

# Table of Contents

## CHAPTER 1. PROLOGUE

### PART I. BACKDROP

- § 1:1 Enron demise, financial reporting fraud, capital market malaise—A new direction for securities regulation
- § 1:2 President Bush responds
- § 1:3 Chairman Harvey Pitt accepts the President's challenge
- § 1:4 SEC score card—Pitt reassures the President
- § 1:5 Prosecution of Arthur Andersen LLP for obstruction of justice
- § 1:6 WorldCom's startling financial confession
- § 1:7 SEC orders 947 larger companies to certify under oath accuracy and completeness of Exchange Act filings
- § 1:8 SEC's short-lived proposal to create a public accounting board

### PART II. ADOPTION OF SARBANES-OXLEY

- § 1:9 The legislative road to Sarbanes-Oxley
- § 1:10 Overview of Sarbanes-Oxley

### PART III. IMPACT OF SARBANES-OXLEY ACT

- § 1:11 Introduction
- § 1:12 Impact on accountants, auditors, and accounting principles
- § 1:13 Impact on reporting under the '34 Act
- § 1:14 Impact on CEOs and CFOs
- § 1:15 Impact on boards of directors and corporate governance
- § 1:16 Impact on the SEC
- § 1:17 Impact on attorneys
- § 1:18 Impact on investment banks, research, and securities analysts
- § 1:19 Impact on private securities litigation
- § 1:20 Worthy of note
- § 1:21 Sarbanes-Oxley core provisions and implementing Rules
- § 1:22 Sarbanes-Oxley under attack

### PART IV. BACKGROUND TO THE JOBS ACT

- § 1:23 Introduction
- § 1:24 Legislative history: background
- § 1:25 Legislative history: Overview
- § 1:26 JOBS Act: The early returns

### PART V. THE FAST ACT

- § 1:27 The FAST Act: Overview

### PART VI. CONTEMPORARY TOPICS

- § 1:28 Public policy shift at the SEC
- § 1:29 Investor-driven initiatives

- § 1:30 *[Reserved]*
- § 1:31 The Regulatory Agenda: Regulatory Flexibility Act publications
- § 1:32 The SEC and the Unified Agenda
- § 1:33 Focus on costs of Sarbanes-Oxley
- § 1:34 Quarterly reporting, earnings releases and short-termism

## **PART VII. SMALLER REPORTING COMPANIES, THE 2018 AMENDMENTS AND THE SARBANES-OXLEY ACT**

- § 1:35 Introduction to SRC status determinations
- § 1:36 Determinations and disclosure of status
- § 1:37 Anticipated economic effects
- § 1:38 Initial qualification thresholds: Qualification based upon public float
- § 1:39 Subsequent qualification thresholds: Public float
- § 1:40 Initial qualification thresholds: “Lower revenue” companies
- § 1:41 Subsequent qualification thresholds: Revenue
- § 1:42 Subsequent qualification thresholds: Summary
- § 1:43 Interplay with emerging growth company rules
- § 1:44 Scaled disclosure accommodations
- § 1:45 Conclusion

## **CHAPTER 2. ATTACK ON CONSTITUTIONALITY OF THE PCAOB**

- § 2:1 Introduction
- § 2:2 The plaintiffs
- § 2:3 Issues before the District Court for District of Columbia
- § 2:4 Decision of Judge Robertson granting PCAOB’s motion for summary judgment
- § 2:5 Introduction to the D.C. Circuit opinions
- § 2:6 The issues simplified
- § 2:7 The Appointment Clause
- § 2:8 Supreme Court considers constitutionality of PCAOB
- § 2:9 Broad authority of the board
- § 2:10 This case is different
- § 2:11 Recounting of precedent
- § 2:12 Two levels of good-cause removal
- § 2:13 Control of functions not a substitute for removal of a board member
- § 2:14 A functional approach
- § 2:15 Court saves PCAOB by making second level removable at will
- § 2:16 The troublesome Section 404
- § 2:17 A new attack on the PCAOB

## **CHAPTER 3. ENHANCING RELIABILITY AND QUALITY OF COMPANY FINANCIAL AND OTHER REPORTS**

### **PART I. BACKGROUND**

- § 3:1 Introduction
- § 3:2 An overview of the Sections 302/404 regulatory scheme

### **PART II. SECTION 302 CERTIFICATION**

- § 3:3 Sarbanes-Oxley Section 302 certification of periodic reports of public companies

## TABLE OF CONTENTS

- § 3:4 —Overview of the Commission’s task and approach
- § 3:5 —The certification form
- § 3:6 —Certification as to accuracy and completeness of periodic reports
- § 3:7 —Certification and process of disclosure controls and procedures
- § 3:8 —Certification of internal control over financial reporting
- § 3:9 —Certification of investment company reports
- § 3:10 —Foreign private issuers
- § 3:11 —SEC enforcement for certifications of false statements
- § 3:12 —Private civil liability and scienter
- § 3:12.02 —Private civil liability opinion statements

### **PART III. DISCLOSURE CONTROLS AND PROCEDURES**

- § 3:13 Disclosure controls and procedures

### **PART IV. SECTION 906 CERTIFICATION AND CRIMINAL PENALTIES**

- § 3:14 Introduction
- § 3:15 SEC and Department of Justice make-do approach

### **PART V. SECTION 404 ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING**

- § 3:16 Introduction
- § 3:17 Commission implements Section 404 and the assessment of internal control over financial reporting
- § 3:18 The COSO framework
- § 3:19 The auditor’s attestation of internal control over financial reporting assessment
- § 3:20 The quarterly evaluation of changes in internal control over financial reporting
- § 3:21 Other Section 404 related matters
- § 3:22 Will the Section 404 assessment of internal control over financial reporting make a difference?
- § 3:23 AS 2805 and management’s representation letter to the auditors

### **PART VI. SECTION 404 IN OPERATION**

- § 3:24 Background: Initial compliance dates
- § 3:25 Early returns and consequences
- § 3:26 SEC and PCAOB respond with guidance
- § 3:27 SEC guidance
- § 3:28 Distinguishing pervasive from less serious material weaknesses
- § 3:29 Integrating audit of financial statements and audit of company’s internal control over financial reporting
- § 3:30 Drawing some fine lines—Communications of auditor with audit clients
- § 3:31 —Risk based approach and company level controls
- § 3:32 SEC staff suggested format for reporting material weaknesses
- § 3:33 Acquisitions and internal control over financial reporting
- § 3:34 Sample staff comments on ICFR

## **PART VII. THE ROAD TO SECTION 404 REVISIONS**

### **A. INTRODUCTION**

- § 3:35 Pre-2020 definition of large accelerated, accelerated, and non-accelerated filers
- § 3:36 Additional and amended Section 404 compliance dates

### **B. SMALLER BUSINESS COMPANIES**

- § 3:37 Formation and role of Advisory Committee on Smaller Business Companies
- § 3:38 Advisory Committee's recommendations on internal control over financial reporting

### **C. FOCUS ON RELIEF FOR NON-ACCELERATED FILERS**

- § 3:39 Second roundtable and the Commission's response
- § 3:40 PCAOB response to the second roundtable
- § 3:41 Commission's concept release
- § 3:42 COSO's Guidance for Smaller Business Companies

