## Table of Contents

About the Author ................................................................. vii
Table of Chapters ................................................................. ix
Preface .................................................................................. xxi

### Chapter 1  Approaching Securities Law

- § 1:1 Introduction .................................................................. 1-1
- § 1:2 Historical and Cultural Perspective ............................. 1-1
  - § 1:2.1 History Repeats Itself ........................................... 1-1
  - § 1:2.2 Origins of the Federal Securities Laws ................. 1-4
- § 1:3 Sources of Federal Securities Law ............................... 1-7
- § 1:4 Government Publications ......................................... 1-12
- § 1:5 Private Publications .................................................. 1-17
- § 1:6 State Securities Law .................................................... 1-18
- § 1:7 Special Position of Securities Lawyers ....................... 1-20

### Chapter 2  Business Context of Securities Act Registration

- § 2:1 Introduction ............................................................... 2-2
- § 2:2 Reasons Companies Register Securities .................... 2-2
  - § 2:2.1 Advantages of Registration or Being Publicly Held ..................................................................... 2-2
    - [A] Economy ................................................................. 2-2
    - [B] Control ................................................................. 2-4
    - [C] Creation of a Public Market ................................. 2-4
    - [D] Improved Access to Capital ............................... 2-5
    - [E] Prestige ............................................................... 2-6
    - [F] Estate Planning ................................................... 2-6
    - [G] Executive Recruiting and Retention .................... 2-7
    - [H] Acquisitions ......................................................... 2-8
  - § 2:2.2 Disadvantages of Registration or Being Publicly Held ..................................................................... 2-8
    - [A] Expense ................................................................. 2-8
    - [B] Disclosure of Information ..................................... 2-9
    - [C] Loss of Management Flexibility ......................... 2-10

( Sec. Law & Prac., Rel. #5, 4/15)
Chapter 3  Regulatory Framework of Securities Act Registration

§ 3:1  Introduction.................................................................. 3-2
§ 3:1.1  Statutory Framework ................................................ 3-2
§ 3:1.2  Categories of Issuers ................................................. 3-3
[A]  Generally................................................................. 3-3
[B]  Waiver of Ineligible Issuer Status .............................. 3-4
§ 3:2  Prefiling Period ............................................................... 3-7
§ 3:2.1  Statutory Scheme...................................................... 3-7
[A]  Generally................................................................. 3-7
[B]  Emerging Growth Companies .................................. 3-9
§ 3:2.2  What Is an Offer? ................................................... 3-11
[A]  Section 2(a)(3) ......................................................... 3-11
[B]  Conditioning the Market ........................................ 3-11
[C]  General Exceptions ................................................. 3-16
[D]  Special Situations.................................................... 3-22
§ 3:3  Waiting Period............................................................... 3-24
§ 3:3.1  Statutory Scheme.................................................... 3-24
[A]  Generally................................................................. 3-24
[B]  For Emerging Growth Companies .......................... 3-27
§ 3:3.2  What Is a Sale? ....................................................... 3-27
§ 3:3.3  What Is a Prospectus?............................................. 3-29
[A]  Indirect Offers......................................................... 3-31
[B]  Exceptions............................................................... 3-34
[C]  Free Writing Prospectuses ....................................... 3-37
[D]  Electronic Road Shows............................................. 3-39
[E]  Websites .................................................................. 3-40
[F]  Research Reports..................................................... 3-40
§ 3:3.4  Preliminary Prospectus Delivery Requirements ...... 3-42
§ 3:4  Posteffective Period .......................................................... 3-44
§ 3:4.1  Statutory Scheme.................................................... 3-44
§ 3:4.2  Section 5(b) and Defective Prospectuses ................. 3-46
§ 3:4.3  Final Prospectus Delivery Requirements............... 3-48
Table 3-1  Summary of Communication Rules .................. 3-53
Chapter 4 Securities Act Registration Process

