

# Table of Contents

---

## VOLUME 1

<b>About the Authors</b> .....	vii
<b>Table of Chapters</b> .....	ix

### PART I: Introductory Material

<b>Chapter 1</b>	<b>Introduction</b> .....	1-1
<b>Chapter 2</b>	<b>Scope of the SOA</b>	
SUMM 2:1	Overview .....	2-1
§ 2:1	Scope of the SOA.....	2-2
§ 2:1.1	Definition of “Issuer” .....	2-2
[A]	Text of SOA Section 2(a)(7) .....	2-2
[B]	Discussion .....	2-2
[B][1]	Issuers Having Securities Registered Under Exchange Act Section 12.....	2-2
[B][2]	Issuers Required to File Reports Under Exchange Act Section 15(d).....	2-3
[B][3]	Issuers Having Pending Securities Act Registration Statements .....	2-3
[B][4]	Voluntary Filers .....	2-3
[C]	Rule 12g3-2(b) Filers .....	2-4
[D]	Schedule B Issuers .....	2-4
[E]	Other Issuers .....	2-5
§ 2:1.2	SOA Provisions Applicable to All Persons .....	2-5
§ 2:2	Scope of Other Initiatives .....	2-6

### PART II: Governance

<b>Chapter 3</b>	<b>Director Independence</b>	
SUMM 3:1	Overview .....	3-2
SUMM 3:2	NYSE Director Independence Rules .....	3-3
SUMM 3:2.1	Entities Subject to the NYSE Rules .....	3-3
SUMM 3:2.2	Requirements of the NYSE Rules .....	3-4
SUMM 3:2.3	Definition of “Independent Director” .....	3-4

SUMM 3:3	Nasdaq Director Independence Rules .....	3-5
SUMM 3:3.1	Entities Subject to the Nasdaq Rules .....	3-5
SUMM 3:3.2	Requirements of the Nasdaq Rules.....	3-6
SUMM 3:3.3	Definition of “Independent Director” .....	3-6
SUMM 3:4	Board of Directors Disclosure Under Item 407 of Regulation S-K.....	3-7
SUMM 3:4.1	Entities Subject to the Rule.....	3-7
SUMM 3:4.2	Required Disclosure .....	3-8
§ 3:1	NYSE and Nasdaq Rules Relating to Director Independence .....	3-9
§ 3:1.1	Overview.....	3-9
§ 3:1.2	Background .....	3-9
§ 3:1.3	NYSE Director Independence Rules.....	3-13
[A]	Text of Section 303A.OO, “Introduction,” and Sections 303A.01–.03 (Including NYSE Commentary) .....	3-13
[B]	Timing of Effectiveness .....	3-28
[C]	Entities Subject to the Rules .....	3-30
[D]	Application to Non-U.S. Issuers.....	3-32
[E]	Majority Independent Board.....	3-34
[F]	Executive Sessions .....	3-34
[G]	Direct Communications with Non-Management Directors .....	3-35
[H]	Bright-Line Independence Tests.....	3-36
[H][1]	Substantive Tests .....	3-36
[H][2]	Look-Back Period.....	3-41
[I]	Affirmative Independence Determinations .....	3-41
[J]	Disclosure of Categorical Standards .....	3-42
§ 3:1.4	Nasdaq Director Independence Rules .....	3-43
[A]	Text of Nasdaq Rules Relating to Director Independence (Including Interpretations) .....	3-43
[B]	Timing of Effectiveness .....	3-59
[C]	Entities Subject to the Rules .....	3-60
[D]	Application to Non-U.S. Issuers.....	3-60
[E]	Majority Independent Board.....	3-61
[F]	Executive Sessions .....	3-61
[G]	Definition of “Independent Director” .....	3-61
[G][1]	General Standard of Independence .....	3-61
[G][2]	Bright-Line Bars to Independence .....	3-62
§ 3:2	Board of Directors Disclosure Under Item 407 of Regulation S-K .....	3-64
§ 3:2.1	Background .....	3-64
§ 3:2.2	Text of Item 407 of Regulation S-K.....	3-65
§ 3:2.3	Director Independence Under Item 407(a) .....	3-72

*Table of Contents*

§ 3:2.4 Board and Committee Structure and Functioning..... 3-74

[A] Board Meetings and Committees ..... 3-74

[B] Disclosure Regarding Shareholder Communication with the Board..... 3-74

[C] Disclosure on Leadership Structure..... 3-76

[D] Application to Registered Investment Companies ..... 3-77

**Chapter 4 Audit Committee**

SUMM 4:1 Overview ..... 4-4

SUMM 4:2 Rule 10A-3 ..... 4-4

    SUMM 4:2.1 Issuers Subject to the Rule ..... 4-4

    SUMM 4:2.2 Audit Committee Independence ..... 4-5

    SUMM 4:2.3 Authority and Responsibilities of the Audit Committee..... 4-5

    SUMM 4:2.4 Disclosure Requirements ..... 4-6

SUMM 4:3 NYSE Listing Requirements ..... 4-6

    SUMM 4:3.1 Entities Subject to the Rules ..... 4-6

    SUMM 4:3.2 Independence and Other Qualifications ..... 4-6

    SUMM 4:3.3 Authority and Responsibilities of the Audit Committee..... 4-7

SUMM 4:4 Nasdaq Listing Requirements ..... 4-7

    SUMM 4:4.1 Entities Subject to the Rules ..... 4-7

    SUMM 4:4.2 Independence and Other Qualifications ..... 4-7

    SUMM 4:4.3 Authority and Responsibilities of the Audit Committee..... 4-8

SUMM 4:5 Audit Committee Financial Expert..... 4-8

    SUMM 4:5.1 Entities Subject to the Rules ..... 4-8

    SUMM 4:5.2 Required Disclosure..... 4-8

    SUMM 4:5.3 Definition of Audit Committee Financial Expert ..... 4-8

    SUMM 4:5.4 Safe Harbor..... 4-9

SUMM 4:6 Communications with Audit Committees ..... 4-9

§ 4:1 Background ..... 4-10

    § 4:1.1 SEC and SRO Rulemaking Pre-SOA ..... 4-10

    § 4:1.2 Effect of Enron and Other Financial Scandals ..... 4-11

    § 4:1.3 Legislative History of SOA Section 301 ..... 4-11

§ 4:2 Text of Requirements ..... 4-12

    § 4:2.1 SOA Section 301 ..... 4-12

    § 4:2.2 Rule 10A-3 Under the Exchange Act ..... 4-14

    § 4:2.3 Item 407(d) of Regulation S-K ..... 4-26

    § 4:2.4 Item 22 of Schedule 14A ..... 4-29

§ 4:3	Requirements of SOA Section 301 and Rule 10A-3.....	4-32
§ 4:3.1	Scope of Requirement.....	4-32
	[A] Issuers Subject to the Rule .....	4-32
	[A][1] Non-U.S. Companies .....	4-32
	[A][2] OTC Companies .....	4-32
	[A][3] Registered Investment Companies .....	4-32
	[A][4] Issuers Exempt from the Rule.....	4-33
	[A][5] Limited Partnerships and Limited Liability Companies .....	4-33
	[B] Securities Subject to the Rule .....	4-33
	[C] Multiple Listings.....	4-33
§ 4:3.2	Audit Committee Independence .....	4-34
	[A] Criteria for Independence.....	4-34
	[A][1] Prohibition on Compensatory Fees .....	4-34
	[A][2] “Affiliated Person” .....	4-36
	[A][2][a] Safe Harbor.....	4-37
	[A][2][b] Affiliates of Affiliates .....	4-37
	[B] Exemptions from the Independence Requirements.....	4-38
§ 4:3.3	Responsibilities and Authority of the Audit Committee.....	4-38
	[A] Selection and Oversight of Independent Auditors.....	4-39
	[B] Complaint Procedures.....	4-39
	[C] Authority to Engage Advisors .....	4-40
	[D] Adequate Funding .....	4-41
	[E] Selection and Oversight of Accounting Firms Other Than the Independent Auditors .....	4-41
§ 4:3.4	Non-U.S. Issuers.....	4-42
	[A] Exemptions from the Independence Requirements.....	4-42
	[B] Alternative Auditor Oversight Structures .....	4-44
	[C] Dual Holding Companies .....	4-45
	[D] Exercise of Audit Committee Responsibilities by Shareholders and the Board of Directors .....	4-45
§ 4:3.5	Registered Investment Companies .....	4-46
§ 4:3.6	Disclosure Requirements.....	4-47
	[A] Disclosure Regarding Exemptions .....	4-47
	[B] Identification of the Audit Committee in Annual Reports.....	4-48
	[C] Audit Committee Disclosure in Proxy or Information Statements .....	4-48
§ 4:3.7	Additional Provisions .....	4-49
	[A] Notice of Noncompliance .....	4-49

*Table of Contents*

	[B] Opportunity to Cure Defects.....	4-49
§ 4:4	NYSE Listing Requirements .....	4-50
§ 4:4.1	Text of Section 303A.06 and .07 (Including NYSE Commentary) .....	4-50
§ 4:4.2	Timing of Effectiveness .....	4-56
§ 4:4.3	Entities Subject to the Rules .....	4-57
§ 4:4.4	Application to Non-U.S. Issuers .....	4-58
§ 4:4.5	Independence and Other Qualifications.....	4-59
[A]	Independence.....	4-59
[B]	Service on Other Audit Committees .....	4-59
§ 4:4.6	Authority and Responsibility of the Audit Committee.....	4-60
[A]	NYSE Requirements Generally.....	4-60
[B]	Audit Committee Role in Risk Oversight .....	4-63
§ 4:4.7	Sample Audit Committee Charter for Listed U.S. Companies .....	4-64
§ 4:4.8	Sample Audit Committee Report .....	4-78
§ 4:5	Nasdaq Listing Requirements .....	4-80
§ 4:5.1	Text of Nasdaq Rules Relating to Audit Committees (Including Interpretations) .....	4-80
§ 4:5.2	Timing of Effectiveness .....	4-87
§ 4:5.3	Entities Subject to the Rules .....	4-87
§ 4:5.4	Application to Non-U.S. Issuers .....	4-88
§ 4:5.5	Independence and Other Qualifications.....	4-88
§ 4:5.6	Authority and Responsibility of the Audit Committee.....	4-89
§ 4:5.7	Approval of Related Party Transactions.....	4-89
§ 4:5.8	Nasdaq Sample Audit Committee Charter and Audit Committee Report .....	4-90
§ 4:6	Financial Expert (SOA Section 407, Regulation S-K Item 407(d)(5)) .....	4-90
§ 4:6.1	Background and Legislative History .....	4-90
§ 4:6.2	Text of Requirements .....	4-91
[A]	SOA Section 407 .....	4-91
[B]	Regulation S-K Item 407(d)(5) .....	4-92
§ 4:6.3	Required Disclosure .....	4-95
§ 4:6.4	Definition of Audit Committee Financial Expert .....	4-96
[A]	Five Required Attributes.....	4-96
[B]	How Attributes Can Be Acquired .....	4-98
[B][1]	Active Supervision.....	4-98
[B][2]	Other Relevant Experience .....	4-98
[B][3]	No Presumptive Experience .....	4-99

	[B][4] Facts and Circumstances Determination .....	4-99
§ 4:6.5	Safe Harbor .....	4-101
§ 4:6.6	Non-U.S. Issuers .....	4-102
§ 4:6.7	Registered Investment Companies .....	4-102
§ 4:6.8	Relationship to NYSE and Nasdaq Standards .....	4-103
§ 4:6.9	Possible Approach for Companies Without an Audit Committee Financial Expert .....	4-104
§ 4:7	Communications with Audit Committee (SOA Section 204, Regulation S-X Rule 2-07, PCAOB Rule 3526, Auditing Standard No. 16) .....	4-106
§ 4:7.1	Background and Legislative History .....	4-106
§ 4:7.2	Text of Requirement .....	4-107
	[A] SOA Section 204 .....	4-107
	[B] Regulation S-X Rule 2-07 .....	4-107
§ 4:7.3	Overview of Rule .....	4-108
§ 4:7.4	Critical Accounting Policies and Practices .....	4-110
§ 4:7.5	Alternative Accounting Treatments .....	4-111
§ 4:7.6	Other Material Written Communications .....	4-113
§ 4:7.7	Registered Investment Companies .....	4-114
§ 4:7.8	PCAOB Audit Committee Communication Requirements .....	4-115
	[A] Communications Concerning Auditor Independence .....	4-115
	[B] GAAS Requirements Related to Audit Committee Communications .....	4-116
§ 4:8	Audit Committee Communications Relating to Audit Firm Inspections .....	4-118
§ 4:8.1	Overview .....	4-118
§ 4:8.2	PCAOB Inspections of Public Company Auditors .....	4-119
§ 4:8.3	Inspection-Related Communications with Audit Firms .....	4-119
§ 4:8.4	Potential Areas for Inquiry As a Result of 2010 Inspections .....	4-120

## **Chapter 5 Compensation Committee**

SUMM 5:1	Overview .....	5-3
SUMM 5:2	Dodd-Frank Act Compensation Committee Requirements .....	5-3
SUMM 5:3	NYSE Compensation Committee Requirements .....	5-3
SUMM 5:4	Nasdaq Compensation Committee Requirements .....	5-4

*Table of Contents*

SUMM 5:5	SEC Corporate Governance Disclosure Relating to Compensation Committees .....	5-5
SUMM 5:6	Additional Compensation Committee Independence Considerations .....	5-5
§ 5:1	Dodd-Frank Act Compensation Committee Requirements .....	5-5
§ 5:1.1	Overview .....	5-5
§ 5:1.2	Relevant Text of the Dodd-Frank Act .....	5-6
§ 5:1.3	Relevant Text of Final Rules Under Section 952 of the Dodd-Frank Act .....	5-11
	[A] Text of Item 407(e)(3)(iv) of Regulation S-K .....	5-11
	[B] Text of § 240.10C-1 of Exchange Act General Rules and Regulations .....	5-12
§ 5:1.4	Discussion of Final Rules Under Section 952 of the Dodd-Frank Act .....	5-18
	[A] Background .....	5-18
	[B] Coverage of Final Rules .....	5-19
	[C] Impact on Non-U.S. Issuers .....	5-20
	[D] Discussion of Compensation Committee Independence Under Final SEC Rules .....	5-20
	[E] Discussion of Compensation Advisor “Independence Factors” Under Final SEC Rules .....	5-22
	[F] Discussion of Authority and Funding to Engage Compensation Consultants and Other Advisers Under Final SEC Rules .....	5-23
	[G] Discussion of Additional Disclosure Requirements Under Final SEC Rules .....	5-23
	[H] Timing and Implementation of Final Listing Standards .....	5-24
§ 5:2	NYSE Compensation Committee Requirements .....	5-24
§ 5:2.1	Overview .....	5-24
§ 5:2.2	Text of Relevant Portions of Section 303A.00, .02 and .05 (Including NYSE Commentary) .....	5-25
§ 5:2.3	Discussion of the Rule .....	5-31
	[A] Compensation Committee Independence .....	5-31
	[B] Compensation Committee Charter and Responsibilities .....	5-32
§ 5:2.4	Sample Compensation Committee Charter for NYSE-Listed U.S. Companies .....	5-34
§ 5:3	Nasdaq Compensation Committee Requirements .....	5-38
§ 5:3.1	Overview .....	5-38
§ 5:3.2	Text of Rule 5605(d) (Including Interpretations) .....	5-39

§ 5:3.3	Discussion of the Rule .....	5-46
	[A] Requirement to Have a Compensation Committee .....	5-47
	[B] Compensation Committee Independence ....	5-48
	[C] Compensation Committee Oversight of Compensation Advisers .....	5-50
§ 5:3.4	Sample Compensation Committee Charter for Nasdaq-Listed U.S. Companies .....	5-50
§ 5:4	SEC Corporate Governance Disclosure Relating to Compensation Committees .....	5-55
§ 5:4.1	Background .....	5-55
§ 5:4.2	Text of SEC Rules Relating to Compensation Committees .....	5-56
	[A] Item 407(e) of Regulation S-K .....	5-56
	[B] Items 7 and 8 of Schedule 14A.....	5-62
§ 5:4.3	Compensation Committee Process.....	5-65
	[A] Requirements Under 2006 Rule .....	5-65
	[B] Compensation Consultant Disclosure Under 2009 Revisions.....	5-66
	[B][1] Background .....	5-66
	[B][2] Discussion of 2009 Revisions.....	5-67
§ 5:5	Additional Compensation Committee Independence Considerations.....	5-68
§ 5:5.1	Background .....	5-68
§ 5:5.2	Standards for Outside Director Under Section 162(m) of the Code.....	5-69
	[A] Text of Requirements .....	5-69
	[A][1] Section 162(m) of the Internal Revenue Code .....	5-69
	[A][2] Treasury Regulation 1.162-27(e)(3).....	5-78
	[B] Discussion of the Rule .....	5-84
	[B][1] Requirements to Be an Outside Director .....	5-84
	[B][2] Former Officer.....	5-85
	[B][3] Remuneration Received from the Company .....	5-86
§ 5:5.3	Standards for Non-Employee Director Under Section 16 of the Exchange Act .....	5-87
	[A] Text of Requirements .....	5-87
	[A][1] Text of Section 16(b) of the Exchange Act .....	5-87
	[A][2] Text of Rule 16b-3 .....	5-88
	[B] Discussion of the Rule .....	5-89



Table of Contents

**Chapter 6 Nominating and Corporate Governance Committee**

SUMM 6:1 Overview ..... 6-2

SUMM 6:2 NYSE Nominating/Corporate Governance  
Committee Requirements ..... 6-2

SUMM 6:3 Nasdaq Rules Relating to Director Nominations.. 6-2

SUMM 6:4 SEC Disclosure Requirements Relating to  
Nominating Committees ..... 6-3

§ 6:1 NYSE Nominating/Corporate Governance Committee  
Rules ..... 6-4

    § 6:1.1 Overview ..... 6-4

    § 6:1.2 Text of Section 303A.04 (Including NYSE  
    Commentary)..... 6-4

    § 6:1.3 Discussion of the Rule..... 6-6

    § 6:1.4 Sample Nominating/Corporate Governance  
    Committee Charter for NYSE-Listed  
    U.S. Companies ..... 6-7

§ 6:2 Nasdaq Rules Relating to Director Nominations ..... 6-11

    § 6:2.1 Overview ..... 6-11

    § 6:2.2 Text of Nasdaq Rules Relating to Director  
    Nominations (Including Interpretations) ..... 6-11

    § 6:2.3 Discussion of the Rule..... 6-13

    § 6:2.4 Sample Nominations Committee Charter  
    for Nasdaq-Listed U.S. Companies ..... 6-14

§ 6:3 SEC Corporate Governance Disclosure Rules  
Relating to Nominating Committees ..... 6-18

