

# Table of Contents

---

## VOLUME 1

<b>About the Author</b> .....	vii
<b>Table of Chapters</b> .....	ix
<b>Preface</b> .....	cxxxxiii
<b>Acknowledgments</b> .....	cxxxxix
<b>Summary of New Developments for Chapters 14–28</b> .....	cxliii

### Chapter 1      Introduction

§ 1:1      Scope of Book .....	1-9
§ 1:1.1      The Impact of COVID-19 on M&A .....	1-15
§ 1:2      Scope of Chapter .....	1-15
§ 1:3      Introduction to Consensual Transactions .....	1-16
§ 1:3.1      The Starting Point: Valuation and Due Diligence.....	1-16
§ 1:3.2      Structuring the Transaction: Tax and Corporate Law Considerations .....	1-16
[A]      In General .....	1-16
[B]      Stock Purchase Structure.....	1-17
Diagram 1-1      Stock Purchase Structure .....	1-18
[C]      Asset Purchase Structure.....	1-18
Diagram 1-2      Asset Purchase Structure .....	1-18
[D]      Direct Merger Structure .....	1-19
Diagram 1-3      Direct Merger Structure.....	1-19
[E]      Reverse Subsidiary Merger Structure .....	1-19
Diagram 1-4      Reverse Subsidiary Merger Structure.....	1-20
[F]      Forward Subsidiary Merger Structure .....	1-20
Diagram 1-5      Forward Subsidiary Merger Structure.....	1-21
[G]      Compulsory Share Exchange Structure.....	1-21
Diagram 1-6      Compulsory Share Exchange Structure .....	1-22
[H]      Short-Form Merger Structure .....	1-22
Diagram 1-7      Short-Form Merger Structure.....	1-23
[I]      Brief Introduction to Spin-Offs and Reverse Spin-Offs .....	1-23

§ 1:3.3	Drafting the Acquisition Agreement.....	1-23
§ 1:3.4	Federal Securities Laws Considerations .....	1-24
§ 1:3.5	Antitrust, Pre-Merger Notification, and Regulatory Considerations.....	1-25
§ 1:4	Introduction to Tender Offers and Related Transactions.....	1-26
Diagram 1-8	Tender Offer Structure .....	1-26
§ 1:5	Do the Shareholders of the Target and Acquirer Benefit in Mergers and Acquisitions?.....	1-28
§ 1:5.1	Introduction .....	1-28
§ 1:5.2	Recent Evidence That Acquirer Shareholders Are Benefiting in More Mergers, but Not So Fast.....	1-31
§ 1:6	Strategy for Approaching Mergers .....	1-34
§ 1:7	The Current M&A Scene .....	1-36
§ 1:7.1	Introduction .....	1-36
§ 1:7.2	Strategic, Private Equity, and SPAC Deals.....	1-36
§ 1:7.3	Past Trends in U.S. M&A Activity.....	1-38
§ 1:7.4	Introduction to Recent Data on the M&A Marketplace Contained in Sections 1:7.5 Through 1:7.45 .....	1-39
[A]	The Purpose of These Sections.....	1-39
[B]	A Brief Introduction to the Principal Sources of Information.....	1-40
[B][1]	In General and 2025 FactSet Review.....	1-40
[B][2]	An Introduction to Wachtell Lipton's May 2024 Takeover Law and Practice Book and to Its January 2024 M&A Update .....	1-40
[B][3]	The Different Legal Styles for Implementing M&A .....	1-41
[B][4]	The Wealth of Industry Financial and Economic Data in the McKinsey & Company, M&A Annual Report 2025 .....	1-42
[B][5]	Other Sources .....	1-43
[B][6]	The "Elephant," but Maybe the "Mouse," in the Room—Trump's Tariffs.....	1-43
[B][7]	A Caveat on the Data and the Interpretation of the Data.....	1-44
[C]	Macro View of the Recent Economic and Financial Impact of M&A, Sections 1:7.5 Through 1:7.10 .....	1-44
[D]	Structural Issues in Recent M&A Deals, Sections 1:7.11 Through 1:7.19 .....	1-45
[E]	Takeover Defenses, Tender Offers, and Miscellaneous M&A Issues, Sections 1:7.20 Through 1:7.31 .....	1-46

## Table of Contents

[F]	Cross-Border M&A, Sections 1:7.32 to 1:7.36 .....	1-46
[G]	Other Recent Development M&A Issues, Sections 1:7.37 Through 1:7.45 .....	1-47
[H]	B2B and B2C Concepts .....	1-48
[I]	The Breakdown of the Recent Developments Addressed in Part I Through Part V (That Is, Sections 1:7.5 Through 1:7.45).....	1-49
[J]	An Appendix Guide to the Economic and Related Factors Discussed in Sections 1:7.5 Through 1:7.45 .....	1-49
§ 1:7.5	Review of 2019–2025 Trend in U.S. M&A Activity.....	1-49
Figure 1-1A	Returns on the S&P 500, for Various Recent Periods, As of May 29, 2024 and May 11, 2025.....	1-51
[A]	The General Trend in M&A Activity in the 2014–2025 Period .....	1-52
Figure 1-1B	Trends in U.S. Mergers and Acquisition Activity 2014–2024 .....	1-52
Figure 1-1C	U.S. Mergers and Acquisition Activity 2020, 2021, 2022, 2023, and 2024 .....	1-54
Figure 1-2	Percentage Change in U.S. Deals Volume and Percentage Change in U.S. Number of Deals 2019–2024 .....	1-55
Figure 1-3	Top Five Seller [That Is, Target] Industries Ranked by Number of Announcements 2024 .....	1-56
Figure 1-4	Top Five Seller [That Is, Target] Industries Ranked by Dollar Value of Offers 2024 .....	1-56
§ 1:7.6	Recent Trends in U.S. and Worldwide M&A Activity.....	1-56
[A]	In General .....	1-56
Figure 1-5	Trends in U.S. and Worldwide M&A Activity 2013–2022 .....	1-57
[B]	McKinsey’s 2024 View on the “M&A Market Durability” .....	1-58
§ 1:7.7	Recent U.S. M&A Volume (1) Related to Aggregate U.S. Gross Domestic Product, GDP, and (2) As a Percentage of Aggregate GDP.....	1-59
[A]	What Is GDP and What Does It Have to Do with M&A.....	1-59
[B]	Relationship Between Aggregate GDP and M&A Activity.....	1-59
Figure 1-6	U.S. M&A Volume Related to Aggregate GDP 2014–2024.....	1-60
[C]	Recent U.S. M&A Volume As a Percentage of Aggregate GDP .....	1-60

Figure 1-7	U.S. M&A Volume As a Percentage of Aggregate GDP 2014–2024 .....	1-61
§ 1:7.8	Recent U.S. M&A Volume Related to Investment Component of GDP .....	1-62
Figure 1-8	Recent U.S. M&A Volume Related to the Nonresidential Investment Component of GDP 2014–2024.....	1-62
Figure 1-9	Recent U.S. M&A Percentage Change in U.S. Deal Volume Related to Nonresidential Investment Component of GDP 2018–2024 .....	1-63
§ 1:7.9	Recent U.S. M&A Volume Related to the S&P 500 Stock Index.....	1-63
Figure 1-10	Recent U.S. M&A Volume Related to S&P 500 Index 2014–2024.....	1-64
§ 1:7.10	FactSet's Overall Assessment of M&A Activity Over the 20-Year Period Ending in 2024 .....	1-65
§ 1:7.11	Recent U.S. M&A Activity by Type of Transaction: [1] Public Domestic; [2] Foreign; [3] Divesture, Including Spinoffs; and [4] Private Deals .....	1-66
Figure 1-11	Breakdown of U.S. M&A Activity by Type of Transaction: Number of Deals and Deal Value 2020–2024 .....	1-66
§ 1:7.12	Recent (1) P:E Ratios. (2) Premiums Paid, and (3) Revenue Metrics in U.S. Public Deals .....	1-68
[A]	In General .....	1-68
Figure 1-12	U.S. P:E Ratio and Premiums Paid 2017–2024 .....	1-68
[B]	The EBITDA Metric.....	1-69
[C]	Revenue Metric .....	1-71
§ 1:7.13	Recent U.S. Payment Trends: Cash, Stock, Mixed, and Other .....	1-71
[A]	General Principles .....	1-71
Figure 1-13	U.S. Payment Trends 2017–2024, with (1) Cash Consideration, Followed by (2) Stock, (3) Mixed and (4) Other, from Bottom to Top .....	1-72
[B]	Taxable and Tax-Free Acquisitions: A Brief Introduction .....	1-73
§ 1:7.14	Recent Data on Acquisitions of Domestic and Foreign Publicly Traded Companies and the Returns to the Target's and the Acquirer's Shareholders.....	1-73
[A]	In General .....	1-73
Figure 1-14	Acquisitions of Domestic and Foreign Publicly Traded Companies 2018–2024 .....	1-74

## Table of Contents

[B]	The Tendency for Acquirers in Public Deals to Overpay: The Salesforce-Slack Deal .....	1-74
§ 1:7.15	Recent Data on Acquisitions of Privately	
	Owned Companies .....	1-76
[A]	In General .....	1-76
	Figure 1-15 Acquisitions of Privately Owned Companies 2018–2024 .....	1-76
[B]	The Tax Reason for Stock-for-Stock Deals .....	1-77
	§ 1:7.16 Recent (1) Private Equity Capital Raising, (2) Leveraged Buy-Out Activity, and (2) Related Issues .....	1-77
[A]	Introduction .....	1-77
	[B] PE Firms Are “on the Clock” .....	1-78
	[C] Capital Raised by PE Funds Generally .....	1-78
Figure 1-16	Capital Raised by Private Equity Funds 2011–2021 .....	1-78
	[D] McKinsey’s View on PE Investing in 2025 .....	1-79
Figure 1-17	[E] Relationship Between LBOs and PE Activity .....	1-80
	Leveraged Buy-Out Activity in Relation to Private Equity Activity 2013–2022 .....	1-80
[F]	Cov-Lite Bonds .....	1-81
	[G] The Greater the Risk, the Greater the Potential Reward with LBOs .....	1-82
§ 1:7.17	Recent Data on U.S. M&A Deal Size .....	1-82
	Figure 1-18 Number of Deals by U.S. Deal Size 2020–2024 .....	1-83
§ 1:7.18	Recent Data on U.S. Regional Acquirer Activity .....	1-83
	Figure 1-19 U.S. Regional Acquirer (That Is, Buyer) Activity 2020–2024, with Regions Shown from Bottom to Top .....	1-84
§ 1:7.19	Recent Data on U.S. Regional Target Activity .....	1-84
	Figure 1-20 U.S. Regional Target (That Is, Seller) Activity 2020–2024, with Regions Shown from Bottom to Top .....	1-85
§ 1:7.20	Recent Data on the Shareholder Rights Plan, That Is, the Poison Pill .....	1-86
	[A] Introduction .....	1-86
[A][1]	In General .....	1-86
	[A][2] The WilmerHale Primer on Poison Pills .....	1-86
[B]	Illustration of an Effective Pill, <i>Air Gas</i> .....	1-88
	[C] Illustration of an Ineffective Pill, Twitter .....	1-88
[D]	Companies with Pills .....	1-88
	[D][1] Pills from 2018 Through 2017 and in 2023 .....	1-88

Figure 1-21	Percentage of S&P 500 Companies with a Shareholder Rights Plan 2008-2017 and As of June 2023 .....	1-89
Figure 1-22	Total Number of U.S.-Incorporated Companies with Poison Pills in Force at Year End 2008–2017 .....	1-90
	[E] Pills and a Target’s Board Fiduciary Duties.....	1-90
	[F] Pills and COVID-19 .....	1-90
§ 1:7.21	Recent Data on the Percentage of S&P 500 Companies with Various Types of Defensive Measures.....	1-91
	[A] In General .....	1-91
Figure 1-23	Percentage of Companies in the S&P 500 Index with Various Defensive Measures, 2022.....	1-92
	[B] Special Meetings of Shareholders .....	1-93
	[C] Action by Written Consent.....	1-93
	[D] WilmerHale’s Recent 2023 Data on Various Takeover Defense Provisions Included in IPOs.....	1-94
§ 1:7.22	Recent Data on U.S. Tender Offers, Contested and Uncontested .....	1-94
	[A] The Basic Data.....	1-94
Figure 1-24	U.S. Tender Offers Contested and Uncontested 2019–2024 .....	1-95
	[B] The Target’s Defensive Measures Against a Hostile Tender Offer.....	1-96
§ 1:7.23	Recent Data on the Rise of Two-Step Transactions and the Top-Up Option .....	1-96
	[A] In General .....	1-96
Figure 1-25	Percentage of One-Step and Two-Step Transactions 2012–2016, and 2021 .....	1-97
	[B] Reason for Employing a Two-Step Deal .....	1-97
	[C] Top-Up Options .....	1-97
	[D] Delaware’s Section 251(h) Intermediate-Form Merger: Eliminating the Need for a Top-Up Option.....	1-98
§ 1:7.24	Recent Data on U.S. Termination Fees: Direct, Payable by a Walking Target, and Reverse, Payable by a Walking Acquirer .....	1-98
	[A] In General .....	1-98
	[B] Elaboration on Direct Termination Fees .....	1-98
Figure 1-26	U.S. Direct Termination Fees—Average and Median Percentage of (1) the Target’s Total Invested Capital, and (2) Deal Size, 2024 .....	1-99
Figure 1-27	Transactions with or Without Direct Termination Fees of Publicly Traded Sellers, Privately Held Sellers, and Divestitures 2024 .....	1-100

## Table of Contents

	<p>[C] Elaboration on Reverse Termination Fees ..... 1-101</p> <p>[D] The Direct and Reverse Termination Fees in the Acquisition of Twitter by Musk ..... 1-101</p>
<p>§ 1:7.25</p>	<p>Recent Data on "No-Shop" and "Go Shop" Provisions of Acquisition Agreements in Negotiated Deals ..... 1-102</p> <p>[A] In General ..... 1-102</p> <p>[B] "No-Shops" ..... 1-102</p> <p>[B][1] "No-Shops" Generally ..... 1-102</p>
<p>Figure 1-28</p>	<p>No-Shop Provisions in Negotiated Deals 2009–2018 ..... 1-102</p> <p>[B][2] Data on "No-Shops" for 2024 ..... 1-103</p> <p>[C] "Go-Shops" ..... 1-103</p> <p>[C][1] "Go-Shops" Generally ..... 1-103</p>
<p>Figure 1-29</p>	<p>Go-Shop Rights in Negotiated Deals 2009–2018 ..... 1-104</p> <p>[C][2] Data on "Go-Shops" for 2022, 2023, and 2024 ..... 1-104</p>
<p>§ 1:7.26</p>	<p>Wachtell's Assessment of Hostile M&amp;A Activity in 2022, 2023, and 2024, and Projected for 2025 ..... 1-104</p>
<p>§ 1:7.27</p>	<p>Recent Information on Bankruptcies ..... 1-106</p> <p>[A] In General ..... 1-106</p> <p>[B] The Bankruptcy of Several Bank Holding Companies in 2023 and 2024 ..... 1-106</p>
	<p>[B][1] Introduction ..... 1-106</p> <p>[B][2] The Signature March 19, 2023, Bankruptcy ..... 1-107</p> <p>[B][3] The Silicon Valley Bank March 26, 2023, Bankruptcy ..... 1-108</p>
	<p>[B][4] The First Republic May 1, 2023, Bankruptcy ..... 1-109</p> <p>[B][5] April 26, 2024, Bankruptcy of Republic First Bank in Philadelphia ..... 1-110</p>
<p>§ 1:7.28</p>	<p>Recent ABA Deal Point Studies ..... 1-111</p>
	<p>[A] Introduction to the ABA Deal Point Studies ..... 1-111</p> <p>[B] SRSAcquiom, 2025 M&amp;A Deal Term Study ..... 1-113</p>
	<p>[C] The <i>WilmerHale, 2025 M&amp;A Report on Deal Terms</i> ..... 1-113</p>
<p>§ 1:7.29</p>	<p>Recent Information on the Top Ten M&amp;A Investment Banks and Law Firms Ranked by U.S. Deal Size ..... 1-114</p>
<p>Figure 1-30</p>	<p>Top 10 M&amp;A Investment Banking Firms and Law Firms Ranked by U.S. Deal Volume 2024 ..... 1-114</p>
<p>§ 1:7.30</p>	<p>Recent Information on Proxy Contests ..... 1-115</p>
	<p>[A] The Number of Proxy Contests from 2018 to 2022 ..... 1-115</p>

Figure 1-31	Number of U.S. Proxy Contests.....	1-115
[B]	The Results of Proxy Contests	
	from 2018 to 2022 .....	1-116
Figure 1-32	U.S. Proxy Contest Results 2018–2022 .....	1-116
[C]	An Early 2025 Report on Proxy Contests .....	1-117
§ 1:7.31	The Role of Activist Shareholders.....	1-117
[A]	In General .....	1-117
[B]	Sullivan & Cromwell's 2022 Activism Study .....	1-118
[C]	Barclays Shareholder Advisory Group, Q1 Review of Shareholder Activism .....	1-119
[D]	Trump's Opposition to Climate Change and ESG .....	1-120
§ 1:7.32	Recent Data on Cross-Border M&A Activity .....	1-121
[A]	Introduction .....	1-121
[B]	The Impact of the Dollar and "Foreign Exchange" on Cross-Border M&A, in General.....	1-123
[C]	Cross-Border M&A by Region of the Target.....	1-123
[C][1]	A Note on the UNCTAD, World Investment Report .....	1-123
[C][2]	Cross-Border M&A As Reported in the UNCTAD, World Investment Report.....	1-123
Figure 1-33	Value of Cross-Border M&As, by Region/Economy of Target, 2016–2021 .....	1-124
[C][3]	The 2024 Decrease in Cross-Border M&A .....	1-124
[D]	Cross-Border M&A: Foreign Acquirers and U.S. Acquirers, 2018–2022 .....	1-125
Figure 1-34	Cross-Border M&A Foreign Buyers of U.S. Targets and Foreign Sellers to U.S. Acquirers 2019–2024 .....	1-125
[E]	The Growth of Investment Restrictions on Cross-Border M&A .....	1-127
[F]	Wachtell's 2025 Assessment of Trends in National Security Considerations in the United States and Other Countries .....	1-128
[G]	The United States's "Reverse CFIUS" Rules.....	1-128
[H]	The Trump Administration's February 2024 Initial Approach to CFIUS and Reverse CFIUS .....	1-129
§ 1:7.33	Recent Data on the Top Ten Foreign Buyer Countries: Inbound Acquisitions.....	1-129
Figure 1-35	Top 10 Foreign Buyer Countries by Deal Volume 2023–2024 (\$ Billions) .....	1-130
§ 1:7.34	Recent Data on the Top Ten Foreign Seller Countries: Outbound Acquisitions.....	1-130

*Table of Contents*

Figure 1-36	Top 10 Foreign Seller Countries by Deal Volume 2023–2024 (\$ Billions) .....	1-131
§ 1:7.35	Resolution of the Trapped Foreign Income Problem by the Trump Supported 2017 Tax Cuts and Jobs Act (TCAJA) .....	1-132
§ 1:7.36	The Inversion Problem Before and After the TCAJA and the I.R.C. Section 385 Regs.....	1-133
§ 1:7.37	Brief Introduction to Special Purpose Acquisition Companies (SPACs) .....	1-134
[A]	In General .....	1-134
[B]	Number of SPACs and Amounts Raised in 2020 Through 2024 .....	1-135
Figure 1-37	Number and Dollars Raised by SPACs 2020 to 2024 .....	1-136
[C]	Illustration of a 2024 SPAC and a Related 2025 De-SPAC .....	1-136
§ 1:7.38	Brief Introduction to Blockchain and Cryptocurrency M&A .....	1-137
[A]	In General and the Trump Effect .....	1-137
[B]	The Starting Point: Trump's Crypto Business .....	1-137
[C]	The Basic Crypto Principles .....	1-138
[D]	A Guide to a Very Helpful Introduction to Crypto by F. Dario de Martino .....	1-139
[E]	Brief Introduction to a Leading Publicly Traded Firm Active in the Crypto Industry—Coinbase .....	1-143
[F]	The Risk with Crypto As Explained by Coinbase .....	1-143
[G]	The SEC's Termination of the Its Action Against Coinbase After Trump Took Office .....	1-144
[H]	Discussions of Crypto in the Due Diligence Context .....	1-145
§ 1:7.39	The Impact of Environmental, Social and Governance (ESG) on M&A .....	1-145
[A]	In General: Not Including the Impact of President Trump on ESG .....	1-145
[B]	The Impact of President Trump on ESG as of May 2025 .....	1-146
§ 1:7.40	The Impact of ChatGPT and Other Artificial Intelligence (AI) Firms on M&A .....	1-147
[A]	Introduction .....	1-147
[B]	AI Burst On to the Scene in 2023 .....	1-147
[C]	President Biden's Executive Order on AI, October 2023 .....	1-149

[D]	E.U. Adopts the E.U. Artificial Intelligence Act, 2024 .....	1-149
[E]	Wachtell Lipton's View of the Impact of AI on M&A as of January 2025 .....	1-151
[F]	Trump Administration's January 23, 2025 Executive Order on AI .....	1-152
[G]	Use of ChatGPT and Other AI Systems in M&A .....	1-153
[H]	A Related Tech Acquisition—Apple's Acquisition of AR Headset Startup—Mira .....	1-154
[I]	The "Deepfake Act" Almost Faked Me Out! .....	1-155
[J]	Discussions of AI in the Due Diligence Context .....	1-155
§ 1:7.41	The Impact of Monetary Policy and Tariff Policy on the Level of M&A Activity .....	1-155
Figure 1-38A	From 2021 to 2022, Annual Inflation (1) More Than Tripled in the U.S., and EU, and (2) Significantly Increased in Japan and China .....	1-157
Figure 1-38B	Illustration of the General Relationship Between the Recent (1) Level of Inflation, and (2) Performance of the Stock Market—2018–2022: As Inflation Goes Up, the Stock Market Generally Goes Down .....	1-158
§ 1:7.42	An Early 2025 Introduction to the Trump Tariffs and Their Negative Economic Impact on Markets .....	1-160
[A]	Introduction .....	1-160
[A][1]	General Introduction to the Issues .....	1-160
[A][2]	General Introduction to This Section .....	1-161
[B]	What Is a Tariff and Who in the United States Has the Authority to Impose a Tariff? .....	1-161
[C]	What Is the Essential Economic Case Against Tariffs? .....	1-162
[D]	What Has Been the General Reaction of the Experts to These Trump Tariffs? .....	1-162
[E]	CNN's Superb Answer to the Question: "What Tariffs Has President Trump Imposed or Threatened to Impose During His First 100 Days?" .....	1-163
[F]	The Author's Question Regarding This Tariff Issue As of May 26, 2025 .....	1-167
§ 1:7.43	Preliminary Report on M&A Activity in 2025 .....	1-167
[A]	In General .....	1-167

*Table of Contents*

[B]	Assessment by the Paul Weiss Law Firm of M&A Activity As of May 2025.....	1-167
[B][1]	General Observations .....	1-167
[B][2]	Observations Regarding Strategic As Compared to Sponsor Transactions .....	1-168
§ 1:7.44	A Deal Lawyer's "Takes" on the Impact on M&A of the Current and Recent Past Presidential Administration's Laws and Regulations.....	1-169
[A]	The Trump Administration's Impact on M&A.....	1-169
[A][1]	The First Take: the "First 100 Days," Beginning January 2025.....	1-169
[A][1][a]	General Trump Approach to Regulation: For Every New One, Get Rid of Ten Old Ones .....	1-169
[A][1][b]	Trump's Approach to Both (1) Substantive Antitrust Enforcement of Mergers, and (2) Pre-Merger Notification .....	1-169
[B]	The Biden Administration's Impact on M&A .....	1-170
§ 1:7.45	A Guide to Some of the Literature Addressing Current Developments in M&A.....	1-171
§ 1:8	Introduction to Corporate Governance Issues Generally.....	1-174
§ 1:8.1	Background .....	1-174
§ 1:8.2	Overview of Corporate Governance at the State Level .....	1-175
§ 1:8.3	Overview of Corporate Governance at the Federal Level.....	1-176
§ 1:8.4	Overview of Corporate Governance Provisions in SOX.....	1-176
§ 1:8.5	Overview of Corporate Governance Provisions in Dodd-Frank.....	1-177
§ 1:8.6	The ALI Draft on Corporate Governance As of May 2023 .....	1-178
§ 1:9	Guide to References.....	1-178
§ 1:9.1	PLI's Annual Advanced M&A Developments Course and Other Current Sources .....	1-180

**PART I**  
**CONTRACT LAW AND RELATED CONSIDERATIONS**  
**IN M&A, INCLUDING DRAFTING OF ACQUISITION**  
**AGREEMENTS**

**Chapter 2 General Principles in Drafting an Acquisition  
 Agreement—Merger Agreement, Asset  
 Acquisition Agreement, and Stock Purchase  
 Agreement**

