SECURITIES LAW AND PRACTICE DESKBOOK
PLI’S COMPLETE LIBRARY OF TREATISE TITLES

ART LAW

BANKING & COMMERCIAL LAW
Asset-Based Lending: A Practical Guide to Secured Financing
Equipment Leasing–Leveraged Leasing
Hillman on Commercial Loan Documentation
Hillman on Documenting Secured Transactions: Effective Drafting and Litigation
Maritime Law Answer Book

BANKRUPTCY LAW
Bankruptcy Deskbook
Personal Bankruptcy Answer Book

BUSINESS, CORPORATE & SECURITIES LAW
Accountants’ Liability
Anti-Money Laundering: A Practical Guide to Law and Compliance
Antitrust Law Answer Book
Broker-Dealer Regulation
Conducting Due Diligence in a Securities Offering
Consumer Financial Services Answer Book
Corporate Compliance Answer Book
Corporate Legal Departments: Practicing Law in a Corporation
Corporate Political Activities Deskbook
Corporate Whistleblowing in the Sarbanes-Oxley/Dodd-Frank Era
Covered Bonds Handbook
Cybersecurity: A Practical Guide to the Law of Cyber Risk
Derivatives Deskbook: Close-OutNetting, Risk Mitigation, Litigation
Deskbook on Internal Investigations, Corporate Compliance, and White Collar Issues
Directors’ and Officers’ Liability: Current Law, Recent Developments, Emerging Issues
Doing Business Under the Foreign Corrupt Practices Act
EPA Compliance and Enforcement Answer Book
Exempt and Hybrid Securities Offerings
Fashion Law and Business: Brands & Retailers
Financial Institutions Answer Book: Law, Governance, Compliance
Financial Product Fundamentals: Law, Business, Compliance
Financial Services Mediation Answer Book
Financial Services Regulation Deskbook
Financially Distressed Companies Answer Book
Global Business Fraud and the Law: Preventing and Remedy Fraud and Corruption
Hedge Fund Regulation
Initial Public Offerings: A Practical Guide to Going Public
Insider Trading Law and Compliance Answer Book
Insurance and Investment Management M&A Deskbook
International Corporate Practice: A Practitioner’s Guide to Global Success
Investment Adviser Regulation: A Step-by-Step Guide to Compliance and the Law
Life at the Center: Reflections on Fifty Years of Securities Regulation
Mergers, Acquisitions and Tender Offers: Law and Strategies
Mutual Funds and Exchange Traded Funds Regulation
Outsourcing: A Practical Guide to Law and Business
Privacy Law Answer Book
Private Equity Funds: Formation and Operation
Prokauer on Privacy: A Guide to Privacy and Data Security Law in the Information Age
Public Company Deskbook: Complying with Federal Governance & Disclosure Requirements
SEC Compliance and Enforcement Answer Book
Securities Investigations: Internal, Civil and Criminal
Securities Law and Practice Deskbook
The Securities Law of Public Finance
Securities Litigation: A Practitioner's Guide
Social Media and the Law
Soderquist on Corporate Law and Practice
Sovereign Wealth Funds: A Legal, Tax and Economic Perspective
A Starter Guide to Doing Business in the United States
Technology Transactions: A Practical Guide to Drafting and Negotiating Commercial Agreements
Variable Annuities and Variable Life Insurance Regulation

COMMUNICATIONS LAW
Advertising and Commercial Speech: A First Amendment Guide
Sack on Defamation: Libel, Slander, and Related Problems
Telecommunications Law Answer Book

EMPLOYMENT LAW
Employment Law Yearbook
ERISA Benefits Litigation Answer Book
Labor Management Law Answer Book

ESTATE PLANNING AND ELDER LAW
Blattmachr on Income Taxation of Estates and Trusts
Estate Planning & Chapter 14: Understanding the Special Valuation Rules
International Tax & Estate Planning: A Practical Guide for Multinational Investors
Manning on Estate Planning
New York Elder Law
Stocker on Drawing Wills and Trusts

