**TABLE OF CONTENTS**

*Volume 1*

**CHAPTER 1**

*Initial Decision on Choice of Entity*

*John B. Power & Richard S. Kolodny*

<table>
<thead>
<tr>
<th>§ 1.01</th>
<th>Scope of Chapter</th>
<th>1-4</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Introduction</td>
<td>1-4</td>
</tr>
<tr>
<td>[2]</td>
<td>Overview of Chapter</td>
<td>1-4.1</td>
</tr>
<tr>
<td>§ 1.02</td>
<td>Summary of Major Considerations in Choice of Entity</td>
<td>1-6</td>
</tr>
<tr>
<td>[1]</td>
<td>Checklist of Characteristics</td>
<td>1-6</td>
</tr>
<tr>
<td>[2]</td>
<td>Additional Factors to Consider</td>
<td>1-7</td>
</tr>
<tr>
<td>§ 1.03</td>
<td>Preliminary Considerations</td>
<td>1-9</td>
</tr>
<tr>
<td>[1]</td>
<td>Introduction</td>
<td>1-9</td>
</tr>
<tr>
<td>[3]</td>
<td>Regulatory Considerations</td>
<td>1-10</td>
</tr>
<tr>
<td>[a]</td>
<td>Regulation Affecting Formation of the Enterprise</td>
<td>1-10</td>
</tr>
<tr>
<td>[b]</td>
<td>Operational Regulation</td>
<td>1-11</td>
</tr>
<tr>
<td>[6]</td>
<td>Deadlock and Dissolution</td>
<td>1-14</td>
</tr>
<tr>
<td>§ 1.04</td>
<td>The Role of Counsel</td>
<td>1-16</td>
</tr>
<tr>
<td>§ 1.05</td>
<td>Sole Proprietorships</td>
<td>1-18</td>
</tr>
<tr>
<td>[1]</td>
<td>Fundamental Characteristics</td>
<td>1-18</td>
</tr>
<tr>
<td>[5]</td>
<td>Transferability of Interests</td>
<td>1-20</td>
</tr>
<tr>
<td>[6]</td>
<td>Ease of Changing the Entity</td>
<td>1-21</td>
</tr>
<tr>
<td>[7]</td>
<td>Conclusion</td>
<td>1-21</td>
</tr>
</tbody>
</table>
START-UP & EMERGING COMPANIES

§ 1.06 General Partnerships .............................. 1-23
[1] Preliminary Considerations ................. 1-23
[5] Informal Partnerships .......................... 1-27
[6] Liability for Partnership Obligations ...... 1-29
[12] Conclusion ................................ 1-39

§ 1.07 Limited Partnerships .............................. 1-41
[1] Preliminary of Considerations ............. 1-41
[5] Limited Liability ....................... 1-45
[8] Continuity of Existence ..................... 1-49
[9] Transferability of Interest ............. 1-49
[10] Conclusion ................................ 1-50

§ 1.08 Corporation ........................................ 1-51
[1] Preliminary Considerations ................. 1-51
[5] Limited Liability ....................... 1-56
[6] Piercing the Corporate Veil ............... 1-57
[8] Fiduciary Obligations of Directors and
Officers ......................................... 1-61
[10] Transferability of Interests ............ 1-63
[11] Accommodation to Alternative Forms of
Capitalization ................................. 1-64
[12] Statutory Close Corporations ............. 1-64
[13] Conclusion ................................ 1-66

§ 1.09 Specialized Entities .............................. 1-68
[1] Overview ................................ 1-68
[1A] Limited Liability Companies ............ 1-68
[a] Preliminary Considerations ............ 1-68
[b] Formation of the Limited Liability
Company ........................................ 1-68
TABLE OF CONTENTS

[c] Costs of Formation and Maintenance .......................... 1-69
[d] Governing Law ........................................... 1-69
[e] Limited Liability ......................................... 1-70
[f] Management and Control .................................. 1-70
[g] Fiduciary Relationships ................................. 1-71
[h] Continuity of Existence .................................. 1-71
[i] Transferability of Interests .............................. 1-71
[j] Conclusion .................................................. 1-71

[2] Joint Ventures ............................................. 1-72
[3] Professional Corporations .................................. 1-75
[5] S Corporations .............................................. 1-81

[a] Introduction ................................................ 1-81
[b] History ...................................................... 1-82
[c] Formation and Basic Requirements .................. 1-82
[d] Limited Liability ......................................... 1-82
[e] Ambiguity Attributable to Recent Enactments .... 1-83

[f] Use of the Form by Professionals ....................... 1-83

§ 1.10 Indemnification and Insurance ......................... 1-85

[1] Overview .................................................. 1-85
[2] Indemnification ............................................ 1-85
[3] Indemnity Agreements .................................... 1-86
[4] Director and Officer Insurance ......................... 1-87

§ 1.11 Form: Indemnification Agreement (Delaware Corporation) ........................................ 1-89

CHAPTER 2

Legal Mechanics of Organizing Corporations

Mark G. Borden & David D. Gammell

§ 2.01 Introduction ............................................. 2-2
§ 2.02 Selection of Corporate Name .......................... 2-3
§ 2.03 Choice of State of Incorporation ................... 2-5
[2] Stockholder Consents .................................... 2-6
[3] Voting Agreements ........................................ 2-6
[4] Election of Directors ..................................... 2-6
[5] Number of Directors ..................................... 2-7

(Rel. 38)
Startup & Emerging Companies

§ 2.04 Articles of Incorporation

[1] Name of the Corporation
   [a] Number and Classes of Shares
   [b] Par Value
[4] Name and Address of Resident Agent
[5] Duration
[7] Filing of the Articles

§ 2.05 Bylaws

[1] Meetings of Directors
[3] Officers
[4] Indemnification
[5] Fiscal Year

§ 2.06 Organizational Meeting of Directors

§ 2.07 Other Mechanical Steps

[1] Corporate Seal
[2] Stock Book and Minute Book
[3] Application for Employer Identification Number

§ 2.08 Certain Tax Considerations

[1] Section 351
[2] Thin Capitalization
[3] Organizational Expense

§ 2.09 Foreign Qualification

§ 2.10 “Doing Business as” and Fictitious Business Names

§ 2.11 State Information Filings

§ 2.12 Reports to Shareholders

§ 2.13 Other Agreements

§ 2.14 Form: Sample Organizational Resolutions

Chapter 3

Mechanics of Forming LLCs and Other Partnerships

Susan Cooper Philpot

§ 3.01 Introduction

§ 3.02 Formation Documents
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Limited Liability Articles of Organization</td>
<td>3-4</td>
</tr>
<tr>
<td>[3]</td>
<td>Limited Liability Partnership Registration</td>
<td>3-7</td>
</tr>
<tr>
<td>[6]</td>
<td>Limited Liability Company Articles of Organization</td>
<td>3-8</td>
</tr>
</tbody>
</table>

§ 3.03 The Operating or Partnership Agreement

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Name</td>
<td>3-10</td>
</tr>
<tr>
<td>[2]</td>
<td>Term</td>
<td>3-11</td>
</tr>
<tr>
<td>[3]</td>
<td>Purpose</td>
<td>3-11</td>
</tr>
<tr>
<td>[4]</td>
<td>Designation of Agents and Officers</td>
<td>3-12</td>
</tr>
<tr>
<td>[5]</td>
<td>Admission of Members/Partners</td>
<td>3-12</td>
</tr>
<tr>
<td>[7]</td>
<td>Capital Contributions</td>
<td>3-13</td>
</tr>
<tr>
<td>[8]</td>
<td>Allocations of Profits and Losses</td>
<td>3-14</td>
</tr>
<tr>
<td>[9]</td>
<td>Distributions</td>
<td>3-16</td>
</tr>
<tr>
<td>[10]</td>
<td>Governance</td>
<td>3-16</td>
</tr>
<tr>
<td>[12]</td>
<td>Fiduciary Duties; Exculpation and Indemnification</td>
<td>3-17</td>
</tr>
<tr>
<td>[14]</td>
<td>Transferability of Interests</td>
<td>3-18</td>
</tr>
<tr>
<td>[16]</td>
<td>Books and Records</td>
<td>3-19</td>
</tr>
<tr>
<td>[17]</td>
<td>Withdrawal and Expulsion</td>
<td>3-20</td>
</tr>
<tr>
<td>[18]</td>
<td>Dissolution and Termination</td>
<td>3-20</td>
</tr>
<tr>
<td>[19]</td>
<td>Amendments</td>
<td>3-20</td>
</tr>
</tbody>
</table>

§ 3.04 Other LLC and Partnership Formation Matters

§ 3.05 Special Considerations for LLCs and other Partnership Entities

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Income Tax Treatment</td>
<td>3-23</td>
</tr>
</tbody>
</table>

§ 3.06 Businesses Best Suited to the LLC or Partnership Form

§ 3.06A *Form:* Sample Limited Liability Certificate of Formation (Delaware) 3-30.1

§ 3.07 *Form:* Sample Limited Liability Company Operating Agreement 3-30.2

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Introduction</td>
<td>3-30.2</td>
</tr>
<tr>
<td>[2]</td>
<td>Sample Form</td>
<td>3-30.2</td>
</tr>
</tbody>
</table>
CHAPTER 4