### **D. CONGRESS EXEMPTS SMALLER ISSUERS FROM SECTION 404(B)**

- § 3:43 Legislative exemption for non-accelerated filers

### **E. JOBS ACT EXEMPTION FROM SECTION 404(B)**

- § 3:44 Section 404(b) exemption for emerging growth companies

### **F. PROPOSED LEGISLATION**

- § 3:45 Financial CHOICE Act as passed by the House of Representatives
- § 3:46 Fostering Innovation Act of 2019

### **G. AMENDMENT TO ACCELERATED FILER DEFINITIONS AND CURTAILMENT OF AUDITOR ATTESTATIONS**

- § 3:47 Accelerated filers, large accelerated filers, and Section 404(b): Background
- § 3:48 Amendments to accelerated filer and large accelerated filer definitions; public commentary on Section 404(b) of SOX in response to 2016 request
- § 3:49 Commission amends accelerated/large accelerated filer definitions and curtails auditor attestations

## **PART VIII. COMMISSION'S AUTHORITATIVE ICFR GUIDANCE**

### **A. PRINCIPLES-BASED APPROACH**

- § 3:50 Introduction
- § 3:51 The two broad principles
- § 3:52 SEC guidance in outline

### **B. FINANCIAL REPORTING RISKS**

- § 3:53 Identifying financial reporting risks
- § 3:54 Identifying controls that address financial reporting risks
- § 3:55 Entity-level controls and information technology general controls

## C. EVALUATING DESIGN AND OPERATION OF CONTROLS

- § 3:56 ICFR design assessment
- § 3:57 Operating effectiveness of ICFR
- § 3:58 Testing and monitoring of controls

## D. REPORTING CONSIDERATIONS

- § 3:59 Documenting the assessment
- § 3:60 Determining whether deficiencies are a significant deficiency or a material weakness

## E. OTHER MATTERS

- § 3:61 Foreign private issuers
- § 3:62 Principles-based approach—Some comments

## PART IX. ENFORCEMENT

- § 3:63 Internal control deficiencies and the role of outside auditors
- § 3:64 Controls over integrity of portfolio valuations
- § 3:65 Failure to remediate internal control violations versus failure to disclose
- § 3:66 Failure to include full set of potentially affected transactions or total activity when assessing internal control over financial reporting
- § 3:67 Revenue recognition
- § 3:68 Control environment related to end-of-quarter sales incentives
- § 3:69 Material weaknesses relating to controls over automated systems and financial close processes
- § 3:69.02 ICFR and target companies in acquisitions

## PART X. CIVIL LITIGATION AND ICFR

- § 3:70 Introduction
- § 3:71 *PetroChina*
- § 3:72 *Kandi* in state court
- § 3:73 *Kandi* in federal court
- § 3:74 *Atlas Financial*
- § 3:74.02 *Amtrust/New England Carpenters*: Management reports as statements of opinion
- § 3:75 *In re GOL Linhas*: Timing issues relating to disclosure of ineffective ICFR
- § 3:76 *Spirit Aerosystems*: Potential for private civil liability arising from ICFR disclosure and certifications; dismissal based upon failure adequately to plead scienter

## PART XI. RELATED MATTERS

- § 3:77 Internal control provisions of the FCPA and modern era cyber fraud
- Appendix 3.1. Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports
- Appendix 3.2. Staff Statement on Management's Report on Internal Control Over Financial Reporting
- Appendix 3.3. Management's Assessment of Internal Control Over Financial Reporting—Effective Controls—Illustration

- Appendix 3.4. Management Assessment of Ineffective Internal Control Over Financial Reporting—Illustration
- Appendix 3.5. Management Assessment of Ineffective Internal Control Over Financial Reporting—Alternative Illustration
- Appendix 3.6. Auditors’ Report and Opinion Including Opinion on Internal Control Over Financial Reporting—ICFR Ineffective—Illustration

## **CHAPTER 4. INTERNAL CONTROL OVER FINANCIAL REPORTING**

### **PART I. INTRODUCTION**

#### **A. OVERVIEW OF THE SARBANES-OXLEY ACT**

- § 4:1 Introduction
- § 4:2 Overview of exemptions from the auditor attestation requirement

### **PART II. INTERNAL ACCOUNTING CONTROL REQUIREMENTS BEFORE ENACTMENT OF SARBANES-OXLEY**

- § 4:3 “Internal accounting controls” required by the Foreign Corrupt Practices Act
- § 4:4 In 1979 and 1988 the SEC proposed rules that would have required management and auditors to assess an issuer’s internal accounting controls
- § 4:5 Federal Deposit Insurance Corporation Improvement Act of 1991 requiring banks to file a management report and an auditor attestation on their internal control structure and procedures for financial reporting

### **PART III. SARBANES-OXLEY REQUIREMENTS FOR INTERNAL CONTROL STRUCTURE AND PROCEDURES FOR FINANCIAL REPORTING**

#### **A. SECTION 404 OF SARBANES-OXLEY**

- § 4:6 Introduction
- § 4:7 Section 404(a) requirement for an internal control report
- § 4:8 Section 404(b) requirement for an auditor attestation report
- § 4:9 The intent of Congress in enacting the auditor attestation requirement

### **PART IV. SEC IMPLEMENTATION OF SARBANES-OXLEY**

#### **A. SEC DEFINITION OF THE TERM “INTERNAL CONTROL OVER FINANCIAL REPORTING”**

- § 4:10 Overview

#### **B. SEC REQUIREMENTS FOR REGISTRANTS TO MAINTAIN INTERNAL CONTROL OVER FINANCIAL REPORTING**

- § 4:11 Exchange Act Rule 13a-15(a)

### **PART V. ANNUAL EVALUATION OF AND REPORT ON THE EFFECTIVENESS OF ICFR**

#### **A. ANNUAL EVALUATION**

- § 4:12 Introduction

## TABLE OF CONTENTS

§ 4:13	The nature of the evaluation
§ 4:14	The “Internal Control—Integrated Framework” of the Committee of Sponsoring Organizations of the Treadway Commission
§ 4:15	Commission guidance on management’s evaluation of its internal control over financial reporting
 <b>B. MANAGEMENT’S ANNUAL REPORT ON THE EFFECTIVENESS OF ITS INTERNAL CONTROL OVER FINANCIAL REPORTING</b>	
§ 4:16	Introduction
§ 4:17	The four components of management’s annual report on internal control over financial reporting
§ 4:18	Evidence supporting management’s assessment
 <b>PART VI. QUARTERLY EVALUATION AND DISCLOSURE OF MATERIAL CHANGES IN THE ISSUER’S INTERNAL CONTROL OVER FINANCIAL REPORTING</b>	
<b>A. OVERVIEW</b>	
§ 4:19	Introduction
§ 4:20	Quarterly evaluation of material changes in internal control over financial reporting
 <b>B. QUARTERLY DISCLOSURE OF MATERIAL CHANGES IN INTERNAL CONTROL OVER FINANCIAL REPORTING</b>	
§ 4:21	Disclosure Requirements
 <b>PART VII. CEO AND CFO CERTIFICATION OF QUARTERLY AND ANNUAL REPORTS</b>	
<b>A. OVERVIEW</b>	
§ 4:22	Introduction
§ 4:23	Representations regarding internal control over financial reporting
§ 4:24	Representation regarding material changes in internal control over financial reporting
§ 4:25	Representation regarding disclosure to the auditors and the audit committee
§ 4:26	Other representations
 <b>PART VIII. SEC AND PCAOB REQUIREMENTS FOR THE AUDITOR ATTESTATION REPORT</b>	
<b>A. SEC REQUIREMENTS FOR THE AUDITOR ATTESTATION REPORT</b>	
§ 4:27	Overview of the SEC requirements
 <b>B. PCAOB STANDARDS FOR AUDITS OF INTERNAL CONTROL OVER FINANCIAL REPORTING</b>	
§ 4:28	Overview of PCAOB standards
 <b>C. 2023 PCAOB UPDATE OF ATTESTATION STANDARDS</b>	
§ 4:29	Overview



