

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
	[2] Asset Purchases	1-5
	[3] Mergers	1-6
	[4] Three-Party Mergers	1-8
	[5] Binding Share Exchanges	1-9
	[6] Short-Form Mergers	1-10
	[7] Reversing the Structure	1-12
	[8] Some Variations	1-13
	[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
	[10] Acquisitions of Partnerships, Limited Partnerships, and Limited Liability Companies	1-16
	[11] Issues to Be Considered in the Different Structures	1-18
§ 1.03	Schematic Summary of Acquisition Methods . . .	1-19
	[1] Stock Purchase	1-19
	[2] Asset Purchase	1-21

NEGOTIATED ACQUISITIONS

	[3] Parent/Target Merger	1-23
	[4] Forward Subsidiary Merger	1-24
	[5] Reverse Subsidiary Merger	1-26
§ 1.04	The Acquisition Process	1-28
	[1] Sequence of Events	1-28
	[a] Initial Negotiations on Price and Terms; Letter of Intent	1-28
	[b] Board Approval and Execution of the Acquisition Agreement	1-30
	[c] The Period Pending Closing	1-31
	[i] The Main Timing Considerations: Federal Securities Laws and the Hart-Scott-Rodino Act	1-31
	[ii] Other Timing Considerations: Regulated Industries and Financing Considerations	1-34
	[d] The Closing	1-36
	[e] Post-Closing	1-37
	[2] Deferred or Simultaneous Closings	1-37
§ 1.05	The Acquisition Agreement	1-39
	[1] The “Deal” Provisions	1-40.1
	[2] Representations and Warranties	1-40.2
	[3] Covenants	1-41
	[4] Conditions	1-41
	[5] Indemnification	1-42
	[6] Miscellaneous Matters: Choice of Law; Consent to Jurisdiction; Termination; Fees	1-42
§ 1.06	Interplay Between Representations and Warranties and Due Diligence	1-43
§ 1.07	The Purchase Price: Cash v. Noncash; Adjustment Mechanisms and the Effect of Seasonality	1-44
§ 1.08	Social Issues	1-47

CHAPTER 2

Structuring the Transaction— Non-Tax Considerations

§ 2.01	Scope of the Chapter	2-2
§ 2.02	Corporate Law Considerations: Board Approval	2-3

TABLE OF CONTENTS

vii

§ 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
	[3] Asset Sales	2-14
	[4] Binding Share Exchanges	2-16
§ 2.04	Shareholder Approval—Stock Exchange and NASD Requirements; Other Requirements	2-17
	[1] Stock Exchange Rules	2-18
	[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] Stockholders of the Acquiring Entity	2-35
	[3] “Market Out” Exceptions	2-37
	[4] Critical Perspectives	2-39
§ 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
	[1] Basic Observations on the Transfer and Assumption of Assets and Liabilities	2-52
	[2] Third Party Consents	2-53
	[3] Governmental Consents	2-66
	[4] Transfer Taxes	2-66
	[5] Mechanics; Documentation	2-67
	[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
	[1] Basic Income Tax Consequences	3-5
	[2] Asset Sales; Direct and Forward Subsidiary Mergers	3-7

NEGOTIATED ACQUISITIONS

	[3]	Stock Sales; Reverse Subsidiary Mergers	3-11
	[4]	Indemnification; Escrows	3-14
	[5]	Sales of Subsidiaries and Divisions	3-15
§ 3.03		Reorganizations: Tax Free and Partially Tax Free Transactions	3-16
	[1]	Continuity of Interest	3-17
	[2]	Direct Mergers and Forward Subsidiary Mergers	3-22
	[3]	Reverse Subsidiary Mergers	3-24
	[4]	Stock for Stock Exchanges	3-26
	[5]	Assets Acquisitions for Stock	3-27
	[6]	Escrows and Contingent Stock	3-29
§ 3.04		Reorganizations: Treatment of Targets, Acquirors and Shareholders	3-31
	[1]	Target Shareholders	3-31
		[a] In General	3-31
		[b] Escrowed and Contingent Stock	3-33
	[2]	Treatment of Targets and Acquirors	3-34
	[3]	Cross-Border Reorganizations	3-36
§ 3.05		Section 351 Transactions	3-41
	[1]	Tax Treatment	3-41
	[2]	Section 351 in Acquisitions	3-42
§ 3.06		Deductibility of Merger and Acquisition Expenses	3-42.2
§ 3.07		Accounting for Business Combinations	3-42.6
	[1]	Historical Purchase Accounting and Pooling	3-43
		[a] Purchase Accounting	3-43
		[b] Pooling Accounting	3-45
	[2]	Current Acquisition (or Purchase) Accounting Method	3-49
		[a] Identifying the Acquiror	3-49
		[b] Purchase Price Allocation, Treatment of Intangible Assets and Goodwill	3-51
		[c] Financial Statement Disclosures	3-54
	[3]	Recapitalizations and Leveraged Buyouts	3-55
§ 3.08		Special Tax Issues in Restructuring Financially Troubled Corporations	3-61
	[1]	In General	3-61
	[2]	Cancellation of Indebtedness (“COI”) Income	3-61
		[a] Basic Principles	3-61

