

Table of Contents

LIABILITY FOR SECURITIES TRANSACTIONS

CHAPTER 1. SECTION 11—1933 ACT

- § 1:1 General provisions of Section 11
- § 1:1.10 Section 11 and § 10(b) Liability—Market Manipulation
- § 1:1.30 Section 11 Liability—Standing—Direct Listing
- § 1:2 Overview of Section 11 liabilities of attorneys and accountants
- § 1:3 Attorneys generally not “experts” under Section 11(a)(4); Exceptions
- § 1:4 Accountants generally act as “experts” under Section 11(a)(4); Exceptions
- § 1:5 *BarChris*: Due diligence defenses of the attorney as director and of the accountant
- § 1:6 *Leasco*: Due diligence defenses of the attorney as director
- § 1:7 Due diligence defenses—Recent cases
- § 1:8 No aiding and abetting liability under Section 11
- § 1:9 Statements of opinion or belief as actionable “facts”
- § 1:9.50 Omnicare extended to Proxy Statements
- § 1:10 “Puffery”—Immateriality as a matter of law
- § 1:10.50 Aspirational statements
- § 1:11 Actionable misrepresentations of legal compliance—Cases

CHAPTER 2. SECTION 12—1933 ACT

- § 2:1 Section 12 liability, generally
- § 2:2 *Pinter v. Dahl*
- § 2:3 Post-*Pinter* cases: Extension of decision to Section 12(a)(2) and further clarification of “seller”
- § 2:4 Attorneys and accountants as “sellers”
- § 2:5 Section 12(a)(2) applies only to public offerings
- § 2:6 No aiding and abetting under Section 12
- § 2:7 The importance or not of targeted solicitation under Section 12—The BitConnect case
- § 2:8 —Non-fungible tokens were securities under U.S. Supreme Court case *Howey*

CHAPTER 3. RULE 10b-5—1934 ACT

- § 3:1 Overview of Rule 10b-5
- § 3:1.30 SEC Responsibility to Regulate Unregistered Brokers under Exchange Act § 15
- § 3:1.50 Rule 10b-5 (1934 Act)—Independent duty to disclose?
- § 3:2 Professional’s duty to disclose material facts; professional’s materially misleading or false statements
- § 3:3 Attorney’s duty to disclose material facts; professional’s materially misleading or false statements
- § 3:4 Financial statement/accounting “materiality” generally, and under Item 303 of Regulation S-K; Item 303 of Regulation S-K generally
- § 3:4.10 Actual knowledge of known trend or uncertainty required for 10b-5 liability under item 303

- § 3:4.50 Accountant's duty to disclose
- § 3:5 Accountant's duty to correct versus duty to update
- § 3:5.50 Accountant's opinion in financial statement as certification and consequent Section 11 violation
- § 3:6 Transaction and loss causation
- § 3:6.50 Loss Causation—Materialization of the Risk
- § 3:6.60 Generic Misstatements—Fraud-on-the-Market
- § 3:6.70 Causation—Reliance—Mixed Affirmative Statements and Omissions
- § 3:6.80 Loss Causation—Time delay between corrective disclosure and share price drop
- § 3:7 End-Runs around no Rule 10b-5 aiding and abetting liability in private actions? Few, if any, after Supreme Court's *Janus* decision (2011)
- § 3:8 End-runs around no Rule 10b-5 aiding and abetting liability in private actions?—"Making" a misstatement
- § 3:9 End-Runs around no Rule 10b-5 aiding and abetting liability in private actions?—Drafting, editing, reviewing, advising, or assisting in preparation of statements made by another: "Substantial Participation" approach—Expressly rejected by Supreme Court in *Janus* (2011)
- § 3:10 —SEC Amicus approach: "creating" the misrepresentation—Expressly rejected by the Supreme Court in *Janus* (2011)
- § 3:11 —The "Bright Line" approach: Consistent with *Janus* (2011)
- § 3:12 —Statements "made" by an accountant regarding unaudited financial information; interim reviews
- § 3:12.50 Overview—Rule 10b-5 (1934 Act)—Accountants: "red flags" requiring additional due diligence?
- § 3:13 End-Runs around no Rule 10b-5 aiding and abetting liability in private actions?—"Primary" violations of the nonrepresentational 10b-5 subdivisions
- § 3:14 Aiding and abetting actions by SEC
- § 3:15 Special pleading requirements for Rule 10b-5 claims
- § 3:15.50 Corporate scienter—Various approaches
- § 3:15.60 —Adverse interests exception