Federal Securities Law Considerations
of Raising Capital: A Practical Guide

Gregory C. Smith

§ 4.01 Overview .................................................. 4-3
§ 4.02 Statutory Framework ................................. 4-5
[3] A “Sale” .................................................... 4-7
[4] Section 5 of the Securities Act .................. 4-7
§ 4.03 Exemptions .............................................. 4-8
[1] Private Placement Exemptions ................. 4-9
[a] Section 4(a)(2) ............................................ 4-9
[i] Ralston Purina Co. .......................... 4-10
[ii] Subsequent Judicial Approaches .............. 4-10
[b] Regulation D .............................................. 4-12
[i] Rule 506—Offerings Not Limited by Size ...... 4-13
[ii] Rule 504—Offerings Up to $5 Million ....... 4-15
[iii] Accredited Investors ......................... 4-16
[iv] Number of Purchasers ....................... 4-21
[v] General Solicitations and Advertising ......... 4-21
[vi] Information Requirements ................. 4-24
[vii] Resale Limitations ....................... 4-26
[viii] Notice of Sale .......................... 4-28
[ix] Integration ...................................... 4-29
[x] Insignificant Deviations .................... 4-32
[2] Other Exemptions ......................................... 4-33
[a] Sales to Employees—Rule 701 ............... 4-33
[i] In General ....................................... 4-33
[ii] Preliminary Notes .......................... 4-33
[iii] Issuer Requirements ....................... 4-34
[iv] Compensatory Plans Requirement ........ 4-34
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[v]</td>
<td>Employees and Consultants Requirements</td>
<td>4-34</td>
</tr>
<tr>
<td>[vi]</td>
<td>Limitations of Offering Amounts</td>
<td>4-35</td>
</tr>
<tr>
<td>[vii]</td>
<td>Disclosure Requirements</td>
<td>4-36</td>
</tr>
<tr>
<td>[viii]</td>
<td>Integration</td>
<td>4-37</td>
</tr>
<tr>
<td>[ix]</td>
<td>Resale Limitations</td>
<td>4-38</td>
</tr>
<tr>
<td>[x]</td>
<td>Exchange Act Registration Requirements</td>
<td>4-38</td>
</tr>
<tr>
<td>[b]</td>
<td>Foreign Offerings—Regulation S</td>
<td>4-39</td>
</tr>
<tr>
<td>[i]</td>
<td>In General</td>
<td>4-39</td>
</tr>
<tr>
<td>[ii]</td>
<td>Requirements</td>
<td>4-39</td>
</tr>
<tr>
<td>[iii]</td>
<td>Resale Limitations</td>
<td>4-40</td>
</tr>
<tr>
<td>[c]</td>
<td>Intrastate Offerings</td>
<td>4-41</td>
</tr>
<tr>
<td>[i]</td>
<td>Section 3(a)(11)</td>
<td>4-41</td>
</tr>
<tr>
<td>[ii]</td>
<td>Rule 147 and Rule 147A</td>
<td>4-42</td>
</tr>
<tr>
<td>[d]</td>
<td>Section 4(a)(5)—Offerings Up to $5 Million</td>
<td>4-46</td>
</tr>
<tr>
<td>[e]</td>
<td>Rule 1001—California</td>
<td>4-46</td>
</tr>
<tr>
<td>[f]</td>
<td>Regulation A—Qualified Offerings Up to $5 Million</td>
<td>4-47</td>
</tr>
<tr>
<td>[i]</td>
<td>Issuer Limitations</td>
<td>4-49</td>
</tr>
<tr>
<td>[ii]</td>
<td>Offering Size Limitations</td>
<td>4-49</td>
</tr>
<tr>
<td>[iii]</td>
<td>Type of Purchaser</td>
<td>4-50</td>
</tr>
<tr>
<td>[iv]</td>
<td>Integration</td>
<td>4-50</td>
</tr>
<tr>
<td>[v]</td>
<td>Offering Conditions</td>
<td>4-51</td>
</tr>
<tr>
<td>[vi]</td>
<td>SEC Qualification</td>
<td>4-51</td>
</tr>
<tr>
<td>[vii]</td>
<td>Disclosure Requirements</td>
<td>4-52</td>
</tr>
<tr>
<td>[viii]</td>
<td>Insignificant Deviations</td>
<td>4-53</td>
</tr>
<tr>
<td>[g]</td>
<td>Crowd-funding Crowdfunding</td>
<td>4-53</td>
</tr>
<tr>
<td>[i]</td>
<td>Issuer Limitations</td>
<td>4-54</td>
</tr>
<tr>
<td>[ii]</td>
<td>Offering Size Limitations</td>
<td>4-55</td>
</tr>
<tr>
<td>[iii]</td>
<td>Integration</td>
<td>4-56</td>
</tr>
<tr>
<td>[iv]</td>
<td>Offering Conditions</td>
<td>4-56</td>
</tr>
<tr>
<td>[v]</td>
<td>Disclosure Requirements</td>
<td>4-58</td>
</tr>
<tr>
<td>[vi]</td>
<td>Insignificant Deviations</td>
<td>4-60</td>
</tr>
<tr>
<td>[3]</td>
<td>Integration of Public Offerings and Private Placements</td>
<td>4-60</td>
</tr>
<tr>
<td>[a]</td>
<td>Rule 152</td>
<td>4-60</td>
</tr>
<tr>
<td>[b]</td>
<td>Rule 155</td>
<td>4-62</td>
</tr>
<tr>
<td>[4]</td>
<td>Minimum/Maximum and All-or-None Offerings</td>
<td>4-63</td>
</tr>
<tr>
<td>[5]</td>
<td>Placement Agents or Other Selling Representatives</td>
<td>4-64</td>
</tr>
</tbody>
</table>

§ 4.04 Antifraud Disclosure Obligations | 4-65
[1] Section 12(a)(2) of the Securities Act | 4-65
CHAPTER 5

State Securities Laws
Considerations of Raising Capital

Michelle A. Kulerman

§ 5.01 Introduction ............................................. 5-4
[1] Overview of the State Securities Laws ...... 5-4
[3] Registration or Exemption ....................... 5-5

§ 5.02 Development of the State Securities Laws ...... 5-7

§ 5.03 Jurisdictional Basis: State Jurisdiction Over Offers
and Sales of Securities ................................. 5-11
[1] Summary ............................................. 5-11
[2] “Offer” or “Sale” ....................................... 5-11
[a] Generally ............................................. 5-11
[b] “For Value” ............................................. 5-12
[c] Exclusions from the Definitions of
   “Offer” and “Sale” ................................. 5-13
[d] Advertisements as “Offers” ................. 5-13
[a] Generally ............................................. 5-14
[b] Limited Liability Company
   Interests ............................................. 5-16
[c] Limited Partnership Interests .......... 5-16
[4] “In the State” ............................................. 5-16
[a] Generally ............................................. 5-16
[b] Internet “Offers in this State” .......... 5-18
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>§ 5.04</th>
<th>Raising Capital: Exemptions from Registration</th>
<th>5-20</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Uniform Securities Act: General</td>
<td>5-20</td>
</tr>
<tr>
<td>[a]</td>
<td>Registration Requirement</td>
<td>5-20</td>
</tr>
<tr>
<td>[b]</td>
<td>Exemption for the Security</td>
<td>5-20</td>
</tr>
<tr>
<td>[c]</td>
<td>Exemption for the Transaction</td>
<td>5-21</td>
</tr>
<tr>
<td>[2]</td>
<td>Organizational Exemptions</td>
<td>5-21</td>
</tr>
<tr>
<td>[5]</td>
<td>Use of Sales and Advertising Literature</td>
<td>5-25</td>
</tr>
<tr>
<td>[7]</td>
<td>Number of Offerees</td>
<td>5-26</td>
</tr>
<tr>
<td>[8]</td>
<td>“ Twelve Consecutive Months”</td>
<td>5-28</td>
</tr>
<tr>
<td>[9]</td>
<td>Investment Intent</td>
<td>5-28</td>
</tr>
<tr>
<td>[10]</td>
<td>Sales Commissions</td>
<td>5-29</td>
</tr>
<tr>
<td>[12]</td>
<td>Institutional Investor Exemption</td>
<td>5-30</td>
</tr>
</tbody>
</table>

| § 5.05 | Rule 506 Private Placement Offering Exemption Pursuant to Regulation D: The “Safe Harbor” Exemption | 5-32 |
| [1] | Background | 5-32 |
| [2] | Lifting the Ban on General Solicitation | 5-33 |
| [3] | “Bad Actor” Disqualification | 5-34 |
| [4] | Requirements for Rule 506 Offering | 5-34 |
| [a] | Rule 506(b) | 5-35 |
| [b] | Rule 506(c) | 5-35 |
| [c] | Additional Filing and Disclosure Requirements | 5-36 |
| [5] | State Notice Filing Requirements | 5-37 |
| [a] | New York | 5-39 |
| [b] | Sales Commissions | 5-40 |

| § 5.06 | Unusual Limited Offering Exemptions | 5-41 |
| [1] | Summary | 5-41 |
| [2] | California | 5-41 |
| [a] | Limited Offering Exemption | 5-41 |
| [b] | California Issuers: Section 25102[n] Qualified Purchaser Exemption | 5-43 |
| [c] | Nonpublic Debt Offering Exemption | 5-44 |
| [d] | Organizational Exemption | 5-45 |
| [a] | Issuer Registration | 5-46 |
| [b] | Real Estate Securities | 5-48 |
| [a] | Organizational and Small Offering Exemptions | 5-49 |

(Rel. 44)
§ 5.07 Exemption for Limited Public Solicitation of Accredited Investors

[1] Generally
[3] Electronic Posting and Delivery of Additional Information

§ 5.08 Exempt Public Offerings: Rule 504 of Regulation D, Regulation A and Regulation Crowdfunding

[1] Background
[2] Offerings under Rule 504
[a] Generally
[b] Prohibition on General Solicitation and Issuance of Restricted Securities
[c] Bad Actor Disqualification
[d] Exceptions and Waivers to Disqualification
[3] Regulation A Offerings
[a] Generally
[b] Tier 1 Offerings
[c] Tier 2 Offerings
[4] Federal Crowdfunding (Regulation CF)
[5] Role of the States

§ 5.09 The Employee Benefit Plan Exemptions

[1] Summary
[2] The Uniform Securities Act
[3] State Exemptions Based on Federal Rule 701