**PART IX. EXEMPTIONS FROM SARBANES-OXLEY'S  
REQUIREMENT FOR AUDITOR ATTESTATION  
REPORTS**

**A. THE SEC DELAYED IMPLEMENTATION OF SECTION 404(B)  
OF SARBANES-OXLEY FOR NON-ACCELERATED FILERS**

§ 4:30 Overview

**B. DODD-FRANK'S EXEMPTION FROM THE AUDITOR  
ATTESTATION REQUIREMENT FOR NON-ACCELERATED  
FILERS**

§ 4:31 Congress in 2010 provides an exemption in Dodd-Frank

**C. 2011 SEC STAFF STUDY ON THE BURDEN OF COMPLIANCE  
WITH THE AUDITOR ATTESTATION REQUIREMENTS**

§ 4:32 Summary of the 2011 SEC Study

**D. 2013 GAO STUDY ON THE IMPACT OF DODD-FRANK  
EXEMPTIONS FROM THE AUDITOR ATTESTATION  
REQUIREMENTS**

§ 4:33 Overview of 2013 GAO Report

**E. IN 2012 CONGRESS CREATED A SECOND EXEMPTION FROM  
THE AUDITOR ATTESTATION REPORT REQUIREMENT FOR  
EMERGING GROWTH COMPANIES**

§ 4:34 Exemption in the JOBS Act for emerging growth companies

**F. 2018 SEC EXPANSION OF THE DEFINITION OF A "SMALLER  
REPORTING COMPANY"**

§ 4:35 Overview of the amended definition of "smaller reporting company"

**G. 2020 SEC AMENDMENTS WIDENING THE DODD-FRANK  
EXEMPTION FOR NON-ACCELERATED FILERS BY  
NARROWING THE DEFINITIONS OF "ACCELERATED FILER"  
AND "LARGE ACCELERATED FILER"**

§ 4:36 Introduction

§ 4:37 The New Definitions of "Accelerated Filers" and "Large Accelerated Filers"

§ 4:38 The Commission's reasons for narrowing the definitions

§ 4:39 The limited but lasting impact of the SEC's expansion of the Dodd-Frank  
exemption

§ 4:40 Objections to the Commission's Expanded Exemption

**PART X. TRENDS IN MANAGEMENT AND AUDITOR  
ATTESTATION REPORTS ON INTERNAL CONTROL  
OVER FINANCIAL REPORTING**

§ 4:41 Introduction

§ 4:42 Auditor attestation and management reports on ICFR for 2021



## TABLE OF CONTENTS

- § 4:43 Trends in auditor attestation and management reports on ICFR for the period from 2004 to 2021
- § 4:44 Conclusion

## **PART XI. TRENDS IN THE QUALITY OF AUDITS OF INTERNAL CONTROL OVER FINANCIAL REPORTING**

### **A. PCAOB INSPECTIONS OF AUDITS**

- § 4:45 Introduction
- § 4:46 Basis for PCAOB finding of deficiencies in ICFR audits
- § 4:47 Areas of ICFR audit deficiencies
- § 4:48 Types of deficiencies in ICFR audits

## **PART XII. TRENDS IN FINANCIAL RESTATEMENTS**

### **A. RECENT RESTATEMENTS**

- § 4:49 Overview

## **PART XIII. SEC ENFORCEMENT OF ICFR REQUIREMENTS**

### **A. OVERVIEW**

- § 4:50 Introduction

### **B. 2013 CASE AGAINST JPMORGAN CHASE BASED UPON TRADING LOSSES INVOLVING THE LONDON WHALE**

- § 4:51 Introduction
- § 4:52 SEC action
- § 4:53 Sanctions
- § 4:54 Other sanctions

### **C. 2018 REPORT OF INVESTIGATION ON INCLUDING CYBER SECURITY IN DESIGNING INTERNAL CONTROL OVER FINANCIAL REPORTING**

- § 4:55 Introduction
- § 4:56 Including cybersecurity in internal controls

### **D. 2019 GROUP OF CASES AGAINST FOUR ISSUERS**

- § 4:57 Introduction
- § 4:58 Sarbanes-Oxley requires both disclosure and remediation
- § 4:59 Conclusion

### **E. 2019 CASE AGAINST METLIFE**

- § 4:60 Introduction
- § 4:61 The violations
- § 4:62 The terms of the SEC settlement

## **PART XIV. CONCLUSION**

### **A. OVERVIEW**

- § 4:63 Perspective on Sarbanes-Oxley's requirements on internal control over financial reporting

## **CHAPTER 5. CORPORATE GOVERNANCE**

### **PART I. OVERVIEW**

#### **A. BACKGROUND**

- § 5:1 Overview
- § 5:2 Report of the blue ribbon panel

### **PART II. SARBANES-OXLEY SRO AUDIT COMMITTEE LISTING REQUIREMENTS**

#### **A. DIRECTIVE TO THE COMMISSION**

- § 5:3 Sarbanes-Oxley SRO audit committee requirements

#### **B. SEC ADOPTS RULE 10A-3**

- § 5:4 Rule 10A-3—Composition and independence of audit committees of listed companies
- § 5:5 —The affiliate aspect of independence under Rule 10A-3
- § 5:6 —Commercial and family relationships
- § 5:7 —Foreign private issuers
- § 5:8 Are the Rule 10A-3 independence standards all encompassing?
- § 5:9 Delisting and the opportunity to cure defects
- § 5:10 General exemptions
- § 5:11 Audit committee report

#### **C. SRO COMPLIANCE WITH RULE 10A-3**

- § 5:12 Introduction
- § 5:13 NYSE definition of independent director
- § 5:14 Nasdaq definition of independent director
- § 5:15 Audit committee authority and responsibility
- § 5:16 Status of other SROs

### **PART III. OTHER CORPORATE GOVERNANCE ISSUES**

#### **A. COMPENSATION COMMITTEES, ADVISORS AND DODD-FRANK**

- § 5:17 Compensation committees: overview
- § 5:18 Effective and compliance dates
- § 5:19 Compensation, compensation committees, and independence
- § 5:20 Compensation advisers
- § 5:21 Background: Prior compensation committee and consultant disclosure
- § 5:22 New disclosure rule concerning compensation consultants

#### **B. NYSE OTHER CORPORATE GOVERNANCE INITIATIVES**

- § 5:23 Introduction
- § 5:24 Majority of board to consist of independent directors
- § 5:25 Nominating/corporate governance and compensation committees
- § 5:26 Changes to NYSE's rules regarding compensation committees as a result of Dodd-Frank