TABLE OF CONTENTS

ix

	[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
[3]		Net Operating Losses of the Financially Troubled Corporation	3-69
	[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

CHAPTER 4

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] <i>Revlon</i> and the Duty to Maximize Short-Term Value	4-47
	[4] Conducting Auctions—The Legal Framework	4-52
	[5] When Does the <i>Revlon</i> 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	4-156
	[a] Mergers	4-156
	[b] Tender Offers	4-174.10
	[2] Other Jurisdictions	4-174.17
	[a] New York	4-174.17
	[b] California	4-174.19
§ 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

xi

§ 4.09	Sales of Substantially All of a Corporation's Assets	4-175
§ 4.10	<i>De Facto</i> Mergers	4-182.1
§ 4.11	Transactions Involving Controlling Sellers.	4-184
	[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.	5-7
	[1] Registered Transactions.	5-7
	[2] Exempt Securities and Exempted Transactions	5-24
	[a] Private Placements and Regulation D	5-25
	[b] Same Issuer Exchanges	5-38
	[c] Regulation S and Rule 144A	5-40
	[d] Miscellaneous Exemptions	5-48
	[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
	[a] Regulation 13D	5-64.6
	[b] Regulation 13G	5-77
	[c] Form 8-K.	5-79
	[2] The Proxy Rules	5-84
	[a] General Disclosure Requirements.	5-89
	[b] Projections.	5-92.6
	[c] Banker's Fee Arrangements, Reports	5-92.15
	[d] Solicitation Provisions	5-92.17
	[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

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
[4]		Insider Trading: Section 16.	5-145
	[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
[5]		Going Private: Rule 13e-3 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 OF CONTENTS

xiii

	[6]	Regulation M: Manipulative Trade Practices	5-177
	[a]	Rule 101—Activities by Distribution Participants	5-180
	[b]	Rule 102—Activities by Issuers and Selling Security Holders	5-181
§ 5.04		Hart-Scott-Rodino Antitrust Improvements Act	5-184
	[1]	H-S-R Act Summary	5-184
	[2]	H-S-R Filing Considerations	5-186.4
§ 5.05		Acquisitions in Regulated Industries	5-186.10
	[1]	Introduction	5-186.10
	[2]	The Communications Act	5-186.11
	[a]	In General	5-186.11
	[b]	The Application Process	5-187
	[c]	Multiple Ownership	5-189
	[3]	Federal Aviation Act	5-190
	[4]	Interstate Commerce Termination Act	5-192
	[5]	Public Utility Holding Company Act	5-194
	[6]	Atomic Energy Act	5-199
	[a]	Introduction	5-199
	[b]	Financial Qualifications	5-201
	[c]	Decommissioning Funding	5-202
	[d]	Technical Qualifications	5-202
	[e]	Foreign Ownership	5-203
	[f]	Procedure	5-204
	[7]	Federal Power Act	5-205
	[8]	State Insurance Regulation	5-206
	[9]	State Liquor Regulation	5-207
§ 5.06		Bulk Sales Laws	5-209
	[1]	Introduction	5-209
	[2]	Article 6 Summary	5-210
	[3]	Comparing and Contrasting Article 6 With Revised Article 6	5-214
§ 5.07		Margin Rules	5-216
	[1]	Introduction	5-216
	[2]	Regulations G and U	5-217
	[a]	In General	5-217
	[b]	Indirectly Secured Credits; the “Junk Bond Interpretation”	5-220
	[c]	Aggregating Loans; The Single Credit Rule	5-222
	[3]	Regulation T	5-223
§ 5.08		The Worker Adjustment and Retraining Notification Act (“WARN Act”)	5-224.1