    § 6:3.1 Background ..... 6-18

    § 6:3.2 Text of SEC Rules Relating to Nominating  
    Committees ..... 6-20

        [A] Item 407(c) of Regulation S-K ..... 6-20

        [B] Item 22(b)(15) of Schedule 14A..... 6-24

    § 6:3.3 Nominating Committee Process..... 6-26

        [A] Disclosure Regarding Nominating  
        Committee Functions ..... 6-26

        [B] Application to Registered Investment  
        Companies ..... 6-30

**Chapter 7 Codes of Ethics**

SUMM 7:1 Overview ..... 7-2

SUMM 7:2 SEC Code of Ethics for Senior Financial  
Officers ..... 7-2

SUMM 7:3 NYSE Code of Ethics Requirement..... 7-3

SUMM 7:4 Nasdaq Code of Conduct Requirement ..... 7-3

§ 7:1 SEC Code of Ethics for Senior Financial Officers ..... 7-3

    § 7:1.1 Overview and Legislative History ..... 7-3

§ 7:1.2	Text of Requirements .....	7-4
	[A] SOA Section 406.....	7-4
	[B] Item 406 of Regulation S-K.....	7-5
	[C] Item 5.05 of Form 8-K .....	7-7
§ 7:1.3	Required Disclosure .....	7-8
§ 7:1.4	Definition of Code of Ethics .....	7-9
§ 7:1.5	Public Availability of Code of Ethics .....	7-10
§ 7:1.6	Amendments and Waivers .....	7-11
	[A] U.S. Companies.....	7-11
	[B] Non-U.S. Companies.....	7-12
§ 7:1.7	Registered Investment Companies .....	7-12
§ 7:2	NYSE Code of Ethics Requirement.....	7-13
§ 7:2.1	Overview.....	7-13
§ 7:2.2	Text of Section 303A.10 (Including NYSE Commentary).....	7-14
§ 7:2.3	Discussion of the Rule .....	7-16
§ 7:3	Nasdaq Code of Conduct Requirement.....	7-18
§ 7:3.1	Overview.....	7-18
§ 7:3.2	Text of Nasdaq Rules Relating to Codes of Conduct (Including Interpretations) .....	7-18
§ 7:3.3	Discussion of the Rule .....	7-20
§ 7:4	Interplay between SOA Section 406 Requirements and NYSE/Nasdaq Requirements.....	7-21
§ 7:5	Effective Compliance and Ethics Program Under Federal Sentencing Guidelines.....	7-22
§ 7:6	Sample SEC and NYSE or Nasdaq Code of Ethics.....	7-22

**Chapter 8 Corporate Governance Guidelines and Certification**

SUMM 8:1	Corporate Governance Guidelines .....	8-2
SUMM 8:2	Related Person Transactions.....	8-3
SUMM 8:3	Other NYSE Corporate Governance Compliance Rules.....	8-3
SUMM 8:4	Other Nasdaq Corporate Governance Compliance Rules.....	8-4
§ 8:1	Corporate Governance Guidelines.....	8-4
§ 8:1.1	Overview.....	8-4
§ 8:1.2	Text of Section 303A.09 (Including NYSE Commentary).....	8-5
§ 8:1.3	Discussion of the NYSE Rule .....	8-7
§ 8:1.4	Nasdaq.....	8-8
§ 8:1.5	Sample Corporate Governance Guidelines for NYSE-Listed Companies .....	8-9
§ 8:1.6	Sample Corporate Governance Guidelines for Nasdaq-Listed Companies.....	8-18

*Table of Contents*

§ 8:2	Disclosure of Related Person Transactions .....	8-28
§ 8:2.1	Overview .....	8-28
§ 8:2.2	Text of Item 404(a) and (b) of Regulation S-K .....	8-28
§ 8:2.3	Discussion of the Rule.....	8-34
[A]	Related Persons .....	8-35
[B]	Amount Involved .....	8-36
[C]	Direct or Indirect Material Interest .....	8-36
[D]	Required Disclosure .....	8-38
§ 8:2.4	Related Person Transaction Approval Policies .....	8-39
§ 8:3	Other NYSE Corporate Governance Rules .....	8-41
§ 8:3.1	NYSE CEO Certification, CEO Notice of Noncompliance, and Written Affirmations .....	8-41
[A]	Overview .....	8-41
[B]	Text of Section 303.12 (Including NYSE Commentary) .....	8-41
[C]	Discussion of Requirements.....	8-42
[D]	NYSE Corporate Governance Forms .....	8-45
[D][1]	Annual CEO Certification for U.S. Issuers.....	8-45
[D][2]	Annual Written Affirmation for U.S. Issuers.....	8-46
[D][2][a]	Text of Affirmation .....	8-46
[D][2][b]	Exhibit F.....	8-52
[D][2][c]	Exhibit G .....	8-54
[D][2][d]	Exhibit I.....	8-61
[D][3]	Interim Written Affirmation for U.S. Issuers.....	8-63
[D][3][a]	Text of Affirmation .....	8-63
[D][3][b]	Exhibit J.....	8-71
[D][3][c]	Exhibit K.....	8-72
[D][4]	Instructions to Written Affirmations for U.S. Issuers.....	8-74
[D][5]	Annual Written Affirmation for Non-U.S. Issuers.....	8-82
[D][5][a]	Text of Affirmation .....	8-82
[D][5][b]	Exhibit B.....	8-85
[D][6]	Interim Written Affirmation for Non-U.S. Issuers.....	8-91
[D][6][a]	Text of Affirmation .....	8-91
[D][6][b]	Exhibit D .....	8-96
[D][7]	Instructions to Written Affirmations for Non-U.S. Issuers.....	8-100
§ 8:4	Other Nasdaq Corporate Governance Rules .....	8-105
§ 8:4.1	Nasdaq Notice of Noncompliance .....	8-105

§ 8:4.2	Elimination of Going Concern Notice Requirement .....	8-106
§ 8:4.3	Authority to Delist for Misrepresenting Information to Nasdaq.....	8-106
§ 8:4.4	Consideration of Corporate Governance Requirements in Listing Appeals .....	8-107

**Chapter 9 Private Corporate Governance Initiatives**

SUMM 9:1	Overview of Private Group Recommendations .....	9-1
§ 9:1	Background .....	9-3
§ 9:1.1	Development of Private Corporate Governance Initiatives.....	9-3
§ 9:1.2	Codification of Private Group Recommendations ..	9-4
§ 9:1.3	Current Sources for Private Group Recommendations.....	9-6
§ 9:1.4	Corporate Governance Ratings .....	9-9
§ 9:2	Corporate Governance Recommendations of Private Groups .....	9-10
§ 9:2.1	Substantial Majority of Independent Directors ....	9-11
§ 9:2.2	Heightened Director Independence Definitions ...	9-12
§ 9:2.3	Independent Board Leadership .....	9-14
§ 9:2.4	Annual Election of Directors .....	9-15
§ 9:2.5	Majority Voting Standard for Uncontested Director Elections .....	9-16
§ 9:2.6	No Supermajority Voting Thresholds in Charter and By-Laws .....	9-17
§ 9:2.7	No Poison Pills Without Shareholder Approval....	9-18
§ 9:2.8	Executive Compensation .....	9-18
§ 9:2.9	Director Compensation .....	9-18
§ 9:2.10	Shareholder Meetings with Board Members.....	9-19
§ 9:2.11	Individual Director Evaluations .....	9-20
§ 9:2.12	Rotating Committee Chairs .....	9-20
§ 9:2.13	Service on Multiple Boards .....	9-21

**Chapter 10 Blackouts and Insider Trading**

SUMM 10:1	Overview .....	10-3
SUMM 10:2	Blackouts to Prevent Insider Trading .....	10-3
SUMM 10:2.1	Considerations in Establishing Blackout Policies .....	10-3
SUMM 10:2.2	Affirmative Defenses Under Rule 10b5-1 ...	10-4
SUMM 10:3	Blackouts Related to Benefit Plans .....	10-4
SUMM 10:3.1	Prohibited Insider Trades During a Blackout Period.....	10-4

*Table of Contents*

SUMM 10:3.2 Department of Labor  
Advance Notice Rule..... 10-5

SUMM 10:3.3 Notice of a Blackout Period to Insiders  
and the SEC ..... 10-5

§ 10:1 Insider Trading and Blackouts Under Exchange Act  
Section 10(b) and Rule 10b-5..... 10-5

§ 10:1.1 Text of Requirements ..... 10-6

[A] Section 10(b) of the Exchange Act ..... 10-6

[B] Rule 10b-5 Under the Exchange Act ..... 10-7

[C] Rule 10b5-1(c) Under the Exchange Act ..... 10-8

§ 10:1.2 Determining the Beginning and the End of  
a Blackout Period ..... 10-9

[A] Blackout Periods Related to Earnings  
Announcements ..... 10-9

[B] Blackout Periods Related to Specific  
Corporate Events ..... 10-10

§ 10:1.3 Determining Who Is Subject to a Blackout  
Policy ..... 10-11

§ 10:1.4 Pre-Clearance of Trades and Trading Outside  
Blackout Periods..... 10-12

§ 10:1.5 Window Periods ..... 10-12

§ 10:1.6 Affirmative Defenses Under Rule 10b5-1 ..... 10-13

[A] Requirements for Written Plan Defense..... 10-13

[A][1] Specificity of Trade Information ..... 10-14

[A][2] Purchase and/or Sale Pursuant  
to the Plan ..... 10-14

[A][3] The Good Faith Requirement ..... 10-15

[A][4] Termination of a Plan..... 10-15

[B] The Binding Contract or Instruction  
Defense ..... 10-16

[C] SEC Staff Guidance..... 10-16

[C][1] Rule 10b5-1 Plan Requirements ..... 10-16

[C][2] Rule 10b5-1 Plans That Delegate  
Investment Discretion..... 10-19

[C][3] Options Transactions ..... 10-19

[C][4] 401(k) Plan Transactions ..... 10-20

[C][5] Form 144 Filing Requirements ..... 10-20

§ 10:2 Benefit Plan Blackouts (SOA Section 306,  
Regulation BTR & DOL Advance Notice Rule) ..... 10-20

§ 10:2.1 Legislative History ..... 10-21

§ 10:2.2 Text of Requirements ..... 10-22

[A] Text of SOA Section 306 ..... 10-22

[B] Text of Regulation BTR ..... 10-22

[C] Item 5.04 of Form 8-K ..... 10-34

§ 10:2.3	Discussion of Regulation BTR and SOA Section 306(a) .....	10-35
	[A] Issuers and Insiders Subject to the Rule .....	10-35
	[A][1] Issuers.....	10-35
	[A][2] Directors .....	10-36
	[A][3] Executive Officers .....	10-36
	[B] Plan Blackouts Subject to the Rule .....	10-37
	[B][1] Individual Account Plans .....	10-37
	[B][2] Blackout Period .....	10-38
	[B][3] Calculating the 50% Threshold .....	10-39
	[B][4] Blackout Period Exceptions.....	10-39
	[C] Prohibited Insider Trades During a Blackout Period.....	10-41
	[C][1] Securities Subject to the Blackout Trading Restrictions .....	10-41
	[C][2] Securities “Acquired in Connection with Service or Employment As a Director or Executive Officer” .....	10-42
	[C][3] Securities Traded During a Blackout Period Considered “Acquired in Connection with Service” Unless Traced to Another Source .....	10-43
	[C][4] Transactions Exempt from the Blackout Trading Restrictions .....	10-44
	[D] Content and Timing of Notice to Insiders and the SEC.....	10-46
	[D][1] Content of Notice .....	10-46
	[D][2] Timing of Notice to Insiders .....	10-46
	[D][3] Timing of Notice to the SEC .....	10-47
	[D][4] Department of Labor’s Model Notice ....	10-48
	[E] Remedies .....	10-48
	[E][1] General .....	10-48
	[E][2] Calculation of Realized Profits.....	10-48
	[E][3] SEC Enforcement .....	10-49
	[F] Non-U.S. Companies.....	10-49
	[F][1] Additional Calculation Threshold for Non-U.S. Companies .....	10-49
	[F][2] Directors and Executive Officers .....	10-50
	[F][3] Securities Subject to the Trading Restriction .....	10-50
	[F][4] Exempt Transactions .....	10-50
	[F][5] Notice to the SEC .....	10-50
§ 10:2.4	Discussion of DOL Advance Notice Rule and SOA Section 306(b) .....	10-50

*Table of Contents*

- [A] Text of Department of Labor’s Final Rules, Including Text of Its Model Notice ..... 10-51
- [B] Plans and Blackouts Subject to the Advance Notice Rules ..... 10-58
  - [B][1] Plans Subject to the Notice Rules ..... 10-58
  - [B][2] Blackout Periods ..... 10-59
  - [B][3] Exceptions to the Advance Notice Requirement ..... 10-59
  - [B][4] Waiver of Thirty Days’ Advance Notice ..... 10-60
- [C] Notice Requirements ..... 10-61
  - [C][1] Timing of Notice ..... 10-61
  - [C][2] Contents of Notice to Participants ..... 10-62
  - [C][3] Notice to Issuer ..... 10-63
  - [C][4] Regular Participant Communications Can Include Blackout Notice ..... 10-64
  - [C][5] Model Notice ..... 10-64
- [D] Civil Penalties ..... 10-65

**Chapter 11 Loans to Insiders and Insider Ownership Reporting**

- SUMM 11:1 Overview ..... 11-3
- SUMM 11:2 Prohibition on Loans to Officers and Directors ..... 11-3
- SUMM 11:3 Deadlines for Ownership Reports by Insiders of U.S. Public Companies ..... 11-4
- SUMM 11:4 Dodd-Frank Beneficial Ownership Provisions ..... 11-5
- § 11:1 Prohibition on Loans (SOA Section 402, Exchange Act Rule 13k-1) ..... 11-5
  - § 11:1.1 Background and Legislative History ..... 11-5
  - § 11:1.2 Text of Requirements ..... 11-7
    - [A] SOA Section 402 ..... 11-7
    - [B] Exchange Act Rule 13k-1 ..... 11-8
  - § 11:1.3 General Principles for Analysis ..... 11-10
    - [A] Relationship to Historic Margin Interpretation ..... 11-10
    - [B] Meaning of “In the Form of a Personal Loan” ..... 11-11
    - [C] Arranging ..... 11-11
  - § 11:1.4 General ..... 11-12
    - [A] Scope of Prohibition ..... 11-12
    - [B] Meaning of Issuer ..... 11-12
    - [C] Applicability to Non-U.S. Companies ..... 11-12
    - [D] Scope of Covered Executive Officers and Directors ..... 11-13

	[E]	Grandfather Exemption .....	11-13
	[F]	Exemption for Consumer and Related Credits.....	11-14
	[F][1]	Types of Credit Eligible.....	11-14
	[F][1][a]	Consumer Credit .....	11-14
	[F][1][b]	Margin Loans.....	11-14
	[F][1][c]	Loans by FDIC-Insured Banks .....	11-15
	[F][2]	Conditions to Exemption .....	11-15
	[G]	Exemption for Non-U.S. Banks— Exchange Act Rule 13k-1 .....	11-15
	[G][1]	Non-U.S. Banks Eligible for Exemption.....	11-16
	[G][2]	Requirements of Exchange Act Rule 13k-1 .....	11-16
	[G][2][a]	Condition 1—Home-Country Deposit Insurance or Comprehensive Consolidated Supervision .....	11-16
	[G][2][b]	Condition 2—Insider Lending Restriction .....	11-17
	[G][3]	Disclosure of Insider Loans .....	11-18
§ 11:1.5		Common Issues .....	11-18
	[A]	Indemnification .....	11-19
	[B]	Loan to a Company Controlled by a Director or Executive Officer.....	11-20
	[C]	Travel Advance or Provision of Company Credit Card.....	11-20
	[D]	Personal Use of Company Car .....	11-21
	[E]	Split-Dollar Life Insurance .....	11-21
	[F]	Loans from a 401(k) Plan .....	11-22
	[G]	“Cashless” Option Exercises .....	11-23
	[G][1]	General Analysis of Cashless Exercise Transactions.....	11-23
	[G][2]	Types of Cashless Exercise Transactions Providing Greatest Comfort .....	11-25
	[G][2][a]	So-Called “T+3” Cashless Exercise Arrangements .....	11-26
	[G][2][b]	Unarranged Cashless Exercise Transactions .....	11-26
	[H]	Grandfather Issues.....	11-27
	[H][1]	Commitments and Maintaining Demand Loans.....	11-27
	[H][2]	Permissible Changes to Grandfathered Credits .....	11-27
§ 11:1.6		Text of Joint Outline of 25 Law Firms (October 15, 2002) .....	11-28



*Table of Contents*

§ 11:2 Ownership Reported by Insiders and Shareholders  
of U.S. Issuers ..... 11-43

§ 11:2.1 Background ..... 11-44

§ 11:2.2 Text of Section 16 Requirements ..... 11-45

[A] Exchange Act Section 16(a) As Amended  
by the SOA and the Dodd-Frank Act ..... 11-45

[B] Amended Rules Under Exchange Act  
Section 16..... 11-47

[C] Amended Rules Regarding Electronic  
Filing ..... 11-49

§ 11:2.3 Form 4 2-Day Reporting..... 11-50

§ 11:2.4 Limited Exceptions Permitting Delayed  
Reporting ..... 11-51

[A] Description of Exceptions ..... 11-51

[B] Interpretive Issues..... 11-52

§ 11:2.5 Form 3 and Form 5 Reporting ..... 11-52

§ 11:2.6 Electronic Filing ..... 11-53

[A] Electronic Filing Procedures ..... 11-53

[B] Required Website Posting of Forms 3, 4,  
and 5 ..... 11-55

[C] Hardship Exemptions and Filing Dates ..... 11-56

[D] Time of Filing ..... 11-57

[E] Changes to Forms 3, 4, and 5 ..... 11-57

§ 11:2.7 Filing Strategies..... 11-57

§ 11:2.8 Dodd-Frank Beneficial Ownership  
Provisions ..... 11-58

[A] Deadline for Initial Schedule 13D  
Filing ..... 11-58

[B] Treatment of Security-Based Swaps ..... 11-59

**PART III: Proxy Access and Disclosure**

**Chapter 12 Proxy Process and Proxy Access**

SUMM 12:1 Proxy Process for Annual Meetings ..... 12-3

SUMM 12:1.1 Proxy Process Timeline and Planning ..... 12-3

SUMM 12:1.2 Key Provisions of Regulation 14A ..... 12-4

[A] Rule 14a-3. Information to Be Furnished  
to Security Holders..... 12-4

[B] Rule 14a-4. Requirements As to Proxy ..... 12-4

[C] Rule 14a-6. Filing Requirements ..... 12-5

[D] Rule 14a-8. Proposals of Security Holders ..... 12-5

[E] Rule 14a-9. False or Misleading Statements ..... 12-6

[F] Rule 14a-16. Internet Availability of Proxy  
Materials..... 12-6

SUMM 12:2	Shareholder Nominations and Proxy Access .....	12-7
SUMM 12:2.1	Right to Nominate Directors Under State Law .....	12-7
SUMM 12:2.2	Proxy Access Rules .....	12-7
SUMM 12:2.3	Amendment to Rule 14a-8 Election Exclusion .....	12-8
[A]	Potential Company Responses to Proxy Access.....	12-9
SUMM 12:2.4	Schedule 14N .....	12-9
SUMM 12:3	Limitations on Broker Discretionary Voting.....	12-10
SUMM 12:4	SEC Proxy System Modernization Initiative.....	12-11
§ 12:1	Overview of the Proxy Process for Annual Meetings ..	12-11
§ 12:1.1	Key Provisions of Regulation 14A .....	12-12
[A]	Rule 14a-3. Information to Be Furnished to Security Holders .....	12-12
[B]	Rule 14a-4. Requirements As to Proxy .....	12-13
[C]	Rule 14a-5. Presentation of Information in Proxy Statement .....	12-15
[D]	Rule 14a-6. Filing Requirements .....	12-15
[E]	Rule 14a-8. Proposals of Security Holders.....	12-16
[F]	Rule 14a-9. False or Misleading Statements.....	12-16
[G]	Rule 14a-16. Internet Availability of Proxy Materials.....	12-17
[G][1]	Notice Only Option .....	12-17
[G][2]	Full Set Delivery Option.....	12-19
[H]	Schedule 14A Information Required in Proxy Statement .....	12-19
§ 12:1.2	Sample Proxy Statement Timeline.....	12-20
§ 12:2	Director and Officer Questionnaires.....	12-24
§ 12:3	Shareholder Nominations and Proxy Access .....	12-27
§ 12:3.1	Background .....	12-27
§ 12:3.2	Proxy Access and Director Nominations Under State Law .....	12-29
[A]	North Dakota Publicly Traded Corporations Act.....	12-30
[B]	Delaware General Corporation Law .....	12-30
[B][1]	Background .....	12-30
[B][2]	Text of DGCL Sections 112 and 113 .....	12-31
[B][3]	Delaware Provisions on Bylaws Concerning Stockholder Access to Proxy Materials .....	12-33
[B][4]	Delaware Provisions on Bylaws Concerning Reimbursement of Proxy Solicitation Expenses .....	12-34