HEALTH LAW
FDA Deskbook: A Compliance and Enforcement Guide
Health Care Litigation and Risk Management Answer Book
Health Care Mergers and Acquisitions Answer Book
Medical Devices Law and Regulation Answer Book
Pharmaceutical Compliance and Enforcement Answer Book

IMMIGRATION LAW
Fragomen on Immigration Fundamentals: A Guide to Law and Practice

INSURANCE LAW
Business Liability Insurance Answer Book
Insurance Regulation Answer Book
Reinsurance Law

INTELLECTUAL PROPERTY LAW
Copyright Law: A Practitioner's Guide
Faber on Mechanics of Patent Claim Drafting
How to Write a Patent Application
Intellectual Property Law Answer Book
Kane on Trademark Law: A Practitioner's Guide
Likelihood of Confusion in Trademark Law
Patent Claim Construction and Markman Hearings
Patent Licensing and Selling: Strategy, Negotiation, Forms
Patent Litigation
Pharmaceutical and Biotech Patent Law
Post-Grant Proceedings Before the Patent Trial and Appeal Board
Substantial Similarity in Copyright Law
Trade Secrets: A Practitioner's Guide
LITIGATION
- American Arbitration: Principles and Practice
- Class Actions and Mass Torts Answer Book
- Electronic Discovery Deskbook
- Essential Trial Evidence: Brought to Life by Famous Trials, Films, and Fiction
- Expert Witness Answer Book
- Evidence in Negligence Cases
- Federal Bail and Detention Handbook
- How to Handle an Appeal
- Medical Malpractice: Discovery and Trial
- Product Liability Litigation: Current Law, Strategies and Best Practices
- Sinclair on Federal Civil Practice
- Trial Handbook

REAL ESTATE LAW
- Commercial Ground Leases
- Friedman on Contracts and Conveyances of Real Property
- Friedman on Leases
- Holtzschue on Real Estate Contracts and Closings: A Step-by-Step Guide to Buying and Selling Real Estate
- Net Leases and Sale-Leasebacks

TAX LAW
- The Circular 230 Deskbook: Related Penalties, Reportable Transactions, Working Forms
- The Corporate Tax Practice Series: Strategies for Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings
- Foreign Account Tax Compliance Act Answer Book
- Internal Revenue Service Practice and Procedure Deskbook
- International Tax & Estate Planning: A Practical Guide for Multinational Investors
- International Tax Controversies: A Practical Guide
- International Trade Law Answer Book: U.S. Customs Laws and Regulations
- Langer on Practical International Tax Planning
- The Partnership Tax Practice Series: Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances
- Private Clients Legal & Tax Planning Answer Book
- Transfer Pricing Answer Book

GENERAL PRACTICE PAPERBACKS
- Anatomy of a Mediation: A Dealmaker’s Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts
- Attorney-Client Privilege Answer Book
- Drafting for Corporate Finance: Concepts, Deals, and Documents
- Pro Bono Service by In-House Counsel: Strategies and Perspectives
- Smart Negotiating: How to Make Good Deals in the Real World
- Thinking Like a Writer: A Lawyer’s Guide to Effective Writing & Editing
- Working with Contracts: What Law School Doesn’t Teach You

Order now at www.pli.edu
Or call (800) 260-4754 Mon.–Fri., 9 a.m.–6 p.m.

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036

When ordering, please use Priority Code NWS9-X.
About the Author

GARY M. BROWN is a partner with Nelson Mullins Riley & Scarborough LLP, where he concentrates his practice in securities, representation of public companies, and corporate governance. Prior to joining Nelson Mullins in 2018, he had served for seven years as the Chief Executive Officer of a financial services firm that specialized in the life settlement market and which, during his tenure, acquired and managed life settlement portfolios with over $4 billion (USD) in face amount.

In his thirty-one prior years of private law practice, Mr. Brown was recognized in both Best Lawyers in America and Chambers—America’s Leading Business Lawyers. In addition, from 1994 until 2011, he taught corporate and securities law at the Vanderbilt University Law School. He also served as general counsel to the Ethics and Compliance Officer Association (now known as the Ethics and Compliance Initiative), then the world’s largest group of ethics and compliance professionals.

