TABLE OF CONTENTS

PART I
The Acquisition Process; Structuring the Deal

CHAPTER 1
The Basics: Acquisition Methods and an Overview of the Process

§ 1.01 Overview of the Acquisition Process ........ 1-2
§ 1.02 Acquisition Methods .......................... 1-4
   [1] Stock Purchases ............................. 1-4
   [6] Short-Form Mergers ...................... 1-10
   [7] Reversing the Structure ................. 1-12
      [a] Mergers of Equals ..................... 1-13
      [b] Target Repurchase as Part of the Acquisition Structure .... 1-15
   [9] Acquisitions of Less than an Entire Company .......................... 1-16
§ 1.03 Schematic Summary of Acquisition Methods ... 1-19
   [1] Stock Purchase ............................. 1-19
NEGOTIATED ACQUISITIONS

§ 1.04 The Acquisition Process

[1] Sequence of Events

[a] Initial Negotiations on Price and Terms; Letter of Intent

[b] Board Approval and Execution of the Acquisition Agreement

[c] The Period Pending Closing


[ii] Other Timing Considerations: Regulated Industries and Financing

[d] The Closing

[e] Post-Closing

§ 1.05 The Acquisition Agreement


[2] Representations and Warranties

[3] Covenants

[4] Conditions

[5] Indemnification

[6] Miscellaneous Matters: Choice of Law; Consent to Jurisdiction; Termination; Fees

§ 1.06 Interplay Between Representations and Warranties and Due Diligence

§ 1.07 The Purchase Price: Cash v. Noncash; Adjustment Mechanisms and the Effect of Seasonality

§ 1.08 Social Issues

CHAPTER 2

Structuring the Transaction—Non-Tax Considerations

§ 2.01 Scope of the Chapter

§ 2.02 Corporate Law Considerations: Board Approval
TABLE OF CONTENTS

§ 2.03 Corporate Law Considerations: Stockholder Approval—The Statutory Scheme             2-7
  [1] Stock Purchases                           2-7
  [2] Direct Mergers and Subsidiary Mergers    2-8
  [4] Binding Share Exchanges                   2-16

§ 2.04 Shareholder Approval—Stock Exchange and NASD Requirements; Other Requirements      2-17
  [2] NASD Requirements                           2-22.1
  [3] Other Shareholder Vote Requirements         2-25

§ 2.05 Parent Stockholder Approval Requirements in Transactions Involving the Disposition of Subsidiaries 2-26.1

§ 2.06 Appraisal Rights: A Structural Analysis                                           2-33
  [1] Target Stockholders                         2-34

§ 2.07 Comparison of the Laws of California, Delaware, New York and the Model Business Corporation Act 2-44

§ 2.08 Other Structuring Issues                                                          2-52
  [6] Other Structuring Considerations           2-68
  [7] Sarbanes-Oxley Structural Considerations   2-70

§ 2.09 Summary Guidelines on Structuring                                                2-71

CHAPTER 3

Tax and Accounting Matters

§ 3.01 Introduction                                                                       3-3

§ 3.02 Taxable Transactions                                                               3-5
  [2] Asset Sales; Direct and Forward Subsidiary Mergers                                   3-7

(Rel. 57)
NEGOTIATED ACQUISITIONS

§ 3.03 Reorganizations: Tax Free and Partially Tax Free Transactions
1. Continuity of Interest
2. Direct Mergers and Forward Subsidiary Mergers
3. Reverse Subsidiary Mergers
4. Stock for Stock Exchanges
5. Assets Acquisitions for Stock
6. Escrows and Contingent Stock

§ 3.04 Reorganizations: Treatment of Targets, Acquirors and Shareholders
1. Target Shareholders
   a. In General
   b. Escrowed and Contingent Stock
2. Treatment of Targets and Acquirors
3. Cross-Border Reorganizations

§ 3.05 Section 351 Transactions
1. Tax Treatment
2. Section 351 in Acquisitions

§ 3.06 Deductibility of Merger and Acquisition Expenses

§ 3.07 Accounting for Business Combinations
1. Historical Purchase Accounting and Pooling
   a. Purchase Accounting
   b. Pooling Accounting
2. Current Acquisition (or Purchase) Accounting Method
   a. Identifying the Acquiror
   b. Purchase Price Allocation, Treatment of Intangible Assets and Goodwill
   c. Financial Statement Disclosures
3. Recapitalizations and Leveraged Buyouts

§ 3.08 Special Tax Issues in Restructuring Financially Troubled Corporations
1. In General
2. Cancellation of Indebtedness (“COI”) Income
   a. Basic Principles
**TABLE OF CONTENTS**

[b] Exceptions to Recognition of COI Income 3-63
   [i] Insolvent Debtor or Debtor in Bankruptcy 3-63
   [ii] Prior Law: The Stock-for-Debt Exception 3-65
   [iii] Lost Deductions 3-65
   [iv] Purchase Price Reduction 3-65
   [v] Debt Contributed to Capital 3-65
[c] Deemed Exchange of Old Debt 3-66
[d] Acquisition of Indebtedness by “Related” Person 3-67
[e] Original Issue Discount 3-68