§ 5.10 Broker-Dealer and Agent Registration Exemptions

[1] Summary
[2] Broker-Dealer Registration or Exemption
[3] Agent Registration Exemptions
[4] Platforms: Section 4(b)

§ 5.11 Small Entity Public Offerings Registration

[1] Registration of Securities for a Small Public Offering: General Requirements
[a] Registration: Generally
[b] Registration by Qualification Procedures
[c] Review Standards
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>[2]</td>
<td>Small Corporate Offering Registration (&quot;SCOR&quot;)</td>
<td>5-70</td>
</tr>
<tr>
<td>[a]</td>
<td>Summary</td>
<td>5-70</td>
</tr>
<tr>
<td>[b]</td>
<td>Application for Registration Review</td>
<td>5-70</td>
</tr>
<tr>
<td>[c]</td>
<td>Regional Coordinated Review</td>
<td>5-71</td>
</tr>
<tr>
<td>[d]</td>
<td>Conditions</td>
<td>5-71</td>
</tr>
<tr>
<td>[e]</td>
<td>Audited Financial Statements</td>
<td>5-72</td>
</tr>
<tr>
<td>[3]</td>
<td>Selling Agent</td>
<td>5-72</td>
</tr>
</tbody>
</table>

§ 5.12 Coordinated Review of Public Offerings by States for Start-up Companies | 5-74  |
| [1]     | CR-EQUITY | 5-74  |
| [2]     | Coordinated Review SCOR | 5-75  |
| [3]     | Coordinated Review – Direct Participation Programs | 5-75  |

§ 5.13 Civil and Criminal Liabilities | 5-77  |
| [1]     | Summary | 5-77  |
| [2]     | Broad State Regulatory Powers | 5-77  |
| [3]     | Criminal Penalties | 5-77  |
| [4]     | Civil Liabilities | 5-78  |

##CHAPTER 6

[Reserved]

##CHAPTER 7

The Venture Financing Process

*Alan E. Salzman & L. John Doerr*

§ 7.01 Overview | 7-2  |

§ 7.02 Developing a Company Financing Strategy | 7-3  |
| [1]     | The Key Components | 7-3  |
| [2]     | Determining Capital Requirements | 7-3  |
| [5]     | Valuation | 7-8  |

§ 7.03 The Business Plan | 7-10  |
| [1]     | Overview: The Functions of a Business Plan | 7-10  |
| [2]     | Executive Summary | 7-11  |
| [3]     | Company Description | 7-12  |
START-UP & EMERGING COMPANIES

[6] Marketing and Sales ............................... 7-14
  [a] The Market ...................................... 7-14
  [b] Competition ..................................... 7-15
  [c] Projected Market Penetration ............... 7-15
[8] Corporate Organization ......................... 7-17
[9] Financial Statements and Projections ....... 7-17
[10] Appendices ....................................... 7-18

§ 7.04 Working with Venture Capitalists .......... 7-19

CHAPTER 8

Venture Capital Analysis and Negotiation

Gregory C. Smith

§ 8.01 Overview ....................................... 8-2
§ 8.02 Analysis and Negotiation of Key Provisions .. 8-4
  [1] Valuation and Capitalization ................. 8-4
    [a] Authorized Capital ........................... 8-4
    [b] Fully Diluted Calculations ............... 8-4
    [c] Disclosure ................................ 8-5
    [a] Lead Investor and Financing Amount ......... 8-5
    [b] Fiduciary Duty .............................. 8-6
    [c] Friends and Family ......................... 8-6
    [a] Corporate Form and Structure ............ 8-7
    [b] Security and Ranking ...................... 8-8
    [c] Dividends ................................ 8-8
    [d] Preference and Participation ............ 8-8
    [e] Conversion ................................ 8-9
      [i] Optional ................................. 8-9
      [ii] Mandatory ............................ 8-9
    [f] Anti-Dilution .............................. 8-10
    [g] Board Composition ......................... 8-10
    [h] Voting and Protective Provisions ......... 8-11
TABLE OF CONTENTS

[a] In General .................................................. 8-12
[b] Information Rights ................................. 8-12
[c] Registration Rights ....................... 8-12
[d] Lock-Ups ........................................... 8-14
[e] Preemptive or Participation Rights ... 8-14

[5] Right of First Refusal and Co-Sale
Agreements ............................................. 8-15

[a] Representations and Warranties ......... 8-15
[b] Closing Conditions .............................. 8-15

[a] Fees and Expenses .............................. 8-16
[b] No-Shop ............................................. 8-16
[c] Binding and Nonbinding ....................... 8-16
[d] Conditions Precedent ......................... 8-16

[8] Optional Provisions ............................... 8-16
[a] Redemption ........................................... 8-17
[b] Stock Vesting ........................................ 8-17
[c] Observation Rights ................................ 8-18
[d] Super-Majority Board Votes ................. 8-19
[e] Affirmative Covenants ......................... 8-19
[f] Negative Covenants ............................... 8-19
[g] Management Rights ............................... 8-20

§ 8.03 Down-Round Term Sheets ...................... 8-21
[1] In General .............................................. 8-21
[7] Anti-Dilution ......................................... 8-23
[8] Pay-to-Play ......................................... 8-24

§ 8.04 Form: Standard Term Sheet ................... 8-26
§ 8.05 Form: Simple Term Sheet ..................... 8-39
§ 8.06 Form: Down-Round Term Sheet ............... 8-46

CHAPTER 9

Stock Purchase Agreements

Henry P. Massey, Jr. & Melinda G. Douglass

§ 9.01 Overview ............................................. 9-2
§ 9.02 Discussion of Important Provisions .......... 9-3

(Rel. 44)
## START-UP & EMERGING COMPANIES

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Representations and Warranties</td>
<td>9-3</td>
</tr>
<tr>
<td>[2]</td>
<td>Conditions to Closing</td>
<td>9-4</td>
</tr>
<tr>
<td>[3]</td>
<td>Covenants of the Parties</td>
<td>9-4</td>
</tr>
</tbody>
</table>

§ 9.03 **Form:** Investor Stock Purchase Agreement | 9-6 |
| [1] | Introduction | 9-6 |
| [2] | Form of Investor Stock Purchase Agreement with Commentary | 9-6 |

§ 9.04 **Form:** Co-Sale Agreement | 9-30 |
| [1] | Introduction | 9-30 |

§ 9.05 **Form:** Voting Agreement | 9-42 |
| [1] | Introduction | 9-42 |

§ 9.06 **Form:** Management Rights Letter Agreement | 9-53 |
| [1] | Introduction | 9-53 |

§ 9.07 **Form:** Employee Restricted Stock Purchase Agreement | 9-56 |
| [1] | Introduction | 9-56 |
| [2] | Form of Employee Restricted Stock Purchase Agreement with Commentary | 9-56 |
| [3] | Form of Spousal Consent with Commentary | 9-68 |

§ 9.08 **Form:** Escrow Instructions for Escrow of Employee Stock | 9-70 |

## CHAPTER 9A

### Amended and Restated Certificate of Incorporation

*Stephen C. Ferruolo*

§ 9A.01 General | 9A-3 |
§ 9A.02 Why Preferred Stock | 9A-4 |
| [1] | Financial, Operational and Tax Considerations | 9A-4 |

§ 9A.03 Terms of Preferred Stock | 9A-8 |
| [1] | Number of Shares; Par Value; “Blank Check” Provision | 9A-8 |
| [a] | Number of Shares | 9A-8 |
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[b]</td>
<td>Par Value</td>
<td>9A-9</td>
</tr>
<tr>
<td>[c]</td>
<td>“Blank Check” Provisions</td>
<td>9A-9</td>
</tr>
<tr>
<td>[a]</td>
<td>Preference</td>
<td>9A-10</td>
</tr>
<tr>
<td>[b]</td>
<td>Cumulative Versus Noncumulative Dividends</td>
<td>9A-11</td>
</tr>
<tr>
<td>[c]</td>
<td>Participation</td>
<td>9A-11</td>
</tr>
<tr>
<td>[d]</td>
<td>Multiple Series</td>
<td>9A-11</td>
</tr>
<tr>
<td>[a]</td>
<td>Liquidation Price</td>
<td>9A-11</td>
</tr>
<tr>
<td>[b]</td>
<td>Participating Versus Nonparticipating</td>
<td>9A-12</td>
</tr>
<tr>
<td>[c]</td>
<td>Multiple Series</td>
<td>9A-13</td>
</tr>
<tr>
<td>[a]</td>
<td>Company Redemption</td>
<td>9A-15</td>
</tr>
<tr>
<td>[b]</td>
<td>Mandatory Redemption</td>
<td>9A-15</td>
</tr>
<tr>
<td>[c]</td>
<td>Deemed Stock Distributions</td>
<td>9A-16</td>
</tr>
<tr>
<td>[a]</td>
<td>Optional Conversion</td>
<td>9A-18</td>
</tr>
<tr>
<td>[b]</td>
<td>Automatic or Mandatory Conversion</td>
<td>9A-18</td>
</tr>
<tr>
<td>[c]</td>
<td>Anti-Dilution Protection</td>
<td>9A-19</td>
</tr>
<tr>
<td>[i]</td>
<td>Proportional Adjustments</td>
<td>9A-19</td>
</tr>
<tr>
<td>[ii]</td>
<td>Price-Based Anti-Dilution Protection</td>
<td>9A-19</td>
</tr>
<tr>
<td>[iii]</td>
<td>Pay-to-Play Provisions</td>
<td>9A-21</td>
</tr>
<tr>
<td>[d]</td>
<td>“No Impairment” Clause</td>
<td>9A-22</td>
</tr>
<tr>
<td>[a]</td>
<td>Election of Directors</td>
<td>9A-23</td>
</tr>
<tr>
<td>[b]</td>
<td>Protective Provisions</td>
<td>9A-27</td>
</tr>
<tr>
<td>[c]</td>
<td>Optional Protective Provision for Common Stock</td>
<td>9A-28</td>
</tr>
<tr>
<td>[8]</td>
<td>Limitation of Liability; Indemnification</td>
<td>9A-29</td>
</tr>
</tbody>
</table>

