

TABLE OF CONTENTS

Volume 1

CHAPTER 1

Initial Decision on Choice of Entity

John B. Power & Richard S. Kolodny

§ 1.01	Scope of Chapter	1-4
	[1] Introduction	1-4
	[2] Overview of Chapter	1-4.1
§ 1.02	Summary of Major Considerations in Choice of Entity	1-6
	[1] Checklist of Characteristics	1-6
	[2] Additional Factors to Consider	1-7
§ 1.03	Preliminary Considerations	1-9
	[1] Introduction	1-9
	[2] Gathering Information	1-9
	[3] Regulatory Considerations	1-10
	[a] Regulation Affecting Formation of the Enterprise	1-10
	[b] Operational Regulation	1-11
	[4] Governing Law	1-12
	[5] Formation and Maintenance Costs	1-13
	[6] Deadlock and Dissolution	1-14
§ 1.04	The Role of Counsel	1-16
§ 1.05	Sole Proprietorships	1-18
	[1] Fundamental Characteristics	1-18
	[2] Formation and Maintenance Costs	1-19
	[3] Governing Law	1-19
	[4] Continuity of Existence	1-20
	[5] Transferability of Interests	1-20
	[6] Ease of Changing the Entity	1-21
	[7] Conclusion	1-21

§ 1.06	General Partnerships	1-23
	[1] Preliminary Considerations	1-23
	[2] Governing Law	1-23
	[3] Formation of the General Partnership	1-25
	[4] Formation and Maintenance Costs	1-27
	[5] Informal Partnerships	1-27
	[6] Liability for Partnership Obligations	1-29
	[7] Management and Control	1-30
	[8] Mutual Agency of Partners	1-31
	[9] Fiduciary Relationships	1-33
	[10] Continuity of Existence	1-36
	[11] Transferability of Interests	1-38
	[12] Conclusion	1-39
§ 1.07	Limited Partnerships	1-41
	[1] Preliminary of Considerations	1-41
	[2] Formation of the Limited Partnership	1-41
	[3] Formation and Maintenance Costs	1-43
	[4] Governing Law	1-44
	[5] Limited Liability	1-45
	[6] Management and Control	1-47
	[7] Fiduciary Relationships	1-48
	[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
	[2] Formation of the Corporation	1-51
	[3] Formation and Maintenance Costs	1-53
	[4] Governing Law	1-55
	[5] Limited Liability	1-56
	[6] Piercing the Corporate Veil	1-57
	[7] Management and Control	1-59
	[8] Fiduciary Obligations of Directors and Officers	1-61
	[9] Continuity of Existence	1-62
	[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

xxi

	[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
	[4]	Business Trusts	1-77
	[5]	S Corporations	1-81
	[6]	Limited Liability Partnerships and Limited Liability Limited Partnerships	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		<i>Form</i> : Indemnification Agreement (Delaware Corporation)	1-89

CHAPTER 2

Legal Mechanics of Organizing Corporations

Dror Futter

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

	[6]	Appraisal	2-7
	[7]	Call of Stockholders Meetings	2-7
	[8]	Anti-Takeover Statutes	2-8
§ 2.04		Articles of Incorporation.	2-9
	[1]	Name of the Corporation	2-9
	[2]	Purposes and Powers.	2-9
	[3]	Authorized Capital	2-9
	[a]	Number and Classes of Shares	2-9
	[b]	Par Value	2-11
	[4]	Name and Address of Resident Agent.	2-12
	[5]	Duration	2-12
	[6]	Other Permissive Provisions	2-13
	[7]	Filing of the Articles.	2-13
§ 2.05		Bylaws	2-14
	[1]	Meetings of Directors	2-14
	[2]	Voting Rights	2-14
	[3]	Officers	2-14
	[4]	Indemnification	2-15
	[5]	Fiscal Year.	2-15
§ 2.06		Organizational Meeting of Directors	2-16
§ 2.07		Other Mechanical Steps	2-17
	[1]	Corporate Seal	2-17
	[2]	Stock Book and Minute Book	2-17
	[3]	Application for Employer Identification Number	2-17 2-17
§ 2.08		Certain Tax Considerations.	2-18
	[1]	Section 351	2-18
	[2]	Thin Capitalization	2-18
	[3]	Organizational Expense.	2-19
§ 2.09		Foreign Qualification	2-20
§ 2.10		“Doing Business as” and Fictitious Business Names	2-22 2-22
§ 2.11		State Information Filings	2-23
§ 2.12		Reports to Shareholders	2-24
§ 2.13		Other Agreements	2-25
§ 2.14		<i>Form</i> : Sample Organizational Resolutions	2-27

CHAPTER 3

Mechanics of Forming LLCs and Other Partnerships

Susan Cooper Philpot

§ 3.01	Introduction	3-2
§ 3.02	Formation Documents	3-4

TABLE OF CONTENTS

xxiii

	[1] Limited Liability Articles of Organization . . .	3-4
	[2] General Partnership	3-5
	[3] Limited Liability Partnership Registration	3-7
	[4] Certificate of Limited Partnership	3-8
	[5] Certificate of Limited Liability Limited Partnership	3-9
	[6] Limited Liability Company Articles of Organization	3-8
§ 3.03	The Operating or Partnership Agreement	3-10
	[1] Name	3-10
	[2] Term.	3-11
	[3] Purpose	3-11
	[4] Designation of Agents and Officers.	3-12
	[5] Admission of Members/Partners.	3-12
	[6] The Capital Account	3-13
	[7] Capital Contributions	3-13
	[8] Allocations of Profits and Losses.	3-14
	[9] Distributions	3-16
	[10] Governance	3-16
	[11] Compensation of Management.	3-17
	[12] Fiduciary Duties; Exculpation and Indemnification.	3-17
	[13] Meetings and Voting.	3-18
	[14] Transferability of Interests	3-18
	[15] Buy/Sell Arrangements	3-19
	[16] Books and Records	3-19
	[17] Withdrawal and Expulsion	3-20
	[18] Dissolution and Termination.	3-20
	[19] Amendments	3-20
§ 3.04	Other LLC and Partnership Formation Matters.	3-22
§ 3.05	Special Considerations for LLCs and other Partnership Entities.	3-23
	[1] Income Tax Treatment	3-23
	[2] Cost and Complexity of Formation and Maintenance	3-23
	[3] Raising Capital	3-24
	[4] Employee Equity Incentives	3-25
	[5] Acquisition Structures.	3-27
	[6] Exit Strategies	3-27
§ 3.06	Businesses Best Suited to the LLC or Partnership Form	3-30
§ 3.06A	<i>Form:</i> Sample Limited Liability Certificate of Formation (Delaware)	3-30.1
§ 3.07	<i>Form:</i> Sample Limited Liability Company Operating Agreement.	3-30.2
	[1] Introduction	3-30.2
	[2] Sample Form	3-30.2

§ 3.08	<i>Form</i> : Sample Limited Liability Company Operating Agreement (Single Member)	3-53
	[1] Introduction	3-53
	[2] Sample Form	3-53

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
	[1] The Concept of a Security	4-5
	[2] An “Offer”	4-6
	[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] <i>Ralston Purina Co.</i>	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 \$10 Million	4-15
	[iii] Accredited Investors	4-17
	[iv] Number of Purchasers	4-21
	[v] General Solicitations and Advertising	4-21
	[vi] Information Requirements	4-25
	[vii] Resale Limitations	4-27
	[viii] Notice of Sale	4-29
	[ix] Integration	4-29
	[x] Insignificant Deviations	4-33
	[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