   [a] Basic Principles 3-69
   [b] Definition of “Ownership Change” 3-71
   [c] Special Rules for Determining Whether an Ownership Change Has Occurred 3-72
      [i] Certain Preferred Stock Not “Stock” 3-72
      [ii] Treatment of Options 3-72
      [iii] Determination of 5% Shareholders 3-75
      [iv] Worthless Stock Loss 3-80
   [d] Allocation of Income and Loss in the Year in Which the Ownership Change Occurs 3-80
   [e] Built-In Gains and Losses 3-81
   [f] Successive Ownership Changes 3-82
   [g] Continuity of Business Requirement 3-82
   [h] The Bankruptcy Exception 3-83
   [i] Issues Going Forward 3-94
   [j] Practical Use and Preservation of NOLs by Target 3-96
   [k] Conclusions—Practical Generalizations Regarding Transaction Structures 3-97
# Corporate Law Aspects of Acquisitions

## § 4.01 Introduction

4-2

## § 4.02 Duty of Care, Duty of Loyalty and the Business Judgment Rule

4-4

1. Duty of Care ........................................... 4-7
2. Duty of Loyalty ....................................... 4-10
3. Business Judgment Rule ................................. 4-23
4. Fiduciary Duties of Officers ............................ 4-26.5

## § 4.03 The Classic Case of Duty of Care Failure

4-26.9

## § 4.04 Board Duties and the Business Judgment Rule: The Rules of the Game When Selling the Company

4-39

1. Introduction and Preview ............................... 4-39
2. Enhanced Scrutiny .................................... 4-42
3. *Revlon* and the Duty to Maximize Short-Term Value 4-47
4. Conducting Auctions—The Legal Framework .......... 4-52
5. When Does the *Revlon* Duty Arise? ................... 4-64
6. Selling a Company the Old Fashioned Way ............ 4-78
   a. Typical Patterns of Sale ............................ 4-78
   b. Basic Rules ......................................... 4-82
   c. Lock-Ups; Termination Fees ......................... 4-103
   d. Enhanced Scrutiny .................................. 4-125
   e. Dealing with Conflicts; Use of Special Committees 4-137
7. Strategic Combinations and Mergers of Equals ........ 4-142.7
8. Summary ............................................... 4-142.14

## § 4.04A Representing Buyers

4-143

## § 4.05 Practical Lessons and Suggestions

4-144

## § 4.06 Duties to Other Constituencies

4-147

## § 4.07 Going Private

4-149

1. Delaware ................................................ 4-155
   a. Mergers ............................................. 4-155
   b. Tender Offers ...................................... 4-174.9
2. Other Jurisdictions .................................... 4-174.16
   a. New York .......................................... 4-174.16
   b. California ......................................... 4-174.18

## § 4.08 Appraisal Rights

4-174.24

1. Procedural Requirements for Perfection of Appraisal Rights 4-174.24
2. Determining Fair Value ................................ 4-174.38
TABLE OF CONTENTS

§ 4.09 Sales of Substantially All of a Corporation’s Assets ........................................... 4-175
§ 4.10 De Facto Mergers ................................................................. 4-182.1
§ 4.11 Transactions Involving Controlling Sellers.
[1] Sale of Control.................................................. 4-184
[2] Sale of Entire Company ....................... 4-188
§ 4.12 Dealing with Preferred Stock ................... 4-194

CHAPTER 5

Legal and Regulatory Concerns

§ 5.01 Introduction ................................................................. 5-5
§ 5.02 Securities Act of 1933 and Related Matters.
[1] Registered Transactions............... 5-7
[3] Resales and Registration Rights;
   Rules 144 and 145 ............... 5-49
[4] The Trust Indenture Act ............... 5-64.2
[5] Cross Border Transactions ............ 5-64.3
§ 5.03 Securities Exchange Act of 1934 ............... 5-64.6
[1] Certain Disclosure and Filing Requirements ....................... 5-64.6
[2] The Proxy Rules ............... 5-84
[3] Third Party and Self Tenders:
   The Tender Offer Rules ............... 5-95
   [a] In General .................. 5-95
   [b] Third Party Tenders ............ 5-100.1
   [c] Exchange Offers ............... 5-120
   [d] Section 13e-4 ............... 5-124

(Rel. 59)
NEGOTIATED ACQUISITIONS

[i] Issuer Tender Offers .... 5-124
[ii] Odd-Lot Tender Offers ... 5-126
[iii] Modified “Dutch
  Auctions” ................. 5-127
[e] Section 14(e) and
  Regulation 14E ............ 5-128
[f] Section 14(f) ............... 5-130
[g] Multinational Tender Offers .... 5-131
[i] In General .............. 5-131
[ii] Statutory Framework .... 5-133
[iii] Tier I Exemption (10%
  (or Fewer) U.S.
  Shareholders) ............. 5-136
[iv] Tier II Exemption (40%
  (or Fewer) U.S.
  Shareholders) ............. 5-138
[v] Rule 14e-5 ............... 5-142
[vi] Offers for Securities not
  Registered Under the
  Exchange Act ............... 5-144