He is a frequent instructor at securities programs for the Practising Law Institute, co-chairing PLI’s national securities program, Understanding the Securities Laws, and instructing at The SEC Institute’s “Reporting Skills Workshop for Lawyers.”

During 2002, Mr. Brown served as Special Counsel (Minority) to the United States Senate’s Committee on Governmental Affairs (and also worked with that committee’s Permanent Subcommittee on Investigations (“PSI”) in the investigation into the causes of the collapse of Enron Corp. During 2010, he was retained by PSI to assist the subcommittee in its investigation, “Wall Street and the Financial Crisis,” and related televised hearings. While on those assignments, he provided advice on aspects of both the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act as those pieces of legislation were being debated in the Senate.

Mr. Brown has been a frequent speaker and author on areas including corporate governance, ethics, obligations of corporate directors, and the reporting and disclosure obligations of public companies. His other publications include Master the 8-K (Practising Law Institute 2017); PLI’s Guide to the SEC’s Executive Compensation and Related Party Transaction Rules (Practising Law Institute 2007); The Implications of the U.S. Sarbanes-Oxley Act (Oxford Press 2004) (presented to an international corporate governance symposium in Berlin co-sponsored by the Japanese-German Center–Berlin and the Max Planck Institute for Foreign Private and Private International Law);
# Table of Chapters

<table>
<thead>
<tr>
<th>Chapter 1</th>
<th>Approaching Securities Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 2</td>
<td>Business Context of Securities Act Registration</td>
</tr>
<tr>
<td>Chapter 3</td>
<td>Regulatory Framework of Securities Act Registration</td>
</tr>
<tr>
<td>Chapter 4</td>
<td>Securities Act Registration Process</td>
</tr>
<tr>
<td>Chapter 5</td>
<td>Reach of Securities Act Regulation</td>
</tr>
<tr>
<td>Chapter 6</td>
<td>Securities Act Registration Exemptions</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>Resales of Securities Under the Securities Act</td>
</tr>
<tr>
<td>Chapter 8</td>
<td>Liability for Securities Act Violations</td>
</tr>
<tr>
<td>Chapter 9</td>
<td>Registration and Periodic Reporting Under the Exchange Act</td>
</tr>
<tr>
<td>Chapter 10</td>
<td>Regulation of Proxy Solicitations</td>
</tr>
<tr>
<td>Chapter 11</td>
<td>Regulation of Tender Offers</td>
</tr>
<tr>
<td>Chapter 12</td>
<td>Fraud Under Rule 10b-5 and Related Issues</td>
</tr>
<tr>
<td>Chapter 13</td>
<td>Disgorgements Under Exchange Act Section 16(b) and Securities Law “Clawback” Provisions</td>
</tr>
<tr>
<td>Chapter 14</td>
<td>Regulation of the Securities Business</td>
</tr>
</tbody>
</table>
Table of Contents

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

Chapter 1  Approaching Securities Law

§ 1:1 Introduction ........................................................................................................ 1-1
§ 1:2 Historical and Cultural Perspective ................................................................. 1-1
  § 1:2.1 History Repeats Itself ............................................................................. 1-1
  § 1:2.2 Origins of the Federal Securities Laws ................................................. 1-4
§ 1:3 Sources of Federal Securities Law ................................................................. 1-7
§ 1:4 Government Publications ............................................................................. 1-12
§ 1:5 Private Publications ....................................................................................... 1-17
§ 1:6 State Securities Law ....................................................................................... 1-18
§ 1:7 Special Position of Securities Lawyers ......................................................... 1-19

Chapter 2  Business Context of Securities Act Registration

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

(Sec. Law & Prac., Rel. #11, 3/18)  xi
Chapter 3  Regulatory Framework of Securities Act Registration