§ 4:1 Statutory Scheme .......................................................... 4-2
§ 4:2 Commission Procedures ................................................. 4-4
  § 4:2.1 Confidential Submission of Draft Registration Statements by Emerging Growth Companies .................................. 4-4
§ 4:2.2 Review and Comment Procedure ................................ 4-6
§ 4:2.3 Delaying and Accelerating Effectiveness ....................... 4-10
§ 4:2.4 Refusal Orders, Stop Orders, and Withdrawal of Registration Statements ..................................... 4-13
§ 4:3 Disclosure Requirements .............................................. 4-14
  § 4:3.1 Registration Statement Forms ................................ 4-14
  § 4:3.2 Rules, Regulations, and Industry Guides ..................... 4-17
§ 4:3.3 Shelf Registration .................................................... 4-20
  [A] Background and History ........................................ 4-20
  [B] Shelf Registration Generally ................................... 4-21
  [B][1] Rule 415 ................................................................ 4-21
  [B][2] Rule 430B Base Prospectus Requirements ............... 4-22
  [C] Shelf Registration Procedures for Well-Known Seasoned Issuers (WKSIs) ..................................... 4-23
§ 4:4 Registration Statement Drafting and Filing ..................... 4-25
§ 4:5 Perspectives ............................................................... 4-29

Chapter 5 Reach of Securities Act Regulation

§ 5:1 Introduction ................................................................... 5-1
§ 5:2 What Is a Security? ........................................................ 5-2
  § 5:2.1 Statutory Scheme .................................................... 5-2
  § 5:2.2 Investment Contract ............................................... 5-3
    [A] Investment of Money ............................................... 5-5
    [B] Common Enterprise ............................................... 5-6
    [C] Expectation of Profits ............................................. 5-8
    [D] Solely from the Efforts of Others .............................. 5-10
  § 5:2.3 Unless the Context Otherwise Requires ................... 5-15
§ 5:3 What Is a Sale? ............................................................ 5-22
  § 5:3.1 Pledges ............................................................... 5-23
  § 5:3.2 Acquisitions ....................................................... 5-23
  § 5:3.3 Spin-Offs and “Free” Stock Give-Aways .................. 5-25

Chapter 6 Securities Act Registration Exemptions

§ 6:1 Introduction .................................................................. 6-3
  § 6:1.1 Statutory Exemptions ............................................. 6-3
§ 6:1.2 The Commission’s Power of Exemption .......... 6-4
[A] Section 3(b)(1) ................................................. 6-4
[B] Section 3(b)(2) ................................................. 6-5
[C] Section 4(a)(5) ................................................. 6-6
[D] Sections 4(a)(6) and 4A .................................. 6-8
[E] Section 28 ....................................................... 6-9
§ 6:2 Private Placements: Section 4(a)(2) .................. 6-10
§ 6:3 Intrastate Offerings: Section 3(a)(11) and Rule 147 . 6-18
§ 6:3.1 Statutory Exemption .................................... 6-19
§ 6:3.2 Rule 147 ................................................... 6-21
§ 6:4 Regulation A .................................................. 6-24
§ 6:4.1 Historical Background ................................ 6-24
§ 6:4.2 2015 Regulation A Amendments .................. 6-26
§ 6:5 Regulation D .................................................. 6-34
§ 6:5.1 Current Regulation D .................................... 6-34
[A] Generally ....................................................... 6-34
[B] Key Concepts ................................................. 6-36
[B][1] Accredited Investors .................................... 6-36
[B][2] “Bad Actors” ................................................. 6-37
[B][3] Disclosure Requirements ............................... 6-41
[B][4] “Insignificant Deviations” ............................... 6-42
[C] The Exemptive Rules ....................................... 6-43
[C][1] Rule 504 ....................................................... 6-43
[C][2] Rule 505 ....................................................... 6-44
[C][3] Rule 506(b) ................................................... 6-44
[C][4] Rule 506(c) ................................................... 6-46
[D] Filing ............................................................. 6-50
§ 6:5.2 Proposed Pending Changes ......................... 6-51
[A] Proposed Changes to Form D ......................... 6-52
[B] Additional Rule 507 Disqualification Provisions .... 6-54
[C] Legends and Other Disclosure Requirements
for General Solicitation Materials ......................... 6-55
[D] Mandatory Submission of Written
General Solicitation Materials .............................. 6-56
§ 6:6 Regulation Crowdfunding (Proposed) .............. 6-56
§ 6:6.1 Generally ................................................... 6-56
§ 6:6.2 Provisions Relative to Issuers and Investors .... 6-57
[A] Issuer Eligibility .............................................. 6-57
[B] Offering/Selling Limit for Issuers .................... 6-58
[C] Purchasing Limit for Investors ....................... 6-58
[D] Exemption from Section 12(g) ....................... 6-58
[E] Resale Restrictions ......................................... 6-59
[F] Intermediaries ................................................. 6-59
§ 6:6.3 Provisions Relative to Crowdfunding

