TABLE OF CONTENTS

Acknowledgements. .................................................. iii

CHAPTER 1
Introduction: Definitions and Policy Background

§ 1.01 Subject Matter. .............................................. 1-1
§ 1.02 Definition of a “True” Going Private Transaction ........................................... 1-3
§ 1.03 Squeeze-Outs. .............................................. 1-5
§ 1.04 Second and Third Step Take-Outs. .............................................. 1-6
§ 1.05 Technical Going Private Transactions .............................................. 1-6.1
§ 1.06 Definition of Neutralized Voting. .............................................. 1-7
§ 1.07 The Policy Background ........................................... 1-8

CHAPTER 2
A Brief History of the Going Private Issue

§ 2.01 The Beginning. .............................................. 2-1
§ 2.02 Early Cases. .............................................. 2-2
§ 2.03 The Opening Gun: Bryan v. Brock & Blevins Co., Inc. .............................................. 2-4
§ 2.04 Commissioner Sommer’s Notre Dame Speech. .............................................. 2-5
§ 2.05 The 1975 SEC Proposals. ........................................... 2-7
§ 2.06 The Mid-1970s: Writers and Courts Ponder While Issuers Merge. .............................................. 2-9
§ 2.07 An Aside on Professor Cary and the Airlie House Symposium. .............................................. 2-11
§ 2.08 The 1977 Proposal. .............................................. 2-13
§ 2.09 Subsequent Judicial History: Green, Singer, and Weinberger. .............................................. 2-15

(Rel. 56)
CHAPTER 3
State Law: The Statutory Framework for Going Private Transactions; Leveraged Buy-Outs

§ 3.01 In General ................................................. 3-2
§ 3.02 Forms of Transactions: Cash Transactions .... 3-3
[1] The Tender Offer Alternative .................. 3-3
[4] Asset Sale and Dissolution
   Combinations ........................................ 3-7
   [a] Asset Sale ........................................ 3-7
   [b] Dissolution ...................................... 3-8
[5] Leveraged Buy-Outs (LBOs)—
   A Financial Format ............................... 3-10
   [a] In General ................................. 3-10
   [b] When Is an LBO a Going Private
       Transaction? ............................. 3-12
   [c] Structure: Stock Transaction or
       Asset Transaction ........................ 3-13
   [d] Restructurings .............................. 3-15
[6] ESOP Leveraged Buy-Outs ......................... 3-17
   [a] ESOPs as a Means of Going Private 3-17
   [b] General ESOP Requirements ............... 3-19
§ 3.03 Non-Cash Transactions .......................... 3-20.2
§ 3.04 Varieties of Merger Types .................... 3-21
§ 3.05 Appraisal Rights ................................. 3-24
[1] Availability of Appraisal ........................ 3-24
   [a] Generally .............................. 3-24
   [b] Long-Form Mergers ..................... 3-25
   [c] Short-Form Mergers ..................... 3-26
   [d] Reverse Stock Splits .................... 3-27
   [e] Asset Sale/Dissolution ................. 3-27
   [f] Share Exchange Program ............... 3-28
   [a] As a Going Concern .................... 3-31
[3] Procedure ............................................. 3-32.1
TABLE OF CONTENTS

§ 3.06 State Anti-Takeover Statutes .................. 3-44
[1] Introduction .................. 3-44
[2] Relevance to Going Private Transactions .................. 3-45
[3] Control Share Acquisition Statutes ..............
   [a] Jurisdiction .................. 3-45
   [b] General Structure .................. 3-46
   [c] Some Specific Aspects ...........
      [i] In General .............. 3-48
      [ii] Formation of a Group ........... 3-48
      [iv] Appraisal Provisions ........... 3-49
      [v] Transfer .................. 3-49
   [d] Application of Going Private Transactions ........... 3-50
   [a] Jurisdiction .................. 3-51
   [b] General Structure .................. 3-51
   [c] Opting In and Opting Out;
      Exclusions .................. 3-51
   [d] The Delaware Statute ........... 3-52
   [e] Application to Going Private Transactions ........... 3-53
§ 3.07 State Going Private Rules .................. 3-55
§ 3.08 Summary of Formats .................. 3-57