§ 2:1	Scope.....	2-19
§ 2:1.1	References .....	2-24
§ 2:1.2	The Impact of COVID-19 on Drafting and Interpreting M&A Agreements.....	2-27
§ 2:1.3	Impact of Market Volatility in 2022 on M&A Activity.....	2-28
§ 2:2	Basic Principles of Contract Formation and Interpretation Related to Acquisition Agreements .....	2-31
§ 2:2.1	Introduction .....	2-31
[A]	General Principles .....	2-31
[B]	Formation of a Contract: Offer, Acceptance, and Consideration.....	2-31
[C]	“Consideration” in Acquisition Agreements .....	2-32
[C][1]	Introduction.....	2-32
[C][2]	The “Consideration” Issue in <i>Roam-Tel</i> .....	2-32
[C][3]	The “Consideration” Issue in <i>Cigna Health</i> .....	2-33
[D]	Introduction to Contract Interpretation Issues.....	2-35
§ 2:2.2	First Principle of Contract Interpretation: Clear Meaning.....	2-35
§ 2:2.3	Second Principle of Contract Interpretation: Parol Evidence .....	2-35
[A]	Introduction .....	2-35
[B]	Illustration of Parol Evidence Rule: In Interpreting Merger Agreement, No Consideration Given to Nonbinding Letter of Intent (LOI)— <i>ev3</i> .....	2-36
§ 2:2.4	Third Principle of Contract Interpretation: Forthright Negotiator .....	2-38
§ 2:2.5	Summary of the Three Principles .....	2-39
§ 2:2.6	Fourth Principle of Contract Interpretation: Implied Covenant of Good Faith and Fair Dealing.....	2-40
[A]	Introduction .....	2-40
[B]	<i>Shrader</i> , 2010 .....	2-40

## Table of Contents

[C]	<i>Narrowstep</i> , 2010.....	2-41
[D]	<i>WaveDivision</i> , 2010 .....	2-43
[E]	<i>Viacom</i> , 2011 .....	2-43
[F]	<i>Renco</i> , 2015 .....	2-44
[G]	Rejection of Covenant of Good Faith and Fair Dealing in Interpreting an Earn-Out Provision— <i>Lazard Technology</i> , 2015 and <i>Fortis</i> , 2015 .....	2-45
[H]	<i>Dieckman</i> , 2017.....	2-47
[I]	Implied Covenant in an Earn-Out— <i>Tutor</i> .....	2-51
[J]	Defending Against a Claim of Implied Covenant of Good Faith and Fair Dealing .....	2-52
[K]	Judge Posner's Take.....	2-52
§ 2:2.7	Related Concept of Tortious Interference.....	2-53
[A]	Introduction .....	2-53
[B]	Illustrations— <i>NACCO</i> and <i>Guidant</i> .....	2-53
[C]	Tortious Interference with Prospective Advantage, Plus Punitive Damages— <i>Ventas</i> .....	2-56
§ 2:2.8	Potential Fraud Claim— <i>NACCO</i> , <i>Airborne</i> , <i>Narrowstep</i> , and <i>Express Scripts</i> .....	2-63
§ 2:2.9	Reforming Contracts— <i>Cambridge North</i> .....	2-70
§ 2:2.10	Consciously Leaving Gaps in a Contract .....	2-71
§ 2:2.11	Amendment to the Delaware Code Extending the Time for Contract Claims .....	2-72
§ 2:2.12	The Elements of a Breach of Contract Claim— <i>NAF</i> .....	2-72
§ 2:2.13	Alleged "Frustration of Purpose," Acquirer Walks Because of COVID-19— <i>Khan v. Cinemex</i> .....	2-76
[A]	Basic Facts Relating to the Issue Presented Here .....	2-76
[B]	Frustration of Purpose and Impossibility Excuses.....	2-77
§ 2:2.14	The Acquisition in 2022 of Twitter by Elon Musk: After Musk Reversed His Decision to "Walk" from the Transaction, the Transaction Closed Without a Final Court Decision on the Transaction.....	2-79
§ 2:2.15	The Specific Performance Remedy.....	2-80
§ 2:2.16	Drag-Along Rights and Covenants Not to Sue— <i>New Enterprise</i> .....	2-82
§ 2:2.17	The Value of M&A Drafting .....	2-83
§ 2:3	Introduction to Stock Purchase Agreements, Asset Acquisition Agreements, and Merger Agreements .....	2-83

§ 2:4	Advantages and Disadvantages of Stock Purchase Agreements, Asset Acquisition Agreements, and Merger Agreements .....	2-84
§ 2:4.1	Introduction .....	2-84
§ 2:4.2	Stock Purchase Agreements.....	2-85
§ 2:4.3	Asset Acquisition Agreements .....	2-86
§ 2:4.4	Merger Agreements .....	2-87
§ 2:4.5	The ABA Model Short Stock Purchase Agreement.....	2-88
§ 2:4.6	The ABA Legal Project Management Initiative.....	2-88
§ 2:4.7	Advantages of Ensuring That a Target Continues As a Subsidiary of the Acquirer .....	2-90
§ 2:5	Outline of Common Provisions of Acquisition Agreements .....	2-91
§ 2:6	The Parties to the Transaction.....	2-92
§ 2:7	The Whereas Clauses .....	2-93
§ 2:8	Defined Terms .....	2-94
§ 2:9	Description of the Basic Purchase and Sale or Merger Transaction.....	2-95
§ 2:9.1	Introduction .....	2-95
§ 2:9.2	Purchase Price Considerations, Including the Exchange Ratio.....	2-95
[A]	Introduction .....	2-95
[B]	Structuring the Cash Payment or Exchange Ratio in Public Company Mergers: Caps, Floors, and Collars .....	2-96
[B][1]	Cash Consideration .....	2-96
[B][2]	Fixed Exchange Ratio .....	2-96
[B][2][a]	Introduction .....	2-96
[B][2][b]	Fixed Exchange Ratio Mergers During COVID-19 .....	2-97
[B][3]	Fixed Value Exchange Ratio.....	2-97
[B][4]	Floating Value Exchange Ratio with a Collar.....	2-98
[B][5]	Fixed Value Exchange Ratio with a Collar .....	2-99
[C]	Inclusion of a “Ticking Fee” Payable if the Closing Is Delayed—Dow–Rohm and Haas.....	2-101
[D]	Structuring the Purchase Price in a Stock Acquisition of a Closely Held Target.....	2-102
[E]	Structuring the Purchase Price, Assets to Be Acquired, and Liabilities to Be Assumed in an Asset Acquisition of a Closely Held Target .....	2-103
[F]	Post-Closing Purchase Price Adjustments, Escrows, and Earn-Outs .....	2-106
[F][1]	In General and the ABA, <i>2009 Private             Target Deal Point Study</i> .....	2-106

## Table of Contents

[F][2]	Working Capital and Net Worth	
	Adjustments .....	2-108
[F][2][a]	Working Capital Adjustments.....	2-108
[F][2][a][i]	Introduction.....	2-108
[F][2][a][ii]	The True Up in <i>Chicago Bridge-Westinghouse</i> .....	2-110
[F][2][b]	Net Worth Adjustments .....	2-113
[F][3]	Earn-Outs.....	2-114
[F][3][a]	In General .....	2-114
[F][3][b]	Earn-Outs and the Implied Covenant of Good Faith and Fair Dealing— <i>Viacom</i> .....	2-116
[F][3][c]	The “Diligent Efforts” Clause in an Earn-Out Provision— <i>Sandoz</i> .....	2-117
[F][3][d]	Meaning of “Intent” and Rejection of Covenant of Good Faith and Fair Dealing in Interpreting an Earn-Out Provision— <i>Lazard Technologies</i> .....	2-118
[F][3][e]	Meaning of the Term “Indication” in an Earn-Out— <i>Gilead</i> .....	2-120
[F][3][f]	Earn-Outs and the Implied Covenant of Good Faith and Fair Dealing, and Claim of Fraud— <i>Tutor</i> .....	2-121
[F][3][g]	Common Earnouts, Including in De-SPAC Transactions.....	2-124
[F][3][h]	Introduction to Two 2024 Delaware Earnout Cases: <i>Fortis</i> and <i>Alexion</i> .....	2-125
[F][3][i]	The <i>Fortis Advisers</i> 2024 Earnout Case .....	2-126
[F][3][j]	The <i>Alexion</i> 2024 Earnout Case .....	2-129
[F][3][k]	Four Tips for Earnouts .....	2-132
[F][4]	Contingent Value Rights or CVRs.....	2-132
[F][5]	Binding the Target’s Shareholders to the Post-Closing Adjustment Process— <i>Aveta</i> .....	2-134
[G]	Addressing the Potential for Successor Liability for the Acquirer in an Asset Acquisition.....	2-135
[G][1]	In General.....	2-135
[G][2]	Successor Liability Under Bulk Sales Laws in Asset Acquisitions .....	2-135
[G][3]	Successor Liability Under State Tax Laws in Asset Acquisitions .....	2-137
[G][4]	Successor Liability for the Target’s Defective Products in Asset Acquisitions.....	2-138
[G][4][a]	Introduction .....	2-138
[G][4][b]	The Pennsylvania Approach .....	2-138
[G][4][c]	The California Approach .....	2-140
[G][4][d]	The New Jersey Approach .....	2-141

[G][4][e]	The Florida Approach.....	2-142
[G][4][f]	The Delaware Approach, <i>Merck</i> in 2023 .....	2-142
[G][5]	Successor Liability for the Target's Environmental Torts in Asset Acquisitions.....	2-144
[G][6]	Successor Liability for the Target's General Torts in Asset Acquisitions .....	2-147
[G][7]	Dealing with Potential Successor Liability in the Asset Acquisition Agreement.....	2-149
[G][8]	Successor Liability Under the Labor Laws.....	2-150
[G][9]	Determining the Applicable Law .....	2-150
[H]	Duty to Warn .....	2-152
[I]	Dealing with the Treatment of a Target's Outstanding Stock Options .....	2-153
[J]	Special Issues in the Acquisition of a Division or Subsidiary .....	2-155
[J][1]	Introduction.....	2-155
[J][2]	Dealing with Financials of the Acquired Business.....	2-155
[J][3]	Dealing with Assets and Liabilities and "Right-Sizing" the Acquired Business .....	2-155
[J][4]	Properly Structuring the Seller's Representations, Warranties, and Covenants.....	2-156
[J][5]	Post-Acquisition Support Agreement .....	2-156
[J][6]	Potential for Breach of Fiduciary Duty with Respect to a Support Agreement .....	2-157
§ 2:9.3	Exclusion from Transferred Assets Attorney-Client Communications— <i>Great Hill</i> .....	2-159
§ 2:10	The Representations and Warranties: The Snapshot .....	2-159
§ 2:10.1	In General .....	2-159
§ 2:10.2	Disclosure Schedules .....	2-162
[A]	In General .....	2-162
[B]	Disclosure Under One Representation Recognized Under Another Representation .....	2-163
[C]	Post-Signing Amendments to the Disclosure Schedule.....	2-165
§ 2:10.3	Materiality Qualification .....	2-165
§ 2:10.4	Material Adverse Effect Qualifier and Relationship to Material Adverse Change.....	2-166
§ 2:10.5	Knowledge Qualification.....	2-168
[A]	In General .....	2-168
[B]	Whose Knowledge? .....	2-169
[C]	What Is Knowledge? .....	2-170

## Table of Contents

	[D] Particular Importance in Private Deals .....	2-170
	[E] Dueling Qualified and Non-Qualified	
	Representations— <i>DCV</i> .....	2-170
§ 2:10.6	Common Target Representations and	
	Warranties .....	2-173
	[A] Introduction .....	2-173
	[B] Organization, Standing, and Power .....	2-174
	[C] Capital Structure.....	2-174
	[D] Authority to Enter the Agreement, No Conflict, and Required Consents .....	2-175
	[D][1] In General.....	2-175
	[D][2] Dealing with Change of Control Provisions in Contracts.....	2-177
	[E] Financial Statements, SEC Documents, and	
	SOX Issues .....	2-178
	[E][1] In General: GAAP and Fairly Presents .....	2-178
	[E][2] Impact of FIN 48 on GAAP Representation and Warranty .....	2-180
	[E][3] Specific Representation Regarding Compliance with Internal Control and Disclosure Control Requirements of SOX.....	2-180
	[E][4] The ABA <i>Deal Point Studies</i> .....	2-181
	[F] No Undisclosed Liabilities.....	2-182
	[F][1] In General.....	2-182
	[F][2] The ABA <i>Deal Point Studies</i> .....	2-183
	[G] Absence of Certain Changes: No MAC or MAE Since Last Financials .....	2-183
	[H] Compliance with Applicable Laws and Reporting Requirements .....	2-185
	[H][1] In General.....	2-185
	[H][2] The ABA <i>Deal Point Studies</i> .....	2-187
	[I] Litigation.....	2-187
	[J] Taxes .....	2-192
	[J][1] In General.....	2-192
	[J][2] Dealing with the Foreign Investment in Real Property Tax Act (FIRPTA) in Stock Purchase Agreements.....	2-197
	[K] Material Agreements to Which the Target Is a Party .....	2-198
	[L] Benefit Plans .....	2-200
	[M] Labor and Employment Matters .....	2-201
	[N] Subsidiaries .....	2-203
	[O] Environmental .....	2-203
	[P] Properties and Sufficiency of Assets.....	2-205
	[Q] Intellectual Property .....	2-206

[R]	Insurance .....	2-207
[S]	Brokers or Finders .....	2-207
[T]	Approval of the Agreement by the Target's Board and No Takeover Statutes.....	2-208
[U]	Shareholder Vote Required to Approve the Transaction .....	2-209
[V]	Opinion of Financial Adviser.....	2-209
[W]	Inapplicability of the Target's Poison Pill.....	2-210
[X]	No Restrictions on Business Activities .....	2-210
[Y]	Certain Business Practices, Including Compliance with the Foreign Corrupt Practices Act of 1977 .....	2-211
[Z]	Addressing Receivables and Payables .....	2-212
[AA]	List of Customers and Suppliers.....	2-213
[AB]	No Power of Attorney .....	2-214
[AC]	Complete Copies of Materials .....	2-214
[AD]	The 10b-5—No Nondisclosure or Misrepresentation—Representation .....	2-214
[AD][1]	In General.....	2-214
[AD][2]	Requiring Disclosures Beyond Omissions .....	2-215
[AD][3]	<i>The ABA Deal Point Studies</i> .....	2-217
[AE]	No Other Representations or Warranties— The Anti-Reliance Clause .....	2-218
[AE][1]	Introduction.....	2-218
[AE][2]	Delaware Law Approach to "Anti-Reliance" Clauses— <i>ABRY, RAA, TransDigm, FdG,</i> <i>IAC, and Sparton</i> .....	2-220
[AE][2][a]	<i>ABRY</i> .....	2-220
[AE][2][b]	<i>RAA</i> .....	2-221
[AE][2][c]	<i>TransDigm</i> .....	2-223
[AE][2][d]	<i>FdG Logistics</i> .....	2-227
[AE][2][e]	<i>IAC</i> .....	2-230
[AE][2][f]	<i>Sparton</i> .....	2-235
[AE][3]	Rule 10b-5 Approach to "Non-Reliance" Clauses .....	2-238
[AE][4]	<i>The ABA Deal Point Studies</i> .....	2-239
[AF]	Representations Commonly Found in Stock Purchase Agreements .....	2-239
[AF][1]	Introduction.....	2-239
[AF][2]	Bank Accounts.....	2-239
[AF][3]	Affiliated Transactions .....	2-240
[AF][4]	Books and Records.....	2-240
[AG]	Representations Commonly Found in Asset Acquisition Agreements .....	2-240
[AG][1]	Introduction.....	2-240
[AG][2]	Product Liability .....	2-241

## Table of Contents

[AG][3]	Product Returns and Warranties .....	2-241
[AG][4]	No Defaults in Agreements of the Target to Be Transferred to Acquirer; Novations .....	2-242
[AH]	Additional Representations of Selling Shareholders in Stock Acquisition Agreements ....	2-242
[AI]	Securities Law Representations from Selling Shareholders Where the Consideration Is Unregistered Securities of the Acquirer .....	2-244
[AI][1]	Introduction.....	2-244
[AI][2]	Selling Shareholder's Representations Relating to Private Offering.....	2-244
§ 2:10.7	Common Acquirer Representations and Warranties .....	2-246
[A]	Introduction .....	2-246
[B]	Common Representations Found in Both the Toys and Taleo–JobFlash Cash Consideration Agreements .....	2-247
[C]	The Financing Representation.....	2-247
[D]	The Solvency Representation .....	2-248
[E]	Representation That Stock Is Purchased for Investment.....	2-249
[F]	Delaware Section 203 Representation .....	2-250
[G]	Acquirer's Due Diligence Representation— <i>Hudson's Bay</i> .....	2-250
§ 2:10.8	Representation and Warranty Insurance .....	2-252
§ 2:11	Covenants: The Undertakings .....	2-253
§ 2:11.1	Introduction .....	2-253
§ 2:11.2	The "Efforts" Clause .....	2-254
[A]	Introduction .....	2-254
[A][1]	In General.....	2-254
[A][2]	Further Discussion of "Hell or High Water" Provisions .....	2-256
[B]	"Reasonable Best Efforts"— <i>Huntsman</i> , 2008 .....	2-257
[C]	"Reasonable Best Efforts"— <i>Cooper</i> , 2013.....	2-258
[D]	"Commercially Reasonable Efforts"— <i>Cooper</i> , 2014.....	2-259
[E]	"Diligent Efforts" Clause in an Earn-Out Provision— <i>Sandoz</i> , 2015 .....	2-259
[F]	The Common Law on "Efforts".....	2-261
[G]	ETE Walks from Williams—Latham Tax Opinion and Commercially Reasonable Efforts.....	2-262
[G][1]	The Court of Chancery Decision.....	2-262
[G][2]	The Supreme Court Decision on the Tax Opinion Condition in <i>Williams v. ETE</i> and the Aftermath .....	2-269
[G][2][a]	Background Fact and Issues .....	2-269

[G][2][b]	The “Commercially Reasonable Efforts” and “Reasonable Best Efforts” Issue .....	2-271
[G][2][c]	The Estoppel Issue.....	2-276
[G][2][d]	The Dissent by Chief Justice Strine .....	2-277
[G][2][e]	Implications of the <i>Williams</i> Case .....	2-280
[G][2][f]	My Take on the <i>Williams</i> Case.....	2-280
[G][2][g]	The Final Chapter in the <i>Energy Transfer</i> Litigation—2023.....	2-281
[H]	The Meaning of Reasonable Best Efforts in <i>Tribune v. Sinclair</i> .....	2-282
[I]	Breach of “Efforts” Clauses in Dealing with Antitrust Challenge, but No Liability— <i>Anthem-Cigna</i> .....	2-284
[I][1]	Introduction.....	2-284
[I][2]	The Applicable Provisions of the Merger Agreement .....	2-284
[I][3]	Cigna’s “Cold Feet” .....	2-285
[I][4]	The Court’s “No Harm, No Foul” Analysis on Cigna’s Blatant Breach of the Efforts Covenants.....	2-287
[I][5]	The Court’s Analysis of Cigna’s Claim That Anthem Breached Its Efforts Covenants .....	2-287
[I][6]	The Reverse Termination Fee.....	2-288
[I][7]	The Court’s Succinct Summary of Its Holdings .....	2-288
§ 2:11.3	Common Covenants by Targets and Selling Shareholders in the “Covenants Relating to the Conduct of the Business” Article.....	2-288
[A]	Introduction .....	2-288
[B]	Ordinary Course.....	2-289
[B][1]	Introduction.....	2-289
[B][2]	Buyer Cannot Walk from a COVID-Era Sale and Purchase Agreement on the Basis of the No MAE Condition, but Can Walk Under the Ordinary Course Covenant— <i>Maps Hotels</i> .....	2-290
[C]	No Extraordinary Dividends and Other Adjustments.....	2-292
[D]	No Issuances of New Securities.....	2-292
[E]	No Amendments to Governing Documents .....	2-293
[F]	No Major Acquisitions or Dispositions .....	2-293
[G]	Indebtedness .....	2-294
[H]	Other Actions Not to Cause Representations to Become Untrue .....	2-294
[I]	Accounting Methods and Tax Matters.....	2-295
[J]	Tax-Free Qualification of the Transaction.....	2-295

## Table of Contents

[K]	Compensation and Benefit Plans.....	2-295
[L]	No Liquidation .....	2-296
[M]	Litigation.....	2-296
[N]	No Restrictions on Business.....	2-297
[O]	Other Agreements .....	2-297
[P]	Requirement That Target Adopt a Poison Pill— <i>Compellent</i> .....	2-297
§ 2:11.4	Common Covenants in the “Additional Agreements” Article .....	2-298
[A]	Introduction .....	2-298
[B]	Additional Covenants Generally Found in All Acquisition Agreements.....	2-299
[B][1]	Access to Information.....	2-299
[B][2]	Further Action and Reasonable Best Efforts, Specifically with Regard to Antitrust Approval .....	2-301
[B][2][a]	Introduction .....	2-301
[B][2][b]	The Case Law on Efforts— <i>Huntsman, Narrowstep, and Wave</i> .....	2-303
[B][3]	Confidentiality.....	2-306
[C]	Additional Covenants Relating to the Acquisition of a Publicly Held Target.....	2-308
[C][1]	Covenant Relating to Preparation of the Form S-4 Registration Statement and Proxy Statements for the Acquisition by a Public Acquirer of a Public Target for Stock .....	2-308
[C][2]	Covenant Relating to Preparation of the Proxy Statements for the Acquisition of a Public Target for Cash.....	2-311
[C][3]	Covenant Relating to the Holding by a Public Target of a Shareholders’ Meeting.....	2-312
[C][4]	“No Solicitation”: Acquisition Proposals and Break-Up Fees in Public Deals .....	2-313
[C][4][a]	In General .....	2-313
[C][4][b]	Breach of Acquisition Proposal— <i>NACCO and Guidant</i> .....	2-314
[C][4][c]	Is the Termination Fee the Exclusive Remedy?— <i>Essendant</i> .....	2-319
[C][5]	“No Impairment” Covenant .....	2-320
[C][6]	Governance Covenant in “Mergers of Equals” .....	2-320
[C][7]	Target’s Covenant to Adopt a Poison Pill— <i>Compellent</i> .....	2-321
[C][8]	Other Covenants Relating to the Acquisition of a Public Target .....	2-321

[D]	"No Solicitation" Covenant in Stock Purchase Agreements and Asset Acquisition Agreements .....	2-322
[D][1]	Introduction.....	2-322
[D][2]	The Case Law on Private Company "No Solicitation" Covenants— <i>Wave</i> .....	2-323
[E]	Resignation of Target's Directors .....	2-325
[F]	Covenant Relating to Notification of Changes and Amendments to Disclosure Schedule .....	2-325
[F][1]	Introduction.....	2-325
[F][2]	"Notification of Change" Covenant in <i>Yahoo!–Verizon Transaction</i> .....	2-327
[G]	Covenants Relating to the Post-Closing Period .....	2-328
[G][1]	Introduction.....	2-328
[G][2]	Indemnification, Directors' and Officers' Insurance Post-Closing .....	2-328
[G][2][a]	In General .....	2-328
[G][2][b]	ABA <i>Deal Point Studies</i> Relating to D&O Insurance .....	2-330
[G][2][c]	2009 Amendment to DGCL Regarding Amendments to an Indemnification Provision .....	2-330
[G][3]	Non-Competition Post-Closing Covenant .....	2-331
[G][3][a]	Introduction .....	2-331
[G][3][b]	California Approach to Covenants Not to Compete— <i>Fillpoint</i> .....	2-333
[G][3][c]	Missouri Approach to Covenants Not to Compete— <i>Symphony</i> .....	2-334
[G][3][d]	FTC's Proposed Prohibition Against Certain Covenants Not to Compete .....	2-335
[G][4]	Benefit and Labor Law Post-Closing Covenants.....	2-337
[G][4][a]	In General .....	2-337
[G][4][b]	The WARN Act Covenant .....	2-337
[G][4][b][i]	Introduction.....	2-337
[G][4][b][ii]	The WARN Act and COVID .....	2-338
[H]	Registration Rights Post-Closing Covenant .....	2-341
[I]	Post-Closing Further Action .....	2-341
[J]	Merger of Equals and Other Social Covenants .....	2-341
§ 2:12	Conditions to Closing and the Closing.....	2-344
§ 2:12.1	Introduction .....	2-344
[A]	General Principles .....	2-344
[B]	Acquirer Faced with What It Thinks Are Failed Conditions .....	2-345
[B][1]	Actual Failed Condition and Acquirer Walks .....	2-345

## Table of Contents

[B][2]	Actual Failed Condition but Acquirer Closes and Sues .....	2-346
[B][3]	Acquirer Walks but Condition Found to Be Satisfied .....	2-346
[C]	Target Faced with What It Thinks Are Failed Conditions .....	2-347
[C][1]	Actual Failed Condition and Target Walks .....	2-347
[C][2]	Target Walks but Condition Found to Be Satisfied .....	2-347
[D]	Who Has the Burden of Proof That a Condition Failed? .....	2-348
[E]	The Concept of "Anticipatory Repudiation" .....	2-348
§ 2:12.2	Standard Conditions to Closing .....	2-350
§ 2:12.3	The Accuracy of Representations and Warranties (Other than MAC or MAE) Condition .....	2-351
[A]	Introduction .....	2-351
[B]	The Bring-Down .....	2-352
[C]	Reason for a Materiality Qualification .....	2-354
[D]	The Avoidance of Double Materiality .....	2-354
[E]	The "Back Door No" MAE or MAC .....	2-355
[F]	Illustrations .....	2-356
[F][1]	Damages Imposed on an Acquirer Who Walked on the Basis of Purported False Environmental Representation— <i>Bay Industries</i> .....	2-356
[F][2]	Acquirer Who Walked on the Basis of Purported False Financial Representation Subject to Specific Performance— <i>IBP</i> .....	2-357
§ 2:12.4	The "No Material Adverse Change (MAC) or Effect (MAE)" Condition .....	2-358
[A]	Introduction .....	2-358
[B]	<i>ABA Deal Point Studies</i> Relating to MACs and MAEs .....	2-360
[C]	Survey of Cases Illustrating the Impact of the MAC/MAE Condition .....	2-361
[C][1]	Finding That There Was a MAC Giving the Acquirer the Right to Walk— <i>Katz</i> .....	2-361
[C][2]	Finding That There Was an MAE Giving a Target the Right to Walk— <i>Allegheny</i> .....	2-361
[C][3]	Specific Performance Ordered Against an Acquirer Who Walked Because of an MAE Condition— <i>IBP</i> .....	2-364
[C][4]	Alleged Breach of MAE Clause Relating to Environmental Liabilities— <i>Frontier</i> .....	2-367