§ 9A.04 Corporate Approvals of Amendments to the Certificate of Incorporation | 9A-30

§ 9A.05 Preferred Stock Conversion/Anti-Dilution Examples | 9A-31

[1] Introduction and Abbreviations  | 9A-31
[2] Basic Conversion Formula  | 9A-31
[4] Stock Splits, Etc.  | 9A-31
[5] Price-Based Anti-Dilution  | 9A-31

(Rel. 44)
### START-UP & EMERGING COMPANIES

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[i]  Ratchet Adjustment of the CP</td>
<td>9A-31</td>
</tr>
<tr>
<td>[ii] Formula, or Weighted Average, Adjustment of the CP</td>
<td>9A-32</td>
</tr>
</tbody>
</table>

### CHAPTER 9A

#### Introduction

1. Introduction

2. Form of Amended and Restated Certificate of Incorporation

### Registration and Investor Rights Agreements

**Gregory C. Smith**

#### CHAPTER 9B

#### Overview

1. Analysis of Key Provisions

2. Restrictions on Transfer
   - a) Securities Law Restrictions
   - b) Lock-Ups

3. Registration Rights
   - a) Registrable Securities
   - b) Demand
   - c) Piggyback
   - d) Form S-3
   - e) Expenses
   - f) Company Obligations
   - g) Indemnification
   - h) Assignment
   - i) Termination of Registration Rights
TABLE OF CONTENTS xxxv

  [a] Information and Reporting .................. 9B-11
  [b] Board Observation .......................... 9B-12
  [c] Inspection .................................. 9B-12
  [d] Rule 144 Reporting .......................... 9B-12
  [e] Preemptive or Participation ................. 9B-13
  [f] Drag-Along .................................. 9B-13

  [a] Stock Vesting ............................... 9B-14
  [b] Proprietary Information and Inventions .... 9B-14
  [c] Negative Covenants ......................... 9B-14

  [a] Amendment and Waiver ....................... 9B-15
  [b] Termination of Certain Rights and Covenants 9B-15

§ 9B.03 Form: Investor Rights Agreement ............ 9B-17

CHAPTER 10

[Reserved]

CHAPTER 11

Employment Agreements

Jack H. Nusbaum & Laurence D. Weltman

§ 11.01 Overview .................................. 11-2
§ 11.02 Important Provisions ....................... 11-5

[1] Scope of Duties ................................ 11-5
  [a] Founder .................................... 11-5
  [b] Key Employee ............................... 11-7
  [c] General ..................................... 11-8

[2] Salary and Other Benefits ....................... 11-9

[3] Confidential Information ....................... 11-10


  [a] Neutral Termination ........................ 11-10
  [b] Employee Breach ............................. 11-11
  [c] Employer Breach ............................. 11-11
  [d] Termination by Expiration ................... 11-12

  [a] Overview .................................... 11-13

(Rel. 47)
[b] Post-Employment Restraints on Founders .......................... 11-15
[c] Post-Employment Restraints on Key Employees ................. 11-16
[d] Exceptions to Enforceability ................................. 11-18
[e] Remedies ..................................................... 11-20
[f] Post-Employment Restraints from Prior Employment ........... 11-21
[7] Remedies for Breach of Agreement .............................. 11-21

§ 11.03 *Form:* Employment Agreement for Founder .......................... 11-26
§ 11.04 *Form:* Employment Agreement for Key Employee .................. 11-35
§ 11.05 *Form:* Employment Agreement with President Coupled With Stock Option Grant .................. 11-43
§ 11.06 *Form:* Confidential Invention and Assignment Agreement for Employee .................. 11-55
§ 11.07 *Form:* Checklist of Employment Agreement Issues from the Employee’s Perspective .................. 11-64
§ 11.08 *Form:* Sample Offer Letter to Prospective Employee with Option Grant .................. 11-72
§ 11.09 *Form:* Employment Agreement (Pro-Employee) .................. 11-74
§ 11.10 *Form:* Employee Release ..................................... 11-81

**CHAPTER 11A**

**Employee Handbooks**

*Kristin Major*

§ 11A.01 Overview ................................................... 11A-1
§ 11A.02 At-Will Employment ................................. 11A-4
§ 11A.03 Equal Employment Opportunity (EEO) .................. 11A-5
§ 11A.04 Wage and Hour Policies .............................. 11A-6
§ 11A.05 E-Mail and Technology Policies ...................... 11A-8
§ 11A.06 Ethical Standards, Conflicts of Interest and Confidentiality .......................... 11A-9
§ 11A.07 Other Applicable Policies .......................... 11A-10
§ 11A.08 Handbook Acknowledgement Form ...................... 11A-11
§ 11A.09 Sample Employee Handbook .......................... 11A-12
CHAPTER 12

Federal Income Tax Considerations Affecting Start-Up Businesses

Jack S. Levin & Jeffrey T. Sheffield

§ 12.01 Introduction and Definitions .......................... 12-2
§ 12.02 Start-Up Financing Choosing the Appropriate
Form of Business Organization .......................... 12-4
  [1] Corporate Form with No Subchapter
      S Election .................................. 12-4
  [2] Corporate Form with Subchapter
      S Election .................................. 12-5
    [a] Mechanics of Subchapter S Election. . 12-9
    [b] Mechanics of Subchapter S
      Termination .............................. 12-10
  [3] Limited Partnership Form ....................... 12-10
  [5] Combining or Shifting Between Different
      Forms ........................................ 12-12
    [a] Midstream Incorporation of
        Partnership ............................ 12-12
    [b] Lease of Property from Affiliated
        Partnership ............................ 12-15
§ 12.03 Problems Peculiar to a Corporation .............. 12-18
  [1] Section 351 .................................. 12-18
    [a] Definition of Control and
        the Control Group ..................... 12-18
    [b] Property vs. Services ................. 12-19
    [c] Debt Contributed to Capital .......... 12-20
    [d] Stock Requirement ..................... 12-20
    [e] Nonqualified Preferred Stock Treated
        as Boot ................................ 12-21
    [f] Control “Immediately After”
        the Transfer .......................... 12-22
  [2] Interest and OID Deductibility ................. 12-22
    [a] Section 385 (Debt vs. Equity) .. 12-22
    [b] Limits on Interest and OID
        Deductibility ........................ 12-24
  [3] Section 1244 Stock .......................... 12-25
      Section 1202 Gain ........................ 12-26
§ 12.04 Problems Peculiar to a Partnership ............... 12-28
  [1] Substantial Economic Effect .................. 12-28
      Activity Losses ........................ 12-29
    [a] Basis .................................. 12-29
### START-UP & EMERGING COMPANIES

- **At-Risk Basis** ................. 12-30
- **Passive Activity Losses** .......... 12-30

### § 12.05 Problems Applicable to Any Form .......... 12-33
- **[1]** Compensating the Service Provider ........... 12-33
  - **[a]** Section 83 in the Corporate Context ........ 12-34
  - **[b]** Section 83 in the Partnership Context ........ 12-35
- **[c]** Incentive Stock Options .............. 12-36
- **[d]** Stock Appreciation Rights .............. 12-37
- **[2]** Section 409A ....................... 12-37
- **[3]** Original Issue Discount and Imputed Interest—Section 1274, 7872, and 305 ... 12-40
  - **[a]** Debt Instruments .................. 12-40
  - **[i]** Cash Loans ...................... 12-40
  - **[ii]** Sales of Property ............... 12-41
  - **[b]** Preferred Stock .................. 12-41
- **[4]** Start-Up Expenses .................. 12-43

### CHAPTER 13

**Stock Options**

*Joseph M. Yaffe*

### § 13.01 Overview ......................... 13-2

### § 13.02 Incentive Stock Options ................ 13-5
- **[1]** Option Plan ....................... 13-5
- **[2]** Plan Adoption and Approval .......... 13-5
- **[3]** Option Duration .................... 13-5
- **[4]** Employment Requirement ............ 13-6
- **[5]** Nontransferability .................. 13-6
- **[6]** Exercise Price ..................... 13-6
- **[7]** Quantity Limits .................... 13-7
- **[8]** Holding Period ..................... 13-7

### § 13.03 Non-Qualified Stock Options ............ 13-8
- **[1]** Section 83 Property ............... 13-8
- **[2]** Avoiding Taxation as Nonqualified Deferred Compensation ............. 13-9
- **[3]** Mixed Option Plans ................. 13-11

### § 13.04 The Stock Valuation Problem .......... 13-12
- **[1]** IRS Regulations ................... 13-12
  - **[a]** Stock Valuation to Satisfy ISO Requirements ........ 13-12
  - **[b]** Stock Valuation Under Section 409A .... 13-13
- **[2]** Formula Valuations ............... 13-14
- **[3]** Buy-and-Sell Contracts .......... 13-15

### § 13.05 Other Option Features ................. 13-17
- **[1]** Payment of Exercise Price with Stock .... 13-17
| § 13.06 | Other Considerations .................................................. 13-22 |
| § 13.07 | Form: Stock Option Plan .................................................. 13-34 |
| § 13.08 | Form: Incentive Stock Option Agreement ......................... 13-41 |
| [2]     | Immaculate Cashless Exercise .............................. 13-17 |
| [7]     | Section 83(i) Elections .......................................... 13-31 |
# TABLE OF CONTENTS

**Volume 2**

## CHAPTER 14

**Employee Benefit Plans**

*Barry L. Salkin, Manes Merrit, & David Fields*

§ 14.01 Introduction and Overview .......................... 14-4

[1] Introduction ......................................... 14-4


[a] Equity Incentive Compensation ........... 14-6

[b] Qualified Retirement Plans ............... 14-7

[c] Nonqualified Deferred Compensation
   Arrangements ................................. 14-12