CHAPTER 4

Going Private Issues Under State Law

§ 4.01 Introduction .................. 4-4
§ 4.02 Fiduciary Duty of Directors .................. 4-6
   [a] The Weinberger Decisions:
      Entire Fairness .................. 4-14.1
   [b] The Basic Weinberger Standard:
      When the Rule Applies ........... 4-14.2
   [c] “Entire Fairness” .................. 4-16
   [d] Entire Fairness Does Not Require a Business Purpose ........... 4-18
§ 4.03 Application of the Entire Fairness Standard ... 4-19

(Rel. 62)
GOING PRIVATE

[1] Safe Harbor Where There Is a Controlling Stockholder or an Interested Board ....................... 4-19


[5] A Group of Controlling Stockholders ... 4-54.1

[6] Indemnification of Officers and Directors .............................................. 4-54.3

§ 4.04 Unocal, Cinerama and Revlon ......................... 4-55

[1] Unocal ....................................................... 4-55

[a] Introduction ........................................ 4-55

[b] The Facts in Unocal ............................. 4-55

[c] The Unocal Rule ......................... 4-56

[i] Application of the Unocal Rule .............. 4-57

[d] Interpretations of Unocal Prior to Paramount v. Time ............. 4-58

[e] The Time Case ......................... 5-62

[f] Consequences of Flunking the Unocal Test ..................... 4-68

[2] Cinerama, Inc. v. Technicolor, Inc ............... 4-70

[a] Entire Fairness ................. 4-71

[b] Duty of Loyalty ....................... 4-81

[c] No Duty to “Shop” the Corporation .......... 4-86

[d] Cleansing Vote .................... 4-87

[3] Revlon ..................................................... 4-87

[a] In General ...................... 4-87

[b] The Facts in Revlon .............. 4-88

[c] The Revlon Ruling ............... 4-88

[d] When Do Revlon Duties Arise?: The “For Sale” Issue Prior to Time ...................... 4-90

[e] When Revlon Duties Arise: The Time and Paramount Cases .......... 4-93

[f] Omnicare v. NCS Healthcare: Minority Stockholders and Revlon Protection .......... 4-98

[g] When Revlon Duties Arise: Stock v. Cash Offers ............... 4-106
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[h] Revlon Duties</td>
<td>4-107</td>
</tr>
<tr>
<td>[i] Revlon Duties: No Duty to Solicit Other Offers:</td>
<td>4-113</td>
</tr>
<tr>
<td>Market Checks</td>
<td></td>
</tr>
<tr>
<td>[j] Revlon Duties: Go-Shop Provisions</td>
<td>4-119</td>
</tr>
<tr>
<td>[k] Revlon Duties: Conducting an “Auction”</td>
<td>4-124</td>
</tr>
<tr>
<td>[l] Revlon Duties: Adequate Sales Process</td>
<td>4-127</td>
</tr>
<tr>
<td>[m] Revlon Duties: When They Arise, Focus on Affirmative Actions, and Exculpation Under Lyondell Chemical Co. v. Ryan</td>
<td>4-140</td>
</tr>
<tr>
<td>[i] When Revlon Duties Arise</td>
<td>4-144</td>
</tr>
<tr>
<td>[ii] Revlon Requirements</td>
<td>4-145</td>
</tr>
<tr>
<td>[iii] Bad Faith Requires More Than Acting Badly</td>
<td>4-146</td>
</tr>
<tr>
<td>[n] Revlon Duties: Application of Lyondell</td>
<td>4-149</td>
</tr>
<tr>
<td>[o] Lyondell and the Fiduciary Duty of Loyalty</td>
<td>4-152</td>
</tr>
<tr>
<td>[p] Duties of Officers</td>
<td>4-159</td>
</tr>
<tr>
<td>[q] Best Efforts of Parent Corporation</td>
<td>4-159</td>
</tr>
<tr>
<td>[r] Contractual v. Duty of Loyalty Claims by Preferred Stockholders</td>
<td>4-160</td>
</tr>
<tr>
<td>[i] Certificate of Designation and Similar Governing Documents</td>
<td>4-160</td>
</tr>
<tr>
<td>[ii] Stock Plans</td>
<td>4-164</td>
</tr>
<tr>
<td>[iii] Conflicts Between Preferred and Common Stockholders</td>
<td>4-166</td>
</tr>
<tr>
<td>[s] Consideration of Other Offers</td>
<td>4-167</td>
</tr>
<tr>
<td>[i] Other Offers During Bidding</td>
<td>4-167</td>
</tr>
<tr>
<td>[ii] Other Offers While Agreement Is in Effect</td>
<td>4-169</td>
</tr>
<tr>
<td>[t] Fiduciary Out Clause</td>
<td>4-170</td>
</tr>
<tr>
<td>§ 4.05 Defensive Mechanisms in Contests for Corporate Control</td>
<td>4-172</td>
</tr>
<tr>
<td>[1] “Poison Pills”</td>
<td>4-172</td>
</tr>
<tr>
<td>[a] Takeover by Groups of Bidders</td>
<td>4-173</td>
</tr>
<tr>
<td>[b] To Protect Against Unwanted Transfer of Stock to Outside Parties</td>
<td>4-174</td>
</tr>
</tbody>
</table>
GOING PRIVATE