	[v] Employees and Consultants Requirements	4-34
	[vi] Limitations of Offering Amounts	4-35
	[vii] Disclosure Requirements	4-36
	[viii] Integration	4-38
	[ix] Resale Limitations	4-38
	[x] Exchange Act Registration Requirements	4-38
	[b] Foreign Offerings—Regulation S	4-39
	[i] In General	4-39
	[ii] Requirements	4-40
	[iii] Resale Limitations	4-41
	[c] Intrastate Offerings	4-41
	[i] Section 3(a)(11)	4-41
	[ii] Rule 147 and Rule 147A	4-42
	[d] Section 4(a)(5)—Offerings Up to \$5 Million	4-46
	[e] Rule 1001—California	4-46
	[f] Regulation A—Qualified Offerings Up to \$75 Million	4-47
	[i] Issuer Limitations	4-48
	[ii] Offering Size Limitations	4-49
	[iii] Type of Purchaser	4-49
	[iv] Integration	4-50
	[v] Offering Conditions	4-50
	[vi] SEC Qualification	4-51
	[vii] Disclosure Requirements	4-51
	[viii] Insignificant Deviations	4-52
	[g] Crowdfunding	4-52
	[i] Issuer Limitations	4-54
	[ii] Offering Size Limitations	4-54
	[iii] Integration	4-55
	[iv] Offering Conditions	4-55
	[v] Disclosure Requirements	4-57
	[vi] Insignificant Deviations	4-60
	[3] Integration of Public Offerings and Private Placements	4-60
	[4] Minimum/Maximum and All-or-None Offerings	4-62
	[5] Placement Agents or Other Selling Representatives	4-62
§ 4.04	Antifraud Disclosure Obligations	4-64.1
	[1] Section 12(a)(2) of the Securities Act	4-64.1
	[2] Rule 10b-5 of the Exchange Act	4-64.1
§ 4.05	Remedies	4-66

	[1]	Violations of the Registration Requirements of Section 5	4-66
	[2]	Violations of the Antifraud Provisions	4-66
	[a]	Section 12(a)(2) of the Securities Act.	4-66
	[b]	Rule 10b-5 of the Exchange Act.	4-66
§ 4.05A		State Securities Laws	4-68
§ 4.06		Chart Summarizing Exemptions.	4-69
§ 4.07		<i>Form</i> : Accredited Investor Questionnaire— Offerings Under Rule 504 or 506(b).	4-77
§ 4.08		<i>Form</i> : Accredited Investor Questionnaire— Offerings Under Rule 506(c).	4-78

CHAPTER 5

State Securities Laws Considerations of Raising Capital

Michele A. Kulerman

§ 5.01		Introduction	5-4.1
	[1]	Overview of the State Securities Laws	5-4.1
	[2]	Focus of Chapter 5: Blue Sky Compliance.	5-6
	[3]	Scope of Chapter 5: Statutory Exemptions from Registration under Blue Sky Laws.	5-7
	[4]	Blue Sky Compliance: Due Diligence	5-7
§ 5.02		Development of the State Securities Laws	5-9
	[1]	Uniform Securities Act: General	5-9
	[2]	Overview of Blue Sky Law	5-10
	[a]	Applicability	5-11
	[b]	Registration or Exemption.	5-12
	[c]	Analysis of Blue Sky Law.	5-12
§ 5.03		Jurisdictional Basis: State Jurisdiction over Offers and Sales of Securities	5-14
	[1]	Summary	5-14
	[2]	“Offer” or “Sale”	5-15
	[a]	Generally.	5-15
	[b]	“For Value”	5-15
	[c]	Exclusions from the Definitions of “Offer” and “Sale”	5-16
	[d]	Advertisements as “Offers”	5-17
	[3]	“Security”	5-18
	[a]	Generally.	5-18
	[b]	Limited Liability Company Interests.	5-19
	[c]	Limited Partnership Interests	5-20
	[4]	“In the State”	5-20
	[a]	Generally.	5-20
	[b]	Internet Offers “In This State”	5-22

TABLE OF CONTENTS

xxvii

§ 5.04	Raising Capital in States: Overview of Non-Public Private Offerings	5-24
	[1] Generally	5-24
	[2] Registration Requirement	5-24
	[a] Exemption from State Registration for the Security	5-24
	[b] Exemption from State Registration for the Transaction.	5-25
	[3] Exemptions for Non-Public Offerings	5-26
	[a] Organizational Exemptions: State Considerations	5-26
	[b] Exempt Offerings for Small Business Entities	5-27
	[c] The State Limited Private Offering Exemption	5-28
	[i] Application of Uniform Securities Act	5-28
	[ii] Availability of Exemption.	5-29
	[d] Institutional Investor Exemption	5-35
§ 5.05	Regulation D Rule 506 Private Placement Offerings: The “Safe Harbor” Exemption	5-37
	[1] Background	5-37
	[a] Rulemaking.	5-37
	[2] Overview of Regulation D	5-38
	[a] Lifting the Ban on General Solicitation	5-39
	[b] “Bad Actor” Disqualification.	5-40
	[c] The Definition of “Accredited Investor”: Natural Person and Institutional Entity Investor.	5-41
	[3] Requirements for Rule 506 Offering	5-41
	[a] Rule 506(b)	5-42
	[b] Rule 506(c)	5-43
	[c] Filing and Disclosure Requirements.	5-43
	[i] State Notice Filing Requirements.	5-44
	[ii] “Public” versus “Private” Offering in New York	5-47
	[d] Sales Commission	5-48
	[4] Applicability of FINRA to Regulation D	5-49
§ 5.06	Special State Issues: Raising Capital in California, New York, Texas.	5-50
	[1] Summary	5-50
	[2] California.	5-50
	[a] Section 25102(f) Limited Offering Exemption	5-50
	[b] Section 25102(n) Qualified Purchaser Exemption	5-53

START-UP & EMERGING COMPANIES

	[c]	Nonpublic Debt Offering Exemption	5-54
	[d]	Organizational Exemption	5-54
	[3]	New York	5-55
	[a]	The Martin Act: Registration of Persons Not Securities	5-55
	[b]	Newly Adopted Regulations	5-56
	[c]	Real Estate Securities and the New Regulations	5-58
	[d]	Rule 506 Offerings in New York: In General	5-59
	[4]	Texas	5-60
	[a]	Organizational and Small Offering Exemptions	5-60
	[b]	Exemption for Intrastate Sales to Thirty-Five (35) Persons	5-61
§ 5.07		Model Accredited Investor Exemption: Limited Public Solicitation of Accredited Investors	5-62.1
	[1]	Generally	5-62.1
	[2]	Conditions of Exemption	5-62.1
	[3]	General Announcement of the Offering	5-63
	[4]	Electronic Posting and Delivery of Additional Information	5-64
	[5]	Disadvantages of the MAIE	5-64
	[6]	Other Factors	5-65
§ 5.08		Statutory Exemptions for Public Offerings: Rule 504 of Regulation D, Regulation A+, and Regulation Crowdfunding	5-66
	[1]	Background: Limited Offerings of Securities without Registration	5-66
	[2]	Offerings under Rule 504	5-67
	[a]	Generally	5-67
	[b]	Prohibition on General Solicitation and Issuance of Restricted Securities	5-68
	[c]	Bad Actor Disqualification	5-68
	[d]	Exceptions and Waivers to Disqualification	5-69
	[3]	Regulation A Offerings	5-69
	[a]	Generally	5-69
	[b]	Eligibility of Issuers	5-70
	[c]	Compliance and Disclosure	5-71
	[d]	State Securities Laws	5-71
	[i]	Tier 1 Offerings	5-73
	[ii]	Tier 2 Offerings	5-73
	[4]	Federal Regulation Crowdfunding (Regulation CF)	5-74
	[5]	Role of the States	5-77
§ 5.09		The Employee Benefit Plan Exemption	5-78