[a] The Statute ............ 5-145
[b] Who Is Covered ........... 5-148
[i] Officers ............... 5-148
[ii] Directors ............ 5-148
[iii] 10% Holder .......... 5-149
[c] Calculation of Profit .... 5-150
[d] Derivative Securities .... 5-151
[i] Definition ............ 5-151
[ii] Application .......... 5-152
[e] Mergers and Related
  Transactions ............. 5-153
[f] Treatment of Equity Held by
  Officers and Directors in
  Mergers and Similar
  Transactions ............. 5-156.2

  Considerations ............ 5-158
[a] Scope of the Rule ........ 5-160
[b] Timing and Dissemination
  Requirements ............ 5-168
[c] Filing Requirements ........ 5-169
[d] Disclosure Requirements .... 5-170
[i] General Disclosure
  Requirements ............ 5-170
[ii] Disclosure as to
  Fairness ............... 5-172
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 5.04</td>
<td>Hart-Scott-Rodino Antitrust Improvements Act</td>
<td>5-184</td>
</tr>
<tr>
<td>1</td>
<td>H-S-R Act Summary</td>
<td>5-184</td>
</tr>
<tr>
<td>2</td>
<td>H-S-R Filing Considerations</td>
<td>5-186.4</td>
</tr>
<tr>
<td>§ 5.05</td>
<td>Acquisitions in Regulated Industries</td>
<td>5-186.10</td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>5-186.10</td>
</tr>
<tr>
<td>2</td>
<td>The Communications Act</td>
<td>5-186.11</td>
</tr>
<tr>
<td>[a]</td>
<td>In General</td>
<td>5-186.11</td>
</tr>
<tr>
<td>[b]</td>
<td>The Application Process</td>
<td>5-187</td>
</tr>
<tr>
<td>[c]</td>
<td>Multiple Ownership</td>
<td>5-189</td>
</tr>
<tr>
<td>3</td>
<td>Federal Aviation Act</td>
<td>5-190</td>
</tr>
<tr>
<td>4</td>
<td>Interstate Commerce Termination Act</td>
<td>5-192</td>
</tr>
<tr>
<td>5</td>
<td>Public Utility Holding Company Act</td>
<td>5-194</td>
</tr>
<tr>
<td>6</td>
<td>Atomic Energy Act</td>
<td>5-199</td>
</tr>
<tr>
<td>[a]</td>
<td>Introduction</td>
<td>5-199</td>
</tr>
<tr>
<td>[b]</td>
<td>Financial Qualifications</td>
<td>5-201</td>
</tr>
<tr>
<td>[c]</td>
<td>Decommissioning Funding</td>
<td>5-202</td>
</tr>
<tr>
<td>[d]</td>
<td>Technical Qualifications</td>
<td>5-202</td>
</tr>
<tr>
<td>[e]</td>
<td>Foreign Ownership</td>
<td>5-203</td>
</tr>
<tr>
<td>[f]</td>
<td>Procedure</td>
<td>5-204</td>
</tr>
<tr>
<td>7</td>
<td>Federal Power Act</td>
<td>5-205</td>
</tr>
<tr>
<td>8</td>
<td>State Insurance Regulation</td>
<td>5-206</td>
</tr>
<tr>
<td>9</td>
<td>State Liquor Regulation</td>
<td>5-207</td>
</tr>
<tr>
<td>§ 5.06</td>
<td>Bulk Sales Laws</td>
<td>5-209</td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>5-209</td>
</tr>
<tr>
<td>2</td>
<td>Article 6 Summary</td>
<td>5-210</td>
</tr>
<tr>
<td>3</td>
<td>Comparing and Contrasting Article 6 With Revised Article 6</td>
<td>5-214</td>
</tr>
<tr>
<td>§ 5.07</td>
<td>Margin Rules</td>
<td>5-216</td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>5-216</td>
</tr>
<tr>
<td>2</td>
<td>Regulations G and U</td>
<td>5-217</td>
</tr>
<tr>
<td>[a]</td>
<td>In General</td>
<td>5-217</td>
</tr>
<tr>
<td>[b]</td>
<td>Indirectly Secured Credits; the “Junk Bond Interpretation”</td>
<td>5-220</td>
</tr>
<tr>
<td>[c]</td>
<td>Aggregating Loans; The Single Credit Rule</td>
<td>5-222</td>
</tr>
<tr>
<td>3</td>
<td>Regulation T</td>
<td>5-223</td>
</tr>
<tr>
<td>§ 5.08</td>
<td>The Worker Adjustment and Retraining Notification Act (“WARN Act”)</td>
<td>5-224.1</td>
</tr>
</tbody>
</table>
§ 5.09 Non-U.S. Antitrust Merger Regulations

[1] In General .......................... 5-228

Antitrust Merger Filings .................. 5-230

[a] European Union (EU Merger
Regulation) ............................... 5-230

[i] Preemption of National
Laws .................................. 5-230

[ii] Acquisition of control ........... 5-230

[iii] Summary of EUMR ................. 5-230

[b] National Mandatory Notification
Antitrust Merger Regulations
(EEA) .................................. 5-231