CHAPTER 4. OTHER FEDERAL CIVIL LIABILITY PROVISIONS

- § 4:1 Section 17(a)—1933 Act
- § 4:1.20 Sale of unregistered securities and securities fraud actions by the SEC
- § 4:1.50 Negligent securities "fraud" actions by SEC: Section 17(a)(2) misstatement liability
- § 4:1.60 Negligent securities "fraud" actions by SEC: Section 17(a)(3) "scheme" liability
- § 4:1.70 Standard of care under 1933 Act § 17(a)
- § 4:1.80 The SEC sets forth its prosecutorial position on *Janus* and *Janus*' effect on Rule 10b-5 and Section 17(a)
- § 4:2 Control person liability for 1933 and 1934 Acts violations by controlling persons
- § 4:2.50 Control person liability and advice of counsel defense to prove good faith under § 20(a) of the 1934 Exchange Act
- § 4:3 Section 14(a) and (e) of the 1934 Act: Proxy rules and tender offers

CHAPTER 5. STATE LAW CLAIMS

- § 5:1 State securities statutes

TABLE OF CONTENTS

§ 5:1.50	Securities Litigation Uniform Standards Act Preclusion Discussion
§ 5:1.70	Corporate by-laws improperly used to redirect jurisdiction of Federal securities law issues from Federal to State Court
§ 5:1.80	Foreign and domestic parties—Cryptocurrency jurisdiction
§ 5:2	Common-law negligence claims by clients against attorneys and accountants
§ 5:3	Common-law negligence claims against accountants by nonclients
§ 5:4	— <i>Ultramares</i> approach
§ 5:5	—States following “near privity” approach
§ 5:6	— <i>Second Restatement</i> approach
§ 5:7	—Scope of comment h to the <i>Restatement</i>
§ 5:8	—“Reasonably foreseeable” approach
§ 5:9	— — <i>Rosenbloom</i> : Reasonably foreseeable user test in New Jersey; Overruled by Statute in 1995
§ 5:10	— — <i>Timm</i> : Reasonably foreseeable injury test in Wisconsin
§ 5:11	— —Mississippi: reasonably foreseeable user test
§ 5:12	—Any practical steps possible to limit liability under the foreseeability or <i>Restatement</i> approach?
§ 5:13	—Balancing test
§ 5:14	—Future prospects
§ 5:15	—Accountant liability legislation
§ 5:16	Common-law negligence claims against attorneys by nonclients— Application of <i>Ultramares-Credit Alliance</i> to Attorneys
§ 5:17	—Liability without privity
§ 5:18	—Attorney liability legislation
§ 5:19	Due diligence duties of securities counsel: Scope of state law duties
§ 5:20	In pari delicto defense

CHAPTER 6. INFLUENCE OF PROFESSIONAL STANDARDS ON LIABILITY

§ 6:1	Introduction
§ 6:2	Attorneys—Sarbanes-Oxley Act (2002) and SEC Professional Conduct Rules (2003) thereunder
§ 6:3	—“Up-the-Ladder” reporting requirement
§ 6:4	—Alternative—Reporting to QLCC
§ 6:5	—“Appropriate Response” by issuer
§ 6:6	—If “Up-the-Ladder” fails—“Noisy” withdrawal and disaffirmance proposal and alternative proposal
§ 6:7	—Permissive disclosure of confidential information
§ 6:8	—Supervisory and subordinate attorneys
§ 6:9	—Sanctions and discipline for rule violations
§ 6:10	—Reporting attorney has no duty to investigate
§ 6:11	—Background: ABA and state ethical rules
§ 6:12	—No private right of action
§ 6:13	Inside general counsel’s fiduciary duties and liability for failure to advise board concerning its monitoring duties
§ 6:14	Attorneys—Applicable model rules and model code provisions, generally
§ 6:15	—Disclosure obligations to nonclients
§ 6:16	—Model rules
§ 6:17	— —“Noisy” withdrawal
§ 6:18	— —Corporate entity as client
§ 6:19	—Opinion letters