TABLE OF CONTENTS

xxix

	[1] Summary	5-78
	[2] Requirements	5-79
	[3] Coverage of the Employee Benefit Plan	
	Exemption/Alternative Exemptions	5-79
	[a] Application of the Uniform	
	Securities Act	5-80
	[b] Rule 701	5-82
	[c] State Exemptions Based on Federal	
	Rule 701	5-83
§ 5.10	Broker-Dealer and Agent Registration	
	Exemptions	5-85
	[1] Summary	5-85
	[2] Issuer as “Broker-Dealer”	5-86
	[3] Associated Persons as “Agents”	5-87
	[4] Platform or Mechanism: Section 4(b) of the	
	1933 Act and State Blue Sky Law	5-87
§ 5.11	Small Entity Public Offerings: Categories of State	
	Registration	5-89
	[1] Registration of Securities for a Small Public	
	Offering: General Requirements	5-89
	[a] Types of Registration	5-90
	[b] Merit Review Standards	5-91
	[2] Small Corporate Offering Registration	
	(“SCOR”)	5-92
	[a] Summary	5-92
	[b] Application for SCOR Registration ..	5-93
	[c] Regional Coordinated Review	5-93
	[d] Conditions	5-94
	[e] Audited Financial Statements	5-94
	[3] Selling Agent Issues in State Registration ..	5-95
§ 5.12	Coordinated State Review of Registered Public	
	Offerings for Start-up Companies	5-96
	[1] Coordinated Review – Equity	
	(“CR-EQUITY”)	5-96
	[2] Coordinated Review – Small Corporate	
	Offering Registration Offerings	
	(“CR-SCOR”)	5-97
	[3] Coordinated Review – Direct Participation	
	Programs (“CR-DPP”)	5-98
	[4] Coordinated Review – Regulation A Tier 1	
	Offerings	5-98
	[5] Secondary Trading	5-99
§ 5.13	Civil and Criminal Liabilities	5-100
	[1] Summary	5-100
	[2] Broad State Regulatory Powers	5-100
	[3] Criminal Penalties	5-101
	[4] Civil Liabilities	5-101
	[5] Overview of Fraud and State Enforcement ..	5-103

CHAPTER 6

[Reserved]

CHAPTER 7

The Venture Financing Process*Dror Futter*

§ 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
	[3] Evaluation of Financing Alternatives	7-5
	[4] Relationship of the Financing Strategy and the Business Plan	7-8
	[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
	[4] Management	7-13
	[5] The Product	7-13
	[6] Marketing and Sales	7-14
	[a] The Market	7-14
	[b] Competition	7-15
	[c] Projected Market Penetration	7-15
	[7] Manufacturing Operations	7-16
	[8] Corporate Organization	7-17
	[9] Financial Statements and Projections	7-17
	[10] Appendices	7-18
§ 7.04	Working with Venture Capitalists	7-19
	[1] Overview and Objectives	7-19
	[2] Initial Contacts	7-20
	[3] Presentation	7-21
	[4] Due Diligence	7-21
	[5] Negotiations and Closing	7-23

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
	[2] Investor Participation	8-5
	[a] Lead Investor and Financing Amount	8-5
	[b] Fiduciary Duty	8-6
	[c] Friends and Family	8-6
	[3] Terms of the Security	8-7
	[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
	[4] Investor Rights Agreement	8-12
	[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
	[6] Stock Purchase Agreement	8-15
	[a] Representations and Warranties	8-15
	[b] Closing Conditions	8-15
	[7] Additional Provisions	8-16
	[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
	[2] Gross-Up Provisions	8-21
	[3] Preference and Participation	8-21
	[4] Voting	8-22
	[5] Forced Conversion	8-22
	[6] Drag-Along Rights	8-23
	[7] Anti-Dilution	8-23
	[8] Pay-to-Play	8-24
	[9] Fiduciary Duty	8-24
	[10] Management Considerations	8-25
§ 8.04	<i>Form:</i> Standard Term Sheet	8-26
§ 8.05	<i>Form:</i> Simple Term Sheet	8-40
§ 8.06	<i>Form:</i> Down-Round Term Sheet	8-48

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
	[1] Representations and Warranties	9-3
	[2] Conditions to Closing	9-4
	[3] Covenants of the Parties	9-4
	[4] Restrictions on Transfer	9-5
	[5] Other Provisions	9-5
§ 9.03	<i>Form:</i> Investor Stock Purchase Agreement	9-6
	[1] Introduction	9-6
	[2] Form of Investor Stock Purchase Agreement with Commentary	9-6
§ 9.04	<i>Form:</i> Co-Sale Agreement	9-30
	[1] Introduction	9-30
	[2] Form of Right of First Refusal and Co-Sale Agreement	9-30
§ 9.05	<i>Form:</i> Voting Agreement	9-42
	[1] Introduction	9-42
	[2] Form of Voting Agreement	9-42
§ 9.06	<i>Form:</i> Management Rights Letter Agreement	9-53
	[1] Introduction	9-53
	[2] Form of Management Rights Letter	9-53

TABLE OF CONTENTS

xxxiii

§ 9.07	<i>Form: Employee Restricted Stock Purchase Agreement.</i>	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	<i>Form: Escrow Instructions for Escrow of Employee Stock.</i>	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
	[2] Choice of Jurisdiction; Special Considerations for Companies with California Operations.	9A-6
§ 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
	[b] Par Value	9A-9
	[c] “Blank Check” Provisions	9A-9
	[2] Dividends.	9A-10
	[a] Preference	9A-10
	[b] Cumulative Versus Noncumulative Dividends.	9A-11
	[c] Participation	9A-11
	[d] Multiple Series	9A-11
	[3] Liquidation Preference	9A-12
	[a] Liquidation Price	9A-12
	[b] Participating Versus Nonparticipating.	9A-13
	[c] Multiple Series	9A-14
	[d] Sale of Company as Liquidating Event (“Deemed Liquidation”).	9A-14
	[4] Redemption	9A-15
	[a] Company Redemption	9A-15
	[b] Mandatory Redemption	9A-16
	[c] Deemed Stock Distributions	9A-17

	[5]	Conversion Rights	9A-18
		[a] Optional Conversion	9A-19
		[b] Automatic or Mandatory Conversion	9A-19
		[c] Anti-Dilution Protection	9A-20
		[i] Proportional Adjustments	9A-20
		[ii] Price-Based Anti-Dilution Protection	9A-20
		[iii] Pay-to-Play Provisions	9A-22
		[d] “No Impairment” Clause	9A-23
	[6]	Voting Rights	9A-24
		[a] Election of Directors	9A-24
		[b] Protective Provisions	9A-28
		[c] Optional Protective Provision for Common Stock	9A-29
	[7]	Amendments to Bylaws	9A-30
	[8]	Limitation of Liability; Indemnification	9A-30
§ 9A.04		Corporate Approvals of Amendments to the Certificate of Incorporation	9A-31
§ 9A.05		Preferred Stock Conversion/Anti-Dilution Examples	9A-32
	[1]	Introduction and Abbreviations	9A-32
	[2]	Basic Conversion Formula	9A-32
	[3]	Anti-Dilution Provisions	9A-32
		[a] Stock Splits, Etc.	9A-32
		[b] Price-Based Anti-Dilution	9A-32
		[i] Ratchet Adjustment of the CP	9A-32
		[ii] Formula, or Weighted Average, Adjustment of the CP	9A-32.1
	[4]	Where the Action Is	9A-32.1
		[a] Narrow-Based Formula	9A-32.1
		[b] Broad-Based Formula	9A-32.1
		[c] Middle-of-the-Road Formula	9A-32.1
	[5]	Mechanics/Results	9A-32.1
		[a] Pre-Financing Capital Structure	9A-33
		[b] Dilutive Issuance	9A-33
		[c] Ratchet	9A-33
		[d] Narrow-Based Formula	9A-33
		[e] Middle-of-the-Road Formula	9A-34
		[f] Broad-Based Formula	9A-35
	[6]	Comparative Charts	9A-35
		[a] Conversion Price and Conversion Rate Comparisons	9A-35
		[b] Comparison of Common Stock Issuable upon Conversion	9A-36

TABLE OF CONTENTS

xxxv

§ 9A.06	<i>Form</i> : Amended and Restated Certificate of Incorporation	9A-37
[1]	Introduction	9A-37
[2]	Form of Amended and Restated Certificate of Incorporation	9A-37