[i] Austria .............................. 5-231

[ii] Belgium ............................. 5-233

[iii] Bulgaria ............................ 5-233

[iv] Croatia .............................. 5-234

[v] Cyprus ............................... 5-234

[vi] Czech Republic ..................... 5-235

[vii] Denmark ............................ 5-235

[viii] Estonia ............................. 5-236

[ix] Finland .............................. 5-236

[x] France ............................... 5-237

[xi] Germany ............................. 5-237

[xii] Greece ............................... 5-238

[xiii] Hungary ............................ 5-239

[xiv] Iceland .............................. 5-239

[xv] Ireland ............................... 5-240

[xvi] Italy ................................ 5-240

[xvii] Latvia .............................. 5-240.1

[xviii] Lithuania .......................... 5-240.1

[xix] Malta ............................... 5-240.2

[xx] Netherlands ......................... 5-240.2

[xxi] Norway ............................... 5-240.3

[xxii] Poland .............................. 5-240.3

[xxiii] Portugal ........................... 5-240.4

[xxiv] Romania ............................. 5-240.5

[xxv] Slovak Republic ................... 5-240.5

[xxvi] Slovenia ............................. 5-240.6

[xxvii] Spain .............................. 5-240.6

[xxviii] Sweden ............................. 5-240.7

[c] National Voluntary Notification
Antitrust Merger Regulations
(EEA) .................................. 5-240.7

[i] United Kingdom ...................... 5-240.7

[d] No Formal Antitrust Merger
Control (EEA) ........................... 5-240.8
### Mandatory Filing Systems in other Selected European and Middle Eastern Countries
- Liechtenstein
- Luxembourg
- Israel
- Russian Federation
- Switzerland
- Turkey
- Ukraine

### Mandatory Filing Systems in Selected Asian Countries
- China
- India
- Japan
- South Korea
- Taiwan

### Mandatory Filing Systems in Select African Jurisdictions
- South Africa
- Common Market for Eastern and Southern Africa (COMESA)

### Mandatory Filing Systems in North American and Latin American Countries
- Brazil
- Canada
- Mexico

### Significant Voluntary Filing Systems
- Australia
- New Zealand
- Singapore
- UEMOA (West African Economic and Monetary Union)

---

§ 5.10 Sarbanes-Oxley Act of 2002 and Related Reforms

1. Introduction
2. Disclosure Issues
   - Certification Statements
   - Disclosure Controls and Procedures
   - Internal Controls
CHAPTER 6

Letters of Intent

§ 6.01 Advantages and Disadvantages .......................... 6-1
§ 6.02 Contents of a Letter of Intent ............................. 6-6
§ 6.03 The Binding Nature of Letters of Intent .............. 6-10
[1] In General .................................................. 6-10
[5] Promissory Estoppel .......................... 6-30.1
§ 6.04 Tortious Interference with Contract ................. 6-31

CHAPTER 7

Timing of Disclosure

§ 7.01 In General .................................................. 7-1
§ 7.02 Regulatory Considerations ......................... 7-18
[1] SEC Requirements .......................... 7-18

CHAPTER 8

The Due Diligence Investigation

§ 8.01 Purpose of Due Diligence ............................... 8-2
§ 8.02 Identifying the Team and Managing the Process; The Lawyer’s Role ................. 8-5
TABLE OF CONTENTS

[1] In General ......................... 8-5
[2] The Lawyer’s Role .................. 8-8
   [a] Corporate Organization
      Documents and Stock
      Transfer Records .............. 8-9
   [b] Debt Obligations and Material
      Agreements .................... 8-10
   [c] Title to Property .............. 8-11
   [d] Litigation ...................... 8-12
   [e] Compliance with Laws and
      Regulations .................... 8-12
§ 8.03 A Sample Due Diligence Checklist .......... 8-13
§ 8.04 Special Due Diligence Topics ................. 8-23
   [1] Environmental Due Diligence ....... 8-23
      [a] In General .................. 8-23
      [b] Environmental Issues
      Checklist ...................... 8-23
   [2] Products Liability Due Diligence
      Checklist ...................... 8-25
   [3] Intellectual Property Due Diligence .... 8-27
      [a] In General .................. 8-27
      [b] Intellectual Property Due
      Diligence Checklist ............ 8-28
      [a] In General .................. 8-30
      [b] Sarbanes-Oxley Due Diligence
      Checklist ...................... 8-31
   [5] Due Diligence and Attorney-Client
      Privilege ....................... 8-32

CHAPTER 9

Confidentiality Agreements

§ 9.01 In General .......................... 9-1
§ 9.02 Standard Terms ........................ 9-3
§ 9.03 Special Problems Presented by the Sharing of
      Information by Competitors ...... 9-13
§ 9.04 “Standstill” Agreements .................. 9-16
§ 9.05 Disclosure of Confidential Information .... 9-22