[C][5]	Finding of a Material Adverse Change, but the Change Was Covered by a Carve-Out— <i>Genesco</i> .....	2-367
[C][5][a]	In General .....	2-367
[C][5][b]	The Impact of the Carve-Out .....	2-369
[C][5][c]	Did an MAE Occur? .....	2-369
[C][6]	Finding of No Material Adverse Effect and Willful and Intentional Breach by Acquirer— <i>Huntsman</i> .....	2-372
[C][6][a]	General Background .....	2-372
[C][6][b]	The MAE Issue.....	2-374
[C][6][c]	The “Knowing and Intentional” Issue.....	2-377
[C][6][d]	The Solvency Issue and the Remedy.....	2-381
[C][6][e]	Summary.....	2-382
[C][7]	Two Polar Opposite Approaches to the Definition of “MAE” in 2008 Credit Crisis Deals, Mitsubishi–Morgan Stanley and Wells Fargo–Wachovia .....	2-382
[C][7][a]	In General .....	2-382
[C][7][b]	The Mitsubishi–Morgan Stanley Deal .....	2-382
[C][7][c]	The Wells Fargo–Wachovia Deal .....	2-383
[C][8]	The Carve-Out to the Carve-Out in Exxon–XTO .....	2-384
[D]	The Market MAC.....	2-386
[E]	The MAC and MAE Clauses in <i>Osram</i> .....	2-387
[F]	Buyer Was Able to Walk Because of, Inter Alia, an MAE, <i>Akorn</i> .....	2-389
[F][1]	The Delaware Chancery Court’s Decision in <i>Akorn</i> .....	2-389
[F][2]	The Delaware Supreme Court’s Decision in <i>Akorn</i> .....	2-398
[F][3]	Buyer Can Walk from the Merger Agreement and Not Close— <i>Antin Infrastructure</i> .....	2-400
[G]	Material Adverse Effect Condition, Purchaser Cannot Walk— <i>Boston Scientific–Channel Medsystems</i> .....	2-401
[H]	COVID-19 and the MAC Clause .....	2-403
[H][1]	Introduction.....	2-403
[H][2]	Acquirer Walks on the Basis of the Prevention of the Company’s Ability to Close Clause of the MAC—Victoria’s Secret.....	2-403
[H][2][a]	Basic Facts and Introduction to the Issue Presented Here .....	2-403
[H][2][b]	Discussion of Clause (i) of the MAE, the Prevention of the Company’s Ability to Close Clause.....	2-404

## Table of Contents

[H][3]	Buyer Cannot Walk from a COVID-Era Sale and Purchase Agreement on the Basis of the No MAC Condition, but Can Walk Under the Ordinary Course
	Covenant— <i>Maps Hotels</i> ..... 2-408
[H][3][a]	The Basic Facts ..... 2-408
[H][3][b]	Buyer Refuses to Close and Seller's Response ..... 2-409
[H][3][c]	The COVID Issues ..... 2-409
[H][3][d]	The COVID No-MAE Representation, or Bring Down Condition Issue ..... 2-410
[H][3][d][i]	In General ..... 2-410
[H][3][d][ii]	The Court's Explication of the Impact on the Definition of "Calamities" of the "Rumsfeldian" Categories of Risk: "Known Knowns, Known Unknowns, and Unknown Unknowns" ..... 2-411
[H][3][e]	The Ordinary Course Covenant (or Covenant Compliance Condition) Issue ..... 2-412
[H][3][f]	<i>AB Stable v. Maps</i> Affirmed ..... 2-412
[H][4]	COVID Not an MAE, Buyer Cannot Walk— <i>KCAKE</i> ..... 2-413
[H][5]	COVID Not an MAE, Acquirer Must Close— <i>CorePower</i> ..... 2-416
[H][5][a]	The Facts and Holding ..... 2-416
[H][5][b]	Current Status ..... 2-418
[H][5][c]	Stay, Pending Appeal ..... 2-419
[H][6]	General Observations on Material Adverse Effect and the COVID-19 ..... 2-419
[I]	The "No" Tax MAC Condition to Closing ..... 2-420
[J]	No MAE Change; No "Buyer's Remorse", but Buyer Cannot Walk— <i>Bardy</i> ..... 2-421
§ 2:12.5	The Performance of Covenants Condition ..... 2-423
§ 2:12.6	The Confirming Certificate Condition ..... 2-424
§ 2:12.7	The Financing or Absence of Financing Conditions—Dow Contrasted with Pfizer ..... 2-424
[A]	Introduction ..... 2-424
[B]	Credit Rating System by Moody's and S&P ..... 2-425
[C]	The Dow-Rohm and Haas "Ironclad" Agreement ..... 2-427
[D]	The Financing Condition in the Pfizer-Wyeth Deal ..... 2-436
§ 2:12.8	The Legal (Including Tax) Opinion Condition ..... 2-440
[A]	Introduction ..... 2-440
[B]	Items Generally Covered in Legal Opinions ..... 2-441
[C]	The Supreme Court Decision on the Tax Opinion Condition in <i>Williams v. ETE</i> and the Aftermath ..... 2-443

§ 2:12.9	Employment Contracts and Non-Competition	
	Conditions .....	2-444
§ 2:12.10	Other Conditions .....	2-445
[A]	Due Diligence .....	2-445
[B]	Bring-Down of Fairness Opinion .....	2-446
[C]	Limit on Dissenting Shares .....	2-446
§ 2:12.11	The Mechanics of Closing.....	2-446
§ 2:13	Termination.....	2-448
§ 2:13.1	In General .....	2-448
§ 2:13.2	Illustration of Termination Provision with	
	Break-Up Fee .....	2-449
[A]	Introduction .....	2-449
[B]	"Willful" and "Material" Breach Issues in	
	Break-Up Fee Provision of J&J's Merger	
	Agreement with Guidant, Topped by	
	Boston Scientific.....	2-450
[C]	Anthem–Cigna Fight Over the Break-Up	
	(Termination) Fee .....	2-452
§ 2:13.3	Reverse Break-Up Fees.....	2-452
[A]	Introduction .....	2-452
[B]	How an Acquirer Should Not Draft "Reverse	
	Break-Up" Fee Provisions— <i>United Rentals</i>	
	and the Forthright Negotiator.....	2-453
[C]	How to Draft an Ironclad "Reverse Break-Up"	
	Fee Providing Optionality—The Mars–Wrigley	
	Merger.....	2-460
[D]	Will a Reverse Break-Up Fee Be the Only	
	Remedy in the Face of a "Willful" or	
	"Fraudulent" Breach?.....	2-467
[E]	Target Is Unsuccessful in Requiring Acquirer	
	to Pay a Reverse Termination Fee— <i>ADS</i> .....	2-469
[F]	DynCorp's Double Trigger Reverse	
	Termination and Termination Fees.....	2-473
[G]	ABA <i>Deal Point Study</i> Relating to Reverse	
	Break-Up Fees .....	2-476
[H]	The AT&T Reverse Termination Fee Paid	
	As a Result of the Failed Acquisition of	
	T-Mobile .....	2-476
[I]	Reverse and Direct Break-Up Fees in the	
	ICE–NYSE Merger Agreement.....	2-477
[J]	Cooper's Claim for Reverse Break-Up Fee	
	from Apollo Rejected .....	2-477
[K]	Private Equity Buyer Forgets to Extend Contract,	
	Triggering a Reverse Termination Fee— <i>Rent-A-</i>	
	<i>Center</i> .....	2-481

## Table of Contents

	<ul style="list-style-type: none"> <li>[L] The Reverse Termination Fee Denied to a Bad Actor—<i>Anthem v. Cigna</i>..... 2-485</li> <li>[M] Reverse Termination Fees Response to Biden's Enhanced Antitrust Enforcement..... 2-487</li> </ul>
<ul style="list-style-type: none"> <li>§ 2:13.4 Seeking Damages Above the Break-Up and Reverse Break-Up Fees—Willful, Knowing, Intentional Breaches—<i>Guidant and Huntsman</i> ..... 2-487</li> </ul>	<ul style="list-style-type: none"> <li>§ 2:13.5 "Effect of Termination:" Terminating Party Has No Additional Rights—<i>Yatra</i> ..... 2-489</li> </ul>
<ul style="list-style-type: none"> <li>[A] Introduction ..... 2-489</li> <li>[B] The "Effect of Termination" Provision ..... 2-491</li> <li>[C] Practice Points for Addressing an "Effect of Termination" Provision ..... 2-492</li> </ul>	<ul style="list-style-type: none"> <li>§ 2:14 Survival of Representations and Warranties..... 2-493</li> </ul>
<ul style="list-style-type: none"> <li>§ 2:14.1 Introduction ..... 2-493</li> <li>§ 2:14.2 What Is the Meaning of the Term "Survive"? ..... 2-495</li> </ul>	<ul style="list-style-type: none"> <li>[A] General Principles and the California Approach ..... 2-495</li> <li>[B] How Should "Survival" Clauses Be Drafted? ..... 2-498</li> </ul>
<ul style="list-style-type: none"> <li>§ 2:14.3 What Impact Does a Survival Clause Have on a Fraud, Willful Misrepresentation, or Rule 10b-5 Claim? ..... 2-499</li> </ul>	<ul style="list-style-type: none"> <li>§ 2:14.4 Is "Reliance" an Element of a Post-Closing Claim That a Party Breached a Representation—The Sandbagging Issue ..... 2-500</li> </ul>
<ul style="list-style-type: none"> <li>§ 2:14.5 Illustration of Reliance Element in a Rule 10b-5 Action—<i>Vivendi</i> ..... 2-505</li> <li>§ 2:14.6 Representation and Warranty Insurance (RWI)..... 2-506</li> </ul>	<ul style="list-style-type: none"> <li>§ 2:15 Indemnification ..... 2-506</li> </ul>
<ul style="list-style-type: none"> <li>§ 2:15.1 Introduction ..... 2-506</li> <li>§ 2:15.2 Period During Which an Indemnification Claim May Be Filed ..... 2-507</li> <li>§ 2:15.3 The Basic Indemnification Requirement ..... 2-508</li> </ul>	<ul style="list-style-type: none"> <li>[A] In General ..... 2-508</li> <li>[B] Materiality "Rub Off" or "Scrape" ..... 2-513</li> <li>[B][1] In General ..... 2-513</li> <li>[B][2] Illustration of the Materiality Scrape—<i>Osram</i> ..... 2-513</li> </ul>
<ul style="list-style-type: none"> <li>[C] Meaning of the Term "Indemnification"—<i>Ceradyne</i> ..... 2-514</li> </ul>	<ul style="list-style-type: none"> <li>§ 2:15.4 Baskets, Thresholds, and Ceilings ..... 2-516</li> </ul>
<ul style="list-style-type: none"> <li>[A] In General ..... 2-516</li> <li>[B] Is a Severance Fee Covered by the General Capped Indemnification Provision or the Un-Capped Tax Indemnification Provision?—<i>Innophos</i> ..... 2-518</li> </ul>	

§ 2:15.5	Escrow Accounts, Holdbacks, and Deferred Payment Notes.....	2-519
[A]	In General .....	2-519
[B]	Relationship Between Indemnification Provision and Working Capital Purchase Price Adjustment— <i>Brim</i> .....	2-520
§ 2:15.6	Limitations on Liability.....	2-520
[A]	In General .....	2-520
[B]	Is an Exclusive Indemnification Provision with a Ceiling the Only Remedy in the Event of Fraud?— <i>ABRY</i> .....	2-521
[C]	The Parallel, Breach of Contract, Indemnification, and Fraud Claims in <i>Osram</i> .....	2-524
§ 2:15.7	Procedural Aspects of Indemnification .....	2-528
[A]	In General .....	2-528
[B]	Need to Comply with the Letter of an Indemnification Claims Provision— <i>Gore v. Al Jazeera</i> .....	2-528
§ 2:15.8	ABA <i>Deal Point Studies</i> .....	2-532
§ 2:15.9	Illustration of Interface Among Representations, Covenants, Conditions, and Indemnification— <i>Ameristar</i> .....	2-532
§ 2:15.10	Duty to Mitigate.....	2-541
§ 2:15.11	Bells and Whistles on a Merger Agreement— <i>Cigna</i> .....	2-541
§ 2:16	General Provisions.....	2-542
§ 2:16.1	In General .....	2-542
§ 2:16.2	Third-Party Beneficiaries .....	2-542
[A]	In General .....	2-542
[B]	Specifically Providing That the Target's Shareholders Are Entitled to the "Economic Benefit" of the Deal— <i>InBev</i> .....	2-543
[C]	Application of <i>Consolidated Edison's</i> Rejection of a Target Shareholder in <i>Crispo v. Musk, re Twitter</i> .....	2-545
[D]	Rights of Retirees of Target to Enforce a Provision of the Merger Agreement Relating to a Retiree Medical Plan— <i>Halliburton</i> .....	2-550
§ 2:16.3	Enforcement and Specific Performance.....	2-552
[A]	"Irreparable Harm" Clauses and TROs .....	2-555
§ 2:16.4	Possible Remedies.....	2-556
§ 2:16.5	Arbitration .....	2-557
[A]	Introduction .....	2-557
[B]	Delaware Supreme Court Reinstates an Arbitration Award— <i>SPX</i> .....	2-559
[C]	Delaware's Rapid Arbitration Act of 2015 .....	2-559

## Table of Contents

	<p>[D] Sandbagging or Anti-Sandbagging—Arwood ..... 2-560</p> <p>§ 2:16.6 Possible Efficient Breach ..... 2-561</p> <p>§ 2:16.7 Other General Provisions: Choice of Law, Jurisdiction, Waiver of Jury Trial, Enforcement Remedies, Entire Agreement, and Assignment ..... 2-562</p> <p>[A] Introduction ..... 2-562</p> <p>[B] Choice of Law ..... 2-562</p> <p>[C] Jurisdiction; Choice of Forum ..... 2-563</p> <p>[D] Waiver of Jury Trial ..... 2-564</p> <p>[E] Enforcement Remedies, Including Specific Performance ..... 2-565</p> <p>[F] The Merger or Integration Clause ..... 2-565</p> <p>[G] Anti-Assignment Provision ..... 2-566</p>
§ 2:17	The Two-Step Tender Offer Followed by Merger Agreement ..... 2-566
§ 2:17.1	Introduction ..... 2-566
§ 2:17.2	Provisions of the Agreement Governing the Tender Offer ..... 2-567
§ 2:17.3	The “Top-Up Option” ..... 2-568
[A]	In General ..... 2-568
[B]	Potential Challenges to Top-Up Options— <i>ev3</i> ..... 2-569
[C]	Impact of New Section 251(h) on Top-Ups ..... 2-572
§ 2:17.4	The Second-Step Merger ..... 2-572
§ 2:17.5	Illustration of a Transaction with a Top-Up Option— <i>Metromedia</i> ..... 2-573
§ 2:17.6	Alternative Two-Step, One-Step Burger King Merger Agreement ..... 2-575
§ 2:17.7	ABA <i>Deal Point Studies</i> ..... 2-575
Figure 2-1	Percentage of One-Step and Two-Step Transactions 2007–2009 ..... 2-576
§ 2:18	Merger Agreement Between a Corporation and a Limited Liability Company ..... 2-576
§ 2:19	Checklist of Provisions That Might Be Included in an Acquisition Agreement ..... 2-576
§ 2:20	Issues Relating to the Impact of COVID on the Drafting of M&A Agreements ..... 2-580
§ 2:20.1	Purpose ..... 2-580
§ 2:20.2	Contingent Consideration and the COVID-19 Crisis ..... 2-581
§ 2:20.3	Analyzing the Morgan Stanley–E*Trade Merger, Which Was Signed and Closed During the COVID-19 Crisis, and Related Concepts ..... 2-581
[A]	Introduction ..... 2-581
[B]	A Fixed Exchange Ratio Used During the COVID-19 Crisis: the Morgan Stanley–E*Trade Merger Agreement ..... 2-581

Figure 2-2	Stock Price of Morgan Stanley and E*Trade (1) At the End of the Day Before Announcement of the Merger, and (2) At the End of the Day of the Announcement .....	2-582
[C]	Why the Fixed Exchange Ratio Used in the Morgan Stanley–E*Trade Merger Agreement Was Unlikely to Motivate Either Party to Walk Because of the COVID-19 Crisis .....	2-583
Figure 2-3	Morgan Stanley and E*Trade: (1) Stock Prices at the End of (a) the Day Before Announcement, (b) the Day of the Announcement, and (c) May 22, 2020; (2) Market Caps on (a) Day of the Announcement, and (b) May 22, 2020; and (3) Percentage Decreases in Market Caps from February 20 to May 22, 2020 .....	2-584
[D]	The Definition of “Company Material Adverse Effect” in the Morgan Stanley–E*Trade Merger Agreement, the COVID-19 Carve-Out .....	2-585
[D][1]	In General.....	2-585
[D][2]	The Company MAE with COVID-19 Carve-Out Highlighted .....	2-585
[E]	A Note on the Interface of the Force Majeure Principle with the Definition of Company Material Adverse Effect in the Morgan Stanley–E*Trade Merger Agreement .....	2-587
[F]	A Note on the Potential Interface of the Common Law Principles of Impossibility, Impracticability and Frustration with the Definition of Company Material Adverse Effect in the Morgan Stanley–E*Trade Merger Agreement.....	2-590
[G]	The “No Material Adverse Effect” Representation in the Morgan Stanley–E*Trade Merger Agreement .....	2-591
[G][1]	In General.....	2-591
[G][2]	CARES Act and Other COVID-19 Representations and Warranties.....	2-592
[H]	The “Normal Course of Business” Covenant in the Morgan Stanley–E*Trade Merger Agreement.....	2-593
[H][1]	In General.....	2-593
[H][2]	Covenants Related to the CARES Act .....	2-593
[I]	Conditions to Closing in the Morgan Stanley–E*Trade Merger Agreement: the “Bring Down” .....	2-593

## Table of Contents

§ 2:20.4	Introduction to the Paycheck Protection Program (PPP), the Related Loan Forgiveness Program, and Addressing Such Concepts in the Acquisition Agreement .....	2-594
[A]	In General .....	2-594
[B]	The SBA “Change of Control” Notice .....	2-596
[C]	M&A Transactions Where the Target Has Outstanding PPP Loans and “ <i>SBA Prior Approval Is Required</i> ” .....	2-597
[D]	Illustration of an M&A Transaction Where “ <i>SBA Prior Approval Is Required</i> ”—ZAGG .....	2-598
[D][1]	Introduction .....	2-598
[D][2]	The Passing of Benefit of Loan Forgiveness to the Shareholders of the Target, ZAGG .....	2-599
[D][3]	Economic Impact of the PPP Loan Forgiveness Rights .....	2-601
[D][4]	ZAGG’s Covenant with Respect to Potential Loan Forgiveness .....	2-601
[D][5]	ZAGG’s Compliance with Covenants Closing Condition .....	2-602
§ 2:20.5	Impact of COVID-19 in the Drafting and Interpretation of Contracts Generally .....	2-602
§ 2:20.6	Policy Analysis of COVID and MAE Clauses .....	2-603
§ 2:21	Brief Introduction to the Impact of Crypto and Related Concepts on the Drafting of Acquisition Agreements .....	2-604
§ 2:22	Brief Introduction to the Impact of Artificial Intelligence (AI) on the Drafting of Acquisition Agreements .....	2-605

## **Chapter 3      Confidentiality Agreements, Due Diligence, Letters of Intent and Exclusivity Agreements**

§ 3:1	Scope .....	3-6
§ 3:1.1	References .....	3-7
§ 3:1.2	The Impact of COVID-19 on Due Diligence .....	3-7
§ 3:2	Confidentiality Agreements .....	3-7
§ 3:2.1	Introduction .....	3-7
[A]	In General .....	3-7
[B]	Keeping Your Eye on the Ball .....	3-8
§ 3:2.2	Opening Paragraph .....	3-9
§ 3:2.3	Defined Terms .....	3-9
[A]	In General .....	3-9
[B]	Addressing Antitrust and Attorney-Client Privilege Issues .....	3-10

§ 3:2.4	Agreement to Keep “Information” Confidential .....	3-11
§ 3:2.5	Nondisclosure of Negotiations .....	3-11
§ 3:2.6	If No Agreement Is Reached, Destroy or Return Information .....	3-12
§ 3:2.7	Information That Becomes Public or Independently Developed Information .....	3-12
§ 3:2.8	No Representations—Anti-Reliance Clause.....	3-12
[A]	In General .....	3-12
[B]	Applicability of <i>Abry</i> to a Non-Reliance Provision of a Confidentiality Agreement— <i>RAA</i> ....	3-13
§ 3:2.9	Legal Compulsion to Disclose .....	3-13
§ 3:2.10	No Binding Contract; No Offer to Sell Securities.....	3-13
§ 3:2.11	Information Remains Property of Provider .....	3-13
§ 3:2.12	Termination of Acquirer’s Obligation: Sunset .....	3-14
§ 3:2.13	To Whom Request for Information Should Be Directed .....	3-14
§ 3:2.14	Access to Employees and No Recruitment of Employees .....	3-14
§ 3:2.15	No Waiver, Successors, Equitable Relief, Choice of Law.....	3-14
§ 3:2.16	Standstill Provision .....	3-15
[A]	In General .....	3-15
[B]	Standstills and Fiduciary Duties— <i>Topps</i> .....	3-17
[C]	A Standstill Is Not a “No Shop”— <i>Crane</i> .....	3-19
[D]	Even Without a Standstill, an Acquirer with Confidential Information May Not Be Able to Make a Tender Offer.....	3-21
[E]	Delaware Supreme Court’s Interpretation of the “Stealth” Standstill in <i>Vulcan</i> .....	3-22
[F]	Introduction to Don’t Ask, Don’t Waive (DADW)— <i>Gellomics</i> , <i>Ancestry</i> , and <i>NetSpend</i> .....	3-26
§ 3:2.17	Relationship Between the Confidentiality Agreement and the Acquisition Agreement .....	3-27
§ 3:2.18	Impact of Regulation FD .....	3-28
§ 3:2.19	Most Favored Nation Clause .....	3-28
§ 3:2.20	Non-Completion Fee .....	3-28
§ 3:2.21	No Teaming Provision— <i>Del Monte</i> .....	3-28
§ 3:3	Due Diligence Investigation in Connection with Acquisitions .....	3-30
§ 3:3.1	Introduction .....	3-30
§ 3:3.2	Planning for the Due Diligence Process .....	3-31
[A]	Identifying Substantive Issues .....	3-31
[B]	Addressing Change of Control Provisions in Indentures and Other Contracts.....	3-32
[B][1]	In General.....	3-32

## Table of Contents

[B][2]	Delaware Chancery Court Addresses Amylin's Poison Puts in Debt Instruments— <i>Amylin and SandRidge</i> .....	3-33
[B][2][a]	<i>Amylin</i> .....	3-33
[B][2][b]	<i>SandRidge</i> .....	3-35
[B][2][c]	Elaboration on Poison Puts in Debt Instruments .....	3-37
[B][3]	Dealing in Mergers with Anti-Assignment Clauses in Contracts .....	3-37
[B][4]	Delaware Supreme Court's Interpretation of a Successor Obligation Provision of an Indenture— <i>Liberty Media</i> .....	3-38
[C]	Procedural Issues: The Due Diligence Report, Due Diligence Request List .....	3-38
[D]	Addressing Risks Identified in the Due Diligence Process .....	3-39
[E]	Using the Due Diligence Process to Guard Against Fraud: HP's Acquisition of Autonomy .....	3-40
[F]	Dealing with Social Media in the Due Diligence Process .....	3-41
[G]	Dealing with Patents in the Due Diligence Process .....	3-42
[H]	Dealing with Data Privacy Issues in the Due Diligence Process .....	3-43
[H][1]	Introduction .....	3-43
[H][2]	The Yahoo Data Breach After the Signing of the Yahoo–Verizon Stock Purchase Agreement .....	3-44
[H][2][a]	Introduction .....	3-44
[H][2][b]	The Press Release Announcing the Data Breach .....	3-44
[H][2][c]	The Provisions of the Yahoo–Verizon Stock Purchase Agreement Applicable to the Data Breach .....	3-45
[H][2][c][i]	Introduction .....	3-45
[H][2][c][ii]	Definition of "Security Breach" and "Personal Data" .....	3-46
[H][2][c][iii]	Yahoo's Representation and Warranty Concerning Security Breaches .....	3-46
[H][2][c][iv]	Yahoo's Notice Requirement Regarding the Security Breaches .....	3-48
[H][2][c][v]	Conditions to Verizon's Obligation to Close the Transaction .....	3-48
[H][2][c][vi]	The Business Material Adverse Effect, the Proposed Reductions in the Purchase Price, and the Amended Yahoo–Verizon Stock Purchase Agreement .....	3-49