CHAPTER 9B

Registration and Investor Rights Agreements

Gregory C. Smith

§ 9B.01	Overview	9B-2
§ 9B.02	Analysis of Key Provisions	9B-3
[1]	Restrictions on Transfer	9B-3
	[a] Securities Law Restrictions	9B-3
	[b] Lock-Ups	9B-5
[2]	Registration Rights	9B-5
	[a] Registrable Securities	9B-5
	[b] Demand	9B-6
	[c] Piggyback	9B-6
	[d] Form S-3	9B-7
	[e] Expenses	9B-8
	[f] Company Obligations	9B-8
	[g] Indemnification	9B-9
	[h] Assignment	9B-10
	[i] Termination of Registration Rights	9B-10
[3]	Other Investor Rights and Restrictions	9B-11
	[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
[4]	Company Covenants	9B-14
	[a] Stock Vesting	9B-14
	[b] Proprietary Information and Inventions	9B-14
	[c] Negative Covenants	9B-14
[5]	Miscellaneous	9B-15
	[a] Amendment and Waiver	9B-15
	[b] Termination of Certain Rights and Covenants	9B-15
§ 9B.03	<i>Form</i> : Investors' 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
	[4] Development of Inventions, Trade Secrets and New Business Ideas	11-10
	[5] Termination of Agreement	11-10
	[a] Neutral Termination	11-10
	[b] Employee Breach	11-11
	[c] Employer Breach	11-11
	[d] Termination by Expiration	11-12
	[6] Competition After Termination	11-13
	[a] Overview	11-13
	[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
	[8] Key Man Life Insurance	11-24
	[9] Assignability	11-24
§ 11.03	<i>Form</i> : Employment Agreement for Founder	11-26
§ 11.04	<i>Form</i> : Employment Agreement for Key Employee	11-35
§ 11.05	<i>Form</i> : Employment Agreement with President Coupled With Stock Option Grant	11-43
§ 11.06	<i>Form</i> : Confidential Invention and Assignment Agreement for Employee	11-55

TABLE OF CONTENTS

xxxvii

§ 11.07	<i>Form: Checklist of Employment Agreement Issues from the Employee's Perspective</i>	11-64
§ 11.08	<i>Form: Sample Offer Letter to Prospective Employee with Option Grant</i>	11-72
§ 11.09	<i>Form: Employment Agreement (Pro-Employee)</i>	11-74
§ 11.10	<i>Form: Employee Release</i>	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
[4]	Limited Liability Company Form	12-12
[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	[6]	Debt Restructuring Issues	12-16
		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
	[4]	Qualified Small Business Stock—Section 1202 Gain	12-26
§ 12.04		Problems Peculiar to a Partnership	12-28
	[1]	Substantial Economic Effect	12-28
	[2]	Basis, At-Risk Basis and Passive Activity Losses	12-29
	[a]	Basis	12-29
	[b]	At-Risk Basis	12-30
	[c]	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
	[2] Immaculate Cashless Exercise	13-17
	[3] Reload Options	13-18
	[4] Stock Appreciation Rights	13-19
	[5] Financial Assistance	13-20
§ 13.06	Other Considerations.	13-22
	[1] Securities Laws	13-22
	[2] Accounting Treatment.	13-24
	[3] Securities Exchange Act of 1934.	13-27
	[4] Providing for Future Acquisitions	13-28
	[5] Limit on Deductibility of Executive Compensation	13-30
	[6] Federal Wages and Hours Law	13-30
	[7] Section 83(i) Elections	13-31
§ 13.07	<i>Form:</i> Stock Option Plan	13-34
§ 13.08	<i>Form:</i> Incentive Stock Option Agreement.	13-41

CHAPTER 14

Employee Benefit Plans

Barry L. Salkin

§ 14.01	Introduction and Overview	14-4
	[1] Introduction	14-4
	[2] Overview	14-5
	[a] Equity Incentive Compensation	14-6
	[b] Qualified Retirement Plans	14-6
	[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	14-16
	[b] Tax Consequences for the Company	14-19
	[c] Securities Law Considerations	14-20
	[i] Federal Law	14-20
	[ii] State Law	14-24
	[d] Financial Accounting Considerations	14-24
	[i] Equity Incentive Arrangements	14-25
	[ii] Deferred Compensation	14-28
	[iii] Other Arrangements	14-29
	[e] Employee Retirement Income Security Act of 1974 (“ERISA”)	14-29
	[f] State Regulation of Employee Benefit Plans	14-55
§ 14.02	Equity Incentive Plans	14-58
	[1] In General	14-58
	[2] Stock Purchase Plans	14-59
	[3] Stock Option Plans	14-61
	[a] Incentive Stock Option Plan	14-62
	[b] Employee Stock Purchase Plan	14-72
	[i] Plan Qualification Requirements	14-73
	[ii] Income Tax Consequences	14-75
	[iii] Typical Administrative Provisions	14-81
	[iv] Securities Law Considerations	14-82

TABLE OF CONTENTS

	[v]	Accounting Considerations	14-82
	[vi]	Reporting Considerations	14-82
	[c]	Nonstatutory Stock Option Plans.	14-83
[4]		Junior Common Stock Plans	14-90
[5]		Convertible Debenture Plans	14-91
[6]		Book Value Stock Plans.	14-92
[7]		Stock-Oriented Compensation Plans	14-93
	[a]	Phantom Stock	14-94
	[b]	Stock Appreciation Rights (“SARs”)	14-95
	[c]	Stock Depreciation Rights	14-99
[8]		Employee Stock Ownership Plans (“ESOPs”)	14-99
[9]		Restricted Stock.	14-99
[10]		Restricted Stock Units.	14-104
§ 14.03		Qualified Retirement Plans.	14-109
	[1]	Utility for Start-Up Companies	14-109
	[2]	General Discussion	14-111
	[a]	Tax Considerations.	14-111
	[b]	ERISA.	14-122
	[c]	Securities Law Considerations.	14-122
	[d]	Blackout Periods.	14-122
	[e]	Financial Accounting	14-125
[3]		Types of Qualified Retirement Plans.	14-127
	[a]	Defined Benefit Pension Plan	14-127
	[b]	Money Purchase Pension Plan.	14-133
	[c]	Profit-Sharing Plan.	14-134
	[d]	Stock Bonus Plan.	14-135
	[e]	Employee Stock Ownership Plan (“ESOP”)	14-135
	[f]	Cash or Deferred Arrangements (“Section 401(k) Plan”).	14-144
	[g]	Simplified Employee Pension Plan (“SEP”)	14-161
	[h]	Savings Investment Matching Plan for Employees (“SIMPLE”)	14-163
	[i]	Employer-Sponsored IRA	14-165
	[j]	Cash Balance Plan	14-166
	[k]	Deemed IRA.	14-174
	[l]	Combined Defined Benefit/401(k) Plan	14-175
	[m]	Multiple Employer Defined Contribution Plan.	14-177
	[n]	Pension-linked Emergency Savings Accounts.	14-179
[4]		Requirements for Qualification.	14-179
	[a]	Minimum Participation Standards	14-180

START-UP & EMERGING COMPANIES

	[b]	Minimum Vesting Standards	14-180
	[c]	Limitations on Benefits	14-181
	[d]	Special “Top-Heavy” Rules	14-183
	[e]	Reporting and Disclosure Requirements	14-184
	[f]	Tax Shelter Transactions	14-184
	[g]	Coronavirus Benefits	14-186
	[h]	Consolidated Appropriations Act, 2021	14-188
	[i]	American Rescue Plan Act of 2021	14-188
§ 14.04		Nonqualified Deferred Compensation Arrangements	14-189
	[1]	In General	14-189
	[2]	Tax Treatment of Split-Dollar Life Insurance	14-193
	[3]	Taxation of Nonqualified Arrangements	14-195
	[4]	Accounting Treatment	14-198.12
	[5]	Applications for Start-Up Companies	14-198.13
	[6]	Significant Restriction on the Funding of Nonqualified Deferred Compensation Plans	14-198.13
§ 14.05		Accident, Health and Life Insurance Plans	14-199
	[1]	Accident and Health Insurance Plans	14-199
	[a]	Association Health Plans	14-301
	[2]	Long-Term Care Insurance	14-303
	[3]	Life Insurance Plans	14-306
	[4]	Employer-Owned Life Insurance	14-309
	[5]	Family First Coronavirus Response	14-312
§ 14.06		Supplemental Compensation Devices	14-315
	[1]	In General	14-315
	[2]	Below-Market-Rate Loans	14-315
	[3]	Loans	14-318
	[4]	Executive Financial Counseling	14-322
	[5]	Use of Company Automobile	14-322
	[6]	Educational Assistance Programs	14-324
	[7]	Dependent Care Assistance Programs	14-327
	[8]	Adoption Assistance Exclusion	14-331
	[9]	Athletic Facilities	14-334
	[10]	Miscellaneous Fringe Benefits	14-335
	[a]	No-Additional-Cost Service	14-336
	[b]	Qualified Employee Discount	14-339
	[c]	Working Condition Fringe	14-342
	[d]	<i>De Minimis</i> Fringe	14-345
	[e]	Qualified Transportation Fringe	14-348
	[f]	Qualified Moving Expense Reimbursement	14-354