Chapters 10 through 22 and the Index appear in Volume 2
# TABLE OF CONTENTS

## PART II

The Acquisition Agreement; General Provisions

### CHAPTER 10

**Disclosure Schedules**

| § 10.01  | Introduction | 10-1 |
| § 10.02  | The Disclosure Schedule as an Exception | 10-3 |
| § 10.03  | The Use of Disclosure Schedules to Assist the Buyer’s Due Diligence | 10-6 |
| § 10.04  | Extent of Disclosure | 10-8 |
| [1] Blanket Disclosure and Cross Referencing | 10-8 |
| [3] Level of Specificity | 10-11 |
| § 10.05  | Timing Considerations in the Delivery of Disclosure Schedules | 10-12 |
| [1] Supplementing Disclosure Schedules | 10-12 |

### CHAPTER 11

**Seller Representations and Warranties**

| § 11.01  | General Considerations | 11-2 |
| [1] Purpose of Representations | 11-3 |

v

(Rel. 58)
NEGOTIATED ACQUISITIONS

[2] Scope of Representations................. 11-9
[3] Timing Considerations and
   Representations: Effect
   of the Bringdown.................... 11-14

§ 11.02 Knowledge Qualifications.............. 11-17
§ 11.03 Materiality Limitations............... 11-21
[1] In General................................ 11-21
[2] Appropriate Use of Materiality
   Qualifications....................... 11-25

§ 11.04 Specific Representations of the
   Seller.................................. 11-27
[1] In General............................. 11-27
[2] Corporate Organization
   and Existence......................... 11-27
[3] Good Standing as a Foreign
   Corporation........................... 11-31
[4] Capitalization and Title
   to Stock................................ 11-35
[5] Subsidiaries........................... 11-40
[7] No Violations; Approvals................ 11-44
[8] Financial Statements; Undisclosed
   Liabilities............................ 11-48
[9] No Material Adverse Change............. 11-57
[10] Litigation.............................. 11-75
    Matters............................... 11-77
[12] Title to Assets......................... 11-80.2
[14] Employee Benefits Plans............... 11-81
[15] No Misleading Statements; Nonreliance
    Clauses............................... 11-86
[16] Other Representations.................... 11-91
  [a] Inventory and Accounts
     Receivable.......................... 11-92
  [b] Insurance............................ 11-93
  [c] Customers and
     Suppliers............................ 11-93
  [d] Contracts and Leases.................. 11-94
  [e] Securities Filings.................... 11-95
  [f] Proxy Statement...................... 11-95
  [g] Sufficiency of Assets................. 11-95
  [h] Intellectual Property................ 11-96
  [i] Affiliated Transactions............... 11-98
  [j] Labor Matters........................ 11-99
  [k] Brokers and Finders................... 11-100
### CHAPTER 12

**Representations and Warranties of the Buyer**

- **§ 12.01** General Considerations .......................... 12-1
- **§ 12.02** Purposes of Representations of the Buyer .... 12-3
- **§ 12.03** Specific Representations of the Buyer ......... 12-5
  1. Buyer’s Ability to Consummate the Transaction .......... 12-5
  2. Valuation of the Buyer’s Equity ................... 12-6
- **§ 12.04** Financing Representations of the Buyer ........ 12-9

### CHAPTER 13

**Covenants**

- **§ 13.01** Introduction ...................................... 13-1
- **§ 13.02** Covenants Relating to the Transaction Process... 13-6
  1. Covenants Generally Included ...................... 13-6
  2. Special Transaction Covenants ............. 13-11
  3. Covenants Concerning the Buyer’s Financing .......... 13-12
  4. Covenants Relating to Stockholder Approval .... 13-13
  6. Antitrust and Regulatory Considerations ....... 13-18
- **§ 13.03** Covenants Relating to the Operation of the Business ........................................ 13-19
- **§ 13.04** Post-Closing Covenants .......................... 13-26.4
  1. In General ............................................ 13-26.4
  2. Registration Rights ................................. 13-27
  3. Covenants Not to Compete ........................... 13-29
  4. Non-Solicitation of Employees .................... 13-30
  5. Confidentiality .................................. 13-30
  6. Retention of Records and Availability of the Company’s Personnel Post-Closing ................. 13-31
- **§ 13.05** “No-Shops,” Termination Fees and Expense Reimbursement Provisions .................. 13-32
  1. “No-Shop” Provisions .............................. 13-32
  2. Termination Fees and Expense Reimbursement Provisions .......... 13-42.2
- **§ 13.06** “Best Efforts,” “Reasonable Best Efforts,” and Similar Obligations .......................... 13-44