§ 3:1  Introduction........................................................................ 3-2
§ 3:1.1  Statutory Framework..................................................... 3-2
§ 3:1.2  Categories of Issuers.................................................... 3-3
[A]  Generally................................................................. 3-3
[B]  Waiver of Ineligible Issuer Status.................................. 3-5
§ 3:2  Prefiling Period .................................................................... 3-7
§ 3:2.1  Statutory Scheme........................................................ 3-7
[A]  Generally................................................................. 3-7
[B]  Emerging Growth Companies .................................. 3-10
§ 3:2.2  What Is an Offer?......................................................... 3-11
[A]  Section 2(a)(3) ......................................................... 3-11
[B]  Conditioning the Market ........................................ 3-12
[C]  General Exceptions ................................................ 3-17
[D]  Special Situations..................................................... 3-23
§ 3:3  Waiting Period....................................................................... 3-24
§ 3:3.1  Statutory Scheme........................................................ 3-24
[A]  Generally................................................................. 3-24
[B]  For Emerging Growth Companies .......................... 3-28
§ 3:3.2  What Is a Sale? .......................................................... 3-28
§ 3:3.3  What Is a Prospectus?.................................................. 3-30
[A]  Indirect Offers......................................................... 3-31
[B]  Exceptions................................................................ 3-34
[C]  Free Writing Prospectuses .................................... 3-37
[D]  Electronic Road Shows ........................................... 3-39
[E]  Websites .................................................................. 3-40
[F]  Research Reports..................................................... 3-41
§ 3:3.4  Preliminary Prospectus Delivery Requirements ......... 3-43
§ 3:4  Posteffective Period ............................................................. 3-45
§ 3:4.1  Statutory Scheme........................................................ 3-45
§ 3:4.2  Section 5(b) and Defective Prospectuses............... 3-47
§ 3:4.3  Final Prospectus Delivery Requirements............... 3-48
Table 3-1  Summary of Communication Rules ................. 3-54
Chapter 4  Securities Act Registration Process

§ 4:1  Statutory Scheme ............................................................ 4-2
§ 4:2  Commission Procedures ................................................. 4-4
  § 4:2.1  Confidential Submission of Draft Registration Statements ........................................ 4-4
  § 4:2.2  Review and Comment Procedure ........................................ 4-8
  § 4:2.3  Delaying and Accelerating Effectiveness ................................. 4-12
  § 4:2.4  Refusal Orders, Stop Orders, and Withdrawal of Registration Statements .................. 4-15
§ 4:3  Disclosure Requirements .............................................. 4-16
  § 4:3.1  Registration Statement Forms ................................ 4-16
  § 4:3.2  Rules, Regulations, and Industry Guides ....................... 4-19
  § 4:3.3  Shelf Registration .................................................... 4-22
    [A]  Background and History ............................................ 4-22
    [B]  Shelf Registration Generally ................................... 4-24
      [B][1]  Rule 415 ............................................................ 4-24
      [B][2]  Rule 430B Base Prospectus Requirements ............. 4-25
      [C]  Shelf Registration Procedures for Well-Known Seasoned Issuers [WKSIs] .......... 4-26
§ 4:4  Registration Statement Drafting and Filing ....................... 4-27
§ 4:5  Perspectives ............................................................. 4-31

Chapter 5  Reach of Securities Act Regulation

§ 5:1  Introduction .................................................................. 5-1
§ 5:2  What Is a Security? ......................................................... 5-2
  § 5:2.1  Statutory Scheme ...................................................... 5-2
  § 5:2.2  Investment Contract ................................................. 5-3
    [A]  Investment of Money ................................................ 5-5
    [B]  Common Enterprise ................................................ 5-6
    [C]  Expectation of Profits ................................................ 5-8
    [D]  Solely from the Efforts of Others ............................... 5-10
    [E]  Particular Applications of Howey ................................ 5-13
  § 5:2.3  Unless the Context Otherwise Requires ......................... 5-19
§ 5:3  What Is a Sale? ............................................................. 5-26
  § 5:3.1  Pledges .................................................................... 5-26
  § 5:3.2  Acquisitions ............................................................ 5-27
  § 5:3.3  Spin-Offs and “Free” Stock Give-Aways ....................... 5-28

Chapter 6  Securities Act Registration Exemptions

§ 6:1  Introduction .................................................................. 6-3
  § 6:1.1  Statutory Exemptions ................................................. 6-3
§ 6:1.2 The Commission’s Power of Exemption .................. 6-4
[A] Section 3(b)(1)........................................................... 6-4
[B] Section 3(b)(2)........................................................... 6-5
[C] Section 4(a)(5) ........................................................... 6-6
[D] Sections 4(a)(6) and 4A............................................. 6-8
[E] Section 28 ................................................................. 6-9