*Table of Contents*

§ 12:3.3	Proxy Access Rules .....	12-35
	[A] Overview and Background.....	12-35
	[B] Text of Rules Related to Proxy Access .....	12-36
§ 12:3.4	Amendment to Rule 14a-8 Election Exclusion ...	12-50
	[A] Background.....	12-50
	[B] Shareholder Proposals with Respect to the Process for Election of Directors.....	12-51
	[C] Potential for Private Ordering.....	12-53
	[D] Summary of 2013 Proxy Access Proposals .....	12-54
	[D][1] Norges Bank Precatory Proposals (1%/1 Year) .....	12-55
	[D][2] U.S. Proxy Exchange Form of Proposal (1%/50 Holders) .....	12-55
	[D][3] Precatory 3%/3-Year Proposals .....	12-56
	[E] Potential Company Responses to Proxy Access .....	12-57
	[E][1] Engagement with Shareholders.....	12-57
	[E][2] Early Announcements of Governance Enhancements .....	12-58
	[E][3] Evaluate Standard SEC Exclusion Bases .....	12-58
	[E][4] Conflicting Management Proposal.....	12-58
	[F] Schedule 14N Disclosures for a Proxy Access Nomination.....	12-62
	[F][1] Disclosure Liability .....	12-64
	[G] Preliminary Proxy Filing Requirements .....	12-65
§ 12:4	Limitations on Broker Discretionary Voting .....	12-65
§ 12:4.1	NYSE Rule on Election of Directors.....	12-65
§ 12:4.2	Dodd-Frank Broker Voting Provision .....	12-67
§ 12:4.3	NYSE Rule on “Good Governance” Proposals ....	12-68
§ 12:5	SEC Proxy System Modernization Initiative .....	12-68

**Chapter 13 Compensation Disclosure**

SUMM 13:1	Overview .....	13-4
SUMM 13:2	Named Executive Officers .....	13-5
SUMM 13:3	Compensation Discussion and Analysis .....	13-5
SUMM 13:4	Executive Compensation Tables .....	13-5
SUMM 13:5	Pending Dodd-Frank Act Changes to Compensation Disclosure.....	13-6
SUMM 13:6	Compensation Committee Report .....	13-6
SUMM 13:7	Director Compensation Table.....	13-7
SUMM 13:8	Say-on-Pay and Say-When-on-Pay.....	13-7
SUMM 13:9	Golden Parachute Disclosure and Say-on-Golden Parachutes .....	13-7

SUMM 13:10	Voting Policies on Compensation and Governance Practices .....	13-7
SUMM 13:11	Additional Compensation and Governance Considerations .....	13-8
§ 13:1	Status of Compensation Disclosure.....	13-8
§ 13:2	Named Executive Officers .....	13-9
§ 13:2.1	Text of Item 402(a)(3)–(4) of Regulation S-K.....	13-9
§ 13:2.2	Discussion of Rule .....	13-11
§ 13:2.3	Interpretive Guidance .....	13-11
§ 13:3	Compensation Discussion and Analysis.....	13-12
§ 13:3.1	Text of Item 402(b) of Regulation S-K.....	13-12
§ 13:3.2	Discussion of Rule .....	13-16
§ 13:3.3	Compensation Risk Disclosure .....	13-19
[A]	Text of Item 402(s).....	13-19
[B]	Discussion of Rule .....	13-21
§ 13:3.4	Clawback Policies.....	13-22
[A]	Statutory Clawbacks .....	13-23
[B]	Adopting a Clawback Policy .....	13-24
[C]	Example Clawback Policies .....	13-26
[D]	Reporting Recovered Compensation .....	13-28
§ 13:3.5	Option Grant Practices.....	13-28
§ 13:3.6	Disclosure of Confidential Commercial or Business Information .....	13-29
§ 13:3.7	Subject to General Disclosure and Liability Provisions .....	13-30
§ 13:3.8	Staff Observations .....	13-31
§ 13:4	Tables .....	13-32
§ 13:4.1	Summary Compensation Table .....	13-33
[A]	Text of Item 402(c) of Regulation S-K.....	13-33
[B]	Total Compensation.....	13-42
[C]	Salary and Bonus .....	13-43
[C][1]	Discussion of Rule .....	13-43
[C][2]	Interpretive Guidance.....	13-43
[D]	Stock Awards and Option Awards .....	13-44
[D][1]	Discussion of 2006 Rule.....	13-44
[D][2]	Interpretive Guidance Under 2006 Rule.....	13-45
[D][3]	Discussion of 2009 Revised Rule .....	13-46
[D][4]	Interpretive Guidance Under 2009 Revised Rule .....	13-47
[E]	Non-Equity Incentive Compensation .....	13-50
[F]	Pension Benefits and Deferred Compensation Earnings.....	13-51
[F][1]	Discussion of Rule .....	13-51
[F][2]	Interpretive Guidance.....	13-52
[G]	All Other Compensation.....	13-52

*Table of Contents*

	[G][1] Discussion of Rule .....	13-52
	[G][2] Interpretive Guidance Relating to Perquisites.....	13-53
§ 13:4.2	Grants of Plan-Based Awards Table .....	13-54
	[A] Text of Item 402(d) of Regulation S-K.....	13-54
	[B] Discussion of Rule .....	13-58
	[C] Interpretive Guidance .....	13-59
§ 13:4.3	Narrative Disclosure to Summary Compensation Table and Grants of Plan-Based Awards Table .....	13-60
	[A] Text of Item 402(e) of Regulation S-K.....	13-60
	[B] Discussion of Rule .....	13-61
§ 13:4.4	Tables Relating to Equity Holdings and Value Realization.....	13-62
	[A] Outstanding Equity Awards at Fiscal Year-End Table.....	13-62
	[A][1] Text of Item 402(f) of Regulation S-K.....	13-62
	[A][2] Discussion of Rule.....	13-66
	[A][3] Interpretive Guidance.....	13-66
	[B] Option Exercises and Stock Vested Table.....	13-67
	[B][1] Text of Item 402(g) of Regulation S-K .....	13-67
	[B][2] Discussion of Rule .....	13-68
	[B][3] Interpretive Guidance.....	13-68
§ 13:4.5	Tables and Disclosure Relating to Post-Employment Compensation .....	13-69
	[A] Pension Benefits Table .....	13-69
	[A][1] Text of Item 402(h) of Regulation S-K .....	13-69
	[A][2] Discussion of Rule .....	13-72
	[A][3] Interpretive Guidance.....	13-72
	[B] Nonqualified Deferred Compensation Table.....	13-73
	[B][1] Text of Item 402(i) of Regulation S-K.....	13-73
	[B][2] Discussion of Rule .....	13-76
	[B][3] Interpretive Guidance.....	13-76
	[C] Disclosure of Potential Payments Upon Termination or Change-in-Control .....	13-77
	[C][1] Text of Item 402(j) of Regulation S-K.....	13-77
	[C][2] Discussion of Rule .....	13-79
	[C][3] Interpretive Guidance.....	13-80
§ 13:5	Pending Dodd-Frank Act Changes to Compensation Disclosure.....	13-81

§ 13:5.1	Text of Sections 953 and 955 of the Dodd-Frank Act .....	13-81
§ 13:5.2	Status of Requirements .....	13-82
§ 13:6	Compensation Committee Report .....	13-83
§ 13:7	Director Compensation Table.....	13-83
§ 13:7.1	Item 402(k) of Regulation S-K .....	13-83
§ 13:7.2	Discussion of Rule .....	13-90
§ 13:7.3	2009 Revisions to the Director Compensation Table .....	13-90
§ 13:8	Say-on-Pay and Say-When-on-Pay.....	13-91
§ 13:8.1	Overview.....	13-91
§ 13:8.2	Text of Requirements .....	13-91
	[A] Section 951 of the Dodd-Frank Act .....	13-91
	[B] Rule 14a-21 Under the Exchange Act .....	13-93
§ 13:8.3	Say-on-Pay .....	13-95
§ 13:8.4	Say-When-on-Pay .....	13-96
§ 13:8.5	Reactions to 2011 Say-on-Pay Losses and Review of 2012 Say-on-Pay Results.....	13-97
	[A] Company Reactions to 2011 Say-on-Pay Losses in 2012 .....	13-97
	[B] Review of 2012 Say-on-Pay Results .....	13-99
§ 13:9	Golden Parachute Disclosure and Say-on-Golden Parachutes.....	13-101
§ 13:9.1	Text of Requirements .....	13-102
	[A] Rule 14a-21 Under the Exchange Act .....	13-102
	[B] Item 402(t) of Regulation S-K.....	13-103
	[C] Rule 14a-21(c) Under the Exchange Act.....	13-108
§ 13:9.2	Golden Parachute Disclosure.....	13-109
	[A] Applicable Share Price.....	13-110
	[B] Disclosure in Other Documents .....	13-110
§ 13:9.3	Say-on-Golden Parachutes.....	13-111
§ 13:10	Jumpstart Our Business Startups (JOBS) Act .....	13-112
§ 13:11	Voting Policies on Compensation and Governance Practices and ISS Pay Practices Assessment .....	13-114
§ 13:11.1	Voting Policies on Compensation and Governance Practices .....	13-114
§ 13:11.2	ISS Executive Pay Practices Assessment Methodology .....	13-121
	[A] Summary of ISS Assessment Methodology.....	13-121
	[A][1] Components of Quantitative Analysis .....	13-121
	[A][2] The Qualitative Analysis.....	13-122

*Table of Contents*

- [A][3] 2012 Updates to Assessment
  - Methodology ..... 13-123
- [B] Methodological Concerns ..... 13-125
- [C] Company Responses to Negative ISS Recommendation ..... 13-126
- § 13:12 Additional Compensation and Governance Considerations ..... 13-129
  - § 13:12.1 Incentive Compensation Guidance from U.S. Banking Regulators ..... 13-129
    - [A] Balanced Risk-Taking Incentive Compensation Arrangements ..... 13-130
    - [B] Compatibility with Effective Controls and Risk Management ..... 13-130
    - [C] Effective Corporate Governance ..... 13-130
  - § 13:12.2 Joint Rule for Incentive Compensation Guidance Under Section 956 of the Dodd-Frank Act ..... 13-131
    - [A] Coverage ..... 13-131
    - [B] Specific Requirements for Largest Financial Institutions ..... 13-132
    - [C] Prohibition Against Incentive Compensation That “Could Lead to a Material Financial Loss” ..... 13-134
    - [D] Prohibition Against “Excessive” Compensation, Fees or Benefits ..... 13-134

**Chapter 14 Shareholder Approval of Equity Compensation Plans**

- SUMM 14:1 Overview ..... 14-2
- SUMM 14:2 Covered Equity Compensation Plans ..... 14-2
- SUMM 14:3 Exemptions from the Shareholder Approval Requirement ..... 14-3
- SUMM 14:4 Material Amendments to Plans ..... 14-3
- SUMM 14:5 SEC Disclosure Requirements ..... 14-3
- § 14:1 NYSE Rules on Shareholder Approval of Equity Compensation Plans ..... 14-4
  - § 14:1.1 Overview ..... 14-4
  - § 14:1.2 Text of NYSE Section 303A.08 and NYSE Rule 452 ..... 14-4
  - § 14:1.3 Discussion of the NYSE Rules ..... 14-13
    - [A] Effectiveness and Treatment of Pre-2003 Plans ..... 14-14
    - [B] Covered Equity Compensation Plans ..... 14-14
    - [C] Formula Plans ..... 14-16
    - [D] Discretionary Plans ..... 14-18

[E]	Exemptions from the Shareholder Approval Requirement .....	14-19
[E][1]	Director Approval of Exempted Plans ....	14-21
[E][2]	Disclosure .....	14-22
[F]	Material Revisions to Plans .....	14-22
[F][1]	Repricings .....	14-24
§ 14:2	Nasdaq Rule on Shareholder Approval of Equity Compensation Plans .....	14-25
§ 14:2.1	Overview .....	14-25
§ 14:2.2	Text of Nasdaq Rules Relating to Shareholder Approval of Equity Compensation Plans (Including Interpretations) .....	14-25
§ 14:2.3	Discussion of the Nasdaq Rules .....	14-31
[A]	Effectiveness and Treatment of Pre-2003 Plans.....	14-32
[B]	Covered Equity Compensation Plans .....	14-32
[C]	Open-End Plans .....	14-32
[D]	Formula Plans.....	14-33
[E]	Exceptions from the Shareholder Approval Requirement .....	14-33
[F]	Material Amendments to Plans.....	14-35
§ 14:3	SEC Rules Relating to Disclosure of Equity Compensation Plan Information .....	14-36
§ 14:3.1	Summary of SEC Rules .....	14-36
§ 14:3.2	Interplay of SEC Rules with NYSE and Nasdaq Rules .....	14-37
[A]	Definition of Equity Compensation Plan....	14-37
[B]	Disclosure Consequences of Shareholder Approval.....	14-37

## **Chapter 15 Shareholder Proposals**

SUMM 15:1	Overview .....	15-3
SUMM 15:2	Advance Notice Bylaws .....	15-4
SUMM 15:3	Shareholder Proposals Under Rule 14a-8 .....	15-5
SUMM 15:3.1	Rule 14a-8 Procedural Requirements .....	15-5
SUMM 15:3.2	Substantive Bases for Exclusion Under Rule 14a-8 .....	15-6
SUMM 15:4	Common Shareholder Proposals Relating to Corporate Governance .....	15-9
§ 15:1	Right of Shareholders to Raise Business at Meetings .....	15-10
§ 15:1.1	Enforceability of Advance Notice Bylaws .....	15-11
§ 15:1.2	Interplay Between Advance Notice Bylaws and Rule 14a-8.....	15-12



Table of Contents

- § 15:1.3 Matters Potentially Covered by Advance Notice
  - Bylaws..... 15-13
  - [A] Scope of Advance Notice Requirement ..... 15-13
  - [B] Advance Notice Deadlines ..... 15-14
  - [C] Ownership Requirements..... 15-14
  - [C][1] Record Holder Versus Beneficial Owner ..... 15-14
  - [C][2] Disclosure of Derivative Positions ..... 15-15
  - [D] Other Potential Disclosure Requirements .. 15-16
- § 15:1.4 Judicial Interpretation of Advance Notice
  - Bylaws..... 15-17
  - [A] *JANA Master Fund, Ltd. v. CNET Networks, Inc.* ..... 15-17
  - [B] *Levitt Corp. v. Office Depot, Inc.* ..... 15-20
- § 15:2 Shareholder Proposal Process Under Rule 14a-8 ..... 15-22
  - § 15:2.1 Text of Rule 14a-8 ..... 15-23
  - § 15:2.2 Procedural Requirements of Rule 14a-8 ..... 15-29
    - [A] Stock Ownership Threshold..... 15-29
    - [A][1] Determination of Value ..... 15-29
    - [A][2] Proof of Indirect Ownership ..... 15-30
    - [A][3] Expression of Intent to Hold ..... 15-32
    - [B] Prohibition on Multiple Proposals..... 15-32
    - [C] 500-Word Limit ..... 15-33
    - [D] Deadline for Proposals ..... 15-33
    - [E] Submission of Revised Proposals..... 15-34
    - [F] Withdrawal of Joint Proposals ..... 15-35
  - § 15:2.3 Timeline for Addressing Procedural Deficiencies ..... 15-35
  - § 15:2.4 SEC No-Action Process ..... 15-37
  - § 15:2.5 Shareholder Publicity Trends ..... 15-38
    - [A] Voluntary Use of EDGAR Filings ..... 15-39
    - [B] Shareholder Mailings through Broadridge..... 15-39
    - [C] Use of Website with Additional Information ..... 15-40
- § 15:3 Bases for Exclusion of Shareholder Proposals ..... 15-42
  - § 15:3.1 Improper Under State Law ..... 15-42
    - [A] Text of Rule 14a-8(i)(1)..... 15-42
    - [B] Discussion ..... 15-42
      - [B][1] Precatory Versus Mandatory Proposals .. 15-43
      - [B][2] Mandatory Bylaw Amendments ..... 15-44
      - [B][3] Certification to State Court—  
The 2008 *CA, Inc.* Decision..... 15-45
  - § 15:3.2 Violation of Law ..... 15-49
    - [A] Text of Rule 14a-8(i)(2)..... 15-49

	[B] Discussion .....	15-49
§ 15:3.3	Violation of Proxy Rules .....	15-51
	[A] Text of Rule 14a-8(i)(3) .....	15-51
	[B] Discussion .....	15-51
§ 15:3.4	Personal Grievance; Special Interest .....	15-53
	[A] Text of Rule 14a-8(i)(4) .....	15-53
	[B] Discussion .....	15-54
§ 15:3.5	Relevance .....	15-54
	[A] Text of Rule 14a-8(i)(5) .....	15-54
	[B] Discussion .....	15-55
§ 15:3.6	Absence of Power/Authority .....	15-56
	[A] Text of Rule 14a-8(i)(6) .....	15-56
	[B] Discussion .....	15-56
	[B][1] Charter Amendments .....	15-56
	[B][2] Director Independence and Other Director Qualifications .....	15-57
§ 15:3.7	Management Functions .....	15-58
	[A] Text of Rule 14a-8(i)(7) .....	15-58
	[B] Discussion .....	15-58
	[B][1] Compensation Matters .....	15-60
	[B][2] Health, Environmental and Other Risks .....	15-61
	[B][3] CEO Succession Planning .....	15-62
	[B][4] Notable Recent Staff Positions on Significant Policy Issues .....	15-63
§ 15:3.8	Director Elections .....	15-64
	[A] Text of Rule 14a-8(i)(8) (as amended) .....	15-64
	[B] Discussion .....	15-64
§ 15:3.9	Anti-Duplication Exclusions .....	15-65
	[A] Text of Rule 14a-8(i)(9) .....	15-65
	[B] Text of Rule 14a-8(i)(10) .....	15-65
	[C] Text of Rule 14a-8(i)(11) .....	15-66
	[D] Discussion .....	15-66
§ 15:3.10	Resubmissions .....	15-68
	[A] Text of Rule 14a-8(i)(12) .....	15-68
	[B] Discussion .....	15-68
§ 15:3.11	Specific Amount of Dividends .....	15-68
	[A] Text of Rule 14a-8(i)(13) .....	15-68
	[B] Discussion .....	15-69
§ 15:4	Common Shareholder Proposals Relating to Corporate Governance .....	15-69
§ 15:4.1	Voting Structure .....	15-70
	[A] Majority Voting .....	15-70
	[B] Cumulative Voting .....	15-73
	[C] Rescission of Supermajority Voting .....	15-75

*Table of Contents*

[D] Shareholder Right to Call a Special Meeting ..... 15-76

[E] Shareholder Right to Act by Written Consent ..... 15-78

§ 15:4.2 Board Structure ..... 15-81

[A] Board Declassification..... 15-81

[B] Separating Roles of CEO and Chairperson ..... 15-82

[C] Shareholder Approval of Poison Pills ..... 15-84

§ 15:4.3 Executive Compensation ..... 15-85

[A] Say on Pay ..... 15-85

[B] Equity Retention and “Golden Parachute” Policies ..... 15-85

[C] Pay-for-Performance ..... 15-86

**VOLUME 2**

**Table of Chapters** ..... vii

**Table of Contents** ..... ix

**PART IV: Issuer Reporting**

**Chapter 16 Disclosure Controls and Procedures and Internal Control Over Financial Reporting**

SUMM 16:1 Summary ..... 16-6

SUMM 16:1.1 Overview ..... 16-6

SUMM 16:1.2 Disclosure Controls and Procedures..... 16-6

SUMM 16:1.3 Accounting Controls..... 16-7

SUMM 16:1.4 Relationship of Disclosure Controls and Procedures and Accounting Controls ..... 16-8