[d] Insurance Benefits ......................... 14-13

[e] Supplemental Compensation Devices ... 14-15

[3] Summary of Legal and Regulatory
   Parameters ....................................... 14-15

[a] Tax Consequences for
   the Employee ............................... 14-15

[b] Tax Consequences for
   the Company ................................. 14-18

[c] Securities Law Considerations ........... 14-20

[i] Federal Law ................................. 14-20

[ii] State Law ................................. 14-23

[d] Financial Accounting
   Considerations .............................. 14-24

[i] Equity Incentive
   Arrangements ............................... 14-24

[ii] Deferred Compensation ........... 14-27

[iii] Other Arrangements ......... 14-28

[e] Employee Retirement Income Security
   Act of 1974 (“ERISA”) .................. 14-28

[f] State Regulation of Employee
   Benefit Plans ............................... 14-54
§ 14.02 Equity Incentive Plans ................................ 14-57
[1] In General ........................................ 14-57
[3] Stock Option Plans .............................. 14-60
  [a] Incentive Stock Option Plan ............... 14-61
  [b] Employee Stock Purchase Plan ............. 14-67
  [i] Plan Qualification Requirements ........... 14-67
  [ii] Income Tax Consequences ................. 14-70
  [iii] Typical Administrative Provisions ....... 14-75
  [iv] Securities Law Considerations .......... 14-76
  [v] Accounting Considerations ............... 14-76
  [vi] Reporting Considerations ................. 14-76
  [c] Nonstatutory Stock Option Plans .......... 14-77
  [a] Phantom Stock ............................. 14-86
  [b] Stock Appreciation Rights (“SARs”) .......... 14-88
  [c] Stock Depreciation Rights ............... 14-90
[8] Employee Stock Ownership Plans
  (“ESOPs”)........................................ 14-91
[9] Restricted Stock ................................ 14-91
[10] Restricted Stock Units, ...................... 14-95
§ 14.03 Qualified Retirement Plans ............... 14-99
  [a] Tax Considerations ....................... 14-101
  [b] ERISA ......................................... 14-110
  [c] Securities Law Considerations ........... 14-110
  [d] Blackout Periods ......................... 14-111
  [e] Financial Accounting ..................... 14-113
  [a] Defined Benefit Pension Plan ............ 14-115
  [b] Money Purchase Pension Plan ............. 14-120
  [c] Profit-Sharing Plan ....................... 14-121
  [d] Stock Bonus Plan ......................... 14-122
  [e] Employee Stock Ownership Plan
    (“ESOP”)....................................... 14-122
  [f] Cash or Deferred Arrangements
    (“Section 401(k) Plan”) ................... 14-130
  [g] Simplified Employee Pension Plan (“SEP”) .... 14-145
  [h] Savings Investment Matching Plan
    for Employees (“SIMPLE”) ............... 14-147
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[i]</td>
<td>Employer-Sponsored IRA</td>
<td>14-149</td>
</tr>
<tr>
<td>[j]</td>
<td>Cash Balance Plan</td>
<td>14-150</td>
</tr>
<tr>
<td>[k]</td>
<td>Deemed IRA</td>
<td>14-159</td>
</tr>
<tr>
<td>[l]</td>
<td>Combined Defined</td>
<td>14-159</td>
</tr>
<tr>
<td></td>
<td>Benefit/401(k) Plan</td>
<td></td>
</tr>
<tr>
<td>[m]</td>
<td>Multiple Employer Defined Contribution Plan</td>
<td>14-161</td>
</tr>
<tr>
<td>[4]</td>
<td>Requirements for Qualification</td>
<td>14-163</td>
</tr>
<tr>
<td>[a]</td>
<td>Minimum Participation Standards</td>
<td>14-164</td>
</tr>
<tr>
<td>[b]</td>
<td>Minimum Vesting Standards</td>
<td>14-164</td>
</tr>
<tr>
<td>[c]</td>
<td>Limitations on Benefits</td>
<td>14-165</td>
</tr>
<tr>
<td>[d]</td>
<td>Special “Top-Heavy” Rules</td>
<td>14-168</td>
</tr>
<tr>
<td>[e]</td>
<td>Reporting and Disclosure</td>
<td>14-168</td>
</tr>
<tr>
<td></td>
<td>Requirements</td>
<td></td>
</tr>
<tr>
<td>[f]</td>
<td>Tax Shelter Transactions</td>
<td>14-168</td>
</tr>
<tr>
<td>[g]</td>
<td>Coronavirus Benefits</td>
<td>14-171</td>
</tr>
<tr>
<td>[h]</td>
<td>Consolidated Appropriations Act, 2021</td>
<td>14-172</td>
</tr>
<tr>
<td>[i]</td>
<td>American Rescue Plan Act of 2021</td>
<td>14-172</td>
</tr>
<tr>
<td>§ 14.04</td>
<td>Nonqualified Deferred Compensation Arrangements</td>
<td></td>
</tr>
<tr>
<td>[1]</td>
<td>In General</td>
<td>14-173</td>
</tr>
<tr>
<td>[6]</td>
<td>Significant Restriction on the Funding of Nonqualified Deferred</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Compensation Plans</td>
<td>14-197</td>
</tr>
<tr>
<td>§ 14.05</td>
<td>Accident, Health and Life Insurance Plans</td>
<td>14-198</td>
</tr>
<tr>
<td>[1]</td>
<td>Accident and Health Insurance Plans</td>
<td>14-198</td>
</tr>
<tr>
<td></td>
<td>Association Health Plans</td>
<td>14-293</td>
</tr>
<tr>
<td>[2]</td>
<td>Long-Term Care Insurance</td>
<td>14-295</td>
</tr>
<tr>
<td>§ 14.06</td>
<td>Supplemental Compensation Devices</td>
<td>14-305</td>
</tr>
<tr>
<td>[1]</td>
<td>In General</td>
<td>14-305</td>
</tr>
<tr>
<td>[3]</td>
<td>Loans</td>
<td>14-308</td>
</tr>
<tr>
<td>[5]</td>
<td>Use of Company Automobile</td>
<td>14-312</td>
</tr>
<tr>
<td>[6]</td>
<td>Educational Assistance Programs</td>
<td>14-313</td>
</tr>
<tr>
<td>[7]</td>
<td>Dependent Care Assistance Programs</td>
<td>14-316</td>
</tr>
<tr>
<td>[8]</td>
<td>Adoption Assistance Exclusion</td>
<td>14-320</td>
</tr>
<tr>
<td></td>
<td>No-Additional-Cost Service</td>
<td>14-325</td>
</tr>
</tbody>
</table>
CHAPTER 15

Proprietary Protection of Product or Service

Michael J. Calvey

§ 15.01 Introduction ........................................... 15-2
§ 15.02 Protection for Ideas .................................. 15-4
§ 15.03 Copyrights .............................................. 15-8

[a] “Expression Only” ....................................... 15-8
[b] Originality ............................................... 15-9
[c] Fixed .................................................. 15-10
[d] What Rights Are Included ......................... 15-10
[e] Exceptions to Protection .............................. 15-12

[2] Attaining and Maintaining Copyright Protection; the Role of the Copyright Notice .............................. 15-13


Copyright and the Internet ........................................ 15-24

§ 15.04 Patents .................................................................. 15-26
  [a] Statutory Subject Matter .................................. 15-28
  [b] Novelty .............................................................. 15-29
  [c] Nonobviousness ................................................. 15-31
  [d] Usefulness ........................................................ 15-31
[3] Anticipatory Steps in Working on
   an Invention ......................................................... 15-32

§ 15.05 Trademarks ............................................................ 15-42
[1] Nature of Protection ................................................. 15-42
[2] Selection of a Trademark ......................................... 15-43
  [a] Benefits of Registration ...................................... 15-48.1
  [b] Qualifications for Registration ............................ 15-48.2
  [c] An “Intent to Use” Application ......................... 15-50
  [d] The Registration Application ......................... 15-51
  [e] Examination of Registration ............................ 15-52
  [f] Duration of Rights .............................................. 15-53
  [g] International Registration ................................. 15-54
[7] Trademark Infringement, Dilution and
   Unfair Competition .............................................. 15-57
[8] Domain Names ........................................................ 15-60.1
  [a] Domain Names and Their
      Registration ...................................................... 15-60.1
  [b] Legal Protection for Domain
      Names ............................................................... 15-60.4
      [i] Legal Protection for Domain
          Names Through ICANN
          Administrative Proceedings ...................... 15-60.6
      [ii] Litigation—
          The “Anticybersquatting”
          Act ............................................................... 15-60.9

§ 15.06 Trade Names ......................................................... 15-61

§ 15.07 Trade Secrets ....................................................... 15-62
    Protection ........................................................ 15-63
§ 15.08 Maintaining Confidentiality

[1] Introduction

[2] Sample Form

[a] *Form:* Employee Confidential Information and Inventions Agreement

[b] *Form:* Confidentiality Agreement

CHAPTER 16

Licensing Agreements

*Jay Dratler, Jr.*

§ 16.01 Overview

[1] Introduction

[2] Reasons for Licensing


[a] Obtaining Early Entry to Market

[b] Broadening the Marketplace

[c] Increasing Market Penetration through Complementary Products

[d] “Leveraging” Resources

[e] Obtaining Additional Revenue

[f] Benefiting from Technology Exchanges

[g] Expanding into Auxiliary Product Lines

[h] Enhancing Reputation and Goodwill

[i] Controlling Exploitation

[4] Disadvantages of Licensing

[a] Loss of Control of Exploitation

[b] Dependence on Others for Revenue

[c] Risk of Piracy

[d] Loss of Technological “Edge”

[e] Loss of New Business Opportunities

[f] Loss of Contact with Customers

[g] Loss of Public Recognition

[h] Loss of Incentive or Opportunity for Vertical Integration or Horizontal Expansion