(Rel. 58)
## NEGOTIATED ACQUISITIONS

### CHAPTER 14

#### Conditions

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14.01</td>
<td>Introduction</td>
<td>14-2</td>
</tr>
<tr>
<td>§ 14.02</td>
<td>The Bringdown; Compliance with Covenants</td>
<td>14-9</td>
</tr>
<tr>
<td>[1]</td>
<td>Accuracy of Representations at Signing</td>
<td>14-9</td>
</tr>
<tr>
<td>[4]</td>
<td>Transactions Otherwise Contemplated by the Agreement</td>
<td>14-14</td>
</tr>
<tr>
<td>[6]</td>
<td>Liability</td>
<td>14-17</td>
</tr>
<tr>
<td>[7]</td>
<td>Compliance with Covenants</td>
<td>14-17</td>
</tr>
<tr>
<td>§ 14.03</td>
<td>Governmental and Third-Party Consents</td>
<td>14-18.1</td>
</tr>
<tr>
<td>[1]</td>
<td>In General</td>
<td>14-18.1</td>
</tr>
<tr>
<td>[3]</td>
<td>State Environmental Regulations</td>
<td>14-21</td>
</tr>
<tr>
<td>§ 14.04</td>
<td>Litigation</td>
<td>14-23</td>
</tr>
<tr>
<td>§ 14.05</td>
<td>Shareholder Approval; Securities Law</td>
<td>14-28.1</td>
</tr>
<tr>
<td>[1]</td>
<td>Shareholder Approval</td>
<td>14-28.1</td>
</tr>
<tr>
<td>§ 14.06</td>
<td>Accounting Conditions</td>
<td>14-38</td>
</tr>
<tr>
<td>[1]</td>
<td>Background</td>
<td>14-38</td>
</tr>
<tr>
<td>[a]</td>
<td>Audited Financial Statements</td>
<td>14-41</td>
</tr>
<tr>
<td>[b]</td>
<td>Unaudited Financial Statements</td>
<td>14-41</td>
</tr>
<tr>
<td>[c]</td>
<td>Period Subsequent to the Most Recent Quarterly Financial Statements</td>
<td>14-42</td>
</tr>
<tr>
<td>[d]</td>
<td>Miscellaneous Financial Data</td>
<td>14-43</td>
</tr>
<tr>
<td>[e]</td>
<td>Pro Forma Financials</td>
<td>14-43</td>
</tr>
<tr>
<td>§ 14.07</td>
<td>Tax Rulings and Opinions</td>
<td>14-47</td>
</tr>
<tr>
<td>§ 14.08</td>
<td>Fairness Opinions</td>
<td>14-48.5</td>
</tr>
<tr>
<td>§ 14.09</td>
<td>Legal Opinions</td>
<td>14-52</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

[1] A Theoretical Analysis .................. 14-52
[2] Applications; Practicalities .......... 14-54
  [a] In General ...................... 14-54
  [b] Specific Examples ................ 14-56
  [i] Due Organization .............. 14-56
  [ii] Foreign Good Standing ....... 14-57
  [iii] Capitalization .............. 14-58
  [iv] Authorization and
       Enforcement ................. 14-59
  [v] List of Other Frequently
      Requested Opinions .......... 14-60
  [vi] Buyer’s Counsel Opinions .... 14-61
§ 14.10 Due Diligence Conditions ....... 14-63
§ 14.11 Miscellaneous Conditions ....... 14-65
[1] Book Value/EBITDA Tests ......... 14-65
[2] Execution and Delivery of Other
    Documents and Agreements ....... 14-65
    Securities ..................... 14-66
[6] Employment Related Conditions .... 14-68

CHAPTER 15

Indemnification

§ 15.01 Introduction ................. 15-2
§ 15.02 General Liability Issues .... 15-7
[1] Scope of Indemnification ........ 15-7
  [a] Seller’s Indemnification of the Buyer
      for Breaches of Representations
      and Warranties .............. 15-8
  [b] Buyer’s Indemnification of the Seller
      for Breaches of Representations
      and Warranties .............. 15-11
  [c] Buyer’s Post-Closing Activities .... 15-12
  [d] Specific Areas for
      Indemnification ............ 15-12
  [e] Third Party Claims ............. 15-14
  [f] Seller’s Pre-Closing Activities
      and “Unknowns” ............. 15-17
[2] Survival of Representations and
    Warranties .................... 15-20
[4] Exclusivity of Indemnification .... 15-34.4

(Rel. 60)
NEGOTIATED ACQUISITIONS

§ 15.03 Negotiating Issues in Indemnification Provisions 15-34.13
[1] Baskets, Ceilings and Thresholds 15-34.13
[2] The Effect of Tax Benefits or Insurance on Indemnification 15-34.15
[3] Identity of Parties Covered by Indemnification 15-34.18
[4] Effect of Knowledge and Fraud Exclusions 15-34.21

§ 15.04 Other Liability Issues 15-34.28
[1] Transferee or Successor Liability 15-34.28
[a] Fraudulent Conveyance and Bulk Sales Statutes 15-34.28
[b] De Facto Mergers 15-35
[c] Successor Liability Imposed by Statute or Case Law 15-35

§ 15.05 Drafting Indemnification Provisions 15-38
[1] Use of Securities to Satisfy Indemnification Obligations 15-38

§ 15.06 Collectibility of Indemnification: Set-Offs and Escrows 15-46.2
[1] In General 15-46.2
[a] Amount Put In Escrow 15-48
[b] Exclusivity of Escrow 15-49
[c] Duration 15-49
[d] Administration of Escrow 15-49
[e] Securities as Escrow Collateral 15-50