NEGOTIATED ACQUISITIONS

§ 5.09	Non-U.S. Antitrust Merger Regulations	5-228
	[1] In General	5-228
	[2] Abbreviated Checklist of Non-U.S. 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

TABLE OF CONTENTS

	[i]	Liechtenstein	5-240.8
	[ii]	Luxembourg	5-240.8
[e]		Mandatory Filing Systems in other Selected European and Middle Eastern Countries	5-240.8
	[i]	Israel	5-240.8
	[ii]	Russian Federation	5-240.9
	[iii]	Switzerland	5-240.11
	[iv]	Turkey	5-240.11
	[v]	Ukraine	5-240.12
[f]		Mandatory Filing Systems in Selected Asian Countries	5-240.13
	[i]	China	5-240.13
	[ii]	India	5-240.14
	[iii]	Japan	5-240.15
	[iv]	South Korea	5-240.16
	[v]	Taiwan	5-240.17
[g]		Mandatory Filing Systems in Select African Jurisdictions	5-240.18
	[i]	South Africa	5-240.18
	[ii]	Common Market for Eastern and Southern Africa (COMESA)	5-240.19
[h]		Mandatory Filing Systems in North American and Latin American Countries	5-240.20
	[i]	Brazil	5-240.20
	[ii]	Canada	5-240.20
	[iii]	Mexico	5-240.22
[i]		Significant Voluntary Filing Systems	5-240.23
	[i]	Australia	5-240.23
	[ii]	New Zealand	5-240.23
	[iii]	Singapore	5-240.23
	[iv]	UEMOA (West African Economic and Monetary Union)	5-240.23
§ 5.10		Sarbanes-Oxley Act of 2002 and Related Reforms	5-241
	[1]	Introduction	5-241
	[2]	Disclosure Issues	5-242
	[a]	Certification Statements	5-242
	[b]	Disclosure Controls and Procedures	5-246
	[c]	Internal Controls	5-247

NEGOTIATED ACQUISITIONS

	[d]	Non-GAAP Financial Measures	5-249
	[e]	Off-Balance Sheet Arrangements	5-250
[3]		Personal Loans	5-251
[4]		Audit Related Reforms	5-251
	[a]	Audit Services	5-251
	[b]	Auditor Independence	5-252
[5]		Director Independence	5-252

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
	[2]	A Question of Intent: The New York Cases	6-17
	[3]	<i>Texaco v. Pennzoil</i>	6-22
	[4]	Breach of the Duty to Negotiate in Good Faith	6-25
	[5]	Promissory Estoppel	6-30
§ 6.04		Tortious Interference with Contract	6-31

CHAPTER 7

Timing of Disclosure

§ 7.01		In General.	7-1
	[1]	The Case Law: <i>Basic</i> and Its Progeny	7-1
	[2]	The Practical Approach	7-13
§ 7.02		Regulatory Considerations	7-18
	[1]	SEC Requirements	7-18
	[a]	Regulation FD	7-19
	[2]	Exchange Requirements	7-19

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

xvii

[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
[4]	Sarbanes-Oxley Act of 2002.	8-30
[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 Document	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
	[2] Disclosure of Immaterial Items and Disclaimers	10-9
	[3] Level of Specificity	10-11
§ 10.05	Timing Considerations in the Delivery of Disclosure Schedules	10-12
	[1] Supplementing Disclosure Schedules	10-12
	[2] Delayed Disclosure Schedules	10-12

CHAPTER 11

Seller Representations and Warranties

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

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
	[3]	Double Materiality	11-26.1
§ 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
	[6]	Due Authorization	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
	[11]	Compliance with Law: Environmental Matters	11-77
	[12]	Title to Assets	11-80.2
	[13]	Taxes	11-80.3
	[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
	[5] Covenants Necessary in Stock Acquisitions	13-15
	[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