TABLE OF CONTENTS

xliii

[g]	Qualified Employer Retirement Planning Service	14-355
[h]	Security Arrangements	14-356
[i]	Transportation Furnished by an Employer Because of Unsafe Conditions	14-359
[11]	Cafeteria Plans	14-360
[12]	Employee Assistance Programs	14-373
[13]	Disability Plans	14-374
[14]	Wellness Programs	14-376
[15]	Employee Relocation Costs	14-387
[16]	Group Legal Services	14-388
[17]	Bicycle Commuting Expense Reimbursement	14-389
[18]	Coronavirus Actions	14-389

TABLE OF CONTENTS

Volume 2

CHAPTER 15

Proprietary Protection of Product or Service

Matthew Poppe, David Devernoe, Letao Qin, Michael J. Calvey

§ 15.01	Introduction	15-3
§ 15.02	Types of Intellectual Property	15-4
§ 15.03	Copyrights	15-6
	[1] Nature and Scope of Protection	15-6
	[a] “Expression Only”	15-6
	[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
	[3] Ownership and Duration of Copyrights	15-15
	[4] Copyright Registration and Recordation of Certain Documents	15-18
	[5] Copyright Infringement	15-19
	[6] Semiconductor Chip Protection	15-20.1
	[7] “Moral Rights”—Rights of Attribution and Integrity	15-22
	[8] Copyright and the Internet	15-24
§ 15.04	Patents	15-26
	[1] Nature and Scope of Protection	15-26
	[2] Requirements for Patentability	15-28
	[a] Statutory Subject Matter	15-28
	[b] Novelty	15-30
	[c] Nonobvious	15-31
	[d] Usefulness	15-32

	[3]	Anticipatory Steps in Working on an Invention	15-32
	[4]	Application for a Patent	15-36
	[5]	Duration of Patent Rights	15-40
	[6]	Ownership of Patents	15-41
	[7]	Use of Appropriate “Notices”	15-42
	[8]	Patent Infringement	15-42.1
§ 15.05		Trademarks	15-42.6
	[1]	Nature of Protection	15-42.6
	[2]	Selection of a Trademark	15-43
	[3]	Attaining Trademark Rights	15-47
	[4]	Protective Use of Trademarks	15-48.1
	[5]	Federal Registration of Trademarks	15-48.1
	[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 Application	15-52
	[f]	Duration of Rights	15-53
	[g]	International Registration	15-54
	[6]	Assignments and Licenses	15-55
	[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
	[1]	Nature and Scope of Protection	15-62
	[a]	What Is a “Trade Secret”?	15-62
	[b]	What Conduct Violates a Company’s Trade Secret Rights?	15-66
	[2]	Remedies for Trade Secret Misappropriation	15-68
§ 15.08		Forms: Confidentiality	15-69
	[1]	<i>Form: Employee Confidential Information and Inventions Agreement.</i>	15-69
	[2]	<i>Form: Confidentiality Agreement.</i>	15-78

CHAPTER 16

Licensing Agreements

Jay Dratler, Jr.

§ 16.01	Overview	16-3
	[1] Introduction	16-3
	[2] Reasons for Licensing	16-5
	[3] Advantages of Licensing	16-7
	[a] Obtaining Early Entry to Market	16-7
	[b] Broadening the Marketplace	16-7
	[c] Increasing Market Penetration through Complementary Products	16-8
	[d] “Leveraging” Resources	16-8
	[e] Obtaining Additional Revenue	16-8
	[f] Benefiting from Technology Exchanges	16-8
	[g] Expanding into Auxiliary Product Lines	16-9
	[h] Enhancing Reputation and Goodwill	16-9
	[i] Controlling Exploitation	16-9
	[4] Disadvantages of Licensing	16-9
	[a] Loss of Control of Exploitation	16-9
	[b] Dependence on Others for Revenue	16-10
	[c] Risk of Piracy	16-10
	[d] Loss of Technological “Edge”	16-10
	[e] Loss of New Business Opportunities	16-10
	[f] Loss of Contact with Customers	16-10
	[g] Loss of Public Recognition	16-10
	[h] Loss of Incentive or Opportunity for Vertical Integration or Horizontal Expansion	16-10
	[i] “Passive Income” Tax Issues	16-11
	[5] Tax Aspects of Licensing	16-11
§ 16.02	Types of Licenses	16-14
	[1] Use License	16-14
	[2] Copying or Manufacturing License	16-14
	[3] Modification License	16-15
	[4] Distribution License	16-16
	[5] Sublicensing	16-16
	[6] Trademarks	16-18
	[7] “OEM” and “VAR” Agreements	16-18
	[8] “Hybrid” Licenses	16-18
§ 16.03	Important Terms of Licensing Agreements	16-19
	[1] Scope of License	16-19
	[a] Subject Matter	16-19
	[b] Rights Granted	16-20
	[c] Field of Use	16-21

	[2]	Exclusivity	16-24
	[3]	Obligations to Exploit	16-26
	[4]	Improvements	16-29
	[5]	Cross-Licenses	16-30
	[6]	Royalties	16-31
	[7]	Reports and Audit Rights	16-33
	[8]	Protection of Intellectual Property	16-34
		[a] Protective Notices and Legends	16-34
		[b] Applications for Patents, Registration of Trademarks, Mask Works and Copyrights, and Other Filings	16-38
		[c] Enforcement of Rights and Prevention of Piracy	16-40
	[9]	Warranties	16-40
		[a] Warranty Against Infringement	16-41
		[b] Warranty of Performance	16-44
		[c] Disclaimers of Warranty	16-46
	[10]	Technical Assistance	16-48
	[11]	Term and Termination	16-48
	[12]	Limitations of Liability and Remedy	16-50
		[a] Types of Damages	16-50
		[b] Amount of Damages	16-51
		[c] Limitation of Remedy	16-51
		[d] Time to Sue	16-52
	[13]	Export Controls	16-52
	[14]	Other Terms	16-58
§ 16.04		Technology Licenses	16-60
	[1]	Patents and Trade Secrets Combined	16-60
	[2]	“Hybrid” Licensing	16-61
	[3]	Royalties	16-61
	[4]	Patent Prosecution	16-63
	[5]	Patent Challenges	16-64
	[6]	Arbitration of Patent Disputes	16-70
§ 16.05		Software Licensing	16-72
	[1]	Subject Matter	16-72
	[2]	Source and Object Code	16-75
	[3]	Machine Limitations	16-76
	[4]	Right to Modify	16-78
	[5]	Derivative Works	16-79
	[6]	Sublicensing and Distribution	16-80
	[7]	Royalties	16-81
	[8]	Warranty and Maintenance	16-82
		[a] Warranty	16-82
		[b] Maintenance	16-83
	[9]	“Boxtop” or “Shrinkwrap” Software Licenses	16-84
	[10]	Enhancements	16-86
	[11]	Source Code Escrow	16-86

TABLE OF CONTENTS

ix

§ 16.06	“OEM” and “VAR” Agreements	16-91
	[1] Combined Sale and License	16-91
	[2] Control of Lower-Level License	16-91
	[3] Manufacturing Licenses	16-94
	[4] Other Multilevel Issues	16-94
§ 16.07	Special Issues	16-97
	[1] Defense Department Contracts	16-87
	[2] Special Issues in International Licensing	16-97
	[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	<i>Form:</i> 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	17-9
	[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
	[3] Treatment of Notes in the Event of an Acquisition Prior to a Qualified Equity Financing	17-14
	[a] Acceleration	17-14
	[b] Multiple of Principal Return	17-14
	[c] Multiple of Principal Return or Optional Conversion	17-15
	[4] Maturity Prior to a Qualified Equity Financing	17-16
	[5] Warrant Coverage	17-18
	[6] Secured versus Unsecured Notes	17-21