[c] To Protect the Usability of Net Operating Loss Carryforward .................... 4-176
[d] In Combination with a Non-Disclosure Agreement .... 4-178
[e] Transferability of Poison Pills ........ 4-179
[2] Proxy Puts ................................ 4-180
[3] Top-Up Options ............................. 4-183
[4] Bylaws Amendments ....................... 4-184
[5] Lock-Ups and Leg-Ups Generally ......... 4-186
[a] General Definitions ...................... 4-186
[b] When the Issue Will Arise ............. 4-187
[c] Lock-Ups and Leg-Ups in Contests for Corporate Control ........ 4-188.1
[d] Lock-Ups and Leg-Ups When There Is No Contest for Corporate Control ........ 4-190
[e] Lock-Ups and Leg-Ups Under Paramount .................. 4-192
[f] A Conclusion on Lock-Ups and Leg-Ups ..................... 4-193

§ 4.06 The Role of Independent Directors ................. 4-198
[1] Significance of Independent Directors ... 4-198
[2] Conduct of Independent Directors:
   Duty of Care ............................... 4-206
[3] Conduct of Independent Directors:
   Duty of Loyalty/Good Faith .......... 4-216.1
[4] Defining Independence ...................... 4-220.1
[5] Reviewing Special Litigation Committee Recommendations .......... 4-228.3

§ 4.07 Fairness Opinions in Corporate Control Transactions ...................... 4-230.2
[1] In General .................................. 4-230.2
[3] Criticism of Fairness Opinions ........ 4-234
[4] Investment Bank Liability in Connection with Fairness Opinions ... 4-235

§ 4.08 Financial Advisers (Bankers) ....................... 4-242
[1] In General ................................. 4-242
[2] Duty to Disclose to the Investment Banker .......................... 4-242
[3] Bankers Performance of Their Duties ... 4-242
[4] Independence .............................. 4-243
[5] Liability .................................. 4-244

§ 4.09 The New York Cases .................................. 4-250
[1] In General ................................. 4-250
TABLE OF CONTENTS

[4] Election of Remedies ......................... 4-257
[5] The Martin Act ......................... 4-258
[6] Structure of the Transaction .................. 4-258
§ 4.10 Appraisals .................................. 4-259
[1] Appraisal Proceedings ....................... 4-259
[a] Determining Fair Value .................. 4-260
[b] Perfecting Appraisal Rights .......... 4-262
[2] Exclusivity of Appraisal Rights ............... 4-265
[a] Fairness Review .................. 4-270
[b] Interests of Common Stock .......... 4-270
[c] Rights of the Preferred Stockholder: Certificate of Designation .......... 4-271
§ 4.11 Special Purpose Acquisition Corporations (SPACs) ............... 4-273

CHAPTER 5
Anti-Fraud Strictures of Federal Securities Law

§ 5.01 In General ........................................ 5-1
§ 5.02 The Federal Anti-Fraud Statutes: Initial Expectations .............. 5-3
§ 5.03 The Federal Courts Begin to Look at the Issue ....................... 5-5
§ 5.04 Marshel and Green in the Second Circuit ......................... 5-9
§ 5.05 Green in the Supreme Court ....................... 5-12
§ 5.06 Federal Anti-Fraud Statutes: Claims Cut Down by Green v. Santa Fe. ............. 5-16
§ 5.07 Does Rule 10b-5 Ride Again? ..................... 5-17
[1] The Parklane Decision ..................... 5-17
[2] The “Sue Fact” Doctrine ..................... 5-18

CHAPTER 6
Tax Aspects

§ 6.01 Introduction .................................... 6-3
§ 6.02 Forms of Transactions ......................... 6-5
§ 6.03 Transactions Taxable to Outside Shareholders (but Not to Target) ..................... 6-6
[1] In General .................................... 6-6