§ 16:1 Disclosure Controls and Procedures (Rules 13a-15, 15d-15, Regulation S-K Item 307) ..... 16-8

§ 16:1.1 Text of Rules ..... 16-9

[A] Rule 13a-15 ..... 16-9

[B] Regulation S-K Item 307 ..... 16-10

§ 16:1.2 Requirements ..... 16-10

[A] Objective—Accuracy and Timeliness of Exchange Act Filings ..... 16-10

[B] Definition of Disclosure Controls and Procedures ..... 16-11

[C] Evaluation, Including Regulation S-K Item 307 Disclosure ..... 16-12

	[D] SEC Enforcement Action .....	16-14
§ 16:1.3	Suggested Approach to Develop Procedures .....	16-16
	[A] Attributes of Desirable Procedures .....	16-16
	[B] Document Current Procedures.....	16-16
	[C] Information-Gathering Procedures.....	16-18
	[C][1] Training to Increase Sensitivity to Disclosure Requirements.....	16-18
	[C][2] Methods of Gathering Information.....	16-18
	[C][3] Business Units .....	16-19
	[C][4] Management Review of Reports.....	16-19
	[D] Oversight/Disclosure Management .....	16-20
	[D][1] Disclosure Compliance Calendar .....	16-20
	[D][2] Disclosure Committee .....	16-20
	[E] Verification .....	16-22
	[E][1] Back-Up Certifications .....	16-22
	[E][2] Third-Party Support .....	16-22
	[E][3] Task Forces.....	16-23
§ 16:1.4	Suggested Approach for Management Evaluation.....	16-24
	[A] When the Evaluation Should Be Conducted .....	16-24
	[B] How to Conduct the Evaluation.....	16-24
§ 16:2	Accounting Controls (SOA Section 404, Regulation S-X Rule 2-02(f), Regulation S-K Item 308, Rule 13a-15) .....	16-25
§ 16:2.1	Text of Requirements .....	16-26
	[A] Text of SOA Section 404 .....	16-26
	[B] Regulation S-X Rule 2-02(f) .....	16-27
	[C] Regulation S-K Item 308 .....	16-28
	[D] Rule 13a-15 .....	16-30
§ 16:2.2	Meaning of Internal Controls.....	16-31
	[A] Exchange Act Section 13(b)(2).....	16-32
	[B] Auditing Standards—AS No. 12 .....	16-32
	[C] COSO Report.....	16-33
	[D] Definition—Internal Control Over Financial Reporting.....	16-36
§ 16:2.3	Annual Internal Control Report .....	16-38
	[A] Statement of Management's Responsibilities.....	16-39
	[B] Framework of Evaluation .....	16-40
	[C] Conclusions About Effectiveness.....	16-40
	[C][1] General .....	16-40
	[C][2] Impact of Recently Acquired Entities, Equity Investees, and Consolidated SPEs on Management's Report.....	16-43

*Table of Contents*

[C][2][a] Recently Acquired Entities ..... 16-43

[C][2][b] Equity Investees ..... 16-46

[C][2][c] Special Purpose Entities ..... 16-46

[C][2][d] Entities Accounted for on a  
Proportionate Consolidation Basis ..... 16-48

[C][3] Effect of Adverse Conclusion as to  
Effectiveness of Internal Control Over  
Financial Reporting on Form S-3 and  
Similar Eligibility ..... 16-48

[D] Attestation Report of Auditors..... 16-49

[E] Early Initiatives to Improve Implementation  
of SOA Section 404..... 16-50

[E][1] May 2005 Initiatives to Improve  
Implementation of SOA Section 404 ..... 16-50

[E][1][a] Concepts of Materiality and Reasonable  
Assurance ..... 16-51

[E][1][b] Top-Down, Risk-Based Approach ..... 16-52

[E][1][c] Identifying Significant Accounts and  
Procedures ..... 16-52

[E][1][d] Timing of Assessment or Audit..... 16-53

[E][2] SEC and PCAOB Initiatives in 2006 to  
Improve Implementation of SOA  
Section 404 ..... 16-53

[E][2][a] Concept Release Relating to Additional  
Guidance for Management..... 16-54

[E][2][b] Amendments to Auditing  
Standard No. 2..... 16-54

[E][2][c] Audit Firm Inspections ..... 16-54

[F] SEC Interpretive Guidance for  
Management’s Assessment ..... 16-55

[F][1] Summary ..... 16-55

[F][2] Implications ..... 16-57

[F][3] Overview..... 16-58

[F][3][a] Focus on Two General Principles..... 16-58

[F][3][b] Focus on Reasonable Assurance ..... 16-58

[F][3][c] Revised Definition of Material Weakness  
and Significant Deficiency ..... 16-59

[F][4] Evaluating Design Effectiveness of Internal  
Control Over Financial Reporting..... 16-60

[F][4][a] Identifying Financial Reporting  
Risks..... 16-60

[F][4][b] Identifying Controls that Adequately  
Address Financial Reporting Risks ..... 16-62

[F][4][b][i] General ..... 16-62

	[F][4][b][ii]	Guidance Relating to Entity-Level Controls and Information Technology General Controls .....	16-62
	[F][4][c]	Documenting Management’s Assessment of the Design Effectiveness of Controls .....	16-63
	[F][5]	Evaluating Operating Effectiveness of Internal Control Over Financial Reporting .....	16-64
	[F][5][a]	Determining the Evidence Needed to Support Management’s Assessment ...	16-64
	[F][5][b]	Procedures for Collecting Evidence of Operating Effectiveness.....	16-65
	[F][5][c]	Documentation Requirements .....	16-66
	[F][5][d]	Controls Operating at Multiple Locations .....	16-67
	[F][6]	Evaluating Control Deficiencies .....	16-68
	[F][7]	Disclosure Considerations.....	16-69
	[F][7][a]	Reporting on a Material Weakness .....	16-69
	[F][7][b]	Effect of a Restatement on Management’s Report .....	16-70
	[F][7][c]	Scope Limitations .....	16-70
	[F][8]	Non-Exclusive Safe Harbor.....	16-70
	[G]	Studies and Committees Addressing Smaller Public Companies .....	16-71
§ 16:2.4		Quarterly Evaluation and Disclosure of Internal Control .....	16-72
§ 16:2.5		Internal Control Reports of Insured Depository Institutions and Bank Holding Companies.....	16-74
§ 16:3		Auditing Standard Relating to Audits of Internal Control Over Financial Reporting.....	16-75
§ 16:3.1		Background .....	16-76
	[A]	Statutory Requirements and Regulatory History .....	16-76
	[B]	Required Review .....	16-77
	[C]	“Audit” Versus “Attest” .....	16-78
§ 16:3.2		Implications for Reporting Companies, Management, and Audit Committees.....	16-78
	[A]	Increased Time, Effort, and Expense Associated with the Audit .....	16-79
	[B]	Management’s Additional Obligations with Respect to the Internal Control Audit .....	16-80
	[C]	Auditor Review of the Audit Committee .....	16-80

*Table of Contents*

	[D] Written Consent of Auditor Required to Include Internal Control Audit Report in SEC Filings .....	16-81
§ 16:3.3	Summary of Auditing Standard No. 5.....	16-81
	[A] Objective of the Audit .....	16-81
	[B] Considerations When Planning and Performing the Audit .....	16-82
	[B][1] Planning the Audit .....	16-82
	[B][2] Role of Risk Assessment.....	16-83
	[B][3] Risk of Fraud.....	16-83
	[B][4] Using the Work of Others .....	16-84
	[B][5] Top-Down Approach .....	16-84
	[B][5][a] Identifying and Assessing Entity-Level Controls .....	16-84
	[B][5][b] Guidance in Identifying Significant Accounts and Disclosures and Their Relevant Assertions .....	16-86
	[B][6] Understanding Likely Sources of Misstatement and Walkthroughs .....	16-87
	[C] Testing Controls .....	16-87
	[C][1] Testing Design and Operating Effectiveness .....	16-87
	[C][2] Risk-Based Approach to Gathering Evidence.....	16-88
	[C][3] Timing of Tests of Controls .....	16-89
	[D] Evaluating Identified Deficiencies .....	16-89
	[E] Considerations Regarding Multiple Locations and Business Units .....	16-90
	[F] Considerations Regarding Benchmarking of Automated Controls .....	16-91
	[G] Management Representation Letter.....	16-91
	[H] Audit Opinion.....	16-92
	[H][1] Material Weakness .....	16-93
	[H][2] Additional Report Modifications.....	16-93
	[I] Required Communications with the Audit Committee and Management .....	16-95
	[J] Subsequent Events .....	16-95
	[K] Special Situations.....	16-95
	[L] Inclusion of the Audit Report in SEC Filings .....	16-96
	[M] Quarterly Certifications .....	16-96
	[N] Pre-Approval of Internal Control-Related Audit Services .....	16-97
§ 16:3.4	Reporting on the Correction of a Material Weakness—PCAOB’s Auditing Standard .....	16-98

[A]	Background.....	16-98
[B]	Management’s Report on a Previously Reported Material Weakness .....	16-100
[B][1]	Required Elements, Location, and Effect of an Auditor’s Opinion.....	16-100
[B][2]	Control Objectives .....	16-102
[B][3]	Date of Management’s Assertion.....	16-104
[C]	Management’s Responsibilities Regarding the Engagement .....	16-104
[C][1]	Conditions to the Engagement .....	16-104
[C][2]	Required Representations .....	16-105
[D]	Forming an Opinion and Reporting on Management’s Assertion.....	16-106
[D][1]	A Company’s Outside Auditors Must Provide the Report.....	16-106
[D][2]	Forming an Opinion on Management’s Assessment .....	16-106
[D][3]	Form of Auditor’s Report.....	16-108
[D][4]	Auditor’s Determination That a Previously Reported Material Weakness Continues to Exist .....	16-109
[D][5]	Use of the Work of Others.....	16-110
§ 16:3.5	PCAOB Staff Guidance for Auditors of Smaller, Less Complex Companies .....	16-111
§ 16:4	Relationship of Disclosure Controls and Procedures and Accounting Controls .....	16-111
§ 16:5	Registered Investment Companies and Asset-Backed Issuers .....	16-113
§ 16:5.1	Registered Investment Companies .....	16-113
[A]	Text of Item 11 of Form N-CSR, Item 2 of Form N-Q and Rule 30a-3 .....	16-113
[B]	Discussion of Rules on Disclosure Controls and Procedures and Internal Control Over Financial Reporting.....	16-117
§ 16:5.2	Issuers of Asset-Backed Securities .....	16-118

**Chapter 17 Management Certifications**

SUMM 17:1	Summary.....	17-3
SUMM 17:1.1	Overview .....	17-3
SUMM 17:1.2	Content of SOA Section 302 Certification .....	17-4
SUMM 17:1.3	Mechanics of SOA Section 302 Certification .....	17-4
SUMM 17:1.4	Certification Required by SOA Section 906.....	17-4



Table of Contents

§ 17:1 Legislative History of Section 302 and 906  
    Certifications ..... 17-5  
    § 17:1.1 House, Senate, and Conference Versions ..... 17-6  
        [A] House and Senate Bills ..... 17-6  
        [B] Conference Bill ..... 17-7  
    § 17:1.2 The SEC Response ..... 17-9  
        [A] Original SEC Rule Proposal  
            (June 14, 2002) ..... 17-9  
        [B] SEC One-Time Certification Order  
            (June 27, 2002) ..... 17-10  
        [C] Final Certification Rules ..... 17-12  
§ 17:2 Section 302 Certification Rules ..... 17-12  
    § 17:2.1 Text of Requirements ..... 17-13  
        [A] Text of SOA Section 302 ..... 17-13  
        [B] Rule 13a-14 ..... 17-13  
    § 17:2.2 Issuers Covered ..... 17-14  
    § 17:2.3 Filings Covered ..... 17-15  
        [A] Report Forms Covered ..... 17-15  
        [B] Forward Incorporated Documents ..... 17-15  
        [C] Amendments ..... 17-15  
§ 17:3 Content of Certification ..... 17-16  
    § 17:3.1 Paragraph 1—Review ..... 17-17  
        [A] Certification Text ..... 17-17  
        [A][1] SOA Section 302 ..... 17-17  
        [A][2] Item 601(b)(31)(i) of Regulation S-K ..... 17-17  
        [B] Discussion ..... 17-17  
    § 17:3.2 Paragraph 2—Material Accuracy ..... 17-17  
        [A] Certification Text ..... 17-17  
        [A][1] SOA Section 302 ..... 17-17  
        [A][2] Item 601(b)(31)(i) of Regulation S-K ..... 17-17  
        [B] Discussion ..... 17-17  
    § 17:3.3 Paragraph 3—Fair Presentation of Financial  
        Information ..... 17-18  
        [A] Certification Text ..... 17-18  
        [A][1] SOA Section 302 ..... 17-18  
        [A][2] Item 601(b)(31)(i) of Regulation S-K ..... 17-18  
        [B] Discussion ..... 17-19  
    § 17:3.4 Paragraphs 4(a) and (c)—Evaluation of  
        Disclosure Controls and Procedures ..... 17-20  
        [A] Certification Text ..... 17-20  
        [A][1] SOA Section 302 ..... 17-20  
        [A][2] Item 601(b)(31)(i) of Regulation S-K ..... 17-20  
        [B] Discussion ..... 17-21  
    § 17:3.5 Paragraphs 4(b) and (d) and 5—Internal Control  
        Over Financial Reporting ..... 17-22

PUBLIC COMPANY DESKBOOK

	[A] Certification Text .....	17-22
	[A][1] SOA Section 302 .....	17-22
	[A][2] Item 601(b)(31)(i) of Regulation S-K .....	17-22
	[B] Discussion .....	17-23
	[B][1] Paragraphs 4(b) and (d) .....	17-23
	[B][2] Paragraph 5 .....	17-24
	[B][2][a] Meaning of “Significant Deficiencies” and “Material Weaknesses” .....	17-24
	[B][2][b] Fraud .....	17-24
	[B][2][c] Timing of Evaluation .....	17-25
§ 17:4	Mechanics of Certification .....	17-25
§ 17:4.1	Form .....	17-25
§ 17:4.2	Signatures .....	17-26
§ 17:4.3	Location .....	17-27
§ 17:5	Special Types of Issuers .....	17-27
§ 17:5.1	Non-U.S. Companies .....	17-27
§ 17:5.2	Non-U.S. Governments (Schedule B Issuers) .....	17-29
§ 17:5.3	Registered Investment Companies .....	17-30
	[A] Certification Requirements .....	17-30
	[A][1] Certification Text .....	17-30
	[A][1][a] Rule 30a-2 .....	17-30
	[A][1][b] Item 12(a)(2) of Form N-CSR .....	17-31
	[A][1][c] Item 3 of Form N-Q .....	17-33
	[A][2] Discussion .....	17-33
	[B] Disclosures to Be Certified .....	17-35
	[B][1] Rule 30b2-1 and Form N-CSR and Rule 30b1-5 and Form N-Q .....	17-35
	[B][1][a] Text of Rule 30b2-1 .....	17-35
	[B][1][b] Discussion of Rule 30b2-1 and Form N-CSR .....	17-35
	[B][1][c] Text of Rule 30b1-5 .....	17-36
	[B][1][d] Discussion of Rule 30b1-5 and Form N-Q .....	17-37
	[B][2] Designation of Form N-CSR and Form N-Q as Exchange Act Periodic Reports .....	17-37
	[B][2][a] Text of Rule 30d-1 .....	17-37
	[B][2][b] Discussion of Rule 30d-1 .....	17-38
§ 17:5.4	Asset-Backed Issuers .....	17-38
	[A] Certification Requirement .....	17-38
	[A][1] Text of Rule 13a-14(d)–(e) .....	17-38
	[A][2] Text of Item 601(b)(31)(ii) of Regulation S-K .....	17-39
	[B] Discussion .....	17-40

*Table of Contents*

§ 17:6	Certification Required by SOA Section 906 (Adding 18 U.S.C. § 1350) .....	17-41
§ 17:6.1	Reports Covered .....	17-42
	[A] Text of Requirements .....	17-42
	[A][1] Text of 18 U.S.C. § 1350(a) (Added by SOA Section 906) .....	17-42
	[A][2] Text of Rule 13a-14(b) .....	17-42
	[B] Discussion .....	17-43
	[C] Reports Not Covered .....	17-43
§ 17:6.2	Content .....	17-45
	[A] Text of 18 U.S.C. § 1350(b) (Added by SOA Section 906) .....	17-45
	[B] Discussion .....	17-45
	[B][1] Fully Complies .....	17-46
	[B][2] Fairly Presents .....	17-46
	[B][3] Suggested Form of SOA Section 906 Certification .....	17-47
§ 17:6.3	Submission Method .....	17-47
§ 17:6.4	Relationship to Section 302 Certification .....	17-48
§ 17:6.5	Penalties .....	17-48
	[A] Text of Statute .....	17-48
	[A][1] 18 U.S.C. § 1350(c) (Added by SOA Section 906) .....	17-48
	[A][2] SOA Section 3(b)(1) .....	17-49
	[B] Discussion .....	17-49
§ 17:7	NYSE CEO Certification .....	17-52

**Chapter 18 Management’s Discussion and Analysis**

SUMM 18:1	Overview .....	18-5
SUMM 18:2	General MD&A Objectives and Requirements .....	18-5
SUMM 18:3	Presentation, Focus and Content of MD&A .....	18-6
SUMM 18:4	Liquidity and Capital Resources .....	18-6
SUMM 18:5	Off-Balance Sheet Disclosures .....	18-6
SUMM 18:6	Critical Accounting Estimates .....	18-7
SUMM 18:7	MD&A Discussion of Fair Value Accounting .....	18-7
SUMM 18:8	Miscellaneous MD&A Topics .....	18-8
§ 18:1	General MD&A Objectives and Requirements .....	18-8
	§ 18:1.1 SEC’s Stated Objectives of MD&A Disclosure .....	18-9
	§ 18:1.2 MD&A Requirements and SEC Interpretative Guidance .....	18-9
§ 18:2	Presentation, Focus and Content of MD&A .....	18-11
	§ 18:2.1 Overall Presentation of MD&A .....	18-11
	[A] Executive-Level Overview .....	18-12
	[B] Layered Approach .....	18-13

	[C] Tabular Presentation .....	18-13
	[D] Use of Headings.....	18-14
	[E] Avoidance of Duplicative Disclosure .....	18-14
§ 18:2.2	Focus and Content of MD&A .....	18-14
	[A] Focus on Key Indicators of Financial Condition and Operating Performance.....	18-15
	[B] Focus on Materiality .....	18-16
	[B][1] Eliminate Immaterial and Duplicative Disclosure.....	18-16
	[B][2] Quarterly Reports.....	18-16
	[C] Focus on Material Trends and Uncertainties .....	18-17
	[D] Focus on Analysis .....	18-18
§ 18:2.3	Additional General MD&A Guidance .....	18-20
	[A] Discuss Each Operating Segment .....	18-20
	[B] Expand Discussion Beyond GAAP.....	18-20
	[C] Be Consistent with Other Statements.....	18-21
	[D] Disclose Discrete Contributions to Results.....	18-22
	[E] Consider Need to Disclose Offsetting Items .....	18-22
	[F] Increase Working Group Discussion .....	18-23
	[G] Audit Committee Review .....	18-23
	[H] MD&A “Audit” Report .....	18-23
	[I] Interim MD&A.....	18-24
§ 18:3	Liquidity and Capital Resources .....	18-24
§ 18:3.1	Cash Requirements .....	18-26
§ 18:3.2	Sources and Uses of Cash .....	18-27
	[A] Operating Cash Flows.....	18-28
	[B] Financing Cash Flows .....	18-29
§ 18:3.3	Debt Instruments, Guarantees and Related Covenants.....	18-30
	[A] Breach of Covenants .....	18-30
	[B] Impact of Covenants on Ability to Obtain Additional Financing.....	18-31
§ 18:3.4	Cash Management .....	18-31
§ 18:4	Off-Balance Sheet Disclosures (SOA Section 401(a)) .....	18-32
§ 18:4.1	Overview and Legislative History .....	18-32
	[A] Legislative History .....	18-33
	[B] Objectives of the Off-Balance Sheet Rules.....	18-34
§ 18:4.2	Text of Requirements .....	18-35
	[A] Text of SOA Section 401(a) (Adding Exchange Act Section 13(j)).....	18-35