[i] “Passive Income” Tax Issues

§ 16.02 Types of Licenses

[1] Use License

[2] Copying or Manufacturing License

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 16.03</td>
<td>Important Terms of Licensing Agreements</td>
<td>16-19</td>
</tr>
<tr>
<td>[1]</td>
<td>Scope of License</td>
<td>16-19</td>
</tr>
<tr>
<td>[a]</td>
<td>Subject Matter</td>
<td>16-19</td>
</tr>
<tr>
<td>[b]</td>
<td>Rights Granted</td>
<td>16-20</td>
</tr>
<tr>
<td>[c]</td>
<td>Field of Use</td>
<td>16-21</td>
</tr>
<tr>
<td>[3]</td>
<td>Obligations to Exploit</td>
<td>16-26</td>
</tr>
<tr>
<td>[4]</td>
<td>Improvements</td>
<td>16-29</td>
</tr>
<tr>
<td>[6]</td>
<td>Royalties</td>
<td>16-31</td>
</tr>
<tr>
<td>[7]</td>
<td>Reports and Audit Rights</td>
<td>16-33</td>
</tr>
<tr>
<td>[8]</td>
<td>Protection of Intellectual Property</td>
<td>16-34</td>
</tr>
<tr>
<td>[a]</td>
<td>Protective Notices and Legends</td>
<td>16-34</td>
</tr>
<tr>
<td>[b]</td>
<td>Applications for Patents, Registration of Trademarks, Mask Works and Copyrights, and Other Filings</td>
<td>16-38</td>
</tr>
<tr>
<td>[c]</td>
<td>Enforcement of Rights and Prevention of Piracy</td>
<td>16-40</td>
</tr>
<tr>
<td>[a]</td>
<td>Warranty Against Infringement</td>
<td>16-41</td>
</tr>
<tr>
<td>[b]</td>
<td>Warranty of Performance</td>
<td>16-44</td>
</tr>
<tr>
<td>[c]</td>
<td>Disclaimers of Warranty</td>
<td>16-46</td>
</tr>
<tr>
<td>[12]</td>
<td>Limitations of Liability and Remedy</td>
<td>16-50</td>
</tr>
<tr>
<td>[a]</td>
<td>Types of Damages</td>
<td>16-50</td>
</tr>
<tr>
<td>[b]</td>
<td>Amount of Damages</td>
<td>16-51</td>
</tr>
<tr>
<td>[c]</td>
<td>Limitation of Remedy</td>
<td>16-51</td>
</tr>
<tr>
<td>[d]</td>
<td>Time to Sue</td>
<td>16-52</td>
</tr>
<tr>
<td>[13]</td>
<td>Export Controls</td>
<td>16-52</td>
</tr>
<tr>
<td>[14]</td>
<td>Other Terms</td>
<td>16-58</td>
</tr>
</tbody>
</table>

§ 16.04 Technology Licenses | 16-60 |
| [1]     | Patents and Trade Secrets Combined | 16-60 |

§ 16.05 Software Licensing | 16-72 |
| [1]     | Subject Matter | 16-72 |
| [2]     | Source and Object Code | 16-75 |
| [4]     | Right to Modify | 16-78 |
[7] Royalties ........................................ 16-81
  [a] Warranty .................................... 16-82
  [b] Maintenance ............................... 16-83
[9] “Boxtop” or “Shrinkwrap” Software Licenses ......................... 16-84
[10] Enhancements ................................. 16-86

§ 16.06 “OEM” and “VAR” Agreements .................. 16-91
  [1] Combined Sale and License .................. 16-91
  [2] Control of Lower-Level License ............ 16-91

§ 16.07 Special Issues .............................. 16-97
  [1] Defense Department Contracts ............... 16-87
  [2] Special Issues in International Licensing ...
     [a] “Agency” Termination Laws ............... 16-103
     [b] Currency Control ......................... 16-103
     [c] Protection of Intellectual Property .... 16-104
     [d] Foreign Antitrust Law ..................... 16-109
     [e] Enforcement .............................. 16-110
     [f] Other Foreign Licensing Issues .......... 16-111

§ 16.08 Form: License Agreement ................. 16-112
  [1] Introduction .................................. 16-112
  [2] Form of License Agreement ................. 16-112

CHAPTER 17

Bridge Financings

Thomas C. Klein

§ 17.01 Introduction .................................. 17-3
§ 17.02 Reasons for a Bridge Financing ............ 17-5
  [1] Background ................................... 17-5
  [2] Bridges to Subsequent Rounds of
      Equity Financing or an Acquisition ...... 17-5
  [3] Seed Convertible Note Financings ............ 17-6
  [4] Other Reasons for Bridge Financings ....... 17-7

§ 17.03 Key Considerations in Structuring Bridge Notes ...
  [1] Term versus Demand Notes .................. 17-9
  [2] Automatic Conversion on a
      Qualified Equity Financing ............... 17-10
      [a] Percentage Discounts .................... 17-11
      [b] Valuation Caps ........................... 17-11

START-UP & EMERGING COMPANIES
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[3]</td>
<td>Treatment of Notes in the Event of an Acquisition Prior to a Qualified Equity Financing</td>
<td>17-14</td>
</tr>
<tr>
<td>[a]</td>
<td>Acceleration</td>
<td>17-14</td>
</tr>
<tr>
<td>[b]</td>
<td>Multiple of Principal Return</td>
<td>17-14</td>
</tr>
<tr>
<td>[c]</td>
<td>Multiple of Principal Return or Optional Conversion</td>
<td>17-15</td>
</tr>
<tr>
<td>[4]</td>
<td>Maturity Prior to a Qualified Equity Financing</td>
<td>17-16</td>
</tr>
<tr>
<td>[6]</td>
<td>Secured versus Unsecured Notes</td>
<td>17-21</td>
</tr>
<tr>
<td>§17.04</td>
<td>Specific Terms of the Bridge Financing Documents</td>
<td></td>
</tr>
<tr>
<td>[1]</td>
<td>Note Purchase Agreement or Note and Warrant Purchase Agreement</td>
<td>17-23</td>
</tr>
<tr>
<td>[a]</td>
<td>Structure of Payments</td>
<td>17-23</td>
</tr>
<tr>
<td>[b]</td>
<td>Representations and Warranties</td>
<td>17-23</td>
</tr>
<tr>
<td>[c]</td>
<td>Conditions to Closing</td>
<td>17-24</td>
</tr>
<tr>
<td>[d]</td>
<td>Covenants</td>
<td>17-25</td>
</tr>
<tr>
<td>[e]</td>
<td>Amendment</td>
<td>17-25</td>
</tr>
<tr>
<td>[f]</td>
<td>Fees and Expenses</td>
<td>17-26</td>
</tr>
<tr>
<td>[g]</td>
<td>Most Favored Nations Clause</td>
<td>17-26</td>
</tr>
<tr>
<td>[h]</td>
<td>Book-Entry Registration of the Notes</td>
<td>17-27</td>
</tr>
<tr>
<td>[a]</td>
<td>Interest Rate</td>
<td>17-28</td>
</tr>
<tr>
<td>[b]</td>
<td>Term and Maturity</td>
<td>17-28</td>
</tr>
<tr>
<td>[c]</td>
<td>No Prepayment</td>
<td>17-29</td>
</tr>
<tr>
<td>[d]</td>
<td>Events of Default</td>
<td>17-29</td>
</tr>
<tr>
<td>[e]</td>
<td>Conversion</td>
<td>17-29</td>
</tr>
<tr>
<td>[f]</td>
<td>Rights of Payment</td>
<td>17-30</td>
</tr>
<tr>
<td>[g]</td>
<td>Security and Subordination</td>
<td>17-31</td>
</tr>
<tr>
<td>[h]</td>
<td>Legends; Restrictions on Transfer</td>
<td>17-31</td>
</tr>
<tr>
<td>[a]</td>
<td>Number of Shares and Exercise Price</td>
<td>17-32</td>
</tr>
<tr>
<td>[i]</td>
<td>Qualified Equity Financing</td>
<td>17-32</td>
</tr>
<tr>
<td>[ii]</td>
<td>No Qualified Equity Financing Prior to Expiration, Change of Control or IPO</td>
<td>17-32</td>
</tr>
<tr>
<td>[iii]</td>
<td>Additional Considerations</td>
<td>17-33</td>
</tr>
<tr>
<td>[b]</td>
<td>Exercise Period</td>
<td>17-33</td>
</tr>
<tr>
<td>[c]</td>
<td>Net Exercise, Automatic Exercise and Conditional Exercise</td>
<td>17-34</td>
</tr>
<tr>
<td>[d]</td>
<td>Company Representations and Covenants</td>
<td>17-35</td>
</tr>
<tr>
<td>[e]</td>
<td>Holder Representations</td>
<td>17-35</td>
</tr>
<tr>
<td>[f]</td>
<td>Registration Rights</td>
<td>17-36</td>
</tr>
<tr>
<td>[g]</td>
<td>Amendment and Waiver</td>
<td>17-36</td>
</tr>
</tbody>
</table>