## TABLE OF CONTENTS

- § 5:27 Executive sessions of non-management directors
- § 5:28 Required disclosures, CEO certification, and other matters
- § 5:29 Table comparing Rule 303A to previous corporate governance rules
- § 5:30 Discretionary voting
- § 5:30.02 ESG

### C. NASDAQ CORPORATE GOVERNANCE INITIATIVES

- § 5:31 Introduction
- § 5:32 Majority of board to consist of independent directors
- § 5:33 Role of independent directors in nomination and compensation process
- § 5:34 Changes to Nasdaq compensation rules
- § 5:35 Executive sessions of independent directors and other initiatives
- § 5:36 Foreign issuers
- § 5:37 Golden leash disclosure
- § 5:37.02 The vacated Nasdaq Board Diversity Rule

## PART IV. SHAREHOLDER APPROVAL OF EQUITY COMPENSATION PLANS

- § 5:38 NYSE and Nasdaq enlarge role of shareholders
- § 5:39 Nasdaq revised Rule 4350 and related interpretation—Shareholder approval of equity compensation plans
- § 5:40 NYSE Company Listing Manual Section 308A(8)—Shareholder approval of equity compensation plans
- § 5:41 NYSE restrictions on broker-dealers voting shares of beneficial owners

## PART V. OTHER CORPORATE GOVERNANCE PROVISIONS

- § 5:42 Disclosing expertise (or lack thereof) of members of audit committee
- § 5:43 The audit committee report
- § 5:44 SEC concept release regarding possible enhanced audit committee disclosures
- § 5:45 Continuing emphasis on the role of the audit committee
- § 5:46 Disclosure of code of ethics or lack thereof
- § 5:47 Restricting loans to officers and directors
- § 5:48 Voting rights

## PART VI. PROXY RULES AND CORPORATE DEMOCRACY

### A. IMPROVING COMMUNICATIONS OF SHAREHOLDERS WITH THE BOARD

- § 5:49 Commission reviews proxy rules and corporate democracy
- § 5:50 Commission expands disclosure relating to the nominating process
- § 5:51 Shareholder communications to the board

### B. SHAREHOLDER NOMINEE PROCESS

- § 5:52 Security holder nominee (proxy access) proposal
- § 5:53 Other triggering events—Proposed or considered
- § 5:54 Proxy access proposal
- § 5:55 SEC adopts proxy access; challenge in D.C. Circuit
- § 5:56 Proxy access and shareholder proposals

- § 5:57 The *Business Roundtable* decision
- § 5:58 Standard of review: Arbitrary and capricious
- § 5:59 Consideration of efficiency, competition and capital formation
- § 5:60 Prior case law
- § 5:61 Aftermath of *Business Roundtable*
- § 5:62 Critique

#### C. SHARHOLDER PROPOSALS, PROXY ACCESS AND CORPORATE GOVERNANCE

- § 5:63 Introduction
- § 5:64 Proxy access: recent letters
- § 5:65 Proxy access: further developments
- § 5:66 Other corporate governance proposals
- § 5:67 More stringent procedural requirements for shareholder proposals: here today, gone tomorrow?

#### D. OTHER

- § 5:68 Universal proxy

## CHAPTER 6. PROFESSIONAL RESPONSIBILITY OF ATTORNEYS

### PART I. OVERVIEW

- § 6:1 Introduction
- § 6:2 The well-kept secret—SEC ignored “improper professional conduct” of attorneys
- § 6:3 Professional responsibility of securities practitioners—Section 307 and the obligation to go-up-the-[corporate]-ladder

### PART II. PART 205—RULES IMPLEMENTING SECTION 307

#### A. COMMISSION ADOPTS RULES IMPLEMENTING SECTION 307

- § 6:4 Proposal and response
- § 6:5 The daunting task

#### B. SOME IMPORTANT DEFINITIONS

- § 6:6 Definition of an issuer
- § 6:7 Appearing and practicing before the Commission
- § 6:8 Definition of attorney
- § 6:9 Representation of an issuer
- § 6:10 Definition of evidence of a material violation

#### C. GOING UP-THE-LADDER

- § 6:11 From subordinate attorney to supervising attorney
- § 6:12 From supervising attorney to the Chief Legal Officer
- § 6:13 The slippery slope—Connecting the dots

#### D. ROLE AND OBLIGATION OF ATTORNEYS DIRECTED OR RETAINED TO INVESTIGATE/DEFEND

- § 6:14 Attorney investigating evidence of a material violation

## TABLE OF CONTENTS

- § 6:15 The attorney defending the issuer, or the issuer's officers, directors, employees or agent

### E. APPROPRIATE RESPONSE

- § 6:16 Appropriate response to the reporting attorney absent pending investigation or proceeding
- § 6:17 Colorable defense as an appropriate response to the reporting attorney

### F. RESPONSIBILITIES OF THE CHIEF LEGAL OFFICER

- § 6:18 In general
- § 6:19 When CLO retains or directs an attorney to investigate/defend

### G. THE QUALIFIED LEGAL COMPLIANCE COMMITTEE ROUTE

- § 6:20 Structure of Legal Compliance Committee
- § 6:21 Involving the QLCC
- § 6:22 Authority and responsibility of the QLCC

### H. VIOLATIONS OF PART 205

- § 6:23 Sanctions for violations of any provision of Part 205
- § 6:24 No private actions

### I. NOISY WITHDRAWAL PROVISIONS AND OTHER MATTERS

- § 6:25 Remnants of noisy withdrawal
- § 6:26 The repropose noisy withdrawal provision
- § 6:27 Some other matters
- § 6:28 ABA task force on corporate responsibility

## CHAPTER 7. REPORTING UNDER THE EXCHANGE ACT

### PART I. INTRODUCTION

- § 7:1 From afterthought to central stage
- § 7:2 The Sarbanes-Oxley difference

### PART II. ACCOUNTING DISCLOSURES

#### A. INTRODUCTION

- § 7:3 Sarbanes-Oxley disclosure directives

#### B. NON-GAAP MEASURES

- § 7:4 Sarbanes-Oxley and pro-forma (non-GAAP) financial measures
- § 7:5 Regulation G and non-GAAP financial measures in public announcements
- § 7:6 Form 8-K Item 2.02 and earnings release including NGFM
- § 7:7 Non-GAAP financial measures in filed documents
- § 7:8 NGMF and foreign private issuers
- § 7:9 Initial staff guidance regarding use of NGFM
- § 7:10 SEC increases scrutiny of Regulation G compliance; issues C&DIs
- § 7:10.10 Enforcement actions involving non-GAAP measures

- § 7:11 Examples of compliance issues addressed by SEC comment letters

### C. OTHER ACCOUNTING DISCLOSURES

- § 7:12 Introduction to SPEs and off-balance sheet transactions  
 § 7:13 The Sarbanes-Oxley Act—Disclosure of off-balance sheet transactions  
 § 7:14 Sarbanes-Oxley required study of special purpose entities  
 § 7:15 Impact of the 2017 tax legislation on financial reporting and disclosure  
 § 7:16 Form 10-Q  
 § 7:17 Revenue recognition