(Rel. 62)
[2] Purchase of Target Shares by Acquiring... 6-6
   [a] Form ........................................ 6-6
   [b] Consequences for Outside
       Shareholders .............................. 6-6
       [i] Fully Taxable Transactions ... 6-6
       [ii] Issuing Newco Stock to
            Acquire Target Stock ...... 6-7
   [c] Consequences for Target .......... 6-8
       [i] In General ......................... 6-8
       [ii] Code Section 338 Election ..... 6-10
       [iii] Consistency Rules .............. 6-12
       [iv] Code Section 336(e) Election ... 6-12
   [d] Consequences for Acquiring .... 6-13
   [e] Consequences for Insiders ...... 6-14

[3] Purchase of Target Stock in a Reverse
    Cash Merger ............................... 6-16
   [a] Form ........................................ 6-16
   [b] Consequences for Outside
       Shareholders .............................. 6-16
   [c] Consequences for Target .......... 6-17
   [d] Consequences for Acquiring...... 6-17

§ 6.04 Transactions That Result in Recognition of
   Gain by Both Target and Its Shareholders... 6-21
[1] In General .................................... 6-21
   [a] Form ........................................ 6-22
   [b] Consequences for Outside
       Shareholders .............................. 6-22
   [c] Consequences for Target .......... 6-22
   [d] Consequences for Acquiring
       and Newco ............................... 6-23
       [i] In General ......................... 6-23
       [ii] Acquisition of Intangibles .... 6-24
   [e] Consequences for Insiders ...... 6-25
   [f] Liquidation-Reincorporation Issues... 6-25
[3] Forward Cash Mergers ...................... 6-26
   [a] Form ........................................ 6-26
   [b] Consequences for Outside
       Shareholders .............................. 6-27
   [c] Consequences for Target .......... 6-27
<table>
<thead>
<tr>
<th>§ 6.05 Transactions Not Taxable to Outside Shareholders</th>
<th>6-28</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1] In General ........................................</td>
<td>6-28</td>
</tr>
<tr>
<td>[a] Form ..................................................</td>
<td>6-28</td>
</tr>
<tr>
<td>[i] Mergers .............................................</td>
<td>6-28</td>
</tr>
<tr>
<td>[ii] Triangular Mergers ..............................</td>
<td>6-29</td>
</tr>
<tr>
<td>[b] Qualification for Tax-Free Merger Treatment ........</td>
<td>6-29</td>
</tr>
<tr>
<td>[i] General Rules ......................................</td>
<td>6-29</td>
</tr>
<tr>
<td>[ii] Additional Requirements for Qualification as a Tax-Free Triangular Merger ....</td>
<td>6-31</td>
</tr>
<tr>
<td>[iii] Form Over Substance ............................</td>
<td>6-33</td>
</tr>
<tr>
<td>[c] Consequences for Outside Shareholders ............</td>
<td>6-33</td>
</tr>
<tr>
<td>[d] Consequences for Target ..........................</td>
<td>6-34</td>
</tr>
<tr>
<td>[e] Consequences for Acquiring and New Sub ...........</td>
<td>6-35</td>
</tr>
<tr>
<td>[f] Consequences for Insiders .........................</td>
<td>6-35</td>
</tr>
<tr>
<td>[a] In General ..........................................</td>
<td>6-35</td>
</tr>
<tr>
<td>[b] Form ..................................................</td>
<td>6-36</td>
</tr>
<tr>
<td>[c] Consequences for Outside Shareholders ............</td>
<td>6-36</td>
</tr>
<tr>
<td>[d] Consequences for Target ..........................</td>
<td>6-36</td>
</tr>
<tr>
<td>[e] Consequences for Insiders .........................</td>
<td>6-36</td>
</tr>
</tbody>
</table>

§ 6.06 Choice of Entity ................................... 6-38
| [1] In General .......................................... 6-38 |

§ 6.07 Financing the Going Private Transaction ........ 6-46
| [1] In General .......................................... 6-46 |
## Chapter 7