- § 6:20 —Lawyers “responses to auditors” requests for information
- § 6:21 Accountants—Sarbanes-Oxley Act (2002) and SEC Auditor Rules (2003) thereunder
- § 6:22 —The Public Company Accounting Oversight Board
- § 6:23 —Required accounting disclosures
- § 6:24 Strengthening auditor independence
- § 6:25 —Timely reporting by auditor to audit committee; audit committee’s role
- § 6:26 Standard for auditing control over financial reporting
- § 6:27 Auditing Standard No. 5—An audit of internal control over financial reporting that is integrated with an audit of financial statements—
Overview of changes
- § 6:28 Overview of the audit under AS 5
- § 6:29 Standard for auditing internal control over financial reporting—
Requirement for adverse opinion when a material weakness exists
- § 6:30 —SEC guidance
- § 6:31 Liability for inadequate internal controls: SEC enforcement and private actions
- § 6:32 SEC Authority under Exchange Act § 13—Failing to Report under the Exchange Act over a Significant Time Period
- § 6:32.50 SEC enforcement—Proxy and reporting violations—Material misstatements about interlocking directorates and director/committee independence
- § 6:32.75 SEC injunctive authority—Consent decree to enjoin future § 17 and related violations
- § 6:33 Standard for auditing internal control over financial reporting-FASB No. 154, accounting changes and error corrections
- § 6:34 Audit committee financial experts
- § 6:35 —SEC audit committee disclosure rules
- § 6:36 — —Pre-filing review of quarterly financial statements
- § 6:37 — —Audit committee report
- § 6:38 — —Audit committee charters
- § 6:39 — —Audit committee members’ independence
- § 6:40 — —Safe harbors
- § 6:41 —Self regulatory organization audit committee rules
- § 6:42 — —Composition and qualification
- § 6:43 — —Independence
- § 6:44 — —Audit committee charter
- § 6:45 Management’s discussion and analysis (MD&A), Regulation S-K, Item 303
- § 6:46 Auditor-audit committee communications
- § 6:46.50 Auditing Standard No. 16: Auditor Communications with Audit Committees
- § 6:47 Specific accounting issues for auditor-audit committee communications
- § 6:48 Accountants—Generally Accepted Auditing Standards (GAAS)
- § 6:48.50 Financial due diligence continued: Audit committee’s or the independent directors’ assessment of the risks of fraud and responses thereto; PCAOB standards
- § 6:48.60 Financial/transactional due diligence: PCAOB Standard for related party transactions; significant unusual transactions; relevance to due diligence counsel
- § 6:49 “Present Fairly”—A requirement additional to GAAP compliance?
- § 6:50 Accountants—Section 10A of the 1934 Act: Auditor’s duties regarding illegalities and fraud

TABLE OF CONTENTS

- § 6:51 —Application of GAAS and GAAP in decided cases—GAAS
- § 6:52 —Accountants—GAAP
- § 6:53 — —Internal controls and Sarbanes-Oxley Act (2002)
- § 6:54 —Compliance with GAAS and GAAP as evidence of reasonableness
- § 6:55 —Choice of accounting method
- § 6:56 —Compliance with GAAS
- § 6:57 —Unaudited financial statements
- § 6:58 SEC Administrative Enforcement of Whistleblower Protections under Dodd-Frank Act

CHAPTER 7. DISCLOSURE “DEFENSES”; PROPORTIONATE LIABILITY AND CONTRIBUTION

- § 7:1 Disclosure “defenses”—Using full disclosure offering materials as a defense against oral misrepresentation allegations; “Inquiry notice” under statutes of limitations or as unreasonable or “unjustifiable” reliance by plaintiff
- § 7:2 Enforcing no-representation and no-reliance contract clauses against Rule 10b-5 claims
- § 7:3 Disclosure “defenses”—The statutory safe harbors for forward-looking statements; The judicial “bespeaks caution” doctrine
- § 7:4 —Statutory safe harbor: Applicability and exclusions
- § 7:5 —Meaningful cautionary statement safe harbor
- § 7:6 —State of mind safe harbor: Actual knowledge
- § 7:7 —Oral statements; “immaterial” safe harbor
- § 7:8 —Due diligence
- § 7:9 —Duty to update or correct?
- § 7:10 —Companies taking advantage of the safe harbor
- § 7:11 —Commission authority to expand safe harbors
- § 7:12 —Judicial “bespeaks caution” doctrine
- § 7:13 Liability, contribution, settlement, and indemnity
- § 7:14 —Joint and several versus proportionate liability under PSLRA
- § 7:15 — —Joint and several liability for “knowing” fraud
- § 7:16 — —Modified proportionate liability for “non-knowing” defendants
- § 7:17 — —Bar orders
- § 7:18 — —PSLRA judgment reduction formula
- § 7:19 —Case law prior to 1995 statute
- § 7:20 —Contribution under PSLRA: Two different provisions
- § 7:21 —Outside directors’ liability under Section 11 of the 1933 Act
- § 7:22 —Indemnity
- § 7:23 —Federal preemption of pendent state claims for indemnification and contribution
- § 7:24 —Drafting express contract provisions for contribution

CHAPTER 8. SEC AND OTHER REGULATORY ACTIONS AND PROCEEDINGS AGAINST ATTORNEYS AND ACCOUNTANTS

- § 8:1 SEC enforcement arsenal against professionals; focus on professionals as “gatekeepers”
- § 8:1.40 Supreme Court holds that litigants may challenge the constitutionality of SEC administrative proceedings in Federal District Court parallel or collateral to administrative proceedings before the SEC
- § 8:1.45 Chevron doctrine used for 40 years is overruled by U.S. Supreme Court