## PART III. ACCELERATED FILINGS AND ENHANCED REVIEW

### A. SECTION 16(A) (FORMS 3, 4, AND 5) REPORTS

- § 7:18 Accelerating disclosure of trading by insiders (Forms 3, 4, and 5)  
 § 7:19 Section 16(a) reports and EDGAR  
 § 7:20 Using the Forms 3, 4, and 5 OnlineForms Edgar Filing Web site  
 § 7:21 Mandatory posting on company Web site  
 § 7:22 Reduced content XML submissions  
 § 7:23 Obtaining access codes

### B. ACCELERATED FILING AND ENHANCED REVIEW OF PERIODIC REPORTS

- § 7:24 Accelerated Form 10-K and 10-Q reports for certain issuers  
 § 7:25 Enhanced review of periodic reports

## PART IV. REAL-TIME REPORTING AND THE MAKEOVER OF FORM 8-K

### A. INTRODUCTION

- § 7:26 Sarbanes-Oxley real-time disclosures  
 § 7:27 An overview of the Form 8-K makeover

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

- § 7:28 Item 1.01. Entry into a material definitive agreement  
 § 7:29 Item 1.02. Termination of a material definitive agreement  
 § 7:30 Item 1.03. Bankruptcy or receivership

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

- § 7:31 Item 2.01. Completion of acquisition or disposition of assets  
 § 7:32 Item 2.02. Results of Operations and Financial Condition  
 § 7:33 Item 2.03. Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement of a registrant  
 § 7:34 Item 2.04. Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement  
 § 7:35 Item 2.05. Costs associated with exit or disposal activities  
 § 7:36 Item 2.06. Material impairments

## TABLE OF CONTENTS

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

- § 7:37 Item 3.01. Notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing
- § 7:38 Item 3.02. Unregistered sales of equity securities
- § 7:39 Item 3.03. Material modification to rights of security holders

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

- § 7:40 Item 4.01. Changes in registrants certifying accountant
- § 7:41 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

- § 7:42 Item 5.01. Changes in control of registrant
- § 7:43 Item 5.02. Departure of directors or principal officers; election of directors; appointment of principal officers
- § 7:44 Item 5.03. Amendments to articles of incorporation or bylaws; change in fiscal year
- § 7:45 Item 5.04. Temporary suspension of trading under registrants employee benefit plans
- § 7:46 Item 5.05. Amendments to the Registrants Code of Ethics, or Waiver of a Provision of the Code of Ethics
- § 7:47 Item 5.06. Change in shell company status

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

- § 7:48 Item 7.01. Regulation FD Disclosure
- § 7:49 Item 8.01. Other events
- § 7:50 Item 9.01. Financial statements and exhibits
- § 7:51 Financial statements of businesses acquired or to be acquired
- § 7:52 Hyperlinks
- § 7:53 Structured disclosure

## PART V. EMERGING GROWTH COMPANIES

- § 7:54 Emerging growth companies
- § 7:55 Disclosure obligations: in general
- § 7:56 Disclosure obligations: executive compensation
- § 7:57 Disclosure obligations: Financial information
- § 7:58 Omission of certain financial information prior to IPO
- § 7:59 Extension of time to comply with new financial accounting standards
- § 7:60 Audit of internal control over financial reporting
- § 7:61 Auditing standards
- § 7:62 Opt-in right for emerging growth companies
- § 7:63 General staff comment; sample risk factor
- § 7:64 Confidential submission of draft registration statement
- § 7:65 Section 12(g) amendments
- § 7:66 Staff study on 12(g)



§ 7:67 Other FAST Act provisions

## **CHAPTER 8. THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD**

### **PART I. STRUCTURE, RULES, AND FUNCTIONS**

#### **A. ORGANIZATION AND RULE-MAKING**

- § 8:1 PCAOB—Selecting members of the board
- § 8:2 Status of the board
- § 8:3 PCAOB—Steps prerequisite to being organized and functional
- § 8:4 PCAOB—SEC declares PCAOB organized and functioning
- § 8:5 PCAOB by-laws and code of ethics
- § 8:6 Funding of PCAOB
- § 8:7 PCAOB establishes procedure for determining annual accounting support fee
- § 8:8 PCAOB rule-making authority and procedures

#### **B. REGISTRATION OF PUBLIC ACCOUNTING FIRMS**

- § 8:9 PCAOB—Which accounting firms have to register
- § 8:10 Broker-dealer auditors and voluntary registrants
- § 8:11 The registration process and ramifications
- § 8:12 PCAOB—Online registration
- § 8:13 Form 1 registration application
- § 8:14 PCAOB—Processing registration applications

### **PART II. AUDITING, ATTESTATION, QUALITY CONTROL, AND ETHICS STANDARDS**

- § 8:15 Establishing auditing, attestation, quality control and ethics standards
- § 8:16 PCAOB—Adoption of interim professional standards
- § 8:17 PCAOB announces procedure for adopting professional standards
- § 8:18 Adoption of Auditing Standard No. 1
- § 8:19 Testing for auditing, attestation, quality control and ethics standards
- § 8:20 Developments in 2015-2016
- § 8:21 Reorganization of PCAOB auditing standards: Introduction
- § 8:22 —Reorganized standards
- § 8:23 —Changes to PCAOB standards and rules
- § 8:24 —Changes to PCAOB standards
- § 8:25 —Interim auditing standards
- § 8:26 —Interpretive publications
- § 8:27 —Other changes to PCAOB standards
- § 8:28 —Changes to PCAOB rules
- § 8:29 —Effective date

### **PART III. AS 2201—AN AUDIT OF INTERNAL CONTROL OVER FINANCIAL REPORTING THAT IS INTEGRATED WITH AN AUDIT OF FINANCIAL STATEMENTS**

#### **A. INTRODUCTION**

- § 8:30 Superseded AS-2—Prelude to adoption of AS-5 (AS 2201)

## TABLE OF CONTENTS

§ 8:31 Alignment of AS-5 with SEC guidance

### B. OVERVIEW

§ 8:32 Introduction to AS 2201  
§ 8:33 Integrating the audits of ICFR and financial statements  
§ 8:34 Using a top-down approach  
§ 8:35 Risk and fraud assessment  
§ 8:36 Scaling the audit  
§ 8:37 Materiality and some other planning aspects

### C. USING WORK OF OTHERS

§ 8:38 Introduction  
§ 8:39 Identifying significant accounts and disclosures, and understanding likely sources of misstatement  
§ 8:40 The ubiquitous walkthroughs  
§ 8:41 Testing design and effectiveness of controls

### D. MATERIAL WEAKNESS

§ 8:42 Definition of material weakness, deficiency, and significant deficiency  
§ 8:43 Evaluating deficiencies and indicators of a material weakness

### E. THE OPINION PROCESS AND THE OPINION LETTER

§ 8:44 Management's representation letter and communications by auditor to management  
§ 8:45 The auditor's opinion  
§ 8:46 Subsequent developments

### F. FURTHER PCAOB DEVELOPMENTS CONCERNING THE AUDIT OF ICFR

§ 8:47 Staff Guidance for Auditors of Smaller Public Companies  
§ 8:48 Staff Audit Practice Alert No. 11  
§ 8:49 AS 2201 and the audit committee  
§ 8:50 Auditor's report when management's report on ICFR is not audited and not required to be audited