Intermediaries

[A] Status; Limitation on Activities; Registration

[B] Limitation on Financial Interests in Issuer

[C] Diligence Requirements

[D] Account Opening; Educational Materials;

Electronic Delivery

[E] Compliance with Investment Limit

[F] Acknowledgement of Risk

[G] Communication Channels

[H] Issuer Information

[I] Escrow of Offering Proceeds

[J] Cancellation of Commitments

[K] Compensation; Payments to Third Parties

§ 6:6.4 Liability Issues

§ 6:6.5 Conclusion

§ 6:7 Other Regulatory Exemptions

§ 6:7.1 Regulation CE

§ 6:7.2 Rule 701: Compensatory Benefit Plans and Contracts

§ 6:7.3 Rules 801 and 802: Cross-Border Rights Offerings, Exchange Offers, and Business Combinations

§ 6:7.4 Regulation S

§ 6:8 Choosing Among the Exemptions

Table 6-1 Regulation D Exemptions

Chapter 7 Resales of Securities Under the Securities Act

§ 7:1 Introduction

§ 7:2 Control and Restricted Securities

§ 7:3 Public Resales Outside Rule 144

§ 7:3.1 Sales of Control Securities

§ 7:3.2 Sales of Restricted Securities

§ 7:4 Public Resales Under Rule 144

§ 7:5 Private Resales of Control and Restricted Securities

Table 7-1 Rule 144 Decision Tree
Chapter 8  Liability for Securities Act Violations

§ 8:1  Introduction................................................................. 8-1
§ 8:2  Criminal and Other Governmental Actions................... 8-1
§ 8:3  Civil Liability.............................................................. 8-6
  § 8:3.1  Section 11............................................................. 8-6
  § 8:3.2  Section 12............................................................. 8-13
    [A]  Section 12(a)(1).................................................... 8-13
    [B]  Section 12(a)(2).................................................... 8-17
    [C]  Section 12(b)......................................................... 8-23
  § 8:3.3  Section 15............................................................. 8-23
  § 8:3.4  Section 17(a)........................................................ 8-24
§ 8:4  Contribution and Indemnification ................................ 8-30

Chapter 9  Registration and Periodic Reporting
Under the Exchange Act

§ 9:1  Introduction................................................................. 9-1
§ 9:2  Commission’s General Exemptive Authority .................... 9-2
§ 9:3  Registration of Securities Under the Exchange Act .......... 9-2
§ 9:4  Periodic Reporting Under the Exchange Act................... 9-7
§ 9:5  Foreign Corrupt Practices Act...................................... 9-13
§ 9:6  Regulation FD............................................................. 9-16
  § 9:6.1  Background.......................................................... 9-16
  § 9:6.2  Compliance........................................................... 9-16
    [A]  Generally.............................................................. 9-16
    [B]  Social Media [Netflix Investigation]........................ 9-17
§ 9:7  Sarbanes-Oxley Act of 2002 ....................................... 9-19

Chapter 10  Regulation of Proxy Solicitations

§ 10:1  Introduction............................................................... 10-2
§ 10:2  Statutory Scheme....................................................... 10-2
§ 10:3  Proxy Solicitation Generally ...................................... 10-3
  § 10:3.1  Existing Framework ............................................. 10-3
  § 10:3.2  Proposed Changes: Review of “Proxy Plumbing” ....... 10-8
  § 10:4.1  Executive Compensation and Related-Party
    Transaction Disclosure .................................................... 10-10
    [A]  General Disclosure Requirements............................. 10-10
    [B]  2009 Rule Changes.................................................. 10-12
    [C]  Changes Mandated by Dodd-Frank............................. 10-14
Table of Contents