### Business Background

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 7.01</td>
<td>In General</td>
<td>7-1</td>
</tr>
<tr>
<td>§ 7.02</td>
<td>Why the Price Tends to Rise</td>
<td>7-4</td>
</tr>
<tr>
<td>§ 7.03</td>
<td>Facing Up to a Lawsuit</td>
<td>7-6</td>
</tr>
<tr>
<td>§ 7.04</td>
<td>Professional Fees and Other Expenses of the Transaction</td>
<td>7-8</td>
</tr>
<tr>
<td>[1]</td>
<td>Legal Fees</td>
<td>7-8</td>
</tr>
<tr>
<td>[2]</td>
<td>Accounting Fees</td>
<td>7-9</td>
</tr>
<tr>
<td>[5]</td>
<td>Printing Costs</td>
<td>7-12</td>
</tr>
<tr>
<td>§ 7.05</td>
<td>Margin Rules</td>
<td>7-13</td>
</tr>
<tr>
<td>§ 7.06</td>
<td>Going Private Transaction Timetable and Responsibility Checklist</td>
<td>7-17</td>
</tr>
</tbody>
</table>

## Chapter 8

### Basic Structural Features: Legal Precepts in Practice

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 8.01</td>
<td>The Essentials</td>
<td>8-1</td>
</tr>
<tr>
<td>§ 8.02</td>
<td>Fair Pricing</td>
<td>8-3</td>
</tr>
<tr>
<td>[1]</td>
<td>Issues</td>
<td>8-3</td>
</tr>
<tr>
<td>[2]</td>
<td>Some Practical Advice for the Lawyer</td>
<td>8-3</td>
</tr>
<tr>
<td>§ 8.03</td>
<td>The Role of Independent Directors</td>
<td>8-5</td>
</tr>
<tr>
<td>[1]</td>
<td>In General</td>
<td>8-5</td>
</tr>
<tr>
<td>§ 8.04</td>
<td>The Role of Independent Financial Advisers</td>
<td>8-10</td>
</tr>
<tr>
<td>§ 8.05</td>
<td>Neutralized Voting</td>
<td>8-11</td>
</tr>
<tr>
<td>[1]</td>
<td>Significance</td>
<td>8-11</td>
</tr>
</tbody>
</table>
CHAPTER 9

Engaging Counsel and Financial Advisers

§ 9.01 The Counsel Problem: Who Is, or Should Be, Acting for Whom? ......................... 9-1
§ 9.02 Financial Advisers ......................... 9-6
   [1] In General ......................... 9-6
   [2] Fixing or Confirming the Price ........... 9-6
   [3] Qualification and Disqualification ...... 9-7
§ 9.03 Financial Advisers’ Opinion Letters ........ 9-13
   [1] In General ......................... 9-13
   [3] Financial Advisers’ Opinions:
       Contents ......................... 9-14
§ 9.04 Who Should Pay the Professionals? ........ 9-15

CHAPTER 10

An Analysis of Rule 13e-3 and the General Provisions of Schedule 13E-3

§ 10.01 In General: Scope of Discussion ................ 10-3
§ 10.02 Summary of the Rule ......................... 10-5
§ 10.03 Coverage of the Rule: Definition of a Rule 13e-3 Transaction ......................... 10-7
   [1] The Structure Test ......................... 10-7
      [a] Definition of “Purchase” ........... 10-8
      [b] Definition of “Equity Security” .... 10-9
      [c] Definition of “Affiliate” ........... 10-9
      [a] The Effects Test ......................... 10-13
      [b] The “Series of Transactions” Concept ......................... 10-15
§ 10.04 Exceptions to Coverage ......................... 10-19
   [1] Clean-Up Transactions ........................ 10-19
      [a] The (g)(1) Tender Offer Exception ......................... 10-19
      [b] Application of the “Unitary Transaction” Concept to Other Multi-Step Transactions 10-22

(Rev. 56)
$10.04A$ A Possible Exemption for Transactions Under Section 3(a)(10).............. 10-36

$[1]$ Section 3(a)(10) .................. 10-36

$[2]$ The Brucker Case ............... 10-36.2


$[6]$ How a Settlement May Meet the Requirements of Section 3(a)(10) .... 10-36.11

§ 10.05 When the Rule Bites: The Most Common Issues .......................... 10-36.15

§ 10.06 Filing Requirements .................. 10-36.16


$[3]$ Form of Schedule 13E-3 to Be Filed .......... 10-36.19


§ 10.07 Dissemination Requirements ................. 10-36.23


$[3]$ To Whom Dissemination Is to Be Made .................. 10-36.27

$[4]$ Information Required to Be Distributed Under the Proxy Rules ................. 10-36.27