§ 6:2 Private Placements: Section 4(a)(2)................................. 6-9

§ 6:3 Intrastate Offerings....................................................... 6-18

§ 6:3.1 Statutory Exemption—Section 3(a)(11)................... 6-18

§ 6:3.2 Rule 147.................................................................. 6-21

§ 6:3.3 Rule 147A ............................................................... 6-26

§ 6:4 Regulation A................................................................. 6-27
[A] Historical Background............................................. 6-27
[B] Current Regulation A ............................................. 6-29

§ 6:5 Regulation D................................................................. 6-39

§ 6:5.1 Generally................................................................. 6-39

[A] Accredited Investors................................................ 6-41
[B] “Bad Actor” Disqualification and Waivers .............. 6-42
[C] Disclosure Requirements ........................................ 6-48
[D] “Insignificant Deviations” ....................................... 6-49

§ 6:5.2 Key Concepts .......................................................... 6-41
[A] Accredited Investors................................................ 6-41
[B] “Bad Actor” Disqualification and Waivers .............. 6-42
[C] Disclosure Requirements ........................................ 6-48
[D] “Insignificant Deviations” ....................................... 6-49

§ 6:5.3 The Exemptive Rules .............................................. 6-50
[A] Rule 504.................................................................. 6-50
[B] Rule 506(b).............................................................. 6-51
[C] Rule 506(c).............................................................. 6-53

§ 6:5.4 Filing....................................................................... 6-58

§ 6:6 Regulation Crowdfunding............................................. 6-58

§ 6:6.1 Generally................................................................. 6-58

§ 6:6.2 Provisions Relative to Issuers and Investors ........... 6-59
[A] Issuer Eligibility/Types of Securities
That May Be Offered ...................................................... 6-59
[B] Offering/Selling Limit for Issuers .............................. 6-60
[C] Purchasing Limit for Investors ................................. 6-61
[D] Exemption from Section 12[g] ................................. 6-61
[E] Resale Restrictions .................................................. 6-62
[F] Intermediaries......................................................... 6-62
[G] Disclosures and Reporting ...................................... 6-62
[H] Ongoing Disclosures ............................................... 6-65
[I] Advertising and Publicity ........................................ 6-65
[J] Promoter Compensation .......................................... 6-66

§ 6:6.3 Provisions Relative to Crowdfunding
Intermediaries.................................................................. 6-66
[A] Status; Limitation on Activities; Registration............ 6-66
[B] Limitation on Financial Interests in Issuer ............... 6-67
[C] Diligence Requirements ........................................... 6-68
Table of Contents

[D]  Account Opening, Educational Materials; Electronic Delivery ........................................... 6-68
[E]  Compliance with Investment Limit .................................................. 6-69
[F]  Acknowledgment of Risk .................................................. 6-69
[G]  Communication Channels .................................................. 6-70
[H]  Issuer Information .................................................. 6-70
[I]  Escrow of Offering Proceeds .................................................. 6-70
[J]  Cancellation of Commitments .................................................. 6-71
[K]  Compensation; Payments to Third Parties .................................................. 6-71

§ 6:6.4 Liability Issues ........................................................ 6-71
§ 6:6.5 Conclusion .............................................................. 6-72

§ 6:7 Other Regulatory Exemptions .................................................. 6-74
§ 6:7.1 Regulation CE ......................................................... 6-74
§ 6:7.2 Rule 701: Compensatory Benefit Plans and Contracts .................................................. 6-74
§ 6:7.3 Rules 801 and 802: Cross-Border Rights Offerings, Exchange Offers, and Business Combinations .................................................. 6-75
§ 6:7.4 Regulation S ......................................................... 6-76

§ 6:8 Choosing Among the Exemptions ........................................... 6-76
Table 6-1 Regulation D Exemptions ........................................... 6-79