[H][2][c][vii]	The Termination Provision .....	3-50
[H][2][c][viii]	The Termination Fee Provision .....	3-51
[H][2][d]	The February 21, 2017 Joint Press Release of Verizon and Yahoo Announcing an Amendment to the Stock Purchase Agreement As a Result of the Data Breach .....	3-52
[H][2][e]	The Settlement and Release Agreement .....	3-53
[H][2][f]	Yahoo Proxy Statement Discussion of the Negotiations Between Yahoo and Verizon That Led to the Amended Stock Purchase Agreement .....	3-53
[H][2][g]	Brief Survey of Some of the Literature Addressing Yahoo–Verizon .....	3-57
[I]	Some Miscellaneous Issues in the Due Diligence Process .....	3-58
[J]	Illustration of the Complexity of Due Diligence: Blackstone’s Due Diligence on Dell .....	3-59
[K]	Humans Replaced by Robots in Due Diligence? .....	3-59
[L]	Due Diligence: Environmental Issues .....	3-60
[M]	Due Diligence: Cryptocurrencies .....	3-61
[M][1]	In General .....	3-61
[M][2]	Elaboration on (1) Virtual Currencies, That Is, Cryptocurrencies; (2) Non-Fungible Tokens (NFTs); (3) Stablecoins; (4) the Metaverse; and (5) What Is Next? .....	3-63
[M][2][a]	In General .....	3-63
[M][2][b]	Brief Introduction to Blockchain .....	3-64
[M][2][b][i]	In General .....	3-64
[M][2][b][ii]	“Smart Contract” .....	3-65
[M][2][c]	Brief Introduction to Cryptocurrencies .....	3-65
[M][2][c][i]	In General .....	3-65
[M][2][c][ii]	What Is Crypto Mining? .....	3-68
[M][2][d]	Brief Introduction to Non-Fungible Tokens (NFTs) .....	3-69
[M][2][e]	Brief Introduction to “Stablecoins” .....	3-69
[M][2][f]	Brief Introduction to the Metaverse and Its Relationship to NFTs .....	3-70
[M][2][g]	Brief Introduction to President Biden’s Digital Assets Order .....	3-71
[M][2][h]	General Businesses of the Publicly Traded (1) Coinbase Global, Inc. and (2) Riot Blockchain, Inc. .....	3-73
[M][2][i]	A Davis Polk Guide to “Diligence Considerations,” “Transaction Agreement Considerations,” and “Post-Transaction Considerations” .....	3-74

## Table of Contents

[M][2][j]	A Caveat re Crypto, NFTs, Stablecoins, the Metaverse, and the Unknown Successors to These Concepts .....	3-75
[N]	Due Diligence and Cyber Security .....	3-75
[N][1]	Introduction .....	3-75
[N][2]	The SEC's 2023 Cyber Security Rules, a Brief Introduction .....	3-76
[N][3]	New York Department of Financial Services 2024 Guidance on Risk of AI on Cyber Security .....	3-78
[O]	Impact of <i>Wayfair</i> on Due Diligence Regarding State Taxes .....	3-80
[P]	ESG Considerations in M&A, an Introduction .....	3-80
[Q]	COVID-19: Due Diligence Considerations for M&A Transactions .....	3-81
[R]	Due Diligence Regarding Corporate Criminal Enforcement .....	3-83
[S]	Reporting of Beneficial Ownership Under the Corporate Transparency Act .....	3-84
[T]	Due Diligence and Professional Responsibility Relating to AI .....	3-86
[T][1]	Introduction .....	3-86
[T][2]	Generative AI Issues in Due Diligence and Other M&A Areas .....	3-86
[T][3]	Professional Responsibility Guidance in the Use of AI .....	3-88
[T][4]	Remember AI Issues Are Fast Moving .....	3-89
[U]	Use of Large Language Models (LLMs) [AI] in Due Diligence .....	3-89
[V]	DOJ Safe Harbor-Self-Reporting Policy for Potential Illegality Activity Discovered in M&A .....	3-90
[W]	FTC Rules on Non-Competes .....	3-91
[W][1]	The General Rule .....	3-91
[W][2]	Exceptions, Including the Treatment of Covenants Not to Compete in the Context of M&A .....	3-93
[W][2][a]	The Covenant Not to Compete in an M&A Transaction Exception .....	3-93
[W][2][b]	Other Exceptions .....	3-94
[W][3]	The Non-Compete Rule Enjoined Nationally .....	3-94
[X]	Due Diligence with Respect to Tariffs: A Brief Introduction .....	3-95
§ 3:3.3	Addressing the Fundamental Economics of the Deal .....	3-97

§ 3:3.4	Addressing Items Related to Legal Mechanics and Risks in the Deal .....	3-98
[A]	Introduction .....	3-98
[B]	Purpose of Corporate Review by Acquirer's Counsel.....	3-98
[C]	Procedures for Corporate Review .....	3-99
[D]	Corporate Review Memorandum.....	3-102
§ 3:3.5	Illustration of Target's Due Diligence on Acquirer— <i>Vivendi</i> .....	3-103
§ 3:4	Letters of Intent.....	3-104
§ 3:4.1	Introduction .....	3-104
§ 3:4.2	When Does a Letter of Intent Become a Binding Contract? .....	3-104
[A]	General Principles Governing Preliminary Contracts .....	3-104
[B]	Illustrative Case Law— <i>American Cyanamid, Texaco, Skycom, and Global Asset</i> .....	3-106
[B][1]	Introduction.....	3-106
[B][2]	<i>American Cyanamid</i> .....	3-107
[B][3]	<i>Texaco</i> .....	3-109
[B][4]	<i>Skycom</i> .....	3-110
[B][5]	<i>Global Asset</i> .....	3-112
[C]	Binding and Non-Binding Provisions.....	3-115
[D]	The Duty to Negotiate in Good Faith.....	3-116
§ 3:4.3	The Deal .....	3-116
§ 3:4.4	Exclusive Dealing .....	3-116
§ 3:4.5	Break-Up Fees .....	3-116
§ 3:4.6	Access to Information .....	3-117
§ 3:4.7	Confidentiality .....	3-117
§ 3:4.8	Standstill Provisions.....	3-117
§ 3:5	Exclusivity Agreements.....	3-117

## PART II

### CORPORATE LAW CONSIDERATIONS IN M&A

#### **Chapter 4 Structuring Mergers, Asset Acquisitions, and Compulsory Share Exchanges**

§ 4:1	Scope.....	4-7
§ 4:1.1	References .....	4-9
§ 4:1.2	State Law and SEC Rules Governing Shareholder Voting and Other Corporate Procedures During the Time of the COVID-19 Crisis .....	4-9
§ 4:2	Voting and Dissenting Rights in Stock Acquisitions .....	4-9

## Table of Contents

§ 4:3	Stock Exchange Voting Requirements .....	4-10
§ 4:3.1	Approval by Acquirer's Shareholders .....	4-10
§ 4:3.2	Approval by Target's Shareholders on the Issuance of Target's Stock to Acquirer As a Deal Protection Measure .....	4-11
§ 4:4	Mergers Between Corporations and Other Entities Such As Limited Liability Companies .....	4-12
§ 4:5	Delaware Long-Form Merger Provisions: Acquisition of a Non-90% Controlled Target by Merger .....	4-13
§ 4:5.1	Introduction .....	4-13
§ 4:5.2	Direct Merger of Domestic Delaware Corporations .....	4-13
[A]	In General .....	4-13
[B]	Alternative Transaction Structures .....	4-13
§ 4:5.3	Legal Effect in Delaware of a Merger on the Merging Corporations with Illustration .....	4-14
[A]	Introduction .....	4-14
[B]	Dealing in Mergers with Anti-Assignment Clauses for Patents, Copyrights, and Other Intellectual Property— <i>PPG, SQL, Meso Scale,</i> and <i>Cincom</i> .....	4-15
[C]	Attorney-Client Privilege Passes Over in a Merger— <i>Great Hill</i> .....	4-20
§ 4:5.4	Required Provisions of a Merger Agreement and Board Approval with Illustrations .....	4-22
§ 4:5.5	Terms Dependent upon Facts Outside the Merger Agreement .....	4-26
§ 4:5.6	Required Shareholder Approval .....	4-28
[A]	General Shareholder Voting Rule .....	4-28
[B]	No Shareholder Vote for Acquirer's Shareholders in Certain Mergers .....	4-29
[C]	Class Voting .....	4-31
[C][1]	Generally No Class Vote .....	4-31
[C][2]	No Class Vote on Extending Section 102(b)(7) Exculpation to Officers— <i>Fox/Snap</i> .....	4-32
[D]	No Shareholder Vote on Formation of Certain Holding Companies .....	4-33
[E]	Setting of Record Date for Notice of Meeting and Record Date for Vote .....	4-33
§ 4:5.7	"Force the Vote" Provisions .....	4-34
§ 4:5.8	The Filing Requirement with Illustration .....	4-35
§ 4:5.9	Provisions Relating to Amendments to and Termination of the Merger Agreement with Illustration .....	4-36

§ 4:5.10	Triangular (or Subsidiary) Mergers in Delaware .....	4-38
[A]	Introduction .....	4-38
[B]	Illustration of a Reverse Subsidiary Merger with Stock As the Consideration .....	4-39
[C]	Illustration of a Reverse Subsidiary Merger with Cash As the Consideration .....	4-41
[D]	Amending the Certificate of Incorporation and By-Laws of the Survivor in a Reverse Triangular Merger and Replacing Its Officers and Directors .....	4-43
§ 4:5.11	Mergers of Delaware and Non-Delaware Corporations .....	4-45
§ 4:5.12	Dissenters' Rights in Long-Form Mergers Under Delaware Law .....	4-46
[A]	When Appraisal Is Available in a Long-Form Merger .....	4-46
[A][1]	General Rule .....	4-46
[A][2]	Do Preferred Shareholders Have Appraisal Rights? .....	4-46
[A][3]	The 20% Stock Issuance Exception .....	4-47
[A][4]	The "Market-Out" Exception .....	4-48
[A][4][a]	In General .....	4-48
[A][4][b]	Use of Long-Form Merger to Avoid Dissenters' Rights in a Short-Form Merger .....	4-49
[A][4][c]	The Market-Out Exception to Appraisal Rights in a Cash/Stock Election Merger, <i>Wesco</i> .....	4-50
[A][4][d]	Delaware's 2022 Amendments to the Appraisal Provision, Section 262 .....	4-52
[A][5]	Appraisal Rights in a Certificate of Incorporation .....	4-53
[B]	How Does a Shareholder Seek Appraisal? .....	4-53
[B][1]	General Rules .....	4-53
[B][2]	Elaboration on the Record Holder Requirement .....	4-54
[B][2][a]	<i>Transkaryotic</i> .....	4-54
[B][2][b]	<i>Dell</i> , the Perfection of Appraisal Rights Issue .....	4-55
[B][3]	Perfection of Appraisal Rights .....	4-59
[B][3][a]	Introduction .....	4-59
[B][3][b]	Pre-Merger Shareholder Notice Requirement .....	4-60
[B][3][c]	Pre-Merger Shareholder Demand and "No" Vote Requirement .....	4-60
[B][3][d]	Post-Merger Notice to Shareholder Requirement .....	4-60

## Table of Contents

[B][4]	No Votes or Dividends on Appraisal Shares .....	4-61
[C]	What Are the Procedures After Demand for Appraisal Has Been Made? .....	4-61
[C][1]	In General.....	4-61
[C][2]	Payment of Merger Consideration After Time for Appraisal Lapses— <i>Mehta</i> .....	4-62
[D]	What Are the Standards for Determining the “Fair Value” of the Shares?.....	4-62
[D][1]	The Exclusivity Condition .....	4-63
[D][2]	The All Relevant Factors Condition.....	4-64
[D][3]	Do Not Consider Minority or Marketability Discounts; Focus on Going Concern Value .....	4-66
[D][4]	Recent Approaches to Determine Fair Value— <i>AXA, Hanover, Golden, Ancestry, Dell, Ramtron, Merion, PetSmart, SWS, Sprint, DFC, Aruba, AOL, Merlin, Solera, Stillwater, SourceHOV, Panera, Jarden, Synapse, RAI and Regal</i> .....	4-66
[D][4][a]	<i>AXA</i> , 2007 .....	4-67
[D][4][b]	<i>Hanover</i> , 2010 .....	4-71
[D][4][c]	<i>Golden Telecom</i> , 2010.....	4-71
[D][4][d]	Appraisal of Target Sold in an Auction, Vice Chancellor Glasscock’s Lament— <i>Ancestry</i> , 2015 .....	4-72
[D][4][e]	Appraisal of Stock Sold in a Management Buyout— <i>Dell</i> , 2016 and 2017 .....	4-74
[D][4][e][i]	<i>Delaware Chancery Court</i> 2017 Decision .....	4-74
[D][4][e][ii]	<i>Dell</i> Overturned by the <i>Delaware Supreme Court</i> , December 14, 2017 .....	4-80
[D][4][f]	Appraisal of Stock Sold in a Hostile Deal— <i>Ramtron</i> , 2016 .....	4-85
[D][4][g]	DCF Leads to Conclusion That Fair Value Is the Deal Value— <i>Merion Capital</i> , 2016 .....	4-86
[D][4][h]	Pre-Signing Auction Leads to Conclusion That Fair Value Is the Deal Value— <i>PetSmart</i> , 2017 .....	4-88
[D][4][i]	Combinational Synergies Lead to a Fair Value Below the Deal Price— <i>SWS</i> , 2017 .....	4-89
[D][4][j]	Appraisal of Stock of a Majority Owned Sub (Clearwire) Acquired in a Freezeout Merger, Fair Value Significantly Less than Deal Price, <i>Sprint</i> , 2017.....	4-90
[D][4][k]	Appraisal of Stock Sold in an Auction, No Deal Price Presumption, but Errors Made by Chancery Court— <i>DFC</i> , 2016 and 2017 .....	4-93

[D][4][1]	The <i>Aruba</i> Decision: Delaware Court of Chancery and Delaware Supreme Court.....	4-99
[D][4][1][i]	The Court of Chancery's 2018 Decision in <i>Aruba</i> .....	4-99
[D][4][1][ii]	The Delaware Supreme Court's 2019 Decision in <i>Aruba</i> .....	4-102
[D][4][m]	<i>DFC</i> and <i>Dell</i> Followed in <i>AOL</i> , Delaware Court of Chancery, February 23, 2018.....	4-104
[D][4][n]	<i>DFC</i> and <i>Dell</i> Followed in <i>Merlin Partners</i> , <i>SWS</i> , Delaware Supreme Court Affirms Court of Chancery, February 23, 2018.....	4-106
[D][4][o]	<i>Solera</i> , Finds Fair Value to Be the Deal Price, Not the Unaffected Price.....	4-107
[D][4][p]	Deal Price Controls, Impact of Post-Signing Increase in Commodity Prices Not Proven— <i>Stillwater</i> .....	4-109
[D][4][q]	Court Selects DCF Analysis of Dissenters' Expert, <i>SourceHOV Holdings</i> .....	4-111
[D][4][r]	Court Accepts Deal Price Less Certain Synergies, <i>Panera Bread</i> .....	4-112
[D][4][s]	Delaware Supreme Court Affirms Chancery Court's Decision Basing Fair Value on Unaffected Market Price— <i>Jarden</i> .....	4-113
[D][4][t]	Appraised Value Using DCF About Half of the Deal Price— <i>Synapse</i> .....	4-113
[D][4][u]	<i>RAI</i> , North Carolina's Business Court and Supreme Court .....	4-115
[D][4][u][i]	North Carolina Business Court Finds the Deal Price Was Fair Value— <i>RAI</i> .....	4-115
[D][4][u][ii]	North Carolina Supreme Court Affirms <i>RAI</i> .....	4-117
[D][4][v]	Fair Value Is Deal Price with a 2.6% Kicker— <i>Regal</i> .....	4-121
[D][4][w]	The Appraisal Issue in <i>GGP Morphs</i> into Disclosure and Aiding and Abetting Claims .....	4-122
[D][4][x]	Court (1) Rejects DCF, Comparable Companies, and Comparable Transactions; and (2) Accepts Deal Price— <i>Hyde Park v. FairXchange</i> .....	4-123
[E]	Determining a "Fair Rate of Interest" .....	4-124
[E][1]	In General.....	4-124

*Table of Contents*

[E][2]	The Statutory Interest Rate: Can the Clock Be Stopped?— <i>Huff</i> and the Legislative Reaction .....	4-125
[E][2][a]	<i>Huff</i> .....	4-125
[E][2][b]	Overruling <i>Huff</i> , Stopping the Clock on Interest .....	4-126
[F]	Other Procedural Aspects of Appraisal Proceedings .....	4-126
[G]	Characterization of Unissued Shares of Surviving Corporation .....	4-127
[H]	Exclusivity of Appraisal Proceedings in Delaware .....	4-127
[I]	Disclosure Standard in Transaction with Appraisal Rights .....	4-129
[J]	Illustration of Proxy Statement Disclosure of Appraisal Rights Under the DGCL .....	4-130
[K]	Activist Hedge Funds and Appraisal .....	4-135
[L]	Failure to Exercise Drag-Along Rights— <i>Halpin</i> .....	4-135
[M]	2015 Proposed Amendments to the Delaware Appraisal Statute .....	4-136
[N]	2016 Amendments to the Delaware Appraisal Statute: Limitation on Public Corporation Appraisals and Option to Pay Early .....	4-136
[O]	Appraisal Conditions .....	4-137
[P]	2018 Amendments to Section 262, the Appraisal Statute of the Delaware General Corporation Law .....	4-138
[Q]	Can Appraisal Rights with Respect to Common Stock Be Waived Contractually?— <i>Manti</i> .....	4-139
[Q][1]	The 2019 Chancery Decision in <i>Manti</i> .....	4-139
[Q][2]	Delaware Supreme Court Affirms Dissenting Waivers— <i>Manti</i> .....	4-142
§ 4:5.13	Section 251(h), Facilitating Two-Step Transactions, a 2013 Amendment to Delaware Corporate Law .....	4-142
[A]	In General .....	4-142
[B]	2014 Amendments to Section 251(h) .....	4-144
[C]	Illustration of the Use of Section 251(h) .....	4-144
[D]	2016 Amendments to Section 251(h) .....	4-144
[E]	2018 Amendments to Section 262, the Appraisal Statute, Relating to Section 251(h) “Immediate Form” Mergers .....	4-146
§ 4:5.14	Conversion of Preferred Before Merger— <i>Omneon</i> .....	4-146

§ 4:5.15	Bells and Whistles on a Merger Agreement— <i>Cigna</i> .....	4-148
§ 4:5.16	Allocation of Merger Consideration Between Preferred and Common— <i>GoodCents</i> .....	4-151
§ 4:5.17	Comment on the “Hidden” Proposed Annual Amendments to the Delaware General Corporation Law .....	4-152
[A]	An Introduction and a Complaint .....	4-152
[B]	The Morris Nichols’ Discussion in April 2024 of the Then-Proposed Amendments....	4-153
[C]	The Fight Over the Anti- <i>Moelis</i> Provision .....	4-155
[D]	The 2025 Proposed Amendments to the Delaware General Corporate Law.....	4-156
§ 4:6	The MBCA Long-Form Merger and Share Exchange Provisions: Acquisition of a Non-90% Controlled Target by Merger.....	4-158
§ 4:6.1	Introduction .....	4-158
§ 4:6.2	Essential Differences Between the MBCA and the DGCL.....	4-158
[A]	Vote of Shareholders of Acquiring Corp Parent in Certain Triangular Reorganizations Under the MBCA .....	4-158
[B]	Class Vote Required Under the MBCA .....	4-159
[C]	Quorum and Voting Rule Under the MBCA.....	4-160
[D]	The Market-Out Exception to Appraisal Rights Under the MBCA .....	4-160
§ 4:6.3	The Compulsory Plan of Share Exchange Under MBCA § 11.03.....	4-161
§ 4:7	The Delaware Sale of “All or Substantially All” of the Assets Provision .....	4-162
§ 4:7.1	Introduction .....	4-162
§ 4:7.2	Sale of Assets Provisions Under the DGCL .....	4-162
§ 4:7.3	No Impact on Acquirer.....	4-163
§ 4:7.4	Dissolution Following Sale of Assets Under the DGCL .....	4-164
§ 4:7.5	Tax Impact Determined by Consideration Paid .....	4-165
§ 4:7.6	No Dissenters’ Rights Under the DGCL .....	4-165
§ 4:7.7	Determination of Meaning of “Substantially All” of the Assets Under the DGCL.....	4-165
[A]	In General .....	4-165
[B]	Sale of Assets of a Subsidiary.....	4-169
[C]	Delaware Supreme Court’s Interpretation of “Substantially All” Provision of an Indenture— <i>Liberty Media</i> .....	4-169
[D]	Chancellor McCormick’s 2023 Tutorial on the “Substantially All” Concept— <i>Altieri</i> .....	4-170

## Table of Contents

§ 4:7.8	Illustration of Treatment of the Voting Requirement Under the DGCL in an Asset Acquisition Agreement.....	4-174
§ 4:8	The MBCA Analogue to Sale of “Substantially All” of the Assets Provision .....	4-175
§ 4:8.1	Introduction .....	4-175
§ 4:8.2	Sales Leaving the Corporation “Without a Significant Continuing Business” Under the MBCA .....	4-175
§ 4:8.3	The Required Shareholder Vote Under the MBCA .....	4-176
§ 4:8.4	Sales in Connection with Dissolutions Under the MBCA .....	4-177
§ 4:8.5	Dissenters’ Rights Under the MBCA.....	4-177
§ 4:9	The De Facto Merger Doctrine .....	4-177
§ 4:9.1	Introduction .....	4-177
§ 4:9.2	Absence of a De Facto Merger Principle in Delaware and Many Other Jurisdictions.....	4-178
§ 4:10	Short-Form Mergers.....	4-181
§ 4:10.1	Introduction .....	4-181
§ 4:10.2	Short-Form Mergers Under Section 253 of the DGCL .....	4-181
[A]	In General and <i>Roam-Tel</i> .....	4-181
[B]	Elaboration on the Disclosure Requirement in Short-Form Mergers .....	4-184
[B][1]	General Principles.....	4-184
[B][2]	The Quasi-Appraisal Remedy— <i>Gilliland</i> and <i>Berger</i> .....	4-185
[C]	Inapplicability of the Entire Fairness Doctrine in Short-Form Mergers— <i>Glassman</i> .....	4-187
[D]	Disclosure Claim After Seeking Appraisal— <i>Aristotle</i> .....	4-188
[E]	Short-Form Merger with Parent Non-Corporate Entity .....	4-189
[F]	Failure to Exercise Drag-Along Rights— <i>Halpin</i> .....	4-189
§ 4:10.3	Short-Form Mergers Under the MBCA.....	4-189
§ 4:11	Brief Introduction to the Structure of the So-Called Reverse Spin-Off in the IAC-Match Transaction .....	4-190
§ 4:11.1	Introduction .....	4-190
§ 4:11.2	Pre-Transaction Organizational Structure of IAC and Match and Related Parties .....	4-191
§ 4:11.3	Post-Transaction Organizational Structure of IAC and Match and Related Parties .....	4-191

§ 4:11.4	Proxy Statement “Questions and Answers” on the Transaction.....	4-192
§ 4:11.5	Proxy Statement Description of the Structure of the IAC–Match Separation .....	4-195
§ 4:11.6	The Parties and the Delaware Chancery Court’s Various Descriptions of the Transaction As a Reverse Spin-Off.....	4-197
§ 4:11.7	What Is Going on Here? .....	4-200

## VOLUME 2

<b>Table of Chapters .....</b>	<b>v</b>
--------------------------------	----------

### **Chapter 5 Fiduciary Duties of Directors, Officers, and Controlling Shareholders**

§ 5:1	Scope.....	5-15
§ 5:1.1	References .....	5-17
§ 5:1.2	The Impact of COVID-19 on Director’s Fiduciary Duties in M&A.....	5-18
§ 5:1.3	Caveat on Coverage of the Delaware Decisions in This Chapter .....	5-18
§ 5:2	Directors’ Fiduciary Duties Under Delaware Law .....	5-19
§ 5:2.1	Introduction .....	5-19
§ 5:2.2	The Duty of Loyalty— <i>Guth v. Loft</i> .....	5-19
§ 5:2.3	The Duty of Care— <i>Lutz v. Boas</i> .....	5-20
§ 5:2.4	The Business Judgment Rule— <i>Van Gorkom</i> .....	5-20
§ 5:2.5	The Disclosure Duty .....	5-22
[A]	Introduction— <i>Arnold, Checkfree, Skeen, Gantler, and Malone</i> .....	5-22
[B]	Disclosure Issues Involving Investment Bankers .....	5-25
[B][1]	Introduction.....	5-25
[B][2]	General Obligation to Disclose Regarding the Fairness Opinion— <i>Pure Resources</i> and <i>Checkfree</i> .....	5-25
[B][3]	Different Views on the Need to Disclose Management’s Projections Used by Investment Bankers— <i>3Com, Maric</i> , and <i>Orchid</i> .....	5-26
[B][4]	Disclosure of Previous Work Done by the Target’s Investment Banker for the Acquirer— <i>Art Technologies</i> .....	5-29