START-UP & EMERGING COMPANIES

§ 17.04	Specific Terms of the Bridge Financing	
	Documents	17-23
	[1] Note Purchase Agreement or Note and Warrant Purchase Agreement	17-23
	[a] Structure of Payments	17-23
	[b] Representations and Warranties	17-23
	[c] Conditions to Closing	17-24
	[d] Covenants	17-25
	[e] Amendment	17-25
	[f] Fees and Expenses	17-26
	[g] Most Favored Nations Clause	17-26
	[h] Book-Entry Registration of the Notes	17-27
	[2] Notes	17-28
	[a] Interest Rate	17-28
	[b] Term and Maturity	17-28
	[c] No Prepayment	17-29
	[d] Events of Default	17-29
	[e] Conversion	17-29
	[f] Rights of Payment	17-30
	[g] Security and Subordination	17-31
	[h] Legends; Restrictions on Transfer	17-31
	[3] Warrants	17-32
	[a] Number of Shares and Exercise Price	17-32
	[i] Qualified Equity Financing	17-32
	[ii] No Qualified Equity Financing Prior to Expiration, Change of Control or IPO	17-32
	[iii] Additional Considerations	17-33
	[b] Exercise Period	17-33
	[c] Net Exercise, Automatic Exercise and Conditional Exercise	17-34
	[d] Company Representations and Covenants	17-35
	[e] Holder Representations	17-35
	[f] Registration Rights	17-36
	[g] Amendment and Waiver	17-36
	[4] Security Agreement	17-36
	[a] Collateral	17-36
	[b] Perfection	17-37
	[c] Permitted Liens	17-37
	[d] Representations and Warranties	17-37
	[e] Covenants	17-37
	[f] Collateral Agent and Remedies in the Event of Default	17-38
§ 17.05	Additional Considerations in Bridge Financings	17-39
	[1] Company Considerations	17-39
	[a] Securities Law Compliance	17-39

TABLE OF CONTENTS

xi

	[i]	Exemption from Registration and Qualification of Notes . . .	17-39
	[ii]	Anti-Fraud Compliance	17-40
	[b]	Total Amount Raised	17-41
	[c]	Approval Process	17-41
	[d]	Anti-Dilution Adjustments	17-42
	[e]	Rights Offerings: Participation by Company Shareholders	17-43
	[f]	Current Investors' Participation or Pre-Emptive Rights	17-43
[2]		Investor Considerations	17-44
	[a]	Dilution	17-44
	[b]	Due Diligence	17-44
	[c]	Other Indebtedness and Inter-creditor Arrangements	17-45
[3]		Tax Considerations	17-45
	[a]	Timing and Phantom Income	17-46
	[b]	Character: Debt or Equity	17-46
	[c]	Payment of a Multiple of Principal on Occurrence of Certain Contingencies	17-47
	[d]	Investment Units; Allocation of Purchaser Price	17-48
	[e]	Non-Resident Noteholders; Withholding	17-48
§ 17.06		<i>Form: Term Sheet—Convertible Note Financing</i>	17-50
§ 17.07		<i>Form: Note Purchase Agreement—Seed Financing</i>	17-54
§ 17.08		<i>Form: Convertible Promissory Note—Seed Financing</i>	17-70
§ 17.09		<i>Form: Note and Warrant Purchase Agreement</i>	17-79
§ 17.10		<i>Form: Convertible Promissory Note—Bridge Financing</i>	17-95
§ 17.11		<i>Form: Warrant</i>	17-105
§ 17.12		<i>Form: Security Agreement</i>	17-117

CHAPTER 18

Contracts

Hina Ahmad and Edward L. Turner III

§ 18.01		Overview	18-3
§ 18.02		Sales Contracts	18-5
	[1]	Introduction	18-5
	[2]	Basic Law	18-6
	[3]	Battle of the Forms	18-8
	[4]	Electronic Contracting	18-9
	[5]	Price, Payment and Related Terms	18-10
	[a]	Price Provisions	18-10

(Rel. 52)

	[b]	Taxes	18-12
	[c]	Payment and Credit Terms	18-12
	[d]	Delivery and Risk of Loss	18-14
[6]		Warranties and Disclaimers	18-16
	[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
[8]		"Boilerplate"	18-27
	[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]	<i>Force Majeure</i>	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
	[5]	Warranties and Indemnification	18-35
	[6]	Inventions and Confidentiality	18-36
	[7]	Nonsolicitation	18-38
§ 18.04		<i>Form: Services Agreement with Commentary</i>	18-39
§ 18.05		Distribution Agreements	18-58
	[1]	Introduction	18-58
	[2]	Nature and Scope of Relationship	18-60
	[a]	Preamble; Recitals and Statement of Intent	18-60
	[b]	Appointment; Territory and Relationship	18-60
	[c]	Use of Trademark; Logos and Goodwill	18-62
	[d]	Sales Levels; Marketing and Reviews	18-62
	[3]	Product Issues	18-63
	[a]	Identification of Product	18-63

TABLE OF CONTENTS

	[b]	Product Availability and Inventory Protection	18-63
	[c]	Parts and Supplies.	18-64
	[d]	Service and Maintenance Support	18-65
	[e]	Promotional Activities	18-66
	[f]	Pricing; Payment and Credit Terms	18-66
	[g]	Order Entry; Shipping and Risk of Loss.	18-67
	[h]	Warranties and Limitations of Liability	18-68
	[i]	Indemnification	18-69
	[4]	Termination	18-70
	[a]	Contract Term	18-70
	[b]	Termination	18-70
	[c]	Effect of Termination	18-71
	[d]	Dispute Resolution	18-73
	[5]	Miscellaneous Provisions	18-74
§ 18.06		<i>Form</i> : Distribution Agreement with Commentary	18-75
§ 18.07		<i>Form</i> : 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
	[a]	Rental and Termination Charges	18-106
	[b]	Vendor Representations and Warranties; Maintenance	18-107
	[c]	Lessee Covenants	18-107
	[d]	Events of Default	18-107
	[e]	Default Remedies	18-108
	[f]	Purchase Option	18-108
	[3]	Third-Party Leases	18-109
	[a]	Rentals; Security Deposits and Guarantees	18-109
	[b]	Lessor Undertakings	18-110
	[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 Seagravn 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
	[1] Form of Work Letter	18A-29
	[2] Budget/Allowance	18A-30
	[3] Schedule	18A-31
	[4] Design Team	18A-32
	[5] Contractors	18A-33
	[6] Construction Contracts	18A-33
	[7] Ownership of Completed Improvements; Removal and Restoration	18A-34

CHAPTER 19

Exit Strategies

Daniel I. De Wolf and Eric M. Roth

§ 19.01	Overview	19-2
	[1] Why Are Exit Strategies Important?	19-2
	[2] Types of Liquidity Events	19-3
§ 19.02	IPOs	19-4
	[1] Introduction	19-4
	[2] Advantages of Going Public	19-4
	[3] Disadvantages of Going Public	19-5
§ 19.03	Preparing for a Public Offering	19-6

TABLE OF CONTENTS

xv

	[1]	Selecting the Listing Entity	19-6
		[a] Initial Listing Requirements—NYSE	19-6
		[b] Initial Listing Requirements—Nasdaq	19-7
	[2]	Board Composition	19-9
	[3]	Audit Committee	19-11
	[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
	[5]	Compliance with GAAP	19-13
	[6]	Issues Impacting Financial Statements	19-14
		[a] Employee Option Pricing	19-14
		[b] Revenue Recognition for Software Companies	19-14
§ 19.04		Selecting an Underwriter	19-15
	[1]	Types of Offering	19-15
	[2]	Role of the Analyst	19-15
§ 19.05		Liquidating Shares After the IPO	19-17
	[1]	Registration Statements	19-17
	[2]	Rule 144	19-17
	[3]	Rule 701	19-18
	[4]	Restrictive Legends	19-18
§ 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
	[4]	Issues with Affiliates	19-24
	[5]	Indemnification	19-24
	[6]	Section 3(a)(10) Hearings	19-25
§ 19.08		Conclusion	19-27