*Table of Contents*

	[B] Regulation S-K Item 303(a) .....	18-35
§ 18:4.3	Off-Balance Sheet Arrangements Covered .....	18-41
	[A] Guarantee Contracts .....	18-42
	[A][1] Included Guarantees .....	18-42
	[A][2] Excluded Items .....	18-43
	[B] Retained or Contingent Interests .....	18-44
	[C] Derivative Instruments Accounted for As Equity .....	18-44
	[D] Variable Interests .....	18-46
§ 18:4.4	Applicable Disclosure Threshold .....	18-46
§ 18:4.5	Content of Required Disclosure .....	18-47
§ 18:4.6	Additional Principles-Based Disclosure Requirement .....	18-49
§ 18:4.7	Limitation to Disclosure of Binding Contractual Arrangements .....	18-50
§ 18:4.8	Organization and Presentation of Disclosure .....	18-50
	[A] Aggregate Approach .....	18-50
	[B] Cross-Referencing to the Financial Statements .....	18-51
	[C] Checklist for Compliance .....	18-51
§ 18:4.9	Table of Aggregate Contractual Obligations .....	18-52
§ 18:4.10	Safe Harbor Protection for Forward-Looking Information Relating to Off-Balance Sheet Arrangements .....	18-55
§ 18:4.11	Application of the Rules to Non-U.S. Companies .....	18-56
§ 18:4.12	Relationship to 2003 FASB Interpretation on SPEs .....	18-57
§ 18:4.13	December 2007 “Dear CFO” Letter on Off-Balance Sheet Arrangements .....	18-59
§ 18:4.14	SEC Study of Off-Balance Sheet Arrangements and Use of Special Purpose Entities .....	18-61
	[A] Overview .....	18-61
	[B] Text of SOA Section 401(c) .....	18-62
	[C] Discussion .....	18-63
	[C][1] Scope of the Report .....	18-63
	[C][2] Findings .....	18-64
	[C][3] SEC Recommendations .....	18-65
	[C][3][a] Initiatives to Improve the Financial Reporting System .....	18-65
	[C][3][a][i] Discourage Accounting-Motivated Transactions .....	18-65
	[C][3][a][ii] Implementation of Objectives-Oriented Standards .....	18-66

	[C][3][a][iii] Improve the Consistency and Relevance of Disclosures.....	18-66
	[C][3][a][iv] Clearer Communication of Financial Reporting Concepts .....	18-67
	[C][3][b] Recommendations Relating to Accounting Standards .....	18-67
	[C][3][b][i] Leases.....	18-67
	[C][3][b][ii] Defined-Benefit Plans .....	18-68
	[C][3][b][iii] Consolidation Issues .....	18-69
	[C][3][b][iv] Fair Value Reporting of All Financial Instruments .....	18-69
	[C][3][b][v] Develop Disclosure Framework for Notes to the Financial Statements .....	18-69
§ 18:5	Critical Accounting Estimates .....	18-70
§ 18:5.1	2003 SEC Guidance Regarding Critical Accounting Estimates.....	18-70
	[A] Estimates That Must Be Disclosed .....	18-70
	[B] Supplement Financial Statement Notes .....	18-70
	[C] Related Factors.....	18-71
	[D] Sensitivity Analysis.....	18-71
§ 18:5.2	Accounting and Prior SEC Guidance on Critical Accounting Policies .....	18-72
	[A] APB Opinion No. 22, Disclosure of Accounting Policies (1972).....	18-72
	[B] AICPA SOP 94-6, Disclosure of Significant Risks and Uncertainties (1994).....	18-73
	[C] SAS No. 61, Communication with Audit Committees (As amended by SAS No. 90 in 1999).....	18-73
	[D] SEC's Cautionary Advice (December 2001) .....	18-74
	[E] Speech by SEC Chief Accountant (January 2002) .....	18-75
	[F] SEC Comments on Fortune 500 Critical Accounting Policy Disclosure .....	18-75
	[G] SOA Section 204.....	18-76
§ 18:5.3	2002 Proposed Rules on Critical Accounting Policies.....	18-77
	[A] Overview .....	18-77
	[B] Policy Rationale and Scope of Proposals .....	18-78
	[C] Critical Accounting Estimates.....	18-79
	[C][1] Accounting Estimates Covered .....	18-80
	[C][2] Identification and Description of the Accounting Estimate .....	18-81

*Table of Contents*

- [C][3] Impact of the Critical Accounting Estimate on Financial Statements ..... 18-82
- [C][4] Quantitative Disclosures ..... 18-83
- [C][4][a] Quantitative Disclosure to Demonstrate Sensitivity ..... 18-83
- [C][4][b] Quantitative and Qualitative Disclosures Covering Past Changes in the Estimate ..... 18-84
- [C][5] Senior Management’s Discussions with the Audit Committee ..... 18-84
- [D] Initial Adoption of Accounting Policies ..... 18-85
- [D][1] Proposed MD&A Disclosure ..... 18-85
- [D][2] Disclosing Changes to Existing Policies..... 18-86
- [E] Relationship of 2003 Interpretative Guidance to Rule Proposal ..... 18-87
- § 18:5.4 SEC Examples of Proposed Disclosure About Critical Accounting Estimates ..... 18-88
- [A] SEC Example 1 (Warranty Claims Estimate) ..... 18-88
- [A][1] SEC Statement of Background ..... 18-88
- [A][2] SEC’s Possible MD&A Disclosure ..... 18-89
- [B] SEC Example 2 (Distribution Channel Reserve) ..... 18-91
- [B][1] SEC Statement of Background ..... 18-91
- [B][2] SEC’s Possible MD&A Disclosure ..... 18-92
- [C] SEC Example 3 (Impairment of Manufacturing Plant) ..... 18-93
- [C][1] SEC Statement of Background ..... 18-93
- [C][2] SEC’s Possible MD&A Disclosure ..... 18-94
- § 18:6 MD&A Discussion of Fair Value Accounting ..... 18-96
- § 18:6.1 Background ..... 18-96
- § 18:6.2 Fair Value Accounting Standards ..... 18-98
- [A] Standards Requiring or Permitting Fair Value Accounting ..... 18-98
- [B] SFAS No. 157, Fair Value Measurement ..... 18-99
- [C] FASB Staff Position No. FAS 157-3 ..... 18-100
- [D] FASB Staff Position No. FAS 157-4 ..... 18-101
- § 18:6.3 Guidance on Disclosure of Fair Value Measurements in the MD&A—  
The “Dear CFO” Letters..... 18-102
- [A] The March 2008 Letter ..... 18-102
- [B] The September 2008 Letter ..... 18-104
- § 18:7 Miscellaneous MD&A Topics ..... 18-106
- § 18:7.1 Comments Given in SEC’s 2002 Fortune 500 Review..... 18-106

	[A] Revenue Recognition .....	18-106
	[B] Restructuring Charges .....	18-108
	[C] Impairment Charges .....	18-109
	[C][1] Long-Lived Assets .....	18-109
	[C][2] Securities Held for Investment .....	18-109
	[C][3] Goodwill and Other Intangible Assets .....	18-110
	[D] Pension Plans .....	18-110
	[E] Segment Reporting.....	18-112
	[F] Environmental and Product Liability.....	18-113
§ 18:7.2	Energy and Other OTC Commodity Trading.....	18-113
§ 18:7.3	Transactions with Non-Independent Parties .....	18-114
§ 18:7.4	Accounting for Share-Based Payments .....	18-114
§ 18:7.5	Oil and Gas Disclosures.....	18-116
§ 18:7.6	Loss Contingencies and Reserves .....	18-117
§ 18:7.7	Allowance for Loan Losses .....	18-118
§ 18:7.8	Mortgage- and Foreclosure-Related Activities or Exposures .....	18-119

## **Chapter 19 Non-GAAP Financial Measures (Regulation G)**

SUMM 19:1	Summary .....	19-2
	SUMM 19:1.1 Required Reconciliation in Public Announcements—Regulation G.....	19-2
	SUMM 19:1.2 Expanded Disclosure of Non-GAAP Information for SEC Filings .....	19-3
	SUMM 19:1.3 Limited Exceptions for Business Combinations and Non-U.S. Public Companies .....	19-4
	SUMM 19:1.4 Revised Guidance on Non-GAAP Financial Measures .....	19-4
§ 19:1	Background .....	19-5
	§ 19:1.1 SEC Cautionary Advice (December 4, 2001).....	19-6
	[A] The SEC’s Three Principles .....	19-6
	[A][1] Set Forth Controlling Principles Underlying the Non-GAAP Presentation .....	19-6
	[A][2] Provide Clear and Comprehensible Information Regarding Omissions .....	19-7
	[A][3] Pro Forma Earnings Releases Should Always Be Accompanied by a Clearly Described Reconciliation to GAAP .....	19-7
	[B] Matters Not Addressed .....	19-7
§ 19:1.2	Trump Enforcement Action (January 16, 2002) ...	19-8



*Table of Contents*

	[A] Factual Findings.....	19-8
	[B] SEC Findings .....	19-9
	[C] Implications.....	19-10
§ 19:1.3	SOA Section 401(b) .....	19-11
	[A] Text of SOA Section 401(b) .....	19-11
	[B] Legislative History .....	19-11
§ 19:2	Required Reconciliation in Public Announcements— Regulation G .....	19-12
§ 19:2.1	Text of Regulation G .....	19-12
§ 19:2.2	Definition of a “Non-GAAP Measure” .....	19-16
	[A] Examples of Non-GAAP Measures .....	19-17
	[B] Financial Measures Not Captured.....	19-17
§ 19:2.3	Reconciliation .....	19-20
	[A] Most Directly Comparable GAAP Measure.....	19-21
	[B] No Misleading Information.....	19-22
	[C] Oral, Telephonic, Webcast, or Broadcast Releases .....	19-22
	[D] Forward-Looking Quantitative Reconciliation .....	19-22
	[E] Segment Reporting Quantitative Reconciliation .....	19-23
	[F] EBIT and EBITDA .....	19-23
§ 19:2.4	“Public” Disclosure and Relationship to Regulation FD .....	19-24
§ 19:2.5	Liability Considerations Under Regulation G ....	19-24
§ 19:3	Expanded Disclosure of Non-GAAP Information for SEC Filings .....	19-25
§ 19:3.1	Text of Regulation S-K Item 10.....	19-25
§ 19:3.2	Required Disclosures .....	19-29
§ 19:3.3	Prohibited Disclosures in SEC Filings.....	19-31
	[A] Exclusion of “Non-Recurring” Items .....	19-32
	[A][1] SEC Filings.....	19-32
	[A][2] All Public Announcements.....	19-33
	[A][3] Specific Application to MD&A .....	19-33
	[B] Non-GAAP Liquidity Measures .....	19-34
	[C] Non-GAAP Per-Share Measures .....	19-35
	[D] Other Disclosure Problems .....	19-36
	[D][1] Systemwide Sales .....	19-36
	[D][2] “Managed Basis” .....	19-36
§ 19:4	Application of Non-GAAP Rules to Form 8-K Furnishing of Earnings Releases by U.S. Companies .....	19-37
§ 19:5	Application of Non-GAAP Rules to Business Combinations .....	19-38

§ 19:6	Non-U.S. Companies .....	19-39
§ 19:6.1	Regulation G .....	19-39
§ 19:6.2	Additional Limitations on Non-GAAP Information for SEC Filings .....	19-41
§ 19:6.3	No Furnishing of Earnings Releases.....	19-42
§ 19:6.4	Specific Situations Involving Non-U.S. Companies.....	19-42
[A]	Earnings Releases.....	19-43
[B]	Home-Country Annual Reports .....	19-43
[C]	Annual Reports on Form 20-F.....	19-43
§ 19:7	Voluntary Filers.....	19-43
§ 19:8	Practical Suggestions for Affected U.S. and Non-U.S. Companies .....	19-44

## **Chapter 20 Real-Time Disclosures**

SUMM 20:1	Summary .....	20-4
SUMM 20:1.1	Overview .....	20-4
SUMM 20:1.2	Form 8-K Disclosure Requirements .....	20-4
[A]	Generally Applicable Requirements.....	20-4
[A][1]	Entry into a Material Definitive Agreement .....	20-4
[A][2]	Termination of a Material Definitive Agreement .....	20-5
[A][3]	Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement .....	20-5
[A][4]	Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement .....	20-5
[A][5]	Costs Associated with Exit or Disposal Activities.....	20-5
[A][6]	Material Impairments .....	20-6
[A][7]	Notice of Delisting or Failure to Satisfy Listing Standards; Transfers of Listings ...	20-6
[A][8]	Unregistered Sales of Equity Securities ....	20-6
[A][9]	Material Modification to Rights of Security Holders.....	20-6
[A][10]	Restatement of Previously Issued Financial Statements.....	20-6
[A][11]	A Director Departs or Declines to Stand for Re-Election.....	20-7
[A][12]	Principal Officers Retire, Resign or Are Terminated .....	20-7

*Table of Contents*

[A][13]	A New Director Is Elected or New Principal Officer Is Appointed .....	20-7
[A][14]	Compensatory Arrangements of Certain Officers.....	20-7
[A][15]	Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year .....	20-7
[A][16]	Results of Security Holder Votes .....	20-7
[A][17]	Other Form 8-K Requirements .....	20-8
[B]	Requirements Applicable to Asset-Backed Securities and Issuers.....	20-8
[C]	Requirements Applicable to Shell Companies .....	20-9
SUMM 20:1.3	Shortened Deadlines for Forms 10-K and 10-Q .....	20-10
SUMM 20:1.4	Enhanced Disclosure Regarding Website Access to Periodic and Current Reports....	20-10
§ 20:1	Overview and Legislative History .....	20-10
§ 20:2	Text of SOA Section 409.....	20-12
§ 20:3	Expanded Form 8-K Disclosure .....	20-12
§ 20:4	Item-by-Item Discussion of Form 8-K .....	20-16
§ 20:4.1	Item 1.01—Entry into a Material Definitive Agreement .....	20-18
§ 20:4.2	Item 1.02—Termination of a Material Definitive Agreement .....	20-20
§ 20:4.3	Item 1.03—Bankruptcy or Receivership.....	20-21
§ 20:4.4	Item 1.04—Mine Safety—Reporting of Shutdowns and Patterns of Violations .....	20-21
§ 20:4.5	Item 2.01—Completion of Significant Acquisitions or Dispositions of Assets.....	20-22
§ 20:4.6	Item 2.02—Results of Operations and Financial Condition .....	20-22
§ 20:4.7	Item 2.03—Creation of a Material Direct Financial Obligation or Obligation Under an Off-Balance Sheet Arrangement That Is Material to the Company .....	20-23
§ 20:4.8	Item 2.04—Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement .....	20-25
§ 20:4.9	Item 2.05—Costs Associated with Exit or Disposal Activities .....	20-26
§ 20:4.10	Item 2.06—Material Impairments.....	20-27
§ 20:4.11	Item 3.01—Notice of Delisting or Failure to Satisfy Listing Rule or Standard; Transfer of Listing .....	20-28

§ 20:4.12	Items 3.02 and 3.03—Unregistered Sales of Equity Securities; Material Modifications to Rights of Security Holders .....	20-29
§ 20:4.13	Item 4.01—Changes in Registrant’s Certifying Accountant .....	20-30
§ 20:4.14	Item 4.02—Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.....	20-31
§ 20:4.15	Item 5.01—Changes in Control of Registrant....	20-32
§ 20:4.16	Item 5.02(a)—A Director Resigns or Declines to Stand for Re-Election Due to a Disagreement or Is Removed for Cause .....	20-32
§ 20:4.17	Item 5.02(b)—Certain Officers Retire, Resign or Are Terminated; a Director Retires, Resigns, Is Removed or Declines to Stand for Re-Election for Any Reason Other Than a Disagreement or for Cause .....	20-33
§ 20:4.18	Items 5.02(c), (d), (e) and (f)—Election of New Directors; Appointment of Certain New Officers and Compensatory Arrangements of Certain Officers.....	20-34
	[A] Items 5.02(c) and (d)—Company Appoints Certain New Officers or a New Director Is Elected .....	20-34
	[B] Items 5.02(e) and (f)—Compensatory Arrangements of Certain Officers .....	20-35
§ 20:4.19	Item 5.03—Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year .....	20-37
§ 20:4.20	Item 5.04—Temporary Suspension of Trading Under Registrant’s Employee Benefit Plans .....	20-37
§ 20:4.21	Item 5.05—Amendments to Registrant’s Code of Ethics, or Waiver of a Provision of the Code of Ethics .....	20-37
§ 20:4.22	Item 5.07—Submission of Matters to a Vote of Security Holders .....	20-38
§ 20:4.23	Item 5.08—Shareholder Director Nominations .....	20-39
§ 20:4.24	Item 7.01—Regulation FD Disclosure .....	20-40
§ 20:4.25	Item 8.01—Other Events .....	20-40
§ 20:4.26	Item 9.01—Financial Statements and Exhibits.....	20-40
§ 20:4.27	Asset-Backed Securities .....	20-41
	[A] Item 6.01—ABS Informational and Computational Material .....	20-41

*Table of Contents*

[B] Item 6.02—Change of Servicer or Trustee..... 20-41

[C] Item 6.03—Change in Credit Enhancement or Other External Support..... 20-42

[D] Item 6.04—Failure to Make a Required Distribution..... 20-42

[E] Item 6.05—Securities Act Updating Disclosure..... 20-42

§ 20:4.28 Shell Companies ..... 20-43

§ 20:5 Liability Issues and Safe Harbor ..... 20-45

§ 20:6 Shortened Deadlines for Forms 10-K and 10-Q ..... 20-47

§ 20:6.1 Applicable to “Accelerated Filers” and “Large Accelerated Filers” Only ..... 20-47

§ 20:6.2 Conforming Amendments to Regulations S-K and S-X ..... 20-48

§ 20:6.3 Unconsolidated Subsidiaries and 50% or Less Owned Persons ..... 20-49

§ 20:6.4 Other Conforming Amendments..... 20-49

§ 20:6.5 Enhanced Disclosure Regarding Website Access to Periodic and Current Reports ..... 20-50

§ 20:6.6 Non-U.S. Issuers..... 20-51

**Chapter 21 Increased SEC Review of Periodic Reports and Other Issuer Disclosure Initiatives**

SUMM 21:1 Summary Introduction..... 21-2

SUMM 21:1.1 Special 2002 SEC Review of Fortune 500 Companies ..... 21-2

SUMM 21:1.2 Mandatory Regular and Systematic Review ..... 21-2

SUMM 21:1.3 Public Release of Comment and Response Letters ..... 21-3

SUMM 21:1.4 SEC Study of Financial Restatements..... 21-4

SUMM 21:1.5 SEC Study on Adoption of a Principles-Based Accounting System ..... 21-4