*Table of Contents*

[B][5]	Disclosure of Investment Banker's Conflicts and Compensation— <i>Hammons, Del Monte, and Atheros</i> .....	5-30
[C]	Potential Deterrent to Disclosure Only Settlements— <i>Trulia</i> and Its Progeny .....	5-32
[C][1]	<i>Trulia</i> , 2016 .....	5-32
[C][2]	Disclosure-Only Settlements, Judge Posner Follows <i>Trulia</i> in <i>Walgreen</i> , 2016.....	5-34
[C][3]	A 2016 Cornerstone Report on the Number of M&A Suits After <i>Trulia</i> .....	5-37
[C][4]	Mootness Fees, As a Work-Around to <i>Trulia</i> , <i>Zoom</i> , 2016 .....	5-37
[C][5]	The Approach of Former Delaware Supreme Court Justice Jack Jacobs to Mootness Fees .....	5-38
[D]	Breach of the Disclosure Duty, but No Damages— <i>PLX</i> .....	5-39
[D][1]	Introduction to <i>PLX</i> .....	5-39
[D][2]	The Chancery Court's Decision in <i>PLX</i> .....	5-40
[D][3]	The Supreme Court's Decision in <i>PLX</i> .....	5-41
[D][4]	Observations on <i>PLX</i> .....	5-41
[E]	Failure of CEO to Disclose Compensation Package— <i>Haley</i> .....	5-42
§ 5:2.6	Guide to Satisfying Board's Fiduciary Duties in M&A Transactions .....	5-45
[A]	Introduction .....	5-45
[B]	Satisfying the Duties of Loyalty and Good Faith .....	5-46
[B][1]	In General.....	5-46
[B][2]	Use of Special Committees .....	5-46
[B][3]	The Benefit of Exculpation Under Section 102(b)(7).....	5-51
[C]	Satisfying the Duty of Care .....	5-51
[D]	Satisfying the Duty of Disclosure .....	5-52
[E]	Impact of Shareholder Ratification— <i>Gantler</i> .....	5-52
[F]	Vote of Majority-of-the-Outstanding-Minority in Interested Transactions .....	5-54
[G]	<i>Caremark</i> Claims.....	5-56
[G][1]	What Is a <i>Caremark</i> Claim? .....	5-56
[G][2]	<i>Caremark</i> Claim Survives Motion to Dismiss, Delaware Supreme Court Reverses Chancery Court— <i>Marchand</i> .....	5-57
[G][3]	<i>Caremark</i> Claim Survives Motion to Dismiss in Chancery Court— <i>Clovis</i> .....	5-59
[G][4]	<i>Caremark</i> Claim Not Dismissed by the Delaware Chancery Court— <i>Hughes v. Hu</i> .....	5-59

[H]	ESG Considerations in M&A, an Introduction.....	5-60
[I]	Summary of the Law Without Considering <i>MFW</i> , <i>Corwin</i> , and <i>Volcano</i> .....	5-61
[J]	The Overarching Equitable Screen, Difference Between What Is Legal and What Is Equitable— <i>Schnell</i> .....	5-61
§ 5:2.7	Do Officers Have the Same Fiduciary Duties As Directors? .....	5-62
§ 5:2.8	Forum Selection for Intra-Company Disputes .....	5-62
[A]	In General .....	5-62
[B]	The LinkedIn Choice of Forum Provision in Its Certificate of Incorporation .....	5-65
[C]	The California Federal District Court's View on Oracle's Board-Adopted Forum Selection Bylaw— <i>Galaviz</i> .....	5-65
[D]	Director-Adopted Forum Selection Bylaw Upheld— <i>Chevron</i> .....	5-66
[E]	Forum Selection of North Carolina— <i>City of Providence</i> .....	5-69
[F]	The Delaware Legislature Ratifies <i>Chevron</i> ; Rejects <i>Providence</i> —2015 .....	5-70
[G]	Problems with Multijurisdictional Litigation.....	5-71
[H]	Choice of Forum for Federal Securities Action, Delaware or Federal Court— <i>Sciabacucchi</i> .....	5-72
§ 5:2.9	Direct and Derivative Actions in Delaware .....	5-73
[A]	Introduction .....	5-73
[B]	Chancellor Strine's Decision on the Treatment in a Merger of a Derivative Action Against a Target's Directors— <i>Massey</i> .....	5-78
[C]	The Direct Action by an Acquirer's Parent Against a Third Party for Breach of Contract with Acquirer That Resulted in a Failed Acquisition— <i>NAF</i> .....	5-80
[D]	When Is Demand in a Derivative Action Excused?—Chief Justice Strine in <i>Zynga</i> .....	5-83
[E]	Demand Not Excused in Action Against Williams' Directors for Action Taken to Defeat Acquisition by ETE .....	5-84
[F]	Majority of Board Was Disinterested, Demand Is Required— <i>Kalanick</i> (Uber).....	5-86
[G]	New Three-Part Test for Determining if a Derivative Suit Should Be Dismissed— <i>Zuckerberg</i> .....	5-87
§ 5:2.10	Shareholder Access to Books and Records.....	5-88
[A]	Introduction .....	5-88

## Table of Contents

[B]	Delaware Legislature's 2025 Amendment to Section 220 .....	5-88
§ 5:2.11	Fee Shifting in Delaware.....	5-89
[A]	Introduction .....	5-89
[B]	The Initial Decision Authorizing Fee Shifting Bylaws— <i>ATP</i> .....	5-89
[C]	The Corporate Reaction to <i>ATP</i> .....	5-90
[D]	Fee Shifting Bylaw Not Applicable to Former Shareholder— <i>Hollander</i> .....	5-91
[E]	The Delaware Legislature Brings a Quick End to Fee Shifting for Delaware Stock Corporations .....	5-92
[F]	Fee Shifting ByLaw Facially Invalid— <i>Solak/Paylocity</i> .....	5-93
§ 5:2.12	Potential Aiding and Abetting Liability for Investment Bankers.....	5-94
§ 5:2.13	Section 144 of the Delaware Corporate Law, Addressing Related Party Transactions, As Amended in 2025.....	5-94
§ 5:3	Directors' Fiduciary Duties Under the ALI's Corporate Governance Project .....	5-98
§ 5:4	The Role of Proxy Advisory Firms in Corporate Governance .....	5-98
§ 5:5	The Delaware Law Governing the Fiduciary Duties of a Target's Directors in M&A .....	5-99
§ 5:5.1	Introduction .....	5-99
[A]	In General .....	5-99
[B]	The Overarching Importance of <i>MFW</i> and <i>Corwin</i> in Addressing Fiduciary Duty Issues in M&A .....	5-99
[B][1]	Introduction.....	5-99
[B][2]	Introduction to the Delaware Supreme Court's 2014 Decision in <i>MFW</i> .....	5-100
[B][3]	Introduction to the Delaware Supreme Court's 2015 Decision in <i>Corwin</i> .....	5-100
[B][4]	Potential Winning Game with <i>MFW</i> and <i>Corwin</i> .....	5-101
§ 5:5.2	Tender Offer Defensive Tactics—Including Introduction to Poison Pills .....	5-102
[A]	The <i>Unocal</i> Enhanced Business Judgment Standard with <i>Unitrin</i> Gloss .....	5-102
[B]	The Preferred Defensive Tactic—Poison Pills .....	5-104
[B][1]	Introduction.....	5-104
[B][2]	Adoption of a Pill .....	5-106
[B][3]	Board's Redemption Right .....	5-107

[B][4]	Board's Right to Amend the Pill.....	5-108
[B][5]	When the Pill Becomes Exercisable.....	5-108
[B][6]	Definition of "Acquiring Person," "Beneficial Ownership" .....	5-110
[B][7]	Exception to the Definition of "Acquiring Person" for "Qualifying Tender Offer" .....	5-113
[B][8]	The Flip-In Right .....	5-116
[B][9]	The Flip-Over Right.....	5-117
[B][10]	Exchange Right .....	5-120
[B][11]	The Validity of the Poison Pill in Delaware— <i>Moran</i> and <i>Hilton</i> .....	5-121
[B][12]	No Dead Hand and Similar Provisions in Delaware, <i>Quickturn</i> , and Other States .....	5-126
[B][13]	Application of <i>Unocal</i> to the Combination of a Poison Pill and Staggered Board.....	5-129
[B][14]	Reaction of Proxy Advisory Firms to Poison Pills .....	5-131
[B][14][a]	In General .....	5-131
[B][14][b]	The NOL Poison Pill .....	5-132
[B][14][c]	The NOL Bylaw and Charter Provision .....	5-133
[B][15]	Triggering of Selectica's NOL Pill .....	5-134
[B][15][a]	Introduction .....	5-134
[B][15][b]	The Chancery Court Opinion in <i>Selectica</i> .....	5-139
[B][15][c]	Supreme Court Opinion in <i>Selectica</i> .....	5-143
[B][16]	The Pill During COVID.....	5-145
[B][16][a]	In General .....	5-145
[B][16][b]	The COVID NOL-Pill .....	5-148
[B][16][c]	A COVID Pill with a 5% Trigger— <i>Williams Companies</i> .....	5-149
[B][17]	Adoption of a Pill with Two Different Thresholds: 20% for New Shareholders, 30% for Old Shareholders— <i>Yucaipa</i> .....	5-151
[B][18]	Adoption of a Pill by a Closely Held Corporation— <i>eBay</i> .....	5-159
[B][19]	<i>Airgas</i> : The Poison Pill Decision .....	5-163
[B][19][a]	Introduction to <i>Airgas</i> .....	5-163
[B][19][b]	The Basic Facts in <i>Airgas</i> .....	5-164
[B][19][c]	The Issue in <i>Airgas</i> .....	5-166
[B][19][d]	The Standard of Review in <i>Airgas</i> .....	5-167
[B][19][e]	A Brief Poison Pill Primer from <i>Airgas</i> .....	5-168
[B][19][f]	Note on <i>TW Services</i> from <i>Airgas</i> .....	5-170
[B][19][g]	Analyzing the Threat Prong of <i>Unocal</i> in <i>Airgas</i> .....	5-170
[B][19][h]	Analyzing the Proportionate Prong of <i>Unocal</i> in <i>Airgas</i> .....	5-171

## Table of Contents

[B][19][i]	Pills, Policy and Professors (and Hypotheticals) from <i>Airgas</i> .....	5-172
[B][19][j]	Chancellor Chandler's Lament in <i>Airgas</i> .....	5-173
[B][19][k]	The Reaction to <i>Airgas</i> of the Pill's Inventor, Martin Lipton .....	5-175
[B][19][l]	Some Thoughts on <i>Airgas</i> .....	5-175
[B][20]	Target's Covenant to Adopt a Poison Pill— <i>Compellent</i> .....	5-177
[B][21]	Two Trigger Pill, 10% for 13D Filers, 20% for 13G Filers— <i>Third Point</i> .....	5-178
[B][22]	Constitutionality of the Poison Pill .....	5-178
[B][22][a]	The Babchuk, Jackson Position .....	5-178
[B][22][b]	Martin Lipton's Response .....	5-179
[B][22][c]	My Take .....	5-180
[C]	"Just Saying No" Under <i>Unocal</i> — <i>Moore</i> .....	5-181
[D]	Other Defensive Tactics .....	5-181
[D][1]	White Knights and Self Tenders .....	5-182
[D][2]	Super-Majority Voting, Classified Boards, and Tenured Voting .....	5-182
[D][2][a]	In General .....	5-182
[D][2][b]	Removal of Directors .....	5-185
[D][2][c]	Tenured Voting .....	5-187
[D][2][d]	<i>Airgas</i> Issue with the Staggered Board .....	5-187
[D][2][e]	Addressing the Ambiguity in the <i>Airgas</i> Charter .....	5-190
[D][2][f]	Nutrisystem's Super-Majority Shareholder Vote Requirement for Removal of Directors— <i>Zier</i> .....	5-191
[D][3]	Eliminating the Right of Shareholders to Call Special Meetings or Act by Consent .....	5-192
[D][4]	The Pac Man Defense .....	5-193
[D][5]	Actions Affecting Shareholder Voting .....	5-194
[D][6]	Closing the Section 13(d) Loophole .....	5-194
[D][7]	Golden Parachute Payments .....	5-194
[D][8]	Greenmail .....	5-194
[D][9]	Poison or Putable Debt .....	5-195
[D][10]	LinkedIn's Charter Defensive Measures .....	5-196
[E]	The Intersection of <i>Unocal</i> with the <i>Revlon</i> Duty to "Auction" Standard .....	5-197
[F]	Illustration of the Limits of <i>Revlon</i> and the Application of <i>Unocal</i> — <i>Time-Warner</i> .....	5-199
[G]	<i>Time-Warner</i> 's Questions Regarding Cases Requiring Redemption of Poison Pills .....	5-201
[H]	Elaboration on <i>Revlon</i> : Obligation to Get the Best Price Reasonably Available Where There Is a Change of Control— <i>QVC</i> .....	5-204

[I]	Summary of Situations in Which <i>Revlon</i> Applies— <i>Arnold, Lukens, NYMEX</i> , and <i>Smurfit-Stone</i> .....	5-206
[J]	The Corporation’s Attorney-Client Privilege .....	5-210
[K]	The “White Knight” or Business Strategy Privilege.....	5-213
[L]	Mylan’s Dutch Stichting and a Potential Joe Frazier Left Hook with Inversions .....	5-215
[M]	Poison Puts in Debt Instruments .....	5-217
§ 5:5.3	Interference with Voting Rights— <i>Blasius</i> , <i>Liquid Audio</i> , and <i>Mercier</i> .....	5-217
[A]	<i>Blasius</i> May Have a New Life; Applicable in a Transaction That May Be Entirely Fair— <i>UIP</i> .....	5-220
§ 5:5.4	Arm’s-Length M&A—Including Impact of Deal Protection Devices .....	5-223
[A]	Introduction to the Potential Revolutionary Impact of <i>MFW</i> , <i>Corwin</i> , <i>Volcano</i> and Their Progeny in Arm’s-Length and Other Transactions.....	5-223
[B]	The Business Judgment Rule (BJR) As Applied in <i>Van Gorkom</i> and the Legislative Reaction .....	5-224
[B][1]	<i>Van Gorkom</i> .....	5-224
[B][2]	The Legislative Reaction to <i>Van Gorkom</i> —The Section 102(b)(7) Exculpation Provision .....	5-227
[B][2][a]	Introduction .....	5-227
[B][2][b]	<i>Cornerstone</i> .....	5-230
[B][2][c]	Denial of Exculpation for Officer Who Is Not Also a Director— <i>Minebody</i> .....	5-230
[B][2][d]	Is It Sensible to Exculpate Directors, but Not Officers? .....	5-232
[B][2][e]	Exculpation for (1) Directors Who Are Officers, and (2) Controlling Shareholders?— <i>Presidio</i> .....	5-232
[B][2][f]	Section 102(b)(7) Available in a <i>Revlon</i> Case— <i>Rudd v. Brown</i> .....	5-233
[B][2][g]	Exculpation for Officers, an Elaboration— <i>Berry</i> .....	5-236
[B][2][h]	Exculpation Extended to Officers in Delaware .....	5-236
[C]	Entire Fairness Standard Applies if BJR Not Applicable— <i>Technicolor</i> .....	5-237
[D]	Determining Director Liability on a Director-by-Director Basis— <i>Emerging Communications</i> .....	5-238

*Table of Contents*

[E]	The Good Faith Element of the BJR— <i>Disney, Caremark, Stone, Sidhu, AIG, Citigroup, and Dow</i> .....	5-239
[F]	The Duty to Get the Best Price Reasonably Available—Applicability of <i>Revlon</i> in Negotiated Mergers .....	5-248
[G]	Satisfying <i>Revlon</i> Duties with a Post-Signing Market Check— <i>Barkan, Pennaco, and MONY</i> .....	5-250
[H]	The Applicability of <i>Revlon</i> and <i>Unocal</i> to Deal Protection Devices in Arm's-Length M&A.....	5-252
[H][1]	Introduction.....	5-252
[H][2]	No Vested Rights in Deal Protection Devices Where <i>Revlon</i> Applies— <i>QVC</i> .....	5-253
[H][3]	Theoretical Basis of Applying <i>Unocal</i> to Deal Protection Devices in Non- <i>Revlon</i> Cases .....	5-254
[H][4]	<i>Unocal</i> Standard Applies and No Fait Accompli with Deal Protection Devices in Non- <i>Revlon</i> Case— <i>Omnicare</i> .....	5-255
[H][4][a]	Background on <i>Omnicare</i> .....	5-255
[H][4][b]	The Limits of <i>Omnicare</i> — <i>Orman</i> .....	5-257
[H][4][c]	The Continuing Validity of <i>Omnicare</i> — <i>Optima</i> .....	5-259
[H][4][d]	Rejection of <i>Omnicare</i> in California— <i>Monty</i> .....	5-260
[H][4][e]	Vice Chancellor Noble's Decision Regarding Consents Given After Signing of Merger Agreement— <i>Openlane</i> .....	5-262
[H][5]	Illustration of Standard Deal Protections: No Solicit, Superior Proposal, Fiduciary Out, Matching Right, Force the Vote, and Termination Fee—MCI–Verizon Merger .....	5-263
[H][5][a]	Introduction .....	5-263
[H][5][b]	The “No Solicitation” Provision .....	5-264
[H][5][c]	MCI Can Provide Information to Third-Party Bidders.....	5-265
[H][5][d]	Negotiation with Bidder Making “Superior Proposal”.....	5-266
[H][5][e]	Notice to Verizon of Receipt of Any “Takeover Proposal” .....	5-268
[H][5][f]	Change in Shareholder Recommendation or Entering Alternative Agreement—Fiduciary Out with Matching Rights .....	5-268
[H][5][g]	Force the Vote.....	5-271
[H][5][h]	MCI's Disclosure Obligations.....	5-271
[H][5][i]	Termination and Fee.....	5-272

[H][5][j]	No Termination Fee if “Naked No Vote”.....	5-275
[H][5][k]	ABA <i>Deal Point Study</i> —Deal Protection Devices .....	5-276
[H][6]	Illustrative Analysis of Standard Superior Proposal Provision, Fiduciary Out, Matching Right and Termination Fee .....	5-276
[H][6][a]	Deal Protection in <i>Toys “R” Us</i> .....	5-276
[H][6][b]	Deal Protection and Reverse Termination Fee in <i>Dollar Thrifty</i> .....	5-280
[H][6][c]	Measuring the Termination Fee Against Enterprise Value or Equity Value— <i>Cogent</i> .....	5-284
[H][6][d]	The Cumulative Effect of Deal Protection Provisions— <i>Orchid</i> .....	5-286
[H][7]	Go-Shops— <i>TXU, Topps, Lear, and Dell</i> .....	5-287
[H][7][a]	Introduction .....	5-287
[H][7][b]	The <i>TXU</i> Go-Shop Period.....	5-288
[H][7][c]	The <i>TXU</i> No-Shop Period.....	5-290
[H][7][d]	<i>TXU</i> Fiduciary Out for a Superior Proposal.....	5-290
[H][7][e]	<i>TXU</i> Change in Shareholder Recommendation.....	5-292
[H][7][f]	<i>TXU</i> Disclosure Obligations and Notice to Acquirer .....	5-294
[H][7][g]	<i>TXU</i> Termination Provisions .....	5-295
[H][7][h]	Delaware’s Approach to Go-Shops— <i>Topps, Lear, and Dell</i> .....	5-296
[H][7][h][i]	Introduction.....	5-296
[H][7][h][ii]	<i>Topps</i> 2007, Go-Shop .....	5-297
[H][7][h][iii]	<i>Lear</i> 2007, Go-Shop and Match Rights.....	5-299
[H][7][h][iv]	<i>Dell</i> 2016, Go-Shop and Match Rights .....	5-302
[H][8]	“No Impairment” Covenant and Relation to Deal Protection— <i>Energy Partners</i> .....	5-307
[H][9]	Asset or Crown Jewel Options As Deal Protection Measures .....	5-310
[H][10]	Stock Options or Share Exchanges As Deal Protection Devices .....	5-310
[H][10][a]	In General .....	5-310
[H][10][b]	The Stock Options in J.P. Morgan–Bear Stearns and Wells Fargo–Wachovia .....	5-311
[H][10][c]	Courts’ Analyses of Stock Options and Other Deal Protection Devices in J.P. Morgan–Bear Stearns and Wells Fargo–Wachovia .....	5-314
[I]	Does the Board’s Passive Approach Satisfy <i>Revlon?</i> — <i>Lyondell, Bernal, and Brown</i> .....	5-316
[J]	Power of Board to Reject a Proposed Merger— <i>TW Services</i> .....	5-327

## Table of Contents

[K]	Sale of Target Where Preferred Shareholders Receive All the Consideration— <i>Trados</i> ..... 5-327
[L]	The “Last Period” Problem— <i>Steinhardt and Reis</i> ..... 5-329
[M]	Investment Banker’s Manipulation of the Sales Process, Stapled Financing— <i>Del Monte</i> and <i>Rural</i> ..... 5-334
[N]	Chancellor Strine’s Opinion in <i>El Paso</i> ..... 5-340
[O]	Allegation of Violation of the Duty of Loyalty and Aiding and Abetting in a <i>Revlon</i> Sale Transaction— <i>Answers</i> ..... 5-344
[P]	The Fight in Delaware Chancery Over “Don’t Ask, Don’t Waive” (DADW)— <i>Genomics, Ancestry</i> , and <i>NetSpend</i> ..... 5-346
[P][1]	Introduction to Don’t Ask, Don’t Waive (DADW) Provisions ..... 5-346
[P][2]	Vice Chancellor Laster’s Transcript Ruling in <i>Genomics</i> ..... 5-347
[P][3]	Chancellor Strine’s Transcript Ruling in <i>Ancestry</i> ..... 5-349
[P][4]	Vice Chancellor Glasscock’s Decision in <i>NetSpend</i> ..... 5-350
[P][5]	My Take on DADWs ..... 5-352
[Q]	Flawed Single Bidder Process, Including a DADW, but No Injunction— <i>NetSpend</i> ..... 5-353
[R]	Exculpation on <i>Revlon</i> Claim but Not on Disclosure Claim— <i>Chen</i> ..... 5-354
[S]	The Challenges to the C&J Energy–Nabors Merger ..... 5-355
[S][1]	Delaware Supreme Court (1) Again Says No Reason to Shop in a <i>Revlon</i> Transaction, and (2) Says No Reason to Blue Pencil the Merger Agreement— <i>C&amp;J Energy</i> Inversion Transaction ..... 5-355
[S][2]	In the Second Trip to the Delaware Supreme Court, That Court Affirmed the Chancery Court’s Decision on the Dismissal and the Bond Issue— <i>C&amp;J Energy/Comstock</i> ..... 5-358
[T]	No Flawed Sales Process; but Query Deal Protections— <i>Converge</i> ..... 5-359
[T][1]	The 2014 Decision in <i>Converge</i> ..... 5-359
[T][2]	The 2016 Decision in <i>Converge, Corwin</i> Principle Not Applicable ..... 5-360
[U]	Single Bidder Strategy Accepted— <i>Novell</i> ..... 5-362

[V]	Antitrust Concerns As Basis for Single Bidder Strategy— <i>Family Dollar</i> .....	5-363
[W]	Business Judgment Rule Applicable in a Cash Transaction Otherwise Subject to <i>Revlon</i> , if the Transaction Is Approved by a Fully Informed, Non-Coerced, Majority Vote of Public Shareholders .....	5-365
[W][1]	Introduction to <i>Corwin v. KKR</i> and Its Progeny .....	5-365
[W][2]	Cases Applying <i>Corwin</i> in Cash Transactions Otherwise Subject to <i>Revlon</i> .....	5-366
[W][2][a]	Business Judgment Rule in <i>Volcano</i> .....	5-366
[W][2][b]	Business Judgment Rule, When Transaction Is Not Subject to Entire Fairness— <i>Solera</i> .....	5-367
[W][2][c]	Some Other Cases Applying <i>Corwin</i> .....	5-369
[W][2][d]	Some Cases Not, Because of the Facts, Applying <i>Corwin</i> .....	5-371
[W][2][e]	<i>Corwin</i> Not Applicable, <i>KCG</i> , 2019 .....	5-372
[W][2][f]	Delaware Chancery Court Rejects Action Against a Topping Bidder Without Considering <i>Corwin</i> and Addresses Meaning of Controlling Shareholder— <i>Essendant</i> .....	5-375
[W][2][g]	<i>Corwin</i> Not Applicable; CD&R Is a Controlling Shareholder of Both the Acquirer and Target and Must Establish Entire Fairness— <i>Voigt</i> .....	5-377
[W][2][h]	<i>Corwin</i> Not Applicable, <i>Revlon</i> Applies, but Dismissal Because of Exculpation— <i>USG</i> .....	5-379
[W][2][i]	<i>Corwin</i> Not Applicable: Supine Board and Overweening CEO— <i>Minebody</i> .....	5-382
[W][2][i][i]	Introduction.....	5-382
[W][2][i][ii]	Delaware Supreme Court Affirmed the <i>Corwin</i> Aspects of <i>Minebody</i> .....	5-384
[W][2][j]	<i>Corwin</i> Not Applicable, Notwithstanding “an Undisputedly Disinterested and Independent Special Committee”— <i>Pattern</i> .....	5-384
[W][2][k]	<i>Corwin</i> Applicable, Substantial Shareholder Not a Controller— <i>GGP</i> .....	5-386
[W][2][k][i]	The Chancery Court on the <i>Corwin</i> Issue .....	5-386
[W][2][k][ii]	The Delaware Supreme Court’s Decision on the Appraisal Issue in <i>GGP</i> .....	5-388