CHAPTER 14

Conditions

§ 14.01	Introduction	14-2
§ 14.02	The Bringdown; Compliance with Covenants	14-9
	[1] Accuracy of Representations at Signing	14-9
	[2] Time Frame of the Representations	14-11
	[3] Double Materiality	14-12
	[4] Transactions Otherwise Contemplated by the Agreement	14-14
	[5] Delivery of Officers' Certificate	14-15
	[6] Liability	14-17
	[7] Compliance with Covenants	14-17
§ 14.03	Governmental and Third-Party Consents	14-18.1
	[1] In General	14-18.1
	[2] Hart-Scott-Rodino Waiting Period	14-20
	[3] State Environmental Regulations	14-21
	[4] Non-U.S. Competition and Foreign Investment Approvals Transactions	14-22
§ 14.04	Litigation	14-23
§ 14.05	Shareholder Approval; Securities Law Matters	14-28.1
	[1] Shareholder Approval	14-28.1
	[2] Dissenters' Appraisal Rights	14-28.1
	[3] Federal Securities Laws	14-31
	[4] State Securities Laws	14-33
	[5] Stock Exchange Listing; Securities Exchange Act Registration	14-34
	[6] Rule 145 Letters	14-35
§ 14.06	Accounting Conditions	14-38
	[1] Background	14-38
	[2] Acquisitions	14-40
	[3] Form of Letter	14-41
	[a] Audited Financial Statements	14-41
	[b] Unaudited Financial Statements	14-41
	[c] Period Subsequent to the Most Recent Quarterly Financial Statements	14-42
	[d] Miscellaneous Financial Data	14-43
	[e] <i>Pro Forma</i> Financials	14-43
	[4] Observations	14-44
	[5] Comfort Letters in Nonregistered Transactions	14-45
§ 14.07	Tax Rulings and Opinions	14-47
§ 14.08	Fairness Opinions	14-48.5
§ 14.09	Legal Opinions	14-52

TABLE OF CONTENTS

ix

	[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
	[3]	Absence of Options, Convertible Securities	14-66
	[4]	Financing	14-66
	[5]	No Material Adverse Change	14-67
	[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
	[3]	Scope of Losses	15-32
	[4]	Exclusivity of Indemnification	15-34.5

NEGOTIATED ACQUISITIONS

§ 15.03	Negotiating Issues in Indemnification	
	Provisions	15-34.14
	[1] Baskets, Ceilings and Thresholds	15-34.14
	[2] The Effect of Tax Benefits or Insurance on Indemnification	15-34.16
	[3] Identity of Parties Covered by Indemnification	15-34.19
	[4] Effect of Knowledge and Fraud Exclusions	15-34.22
§ 15.04	Other Liability Issues	15-34.30
	[1] Transferee or Successor Liability	15-34.30
	[a] Fraudulent Conveyance and Bulk Sales Statutes	15-34.30
	[b] <i>De Facto</i> Mergers	15-35
	[c] Successor Liability Imposed by Statute or Case Law	15-35
	[2] Liability Under the Federal Securities Laws and State Securities Laws	15-36
§ 15.05	Drafting Indemnification Provisions	15-38
	[1] Use of Securities to Satisfy Indemnification Obligations	15-38
	[2] Joint and Several Liability	15-38
	[3] Indemnification Procedures	15-43
§ 15.06	Collectibility of Indemnification: Set-Offs and Escrows	15-48
	[1] In General	15-48
	[2] Rights of Set-Off	15-48
	[3] Escrow Arrangements	15-48.1
	[a] Amount Put In Escrow	15-48.2
	[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
	[2] Some Commonly Encountered Terms	15-52
	[3] Typical Process for Obtaining a Policy	15-55

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
	[3] The Tender Offer	16-25
	[4] The Merger	16-29
	[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
	[2] Representations and Warranties	16-60
	[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
	[2] Back-End Plans	16-86
	[3] Rights Plans and Competing Bidders ...	16-87
	[4] “Dead Hand” and Nonredeemable Rights Plans	16-88