SUMM 21:1.6 Material Correcting Adjustments ..... 21-5

§ 21:1 Special 2002 Review Program of Fortune 500 Companies..... 21-5

§ 21:1.1 SEC Description of Program..... 21-5

§ 21:1.2 Results of Reviews ..... 21-5

§ 21:2 Mandatory Regular and Systematic Review (Section 408) ..... 21-7

§ 21:2.1 Background and Legislative History..... 21-7

§ 21:2.2 Text of SOA Section 408..... 21-8

§ 21:2.3 SEC Description of Approach ..... 21-8

[A] Conduct of Periodic Review Process ..... 21-10

	[B] Reconsideration of SEC Staff Comments.....	21-12
§ 21:2.4	Enhanced Reviews of Large and Financially Significant Companies .....	21-13
§ 21:2.5	Review by Office of Global Security Risk .....	21-14
§ 21:2.6	Confidential Submission Process for Emerging Growth Companies .....	21-18
§ 21:2.7	Non-Public Submissions from Foreign Private Issuers .....	21-21
§ 21:3	Public Release of Comment Letters and Non-Public Response Letters .....	21-23
§ 21:3.1	Background .....	21-23
§ 21:3.2	Automatic Public Availability Through EDGAR Database .....	21-24
§ 21:3.3	Availability of Confidential Treatment.....	21-24
	[A] General Principles.....	21-24
	[B] Steps to Claim FOIA Protection .....	21-27
§ 21:3.4	“Tandy Letter” Requirement.....	21-28
§ 21:4	SEC Study of Financial Restatements (Section 704).....	21-29
§ 21:4.1	Text of SOA Section 704 .....	21-29
§ 21:4.2	The SEC Report .....	21-29
	[A] Goals of the Report .....	21-29
	[B] Summary of the Report .....	21-29
§ 21:4.3	GAO Reports.....	21-32
	[A] 2002 Report .....	21-32
	[B] 2006 Report .....	21-33
§ 21:5	SEC Study on Adoption of a Principles-Based Accounting System (SOA Section 108(d)) .....	21-34
§ 21:5.1	Goals of the Report .....	21-34
§ 21:5.2	Summary of the Report .....	21-34
§ 21:5.3	FASB’s Response to the SEC Report.....	21-35
§ 21:6	Material Correcting Adjustments (SOA Section 401(a)) .....	21-36
§ 21:6.1	Background and Legislative History.....	21-36
§ 21:6.2	Text of SOA Section 401(a) (adding Exchange Act Section 13(i)).....	21-37
§ 21:6.3	Discussion .....	21-37

**PART V: Auditors**

**Chapter 22 Regulation of Auditor/Audit Client Relationships**

SUMM 22:1	Overview .....	22-4
SUMM 22:2	Prohibited Non-Audit Services .....	22-5

*Table of Contents*

SUMM 22:3 Prohibition on Audit Partner Compensation  
for Cross-Selling Non-Audit Services ..... 22-5

SUMM 22:4 Other Financial, Business and Payment  
Relationships ..... 22-6

SUMM 22:5 Employment Relationships ..... 22-6

SUMM 22:6 Improper Influence on Conduct of Audits ..... 22-7

§ 22:1 General Auditor Independence Principles ..... 22-7

§ 22:2 Prohibited Non-Audit Services (SOA Section 201,  
Regulation S-X Rule 2-01(c)(4))..... 22-8

    § 22:2.1 Background ..... 22-8

        [A] Revision of SEC’s Auditor Independence  
            Rules in 2000..... 22-8

        [B] Text of Requirements ..... 22-9

        [B][1] SOA Section 201 ..... 22-9

        [B][2] Regulation S-X Rule 2-01(c)(4)..... 22-10

        [C] Legislative History ..... 22-10

    § 22:2.2 Overview of Rulemaking on Prohibited  
    Services ..... 22-11

    § 22:2.3 Scope of the Rules ..... 22-13

        [A] Rebuttable Presumption ..... 22-13

        [B] Scope Determined by Three Definitions .... 22-15

        [B][1] “Accountant” ..... 22-15

        [B][2] “Audit Client” ..... 22-15

        [B][3] “Audit and Professional Engagement  
            Period” ..... 22-18

        [C] When Independence Is Required ..... 22-19

    § 22:2.4 Discussion of Prohibited Non-Audit Services..... 22-21

        [A] Bookkeeping or Other Services Related to  
            the Audit Client’s Accounting Records or  
            Financial Statements ..... 22-21

        [A][1] Text of Regulation S-X  
            Rule 2-01(c)(4)(i) ..... 22-21

        [A][2] Discussion ..... 22-21

        [B] Financial Information Systems Design and  
            Implementation ..... 22-22

        [B][1] Text of Regulation S-X  
            Rule 2-01(c)(4)(ii) ..... 22-22

        [B][2] Discussion ..... 22-22

        [C] Appraisal or Valuation Services, Fairness  
            Opinions or Contribution-in-Kind  
            Reports ..... 22-24

        [C][1] Text of Regulation S-X  
            Rule 2-01(c)(4)(iii) ..... 22-24

        [C][2] Discussion ..... 22-25

        [D] Actuarial Services ..... 22-26

	[D][1]	Text of Regulation S-X Rule 2-01(c)(4)(iv).....	22-26
	[D][2]	Discussion .....	22-26
	[E]	Internal Audit Outsourcing.....	22-27
	[E][1]	Text of Regulation S-X Rule 2-01(c)(4)(v).....	22-27
	[E][2]	Discussion .....	22-27
	[F]	Management Functions .....	22-28
	[F][1]	Text of Regulation S-X Rule 2-01(c)(4)(vi).....	22-28
	[F][2]	Discussion .....	22-28
	[G]	Human Resources.....	22-29
	[G][1]	Text of Regulation S-X Rule 2-01(c)(4)(vii) .....	22-29
	[G][2]	Discussion .....	22-30
	[H]	Broker-Dealer, Investment Adviser or Investment Banking Services .....	22-30
	[H][1]	Text of Regulation S-X Rule 2-01(c)(4)(viii) .....	22-30
	[H][2]	Discussion .....	22-30
	[I]	Legal Services.....	22-31
	[I][1]	Text of Regulation S-X Rule 2-01(c)(4)(ix) .....	22-31
	[I][2]	Discussion .....	22-31
	[J]	Expert Services.....	22-32
	[J][1]	Text of Regulation S-X Rule 2-01(c)(4)(x).....	22-32
	[J][2]	Discussion .....	22-32
§ 22:2.5		Tax Services .....	22-34
	[A]	SEC Rules .....	22-34
	[B]	PCAOB Rules .....	22-36
	[B][1]	Potentially Abusive Tax Transactions.....	22-37
	[B][1][a]	Confidential Transactions .....	22-37
	[B][1][b]	Aggressive Tax Position Transactions .....	22-38
	[B][2]	Tax Services for Persons in Financial Reporting Oversight Roles .....	22-41
	[B][3]	Permitted Tax Services .....	22-43
§ 22:2.6		Application to Registered Investment Companies.....	22-44
§ 22:3		Compensation of Audit Partners for Cross-Selling Non-Audit Services (Regulation S-X Rule 2-01(c)(8)) .....	22-45
§ 22:3.1		Text of Regulation S-X Rule 2-01(c)(8) .....	22-45
§ 22:3.2		Covered Compensation .....	22-45
§ 22:3.3		Partners Subject to the Rule.....	22-46



*Table of Contents*

§ 22:3.4	Registered Investment Companies .....	22-47
§ 22:4	Other Independence-Impairing Relationships (Regulation S-X Rules 2-01(c)(1), 2-01(c)(3), 2-01(c)(5) and 2-01(d)) .....	22-48
§ 22:4.1	Overview .....	22-48
§ 22:4.2	Financial Relationships .....	22-48
[A]	Investments in Audit Clients .....	22-49
[A][1]	Text of Regulation S-X Rule 2-01(c)(1)(i) .....	22-49
[A][2]	Discussion .....	22-50
[A][2][a]	Direct Investments .....	22-51
[A][2][b]	Greater Than 5% Ownership or Control .....	22-52
[A][2][c]	Trustee Positions .....	22-52
[A][2][d]	Material Indirect Investments .....	22-53
[A][2][e]	Intermediary Investors and Common Investees .....	22-54
[B]	Other Financial Interests .....	22-55
[B][1]	Text of Regulation S-X Rule 2-01(c)(1)(ii) .....	22-55
[B][2]	Discussion .....	22-56
[C]	Limited Exceptions to Prohibition on Investments and Other Financial Interests in Audit Clients .....	22-59
[C][1]	Text of Regulation S-X Rule 2-01(c)(1)(iii) .....	22-59
[C][2]	Discussion .....	22-60
[D]	Audit Client's Investments and Financial Relationships with the Accounting Firm ....	22-61
[D][1]	Text of Regulation S-X Rule 2-01(c)(1)(iv) .....	22-61
[D][2]	Discussion .....	22-62
[E]	Limitation of Liability Provisions in Audit Engagement Letters .....	22-62
[E][1]	SEC Guidance on Indemnification by Audit Clients .....	22-63
[E][2]	Bank Regulatory Guidance on Audit Clients' Limiting Liability of Auditors .....	22-63
[E][3]	AICPA Guidance Affecting Indemnification by Private Companies of Their Auditors .....	22-65
§ 22:4.3	Business Relationships .....	22-67
[A]	Text of Regulation S-X Rule 2-01(c)(3) .....	22-67
[B]	Discussion .....	22-67

	[C] SEC Decision in E&Y–PeopleSoft Matter ...	22-68
	[C][1] Background .....	22-68
	[C][1][a] Facts .....	22-68
	[C][1][b] SEC Administrative Proceeding.....	22-69
	[C][2] Violations Found .....	22-69
	[C][3] Sanctions Against E&Y .....	22-72
§ 22:4.4	Contingent Fees .....	22-73
	[A] Text of Regulation S-X Rule 2-01(c)(5).....	22-73
	[B] Discussion .....	22-73
	[C] PCAOB Rule .....	22-75
§ 22:4.5	Limited Exception Where Firm Has Quality Control System .....	22-76
	[A] Text of Regulation S-X Rule 2-01(d).....	22-76
	[B] Discussion .....	22-78
§ 22:5	Prohibited Employment Relationships (SOA Section 206, Regulation S-X Rules 2-01(c)(2)(i), 2-01(c)(2)(ii), 2-01(c)(2)(iii) and 2-01(c)(2)(iv)) .....	22-79
§ 22:5.1	Employing Former Auditors.....	22-79
	[A] Text of Requirement.....	22-80
	[A][1] SOA Section 206 .....	22-80
	[A][2] Regulation S-X Rule 2-01(c)(2)(iii) .....	22-80
	[B] Affected Employment Positions.....	22-83
	[C] Audit Engagement Team .....	22-84
	[D] Cooling-Off Period .....	22-85
	[E] Application to Registered Investment Companies .....	22-86
	[F] Transition Period .....	22-87
	[G] Pre-SOA Employment Prohibitions .....	22-87
§ 22:5.2	Employment at the Audit Client of an Accountant.....	22-88
	[A] Text of Regulation S-X Rule 2-01(c)(2)(i).....	22-88
	[B] Discussion .....	22-88
§ 22:5.3	Employment at the Audit Client of Certain Relatives of an Accountant .....	22-89
	[A] Text of Regulation S-X Rule 2-01(c)(2)(ii)....	22-89
	[B] Discussion .....	22-89
§ 22:5.4	Employment at Accounting Firm of Former Employee of the Audit Client .....	22-90
	[A] Text of Regulation S-X Rule 2-01(c)(2)(iv) ...	22-90
	[B] Discussion .....	22-90
§ 22:6	Improper Influence on Conduct of Audits (SOA Section 303, Rule 13b2-2) .....	22-90
§ 22:6.1	Background and Legislative History.....	22-90
§ 22:6.2	Text of Requirement .....	22-91
	[A] Text of SOA Section 303 .....	22-91
	[B] Rule 13b2-2 .....	22-92

*Table of Contents*

§ 22:6.3 Description ..... 22-94  
     [A] Activities That Could Give Rise to a  
         Violation of the Rule ..... 22-95  
     [B] Individuals Covered by the Rule ..... 22-97  
     [C] Period Covered by the Rule ..... 22-98

**Chapter 23 Procedural Safeguards Against Auditor Conflicts**

SUMM 23:1 Summary ..... 23-3  
     SUMM 23:1.1 Audit Committee Pre-Approval ..... 23-3  
     SUMM 23:1.2 Enhanced Disclosure ..... 23-3  
     SUMM 23:1.3 Audit Partner Rotation ..... 23-3  
     SUMM 23:1.4 Retention of Workpapers ..... 23-4  
     SUMM 23:1.5 Required Audit Firm Studies ..... 23-4  
     SUMM 23:1.6 Liability ..... 23-4  
   § 23:1 Pre-Approval of Permitted Services (Section 202,  
     Regulation S-X Rule 2-01(c)(7)) ..... 23-4  
     § 23:1.1 Text of Requirements ..... 23-5  
         [A] SOA Section 202 ..... 23-5  
         [B] Regulation S-X Rule 2-01(c)(7) ..... 23-6  
     § 23:1.2 Legislative History ..... 23-8  
     § 23:1.3 Pre-Approval Requirement ..... 23-9  
         [A] Two Pre-Approval Methods ..... 23-9  
         [B] Limited *De Minimis* Exception ..... 23-13  
         [C] Application to Issuers and Their  
             Subsidiaries ..... 23-14  
         [C][1] Scope of the Rule ..... 23-14  
         [C][2] Corporate “Families” with  
             Multiple Issuers ..... 23-15  
     § 23:1.4 Audit Versus Non-Audit Services ..... 23-15  
     § 23:1.5 Application to Non-U.S. Issuers ..... 23-16  
     § 23:1.6 Application to Registered Investment  
         Companies ..... 23-17  
     § 23:1.7 Auditor Involvement in Pre-Approval Process—  
         PCAOB Rule ..... 23-18  
   § 23:2 Disclosure of Accountants’ Fees and Pre-Approval  
     Policies and Procedures ..... 23-19  
     § 23:2.1 Text of Schedule 14A Item 9(e) ..... 23-20  
     § 23:2.2 Disclosure of Professional Fees ..... 23-22  
         [A] Audit Fees ..... 23-22  
         [B] Audit-Related Fees ..... 23-23  
         [C] Tax Fees ..... 23-24  
         [D] All Other Fees ..... 23-24  
     § 23:2.3 Disclosure of Pre-Approval Policies and  
         Procedures ..... 23-25  
     § 23:2.4 Location of Disclosure ..... 23-25

§ 23:2.5	Application to Registered Investment Companies.....	23-26
§ 23:3	Audit Partner Rotation (Section 203, Regulation S-X Rule 2-01(c)(6)).....	23-27
§ 23:3.1	Text of Requirement .....	23-28
	[A] SOA Section 203.....	23-28
	[B] Regulation S-X Rule 2-01(c)(6) .....	23-28
§ 23:3.2	Partners Required to Rotate .....	23-30
	[A] "Lead" and "Concurring or Reviewing" Partners .....	23-30
	[B] Audit Partners .....	23-30
§ 23:3.3	Rotation and Time-Out Period .....	23-32
§ 23:3.4	Application to Registered Investment Companies.....	23-33
§ 23:3.5	Companies that Have Recently Become "Issuers" .....	23-34
§ 23:3.6	Concept Release on Auditor Independence and Audit Firm Rotation .....	23-35
§ 23:4	Retention of Workpapers (Section 802, Regulation S-X Rule 2-06) .....	23-37
§ 23:4.1	Text of Requirement .....	23-37
	[A] SOA Section 802(a) .....	23-37
	[B] Regulation S-X Rule 2-06 .....	23-38
§ 23:4.2	Legislative History .....	23-39
§ 23:4.3	Description of SEC Rule .....	23-40
	[A] Documents to Be Retained.....	23-40
	[A][1] Substantive Materials.....	23-41
	[A][2] "Workpapers" Defined.....	23-42
	[B] Documents that Are Inconsistent with the Auditor's Final Conclusions.....	23-42
	[C] Time Period for Which Documents Must Be Retained.....	23-44
	[D] Items for Consideration by the PCAOB.....	23-45
	[E] Accountants Subject to the Rule.....	23-45
	[E][1] Covered Issuers .....	23-45
	[E][2] Covered Accountants .....	23-45
	[E][3] Non-U.S. SEC-Reporting Companies and Accountants .....	23-46
	[F] Criminal Penalties for Violations of the Rule .....	23-46
§ 23:5	Required Audit Firm Studies .....	23-46
§ 23:5.1	Study of Audit Firm Rotation (Section 207) .....	23-47
	[A] Text of SOA Section 207 .....	23-47
	[B] Discussion .....	23-47
§ 23:5.2	Study of Consolidation of Public Accounting Firms (Section 701) .....	23-48

*Table of Contents*

	[A] Text of SOA Section 701 .....	23-48
	[B] Discussion .....	23-50
§ 23:6	Sanctions .....	23-52
§ 23:6.1	Violation of Auditor Independence Rules .....	23-52
§ 23:6.2	Codification of Rule 102(e) (Section 602) .....	23-53
	[A] Section 602 .....	23-53
	[B] Discussion .....	23-54

**Chapter 24   Audit Oversight Board and Auditor Registration**

SUMM 24:1	Summary .....	24-3
SUMM 24:1.1	Background .....	24-3
SUMM 24:1.2	Organization and SEC Oversight of PCAOB .....	24-3
SUMM 24:1.3	Registration of Public Accounting Firms with PCAOB .....	24-4
SUMM 24:1.4	Auditing, Quality Control and Independence Standards .....	24-4
SUMM 24:1.5	Inspections of Registered Public Accounting Firms .....	24-4
SUMM 24:1.6	Investigations and Disciplinary Proceedings .....	24-5
SUMM 24:1.7	Non-U.S. Public Accounting Firms .....	24-5
SUMM 24:1.8	Funding of the PCAOB and the FASB .....	24-5
§ 24:1	Background .....	24-6
§ 24:1.1	Pre-SOA Self-Regulation of the Accounting Profession .....	24-6
§ 24:1.2	Creation of the PCAOB .....	24-8
	[A] Legislative History .....	24-8
	[B] Basis of Authority for PCAOB .....	24-9
	[C] Challenge to Constitutionality of the PCAOB .....	24-10
	[D] Financial Accounting Standards Board .....	24-12
§ 24:2	Organization and SEC Oversight of PCAOB (SOA Sections 101 and 107) .....	24-12
§ 24:2.1	Overview of SOA Sections 101 and 107 .....	24-12
§ 24:2.2	Text of SOA Sections 101 and 107 .....	24-12
§ 24:2.3	PCAOB Organization .....	24-22
§ 24:2.4	Major PCAOB Duties and Responsibilities .....	24-23
§ 24:2.5	SEC Oversight of PCAOB .....	24-23
§ 24:3	Registration of Public Accounting Firms with PCAOB (SOA Section 102, PCAOB Rules 2100–2107 and 2300) .....	24-24
§ 24:3.1	Overview of Registration .....	24-24
§ 24:3.2	Text of Requirements .....	24-24
	[A] Text of SOA Section 102 .....	24-24