## PART IV. THE AUDITOR'S REPORT

§ 8:51 Introduction to the new auditor reporting standard  
§ 8:52 Rulemaking history  
§ 8:53 Critical audit matters  
§ 8:54 Applicability of critical audit matter requirements  
§ 8:55 Additional changes to the auditor's report  
§ 8:56 Explanatory language required by other PCAOB standards  
§ 8:57 Emphasis of a matter  
§ 8:58 Amendments to other PCAOB standards  
§ 8:59 Effective date  
§ 8:60 The Effect of the Auditor Report Standards on Audit Committees  
§ 8:61 PCAOB guidance on critical audit matters  
§ 8:61.02 The audit report and private civil litigation

## **PART V. PCAOB INSPECTIONS, INVESTIGATIONS, AND DISCIPLINARY PROCEEDINGS**

### **A. INSPECTIONS OF REGISTERED PUBLIC ACCOUNTING FIRMS**

- § 8:62 Scope of the inspection
- § 8:63 Report of the inspection
- § 8:64 Inspections relating to audits of broker-dealers

### **B. PCAOB INVESTIGATIONS, DISCIPLINARY PROCEEDINGS, AND SANCTIONS**

- § 8:65 Investigations
- § 8:66 PCAOB disciplinary proceedings
- § 8:67 Disciplinary sanctions
- § 8:68 Inspection of, investigations of, and imposing disciplinary sanctions on foreign accounting firms
- § 8:69 The Holding Foreign Companies Accountable Act and regulatory follow-up
- § 8:70 PCAOB and China reach agreement on audit inspections and investigations: problem solved?
- § 8:71 SEC review of disciplinary sanctions
- § 8:72 The stealth board

Appendix 8.1. Illustrative Reports—Auditor’s Opinion on Financial Statements

Appendix 8.2. Report of Independent Registered Public Accounting Firm

## **CHAPTER 9. SEC AND PUBLIC ACCOUNTANTS**

### **PART I. SEC’S OVERSIGHT ROLE**

#### **A. REGULATION OF ACCOUNTANTS**

- § 9:1 Oversight of and overlap with the PCAOB
- § 9:2 Disqualification of accountants for improper professional conduct
- § 9:3 The *Checkosky* saga
- § 9:4 The improper professional conduct standard for accountants
- § 9:5 *Checkosky* revisited
- § 9:6 Focus on miscreant accountants
- § 9:7 Section 10A of the Exchange Act and duty of the auditor to detect fraud
- § 9:8 Case study
- § 9:8.02 Borgers and BF Borgers barred from practice before the Commission for alleged pattern of audit failures
- § 9:9 Dealing with preservation of audit workpapers, shredding documents, and obstruction of justice

#### **B. AUDITOR INDEPENDENCE, NON-AUDIT SERVICES; LIMITING AUDITOR CONFLICTS**

- § 9:10 The SEC-Levitt reforms
- § 9:11 SOA proscription of non-audit services
- § 9:12 Commission defines proscribed non-audit services
- § 9:13 Wavering on tax services
- § 9:14 Administration of the engagement
- § 9:15 Auditors’ report to the audit committee

## TABLE OF CONTENTS

- § 9:16 Disclosure of fees
- § 9:17 Rotation of partners on the audit engagement
- § 9:18 Ex-auditors as financial employees
- § 9:19 Rule 13b2-2(b)—Improper influence on conduct of audits
- § 9:20 PCAOB Concept Release on Audit Firm Rotation and Auditor Independence
- § 9:21 Auditor rotation: shareholder proposals
- § 9:22 S. 1526—Auditor requirements and rotation: legislation
- § 9:23 2020 amendments to auditor independence requirements
- § 9:24 SEC rules on auditor independence: FAQs

## **PART II. SETTING ACCOUNTING STANDARDS**

- § 9:25 Accounting standards and financial engineering
- § 9:26 Reincarnating the financial accounting standards board
- § 9:27 Commission designates FSAB as the Sarbanes-Oxley standard setting board
- § 9:28 Will principles-based accounting standards reduce financial fraud?

## **CHAPTER 10. AUDITOR INDEPENDENCE: STATUTORY, REGULATORY AND BUSINESS TRENDS**

### **I. INTRODUCTION**

- § 10:1 Overview

### **II. BACKGROUND**

- § 10:2 History of auditor independence

### **III. 2000 AMENDMENTS TO THE SEC'S AUDITOR INDEPENDENCE RULES**

- § 10:3 Introduction
- § 10:4 The SEC's general standard of auditor independence
- § 10:5 Specific circumstances under which the SEC will not consider an accountant to be independent

### **IV. SARBANES-OXLEY AUDITOR INDEPENDENCE PROVISIONS**

- § 10:6 Introduction
- § 10:7 Prohibited non-audit services
- § 10:8 Requirements for other non-audit services
- § 10:9 Audit committee responsibility
- § 10:10 Auditor's obligation to report information to the audit committee
- § 10:11 Rotation of audit partners
- § 10:12 Prohibition on auditing a company whose management includes a former employee of an audit firm
- § 10:13 2003 SEC rule amendments pursuant to Sarbanes-Oxley

### **V. SEPARATING AUDITING FROM NON-AUDITING BUSINESSES**

- § 10:14 Introduction
- § 10:15 Recent growth of non-audit business
- § 10:16 Ernst & Young announces plans to split into two firms

- § 10:17 Will other firms follow?
- § 10:18 SEC staff views on the independence implications of divestiture of a portion of an accounting firm's business
- § 10:19 Private equity firms invest in accounting firms
- § 10:20 SEC staff views on independence implications of private equity's investments in accounting firms

## **VI. 2019 AMENDMENTS TO THE SEC'S AUDITOR INDEPENDENCE RULES REPEALING PROHIBITIONS ON CERTAIN LOANS BETWEEN AUDITORS AND AUDIT CLIENTS**

- § 10:21 Introduction
- § 10:22 The loan provision of the auditor independence rules
- § 10:23 The Commission's reasons for repealing prohibitions on certain loans
- § 10:24 2019 amendments
- § 10:25 Limiting the prohibition on loans between auditors and beneficial owners
- § 10:26 Limiting the prohibition to loans between auditors and beneficial owners who have significant influence
- § 10:27 Repealing the prohibition on loans between auditors and sister funds of investment companies

## **VII. 2020 AMENDMENTS TO THE SEC'S AUDITOR INDEPENDENCE RULES TO REPEAL PROHIBITIONS ON CERTAIN RELATIONSHIPS BETWEEN AN AUDITOR AND ITS AUDIT CLIENT**

- § 10:28 Introduction
- § 10:29 The Commission's reasons for repealing prohibitions on certain relationships
- § 10:30 Repealing prohibitions on relationships between auditors and affiliates of an audit client
- § 10:31 Repealing prohibitions on certain relationships between an auditor and an affiliate of the audit client under common control
- § 10:32 Repealing prohibitions on certain relationships between an auditor and an affiliate of the audit client in the "investment company complex"
- § 10:33 Repealing prohibitions on certain business relationships between auditors and stockholders, officers and directors of audit clients
- § 10:34 Reducing the period during which auditor independence is required before an audit client undertakes an IPO
- § 10:35 Repealing prohibitions on certain loans between an auditor and its audit client
- § 10:36 Inadvertent violations of the independence rule resulting from mergers and acquisitions
- § 10:37 Two SEC Commissioners disapprove of the 2020 amendments
- § 10:38 Former Chairman Levitt calls for the SEC to rescind the 2020 amendments