CHAPTER 17

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

§ 17.01	Types of Purchase Price	17-1
	[1] Medium of Payment	17-2
	[2] Valuation Techniques and Mechanisms of Payment	17-6
	[3] Timing of Payments	17-9
	[4] Valuation Issues Associated with Equity Securities	17-9
§ 17.02	Post-Closing Adjustments	17-12
§ 17.03	Contingent Payment Mechanisms: Earn-Outs . . .	17-28
§ 17.04	Accounting Procedures and Dispute Resolution Mechanisms Applicable to Post-Closing Adjustments and Earn-Outs . . .	17-38.2

CHAPTER 18

**Acquisitions of Subsidiaries, Divisions and Private
Companies: General Issues**

§ 18.01	Introduction	18-2
§ 18.02	Identifying the Assets to Be Transferred	18-5
§ 18.03	Identifying the Liabilities to Be Transferred . . .	18-9
§ 18.04	Receivables and Payables	18-12
§ 18.05	Support Arrangements	18-14
§ 18.06	Covenants Not to Compete	18-15
§ 18.07	Transferee or Successor Liability	18-17
	[1] In General	18-17
	[2] <i>De Facto</i> Mergers	18-17
	[3] Fraudulent Conveyances	18-20
	[4] Successor Liability Imposed by Statute or Case Law	18-21
	[a] Products Liability	18-21
	[b] Environmental Liability	18-26
	[c] Labor Relations	18-31
	[i] Stock Transactions	18-32
	[ii] Asset Transactions	18-34
	[iii] Successors and Assigns Clauses	18-36
	[iv] Effects Bargaining	18-37
	[v] Accretion	18-39

TABLE OF CONTENTS xiii

[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
[1]	Taxable Acquisitions	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
[2]	Target Subsidiary's Liability For Unpaid Federal Income Taxes of Seller's Consolidated Group	19-9
[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
[2]	Retention of Plan Assets and Liabilities by the Seller	19-15
[a]	Distributions by the Seller	19-15
[b]	Recognition of Prior Service by the Seller and the Buyer	19-16
[3]	Assumption of the Seller's Plan Assets by the Buyer	19-18

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
	[1]	Withdrawal Liability	19-21
		[a] Successor Liability	19-21
		[b] Sale of Assets.	19-22
	[2]	Contributions	19-22
§ 19.05		Other Employee Benefit Issues	19-24
	[1]	Welfare Benefit Plans	19-24
	[2]	Severance Plans	19-24
	[3]	Employment Law Violations.	19-25

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

xv

	[2] Subordination	20-20.1
§ 20.03	Fraudulent Conveyance Issues	20-27
	[1] In General	20-27
	[2] Recharacterization as a Dividend	20-40.3
§ 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
	[2] Timing of Disclosure	21-7
	[3] Multiplicity of Parties	21-8
	[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
	[2] Bulk Transfer Laws	21-29
	[3] Successor Liability	21-30
	[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
	[3] “Prepackaged” Bankruptcies	21-39
	[4] Acquisition Strategies Within the Bankruptcy Process	21-42

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
	[2] Effecting a Merger of Equals	22-10
	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
	[2] Fairness Opinions	22-23
	[3] Liability	22-29
	[4] Engagement Letters	22-36.2
§ 22.05	Acquisitions in the United States by Foreign Companies	22-36.6
	[1] SEC Requirements	22-37
	[2] Exon-Florio Amendment	22-38
	[3] Regulated Industries	22-40.1
	[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
	[4] Reporting Requirements	22-46
§ 22.06	Auctioning a Company	22-47
§ 22.07	Treatment of Options and Stock Based Awards; Golden Parachute Payments	22-55

TABLE OF CONTENTS

xvii

[1]	Options and Stock Based Awards	22-55
[2]	Golden Parachute Provisions	22-56.1
[3]	Deferred Compensation Arrangements:	
	Impact of Code Section 409A	22-57
	[a] Accelerating Payments to Closing	22-58
	[b] Subjecting Payments to Additional Vesting Requirements	22-58.1
	[c] Special Earn-Out Provisions	22-58.1
	[d] Treatment of Stock Rights	22-58.2
[4]	Equity Incentive Compensation in Private Equity Transactions	22-58.3
§ 22.08	Registrations Rights Agreements	22-58.5
INDEX	I-1