	[B] Text of PCAOB Rules .....	24-27
§ 24:3.3	Discussion .....	24-27
	[A] Initial Mandatory Registration Date.....	24-27
	[B] Entities Subject to Registration .....	24-28
	[C] Application for Registration .....	24-29
	[D] Withdrawal from Registration .....	24-30
	[E] Non-U.S. Public Accounting Firms .....	24-31
§ 24:4	Auditing, Quality Control and Independence Standards (SOA Section 103, PCAOB Rules 3200T–3600T, PCAOB Rules 3100 and 3700).....	24-32
§ 24:4.1	Overview of Auditing, Quality Control and Independence Standards.....	24-32
§ 24:4.2	Text of Auditing, Quality Control and Independence Standards.....	24-32
	[A] Text of SOA Section 103 .....	24-32
	[B] Text of PCAOB Rules .....	24-36
§ 24:4.3	Establishment of Auditing and Other Professional Standards (PCAOB Rules 3100, 3101 and 3700).....	24-36
§ 24:4.4	Interim Professional Auditing Standards (PCAOB Rules 3200T–3600T) .....	24-38
§ 24:4.5	Other PCAOB Auditing Standards.....	24-38
§ 24:5	Inspections of Registered Public Accounting Firms (SOA Section 104, PCAOB Rules 4000–4012) .....	24-41
§ 24:5.1	Overview of Requirements .....	24-41
§ 24:5.2	Text of Requirements .....	24-41
	[A] Text of SOA Section 104 .....	24-41
	[B] Text of PCAOB Rules .....	24-45
§ 24:5.3	Discussion .....	24-46
§ 24:6	Investigations and Disciplinary Proceedings (SOA Section 105, PCAOB Rules 5000–5501) .....	24-48
§ 24:6.1	Overview of Text of Investigations and Disciplinary Proceedings .....	24-48
§ 24:6.2	Text of Requirements .....	24-48
	[A] Text of SOA Section 105 .....	24-48
	[B] Text of PCAOB Rules .....	24-57
§ 24:6.3	Discussion .....	24-57
§ 24:7	Applicability to Non-U.S. Public Accounting Firms (SOA Section 106).....	24-60
§ 24:7.1	Overview of SOA Section 106.....	24-60
§ 24:7.2	Text of SOA Section 106 .....	24-60
§ 24:7.3	Discussion .....	24-62
§ 24:7.4	Confidentiality Waivers from Audit Clients .....	24-63
	[A] General .....	24-63

Table of Contents

[B] The Hundred Group Form of PCAOB Waiver..... 24-65

[B][1] Discussion ..... 24-65

[B][2] Text of The Hundred Group Form of PCAOB Waiver ..... 24-66

§ 24:8 PCAOB and FASB Funding..... 24-72

    § 24:8.1 Background ..... 24-72

    § 24:8.2 Text of Requirements ..... 24-73

        [A] Text of SOA Sections 108 and 109 ..... 24-73

        [B] Text of PCAOB Rules 7100–7104 and Related Definitions ..... 24-79

    § 24:8.3 Discussion ..... 24-86

**PART VI: Attorneys and Ancillary Gatekeepers**

**Chapter 25 Attorney Professional Responsibility**

SUMM 25:1 Summary ..... 25-4

    SUMM 25:1.1 Overview ..... 25-4

    SUMM 25:1.2 Covered Attorneys ..... 25-4

    SUMM 25:1.3 Reporting Trigger ..... 25-5

    SUMM 25:1.4 Reporting Procedures ..... 25-6

        [A] Obligations of Chief Legal Officer ..... 25-6

        [B] Further Reporting..... 25-6

        [C] Qualified Legal Compliance Committee..... 25-7

        [D] Reporting Obligations of Investigatory and Defense Counsel ..... 25-7

        [E] Permissive Reporting Beyond the Issuer ..... 25-8

    SUMM 25:1.5 Noisy Withdrawal Proposals ..... 25-8

§ 25:1 Background and Legislative History..... 25-9

    § 25:1.1 Background ..... 25-9

    § 25:1.2 Legislative History ..... 25-10

    § 25:1.3 SEC Authority to Require Noisy Withdrawal—Federal Rule of Evidence Rule 501 ..... 25-11

§ 25:2 Text of Requirements ..... 25-12

    § 25:2.1 Text of SOA Section 307..... 25-12

    § 25:2.2 Text of 17 C.F.R. Part 205 ..... 25-13

§ 25:3 Issuer As Client ..... 25-26

§ 25:4 Key Definitions—To Whom the Rules Apply and the Threshold for an Initial Report..... 25-26

    § 25:4.1 The Rules Apply to Any “Attorney Appearing or Practicing Before the [SEC] in Any Way in the Representation of an Issuer” ..... 25-26

    § 25:4.2 Defined Terms ..... 25-27

        [A] “Attorney” ..... 25-27

	[B] “Non-Appearing Foreign Attorney” .....	25-27
	[C] “Appearing and Practicing Before the [SEC]” .....	25-27
	[C][1] Covered Activity .....	25-27
	[C][2] Requirement of Attorney-Client Relationship .....	25-28
	[D] “In the Representation of an Issuer” .....	25-28
	[E] “Issuer” .....	25-28
	[E][1] Covered Issuers .....	25-28
	[E][2] “Foreign Government Issuer” .....	25-29
§ 25:4.3	Additional Observations Regarding the Scope of the Rules .....	25-29
	[A] Non-Practicing Attorneys and Existence of Attorney-Client Relationship .....	25-29
	[B] Existence of Attorney-Client Relationship As a “Federal Question” .....	25-30
	[C] Eligibility for “Foreign Non-Appearing Attorney” Exemption .....	25-30
	[D] Application to Attorneys Representing Registered Investment Companies .....	25-31
	[E] Application to Broker-Dealers and Other Market Professionals .....	25-32
	[F] Application to Underwriters’ and Other Counterparties’ Counsel .....	25-32
§ 25:4.4	The Rules Trigger an Attorney’s Reporting Obligations When the Attorney Discovers “Evidence of a Material Violation” .....	25-33
	[A] “Material Violation” .....	25-33
	[B] “Breach of Fiduciary Duty” .....	25-33
	[C] “Similar Violation” .....	25-34
	[D] “Evidence” .....	25-34
§ 25:5	Up-the-Ladder Reporting, and Exceptions, in the Absence of a QLCC .....	25-36
§ 25:5.1	Up-the-Ladder Reporting .....	25-36
	[A] Initial Up-the-Ladder Reporting .....	25-36
	[B] CLO’s Duty to Investigate .....	25-37
	[C] Further Up-the-Ladder Reporting .....	25-37
	[D] “Appropriate Response,” “Reasonably” and “Reasonably Believes” .....	25-38
	[E] Satisfaction of Reporting Attorney Obligation .....	25-39
	[F] Failure of Up-the-Ladder Reporting .....	25-40
	[G] Additional Observations Regarding Up-the-Ladder Reporting .....	25-40



Table of Contents

§ 25:5.2 Exceptions for Investigatory and Defense Counsel ..... 25-41

    [A] Obligations of Investigatory and Defense Counsel ..... 25-41

    [B] “Colorable Defense” ..... 25-42

§ 25:6 Qualified Legal Compliance Committee—Alternative Up-the-Ladder Procedures ..... 25-42

    § 25:6.1 Composition ..... 25-43

    § 25:6.2 Authority and Responsibilities ..... 25-43

    § 25:6.3 Permissive SEC Reporting ..... 25-44

    § 25:6.4 Written Procedures; Committee Resources ..... 25-44

    § 25:6.5 Reporting Obligations of Investigatory and Defense Counsel Retained or Directed by a QLCC ..... 25-44

    § 25:6.6 Implications ..... 25-44

        [A] Implications Under Final Rules ..... 25-44

        [B] Implications Relating to Noisy Withdrawal Proposals ..... 25-45

§ 25:7 Disclosure of Issuer Confidences ..... 25-46

    § 25:7.1 Self-Defense ..... 25-47

    § 25:7.2 SEC Reporting ..... 25-47

§ 25:8 Responsibilities of Supervisory and Subordinate Attorneys ..... 25-48

    § 25:8.1 Definition of “Supervisory Attorney” and “Subordinate Attorney” ..... 25-48

    § 25:8.2 Subordinate Attorneys ..... 25-49

    § 25:8.3 Supervisory Attorneys ..... 25-49

    § 25:8.4 Obligations of Mid-Level Attorneys ..... 25-50

§ 25:9 Sanctions, Discipline and Liability ..... 25-50

    § 25:9.1 Penalty Provisions ..... 25-50

    § 25:9.2 Concurrent and Inconsistent Disciplinary Authority Applicable to U.S. and Non-U.S. Attorneys ..... 25-51

    § 25:9.3 No Private Right of Action ..... 25-52

§ 25:10 Whistleblower Protections ..... 25-53

§ 25:11 Implications for Non-U.S. Issuers and Non-U.S. Attorneys ..... 25-53

    § 25:11.1 Matters Relating to Non-U.S. Issuers ..... 25-54

        [A] Use of QLCC ..... 25-54

        [B] Scope of Covered Activity ..... 25-54

    § 25:11.2 Matters Relating to Non-U.S. Attorneys ..... 25-55

        [A] Scope of Application ..... 25-55

        [B] Determining Whether Reporting Is Required ..... 25-55

        [C] Exemption for Local Law Conflicts ..... 25-56

§ 25:12 Beyond Up-the-Ladder—Attorney Withdrawal and SEC Notification or “Noisy Withdrawal” .....	25-56
§ 25:12.1 Noisy Withdrawal Proposals .....	25-56
§ 25:12.2 Text of Proposals .....	25-57
[A] November 2002 Initial Proposal .....	25-57
[B] January 2003 Alternative Proposal .....	25-60
[B][1] Amendment to Part 205 Rules— Proposed .....	25-60
[B][2] Amendments to Form 8-K— Proposed .....	25-62
§ 25:12.3 The SEC’s Initial Proposal .....	25-62
[A] Attorney Withdrawal .....	25-62
[A][1] Mandatory Attorney Withdrawal .....	25-63
[A][2] Permissive Attorney Withdrawal .....	25-63
[B] SEC Notification .....	25-63
[C] Notification to Replacement Attorney .....	25-64
§ 25:12.4 The SEC’s Alternative Proposal .....	25-64
[A] Attorney Withdrawal .....	25-65
[B] Mandatory Internal Whistleblowing .....	25-66
[C] Notification to Replacement Attorney .....	25-66
[D] Issuer Reporting .....	25-66
[E] Permissive Attorney Notification .....	25-67

## **Chapter 26 Employee Whistleblower Protection**

SUMM 26:1 Summary .....	26-2
SUMM 26:1.1 Overview .....	26-2
SUMM 26:1.2 Procedure .....	26-3
SUMM 26:1.3 Remedies .....	26-3
SUMM 26:1.4 Related Criminal Whistleblower Provision .....	26-3
SUMM 26:1.5 Considerations for All Affected Employers .....	26-4
SUMM 26:1.6 Procedures to Receive Whistleblower Reports .....	26-4
SUMM 26:1.7 Considerations for Non-U.S. Issuers and Non-U.S. Employees .....	26-4
SUMM 26:1.8 Potential Conflicts Between SOA Whistleblower Provisions and Laws of Non-U.S. Jurisdictions .....	26-5
SUMM 26:1.9 Additional Whistleblower Protections in 2009 Federal Stimulus Act .....	26-5
SUMM 26:1.10 Additional Whistleblower Protections in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) .....	26-5

*Table of Contents*

SUMM 26:1.11	Amendments to SOA Whistleblower Protections Included in the Dodd-Frank Act .....	26-6
SUMM 26:1.12	Whistleblower Incentives Provided by the Dodd-Frank Act .....	26-6
SUMM 26:1.13	Whistleblower Provisions Included in the Consumer Financial Protection Act of 2010 .....	26-7
§ 26:1	Background and Legislative History of the SOA Provisions .....	26-7
§ 26:2	Text of SOA Section 806, As Amended by the Dodd-Frank Act.....	26-9
§ 26:3	General Discussion .....	26-12
§ 26:4	Procedure .....	26-13
§ 26:5	What Constitutes Protected Whistleblowing Activity .....	26-22
§ 26:5.1	Application to Contractors of Public Companies.....	26-29
§ 26:6	Remedies.....	26-30
§ 26:7	Related Criminal Whistleblower Provision (SOA Section 1107).....	26-32
§ 26:7.1	Text of SOA Section 1107.....	26-32
§ 26:7.2	Discussion .....	26-32
§ 26:8	Considerations for All Affected Employers .....	26-33
§ 26:9	Procedures to Receive Whistleblower Reports .....	26-34
§ 26:10	Considerations for Non-U.S. Issuers and Non-U.S. Employees .....	26-34
§ 26:11	Potential Conflicts Between SOA Whistleblower Provisions and Laws of Non-U.S. Jurisdictions.....	26-37
§ 26:11.1	EU Data Protection Working Party Opinion .....	26-37
§ 26:11.2	Discussions Between the EU Data Protection Working Party and the SEC .....	26-38
§ 26:12	Additional Whistleblower Protections in 2009 Federal Stimulus Act .....	26-41
§ 26:13	Additional Whistleblower Protections in the Dodd-Frank Act .....	26-44
§ 26:14	Amendments to SOA Whistleblower Protections Included in the Dodd-Frank Act .....	26-47
§ 26:15	Whistleblower Incentives Provided by the Dodd-Frank Act .....	26-48
§ 26:15.1	Statutory Provisions .....	26-48
§ 26:15.2	SEC and CFTC Regulations Implementing the Whistleblower Program .....	26-51
§ 26:16	Whistleblower Provisions Included in the Consumer Financial Protection Act of 2010 .....	26-55

**Chapter 27 Research Analysts**

SUMM 27:1	Summary .....	27-4
SUMM 27:1.1	Overview .....	27-4
SUMM 27:1.2	SRO Research Rules.....	27-5
[A]	Research Department Separation .....	27-5
[B]	Prohibition on Research Soliciting Investment Banking Business .....	27-5
[C]	Prohibition on Research Analyst Participation in Road Shows .....	27-5
[D]	No Three-Way Meetings Involving Investors.....	27-6
[E]	Requirement of Fair and Balanced Communications .....	27-6
[F]	Analyst Compensation .....	27-6
[G]	Blackout on Research and Public Appearances in Connection with Offerings .....	27-6
[H]	Research Blackout When “Lock-Ups” Expire .....	27-6
[I]	Termination of Coverage.....	27-7
[J]	Analyst Trading Restrictions .....	27-7
[K]	Disclosure Requirements .....	27-7
[L]	Analyst Exams .....	27-7
[M]	Supervisory Procedures .....	27-7
[N]	Emerging Growth Companies .....	27-7
SUMM 27:1.3	SEC’s Analyst Certification Rules .....	27-7
SUMM 27:1.4	Global Research Analyst Settlement .....	27-8
§ 27:1	Overview.....	27-9
§ 27:1.1	Initial Regulatory Inquiries.....	27-9
§ 27:1.2	From Inquiry to Regulation .....	27-10
[A]	SRO Rulemaking and SOA Section 501.....	27-10
[B]	SEC Rulemaking.....	27-12
[C]	Global Research Settlement .....	27-12
§ 27:2	SOA Requirements.....	27-14
§ 27:2.1	Summary of SOA Section 501 .....	27-14
§ 27:2.2	Legislative History .....	27-16
§ 27:3	SRO Research Rules .....	27-18
§ 27:3.1	Summary .....	27-18
[A]	The SRO Research Rules.....	27-18
[B]	Evolution of SRO Research Rules .....	27-21
§ 27:3.2	Definition of Research Report.....	27-23
[A]	Excluded Material .....	27-24
[B]	Third-Party Research .....	27-26
§ 27:3.3	Definition of Public Appearance.....	27-29
§ 27:3.4	Definition of Research Analyst.....	27-30
§ 27:3.5	Research Department Separation.....	27-32

*Table of Contents*

	[A] No Supervision of Research by Investment Banking .....	27-32
	[B] Restrictions on Prepublication Review of Research by Non-Research Personnel .....	27-33
	[C] Restrictions on Prepublication Review of Research by Subject Companies .....	27-34
	[D] Prohibition on Promises of Favorable Research .....	27-35
	[E] Prohibition on Directing Analysts to Undertake Selling or Marketing Efforts .....	27-35
§ 27:3.6	Prohibition on Research Solicitation of Investment Banking Business .....	27-36
§ 27:3.7	Prohibition on Road Show Participation .....	27-37
§ 27:3.8	Prohibition on Three-Way Communications Involving Investors.....	27-39
§ 27:3.9	Requirement of Fair and Balanced Communications .....	27-40
§ 27:3.10	Review of Analyst Compensation .....	27-40
§ 27:3.11	Quiet Periods for Research and Public Appearances.....	27-42
	[A] Managers and Co-Managers of Securities Offering .....	27-42
	[B] Participating Underwriters and Dealers.....	27-44
	[C] Upon Expiration of “Lock-Up” Agreements.....	27-45
§ 27:3.12	Notice of Termination of Coverage.....	27-46
§ 27:3.13	Restrictions on Personal Trading by Research Analysts .....	27-47
	[A] Prohibition Against Purchasing or Receiving Pre-IPO Securities .....	27-48
	[B] Blackout Periods .....	27-48
	[C] Trading Against Recommendation .....	27-49
	[D] Limited Exceptions .....	27-49
	[E] Application to Supervisors of Research Analysts.....	27-50
§ 27:3.14	Disclosure Requirements.....	27-51
	[A] Conflicts of Interest .....	27-51
	[A][1] Securities Ownership and Employment Disclosures .....	27-52
	[A][2] Additional Disclosures by Member Firms .....	27-52
	[A][3] Additional Disclosure by Analysts .....	27-55
	[A][4] All Other Actual, Material Conflicts.....	27-56
	[B] Meaning and Distribution of Ratings .....	27-56
	[C] Price Charts and Price Targets.....	27-57

	[D] Market Making .....	27-57
	[E] Manner of Disclosure .....	27-58
	[F] Special Rules for Compendium Reports.....	27-59
	[G] SRO Staffs' Recommendation for Disclosure Presentation.....	27-60
§ 27:3.15	Registration, Qualification, and Continuing Education for Research Analysts.....	27-60
§ 27:3.16	Supervisory Procedures.....	27-62
§ 27:3.17	Permanent Exemption for Small Firms.....	27-63
§ 27:3.18	Significant Additions in the 2008 FINRA Proposal .....	27-63
§ 27:3.19	2012 Amendments Addressing Emerging Growth Companies.....	27-65
§ 27:4	SEC's Regulation AC (Analyst Certification) .....	27-66
§ 27:4.1	Summary .....	27-66
§ 27:4.2	Certification of Research Reports .....	27-67
§ 27:4.3	Public Appearances .....	27-69
§ 27:4.4	"Covered Persons"—Application of Regulation AC to Persons Associated with a Broker-Dealer .....	27-71
	[A] Application to Investment Advisers and Banks.....	27-73
	[B] Application to the News Media.....	27-74
§ 27:4.5	Third-Party Research.....	27-74
§ 27:4.6	Interpretive Guidance on What Is and Is Not Research for Regulation AC .....	27-75
§ 27:4.7	Who Is a Research Analyst?.....	27-77
§ 27:4.8	Application to Research Provided by Non-U.S. Firms .....	27-79
§ 27:4.9	Alternative Compliance Methods for Certain Research.....	27-80
	[A] Quantitative and Technical Research .....	27-80
	[B] Compendium Reports .....	27-80
§ 27:4.10	Supervision and Review of Research .....	27-81
§ 27:4.11	Enforcement; Fraud Liability Under the Federal Securities Laws .....	27-82
§ 27:5	Global Research Analyst Settlement.....	27-82
§ 27:5.1	Summary .....	27-82
§ 27:5.2	Scope .....	27-86
	[A] U.S.-Oriented Applicability.....	27-86
	[B] Definition of Research Report .....	27-87
	[B][1] Equity Research.....	27-87
	[B][2] Excepted Communications.....	27-87
	[C] Definition of Research .....	27-88
	[D] Definition of Investment Banking.....	27-89