§ 10.08 Disclosure .................. 10-38


§ 10.09 Schedule 13E-3 .................. 10-40


$[2]$ Compliance with the Schedule (Other Than Items 7, 8, and 9) ................. 10-43
### TABLE OF CONTENTS

| [a] Item 1 | 10-43 |
| [b] Item 92 (Item 1002 of Regulation M-A) | 10-44 |
| [c] Item 5 (Item 1005(a)-(c) and (e) of Regulation M-A) | 10-44 |
| [d] Item 6 (Item 1006(b) and (c)(1)-(8) of Regulation M-A) | 10-46.1 |
| [e] Item 10 (Item 1007 of Regulation M-A) | 10-46.1 |
| [f] Item 11 (Item 1008 of Regulation M-A) | 10-46.1 |
| [g] Item 12 (Item 1012(d) and (e) of Regulation M-A) | 10-46.2 |
| [h] Item 13 (Item 1010(a) and (b) of Regulation M-A) | 10-46.2 |
| [a] Background and Description of the Settlement and 13e-3 Transaction | 10-46.3 |
| [b] The Settlement | 10-46.3 |
| [c] Fairness of the Settlement | 10-46.4 |
| [i] Fair Dealing and Fair Price | 10-46.4 |
| [ii] Settlement Notice | 10-47 |
| [d] Fairness Opinion in Connection with the Settlement | 10-47 |
| [a] Background of the Merger | 10-49 |
| [b] Fairness of the Merger | 10-50 |
| § 10.10 The SEC’s Plain English Initiative | 10-54 |
| § 10.11 SEC Adoption of Regulation M-A Release | 10-55 |
| [a] Tender Offer Commencement | 10-57 |
| [b] “Subsequent Offering Periods” for Tender Offers | 10-59 |
| [c] Financial Statement Disclosure | 10-60 |
| [d] Target Reporting Requirements | 10-61 |
| [e] Prohibiting Purchases Outside an Offer: New Rule 14e-5 | 10-62 |
CHAPTER 11
The Fairness Disclosure Standard of Rule 13e-3

§ 11.01 What Is Fair? ................................. 11-1
§ 11.02 Required Fairness Disclosures .............. 11-3
§ 11.03 The Courts and the SEC Expound on
      Fairness ........................................ 11-4
§ 11.04 Concerning “Purpose” ........................ 11-19

CHAPTER 12
Fairness Disclosure Items: Analysis and Examples

§ 12.01 Methods of Presentation ..................... 12-2
§ 12.02 Item 7: Purposes, Alternatives, Reasons
      and Effects ..................................... 12-4
§ 12.03 Item 1013(a) of Regulation M-A: Purposes ...
      [1] In General ................................. 12-5
      [a] Operating Flexibility and
          Avoidance of Conflicts
          of Interest ............................... 12-5
      [b] Lower Expenses ......................... 12-7
      [c] Competitive Disadvantages ............. 12-8
      [d] Employee Compensation ................. 12-9
      [e] Market Response to Public
          Status .................................... 12-9
      [f] A Good Investment ...................... 12-12
      [g] Class Action Settlement ................ 12-12
§ 12.04 Item 1013(b) of Regulation M-A:
      Alternatives .................................. 12-14
§ 12.05 Item 1013(c) of Regulation M-A: Structure .. 12-16
§ 12.06 Item 1013(c) of Regulation M-A: Timing . . 12-20
§ 12.07 Item 1013(d) of Regulation M-A: Effects . . 12-22.1
§ 12.08 [Reserved] .................................... 12-25
§ 12.09 Item 1014: Fairness of the Transaction .... 12-26
§ 12.10 Item 1014(a) of Regulation M-A:
      Reasonable Belief ........................... 12-27
§ 12.11 Item 1014(a) of Regulation M-A:
      Abstaining or Dissenting Directors ....... 12-29
§ 12.12 Item 1014(b) of Regulation M-A:
      Material Factors in Fairness Evaluation .... 12-31
      [1] In General ............................... 12-31
TABLE OF CONTENTS