§ 15.07 Representation and Warranty Insurance 15-51
[1] In General 15-51

CHAPTER 15A

Miscellaneous Provisions

§ 15A.01 In General 15A-1
§ 15A.02 Termination Provisions 15A-4
§ 15A.03 Third-Party Beneficiaries; Enforceability
Issue ........................................... 15A-5

PART III
The Acquisition Agreement; Special Provisions

CHAPTER 16
Acquisitions of Public Companies

§ 16.01 Introduction .................................. 16-2
§ 16.02 Multistep Transactions ......................... 16-7
[1] The Basic Transaction ............................. 16-7
[2] Stock Purchase and Option
    Agreements ................................. 16-13
[5] Legal and Regulatory Issues ..................... 16-33
    [a] In General ............................... 16-33
    [b] Best Price Rule ........................... 16-45
§ 16.03 Public Company Merger Agreements .......... 16-59
[1] In General .................................... 16-59
[3] Covenants ................................... 16-61
[4] Conditions, Termination Rights and
    Termination Fees ............................ 16-66
§ 16.04 Indemnification and Contingent Payment
    Rights ........................................ 16-66.4
§ 16.05 Pricing in Stock Deals ......................... 16-69
§ 16.06 Shareholders Rights Plans ..................... 16-74
[1] Flip-In/Flip-Over Plans ........................ 16-75
    [a] Description of Plan ...................... 16-75
    [b] NOL Plans and an Actual
        Flip-In .................................... 16-83
    [c] Flip-In and Flip-Over Plans
        and Negotiated Acquisitions .......... 16-84
[4] “Dead Hand” and Nonredeemable
    Rights Plans ............................... 16-88

(Rel. 59)
CHAPTER 17

Acquisitions of Subsidiaries, Divisions and Private Companies: Purchase Price Considerations

§ 17.01 Types of Purchase Price

[1] Medium of Payment


§ 17.02 Post-Closing Adjustments

§ 17.03 Contingent Payment Mechanisms: Earn-Outs

§ 17.04 Accounting Procedures and Dispute Resolution Mechanisms Applicable to Post-Closing Adjustments and Earn-Outs

CHAPTER 18

Acquisitions of Subsidiaries, Divisions and Private Companies: General Issues

§ 18.01 Introduction

§ 18.02 Identifying the Assets to Be Transferred

§ 18.03 Identifying the Liabilities to Be Transferred

§ 18.04 Receivables and Payables

§ 18.05 Support Arrangements

§ 18.06 Covenants Not to Compete

§ 18.07 Transferee or Successor Liability

[1] In General

[2] De Facto Mergers

[3] Fraudulent Conveyances

[4] Successor Liability Imposed by Statute or Case Law

[a] Products Liability

[b] Environmental Liability

[c] Labor Relations

[i] Stock Transactions

[ii] Asset Transactions

[iii] Successors and Assigns Clauses

[iv] Effects Bargaining

[v] Accretion
TABLE OF CONTENTS

[d] Other Employee Matters ........ 18-39
[i] Worker Adjustment and Retraining Notification (WARN) Act ........ 18-39
[ii] Potential Liability for Violations of Employment Laws ........ 18-42
[iii] Restrictive Covenants .... 18-44
[iv] Wage Payment ........ 18-44
[v] Personnel Records .... 18-44

CHAPTER 19

Acquisitions of Subsidiaries and Divisions Special Tax and Employee Benefits Aspects

§ 19.01 Introduction .................. 19-2
§ 19.02 Special Tax Considerations Applicable to the Acquisition of a Subsidiary or Division From a Consolidated Group ........ 19-3
    [a] Taxable Sale of Target’s Stock .... 19-3
    [b] Taxable Sale of Target’s Assets . 19-4
    [c] Deemed Asset Sale Under Code Section 338(h)(10) .... 19-6
[3] Indemnification for Pre-Acquisition Taxes and Control of Tax Audits .... 19-10
    [a] Tax Indemnity ........ 19-10
    [b] Tax Audits ........ 19-10
[4] Allocation of Target’s Tax Liability for the Taxable Year That Includes the Date of Acquisition .......... 19-11
§ 19.03 Qualified Benefit Plans ........ 19-13
[1] Introduction ................ 19-13
    [a] Distributions by the Seller .... 19-15
    [b] Recognition of Prior Service by the Seller and the Buyer .... 19-16

(Rel. 51)
NEGOTIATED ACQUISITIONS

[a] Recognition of Prior Service by Buyer .......................... 19-18
[b] Issues Relating to the Transfer of Assets .................. 19-18
[c] Issues Relating to Nondiscrimination Requirements .... 19-20

§ 19.04 Multiemployer Plan Liability .......................... 19-21
   [a] Successor Liability ................................ 19-21
   [b] Sale of Assets .................................. 19-22