- § 8:1.50 Constitutionality of SEC’s appointment process regarding Administrative Law Judges—Lucia reversed under Appointments Clause
- § 8:1.55 SEC Administrative Law Judge (ALJ) enforcement proceedings involving Civil Fines ruled Unconstitutional Seventh Amendment violation by U.S. Supreme Court
- § 8:1.60 Limit on SEC Enforcement Arsenal—Supreme Court applies Statute of Limitations to the SEC Disgorgement Remedy
- § 8:1.65 Supreme Court upholds propriety of SEC disgorgement remedy while noting restrictions
- § 8:1.70 Attempts to label SEC injunctive enforcement remedies as punitive
- § 8:1.75 SEC Enforcement Arsenal—Consent Decrees and No-Deny Provisions
- § 8:1.80 SEC injunctive authority: cryptocurrency
- § 8:1.85 Required disclosure of the use of back-dated trading strategies
- § 8:1.87 SEC enforcement authority pertaining to private funds and private fund advisers curtailed in Fifth Circuit ruling
- § 8:1.90 SEC enforcement arsenal: Misrepresentations in connection with the Purchase or Sale of a Security
- § 8:1.95 SEC Enforcement—Improper Disclosure about Sexual Misconduct on part of CEO and Corporation
- § 8:2 Civil injunctive actions
- § 8:2.50 SEC to circumvent *Janus* using 1934 Act § 20(b)?
- § 8:3 Rule 102(e) proceedings
- § 8:4 SEC actions and proceedings against attorneys
- § 8:5 Negligent issuance of formal opinions
- § 8:6 Drafting disclosure documents; providing disclosure and other advice
- § 8:7 Section 15(c)(4) administrative proceedings against attorneys: The *Kern* Case
- § 8:8 Cease-and-desist orders against attorneys: The *Feldman*, *Costanza*, and *Weiss* cases; recent SEC use of negligence standard under Section 17(a)(2) and (3)
- § 8:9 Legal/Compliance officers or in-house counsel of broker-dealers as “supervisors”
- § 8:10 SEC proceedings against accountants
- § 8:11 *In re Kaye, Scholer*—Office of Thrift Supervision
- § 8:12 Chamber of Commerce APA challenge to SEC Proxy Voting Advice Business Regulations

CHAPTER 9. MISCELLANEOUS NOTEWORTHY ITEMS

- § 9:1 Summary of the Corporate Transparency Act (the “CTA”)
- § 9:1.10 BOI Reporting Requirements subject to various litigation, a nationwide injunction and stay
- § 9:2 Overview of the CTA and Final Rule
- § 9:3 Penalties for violations
- § 9:4 Proposed rules
- § 9:5 Final rules under the CTA
- § 9:5.50 One district court finds the Corporate Transparency Act (CTA) unconstitutional
- § 9:6 Extension of deadline for BOI Reporting
- § 9:7 FinCEN Small Entity Compliance Guide for CTA
- § 9:8 FAQ regarding BOI Reporting
- § 9:9 Cybersecurity Disclosure
- § 9:9.1 C&DIs Covering Cybersecurity Incident Disclosures Pursuant to Item 1.05 of Form 8-K

TABLE OF CONTENTS

§ 9:10	Cybersecurity Disclosure Rule Adopted
§ 9:11	Earlier cybersecurity guidance
§ 9:12	Cybersecurity enforcement by SEC
§ 9:12.1	Statement Selective Disclosure of Information Regarding Cybersecurity Incidents
§ 9:13	Climate change
§ 9:14	Proposed rule regarding climate change disclosure
§ 9:15	Overview of the proposed new climate change section
§ 9:16	Review of climate change terminology
§ 9:17	Key provisions of the proposed rule
§ 9:18	Conclusion
§ 9:19	Final climate rules adopted

APPENDICES

APPENDIX 1.	Selected SEC Guidance Regarding Accredited Investors
APPENDIX 2.	FAQs About Exempt Offerings
APPENDIX 3.	ABA Committee’s Revised Formal Opinion 346 on Tax Shelter Opinions
APPENDIX 4.	Report by Special Committee on Lawyer’s Role in Securities Transactions
APPENDIX 5.	Formal Opinion No. 1986-2
APPENDIX 6.	Treasury Department Circular 230 (Final Regulations) (Feb. 23, 1984)
APPENDIX 7.	ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information
APPENDIX 7.1.	Statement on the Effect of the FASB Codification on Audit Response Letters
APPENDIX 8.	AICPA Inquiry of a Client’s Lawyer Concerning Litigation, Claims, and Assessments and Excerpts from Statement of Financial Accounting Standards No. 5: Accounting for Contingencies
APPENDIX 9.	Rule 102 of the SEC Rules of Practice
Appendix 10.	Compliance & Disclosure Interpretations (“C&DIs”) Regarding Securities Act Rules
Appendix 11.	Compliance & Disclosure Interpretations (“C&DIs”) Regarding Regulation S-K
Appendix 12.	Overview of Federal Tax System 2024

Table of Laws and Rules

Table of Cases

Index