## **VIII. THE PCAOB ADOPTS AMENDMENTS TO ITS INDEPENDENCE STANDARDS AND RULES CONSISTENT WITH THE SEC AMENDMENTS**

- § 10:39 Overview

## **IX. THE PCAOB IS REVISING ITS AUDITOR INDEPENDENCE STANDARDS AND RULES**

- § 10:40 Adoption of interim standards in 2003
- § 10:41 PCAOB revisions to its independence standards

## **X. 2022 THE PCAOB AND THE SEC VOICE CONCERNS ON AUDITOR INDEPENDENCE**

- § 10:42 Overview

## **XI. TRENDS IN AUDITOR INDEPENDENCE**

- § 10:43 Introduction
- § 10:44 Types of independence violations
- § 10:45 PCAOB “good practices” for auditors relating to independence

## **XII. CONCLUSION**

- § 10:46 Conclusion

# **CHAPTER 11. REGULATION OF ANALYSTS’ CONFLICTS OF INTEREST**

## **PART I. FOCUS ON CONFLICTED ANALYSTS**

- § 11:1 Conflicted analysts and research departments
- § 11:2 Conflicted analysts and the SEC bully pulpit

## **PART II. SARBANES-OXLEY ADDS SECTION 15D TO EXCHANGE ACT**

### **A. INTRODUCTION**

- § 11:3 Sarbanes-Oxley directive to the SEC
- § 11:4 SEC adopts Regulation AC
- § 11:5 NYSE and NASD road to Sarbanes-Oxley

### **B. SEPARATING RESEARCH FROM INVESTMENT BANKING: LEGACY RULES**

- § 11:6 Protecting the purity of the research product
- § 11:7 Restrictions on using analysts to obtain investment banking business
- § 11:8 Insulating research analysts’ compensation from investment banking
- § 11:9 Quiet periods; termination of coverage

### **C. DISCLOSURE/SUNSHINE APPROACH: LEGACY RULES**

- § 11:10 Ratings and price targets
- § 11:11 Disclosure
- § 11:12 Other matters
- § 11:13 Trading ahead of research

### **D. REVISED FINRA EQUITY AND DEBT RESEARCH RULES**

- § 11:14 Finra equity and debt research rules; 2015–2016 revisions

### **PART III. THE JOBS ACT**

- § 11:15 Research reports and IPOs
- § 11:16 Research reports and Section 5
- § 11:17 Research reports and FINRA quiet periods
- § 11:18 Analyst conflicts of interest
- § 11:19 Other current rules governing analysts

### **PART IV. REGULATION BY LITIGATION**

- § 11:20 The global settlement; 2010 revisions
- § 11:21 Regulatory aspects of the global settlement
- § 11:22 Third-party research
- § 11:23 Penalties, disgorgement, and other costs to settling firms
- § 11:24 Private actions in the aftermath of the global settlement
- § 11:25 Research reports of analysts and the fraud-on-the-market doctrine

Appendix 11A. Excerpts from 2010 Amendment to Global Settlement (showing amended version of firewall provision)

## **CHAPTER 12. AUGMENTING ENFORCEMENT OF THE SECURITIES LAWS**

### **PART I. MAKING THE TIME FIT THE CRIME**

#### **A. A PLETHORA OF CRIMINAL PENALTIES**

- § 12:1 Introduction
- § 12:2 —Stiffer penalties for securities fraud and related crimes
- § 12:3 The corporate fraud task force
- § 12:4 Supreme Court construes Section 802: *Yates*
- § 12:4.02 Corruptly impeding an official proceeding: SOX § 1102
- § 12:4.03 Legislative history of § 1512(c)(2)
- § 12:4.04 D.C. Circuit applies SOX to January 6<sup>th</sup> defendants and the Supreme Court grants certiorari: *Fischer*
- § 12:4.06 Indictment of former President for alleged violation of SOX § 1102
- § 12:4.08 Supreme Court limits § 1102 to impairing documents or objects used in an official proceeding, opting for narrow reading of the statute

#### **B. CRIME AND PUNISHMENT**

- § 12:5 Statutory penalties and sensitizing the Sentencing Commission to securities fraud
- § 12:6 Sentencing guidelines after Sarbanes-Oxley
- § 12:7 Sentencing guidelines and the Supreme Court—*Booker/Fanfan* change the landscape
- § 12:8 Determination of the amount of loss
- § 12:9 Sentencing guidelines for corporate defendants

### **PART II. THE COMMISSION'S ENFORCEMENT ARSENAL**

#### **A. BACKGROUND**

- § 12:10 Civil and administrative weapons
- § 12:11 Disgorgement of executive equity-related compensation



## TABLE OF CONTENTS

### B. SARBANES-OXLEY PROVISIONS

- § 12:12 Enriching funds available for distribution to investors
- § 12:13 Officer and director bars
- § 12:14 Temporary freeze authority prior to filing an action

### C. RELATED PROVISIONS

- § 12:15 Booster shot funding for the SEC
- § 12:16 Expanding the range of unlawful securities-related conduct
- § 12:17 Penny stock offering bar

### D. RENEWED FOCUS ON FINANCIAL FRAUD

- § 12:18 The White Commission's renewed focus on financial fraud
- § 12:19 Financial reporting and internal controls: *St. Joe Company*
- § 12:20 Financial reporting and internal controls: Hector Absi (Marrone Bio)
- § 12:21 Internal control reporting deficiencies: *MusclePharm*

### E. CONTEMPORARY ISSUES

- § 12:22 Disqualification and eligibility waivers
- § 12:23 Amendments to SEC rules of practice
- § 12:24 SEC admissions policy: introduction
- § 12:25 Controversy over SEC administrative proceedings
- § 12:25.02 Deference to administrative agencies or the lack thereof

## PART III. OTHER ENFORCEMENT ISSUES

- § 12:26 Study of enforcement actions
- § 12:27 Study of disgorgement and civil penalties in SEC enforcement actions
- § 12:28 Collateral bars and formerly associated persons
- § 12:29 Enforcement authority: Aiding and abetting
- § 12:30 Deadline for enforcement actions and inspections
- § 12:31 Nationwide service of subpoenas
- § 12:32 Civil penalties in cease-and-desist proceedings
- § 12:33 —Civil penalties and the Financial CHOICE Act

## CHAPTER 13. RECOVERY OF EXECUTIVE COMPENSATION, PRIVATE ACTIONS AFTER SARBANES-OXLEY AND RELATED MATTERS

### PART I. DIRECT AND INDIRECT IMPACT

#### A. DOES SARBANES-OXLEY PROVIDE “MORE OPPORTUNITIES”?

- § 13:1 Indirect impact on private actions
- § 13:2 Extending the period of limitations
- § 13:3 *Exxon Mobil*—Third circuit and the statute of limitations after Sarbanes-Oxley
- § 13:4 Unlawful insider trading during pension plan blackout periods

#### B. SECTION 304 REIMBURSEMENT

- § 13:5 Who can bring an action under Section 304?