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

	[1] Perpetual Existence and Ongoing Corporate Obligations: Effect of Failure to Comply	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-8
§ 19A.04	Voluntary Dissolution—Delaware and California	19A-10
	[1] Generally	19A-10
	[2] Mechanics of a Delaware Dissolution	19A-10
	[3] Fairness of Plan of Dissolution in Delaware.	19A-11
	[4] Constituents Responsible for Dissolution Process in Delaware	19A-11
	[5] Three-Year “Winding Down” Period	19A-13
	[6] Revocation of Dissolution in Delaware	19A-13
	[7] Mechanics of California Dissolution	19A-13
	[8] Winding Up Process in California	19A-14
	[9] Certificate of Dissolution in California	19A-15
	[10] Revocation of Dissolution in California	19A-15
	[11] Franchise Taxes in Delaware and California	19A-16
	[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
	[1] Generally	19A-19
	[2] California ABC Process	19A-19
	[3] Fiduciary Duty of Assignee	19A-20
	[4] Delaware ABCs	19A-21
§ 19A.07	Bankruptcy	19A-22
	[1] Generally	19A-22
	[2] Chapter 7 versus Chapter 11 Bankruptcy	19A-22
§ 19A.08	Core Components of Bankruptcy	19A-24
§ 19A.09	Involuntary Bankruptcy	19A-26
§ 19A.10	Differences between an ABC and a Bankruptcy	19A-27
	[1] Supervision	19A-27
	[2] Important Constituents and Choosing the Assignee	19A-27
	[3] Corporate Approval Required for Bankruptcy or ABC	19A-27
	[4] Automatic Stay	19A-28
	[5] Discharge and No Post-Confirmation Injunction	19A-28
	[6] Asset Sales	19A-28
	[7] Preferences	19A-29

TABLE OF CONTENTS

xvii

	[8]	Treatment of Contracts	19A-29
	[9]	Creditor Information	19A-30
§ 19A.11		Duties of Officers and Directors	19A-31
	[1]	Generally	19A-31
	[2]	Delaware	19A-32
	[3]	California	19A-32
§ 19A.12		Exemplar Documents	19A-34
	[1]	Dissolution Checklist	19A-34
	[2]	Board Consent for Dissolution	19A-35
	[3]	Stockholder Consent for Dissolution	19A-37
	[4]	Notice to Stockholders	19A-39
	[5]	Certificate of Dissolution	19A-41
	[6]	Plan of Liquidation	19A-42
	[7]	Certificate of Adoption of Plan of Liquidation	19A-43
	[8]	Board Resolutions and Minutes to Approve an ABC	19A-44
	[9]	Consent of Shareholders to an ABC	19A-45
	[10]	Assignment for Benefit of Creditors Agreement	19A-46

CHAPTER 20

[Reserved]

CHAPTER 21

Planning the Business for a Future Initial Public Offering

James D. Marver

§ 21.01		Introduction	21-2
§ 21.02		Being Truly Public	21-4
	[1]	Float	21-4
	[2]	Investor Appeal	21-5
	[3]	Research Coverage	21-5
	[4]	Market Makers	21-5
§ 21.03		Management and Employees	21-7
	[1]	General Selection Criteria	21-7
	[2]	The Chief Financial Officer	21-7
	[3]	Compensation	21-8
		[a] Salaries	21-8
		[b] Options	21-9
	[4]	Stock Splits	21-9
	[5]	Options for Business Partners	21-10

§ 21.04	Services	21-12
	[1] Counsel	21-12
	[2] Accountants	21-12
§ 21.05	“Certain Transactions” That May Cause Problems	21-14
	[1] Why the Transactions Should Be Avoided	21-14
	[2] No Explicit Criteria	21-14
	[3] Guidelines	21-15
	[4] Examples	21-15
§ 21.06	Interim Financing	21-18
	[1] Type of Security	21-18
	[2] Timing	21-19
	[3] Selecting Investors	21-19
	[4] Pricing	21-20
	[5] Clauses to Avoid	21-20
§ 21.07	Miscellaneous Pre-Public Considerations	21-22

CHAPTER 22

Organizing a Delaware Corporation

Gregory V. Varallo

§ 22.01	Introduction	22-3
	[1] Why Delaware?	22-3
	[2] Scope of Forms in this Chapter	22-5
§ 22.02	Formation	22-6
	[1] Certificate of Incorporation	22-6
	[a] <i>Forms: Mandatory Provisions with Commentary</i>	22-7
	[b] <i>Forms: Optional Provisions with Commentary</i>	22-9
	[i] Capitalization Provisions	22-9
	[ii] “Shark Repellent” Provisions	22-12
	[iii] Miscellaneous Provisions	22-16
	[c] Execution	22-21
	[2] Filing Mechanics	22-21
	[3] Powers of Incorporators	22-22
§ 22.03	Bylaws	22-23
	[1] General Discussion	22-23
	[2] <i>Form: Bylaws with Commentary</i>	22-24
§ 22.04	Corporate Management	22-45
	[1] Board of Directors	22-45
	[2] Officers	22-46
	[3] Mechanics of Board Actions	22-46
	[4] Organizational Forms	22-46

TABLE OF CONTENTS

xix

	[a] <i>Form: Waiver of Notice of Organization Meeting</i>	22-46
	[b] <i>Form: Minutes of Organization Meeting</i>	22-47
	[c] <i>Form: Written Consent of Directors</i>	22-51
§ 22.05	Stock Purchase Agreement	22-52
	[1] The Stock Purchase Agreement	22-52
	[2] <i>Form: Stock Purchase Agreement</i>	22-52
	[3] <i>Form: Subscription Agreement</i>	22-57
§ 22.06	Permitted Capitalizations	22-59
	[1] Classes or Series of Capital Stock	22-59
	[2] Voting Rights	22-59
	[a] By Share	22-59
	[b] By Status of Holder	22-59
	[3] Preferences	22-60
	[4] Conversion and Other Rights	22-60
	[a] Poison Pill	22-60
	[5] Mechanics and Controls on Stock	22-61
§ 22.07	Form of Notice of Meetings	22-62
	[1] <i>Form: Notice of Directors' Meetings with Commentary</i>	22-62
	[2] <i>Form: Notice of Stockholders' Meetings with Commentary</i>	22-62
§ 22.08	Checklist of Additional Documents That May Be Necessary	22-63

CHAPTER 23

Sample Start-Up Company Forms

Gregory C. Smith, Vi Hua and Melissa Schmelzer

§ 23.01	Incorporation	23-2
	[1] Action of Sole Incorporator Electing Directors	23-2
	[2] Action by Written Consent of Board of Directors (Upon Incorporation)	23-3
	[3] Minutes of First Meeting of Board of Directors	23-7
§ 23.02	Certificate of Incorporation	23-14
	[1] Certificate of Amendment to Certificate of Incorporation	23-14
	[2] Certificate of Amendment to Certificate of Incorporation (Effecting Name Change)	23-15
	[3] Introductory Language for Amended and Restated Certificate of Incorporation	23-16
	[4] Certificate of Elimination	23-18