§ 12.13 Item 1014(c) of Regulation M-A: Neutralized Voting .......................... 12-37
§ 12.14 Item 1014(d) of Regulation M-A: Advisers for the Independent Directors..... 12-40
§ 12.15 Item 1014(e) of Regulation M-A: Approval by Independent Directors ........ 12-41
§ 12.16 Item 1014(f) of Regulation M-A: Other Firm Offers ............................. 12-42
§ 12.17 Item 1015 of Regulation M-A: Reports, Opinions, Appraisals and Certain Negotiations ................................................................. 12-43
§ 12.18 Item 1015(a) of Regulation M-A: Disclosable Reports ......................... 12-44
§ 12.19 Items 1015(b) and 1015(c) of Regulation M-A: Details of the Outside Report .... 12-46
§ 12.20 Contents and Form of a Schedule TO Tender Offer Statement as Required Under Sections 14(d)(1) or 13(e)(1) .................. 12-47
§ 12.21 Other Required Disclosures Concerning Item 9 Reports ........................ 12-49

CHAPTER 12A

Going Dark

§ 12A.01 In General .................................................. 12A-1
§ 12A.02 Some Considerations in Going Dark .............. 12A-9
§ 12A.03 How to Go Dark ........................................... 12A-11
[1] Under 300/500 Holders of Record ....... 12A-11
    [a] 12(b) Registrants ......................... 12A-11
    [b] 12(g) Registrants ...................... 12A-12
    [c] 15(d) Registrants ...................... 12A-12
[2] Over 300/500 Holders of Record ......... 12A-15
§ 12A.04 Over the Counter Market ................. 12A-20
§ 12A.05 Form: SECYForm 15 ....................... 12A-21
§ 12A.06 Form: SECYForm 25 ....................... 12A-23
§ 12A.07 Press Release Examples .................... 12A-27
# CHAPTER 13

## Managing a Going Private Transaction: What Happens When

### § 13.01 Starting Out
- [1] Should the Transaction Start with a Price Offer?  
- [2] Contingent Cash Payment

### § 13.02 The First Board Meeting

### § 13.03 The First Press Release

### § 13.04 The Busy Independent Directors

### § 13.05 The Second Board Meeting: Voting

### § 13.06 Subsequent Sale Protection

### § 13.07 The Rival Offer

# CHAPTER 13A

## Analysis of a Going Private Transaction

### § 13A.01 Introduction

### § 13A.02 Rationale for the Offer

### § 13A.03 Submission of the Offer by the Proponent

### § 13A.04 Formation of the Special Committee

### § 13A.05 Advisers to the Special Committee
- [1] In General
- [2] Selection of Legal Counsel

### § 13A.06 Duties and Functions of the Advisers to the Special Committee

### § 13A.07 Valuation of the Company by the Financial Adviser
- [1] Valuation Analysis of the Company
- [2] Negotiation of the Proponent’s Offer
- [3] The Final Offer and the Decision to Proceed

### § 13A.08 Structure of the Transaction

### § 13A.09 Aspects of the Merger Agreement
- [1] In General
- [2] The No-Shop Clause
- [3] The Break-Up Fee
  - [a] Market Termination Fee

### § 13A.10 Neutralized Voting

### § 13A.11 Securities Law Compliance
TABLE OF CONTENTS

§ 13A.12 Retaining Attorney Client Privilege for the Client. 13A-33
§ 13A.13 Inclusion of Terms in Merger Agreements 13A-35

CHAPTER 14
Closing and Post-Closing Matters

§ 14.01 Introduction 14-1
§ 14.02 Closing Aspects 14-2
[1] Stock Transfer 14-2
[4] Conducting the Meeting 14-4.3
§ 14.03 Final Amendment to Schedules 13E-3 and TO 14-5
§ 14.04 Terminating Filing Requirements 14-6

CHAPTER 15
Tender and Exchange Offers in Going Private Transactions

§ 15.01 Introduction 15-1
§ 15.02 What Rule Applies to Which Issuer 15-6
§ 15.03 An Overview of Rule 13e-4 15-8
§ 15.04 An Overview of Tender Offer Mechanics 15-10
§ 15.05 A Possible Exception Under Section 3(a)(10) 15-15

CHAPTER 16
A Litigation Postscript

§ 16.01 Timing and Nature of Complaints 16-1
§ 16.02 Defensive Strategies 16-3
[1] Delaying Strategies 16-3
§ 16.03 Settlements 16-6.9

(Rel. 62)
Appendix

APPENDIX A: Summary of Certain Significant Terms in Recent M&A Agreements A-1

APPENDIX B: Special Purpose Acquisition Corporations (SPAC) Deals B-1

APPENDIX C: Prospectus Summary of the dMY Technology Group, Inc. III C-1

TABLE OF CASES TC-1

INDEX I-1