- § 13:6 Recovery outside of section 304
- § 13:7 What are the elements of a Section 304 action?
- § 13:8 Some other issues
- § 13:9 Who is entitled disgorged funds?

### C. RECOVERY OF EXECUTIVE COMPENSATION UNDER DODD-FRANK

- § 13:10 Recovery of executive compensation under Dodd-Frank: Introduction
- § 13:11 Overview of Rule 10D-1
- § 13:12 The recovery policy
- § 13:13 Applicable time period
- § 13:14 Amount recoverable
- § 13:15 Issuer obligation to recover
- § 13:16 Inclusions and exclusions
- § 13:17 Compensation subject to recovery
- § 13:18 Disclosure
- § 13:19 Foreign private issuers
- § 13:20 Exhibits
- § 13:21 Transition issues
- § 13:21.02 NYSE listing rule on erroneously awarded compensation
- § 13:21.04 Nasdaq listing rule on erroneously awarded compensation
- § 13:21.06 Proxy advisory firms' positions on clawback policies

### D. SOME OTHER RELEVANT PROVISIONS

- § 13:22 Bankruptcy no refuge for debts arising from securities violations
- § 13:23 Supreme Court considers SOX statute of limitations
- § 13:24 Supreme Court and *Merck*—Vioxx center stage
- § 13:25 The VIGOR study is noted by the Third Circuit
- § 13:26 FDA warning letter
- § 13:27 The Harvard Study
- § 13:28 Supreme Court finds against *Merck*—Introduction
- § 13:29 Reliance on Circuit Court Precedent
- § 13:30 Refuting *Merck*'s arguments—Scienter is a fact for purpose of 10b-5 discovery
- § 13:31 Falsity of representation does not establish scienter
- § 13:32 Inquiry notice not point at which period of limitations commences
- § 13:33 Failure of plaintiff to investigate after inquiry notice does not in itself establish scienter
- § 13:34 Determining when reasonable hypothetical plaintiff would have made discovery too complex for a judge to determine—Rejected
- § 13:35 *Merck* argues record shows plaintiff should have made discovery before critical date—Court disagrees
- § 13:36 *Omnicare*: Knowledge of falsity
- § 13:37 Audit reports as statements of opinion: *Puda*

## PART II. WILL ENRON/WORLDCOM MAKE A DIFFERENCE?

- § 13:38 Some empirical measures
- § 13:39 Surveying the landscape
- § 13:40 Judge Harmon takes charge of Enron private litigation
- § 13:41 Disclosure counsel as a primary violator

## TABLE OF CONTENTS

- § 13:42 Pattern of fraud as basis for inference of scienter and participants in scheme
- § 13:43 Investment banks as part of the scheme to defraud
- § 13:44 Investment banks—Fifth Circuit reversal of class certification
- § 13:45 The difficult task for the *Enron* plaintiffs
- § 13:46 Section 404 reports—Grist for the securities fraud class action mill
- § 13:47 Pleading securities fraud based on Section 404 reports
- § 13:48 Sarbanes-Oxley mandated study of aiders and abettors

## CHAPTER 14. WHISTLEBLOWERS

### PART I. SARBANES-OXLEY ACT WHISTLEBLOWER PROVISIONS

- § 14:1 Protecting employees who blow the whistle
- § 14:2 Protecting employees reporting securities fraud—Department of Labor regulations
- § 14:3 The district court alternative to an OSHA proceeding under SOX
- § 14:3.02 Unenforceability of pre-dispute arbitration agreements; issue preclusion
- § 14:4 A CFO fails to make his case under the SOX retaliation provisions
- § 14:5 *Allen* and the need for a reasonable belief as to scienter under SOX
- § 14:6 Do violations of SEC rules require belief as to fraud?
- § 14:7 Employees of a subsidiary of a reporting company under Section 806 of SOX
- § 14:8 Protected activities under SOX § 806
- § 14:9 *Lawson v. FMR* in the First Circuit: Who is entitled to anti-retaliation protection under § 806?
- § 14:10 Whistleblower protection under SOX extends to employees of private contractors and subcontractors serving public companies: *Lawson v. FMR* in the Supreme Court
- § 14:11 Courts construe SOX whistleblower provisions—Including the question of retaliatory intent
- § 14:11.02 Extraterritorial application of the SOX anti-retaliation provision

### PART II. DODD-FRANK ACT WHISTLEBLOWER PROVISIONS

- § 14:12 Whistleblower protection under Dodd-Frank
- § 14:13 Encouraging whistleblowers by cash bonuses: the Dodd-Frank bounty program
- § 14:14 SEC final rules on Dodd-Frank whistleblower protection
- § 14:15 Dodd-Frank whistleblower provisions—Impact on companies—Internal compliance
- § 14:16 Limits on which employees can collect under the Dodd-Frank whistleblower provisions
- § 14:17 Courts construe Dodd-Frank whistleblower provisions
- § 14:18 To whom must the employee report wrongdoing to receive protection under Dodd-Frank: herein of *Digital Realty*
- § 14:19 2020 rule amendments—Whistleblower status and notice requirements
- § 14:20 —Anti-retaliation
- § 14:21 —Expanded application of “judicial or administrative action”
- § 14:22 2020 and 2022 rule amendments—Related actions
- § 14:23 2020 rule amendments—Criteria for determining amount of award
- § 14:24 Use of dollar amount of award in determining amount of award; 2022 amendments

- § 14:25 2020 rule amendments—Unreasonable reporting delays
- § 14:26 —Materials that may form the basis of the SEC’s award determination
- § 14:27 —Summary disposition procedures
- § 14:28 —Independent analysis
- § 14:29 Impeding communications with the staff concerning possible securities law violations

## APPENDICES

- APPENDIX A. Sarbanes-Oxley Act of 2002
- APPENDIX B. Sarbanes-Oxley Act as Amended
- APPENDIX C. Holding Foreign Companies Accountable Act
- APPENDIX D. Concept Release Concerning Management’s Reports on Internal Control Over Financial Reporting
- APPENDIX E. Excerpts From Dodd-Frank Wall Street Reform and Consumer Protection Act
- APPENDIX F. Excerpts from the Jumpstart Our Business Startups Act, P.L. No. 112-106 (April 5, 2012)
- APPENDIX G. Letter from SEC Office of Investor Advocate re Section 404(b)
- APPENDIX H. Excerpts from GAO, “Internal Controls: SEC Should Consider Requiring Companies to Disclose Whether They Obtained an Auditor Attestation” (July 2013)
- APPENDIX I. OSHA Final Rules (2015)—Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, As Amended
- APPENDIX J. DOJ Whistleblower Program
- APPENDIX K. *[Reserved]*
- APPENDIX L. Gensler Speech on Sarbanes-Oxley
- APPENDIX M. Speech on Audit Transparency in China and Hong Kong
- APPENDIX N. DOJ Pilot Program on Compensation and Clawbacks
- APPENDIX O. The Lott Amendment
- APPENDIX P. SEC News Release Regarding Impeding Whistleblower Communications
- APPENDIX Q. SEC Amicus Brief on Audit Function, Opinions and Certifications (Excerpts)

### Table of Laws and Rules

### Table of Cases

### Index