START-UP & EMERGING COMPANIES

	[5]	Action by Written Consent of Board of Directors (Amending Certificate of Incorporation)	23-19
§ 23.03		Board of Directors	23-21
	[1]	Notice of Special Meeting of Board of Directors	23-21
	[2]	Waiver of Notice of Meeting of Board of Directors	23-22
	[3]	Minutes of Regular Meeting of Board of Directors	23-23
	[4]	Sample Resolutions of the Board of Directors	23-25
§ 23.04		Stockholders	23-46
	[1]	Consent in Lieu of Meeting of Stockholders	23-46
	[2]	Notice of Special Meeting of Stockholders	23-47
	[3]	Notice of Annual Meeting of Stockholders	23-48
	[4]	Declaration of Mailing of Notice of Stockholders' Meeting	23-49
	[5]	Notice to Certain Stockholders Pursuant to 228(e)	23-50
§ 23.05		Stock Certificates and Issuance	23-51
	[1]	Stock Ledger and Capitalization Summary	23-51
	[2]	Sample Common Stock Certificate	23-54
	[3]	Certificate Regarding Lost Certificate and Indemnity	23-56
	[4]	Notice of Issuance of Uncertificated Stock	23-56
	[5]	Legends	23-57
§ 23.06		Stock Transfer and Sale	23-60
	[1]	Transferee Representation Statement	23-60
	[2]	Short-Form Stock Purchase Agreement (Resale)	23-63
	[3]	Additional Purchaser Representations and Warranties	23-67
	[4]	Revocable Proxy	23-69
	[5]	Irrevocable Proxy	23-70
	[6]	Irrevocable Stock Power	23-71
§ 23.07		Miscellaneous	23-72
	[1]	Form of Consulting Agreement	23-72
	[2]	Form of Consultant Termination Notice	23-77
	[3]	Form of Advisor Agreement	23-78
	[4]	Secretary's Certificate	23-81
	[5]	Form of Third Party Unilateral Non-Disclosure Agreement	23-82
	[6]	Form of Third Party Mutual Non-Disclosure Agreement	23-86
	[7]	Due Diligence Request	23-91

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
	[1] Default Allocation Paradigm: Joint Ownership.	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
	[2] Preferred IPR Allocation Strategies	24-13
	[a] IPR Ownership: Background, Nonderivative Foreground and Derivative Foreground IPR	24-13
	[b] Optimizing Rights to Use of the Non-IPR Owing 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	24-16
	[1] Contractual Model.	24-16
	[2] Entity Model	24-19
	[3] Two-Stage Model	24-21
	[a] Pre-Joint Venture.	24-22
	[b] Joint Development (Contractual) Phase.	24-22
	[c] NewCo (Entity) Phase	24-24
§ 24.06	Exit Scenarios	24-26
	[1] Merger or Acquisition of the Joint Venture Entity.	24-26

START-UP & EMERGING COMPANIES

	[2]	Dissolution of the Joint Venture Entity	24-26
	[a]	IPR Owned by the Joint Venture Entity	24-27
	[b]	Inbound Licenses from Third Parties	24-28
	[c]	Inbound Licenses from Joint Venturers.	24-28
	[d]	Outbound Licenses from Joint Venture Entity.	24-28
§ 24.07		Conclusion	24-29
§ 24.08		Sidebar: Exclusive Licenses	24-30

CHAPTER 25**Joint Ventures and Strategic Alliances***Kenton J. King*

§ 25.01		Overview	25-1
§ 25.02		Alternatives to Legal Joint Ventures	25-5
§ 25.03		Choice of Entity	25-7
	[1]	In General	25-7
	[2]	Corporation	25-7
	[3]	Partnership	25-8
	[4]	Limited Liability Company.	25-8
§ 25.04		<i>Form:</i> Joint Venture Term Sheet	25-10
	[1]	Introduction	25-10
	[2]	Sample Preliminary Nonbinding Term Sheet	25-11

CHAPTER 26**Privacy and Data Security***Anna Hsia and Nancy Kang*

§ 26.01		Introduction	26-2
§ 26.02		Privacy by Design – Why It Matters and How to Do It	26-4
	[1]	Self-Regulatory Programs	26-9
	[2]	Payment Card Industry Security Standard.	26-9
§ 26.03		Responsible Use of Cookies and Tracking Pixels	26-11
	[1]	Cookies and Tracking Pixels	26-11
	[2]	Potential Misuse of Cookies and Tracking Pixels	26-11

TABLE OF CONTENTS

	[a]	Government Response to Behavioral Tracking	26-12
	[b]	Industry Response to Behavioral Tracking	26-13
§ 26.04		Federal Privacy Laws	26-14
	[1]	COPPA	26-14
	[2]	HIPAA	26-18
	[3]	Gramm-Leach-Bliley Act	26-21
	[4]	CAN-SPAM	26-22
	[5]	Telephone Consumer Protection Act and Telemarketing Sales Rule	26-23
	[6]	Fair Credit Reporting Act	26-26
	[7]	Federal Trade Commission Act	26-27
§ 26.05		State Privacy Laws	26-30
	[1]	California Consumer Privacy Act of 2018	26-30
	[2]	Other State Privacy Laws	26-32
	[3]	California Online Privacy Protection Act	26-33
	[4]	California Privacy Rights for California Minors in the Digital World Act	26-33
	[5]	California Shine the Light Law	26-34
	[6]	Washington’s My Health, My Data Act	26-35
	[7]	Nevada Personal Information Data Privacy Encryption Law	26-35
	[8]	State Data Security and Data Breach Laws	26-36
	[9]	Privacy of Personal Information Held by Internet Service Providers	26-37
	[10]	False and Misleading Statements in Website Privacy Policies	26-37
	[11]	Nevada “Do Not Sell” Law	26-37
§ 26.06		International Privacy Laws	26-38
	[1]	General Data Protection Regulation	26-38
	[2]	EU-U.S. Data Privacy Framework and Standard Contractual Clauses	26-41
	[3]	The United Kingdom General Data Protection Regulation	26-43
	[4]	Personal Information Protection and Electronic Documents Act	26-43
	[5]	Canada’s Anti-Spam Law	26-45
	[6]	Law 25 (formerly Bill 64)	26-45
§ 26.07		<i>Form: Privacy and Data Security Diligence Checklist</i>	26-47

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
	[3] Definitive Documents	27-8
	[4] Post-Signing to Closing	27-9
§ 27.03	Forms of Consideration	27-11
	[1] Cash	27-11
	[2] Stock—Valuing Buyer Stock	27-11
	[3] Stock—Issuance and Resale	27-12
§ 27.04	Form of Acquisition Structure	27-15
	[1] Mergers	27-15
	[2] Stock Purchases	27-17
	[3] Asset Sales	27-17
§ 27.05	Structure of the Merger Agreement	27-19
	[1] Article I: The Merger and the Treatment of Equity	27-19
	[2] Article II and III: Representations and Warranties	27-22
	[3] Article IV: Interim Operating Covenants	27-24
	[4] Article V: Other Covenants	27-25
	[5] Article VI: Closing Conditions	27-27
	[6] Article VI: Termination	27-31
	[7] Article VII: Indemnification	27-32
	[a] Scope	27-32
	[b] Duration	27-32
	[c] Limitation on Liability	27-33
	[d] Deductibles and Other Limitations	27-34
	[e] Representation and Warranties Insurance	27-34
§ 27.06	<i>Form:</i> Short-Form Buyer Merger Agreement	27-36
§ 27.07	<i>Form:</i> Joinder Agreement	27-96
§ 27.08	<i>Form:</i> Escrow Agreement	27-118
§ 27.09	<i>Form:</i> Letter of Transmittal	27-131
§ 27.10	<i>Form:</i> Board Consent	27-141
§ 27.11	<i>Form:</i> Stockholders Consent	27-150
§ 27.12	<i>Form:</i> Non-Competition Agreement	27-158
§ 27.13	<i>Form:</i> Simple Term Sheet	27-167
§ 27.14	<i>Form:</i> Exclusivity Agreement	27-174

CHAPTER 28

Ancillary Documents to Merger Agreements

Celeste E. Greene and Thomas J. Ivey

§ 28.01	Overview	28-2
§ 28.02	<i>Form:</i> Indemnification Escrow Agreement	28-3
	[1] Introduction	28-3
	[2] Form of Indemnification Escrow Agreement with Commentary	28-3
§ 28.03	<i>Form:</i> Noncompetition Agreement	28-19
	[1] Introduction	28-19
	[2] Form of Noncompetition Agreement with Commentary	28-19
§ 28.04	<i>Form:</i> Voting Agreement	28-27
	[1] Introduction	28-27
	[2] Form of Voting Agreement with Commentary	28-27
§ 28.05	<i>Form:</i> 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