*Table of Contents*

	[E] Exempt Investment Adviser Affiliates .....	27-89
§ 27:5.3	Physical Separation .....	27-90
§ 27:5.4	Reporting Lines .....	27-90
§ 27:5.5	Communications Firewalls Between Research and Investment Banking .....	27-90
	[A] Views About the Merits of a Proposed Transaction, a Potential Candidate for a Transaction, or Market or Industry Trends, Conditions or Developments .....	27-90
	[B] Communications to Commitment or Similar Committee .....	27-93
	[C] Confirming the Adequacy of Disclosure.....	27-93
	[D] Post-Mandate Communications.....	27-93
	[D][1] Views on Pricing and Structuring .....	27-94
	[D][2] Sales Force Education .....	27-94
	[E] Conferences .....	27-95
	[F] Matters of General Firm Interest .....	27-96
	[G] Legal and Compliance Issues .....	27-96
	[H] Communications Not Related to Research or Investment Banking.....	27-97
§ 27:5.6	Prohibition on Soliciting Investment Banking Business.....	27-97
	[A] Particular Communications with Issuer at Issuer's Request.....	27-97
	[B] No Three-Way Meetings.....	27-98
§ 27:5.7	Prohibition on Road Show Participation .....	27-98
§ 27:5.8	Marketing and Selling Efforts .....	27-99
§ 27:5.9	Research Coverage Decisions .....	27-100
§ 27:5.10	Termination of Research Coverage .....	27-101
§ 27:5.11	Research Oversight.....	27-101
§ 27:5.12	Research Budget .....	27-102
§ 27:5.13	Compensation and Evaluation of Research Personnel .....	27-102
§ 27:5.14	Legal and Compliance .....	27-104
§ 27:5.15	Policies and Procedures to Restrict Influence over Research.....	27-104
§ 27:5.16	Independent Monitor .....	27-104
§ 27:5.17	Obligation to Provide Independent, Third-Party Research.....	27-106
§ 27:5.18	Additional Disclosures .....	27-106
	[A] Disclosures in Research Reports.....	27-106
	[B] Disclosures Regarding Analyst Performance.....	27-107

§ 27:5.19 Amendments and Compliance  
 Certification..... 27-107

§ 27:5.20 Savings Clauses..... 27-108

**Chapter 28 Rating Agencies and Others**

SUMM 28:1 Summary ..... 28-2

    SUMM 28:1.1 Credit Rating Agencies ..... 28-2

    SUMM 28:1.2 Other Required Studies ..... 28-3

§ 28:1 SEC Study of Rating Agencies (Section 702) ..... 28-4

    § 28:1.1 Text of SOA Section 702 ..... 28-4

    § 28:1.2 Discussion ..... 28-5

        [A] Goals of the Report ..... 28-5

        [B] Summary of the Report ..... 28-5

    § 28:1.3 The Credit Rating Agency Reform Act of 2006 .... 28-7

        [A] Background ..... 28-7

        [B] The NRSRO Registration System ..... 28-9

        [C] SEC Implementing Rules ..... 28-10

            [C][1] June 2007 Initial Rules ..... 28-11

            [C][2] February 2009 Amendments and  
 Rule Proposals ..... 28-13

            [C][3] November 2009 Amendments and  
 Rule Proposals ..... 28-15

    § 28:1.4 Other SEC Actions Affecting the Use of  
 Credit Ratings ..... 28-18

        [A] Proposed and Adopted Amendments  
 Removing References to NRSRO Ratings  
 from SEC Rules and Forms ..... 28-18

            [A][1] October 2009 Adopted Amendments ..... 28-19

            [A][2] October 2009 Proposed Amendments ... 28-20

            [A][3] February 2010 Amendments ..... 28-20

            [A][4] March 2011 Proposals ..... 28-21

            [A][5] April 2011 Proposals ..... 28-23

            [A][6] July 2011 Amendments ..... 28-24

            [A][7] August 2011 Advance Notice of Proposed  
 Rulemaking ..... 28-27

        [B] Proposed Registration Statement Disclosure  
 Requirements Regarding Credit Ratings .... 28-27

        [C] Concept Release on Removing an Exemption  
 for NRSROs from Liability Under Section 11  
 of the Securities Act ..... 28-28

    § 28:1.5 The Dodd-Frank Wall Street Reform and  
 Consumer Protection Act ..... 28-29

        [A] Liability Provisions ..... 28-29

            [A][1] Rescission of Securities Act  
 Rule 436(g) ..... 28-29



*Table of Contents*

[A][2] Additional Liability Provisions.....	28-31
[B] Corporate Governance and Conflicts of Interest .....	28-33
[C] Disclosure Requirements .....	28-34
[C][1] Form and Certifications to Accompany Credit Ratings .....	28-35
[C][2] Public Disclosures Regarding Credit Rating Histories and Performance Statistics .....	28-36
[C][3] Third Party Diligence Services for Asset-Backed Securities .....	28-36
[D] Removal of Exemption from Regulation FD.....	28-37
[E] Methodologies and Rating Practices .....	28-38
[F] Removal of References to Credit Ratings from Federal Laws and Regulations .....	28-39
[G] Studies and Rulemakings Related to the Use of Credit Ratings .....	28-41
[G][1] SEC Study and Rulemaking on Centralized Rating Assignment System for Structured Finance Products .....	28-41
[G][2] Additional Studies and Rulemakings .....	28-42
§ 28:2 SEC Report on Violations by Securities Professionals .....	28-42
§ 28:2.1 Text of SOA Section 703.....	28-42
§ 28:2.2 Discussion .....	28-43
[A] Goals of the Report .....	28-43
[B] Summary of the Report .....	28-44
§ 28:3 Comptroller General Study of Investment Banks (Section 705).....	28-45
§ 28:3.1 Text of SOA Section 705.....	28-45
§ 28:3.2 Discussion .....	28-45

**PART VII: Non-U.S. Issuers**

**Chapter 29 Special Concerns of Non-U.S. Issuers**

§ 29:1 Overview.....	29-4
§ 29:2 Non-U.S. Companies Affected by the SOA .....	29-4
§ 29:2.1 Non-U.S. “Issuers” as Defined .....	29-4
§ 29:2.2 Certain Non-U.S. Companies and Non-U.S. Government or Governmental Entities That Are Not “Issuers” .....	29-5
[A] Voluntary Filers .....	29-5

	[B] Rule 12g3-2(b) Companies Other than Voluntary Filers .....	29-6
	[C] Schedule B Issuers .....	29-7
§ 29:3	Obligations of the CEO, CFO and Management .....	29-7
§ 29:3.1	Management Certifications .....	29-7
	[A] Section 906 Certifications.....	29-8
	[B] Section 302 Certifications.....	29-8
§ 29:3.2	Disclosure Controls and Procedures .....	29-10
§ 29:3.3	Internal Control Over Financial Reporting .....	29-11
§ 29:4	Issuer Reporting—Corporate Disclosure Practices .....	29-15
§ 29:4.1	Management’s Discussion and Analysis— Disclosure of Off-Balance Sheet Transactions ....	29-15
	[A] Off-Balance Sheet Arrangements Covered ..	29-15
	[B] Applicable Disclosure Threshold.....	29-16
	[C] Content and Presentation of Required Disclosure.....	29-16
	[D] Tabular Disclosure of Aggregate Contractual Obligations.....	29-18
	[E] Application to Non-U.S. GAAP Reporting Companies .....	29-18
	[F] Safe Harbor for Forward-Looking Information Relating to Off-Balance Sheet Arrangements.....	29-19
	[G] Relationship to 2003 FASB Interpretation on SPEs .....	29-19
§ 29:4.2	Use of Non-GAAP Financial Information in Earnings Releases, Public Announcements and SEC Filings .....	29-20
	[A] Required Reconciliation in Public Announcements and Disclosures— Regulation G.....	29-21
	[A][1] Definition of “Non-GAAP Financial Measures” .....	29-21
	[A][2] Quantitative Reconciliation Required ....	29-22
	[A][3] Exception for Public Announcements by Certain Non-U.S. Issuers.....	29-23
	[B] Expanded Disclosure Requirements and Prohibitions Applicable to Non-GAAP Information in SEC Filings .....	29-25
	[B][1] SEC Filings Covered.....	29-25
	[B][2] Required Disclosures .....	29-25
	[B][3] Prohibited Disclosures.....	29-26
	[B][4] Exception for Required or Permitted Home-Country Disclosure by Non-U.S. Issuers.....	29-27

*Table of Contents*

[B][5]	Incorporation by Reference of Information Furnished on Form 6-Ks ....	29-28
§ 29:4.3	Mandatory Three-Year Review .....	29-28
§ 29:5	Governance .....	29-28
§ 29:5.1	Audit Committee—Independence and Required Functions .....	29-28
[A]	Summary .....	29-29
[B]	Independence Requirement .....	29-30
[B][1]	Definition of “Independence” .....	29-30
[B][2]	Exemptions Available to Non-U.S. Issuers .....	29-32
[B][3]	Dual Holding Companies .....	29-34
[B][4]	Exercise of Audit Committee Responsibilities by Shareholders, the Board of Directors, or a Government Entity or Tribunal .....	29-34
[C]	Required Audit Committee Functions .....	29-35
[C][1]	Selection and Oversight of Auditors.....	29-35
[C][2]	Complaint Procedures .....	29-36
[C][3]	Authority to Engage Advisors and Access to Adequate Funding .....	29-37
[D]	Required Disclosures in Annual Reports on Forms 20-F and 40-F .....	29-37
[E]	Compliance .....	29-37
§ 29:5.2	Audit Committee Financial Expert .....	29-38
[A]	Definition of Audit Committee Financial Expert .....	29-39
[B]	Safe Harbor—No Enhanced Liability .....	29-40
[C]	Relationship with NYSE and Nasdaq Standards .....	29-40
[D]	Possible Approaches for Companies Without an Audit Committee Financial Expert .....	29-40
§ 29:5.3	Required Communications with the Audit Committee .....	29-41
§ 29:6	Financial Officers’ Code of Ethics .....	29-42
§ 29:6.1	Required Disclosure .....	29-42
§ 29:6.2	Definition of Code of Ethics .....	29-42
§ 29:6.3	Public Availability of Codes of Ethics .....	29-42
§ 29:6.4	Amendments and Waivers of Code Provisions .....	29-43
§ 29:7	Executive Officers and Directors .....	29-43
§ 29:7.1	Prohibitions on Loans .....	29-43
[A]	Requirement .....	29-43

	[B] Scope of Covered Directors and Executive Officers .....	29-44
	[C] Covered Personal Loans .....	29-44
	[D] Exceptions .....	29-45
	[D][1] Exception for Consumer Credit .....	29-45
	[D][2] Exception for Non-U.S. Banks .....	29-45
	[E] Interpretive Issues .....	29-46
§ 29:7.2	Benefit Plan Blackouts.....	29-47
	[A] Requirement .....	29-47
	[B] Application to Non-U.S. Issuers.....	29-47
§ 29:7.3	Disgorgement for Certain Accounting Restatements .....	29-47
§ 29:7.4	Improper Influence on Conduct of Audits .....	29-48
§ 29:7.5	SEC Temporary Freeze on Bonus and Special Payments .....	29-50
§ 29:8	Non-Audit Services and Financial Relationships.....	29-50
§ 29:8.1	Non-Audit Services .....	29-51
	[A] Prohibited Services.....	29-51
	[B] Special Considerations Regarding Tax Services .....	29-52
§ 29:8.2	Audit Committee Pre-Approval of Services Provided by Auditors .....	29-53
	[A] Pre-Approval Required .....	29-53
	[B] Alternative Pre-Approval Structure Permissible .....	29-53
	[C] Application to Issuers and Their Subsidiaries .....	29-54
§ 29:8.3	Financial, Business and Payment Relationships .....	29-54
§ 29:8.4	Enhanced Disclosure .....	29-55
§ 29:8.5	Consequences of Impaired Auditor Independence .....	29-56
§ 29:9	Other Safeguards Against Auditor Conflicts .....	29-56
§ 29:9.1	New Regulator of Accounting Profession .....	29-56
§ 29:9.2	Audit Partner Rotation .....	29-56
	[A] Lead and Concurring Partners .....	29-57
	[B] Other Audit Partners on the Audit Engagement Team.....	29-57
	[C] Transition Relief .....	29-58
	[C][1] All Non-U.S. Audit Partners .....	29-58
	[C][2] U.S. Lead Partner .....	29-58
	[C][3] U.S. Concurring Partner .....	29-58
	[C][4] Other U.S. Audit Partners .....	29-59
§ 29:9.3	Employing Former Auditors.....	29-59
§ 29:9.4	Compensation of Audit Partners.....	29-59

*Table of Contents*

§ 29:9.5 Retention of Workpapers ..... 29-59

§ 29:10 Attorneys ..... 29-60

    § 29:10.1 Up-the-Ladder Reporting ..... 29-61

    § 29:10.2 Affected Attorneys ..... 29-61

        [A] Scope of Coverage ..... 29-62

        [B] Non-Practicing Attorneys ..... 29-62

        [C] Non-U.S. Attorneys ..... 29-62

    § 29:10.3 Qualified Legal Compliance Committee—  
        Alternative Up-the-Ladder Reporting ..... 29-63

    § 29:10.4 Further Rule Proposal—Noisy Withdrawal  
        Regime ..... 29-64

§ 29:11 Employee Whistleblower Protection ..... 29-65

**PART VIII: Remedies & Penalties**

**Chapter 30 Officer and Director Bars**

SUMM 30:1 Summary ..... 30-1

§ 30:1 Overview and Legislative History ..... 30-1

§ 30:2 Text of Requirements ..... 30-2

    § 30:2.1 Text of SOA Section 1105 ..... 30-2

    § 30:2.2 Text of SOA Section 305(a) ..... 30-3

§ 30:3 Discussion ..... 30-3

**Chapter 31 Civil Liability**

SUMM 31:1 Summary ..... 31-2

    SUMM 31:1.1 Extended Statute of Limitations for  
        Securities Fraud ..... 31-2

    SUMM 31:1.2 Nondischargeable Debts for Securities  
        Fraud ..... 31-2

    SUMM 31:1.3 Establishment of Disgorgement Fund ..... 31-2

    SUMM 31:1.4 Disgorgement for Restatements ..... 31-3

    SUMM 31:1.5 SEC Temporary Freeze on Bonus and  
        Special Payments ..... 31-3

§ 31:1 Extended Statute of Limitations for Securities  
    Fraud ..... 31-4

    § 31:1.1 Overview and Legislative History ..... 31-4

    § 31:1.2 Text of SOA Section 804 ..... 31-5

    § 31:1.3 No Retroactive Application ..... 31-6

    § 31:1.4 Applicability to Securities Act ..... 31-6

    § 31:1.5 Inquiry Notice Standard ..... 31-9

§ 31:2 Nondischargeable Debts for Securities Fraud  
    (SOA Section 803) ..... 31-10

    § 31:2.1 Overview and Legislative History ..... 31-10

    § 31:2.2 Text of SOA Section 803 ..... 31-10

§ 31:2.3	Discussion .....	31-11
§ 31:3	Establishment of Disgorgement Fund (SOA Section 308) .....	31-13
§ 31:3.1	Overview and Legislative History .....	31-13
§ 31:3.2	Text of SOA Section 308 .....	31-14
§ 31:3.3	Disgorgement Fund .....	31-15
§ 31:3.4	SEC Study of Restitution .....	31-18
	[A] Goals of Study .....	31-18
	[B] Summary of SEC Conclusions .....	31-18
	[B][1] SEC Findings .....	31-18
	[B][2] SEC Recommendations for Legislation .....	31-19
§ 31:4	Disgorgement for Restatements (SOA Section 304) .....	31-20
§ 31:4.1	Overview and Legislative History .....	31-20
§ 31:4.2	Text of SOA Section 304 .....	31-20
§ 31:4.3	Discussion .....	31-21
	[A] No Private Right of Action .....	31-21
	[B] No Indemnification for Section 304 Liability .....	31-22
	[C] Scope .....	31-23
§ 31:5	SEC Temporary Freeze on Bonus and Special Payments (SOA Section 1103) .....	31-26
§ 31:5.1	Overview and Legislative History .....	31-26
§ 31:5.2	Text of SOA Section 1103 .....	31-27
§ 31:5.3	Discussion .....	31-29

## **Chapter 32 Criminal Penalties**

SUMM 32:1	Summary .....	32-2
SUMM 32:1.1	New Fraud Crimes .....	32-2
SUMM 32:1.2	Obstruction of Justice .....	32-2
SUMM 32:1.3	Increased Penalties .....	32-2
§ 32:1	New Fraud Crimes .....	32-3
§ 32:1.1	Securities Fraud .....	32-3
	[A] Overview and Legislative History .....	32-3
	[B] Text of 18 U.S.C. § 1348 (added by SOA Section 807(a), as amended by the FERA) ....	32-5
	[C] Discussion .....	32-6
§ 32:1.2	Attempt and Conspiracy .....	32-7
	[A] Overview and Legislative History .....	32-7
	[B] Text of SOA Section 902(a) (Adding 18 U.S.C. § 1349) .....	32-8
	[C] Discussion .....	32-8
§ 32:2	Obstruction of Justice .....	32-9
§ 32:2.1	Overview and Legislative History .....	32-9

*Table of Contents*

§ 32:2.2 Text of Requirements ..... 32-11  
    [A] SOA Section 802(a) ..... 32-11  
    [B] SOA Section 1102 ..... 32-11  
§ 32:2.3 Discussion ..... 32-12  
§ 32:3 Increased Penalties ..... 32-15  
    § 32:3.1 Overview and Legislative History ..... 32-15  
        [A] Increased Penalties (SOA Sections 903,  
            904, 1106) ..... 32-16  
        [B] Sentencing Guidelines (SOA Sections 805,  
            905, 1104) ..... 32-16  
    § 32:3.2 Exchange Act Violations ..... 32-17  
    § 32:3.3 Mail and Wire Fraud ..... 32-17  
    § 32:3.4 ERISA Violations ..... 32-17  
    § 32:3.5 Federal Sentencing Guidelines ..... 32-17  
        [A] Overview of Federal Sentencing  
            Guidelines ..... 32-17  
        [B] Revisions to Federal Sentencing  
            Guidelines Governing White Collar  
            Crimes ..... 32-18  
        [C] Effective Compliance and Ethics Program  
            for Organizations ..... 32-20  
        [C][1] Text of Sentencing Guideline  
                Requirements ..... 32-20  
        [C][2] Discussion ..... 32-27

**VOLUME 3**

**Table of Chapters** ..... vii  
**Table of Contents** ..... ix

**PART IX: Appendices & Index**

Appendix A Background—Twelve Months Leading Up  
to the SOA ..... A-1  
Appendix B Cross References of SOA Sections to  
Discussions in This Book ..... B-1  
Appendix C Cross References of SEC Rules to Discussions  
in This Book ..... C-1  
Appendix D Comparison of NYSE and Nasdaq Corporate  
Governance Rules ..... D-1  
Appendix E Text of Sarbanes-Oxley Act of 2002 ..... E-1

PUBLIC COMPANY DESKBOOK

Appendix F	Text of Senate Banking Committee Report on S. 2673 .....	F-1
Appendix G	Text of Conference Committee Bill (Approved July 24, 2002) .....	G-1
Appendix H	Text of S. 2673 (Passed July 15, 2002) .....	H-1
Appendix I	Text of H.R. 3763 and H.R. 5118 .....	I-1
Appendix J	Table of Congressional Hearings Prior to the Enactment of the SOA.....	J-1
Appendix K	PCAOB Rules .....	K-1
Appendix L	PCAOB Auditing Standard—Audits of Internal Control Over Financial Reporting.....	L-1
Appendix M	PCAOB Auditing Standard—Reporting on Whether a Previously Reported Material Weakness Continues to Exist .....	M-1
Appendix N	SEC Compensation-Related Compliance and Disclosure Interpretations .....	N-1
<b>Index</b> .....		<b>Index-1</b>