *[Reserved]*

Appendix 44. *[Reserved]*

Appendix 45. *[Reserved]*

Appendix 46. *[Reserved]*

Appendix 47. International Underwriting Documentation

Appendix 47A. International Underwriting Agreement

Appendix 47B. Agreement Among International Underwriters

Appendix 47C. Selling Group Agreement

Appendix 47D. Agreement Between U.S. and International Underwriters

Appendix 47E. Intersyndicate Agreement

Appendix 48. *[Reserved]*

Appendix 49. *[Reserved]*

Appendix 50. Rule 144A Offering Forms

Appendix 50A. Sample 144A Offering Chronology

Appendix 50B. Sample Offering Document Language Describing Book-Entry-Only Issuance

Appendix 50C. Sample 144A Resale Restrictions

Appendix 50D. 144A Tombstone

Appendix 50E. Sample Letter From Accredited Investors in Rule 144A Offering

Appendix 50F. Letter of Representations to DTC

Appendix 50G. Representations for 144A Securities

Appendix 50H. *[Reserved]*

Appendix 50I. Sample “Original Issue Discount” Disclosure

Appendix 50J. SAS72 Representation Letter from Initial Purchaser to Auditors Requesting Comfort Letter

Appendix 50K. Sample Final Pricing Term Sheet (Pricing Supplement)

Appendix 51. Sample Prospectus Term Sheet

Appendix 52. Use of Electronic Media for Delivery Purposes ([link](#))

Appendix 52A. Use of Electronic Media—Interpretative Release II ([link](#))

Appendix 52B. Use of Electronic Media—Interpretative Release III ([link](#))

Appendix 53. *[Reserved]*

Appendix 54. S-3 Registration Statement and Reoffering Prospectus (PIPE Transaction)

Appendix 54A. Underwriting Agreement with Selling Security Holder (PIPE Transaction)

Appendix 54B. Agreement Between Company and Selling Security Holder (PIPE Transaction)

Appendix 54C. Purchase and Registration Rights Agreement (PIPE)

- Appendix 55. Sample Form S-3ASR (Excerpts—Front Section)
- Appendix 55A. DTC Eligible Securities Requirements and Memorandum (*link*)
- Appendix 56. Rule 5130. Restrictions on the Purchase and Sale of Initial Equity Public Offerings (*link*)
- Appendix 56A. Notice to Members 03-79 Initial Public Offerings (IPOs) (*link*)
- Appendix 57. *[Reserved]*
- Appendix 58. Standards for Disclosure to Analysts
- Appendix 59A. *[Reserved]*
- Appendix 60. Sample Form SD
- Appendix 61. Sample 10-K Exhibit Index
- Appendix 62. *[Reserved]*
- Appendix 63. *[Reserved]*
- Appendix 64A. “Say-on-Pay” and “Say-on-Frequency” Proxy Statement Disclosure Sample (Kraft)
- Appendix 64B. “Say-on-Pay” and “Say-on-Frequency” Proxy Statement Disclosure Sample (IBM)
- Appendix 64C. Pay Versus Performance
- Appendix 65. JOBS Act Materials**
- Appendix 65A. Registration Statement Disclosure (Excerpts) for Emerging Growth Company (JOBS Act)
- Appendix 65B. Registration Statement Disclosure for Emerging Growth Company (JOBS Act)
- Appendix 65C. Registration Statement Risk Factor Disclosure for Emerging Growth Company (JOBS Act)
- Appendix 65D. Underwriting Agreement—Emerging Growth Company Issuer (JOBS Act)
- Appendix 65E. SEC Comment Letter—Emerging Growth Company (JOBS Act)
- Appendix 65F. Sample SEC Staff Comments Regarding Title I of the JOBS Act
- Appendix 65G. SEC Staff, Jumpstart Our Business Startups Act Frequently Asked Questions
- Appendix 65H. SEC, Draft Registration Statement Processing Procedures Expanded
- Appendix 65I. Expanded Draft Registration Statement Procedures
- Appendix 65J. Draft Registration Statements - FAQs
- Appendix 66. *[Reserved]*
- Appendix 67. Cybersecurity**
- Appendix 67A. Sample Staff Comments on Cybersecurity
- Appendix 68. FAST Act**
- Appendix 68A. Fixing America’s Surface Transportation (FAST) Act CDIs
- Appendix 69. FAST Announcement
- Appendix 70. FAST Act—Table of Contents to the Securities Provisions
- Appendix 71. FAST Act Transmittal Letter (Omitting Financial Information) for Registration Statement on Form S-1
- Appendix 72. *[Reserved]*

TABLE OF CONTENTS

Appendix 73. Cryptocurrency

Appendix 73A. Commissioner Peirce Token Safe Harbor Proposal

Appendix 74. Speech—American Leadership in the Digital Finance Revolution

Appendix 75. Excerpts from Binance Complaint Re Crypto Terms

Table of Laws and Rules

Table of Cases