Chapter 7  Resales of Securities Under the Securities Act

§ 7:1  Introduction ......................................................... 7-1
§ 7:2  Control and Restricted Securities ........................................... 7-3
§ 7:3  Public Resales Outside Rule 144 ........................................... 7-7
  § 7:3.1 Sales of Control Securities ........................................... 7-7
  § 7:3.2 Sales of Restricted Securities ........................................... 7-12
§ 7:4  Public Resales Under Rule 144 ........................................... 7-14
§ 7:5  Private Resales of Control and Restricted Securities ........................................... 7-19
  § 7:5.1 Resales Under Rule 144A ........................................... 7-19
  § 7:5.2 Resales Under the “4[a][1½] Exemption” ........................................... 7-21
  § 7:5.3 Resales Under Securities Act Section 4[a][7] ........................................... 7-24
  § 7:5.4 Other Related Issues ........................................... 7-26
Table 7-1 Rule 144 Decision Tree ........................................... 7-28
Table 7-2 Comparison of Rule 144A, the 4[a][1½] Exemption and Section 4[a][7] for Private Resale Transaction ........................................... 7-29

Chapter 8  Liability for Securities Act Violations

§ 8:1  Introduction ......................................................... 8-1
§ 8:2  Criminal and Other Governmental Actions ........................................... 8-1

(Sec. Law & Prac., Rel. #11, 3/18)  XV
§ 8:3 Civil Liability ................................................................. 8-6
§ 8:3.1 Section 11 ................................................................. 8-6
§ 8:3.2 Section 12 .................................................................. 8-14
  [A] Section 12[a][1] .......................................................... 8-14
  [B] Section 12[a][2] .......................................................... 8-17
  [C] Section 12[b] ................................................................ 8-23
§ 8:3.3 Section 15 .................................................................. 8-23
§ 8:3.4 Section 17 .................................................................. 8-25
  [A] Section 17[a] ............................................................. 8-25
  [B] Section 17[b] ............................................................. 8-31
§ 8:4 Contribution and Indemnification ................................... 8-33

Chapter 9 Registration and Periodic Reporting
Under the Exchange Act

§ 9:1 Introduction ................................................................. 9-1
§ 9:2 Commission’s General Exemptive Authority ................. 9-2
§ 9:3 Registration of Securities Under the Exchange Act .......... 9-2
§ 9:4 Periodic Reporting Under the Exchange Act ................. 9-7
§ 9:5 Foreign Corrupt Practices Act .................................... 9-16
§ 9:6 Regulation FD ............................................................... 9-18
  § 9:6.1 Background ............................................................ 9-18
  § 9:6.2 Compliance ............................................................ 9-19
    [A] Generally .............................................................. 9-19
    [B] Social Media [Netflix Investigation] ......................... 9-20
§ 9:7 Sarbanes-Oxley Act of 2002 ......................................... 9-21

Chapter 10 Regulation of Proxy Solicitations

§ 10:1 Introduction .............................................................. 10-2
§ 10:2 Statutory Scheme ......................................................... 10-3
§ 10:3 Proxy Solicitation Generally ...................................... 10-4
  § 10:3.1 Existing Framework .............................................. 10-4
  § 10:3.2 Proposed Changes: Review of “Proxy Plumbing” ... 10-8
§ 10:4 Particular Issues Under the Federal Proxy Rules ........ 10-10
  § 10:4.1 Executive Compensation and Related-Party
    Transaction Disclosure ................................................. 10-10
    [A] General Disclosure Requirements ......................... 10-10
    [B] 2009 Rule Changes ................................................. 10-12
    [C] Changes Mandated by Dodd-Frank ......................... 10-15
    [C][1] Say-on-Pay ....................................................... 10-15
    [C][2] Compensation Committee Independence
           and Related Matters .............................................. 10-17
    [C][3] Pay for Performance ............................................ 10-21
Chapter 11 Regulation of Tender Offers