## Table of Contents

[X]	Potential Liability for Directors/Officers Even Though Appraisal Action Found Consideration Paid Was Fair Value and Other Actions Failed— <i>Columbia Pipeline</i> .....	5-389
[X][1]	Vice Chancellor Laster’s Substantive Decision in <i>Columbia Pipeline</i> .....	5-392
[Y]	Possibly Entire Fairness, Clearly an Issue Under “Enhanced Scrutiny”— <i>Pattern Energy</i> .....	5-393
[Z]	Dismissal of All Claims Including the Fiduciary Duty Claim— <i>Genomic</i> .....	5-394
§ 5:5.5	Freezeout Mergers .....	5-397
[A]	Introduction .....	5-397
[B]	General Principles— <i>Weinberger, Lynch, and Cox</i> .....	5-398
[C]	Does the Entire Fairness Standard Apply in a Tender Offer by Controlling Shareholder for the Minority Held Shares of Its Subsidiary?— <i>Pure Resources</i> and <i>CNX</i> .....	5-403
[D]	Vice Chancellor Laster Applies the <i>CNX</i> Unified Standard of Review in <i>Wesco</i> .....	5-407
[E]	<i>CNX</i> Business Judgment Rule Applied by Chancellor Strine in <i>MFW</i> Controlling Shareholder Acquisition .....	5-408
[F]	The Delaware Supreme Court’s <i>MFW</i> Decision .....	5-410
[G]	Footnote 9 of the <i>MFW</i> Opinion .....	5-411
[H]	The Consequences of <i>MFW</i> : Do <i>Revlon</i> and <i>Unocal</i> Apply in an <i>MFW</i> BJR Transaction? .....	5-412
[I]	New York Adopts <i>MFW</i> .....	5-413
[J]	Entire Fairness Aspects (No <i>MFW</i> ) in a Freezeout Merger of a Sub ( <i>Clearwire</i> ), Where in the Related Appraisal Action, “Fair Value” Was Determined to Be Significantly Less than Deal Price, <i>Sprint</i> , 2017 .....	5-414
[K]	<i>MFW</i> ’s “Up Front” Requirement .....	5-423
[K][1]	The Description of the “Up Front” Requirement .....	5-423
[K][2]	The “Up Front” Requirement in the Delaware Supreme Court’s Decision in <i>Flood</i> .....	5-424
[K][3]	<i>MFW</i> Not Applicable to a Freezeout Merger in <i>Earthstone</i> .....	5-425
[K][4]	The Implications of the “Up Front” Requirement .....	5-426
[L]	Delaware Chancery Court Rejects Motion to Dismiss in a Non- <i>MFW</i> Transaction— <i>Salladay v. Lev</i> .....	5-427

[M]	Court Finds a “Reasonably Conceivable” Set of Facts That <i>MFW</i> Is Not Applicable— <i>Home Fed</i> .....	5-428
[N]	Other Cases Applying <i>MFW</i> .....	5-429
[O]	The Permissive “ <i>MFW</i> ” Standard of Review in Delaware Is Applicable in <i>Match Group</i> .....	5-429
[O][1]	The Facts and Holding in <i>Match Group</i> .....	5-429
[O][2]	A Critique of the Holding in <i>Match Group</i> .....	5-432
[O][2][a]	The Problem with the Holding in <i>Match Group</i> .....	5-432
[O][2][b]	The “Change of Control Board”: A Solution to the Problem in <i>Match Group</i> .....	5-433
[O][3]	The Delaware Supreme Court’s 2024 Reversal in <i>Match Group</i> : Expanding the Case for a Change of Control Board .....	5-435
[O][3][a]	Introduction to the Delaware Supreme Court’s Rejection of the Chancery Court’s Decision in <i>Match Group</i> .....	5-435
[O][3][b]	Brief Discussion of the Delaware Supreme Court’s <i>Match</i> Decision.....	5-436
[O][3][c]	This Author’s View of This Decision and the Need for a Change of Control Board.....	5-437
[O][3][d]	The Unrealistic Thought That Controlling Shareholders Are Not Going to Take Whatever They Can.....	5-438
[O][3][e]	The SEC Should Amend Its Going Private Rules to Require the Appointment of a Change of Control Board in Going Private Transactions .....	5-438
§ 5:5.6	Management Buyouts.....	5-439
[A]	Introduction .....	5-439
[B]	Applicability of Entire Fairness Standard of Review Due to Breach of Duty of Loyalty— <i>Mills</i> .....	5-439
[C]	Traditional Business Judgment Rule Analysis Where Directors Are Independent— <i>RJR Nabisco</i> .....	5-440
[D]	The Impact of <i>Revlon</i> Duty to Auction— <i>Barkan</i> .....	5-441
[E]	Impact of Target’s Decision to Seek a Private Equity, and Not a Strategic, Buyer— <i>Netsmart</i> .....	5-442
[F]	The Procedural Defects in the Health Grades MBO .....	5-443
[G]	The Special Committee in the J. Crew MBO .....	5-445
[H]	Dole Executives Liable in Going Private Transaction .....	5-452

*Table of Contents*

§ 5:5.7	Issues Arising with Controlling Shareholders in M&A.....	5-455
[A]	Introduction .....	5-455
[B]	Sale by Controlling Shareholder of Its Controlling Position .....	5-456
[B][1]	The View of Most Courts: No Equal Opportunity Doctrine— <i>Zetlin</i> .....	5-456
[B][2]	The Minority View— <i>Ahmanson</i> .....	5-456
[B][3]	Exception for Sale of Corporate Opportunity— <i>Perlman v. Feldmann</i> .....	5-457
[B][4]	Exception for Sale of Office— <i>Lionel</i> and <i>Essex</i> .....	5-458
[B][5]	Exception for Sale to Known Looters— <i>Gerdes, Keebler, Insuranshares</i> , and <i>Harris</i> .....	5-458
[B][6]	Was Musk in “Control” of Twitter at the Time He Acquired It? .....	5-464
[C]	Controlling Shareholder’s Responsibility in Structuring the Acquisition by a Third Party of Its Partially Owned Controlled Subsidiary— <i>McMullin</i> .....	5-464
[D]	Controlling Shareholder Receives Premium for High Vote Stock— <i>TCI</i> .....	5-467
[E]	Controlling Shareholder Attempts to Sell Its Shares Rather than Sale of a Subsidiary of Controlled Corporation— <i>CERBCO</i> .....	5-472
[F]	Controlling Shareholder Sells Itself Rather than Subsidiary— <i>Digex</i> .....	5-473
[G]	Use of Poison Pill to Prevent Sale of Stock of Controlled Subsidiary Held by Controlling Shareholder— <i>Hollinger</i> .....	5-474
[H]	Controlling Shareholder Rejects Sale of Target in Favor of Investment by Third Party in Target— <i>Paxson</i> .....	5-475
[I]	Controlling Shareholder Increases Its Interest to a Blocking Interest— <i>Loral</i> .....	5-475
[J]	Challenge to Controlling Shareholder’s Increase in Its Interest, Direct or Derivative— <i>Gatz, Tri-Star, and Rossette</i> .....	5-478
[K]	Sale of Valuable Subsidiary to Controlling Shareholder at a Bargain Price Followed by Resale by Shareholder at a High Price— <i>McPadden</i> .....	5-479
[L]	To Entrench Itself Board Rejects Sale of Target and Causes Target to Pursue a Recapitalization— <i>Gantler</i> .....	5-482
[L][1]	Introduction.....	5-482

[L][2]	Count I, Flawed Sale Process .....	5-483
[L][3]	Count II, Failure to Disclose All Material Information .....	5-485
[L][4]	Count III, Breach of Duty of Loyalty and Ratification .....	5-486
[M]	Controlling Shareholder Participates on the Buy Side— <i>Hammons</i> .....	5-487
[N]	Reverse Stock Splits— <i>Reis</i> .....	5-491
[O]	Controlling Shareholder/Creditor Increases Equity Position in a Recapitalization— <i>Hallmark</i> .....	5-493
[P]	Controlling Shareholder Causes Controlled Corporation to Acquire in Exchange for Its Stock the Stock of a Sister Controlled Corporation— <i>Southern Peru</i> .....	5-494
[Q]	<i>Southern Peru</i> Affirmed by Delaware Supreme Court .....	5-495
[R]	Controlling Shareholder Receives Same Consideration As Other Target Shareholders, Potential Liquidity Trap— <i>Synthes</i> .....	5-496
[R][1]	Introduction to <i>Synthes</i> .....	5-496
[R][2]	The Entire Fairness and Potential “Liquidity Trap” Issue in <i>Synthes</i> .....	5-497
[R][3]	The <i>Revlon</i> and “End Stage” Issue in <i>Synthes</i> .....	5-498
[R][4]	The <i>Unocal</i> Issue in <i>Synthes</i> .....	5-499
[S]	Structuring the Sale of a Partially Owned Portfolio Company— <i>Morton’s</i> .....	5-500
[T]	Constituency Directors and Sale of Portfolio Company Where PE Firm Holds Preferred Stock— <i>Trados</i> .....	5-502
[U]	Entire Fairness: Fair Price but No Fair Dealing?— <i>Nine Systems</i> .....	5-504
[V]	Controlling Shareholder: When Does Entire Fairness Apply?— <i>Crimson</i> .....	5-505
[W]	Controlling Shareholder Not a Controlling Shareholder— <i>KKR Holdings</i> .....	5-506
[W][1]	The Chancery Court .....	5-506
[W][2]	The Supreme Court: Business Judgment Rule Applicable in KKR’s Acquisition of KKR Holdings— <i>Corwin v. KKR</i> .....	5-508
[W][3]	<i>Corwin</i> -Related Cases .....	5-510
[X]	Minority Shareholders Not Controlling Shareholders— <i>Sanchez</i> .....	5-510
[X][1]	<i>Sanchez</i> , Chancery Court .....	5-510
[X][2]	<i>Sanchez</i> , Delaware Supreme Court 2016 .....	5-513

## Table of Contents

[Y]	A 17.5% Shareholder Is a Controller— <i>Zhongpin</i> .....	5-514
[Z]	The Xerox–Fuji Deal and the Entire Fairness Standard of Review in New York.....	5-516
[Z][1]	The Lower Court’s Decision .....	5-516
[Z][2]	<i>Fuji</i> Overturned: Transaction Can Go Forward: Business Judgment Rule Applies .....	5-519
[AA]	Acquisition by One Commonly Controlled Corporation of Stock of Another Commonly Controlled Corporation from the Common Shareholder, Demand Excused— <i>BGC Partners</i> .....	5-520
[AA][1]	In General.....	5-520
[AA][2]	The Discussion in <i>BGC Partners</i> of the Delaware Supreme Court’s Decisions in <i>Sanchez, Sandys, and Marchand</i> .....	5-522
[BB]	Potential Liability for (1) CEO of Target, (2) the Investment Banker for Target, and (3) the Acquirer, but Not for the Controlling Shareholder and Certain Directors of Target— <i>Presidio</i> .....	5-524
[BB][1]	Basic Fact and Holding .....	5-524
[BB][2]	The Standard of Review .....	5-526
[BB][3]	Potential for Lowering the Standard of Review— <i>Corwin</i> Cleansing or the <i>Synthes</i> Safe Harbor.....	5-527
[BB][4]	Court’s Treatment of <i>Corwin</i> Cleansing .....	5-527
[BB][5]	Court’s Treatment of the <i>Synthes</i> Safe Harbor.....	5-528
[BB][6]	Court’s Analysis of the Sale Process Under Enhanced Scrutiny .....	5-529
[BB][7]	Court’s Analysis of the Disclosure Claim Against the Tipper, Lion Tree .....	5-530
[BB][8]	Skadden’s Advice on <i>Presidio</i> .....	5-530
[CC]	Potential Liability for (1) Controlling Shareholder, (2) CEO of Target, and (3) Directors of CBS in Its Acquisition by Viacom— <i>CBS</i> , a Non- <i>MFW</i> Case .....	5-531
[DD]	Chancery Court Refuses to Dismiss the <i>Dell-Class V</i> Case, Rejecting the Argument That <i>MFW</i> Applies .....	5-535
[DD][1]	The Refusal to Dismiss.....	5-535
[DD][2]	The Dell Historic Settlement.....	5-535
[EE]	Other <i>MFW</i> Cases .....	5-537
[FF]	<i>MFW</i> in <i>Match Group</i> .....	5-538

[GG]	<i>Revlon in Mindbody</i> .....	5-538
[GG][1]	In General.....	5-538
[GG][2]	Another Illustration of the Need for the Change of Control Board Concept .....	5-540
[HH]	No Entire Fairness and No Breach of Loyalty in Oracle's Acquisition of NetSuite .....	5-540
[HH][1]	Introduction.....	5-540
[HH][2]	The Delaware Supreme Court Affirms the Chancery Court's Opinion Finding No Liability in NetSuite .....	5-544
[II]	Jay-Z's Sale of Tidal to Block .....	5-545
[II][1]	The Basic Facts and the Delaware Chancery Court's and Supreme Court's Decisions .....	5-545
[II][2]	The Author's Take on This Case .....	5-546
§ 5:5.8	Summary of Current Delaware Law Governance Rules for M&A .....	5-547
Table 5-1	Summary of Current Delaware Law Governance Rules for Mergers and Acquisitions .....	5-548
§ 5:5.9	"Directors," Duties in the "Zone of Insolvency" .....	5-549
[A]	<i>Credit Lyonnais</i> , 1991 .....	5-549
[B]	<i>Production Resources</i> , 2004 .....	5-549
[C]	<i>Trenwick</i> , 2007 .....	5-550
[D]	<i>Gheewalla</i> , 2007 .....	5-551
[E]	J.P. Morgan's Acquisition of Bear Stearns, 2008.....	5-552
[F]	<i>Brown Schools</i> , 2008 .....	5-553
[G]	<i>Quadrant</i> , 2015 .....	5-555
[H]	COVID and the Zone of Insolvency .....	5-558
§ 5:5.10	The Uncertainty in Delaware M&A Law.....	5-558
[A]	General Principles .....	5-558
[B]	Uncertain Deference to Independent and Disinterested Directors— <i>Caremark</i> , <i>Netsmart</i> , <i>Topps</i> , and <i>Lear</i> .....	5-559
§ 5:6	ALI Rules Governing Fiduciary Duties of Target's Directors in M&A .....	5-560
§ 5:6.1	Introduction .....	5-560
§ 5:6.2	Arm's-Length M&A .....	5-560
§ 5:6.3	Management Buyouts.....	5-561
§ 5:6.4	Defensive Tactics in Tender Offers .....	5-562
§ 5:6.5	Freezeouts .....	5-563
§ 5:6.6	Summary of ALI Governance Rules for M&A .....	5-565
Table 5-2	Summary of ALI's Merger and Acquisition Rules.....	5-566
§ 5:6.7	Comments on ALI Approach.....	5-568
§ 5:7	Delaware Law Governing Fiduciary Duties of Acquirer's Directors in M&A .....	5-568

## Table of Contents

§ 5:8	ALI Rules Governing the Fiduciary Duties of an Acquirer's Directors in M&A .....	5-571
§ 5:9	The ALI Draft on Corporate Governance, and the Fight Between UCLA Law and NYU Law, As of May 2023 .....	5-571

## PART III FEDERAL SECURITIES LAW CONSIDERATIONS IN M&A

### Chapter 6      Introduction to the '33 and '34 Acts and Exemptions in Acquisitions of Closely Held Targets

§ 6:1	Scope .....	6-11
§ 6:1.1	References .....	6-14
§ 6:2	Applicability of '33 and '34 Acts to "Securities" and in Mergers and Acquisitions .....	6-14
§ 6:3	Materiality Under the '33 and '34 Acts .....	6-16
§ 6:3.1	Introduction .....	6-16
§ 6:3.2	Materiality Under Rule 14a-9 of the '34 Act .....	6-16
§ 6:3.3	Materiality Under Rule 10b-5 of the '34 Act .....	6-17
§ 6:3.4	Materiality Under the '33 Act .....	6-19
§ 6:3.5	Materiality in Financial Statements .....	6-19
§ 6:3.6	Illustration of Materiality Under Rules 10b-5 and 14a-9—The DaimlerChrysler Merger of Equals .....	6-20
§ 6:3.7	Materiality in BOA–Merrill: The Role of the Lawyers .....	6-22
§ 6:3.8	David Katz's Helpful Guidance on the Meaning of "Materiality" Under the Federal Securities Laws .....	6-24
§ 6:4	Introduction to the Liability Provisions of the '33 Act and '34 Act .....	6-26
§ 6:4.1	In General .....	6-26
§ 6:4.2	Section 12(a)(1) of the '33 Act .....	6-27
§ 6:4.3	Section 11 of the '33 Act .....	6-27
[A]	Introduction .....	6-27
[B]	The Due Diligence and Reliance Defenses .....	6-29
[B][1]	In General .....	6-29
[B][2]	Due Diligence and Reliance Defenses of Underwriters .....	6-31
[B][3]	Due Diligence and Reliance Defenses of Directors .....	6-38
[C]	Honest Opinions Not Actionable Under Section 11— <i>Omnicare</i> .....	6-39

§ 6:4.4	Section 12(a)(2) Under the '33 Act .....	6-41
[A]	In General .....	6-41
[B]	Inapplicability of Section 12(a)(2) to Non-Public Offerings.....	6-43
§ 6:4.5	Rule 10b-5 Under the '34 Act.....	6-45
[A]	Introduction .....	6-45
[B]	Rule 10b-5 in Freezeout Mergers .....	6-48
[C]	Trading on Non-Public Information Regarding Mergers and Acquisitions—Misappropriation Theory Under Rule 10b-5— <i>Sokol</i> .....	6-49
[D]	Impact of Rule 10b-5 on Disclosure of Merger Negotiations.....	6-52
[D][1]	Authorities Dealing with Denial of Merger Negotiations That Are in Fact Taking Place .....	6-52
[D][2]	Authorities Addressing When Merger Negotiations Must Be Included in Disclosure Documents .....	6-58
[D][3]	Failure to Disclose Merger Discussions at Time of Purchase by Corporation of Its Stock— <i>Stiefel</i> .....	6-61
[D][4]	Allergan's Failure to Disclose Talks with "Potentially Friendlier Merger Partners".....	6-62
[E]	Impact of Rule 10b-5 upon the Purchase of Stock of a Closely Held Corporation by the Corporation or a Controlling Shareholder .....	6-64
[F]	Corporation Not Liable for Acquiring Shareholder's Stock Two Years Before Acquisition— <i>Phipps</i> .....	6-66
[G]	Impact of Rule 10b-5 in Vivendi's Acquisition of a Subsidiary of Liberty Media in Exchange for Stock of Vivendi—The Reliance Issue .....	6-67
[H]	The Fraud-on-the-Market Theory Survives with a Modification— <i>Halliburton</i> .....	6-71
[I]	Tippee Liability Under Rule 10b-5— <i>Newman</i> and <i>Salman</i> .....	6-73
[I][1]	The Second Circuit's <i>Newman</i> Decision .....	6-73
[I][2]	Supreme Court Overrides <i>Newman</i> , Finds Tippee Liable for Insider Trading— <i>Salman</i> .....	6-74
[J]	LBO Noteholders' Rule 10b-5 Action Against PE Firm, <i>Oaktree v. Warburg Re Rural</i> .....	6-78
[K]	Initial Coin Offering of Cryptocurrency .....	6-81
[L]	The Musk Tweets Regarding Tesla Going Private: Rule 10b-5.....	6-81
[M]	House Passes the 8-K Trading Gap Bill .....	6-86

## Table of Contents

§ 6:4.6	Rule 14a-9 Under the '34 Act.....	6-87
[A]	In General.....	6-87
[B]	Is Scienter Required in an Action Under Rule 14a-9? .....	6-88
[C]	The "Essential Link" Requirement in a Rule 14a-9 Action.....	6-89
[D]	Is Evil Intent Without a Material Misrepresentation Actionable Under Rule 14a-9? .....	6-92
[E]	Loss Causation Under Section 14(a)(9)— <i>Atheros</i> .....	6-93
[F]	To Be Actionable Under Rule 14a-9, There Must Be a False or Misleading Statement— <i>Gottlieb</i> .....	6-95
[G]	No Liability Under Section 14a-9, Notwithstanding Deal Price Was \$11 Less than Pre-Announcement Trading Price—PSLRA and Bespeaks Caution in <i>Analogic</i> .....	6-96
[H]	Potential Liability Under Section 14a-9: Failure to Disclose Compensation Arrangements Is Material— <i>Willis Towers</i> .....	6-98
[I]	U.S. District Court in Connecticut Refuses to Dismiss Section 14(a) Merger Disclosure Claim— <i>Harman</i> .....	6-99
§ 6:4.7	Rule 9(b) and PSLRA Pleading Standards.....	6-100
§ 6:4.8	Standard for Determining Whether a Violation of the Securities Laws Is Willful— <i>Robare</i> .....	6-111
§ 6:5	Introduction to the Registration Requirements Under Section 5 of the Securities Act of 1933 As Amended by the 2005 Securities Offering Reforms .....	6-112
§ 6:5.1	In General .....	6-112
§ 6:5.2	Types of Underwritings.....	6-113
§ 6:5.3	Rule Change Permitting Direct Listing of Securities: An Alternative to an IPO.....	6-116
§ 6:5.4	Introduction to the SEC's 2005 Securities Offering Reform Rules .....	6-118
§ 6:5.5	Introduction to the Registration Requirement of Section 5 .....	6-120
[A]	Introduction .....	6-120
[B]	The Pre-Filing Period.....	6-120
[B][1]	General Principles and Rule 135 .....	6-120
[B][2]	The Thirty-Day Bright-Line Exemption for All Issuers in Rule 163A Adopted by the 2005 Securities Offering Reform .....	6-122

[B][3]	The Factual Information Exemption for Non-Reporting Issuers in Rule 169 Adopted by the 2005 Securities Offering Reform.....	6-123
[B][4]	The Factual Business Information and Forward-Looking Statement Exemption for Reporting Issuers in Rule 168 Adopted by the 2005 Securities Offering Reform.....	6-124
[B][5]	The Unrestricted Exemption for WKSIs in Rule 163 Adopted by the 2005 Securities Offering Reform.....	6-126
[B][6]	SEC Adopts Test-The-Waters (TTW) Provision, New Rule 163B .....	6-128
[C]	Waiting Period .....	6-129
[C][1]	Introduction.....	6-129
[C][2]	Changes to the Waiting Period Rules Adopted in the 2005 Securities Offering Reform.....	6-131
[C][2][a]	Rule 134 As Amended by the 2005 Securities Offering Reform.....	6-131
[C][2][b]	Use of Free Writing Prospectuses During the Waiting Period Under Rules 164 and 433, Adopted by the 2005 Securities Offering Reform.....	6-135
[C][2][b][i]	Introduction.....	6-135
[C][2][b][ii]	What Type of Information About the Offering May Be Included in a Free Writing Prospectus .....	6-138
[C][2][b][iii]	The Seasoned Issuer and Wksi Class; IPO Issuer and Unseasoned Issuer Class.....	6-139
[C][2][b][iv]	Conditions Applicable to the IPO Issuer and Unseasoned Issuer Class.....	6-139
[C][2][b][v]	Conditions Applicable to the Seasoned Issuer and Wksi Class.....	6-142
[C][2][b][vi]	Conditions Applicable to Road Shows of Both the IPO Issuer and Unseasoned Issuer Class and the Seasoned Issuer and Wksi Class .....	6-142
[C][2][b][vii]	Treatment of Information on or Hyperlinked from the Issuer's Website .....	6-146
[D]	The Post-Effective Period.....	6-147
[D][1]	Introduction and Use of Rule 430A to Go Effective .....	6-147
[D][2]	Changes Made by the 2005 Securities Offering Reform Regarding Completion of Sales: Access Equals Delivery.....	6-149

## *Table of Contents*

[E]	Summary of the Operation of the Three Periods Governed by Section 5 .....	6-153
[F]	The JOBS Act: An Introduction and Applicability to Registered Offerings.....	6-154
[G]	Attempting to Avoid Section 5 Through Reverse Mergers and Similar Transactions .....	6-155
§ 6:6	Compliance with State Law .....	6-157
§ 6:7	Introduction to Registration Statements on Forms S-1 and S-3 .....	6-157
§ 6:7.1	In General .....	6-157
§ 6:7.2	The Interface Between Forms S-1 and S-3 and Regulations S-K and S-X.....	6-158
§ 6:7.3	Requirement for Additional Disclosures if Material: Rule 408(a) and Rule 12b-20 .....	6-160
§ 6:7.4	Presentation of Information in a Registration Statement.....	6-160
§ 6:7.5	The “Plain English” Requirement.....	6-160
§ 6:8	Preparation of the S-1 Registration Statement for an IPO—The EverCore IPO .....	6-161
§ 6:8.1	Introduction .....	6-161
[A]	In General .....	6-161
[B]	Brief Introduction to the 2020 Amendments to the MD&A and Financial Disclosures.....	6-162
§ 6:8.2	The Delaying Amendment to the Registration Statement.....	6-164
§ 6:8.3	S-1, Item 1, Forepart of the Registration Statement and Outside Front Cover Page of Prospectus, Reg. S-K, Item 501 .....	6-165
§ 6:8.4	S-1, Item 2, Inside Front and Outside Back Cover Pages of Prospectus, Reg. S-K, Item 502 .....	6-165
§ 6:8.5	Rule 408 Additional Disclosure: Prospectus Only Source of Information.....	6-165
§ 6:8.6	Terms Used in the Prospectus .....	6-166
§ 6:8.7	S-1, Item 3, Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges, Reg. S-K, Item 503.....	6-166
§ 6:8.8	Reliance on the Bespeaks Caution Doctrine for Forward-Looking Information .....	6-166
§ 6:8.9	Rule 408 Additional Disclosure: Organizational Structure .....	6-169
§ 6:8.10	S-1, Item 4, Use of Proceeds, Reg. S-K, Item 504.....	6-170
§ 6:8.11	S-1, Item 5, Determination of Offering Price, Reg. S-K, Item 506.....	6-170
§ 6:8.12	S-1, Item 6, Dilution, Reg. S-K, Item 506.....	6-170