(Rel. 48)
START-UP & EMERGING COMPANIES

§ 17.05 Additional Considerations in Bridge Financings

§ 17.06 Form: Term Sheet–Convertible Note Financing

§ 17.07 Form: Note Purchase Agreement–Seed Financing

§ 17.08 Form: Convertible Promissory
Note–Seed Financing

§ 17.09 Form: Note and Warrant Purchase Agreement

§ 17.10 Form: Convertible Promissory
Note–Bridge Financing

§ 17.11 Form: Warrant

§ 17.12 Form: Security Agreement
# TABLE OF CONTENTS

## CHAPTER 18

**Contracts**

*Hina Ahmad and Edward L. Turner III*

| § 18.01 Overview .................................. | 18-3 |
| § 18.02 Sales Contracts .......................... | 18-5 |
| [3] Battle of the Forms ......................... | 18-8 |
| [a] Price Provisions .......................... | 18-10 |
| [b] Taxes ..................................... | 18-12 |
| [c] Payment and Credit Terms ................ | 18-12 |
| [d] Delivery and Risk of Loss ................ | 18-14 |
| [a] Patent, Copyright, Trademark, Etc ....... | 18-16 |
| [b] Product Warranties ........................ | 18-17 |
| [i] Express Warranties ....................... | 18-17 |
| [ii] Implied Warranties ...................... | 18-20 |
| [c] Disclaimers and Waivers .................. | 18-21 |
| [i] Warranty Claims ......................... | 18-22 |
| [d] Consequential Damages .................... | 18-23 |
| [7] Limitations on Liability ................... | 18-24.1 |
| [a] Buyer’s Remedies .......................... | 18-24.1 |
| [b] Limitation on Actions ..................... | 18-24.2 |
| [c] Remedies of Seller ....................... | 18-26 |
| [d] Litigation and Related Costs ............ | 18-26 |
| [a] Acceptance; Amendment and Waiver ....... | 18-27 |
| [i] Acceptance ............................... | 18-27 |
| [ii] Amendment and Waiver ................... | 18-27 |
| [b] Integration ................................ | 18-28 |
| [c] Severability .............................. | 18-29 |
| [d] *Force Majeure* .......................... | 18-29 |
| [e] Governing Law; Jurisdiction ............. | 18-30 |
| [f] Assignment ............................... | 18-31 |
| [g] Notice .................................... | 18-31 |

| § 18.03 Service Contracts ....................... | 18-32 |
| [1] Introduction .............................. | 18-32 |
| [2] Nature of Services to Be Performed ...... | 18-33 |
| [3] Compensation ............................. | 18-33 |
| [4] Personnel ................................. | 18-34 |
| [6] Inventions and Confidentiality ........ | 18-36 |

(Rel. 48)
§ 18.04  
*Form:* Services Agreement with Commentary  
18-39

§ 18.05  
Distribution Agreements  
18-58

[1] Introduction  
18-58

18-60

18-63

18-70

18-74

§ 18.06  
*Form:* Distribution Agreement with Commentary  
18-75

§ 18.07  
*Form:* Dealer Agreement with Commentary  
18-92

[1] Introduction  
18-92

[2] Form of Dealer Agreement  
18-92

§ 18.08  
Equipment Leases  
18-104.1

[1] Introduction  
18-104.1

[2] The Vendor Lease  
18-106

18-109

18-68

[5] Indemnification  
18-69

[6] Termination Term  
18-70

[7] Effect of Termination  
18-71

[8] Dispute Resolution  
18-73

[9] Rentals; Security Deposits and Guarantees  
18-109

[10] Lessor Undertakings  
18-110
TABLE OF CONTENTS

[c] Insurance ........................................... 18-111
[d] Indemnities ........................................... 18-112
[e] Financial Information .............................. 18-113
[f] Lessee Covenants ................................. 18-113
[g] Representations by Lessee ....................... 18-114
[h] Events of Default and Conditions
   Precedent ........................................... 18-115
[i] Default Remedies ................................. 18-116
[j] Purchase Option and Termination ............. 18-117
[k] Miscellaneous .................................... 18-117

CHAPTER 18A

Real Estate Leases

Anna Pope and Seagrumn Gilbert

§ 18A.01 Introduction .................................. 18A-2
§ 18A.02 The Premises ................................ 18A-3
§ 18A.03 Expansion Rights .......................... 18A-4
§ 18A.04 Term; Early Termination Rights .......... 18A-6
§ 18A.05 Rent .......................................... 18A-7
§ 18A.06 Commencement Date ....................... 18A-11
§ 18A.07 Use Clause .................................. 18A-14
§ 18A.08 Alterations .................................. 18A-15
§ 18A.09 Compliance with Laws ..................... 18A-17
§ 18A.10 Subordination ................................ 18A-19
§ 18A.11 Destruction of Premises ................... 18A-20
§ 18A.12 Condemnation ............................... 18A-21
§ 18A.13 Assignment and Subletting ............... 18A-22
§ 18A.14 Landlord’s Access ......................... 18A-23
§ 18A.15 Default Provisions and Remedies ....... 18A-24
§ 18A.16 Insurance .................................... 18A-25
§ 18A.17 Security Deposit ............................ 18A-26
§ 18A.18 Rules and Regulations ...................... 18A-27
§ 18A.19 Execution and Exhibits ..................... 18A-28
§ 18A.20 Work Letter .................................. 18A-29

[7] Ownership of Completed Improvements;
   Removal and Restoration .......................... 18A-34

(Rel. 48)
CHAPTER 19

Exit Strategies

Daniel I. De Wolf and Eric M. Roth

§ 19.01 Overview .............................................. 19-2

§ 19.02 IPOs .................................................. 19-4
[1] Introduction ....................................... 19-4

§ 19.03 Preparing for a Public Offering .......... 19-6
[1] Selecting the Listing Entity ................. 19-6
   [a] Initial Listing Requirements—NYSE .... 19-6
   [b] Initial Listing Requirements—Nasdaq .... 19-7
[4] Compliance with Sarbanes-Oxley ............ 19-12
   [a] Loans to Officers and Directors ...... 19-12
   [b] Management Reporting ........... 19-12
   [c] Certifications ....................... 19-13
   [d] SEC Independence ................. 19-13
   [a] Employee Option Pricing ............. 19-14
   [b] Revenue Recognition for Software
      Companies .................................. 19-14

§ 19.04 Selecting an Underwriter ................. 19-15

§ 19.05 Liquidating Shares After the IPO .... 19-17
[1] Registration Statements ...................... 19-17
[2] Rule 144 ........................................... 19-17

§ 19.06 Reverse Mergers ......................... 19-20

§ 19.07 Sales and Mergers ......................... 19-21
[1] Sales of Portfolio Companies ................. 19-21
[2] Consideration Received on the Sale .... 19-21
   [a] Receiving Unregistered Shares of a
      Public Company .......................... 19-21
   [b] Receiving Registered Shares of a
      Public Company .......................... 19-22
   [c] Shelf Registrations ...................... 19-22
[3] Compliance with GAAP, the
    Sarbanes-Oxley Act and Other
    Regulations ...................................... 19-23
CHAPTER 19A

Liquidation of the Privately-Held Company

Ellen A. Friedman & Derrick N.D. Hansen

§ 19A.01 Overview ............................................. 19A-2
§ 19A.02 Dissolution ........................................... 19A-5
§ 19A.03 Termination of Existence ................................ 19A-7
[1] Merger or Consolidation .................................... 19A-7
[2] Revocation or Forfeiture of Charter ......................... 19A-8
[3] Transferring to or Domesticating in a Foreign Jurisdiction ................................................................. 19A-9
§ 19A.04 Voluntary Dissolution—Delaware and California .......... 19A-10
[12] IRS Form 966 and Final Tax Return .......................... 19A-16
[13] Liquidation of a Company in Financial Difficulty ............. 19A-17
§ 19A.05 Out of Court Restructuring and Wind Down ............. 19A-18
§ 19A.06 Assignment for the Benefit of Creditors ................ 19A-19
[4] Delaware ABCs ............................................... 19A-21
§ 19A.07 Bankruptcy .............................................. 19A-22
§ 19A.08 Core Components of Bankruptcy .......................... 19A-24
<table>
<thead>
<tr>
<th>§ 19A.09</th>
<th>Involuntary Bankruptcy</th>
<th>19A-26</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 19A.10</td>
<td>Differences between an ABC and a Bankruptcy</td>
<td>19A-27</td>
</tr>
<tr>
<td>[1]</td>
<td>Supervision</td>
<td>19A-27</td>
</tr>
<tr>
<td>[2]</td>
<td>Important Constituents and Choosing the Assignee</td>
<td>19A-27</td>
</tr>
<tr>
<td>[3]</td>
<td>Corporate Approval Required for Bankruptcy or ABC</td>
<td>19A-27</td>
</tr>
<tr>
<td>[7]</td>
<td>Preferences</td>
<td>19A-29</td>
</tr>
<tr>
<td>§ 19A.11</td>
<td>Duties of Officers and Directors</td>
<td>19A-31</td>
</tr>
<tr>
<td>§ 19A.12</td>
<td>Exemplar Documents</td>
<td>19A-34</td>
</tr>
<tr>
<td>[1]</td>
<td>Dissolution Checklist</td>
<td>19A-34</td>
</tr>
<tr>
<td>[8]</td>
<td>Board Resolutions and Minutes to Approve an ABC</td>
<td>19A-44</td>
</tr>
<tr>
<td>[9]</td>
<td>Consent of Shareholders to an ABC</td>
<td>19A-45</td>
</tr>
<tr>
<td>[10]</td>
<td>Assignment for Benefit of Creditors Agreement</td>
<td>19A-46</td>
</tr>
</tbody>
</table>

CHAPTER 20

[Reserved]

CHAPTER 21

Planning the Business for a Future Initial Public Offering

James D. Marver

<table>
<thead>
<tr>
<th>§ 21.01</th>
<th>Introduction</th>
<th>21-2</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 21.02</td>
<td>Being Truly Public</td>
<td>21-4</td>
</tr>
<tr>
<td>[1]</td>
<td>Float</td>
<td>21-4</td>
</tr>
</tbody>
</table>
CHAPTER 22
Organizing a Delaware Corporation

Gregory V. Varallo

§ 22.01 Introduction ........................................ 22-3
[2] Scope of Forms in this Chapter .................. 22-5