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

Chapter 12 Fraud Under Rule 10b-5 and Related Issues

§ 12:1 Introduction .......................................................... 12-1
§ 12:2 The “In Connection With” Requirement ..................... 12-5
§ 12:3 Reliance and Causation .......................................... 12-10
§ 12:4 “Purchaser-Seller” Requirement ................................ 12-17
§ 12:5 Fault Required—Sciente .......................................... 12-19
§ 12:6 Persons Subject to Trading Restraints ....................... 12-27
§ 12:7 Issuers’ Duty to Disclose .......................................... 12-40
§ 12:8 Materiality ............................................................ 12-44
§ 12:9 Damages and Penalties .......................................... 12-48
§ 12:10 Statute of Limitation .............................................. 12-51
§ 12:11 Controlling Person Liability .................................... 12-54
§ 12:12 Aiding and Abetting and Conspiracy ....................... 12-54
§ 12:13 Contribution ....................................................... 12-61
§ 12:14 Related Issues ..................................................... 12-61
  § 12:14.1 Under the Sarbanes-Oxley Act ......................... 12-61
  § 12:14.2 Under the Dodd-Frank Wall Street Reform and
            Consumer Protection Act ................................. 12-65

Chapter 13 Disgorgements Under Exchange Act
Section 16(b) and Securities Law “Clawback” Provisions

§ 13:1 Exchange Act Section 16 ......................................... 13-1
§ 13:1.1 Introduction ...................................................... 13-1
§ 13:1.2 Persons Liable ................................................... 13-6
  [A] Titles ................................................................. 13-7
  [B] Deputization ......................................................... 13-8
  [C] Beneficial Ownership ............................................. 13-10
  [D] Exemptions ......................................................... 13-14
Table of Contents

§ 13:1.3 What Constitutes a Purchase or Sale? .................. 13-17
§ 13:1.4 Timing of Purchases and Sales ............................. 13-20
§ 13:1.5 Standing to Sue..................................................... 13-23
§ 13:1.6 Calculation of Profits ............................................ 13-23
§ 13:2 Clawbacks Under Sarbanes-Oxley Section 304 ....... 13-26
§ 13:3 Clawbacks Under Dodd-Frank Section 954.............. 13-34

Chapter 14 Regulation of the Securities Business

§ 14:1 Introduction.................................................................. 14-1
§ 14:2 Regulation of Stock Exchanges and FINRA .................. 14-2
§ 14:3 Regulation of Brokers and Dealers......................... 14-5
§ 14:4 Margin Requirements ................................................. 14-11
§ 14:5 Market Manipulation and Stabilization.................... 14-12
§ 14:6 Fairness Opinions....................................................... 14-14
§ 14:7 Regulation of Financial Products ............................ 14-16
§ 14:8 Additional Regulation As Investment Advisers .......... 14-16
§ 14:9 Regulation Initiated by Dodd-Frank ...................... 14-17

Appendix A Securities Act of 1933
(Selected Provisions) ..................................................... App. A-1

Appendix B Exchange Act of 1934
(Selected Provisions) ..................................................... App. B-1

Table of Authorities .......................................................... T-1

Index .................................................................................. I-1
Preface

About the first thing I was asked to do as a young lawyer was to prepare a “144 Opinion Letter.” I had never heard of a 144 Opinion Letter, and at first I had no idea what the partner who had assigned me the project was talking about. The law firm I worked for at the time had one public company client, and because I had taken a course in securities regulation in law school, I became that company’s securities counsel. I picked up securities law as time went by, of course, but it took me a long time. I did not have a readable book that would give me a good and relatively painless initiation into securities, but fortunately I eventually had a dedicated tutor and colleague—Larry Soderquist, author of the predecessor of this book.

I have tried to provide a relatively comprehensive, incisive, and painless initiation to securities law. Certainly one of my intentions is to provide an overview. But there is more to an initiation than that. A real initiation needs to convey a way of thinking about securities questions that is authentically a securities lawyer’s. It also has to pass on the securities lawyer’s special language—so, for example, a reader will know what a 144 Opinion Letter or an “S-1” is. If I have succeeded, the reader will get an initiation to securities law that is both real and mostly painless. For those already introduced to securities law, my hope is that the book will serve both as a tool for general review and as a first resource when approaching an unknown area of securities law.

My thanks for help go a long way back—to my clients that allowed me to learn to be a securities lawyer. My thanks also go to Larry Soderquist for his earlier editions of this book and for his making me learn to live (and love) securities law. I hope that you do as well.

GARY M. BROWN
August 2012