§ 6:8.13	S-1, Item 7, Selling Shareholders, Reg. S-K, Item 507.....	6-170
§ 6:8.14	S-1, Item 8, Plan of Distribution, Reg. S-K, Item 508.....	6-170
§ 6:8.15	S-1, Item 9, Description of Securities to Be Registered, Reg. S-K, Item 202.....	6-171
§ 6:8.16	S-1, Item 10, Interest of Named Experts and Counsel, Reg. S-K, Item 509.....	6-171
§ 6:8.17	S-1, Item 11(a), Description of Business, Reg. S-K, Item 101.....	6-171
§ 6:8.18	S-1, Item 11(b), Description of Property, Reg. S-K, Item 102.....	6-171
§ 6:8.19	S-1, Item 11(c), Legal Proceedings, Reg. S-K, Item 103.....	6-171
§ 6:8.20	S-1, Item 11(d), Market Price, Dividends and Related Matters, Reg. S-K, Item 201 .....	6-171
§ 6:8.21	S-1, Item 11(e), Financial Statements Required by Reg. S-X, Including the Pro Forma Financial Statements Required by Article 11 of Reg. S-K .....	6-171
§ 6:8.22	S-1, Item 11(f), Selected Financial Data, Reg. S-K, Item 301.....	6-171
§ 6:8.23	S-1, Item 11(g), Supplementary Financial Information, Reg. S-K, Item 302.....	6-172
§ 6:8.24	S-1, Item 11(h), Management Discussion and Analysis, Reg. S-K, Item 303 .....	6-172
[A]	Introduction .....	6-172
[B]	Determining if the Issuer Has Complied with the MD&A Disclosure— <i>Blackstone</i> .....	6-172
§ 6:8.25	S-1, Item 11(i), Disagreements with Accountants, Reg. S-K, Item 304 .....	6-175
§ 6:8.26	S-1, Item 11(j), Qualitative and Quantitative Disclosure About Market Risk, Reg. S-K, Item 305.....	6-175
§ 6:8.27	S-1, Item 11(k), Directors and Executive Officers, Reg. S-K, Item 401.....	6-175
§ 6:8.28	S-1, Item 11(l), Executive Compensation and Compensation Committee Interlocks, Reg. S-K, Items 402 and 407(e)(4) .....	6-175
§ 6:8.29	S-1, Item 11(m), Security Ownership of Certain Beneficial Owners and Management, Reg. S-K, Item 403.....	6-176
§ 6:8.30	S-1, Item 11(n), Transactions with Related Persons, Reg. S-K, Item 404.....	6-176
§ 6:8.31	S-1, Item 11(n), Corporate Governance, Reg. S-K, Item 407(a).....	6-176

*Table of Contents*

§ 6:8.32	Rule 408 Additional Disclosure .....	6-176
[A]	In General .....	6-176
[B]	Capitalization Table .....	6-176
[C]	Material Federal Income Taxes .....	6-176
§ 6:8.33	Information Not Required in Prospectus .....	6-177
§ 6:9	Introduction to Special Purpose Acquisition Companies (SPACs).....	6-177
§ 6:9.1	Scope .....	6-177
[A]	References on SPACs .....	6-178
§ 6:9.2	Why the Increase in SPACs? .....	6-179
§ 6:9.3	The SEC's 2020 Introduction to SPACs .....	6-180
[A]	Introduction .....	6-180
[B]	The Basic Description of a SPAC .....	6-180
[C]	A SPAC's IPO Phase.....	6-181
[C][1]	Introduction.....	6-181
[C][2]	The Acies IPO Phase .....	6-181
[C][3]	The Underwriter's Compensation in the Acies IPO .....	6-181
[D]	The Capital Structure of a SPAC: Common Stock and Warrants .....	6-182
[D][1]	Introduction.....	6-182
[D][2]	Capital Structure of the Acies SPAC .....	6-182
[E]	The Deposit of Funds in a Trust Account Pending Completion of the Acquisition .....	6-184
[E][1]	Introduction.....	6-184
[E][2]	The Trust Account in the Acies SPAC .....	6-184
[F]	The \$10 Initial Trading Price .....	6-184
[F][1]	Introduction.....	6-184
[F][2]	The \$10 Price for Common Stock and Warrant in the Acies SPAC .....	6-185
[G]	A SPAC's Business Combination Phase, That Is, the De-SPAC Phase .....	6-185
[G][1]	Introduction.....	6-185
[G][2]	The Business Combination Stage with the Acies SPAC .....	6-186
[H]	Execute an Acquisition or Liquidate .....	6-186
[I]	The Shareholder's Redemption Right .....	6-187
[I][1]	Introduction.....	6-187
[I][2]	Redemption Rights in the Acies SPAC .....	6-187
[J]	Shareholder Approval of the Acquisition .....	6-188
[J][1]	Introduction.....	6-188
[J][2]	Shareholder Approval of the Acquisition of Playstudios with the Acies SPAC .....	6-189
[K]	Understanding the Interest of the Sponsor .....	6-189
[L]	SEC'S Division of Corporate Finance Disclosure Guidance on SPACs .....	6-189

§ 6:9.4	Introduction to SEC Rule 419, Which Deals with Certain SPACs.....	6-191
§ 6:9.5	Non-Applicability of Rule 419 to the Acies SPAC.....	6-192
§ 6:9.6	Comparing the Acies Offering with a Rule 419 Offering.....	6-193
§ 6:9.7	The NASDAQ Listing Rules on SPACs.....	6-201
§ 6:9.8	Other Considerations with SPACs.....	6-203
[A]	Comparing a SPAC with an IPO.....	6-203
[B]	The Hunt for Targets.....	6-204
[C]	The Potential for a "Piggybacked" Private Investment in Public Equity (PIPE) Transaction .....	6-205
§ 6:9.9	Coates 2021 Statement on Liability Risks Associated with SPAC Projections .....	6-206
§ 6:9.10	Are SPACs Subject to Regulation by the SEC Under the Investment Company Act (the ICA)? .....	6-209
§ 6:9.11	New SEC Rules Governing SPACs.....	6-211
[A]	Introduction .....	6-211
[B]	SEC Issues Proposed Changes to SPAC and De-SPAC Rules, March 30, 2022.....	6-211
[C]	2024 Final SPAC Rules.....	6-213
§ 6:9.12	Challenges to SPAC Transactions Under Corporate Law.....	6-215
[A]	Introduction .....	6-215
[B]	Potential Application of the Corporate Law "Entire Fairness" Test to a SPAC Transaction .....	6-215
§ 6:9.13	Illustration of (1) a SPAC, and (2) the Following De-SPAC: HCM II Acquisition Corp. SPAC, June 2024; Followed by the Terrestrial Energy De-SPAC, March 2025 .....	6-217
[A]	Introduction .....	6-217
[B]	Excerpt from the June 17, 2024, Prospectus for HCM II Acquisition Corp., SPAC Public Offering.....	6-217
[C]	Excerpt from the March 6, 2025, De-SPAC Transaction: Acquisition by HCM II of Terrestrial Energy .....	6-220
§ 6:10	Reporting Requirements of a '34 Act Company .....	6-222
§ 6:10.1	Introduction .....	6-222
§ 6:10.2	The Form 10-K Annual Report.....	6-223
[A]	Introduction .....	6-223

*Table of Contents*

[B]	Form 10-K, Item 9A, Controls and Procedures; Regulation S-K, Item 307, Disclosure Controls and Procedures, and Item 308, Internal Control Over Financial Reporting.....	6-224
[B][1]	Introduction.....	6-224
[B][2]	The SOX Origin of Internal Controls, Disclosure Controls and Officer Certification .....	6-225
[B][2][a]	Introduction .....	6-225
[B][2][b]	Management Assessment of Internal Controls .....	6-225
[B][2][b][i]	In General.....	6-225
[B][2][b][ii]	Applicability of Internal Controls Report Regarding a Newly Acquired Target.....	6-226
[B][2][c]	Disclosure Controls and Procedures .....	6-227
[B][2][d]	Illustration of Representation and Warranty in an Acquisition Agreement Concerning Internal Controls and Disclosure Controls.....	6-227
[B][2][e]	Officer Certification of Financial Reports: Including Internal Controls and Disclosure Controls .....	6-228
[B][2][f]	Officer's Certification Under Section 906 of SOX, Section 1350 of Title 18, U.S.C. ....	6-232
[B][3]	Disclosure Controls Under Item 307 of Regulation S-K .....	6-233
[B][4]	Internal Controls and Accountant's Attestation Under Item 308 of Reg. S-K.....	6-233
[C]	Form 10-K, Item 10, Corporate Governance; Regulation S-K, Item 406, Code of Ethics, Item 407(d)(4), Audit Committee, and Item 407(d)(5), Audit Committee Financial Expert.....	6-234
[C][1]	Reg. S-K, Item 406, Code of Ethics .....	6-234
[C][2]	Reg. S-K, Item 407(d)(4), Standing Audit Committee .....	6-235
[C][3]	Reg. S-K, Item 407(d)(5), Audit Committee Financial Expert .....	6-236
[D]	Form 10-K, Item 13, Director Independence, Regulation S-K, Item 407(a) .....	6-237
§ 6:10.3	The Form 10-Q Quarterly Report.....	6-237
§ 6:10.4	The Form 8-K Periodic Report .....	6-238
[A]	In General .....	6-238
[B]	The Non-Disclosure of Conditions and Other Provisions of Public Company Acquisition Agreements .....	6-240

§ 6:10.5	The Annual Proxy Statement .....	6-241
[A]	In General .....	6-241
[A][1]	Keeping Up to Date on the Proxy Rules .....	6-241
[A][2]	Basic Principles .....	6-242
[B]	Final Dodd-Frank Say on Pay and Golden Parachute Rules .....	6-243
[B][1]	The Dodd-Frank Provisions on Say on Pay and Golden Parachutes .....	6-243
[B][2]	Introduction to the SEC's Final Say on Pay Rules .....	6-245
[B][3]	Introduction to the SEC's Final Golden Parachute Rules .....	6-246
[C]	Potential for a Universal Proxy Ballot .....	6-248
[D]	Introduction to the 2020 Changes to the Proxy Adviser Rules .....	6-249
§ 6:10.6	The Annual Report to Shareholders .....	6-249
§ 6:10.7	2010 Financial Reform Act Impact on Proxy System .....	6-250
§ 6:10.8	Other Proxy Initiatives .....	6-251
§ 6:10.9	The JOBS Act and the '34 Act Reporting Requirements for Emerging Growth Companies .....	6-253
§ 6:11	Preparation of a Registration Statement on Form S-3 .....	6-253
§ 6:11.1	Introduction .....	6-253
§ 6:11.2	Shelf Registrations Under Rule 415 .....	6-254
[A]	Introduction .....	6-254
[B]	Impact of 2005 Securities Offering Reform: The Automatic Shelf Registration for WKSIs .....	6-255
[C]	Illustration of an Automatic Shelf Registration Offering, IBM's Note Offering in October 2008 .....	6-255
§ 6:12	Introduction to Section 16 and Its Role in Acquisition Transactions .....	6-256
§ 6:12.1	Section 16(a) Ownership Reports .....	6-256
§ 6:12.2	Section 16(b) Strict Liability .....	6-257
[A]	Introduction .....	6-257
[B]	Regulatory Exemptions Under Section 16(b) .....	6-258
[C]	The Exemption in Rule 16b-3(d) by the Acquirer .....	6-261
[C][1]	In General .....	6-261
[C][2]	Illustration of the Use of Rule 16b-3(d) in the Sirius-XM Transaction .....	6-263
[D]	The Exemption in Rule 16b-3(e) by the Target .....	6-264

## Table of Contents

[E]	Rule 16b-7 Exemption for Certain Mergers That Are Continuations.....	6-265
[F]	Judicially Developed Exemption for Unorthodox Transactions.....	6-266
§ 6:13	Exemptions from '33 Act Registration .....	6-267
§ 6:13.1	Introduction .....	6-267
§ 6:13.2	The JOBS Act, \$50 Million and Crowdfunding Exemptions .....	6-269
§ 6:13.3	Modifications to the Exempt Offering Framework .....	6-269
§ 6:14	Guide for Completing a Statutory Section 4(a)(2) Private Placement.....	6-271
§ 6:15	Rule 506 of Reg. D—Exemptions for Transactions Involving Limited Offers and Sales .....	6-273
§ 6:15.1	Introduction .....	6-273
§ 6:15.2	The Concept of "Accredited Investor".....	6-275
[A]	In General .....	6-275
[B]	Impact of Dodd-Frank Act on Definition of Accredited Investor.....	6-276
[C]	SEC's 2020 Amendments to the Definition of the Term "Accredited Investor".....	6-276
§ 6:15.3	Rule 502 Conditions .....	6-277
[A]	Introduction .....	6-277
[B]	Integration .....	6-277
[C]	Information.....	6-278
[D]	Limitation on the Manner of the Offering.....	6-280
[D][1]	The General Prohibition Against Advertising in Rule 502(c).....	6-280
[D][2]	Goldman's Facebook Private Offering .....	6-280
[D][3]	JOBS Act Relaxation of General Solicitation Ban .....	6-281
[D][4]	Proposed Rules on JOBS Act General Solicitation Provision .....	6-282
[E]	Limitation of Resale .....	6-282
§ 6:15.4	Specific Conditions Under Rule 506(b)(2).....	6-284
[A]	Introduction .....	6-284
[B]	Restriction on the Number of Purchasers .....	6-284
[C]	Nature of the Purchasers .....	6-284
§ 6:15.5	General Observations on the Use of Rule 506 .....	6-285
[A]	Overlap with the Statutory 4(a)(2) Exemption .....	6-285
[B]	Procedural Matters .....	6-286
§ 6:16	Resale of Restricted Securities Under Rule 144 .....	6-286
§ 6:16.1	Introduction .....	6-286
§ 6:16.2	Sales by Non-Affiliates of Reporting Companies: Public Acquirer Acquires Closely Held Target.....	6-288

§ 6:16.3	Sales by Non-Affiliates of Non-Reporting Companies: Closely Held Acquirer Acquires Closely Held Target .....	6-289
§ 6:16.4	Sales by Affiliates: Target Shareholder Becomes Affiliate of the Acquirer.....	6-290
§ 6:16.5	Negotiation for a Registration Rights Agreement.....	6-291
§ 6:16.6	2020 Proposed Amendments to Rule 144.....	6-292
§ 6:17	Resale of Restricted Securities Under Section 4(a)(1½) .....	6-293
§ 6:17.1	General Principles .....	6-293
§ 6:17.2	ABA's 2022 Guidance on Legal Opinions in Section 4(a)(1½) Transactions .....	6-295
§ 6:17.3	The "Fast Act's" Partial Codification of Section 4(1½) in Section 4(a)(7).....	6-296
§ 6:18	Introduction to Rule 144A.....	6-300
§ 6:19	The Exxon Capital A/B Exchange Offering .....	6-301
§ 6:20	Brief Introduction to Short Selling: Reddit, Wallstreetbets, Robinhood, and GameStop .....	6-302
§ 6:20.1	Introduction .....	6-302
§ 6:20.2	What Is a Short Sale? .....	6-303
§ 6:20.3	What Is a Short Squeeze? .....	6-304
§ 6:20.4	What Is a "Naked" Short Sale and a "Failure"? .....	6-304
§ 6:20.5	How Does the SEC Regulate Short Sales .....	6-305
[A]	Short Sales and SEC Regulation SHO Under the '34 Act.....	6-305
[B]	Short Sales and the Reporting Requirement Under Section 13(d) of the '34 Act?.....	6-306
[C]	Reports Under Section 13(f) and Schedule 13F Under the '34 Act.....	6-306
§ 6:20.6	What Have Been Recent Problems with Short Sales.....	6-307
§ 6:20.7	What Does GameStop Say About the Events? .....	6-308
§ 6:20.8	The SEC's Reaction As of April 1, 2021 .....	6-309
§ 6:20.9	Potential Violations of the Securities Laws .....	6-310
[A]	Potential Impact of Sections 9(a), 13(d), and 10(b) of the Securities Exchange Act of 1934.....	6-310
[B]	The Target's Participation in the Party and the Potential Impact of Sections 11 and 12 of the Securities Act of 1933 .....	6-311
§ 6:20.10	Brief Introduction to SEC's October 2023 Adoption of New Rules on Short Sales.....	6-311
§ 6:21	SEC Rules on Share Repurchases.....	6-314
§ 6:22	Introduction to the SEC's 2023 Cyber Security Rules.....	6-315

**Chapter 7 Impact in Negotiated Public Company  
M&A of the '33 and '34 Acts**

§ 7:1	Scope .....	7-3
§ 7:1.1	References .....	7-5
§ 7:2	Practical Considerations in Negotiated Public Company Mergers .....	7-6
§ 7:2.1	Introduction .....	7-6
§ 7:2.2	Acquirer's Perspective.....	7-6
§ 7:2.3	Target's Perspective.....	7-6
§ 7:3	Discussion of Merger Negotiations: Impact of Rule 10b-5 .....	7-7
§ 7:4	Announcing the Consummation of a Merger Agreement: Form 8-K .....	7-7
§ 7:5	Impact of '33 and '34 Acts in Cash and Stock Business Combinations .....	7-8
§ 7:5.1	Basic Principles Under Rule 145.....	7-8
[A]	Rule 145(a) and (b), Business Combinations As Sales and Communications.....	7-8
[B]	The Presumptive Underwriter Provisions of Rule 145(c) and (d) .....	7-11
§ 7:5.2	Basic Principles Under the '34 Act Proxy Rules .....	7-14
§ 7:5.3	SEC's Summary of the Regulatory Structure for Business Combinations and Tender Offers .....	7-15
§ 7:6	1999 M&A Release: Relaxation of the M&A Gun Jumping Rules Under (1) Section 5(c) of the '33 Act, and (2) the Proxy Rules Under the '34 Act.....	7-18
§ 7:6.1	Traditional Gun Jumping Under Section 5(c) in M&A Transactions .....	7-18
§ 7:6.2	Traditional Gun Jumping Under the Proxy Rules in M&A Transactions .....	7-18
§ 7:6.3	Impact of Rules 165 and 14a-12 on Pre-Filing Communications Regarding M&A Transactions.....	7-19
[A]	Rule 165.....	7-19
[B]	Rule 14a-12 .....	7-23
§ 7:7	Overview of Regulation M-A Adopted by the 1999 M&A Release .....	7-25
§ 7:8	Overview of Proxy Rules in Arm's-Length Mergers .....	7-26
§ 7:9	Overview of Schedule 14A in Arm's-Length Mergers .....	7-32
§ 7:9.1	In General .....	7-32
§ 7:9.2	Unbundling of Merger Related Proxy Proposals .....	7-33
[A]	Introduction .....	7-33
[B]	Unbundling in <i>Greenlight v. Apple</i> .....	7-36

§ 7:10	Overview of the Use of Form S-4 in Arm's-Length Mergers .....	7-38
§ 7:11	Overview of the Use of Schedule 14C in Certain Acquisitions and Distributions .....	7-42
§ 7:12	Drafting a Form S-4 for a Stock Merger and a Schedule 14A Proxy Statement for a Cash Merger: A Comparison .....	7-42
§ 7:12.1	Introduction .....	7-42
§ 7:12.2	Comparison of Provisions of the S-4 for the Sirius-XM Stock Merger with the Schedule 14A for the Toys Cash Merger .....	7-43
§ 7:13	Treatment Under the '33 Act of Agreements Pursuant to Which Certain Target Shareholders Agree to Vote Their Shares for a Proposed Merger—Lock-Ups.....	7-54
§ 7:14	Restrictions on Market Activity in Connection with a Merger: Regulation M and Rule 10b-18 .....	7-54
§ 7:14.1	Introduction .....	7-54
§ 7:14.2	Regulation M.....	7-55
§ 7:14.3	Rule 10b-18 .....	7-59
§ 7:15	The JOBS Act and M&A .....	7-63
§ 7:16	SEC Guidance on Emerging Growth Companies (EGCs) Engaging in M&A.....	7-64
§ 7:16.1	Introduction .....	7-64
§ 7:16.2	EGCs' Use of Test the Waters in Exchange Offers and Mergers .....	7-65
§ 7:16.3	EGCs' Use of the Confidential Submission Process .....	7-66
§ 7:16.4	EGCs' Filing Obligations in Connection with a Confidential Submission .....	7-66
§ 7:16.5	Can a Subsidiary That Is Spun Off Qualify As an EGC? .....	7-68
§ 7:17	Social Media and M&A .....	7-68
§ 7:18	Selected Securities Law Provisions Related to Public Company M&A .....	7-69
§ 7:19	Selected Securities Law Provisions Related to the 2022 Acquisition by Elon Musk of Twitter, a Public Company, for Cash.....	7-69
§ 7:20	Selected Securities Law Provisions Related to the 2025 Pending Acquisition by Capital One of Discover .....	7-70

## Chapter 8    Tender Offers, Open Market Purchases, and Going Private Transactions

§ 8:1	Scope .....	8-8
§ 8:1.1	References .....	8-10
§ 8:2	Issues Before Initiating a Hostile Tender Offer .....	8-10
§ 8:2.1	In General .....	8-10
§ 8:2.2	Strategic Rationale for the Acquisition .....	8-10
§ 8:2.3	Special Due Diligence Issues .....	8-11
§ 8:2.4	Financing the Acquisition.....	8-12
§ 8:2.5	Assessing Acquirer's Vulnerability to Counterattack or Third-Party Attack .....	8-12
§ 8:2.6	Establishing a "Toehold" in the Target's Shares .....	8-13
§ 8:2.7	Before It All Begins: The "Bear Hug"—Microsoft–Yahoo! .....	8-14
§ 8:2.8	Planning for a Possible Proxy Contest to Unseat the Target's Board.....	8-15
§ 8:2.9	Planning for the Second-Step Merger.....	8-15
§ 8:3	Introduction to the Williams Act.....	8-16
§ 8:3.1	In General .....	8-16
§ 8:3.2	General Applicability of Sections 13(d) and (e), and Sections 14(d) and (e).....	8-16
§ 8:3.3	Purposes of Sections 13(d) and (e), and 14(d) and (e) .....	8-17
§ 8:4	Regulation of Open Market Purchases Under Section 13(d) .....	8-22
§ 8:4.1	Scope.....	8-22
[A]	In General .....	8-22
[B]	Introduction to the 2023 Amendments to the Regulations Under Section 13(d) .....	8-23
§ 8:4.2	The Filing Requirement in Section 13(d)(1).....	8-23
§ 8:4.3	Interface Between the 5% Limit, the Ten-Day Window, the Hart-Scott-Rodino Act, and Poison Pills .....	8-24
§ 8:4.4	Standing and Remedies Under Section 13(d) .....	8-26
§ 8:4.5	Applicability of Section 13(d) to Groups .....	8-28
§ 8:4.6	Determination of Beneficial Ownership .....	8-31
[A]	In General .....	8-31
[B]	The CSX Decision .....	8-33
[B][1]	The U.S. District Court's Decision in <i>CSX</i> .....	8-33
[B][2]	Second Circuit's Written Opinion in <i>CSX</i> .....	8-40
[C]	The Private Ordering in Response to <i>CSX</i> : Changing Definition of Beneficial Ownership in Poison Pills and Advance Notice By-Laws .....	8-41
[D]	Approach of the U.K.'s Financial Services Authority to Derivative Disclosures .....	8-42

[E]	2010 Amendments to Section 13 Relating to Security-Based Swaps .....	8-42
[F]	SEC Review of the Section 13(d) Beneficial Ownership Rules .....	8-46
[G]	SEC Proposed Modernization of Beneficial Ownership Rules .....	8-48
§ 8:4.7	The Information Required in Schedule 13D.....	8-49
§ 8:4.8	Material Changes and the Prompt Filing Requirement.....	8-52
[A]	Introduction .....	8-52
[B]	SEC Enforcement Action: Failure to Update Schedule 13D in Going Private Transactions.....	8-54
§ 8:4.9	Brief Introduction to Schedules 13G and 13F— <i>Perry</i> .....	8-56
[A]	In General .....	8-56
[B]	<i>Perry</i> .....	8-59
§ 8:4.10	Activist Shareholders and Section 13(d).....	8-60
§ 8:4.11	Proposed Amendments to Section 13(d), the Brokaw Act .....	8-60
§ 8:4.12	Compliance Guide for Section 13 and Section 16 .....	8-61
§ 8:4.13	2022 Proposed Amendments to Rules Governing Schedules 13D and 13G .....	8-61
§ 8:4.14	2023 Adopted Final Regulations Under Sections 13(d) and 13(g) .....	8-62
[A]	In General .....	8-62
[B]	The from 10-Day to 5-Day Rule.....	8-64
[C]	Clarification of the “Group Concept” .....	8-66
[D]	Derivative Securities, Machine-Readable Data, and Cash-Settled Securities .....	8-67
[E]	Shareholder Engagement .....	8-67
§ 8:5	The Meaning of the Term “Tender Offer” .....	8-68
§ 8:5.1	Scope .....	8-68
§ 8:5.2	Definition of Tender Offer: The Case Law .....	8-68
[A]	Organized Solicitation, the <i>Wellman</i> Factors .....	8-68
[B]	Open Market Purchases— <i>Carter Hawley</i> .....	8-69
[C]	Purchase After Termination of Tender Offer— <i>Hanson Trust</i> and the SEC’s Response to Market Sweeps .....	8-70
§ 8:5.3	SEC’s Proposed (and Withdrawn) Definition of Tender Offer .....	8-72
§ 8:5.4	Discussion of SEC’s Position on Definition of “Tender Offer” in 1999 M&A Release .....	8-73
§ 8:6	State Regulation of Tender Offers .....	8-73
§ 8:6.1	Scope .....	8-73