§ 19.05 Other Employee Benefit Issues .................. 19-24

PART IV

Special Topics; LBOS, Troubled Companies and Miscellaneous Topics

CHAPTER 20

Leveraged Buyouts and Recapitalizations

§ 20.01 Introduction .................................. 20-1
§ 20.02 Structure and Financing .................. 20-7
   [1] Different Structures; Effects on Creditors ............. 20-7
       [a] Structure 1: Stock Purchase ........... 20-7
       [b] Structure 2a: Stock Purchase Followed by Merger ...... 20-12
       [c] Structure 2b: Reverse Subsidiary Merger ............. 20-12
       [d] Structure 3: Upstream Guaranty ............ 20-14
       [e] Structure 4: Redemption by Target ............. 20-15
       [f] Structure 5: Target Loan to Purchaser ............ 20-16
       [g] Structures 2a-5: Remedies for Creditors .......... 20-16
       [h] Structure 6: Asset Purchase ............. 20-18
       [i] Structure 7: Forward Merger ............. 20-20
TABLE OF CONTENTS

[2] Subordination ........................................ 20-20.1

§ 20.03 Fraudulent Conveyance Issues .................. 20-27
[1] In General ............................................. 20-27

§ 20.04 The Acquisition Agreement in a Leveraged
Buyout .................................................. 20-41

§ 20.05 Equity Arrangements in Leveraged
Buyouts .................................................. 20-47

§ 20.06 Partial LBOs ........................................ 20-54

§ 20.07 Leveraged Recapitalizations ...................... 20-56

CHAPTER 21

Acquisitions and Dispositions of All or
Part of a Troubled Company

§ 21.01 Overview of the Problem ......................... 21-2

§ 21.02 The Acquisition Process in a Troubled
Company Situation ................................. 21-6
[1] The Due Diligence Process ................. 21-6
[4] Differences in the Acquisition
Agreement .............................................. 21-9
[5] Indemnification .................................... 21-10
[6] Lock-Ups, Termination Fees, Expense
Reimbursement and Other
Bidding Incentives .......................... 21-12

§ 21.03 Fiduciary Duties of Directors of Financially
Troubled Corporations ......................... 21-15

§ 21.04 Special Issues in Troubled Company
Acquisitions ........................................... 21-27
[1] Fraudulent Transfer .............................. 21-27
[4] Right to Reject or Assume
Contracts ........................................... 21-32

§ 21.05 Strategies Associated with Troubled
Company Acquisitions ......................... 21-34
[1] In General ........................................... 21-34
[2] Pre-Bankruptcy Acquisition
Strategies ............................................... 21-37
[4] Acquisition Strategies Within
the Bankruptcy Process .................... 21-42

(Rel. 53)
NEGOTIATED ACQUISITIONS

[a] Sales Under Section 363 .............. 21-42
[b] Comparing Section 363 Sales
and Sales Pursuant to a
Plan of Reorganization ............ 21-49
[i] Advantages of a 363 Sale........ 21-49
[ii] Advantages of a Sale
Pursuant to a Plan
of Reorganization............ 21-49

CHAPTER 22

Some Miscellaneous Topics

§ 22.01 Introduction.......................... 22-2
§ 22.01A Mergers of Equals.................. 22-3
[1] The Definition ......................... 22-3
Table 22-1 – Social Issues and
Protective Provisions in Selected
Mergers of Equals ................. 22-10.3
§ 22.01B Regulatory Divestitures Within Larger
Transactions .............................. 22-10.18
§ 22.02 Partial Acquisitions................. 22-11
§ 22.03 Cash Election Mergers............. 22-17
§ 22.04 Financial Advisors.................. 22-22
[1] In General.............................. 22-22
[3] Liability ............................... 22-29
§ 22.05 Acquisitions in the United States by Foreign
Companies......................... 22-36.6
[1] SEC Requirements................... 22-37
[a] Communication...................... 22-41
[b] Shipping .............................. 22-42
[c] Aviation .............................. 22-42
[d] Defense .............................. 22-44
[e] Energy and Natural Resources..... 22-45
[f] State Regulation..................... 22-46
§ 22.06 Auctioning a Company............. 22-47
§ 22.07 Treatment of Options and Stock Based
Awards; Golden Parachute Payments..... 22-55
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Options and Stock Based Awards</td>
<td>22-55</td>
</tr>
<tr>
<td>[3]</td>
<td>Deferred Compensation Arrangements:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Impact of Code Section 409A</td>
<td>22-57</td>
</tr>
<tr>
<td>[a]</td>
<td>Accelerating Payments to Closing</td>
<td>22-58</td>
</tr>
<tr>
<td>[b]</td>
<td>Subjecting Payments to Additional Vesting Requirements</td>
<td>22-58.1</td>
</tr>
<tr>
<td>[c]</td>
<td>Special Earn-Out Provisions</td>
<td>22-58.1</td>
</tr>
<tr>
<td>[d]</td>
<td>Treatment of Stock Rights</td>
<td>22-58.2</td>
</tr>
<tr>
<td>§ 22.08</td>
<td>Registrations Rights Agreements</td>
<td>22-58.5</td>
</tr>
</tbody>
</table>

INDEX

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>INDEX</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>