[C][1] Say-on-Pay .............................................................. 10-15
[C][2] Compensation Committee Independence and Related Matters ........................................ 10-17
[C][3] New Executive Compensation Disclosures .......................................................... 10-21
§ 10:4.2 Governance Disclosures .............................................. 10-25
[A] General Disclosure Requirements ........................................ 10-25
[B] 2010 Dodd-Frank Changes .................................................... 10-29
[B][1] Disclosures Regarding Chairman and CEO Structures ........................................ 10-30
[B][2] Voting by Brokers ......................................................... 10-30
[B][3] Disclosure Regarding Employee and Director Hedging ........................................ 10-30
§ 10:5 False or Misleading Statements ........................................ 10-49
§ 10:5.1 Materiality ............................................................... 10-50
§ 10:5.2 Causation ................................................................. 10-51
§ 10:5.3 Degree of Fault Required ............................................... 10-54
§ 10:5.4 Other Liability Issues .................................................... 10-55
Table 10-1 Acme Corporation: Annual Meeting/Report/ Proxy Timetable ................................ 10-57

Chapter 11 Regulation of Tender Offers

§ 11:1 Introduction ............................................................... 11-1
§ 11:2 Williams Act and Its Rules .............................................. 11-3
§ 11:3 What Is a Tender Offer? .................................................... 11-8
§ 11:4 Issues in Williams Act Litigation ......................................... 11-10
§ 11:4.1 Who May Bring Suit? .................................................... 11-10
[A] Section 13(d) ................................................................. 11-10
[B] Section 14(e) ................................................................. 11-15
§ 11:4.2 Conduct Proscribed by Section 14(e) .................................. 11-18
§ 11:4.3 Other Liability Issues .................................................... 11-21
§ 11:5 State Regulation of Tender Offers ...................................... 11-23
# Chapter 12  Fraud Under Rule 10b-5 and Related Issues

| § 12:1 | Introduction | 12-1 |
| § 12:2 | The “In Connection With” Requirement | 12-5 |
| § 12:3 | Reliance and Causation | 12-10 |
| § 12:4 | “Purchaser-Seller” Requirement | 12-17 |
| § 12:5 | Fault Required—Scienter | 12-19 |
| § 12:6 | Persons Subject to Trading Restraints | 12-27 |
| § 12:7 | Issuers’ Duty to Disclose | 12-38 |
| § 12:8 | Materiality | 12-41 |
| § 12:9 | Damages and Penalties | 12-44 |
| § 12:10 | Statute of Limitation | 12-48 |
| § 12:11 | Controlling Person Liability | 12-50 |
| § 12:12 | Aiding and Abetting and Conspiracy | 12-51 |
| § 12:13 | Contribution | 12-57 |
| § 12:14 | Related Issues | 12-57 |
| § 12:14.1 | Under the Sarbanes-Oxley Act | 12-57 |
| § 12:14.2 | Under the Dodd-Frank Wall Street Reform and Consumer Protection Act | 12-61 |

# Chapter 13  Liability for Trading Profits Under Exchange Act Section 16(b) and Sarbanes-Oxley Section 306

| § 13:1 | Introduction | 13-1 |
| § 13:2 | Persons Liable | 13-6 |
| § 13:2.1 | Titles | 13-7 |
| § 13:2.2 | Deputization | 13-8 |
| § 13:2.3 | Beneficial Ownership | 13-10 |
| § 13:2.4 | Exemptions | 13-13 |
| § 13:3 | What Constitutes a Purchase or Sale? | 13-15 |
| § 13:4 | Timing of Purchases and Sales | 13-18 |
| § 13:5 | Standing to Sue | 13-20 |
| § 13:6 | Calculation of Profits | 13-21 |

# Chapter 14  Regulation of the Securities Business

| § 14:1 | Introduction | 14-1 |
| § 14:2 | Regulation of Stock Exchanges and FINRA | 14-2 |
| § 14:3 | Regulation of Brokers and Dealers | 14-5 |
| § 14:4 | Margin Requirements | 14-10 |