§ 22.02 Formation ............................................ 22-6
[1] Certificate of Incorporation ..................... 22-6
[a] Forms: Mandatory Provisions with
   Commentary ........................................ 22-7
[b] Forms: Optional Provisions with
   Commentary ........................................ 22-9
   [i] Capitalization Provisions ................. 22-9
   [ii] “Shark Repellent” Provisions ......... 22-12
   [iii] Miscellaneous Provisions ............. 22-16
[c] Execution ............................................. 22-21

(Rel. 48)
CHAPTER 22

Bylaws

§ 22.03 Bylaws
[1] General Discussion
[2] Form: Bylaws with Commentary

§ 22.04 Corporate Management
[1] Board of Directors
[2] Officers
[4] Organizational Forms
  [a] Form: Waiver of Notice of Organization Meeting
  [b] Form: Minutes of Organization Meeting
  [c] Form: Written Consent of Directors

§ 22.05 Stock Purchase Agreement
[1] The Stock Purchase Agreement
[3] Form: Subscription Agreement

§ 22.06 Permitted Capitalizations
[1] Classes or Series of Capital Stock
  [a] By Share
  [b] By Status of Holder
[3] Preferences
[4] Conversion and Other Rights
  [a] Poison Pill

§ 22.07 Form of Notice of Meetings
[1] Form: Notice of Directors’ Meetings with Commentary
[2] Form: Notice of Stockholders’ Meetings with Commentary

§ 22.08 Checklist of Additional Documents That May Be Necessary

CHAPTER 23

Sample Start-Up Company Forms

Gregory C. Smith

§ 23.01 Incorporation
[1] Action of Sole Incorporator Electing Directors
[2] Action by Written Consent of Board of Directors (Upon Incorporation)
<table>
<thead>
<tr>
<th>Page</th>
<th>Section/Document</th>
</tr>
</thead>
<tbody>
<tr>
<td>23-7</td>
<td>Minutes of First Meeting of Board of Directors</td>
</tr>
<tr>
<td>23-14</td>
<td>§ 23.02 Certificate of Incorporation</td>
</tr>
<tr>
<td>23-14</td>
<td>[1] Certificate of Amendment to Certificate of Incorporation</td>
</tr>
<tr>
<td>23-15</td>
<td>[2] Certificate of Amendment to Certificate of Incorporation (Effecting Name Change)</td>
</tr>
<tr>
<td>23-16</td>
<td>[3] Introductory Language for Amended and Restated Certificate of Incorporation</td>
</tr>
<tr>
<td>23-20</td>
<td>§ 23.03 Board of Directors</td>
</tr>
<tr>
<td>23-20</td>
<td>[1] Notice of Special Meeting of Board of Directors</td>
</tr>
<tr>
<td>23-21</td>
<td>[2] Waiver of Notice of Meeting of Board of Directors</td>
</tr>
<tr>
<td>23-22</td>
<td>[3] Minutes of Regular Meeting of Board of Directors</td>
</tr>
<tr>
<td>23-38.2</td>
<td>§ 23.04 Stockholders</td>
</tr>
<tr>
<td>23-38.2</td>
<td>[1] Consent in Lieu of Meeting of Stockholders</td>
</tr>
<tr>
<td>23-38.3</td>
<td>[2] Notice of Special Meeting of Stockholders</td>
</tr>
<tr>
<td>23-38.4</td>
<td>[3] Notice of Annual Meeting of Stockholders</td>
</tr>
<tr>
<td>23-38.5</td>
<td>[4] Declaration of Mailing of Notice of Stockholders’ Meeting</td>
</tr>
<tr>
<td>23-38.6</td>
<td>[5] Notice to Certain Stockholders Pursuant to 228(e)</td>
</tr>
<tr>
<td>23-38.7</td>
<td>§ 23.05 Stock Certificates and Issuance</td>
</tr>
<tr>
<td>23-38.7</td>
<td>[1] Stock Ledger and Capitalization Summary</td>
</tr>
<tr>
<td>23-43</td>
<td>[4] Legends</td>
</tr>
<tr>
<td>23-46</td>
<td>§ 23.06 Stock Transfer and Sale</td>
</tr>
<tr>
<td>23-57</td>
<td>[5] Irrevocable Proxy</td>
</tr>
</tbody>
</table>

(Rel. 48)
CHAPTER 24

Intellectual Property Strategy and Joint Ventures

Joseph Yang

§ 24.01 Introduction ........................................ 24-2
§ 24.02 What is “IP”? ........................................ 24-4
§ 24.03 Joint Venture Structural Models ..................... 24-6
[1] Contractual Model ...................................... 24-6
[2] Entity Model ............................................. 24-7
[3] Two-Stage Model ........................................ 24-8
§ 24.04 IPR Allocation Generally ............................ 24-9
   [a] Conflicting Rights Under Default Laws ............... 24-10
      [i] Right to Exploit .................................. 24-10
      [ii] Right to Enforce ................................. 24-10
      [iii] International Considerations .................. 24-11
   [b] Enforceability of Contractual Provisions ............... 24-12
      [i] Against Third Parties ......................... 24-12
      [ii] Against Joint Owners Themselves ............... 24-12
   [c] Recommendations .................................... 24-13
   [a] IPR Ownership: Background, Nonderivative Foreground and Derivative Foreground IPR .... 24-13
   [b] Optimizing Rights to Use of the Non-IPR Owning Joint Venturers .......... 24-14
      [i] Licenses: Exclusivity, Field of Use and Royalties .... 24-14
      [ii] Noncompetition Covenants ...................... 24-14
§ 24.05 Exemplary Application of IPR Allocation Strategies to the Joint Venture Structural Models

[1] Contractual Model

[2] Entity Model

[3] Two-Stage Model

[a] Pre-Joint Venture Phase

[b] Joint Development (Contractual) Phase

[c] NewCo (Entity) Phase

§ 24.06 Exit Scenarios

[1] Merger or Acquisition of the Joint Venture Entity

[2] Dissolution of the Joint Venture Entity

[a] IPR Owned by the Joint Venture Entity

[b] Inbound Licenses from Third Parties

[c] Inbound Licenses from Joint Venturers

[d] Outbound Licenses from Joint Venture Entity

§ 24.07 Conclusion

§ 24.08 Sidebar: Exclusive Licenses

CHAPTER 25

Joint Ventures and Strategic Alliances

Kenton J. King

§ 25.01 Overview

§ 25.02 Alternatives to Legal Joint Ventures

§ 25.03 Choice of Entity

[1] In General

[2] Corporation

[3] Partnership

[4] Limited Liability Company

§ 25.04 Form: Joint Venture Term Sheet

[1] Introduction

[2] Sample Preliminary Nonbinding Term Sheet

(Rel. 48)
CHAPTER 26

Privacy and Data Security

Anna Hsia and Everett Monroe

§ 26.01 Introduction ........................................... 26-2
§ 26.02 Privacy by Design – Why It Matters and How to Do It ........................................... 26-4
  [1] Self-Regulatory Programs .................. 26-8
§ 26.03 Responsible Use of Cookies and Web Bugs ...... 26-10
  [1] Cookies and Web Bugs ....................... 26-10
      [a] Government Response to Behavioral Tracking ....................... 26-11
      [b] Industry Response to Behavioral Tracking ....................... 26-12
§ 26.04 Federal Privacy Laws .............................. 26-13
  [1] COPPA ........................................... 26-13
  [2] HIPAA ........................................... 26-17
  [4] CAN-SPAM .................................... 26-21
§ 26.05 State Privacy Laws .................................. 26-29
  [2] California Online Privacy Protection Act ...... 26-31
  [6] State Data Security and Data Breach Laws ....................... 26-33
  [7] Privacy of Personal Information Held by Internet Service Providers ....................... 26-34
  [8] False and Misleading Statements in Website Privacy Policies ....................... 26-34
§ 26.06 International Privacy Laws ......................... 26-36
CHAPTER 27

Acquisition Agreements

Robert T. Ishii and Derek Liu

§ 27.01 Introduction .................................................. 27-2
§ 27.02 Overview of the M&A Process .............................. 27-3
[1] Preliminary Discussions, Non-Disclosure,
   Letters of Intent, and Exclusivity
   Agreements .................................................. 27-3
[2] Due Diligence .................................................. 27-6
[4] Post-Signing to Closing ................................. 27-8
§ 27.03 Forms of Consideration ................................. 27-10
[1] Cash .................................................. 27-10
§ 27.04 Form of Acquisition Structure ............................ 27-14
[1] Mergers .................................................. 27-14
§ 27.05 Structure of the Merger Agreement ....................... 27-17
[1] Article I: The Merger and the Treatment of
   Equity .................................................. 27-17
[2] Article II and III: Representations and
   Warranties ............................................ 27-20
   [a] Scope .................................................. 27-30
   [b] Duration ............................................. 27-30
   [c] Limitation on Liability ............................. 27-30
   [d] Deductibles and Other Limitations ............ 27-31
   [e] Representation and Warranties
       Insurance ........................................... 27-31
§ 27.06 Form: Short-Form Buyer Merger Agreement ............ 27-33
§ 27.07 Form: Joinder Agreement ................................. 27-94
§ 27.08 Form: Escrow Agreement ................................. 27-116
CHAPTER 28

Ancillary Documents to Merger Agreements

Celeste E. Greene and Thomas J. Ivey

§ 28.01 Overview .............................................. 28-2

§ 28.02 Form: Indemnification Escrow Agreement .......... 28-3
  [1] Introduction .............................................. 28-3

§ 28.03 Form: Noncompetition Agreement ................... 28-19
  [1] Introduction .............................................. 28-19
  [2] Form of Noncompetition Agreement with Commentary ...................... 28-19

§ 28.04 Form: Voting Agreement .............................. 28-27
  [1] Introduction .............................................. 28-27

§ 28.05 Form: Registration Rights Agreement ............... 28-41
  [1] Introduction .............................................. 28-41
  [2] Form of Registration Rights Agreement with Commentary .............. 28-41

TABLE OF CASES ............................................... TC-1

INDEX .............................................................. I-1