## Table of Contents

§ 8:6.2	The First Generation Statutes: The Supreme Court's View of the Illinois Statute— <i>MITE</i> .....	8-74
§ 8:6.3	The Second Generation Statutes: The Supreme Court's View of the Indiana Control Share Statute— <i>CTS</i> .....	8-75
§ 8:6.4	Third Generation Business Combination Statutes— <i>Amanda</i> .....	8-78
§ 8:6.5	Section 203 of the Delaware General Corporation Law .....	8-80
[A]	The General Rules.....	8-80
[A][1]	Constitutionality .....	8-80
[A][2]	Corporations Subject to Section 203 .....	8-80
[A][3]	The Three-Year Moratorium on Mergers.....	8-81
[A][4]	The "Interested Stockholder" and Ownership Concept .....	8-81
[A][5]	The Business Combination .....	8-84
[A][6]	The Board Approval, the 85%, and the 66-2/3% Exceptions .....	8-84
[A][6][a]	The Board Approval Exception— <i>Digex</i> .....	8-84
[A][6][b]	The 85% Exception.....	8-86
[A][6][c]	The 66-2/3% Exception.....	8-86
[B]	Dealing with Section 203 and Other Possible Baby Williams Acts in Tender Offers—The Oracle Tender Offer for PeopleSoft.....	8-87
[B][1]	Introduction.....	8-87
[B][2]	Why the Acquirer Will Unlikely Be Willing to Live with a Three-Year Moratorium .....	8-87
[B][3]	The Oracle Tender Offer for PeopleSoft.....	8-87
§ 8:7	Third-Party Tender Offers.....	8-90
§ 8:7.1	Scope .....	8-90
§ 8:7.2	Practical Aspects of Tender Offers: The Parties Involved.....	8-91
[A]	Introduction .....	8-91
[B]	Specialized Professionals on the Acquirer's Side.....	8-91
[B][1]	Acquirer's Dealer Manager .....	8-91
[B][2]	Acquirer's Information Agent .....	8-92
[B][3]	Acquirer's Depositary or Exchange Agent and the Tender Documents .....	8-93
§ 8:7.3	Sections 14(d) and (e) and the Substantive Rules Affecting the Bidder .....	8-94
[A]	Introduction to Section 14(d) .....	8-94
[B]	Introduction to Section 14(e) .....	8-94
[B][1]	In General.....	8-94
[B][2]	Applicability of Section 14(e) to Non-Conventional and Non-Public Tender Offers.....	8-99

[B][3]	Ninth Circuit Holds That “Scienter” Is Not a Required Element in an Action Under Section 14(e)— <i>Emulex</i> .....	8-100
[C]	Transactions Covered, Section 14(d)(1) .....	8-101
[D]	What Is “Beneficial Ownership”? .....	8-102
[E]	Who Is the Bidder? .....	8-102
[F]	Information Required, Section 14(d)(1) .....	8-104
[G]	The Group Concept, Section 14(d)(2).....	8-105
[H]	Substantive Provisions of Tender Offers in the Statute and Rules .....	8-105
[H][1]	Twenty Business Days and Other Time Requirements, Rule 14e-1 .....	8-105
[H][2]	Extending the Twenty-Business-Day Period .....	8-106
[H][3]	Subsequent Offering Period, Rule 14d-11.....	8-106
[H][4]	Withdrawal Rights, Section 14(d)(5) and Rule 14d-7 .....	8-107
[H][5]	Pro Rata Purchases, Section 14(d)(6) and Rule 14d-8 .....	8-108
[H][6]	“All Holders, Best Price Rule,” Section 14(d)(7) and Rule 14d-10 .....	8-108
[H][6][a]	In General .....	8-108
[H][6][b]	Integration of Separate Tender Offers— <i>Trump</i> .....	8-110
[H][6][c]	Integration of Side Deal into the Tender Offer— <i>Epstein</i> .....	8-111
[H][6][d]	The Bright Line Rule— <i>Lerro</i> .....	8-114
[H][6][e]	The Amended Rule 14d-10.....	8-114
[H][7]	Prohibition Against Purchases Outside the Tender Offer, Rule 14e-5 .....	8-117
[H][8]	Prompt Payment or Return of Securities, Rule 14e-1(c).....	8-119
[I]	Conditions to a Tender Offer.....	8-119
§ 8:7.4	Bidder’s Pre-Commencement Communications .....	8-121
§ 8:7.5	Bidder’s Commencement of a Tender Offer.....	8-122
[A]	Why “Commencement” Matters .....	8-122
[B]	The Commencement Rules.....	8-122
§ 8:7.6	Bidder’s Filing and Transmission Requirements, Rule 14d-3 .....	8-124
[A]	In General .....	8-124
[B]	Material Changes .....	8-124
§ 8:7.7	Bidder’s Dissemination Requirements, Rule 14d-4.....	8-125
[A]	In General .....	8-125
[B]	All Cash Tender Offer.....	8-125
[C]	Exchange Offers .....	8-126
[C][1]	General Principles.....	8-126

## Table of Contents

	[C][2] Impact of Material Changes on Exchange Offer.....	8-128
	[C][3] SEC Guidance on Emerging Growth Companies (EGCs) Engaging in Exchange Offers.....	8-129
§ 8:7.8	Bidder's Distribution of Tender Offer Materials to Target's Shareholders, Rule 14d-5.....	8-129
§ 8:7.9	Bidder's Disclosure of Tender Offer Information to Target's Stockholders, Rule 14d-6.....	8-131
	[A] In General .....	8-131
	[B] Summary Advertisement.....	8-132
	[C] Offer to Purchase.....	8-133
	[D] Schedule TO .....	8-133
§ 8:7.10	Target's Solicitations and Recommendations, Section 14(d)(4) and Rules 14d-9 and 14e-2 .....	8-136
	[A] General Principles .....	8-136
	[B] Rules 14e-2 and 14d-9.....	8-137
	[C] Rule 14d-9.....	8-137
	[C][1] Applicability .....	8-137
	[C][2] Stop, Look, and Listen Statements.....	8-137
	[C][3] Pre-Commencement Communications .....	8-138
	[C][4] Post-Commencement Communications.....	8-139
	[C][5] The Schedule 14D-9 and Recommendation to Shareholders .....	8-139
	[C][6] Material Changes in the Schedule 14D-9— <i>Kern</i> .....	8-140
§ 8:7.11	Purchases by a Target During a Third-Party Tender Offer, Rules 13(e)(1) and 10b-18 .....	8-141
§ 8:7.12	Trading on the Basis of Material Non-Public Information in the Context of Tender Offers, Rule 14e-3 .....	8-142
§ 8:7.13	Prohibition Against Short and Hedged Tendering, Rule 14e-4.....	8-144
§ 8:7.14	Stock Exchange Rules Regarding Tender Offers.....	8-144
§ 8:8	Negotiated Tender Offers and Second-Step Mergers with "Top-Up" Options .....	8-146
§ 8:9	Issuer Tender Offers .....	8-147
§ 8:10	Going Private Transactions, Rule 13e-3.....	8-148
	§ 8:10.1 Scope.....	8-148
	§ 8:10.2 Definition of Affiliate, Rule 13e-3(a)(1).....	8-149
	§ 8:10.3 Transactions Covered, Rule 13e-3(a)(3) .....	8-149
	[A] In General .....	8-149
	[B] Determining if Management of the Target Causes Acquirer to Be an Affiliate of the Target.....	8-150
	[C] Exception for Two-Step Tender Offer Followed by Merger .....	8-153
	[D] Other Exceptions.....	8-154

§ 8:10.4	The Antifraud Provision for Rule 13e-3 Transactions, Rule 13e-3(b) and (c).....	8-154
[A]	In General .....	8-154
[B]	The Musk Tweets Regarding Tesla Going Private: Rule 10b-5 and Rule 13e-3 .....	8-155
§ 8:10.5	Material Required to Be Filed, Schedule 13E-3, Rule 13e-3(d) .....	8-156
[A]	In General .....	8-156
[B]	Treatment of Investment Bankers' Valuation Reports .....	8-159
§ 8:10.6	Disclosure of Information to Shareholders, Rule 13e-3(e) .....	8-160
§ 8:10.7	Dissemination of Information to Shareholders, Rule 13e-3(f).....	8-161
§ 8:11	Introduction to Use of a Proxy Contest to Unseat a Target's Recalcitrant Board .....	8-161
§ 8:11.1	The Issue.....	8-161
§ 8:11.2	State Corporate Law Issues Regarding Proxy Contests .....	8-163
[A]	Potential Conflicts of Proposed Replacement Directors .....	8-163
[B]	Understanding the Voting Machinery at the Target Corporation .....	8-164
[B][1]	Introduction.....	8-164
[B][2]	Quorums, Required Vote.....	8-164
[B][3]	Plurality or Majority Voting for Directors .....	8-164
[B][4]	The Ability of Stockholders to Act by Consent.....	8-166
[B][5]	Special Meetings .....	8-167
[B][6]	The Annual Meeting .....	8-167
[B][7]	The Advance Notice By-Law .....	8-168
[B][7][a]	In General .....	8-168
[B][7][b]	Illustration of an Advance Notice By-Law, with Derivative Disclosure Element— <i>Biogen</i> and <i>LinkedIn</i> .....	8-170
[B][8]	Requests for Stockholder Lists and Inspection of Books and Records .....	8-172
[B][8][a]	Introduction .....	8-172
[B][8][b]	Request for Books and Records Is Overbroad— <i>Highland</i> in 2006 .....	8-173
[B][8][c]	Derivative Action Before Request for Books and Records— <i>VeriFone</i> in 2011 .....	8-173
[B][8][d]	Icahn's Books and Records Request Rejected— <i>Occidental</i> in 2019.....	8-174

## Table of Contents

[B][9]	Challenge to Contested Elections and Vote Buying— <i>Hewlett-Packard, Portnoy, and Kurz</i> .....	8-175
[B][10]	Reimbursement of Proxy Expenses .....	8-178
[B][11]	2009 Amendments to the DGCL Relating to Proxy Access .....	8-179
[B][12]	Dealing with Shareholder Proposals— <i>CA I</i> and <i>CA II</i> .....	8-180
[B][12][a]	In General .....	8-180
[B][12][b]	<i>CA I</i> , Proposed Unanimous Vote to Adopt Poison Pill .....	8-180
[B][12][c]	<i>CA II</i> , Proposed Mandatory Reimbursement of Proxy Expenses .....	8-181
[B][12][d]	2009 Amendments to DGCL Regarding Proxy Expenses .....	8-184
[B][13]	Reduction in the Number of Directors— <i>Kurz</i> .....	8-185
§ 8:11.3	Summary of the Federal Proxy Rules Relating to Proxy Contests .....	8-186
[A]	Introduction .....	8-186
[B]	Solicitations by the Acquirer and Others Before Providing a Proxy Statement, Rule 14a-12 .....	8-187
[B][1]	Rule 14a-12(a), Conditions to Solicitations Before a Proxy Statement Is Filed .....	8-187
[B][2]	Rule 14a-12(c), Additional Conditions for Contested Elections of Directors .....	8-188
[B][3]	Instruction 2, Communications After Definitive Proxy Statement Is on File .....	8-190
[C]	Filing of the Acquirer’s Preliminary Proxy Statement, Rule 14a-6 .....	8-190
[D]	Mailing of the Acquirer’s Proxy Statement and Other Materials, Rule 14a-7 .....	8-190
[E]	Solicitations by Acquirer or Target After Providing a Definitive Proxy Statement, Fight Letters, Rule 14a-6(b) .....	8-191
[F]	Personal Solicitation Material, Rule 14a-6(c) .....	8-192
[G]	Proxy Contest for a Short Slate, Rule 14a-4(d) .....	8-192
[H]	Exemptions and Exceptions to the Solicitation Concept .....	8-194
[H][1]	Speeches and Similar Communications by Acquirer After Providing Definitive Proxy Statement, Rule 14a-3(f) .....	8-194
[H][2]	Mere Announcement by Non-Parties to the Transaction Is Not a “Solicitation,” Rule 14a-1(l)(2)(iv) .....	8-194
[H][3]	Exempt Solicitations by Non-Parties Under Rule 14a-2(b)(1) .....	8-195

[H][4]	Solicitation of No More than Ten, Rule 14a-2(b)(2) .....	8-195
[H][5]	Furnishing of Proxy Voting Advice in the Ordinary Course, Rule 14a-2(b)(3) .....	8-195
[H][6]	Publication of Research Reports by Broker-Dealers, Rule 14a-2(b)(5) .....	8-195
[H][7]	Solicitations in Electronic Shareholder Forums, Rule 14a-2(b)(6) .....	8-195
[I]	SEC's Final Proxy Access Rule.....	8-196
[I][1]	Introduction.....	8-196
[I][2]	Impact of the Dodd-Frank Act .....	8-197
[I][3]	New Rule 14a-11 Shareholder Nominations and Schedule 14N.....	8-198
[I][4]	The No Change of Control Purpose Requirement in Rule 14a-11 .....	8-201
[I][5]	Rule 14a-2(b)(7) Exemption for Soliciting to Form a Shareholder Nominating Group.....	8-203
[I][6]	Rule 14a-2(b)(8) Exemption for Soliciting in Support of Nominees .....	8-205
[I][7]	Other Related Changes .....	8-206
[J]	SEC's Final Rules on Universal Proxy Cards .....	8-206
[J][1]	In General.....	8-206
[J][2]	Further Discussion of the Purposes of the Universal Proxy Card (UPC) and Related Rules .....	8-208
[J][3]	Introduction to the Operation of Rule 14a-19 and Related Provisions .....	8-209
[J][3][a]	Scope .....	8-209
[J][3][b]	Rule 14a-19(a), Rule 14a-19(b) and Rule 14a-19(c), Regarding "Notice" by the Dissident .....	8-210
[J][3][c]	Rule 14a-19(d), re "Notice" by the Corporation .....	8-212
[J][3][d]	Rule 14a-19(e), re "Form of Proxy" .....	8-212
[J][3][e]	Rule 14a-19(f), re "Vote on Nominees As a Group" .....	8-213
[J][3][f]	Limitation on Applicability.....	8-214
[J][3][g]	Rules Collateral to Rule 14a-19 .....	8-214
[J][3][h]	Wachtell on the Universal Proxy Rules .....	8-215
[J][4]	A 2023 Update on the Universal Proxy Rules .....	8-216
§ 8:11.4	CF Industries' Hostile Exchange Offer and Proxy Contest for Terra .....	8-216
§ 8:12	Social Media in Tender Offers and Proxy Contests .....	8-219

## **VOLUME 3**

<b>Table of Chapters .....</b>	v
--------------------------------	---

### **PART IV** **FEDERAL INCOME TAX, ACCOUNTING, AND VALUATION** **CONSIDERATIONS IN M&A**

#### **Chapter 9     Federal Income Tax Considerations in Taxable and Tax-Free Domestic M&A**

§ 9:1     Scope .....	9-15
§ 9:1.1     References .....	9-16
§ 9:1.2     Introduction to the Domestic Provisions of the 2017 Tax Cuts and Jobs Act (TCJA) .....	9-17
§ 9:1.3     Introduction to the Business Tax Provisions of the CARES Act: A Response to the COVID-19 Crisis .....	9-18
§ 9:1.4     President Biden's Business Tax Proposals .....	9-19
[A]     Introduction .....	9-19
[B]     What Is the Position of Biden on the Tax Treatment of the Ordinary Income of Individuals Earning Less than \$400,000 of Taxable Income? .....	9-19
[C]     What Are Biden's Proposals for the Tax Treatment of Families Making More than \$400,000 of Ordinary Income and QBI? .....	9-19
[D]     What Is Biden's Proposal for the Taxation of Capital Gains and What Impact Would Adoption of His Proposal Have on M&A? .....	9-20
[E]     What Is Biden's Proposal for the Taxation of Carried Interests? .....	9-20
[F]     What Is Biden's Position on Taxing Corporations? .....	9-20
[G]     What Is Biden's Position on the Taxation of Dividends? .....	9-21
[H]     What Is Biden's Position on the Taxation of the Active Income Earned by Controlled Foreign Corporations (CFCs)? .....	9-21
[I]     President Biden's 2024 Domestic Business Tax Proposals .....	9-21
[I][1]     Introduction .....	9-21
[I][2]     Biden Proposal to Raise the Corporate Income Tax Rate to 28% .....	9-22

[I][3]	Biden Proposal to Increase the Corporate Alternative Minimum Tax (CAMT) Rate to 21% .....	9-23
[I][4]	Biden Proposal to Increase the Excise Tax Rate on Repurchase of Corporate Stock and Close Loopholes.....	9-24
[I][5]	The Biden Proposal to Tax Corporate Distributions As Dividends .....	9-25
[I][6]	Biden Proposal to Limit Tax Avoidance Through Inappropriate Leveraging of Parties to Divisive Reorganizations .....	9-27
[I][7]	Biden Proposal to Limit Losses Recognized in Liquidation Transactions .....	9-31
[I][8]	Biden Proposal to Prevent Basis Shifting by Related Parties Through Partnerships .....	9-32
[I][9]	Biden Proposal to Conform Definition of “Control” with Corporate Affiliation Test .....	9-33
[I][10]	Biden Proposal to Strengthen Limitation on Losses for Noncorporate Taxpayers .....	9-34
[I][11]	Biden Proposal to Expand Limitation on Deductibility of Employee Remuneration in Excess of \$1 Million.....	9-36
§ 9:1.5	A Quick Introduction to Two Business Tax Provisions of the Inflation Adjustment Act of 2022 (IAA): [1] The Corporate Alternative Minimum Tax, and [2] The Excise Tax on a Repurchase of Corporate Stock.....	9-38
[A]	In General .....	9-38
[B]	Brief Introduction to the Inflation Reduction Act's 15% C-AMT .....	9-39
[B][1]	In General.....	9-39
[B][2]	The Tax Is a Minimum Tax .....	9-39
[B][3]	Definition of the Term “Applicable Corporation” .....	9-40
[B][4]	The Tentative Minimum Tax on a Billion Dollar+ “Applicable Corporation”.....	9-41
[B][5]	Adjusted Financial Statement Income .....	9-41
[B][6]	Basic Illustration.....	9-41
[C]	Brief Introduction to the Inflation Reduction Act's 1% Excise Tax On Certain Corporate Repurchases .....	9-42
§ 9:1.6	In May 2025 the House Passed Bill; Now at the Senate: A Brief Introduction .....	9-43
§ 9:2	Realization and Recognition of Income on the Sale or Other Disposition of Property .....	9-45
§ 9:2.1	General Principles .....	9-45

## *Table of Contents*

	§ 9:2.2	Introduction to the Exceptions to the Recognition Rule .....	9-46
	§ 9:2.3	Installment Reporting Under Section 453 .....	9-47
§ 9:3	Rate Structure of the Federal Income Tax for Individuals and Corporations After the TCAJA .....	9-50	
§ 9:3.1	Introduction .....	9-50	
[A]	Individual Maximum Tax on the Four Buckets of Income .....	9-50	
[A][1]	The Four Buckets of Income of Individuals.....	9-50	
[A][2]	The Regular Ordinary Income Bucket.....	9-50	
[A][3]	The Qualified Business Income (QBI) Bucket, Added by the TCAJA .....	9-51	
[A][4]	The Dividend/Net Capital Gain Bucket.....	9-51	
[A][4][a]	The Income Tax.....	9-51	
[A][4][b]	The Combined Income Tax and the 3.8% Tax on Net Investment Income .....	9-52	
[A][5]	The Section 1202 Bucket.....	9-52	
[B]	Tax on C Corporations .....	9-52	
[B][1]	Tax on Ordinary Income of a C Corp .....	9-52	
[B][2]	Tax on Capital Gains of a C Corp .....	9-53	
[B][3]	Changes to the Net Operating Loss Deduction, Section 172.....	9-53	
[B][4]	Changes to the Bonus Depreciation Rules .....	9-53	
[C]	The Combined Corporate and Individual Rates Before and After the TCAJA .....	9-53	
Table 9:3(a)	Comparing the Combined Corporate and Shareholder Rates on Dividends Prior to and After the TCAJA .....	9-54	
[D]	The Benefit of Deferral of the Shareholder Level Tax and the Anti-Deferral Provisions .....	9-54	
[D][1]	Introduction.....	9-54	
[D][2]	Purposes of the Accumulated Earnings Tax and Personal Holding Company Tax and Why the IRS Would Be Concerned with Them .....	9-55	
[D][3]	Basic Operation of the Accumulated Earnings Tax .....	9-55	
[D][4]	Basic Operation of the Personal Holding Company Tax .....	9-56	
[D][5]	Constructive Dividends and the Reasonable Compensation Requirement .....	9-56	
[D][6]	The Most Tax-Efficient Mix Between Salary and Dividends .....	9-57	
[E]	The Rate on Inter-Corporate Dividends .....	9-57	
Table 9:3(b)	Comparing the Treatment of Inter-Corporate Dividends Prior to and After the TCAJA.....	9-58	

§ 9:4	Introduction to the Taxation of Corporations, Partnerships, and S Corporations.....	9-58
§ 9:4.1	Characterization of Business Entities for Federal Income Tax Purposes.....	9-58
§ 9:4.2	The C Corporation.....	9-59
§ 9:4.3	The Partnership and the Limited Liability Company.....	9-61
§ 9:4.4	The S Corporation.....	9-62
§ 9:4.5	Private Letter Rulings .....	9-63
[A]	In General .....	9-63
[B]	2013 Modification of Private Letter Ruling Policy.....	9-64
§ 9:4.6	Codification of the Economic Substance Doctrine .....	9-65
[A]	Introduction .....	9-65
[B]	When the Economic Substance Doctrine Applies .....	9-66
[C]	The Conjunctive, Objective, and Subjective Tests.....	9-67
[D]	Large Business and International Division Directive on Economic Substance Doctrine.....	9-68
§ 9:4.7	Reporting of Uncertain Tax Position (UTP) .....	9-69
§ 9:5	Elaboration on Basic Corporate Tax Principles .....	9-70
§ 9:5.1	Introduction .....	9-70
§ 9:5.2	Transfers of Property to Corporations Under Section 351 .....	9-71
[A]	Transfers Without Liability Assumption.....	9-71
[B]	Contributions Involving Liability Assumptions.....	9-73
§ 9:5.3	Debt or Equity Issues .....	9-74
[A]	Tax Stakes in Debt Equity Issues.....	9-74
[A][1]	Introduction.....	9-74
[A][2]	Section 351.....	9-74
[A][3]	Interest Deduction.....	9-74
[A][3][a]	Introduction .....	9-74
[A][3][b]	Introduction to the TCAJA's Section 163(j) Limitation on Interest Deductibility.....	9-75
[A][4]	Dividend-Received Deduction.....	9-76
[A][5]	Redemptions.....	9-76
[A][6]	Original Issue Discount.....	9-77
[A][7]	AHYDOs .....	9-77
[A][8]	Interest on Deferred Payments.....	9-79
[A][9]	Below Market Loans .....	9-79
[A][10]	Bond Premium.....	9-80
[A][11]	Corporate Acquisition Indebtedness .....	9-80
[A][12]	Registration Requirement .....	9-80
[A][13]	Worthless Stock or Debt .....	9-80

*Table of Contents*

[B]	Characterizing an Investment in a Corporation As Debt or Equity: Introduction to Section 385 and the Case Law .....	9-81
§ 9:5.4	Treatment of Non-Liquidating Cash Distributions by C Corporations .....	9-86
§ 9:5.5	Treatment of Non-Liquidating Property Distributions by C Corporations .....	9-90
[A]	Treatment of the Shareholder .....	9-90
[B]	Treatment of the Corporation .....	9-91
§ 9:5.6	Redemptions of Stock by Corporations: Impact of Sections 302 and 318 .....	9-92
[A]	General Principles .....	9-92
[B]	Impact of the Section 318 Attribution Rules .....	9-94
[C]	Treatment of the Corporation .....	9-95
[D]	Redemptions of Debt .....	9-95
§ 9:5.7	Redemptions Through Related Corporations: Impact of Section 304 .....	9-96
[A]	General Principles .....	9-96
[B]	Illustration of the Potential Applicability of Section 304 in Publicly Held M&A .....	9-96
§ 9:5.8	Stock Dividends .....	9-98
[A]	Introduction .....	9-98
[B]	Section 305 .....	9-98
[C]	Section 306: The Preferred Stock Bailout .....	9-99
§ 9:5.9	Treatment of Liquidating Cash and Property Distributions by C Corporations to Non-80% Parent Shareholders .....	9-100
[A]	Introduction .....	9-100
[B]	Treatment of Non-80% Parent Shareholders on Receipt of a Liquidating Distribution: Section 331 .....	9-100
[C]	Treatment of the Corporation on Making a Liquidating Distribution to Non-80% Parent Shareholders: Section 336 .....	9-101
§ 9:5.10	Treatment of Liquidating Cash and Property Distributions by C Corporations to 80% Parent Shareholders .....	9-101
[A]	Treatment of 80% Parent Shareholder on Receipt of a Liquidating Distribution: Section 332 .....	9-101
[B]	Treatment of the Corporation on Making a Liquidating Distribution to an 80% Parent Shareholder: Section 337 .....	9-103
§ 9:5.11	Introduction to Consolidated Returns .....	9-103
[A]	Purpose .....	9-103

[B]	The Statutory Structure of the Consolidated Return Provisions.....	9-103
[C]	Computation of Consolidated Taxable Income and Consolidated Tax Liability .....	9-104
[D]	Intercompany Transactions .....	9-105
[E]	Introduction to the Investment Adjustment System .....	9-106
[E][1]	Excess Loss Accounts.....	9-107
[F]	Tiering Up of Earnings and Profits .....	9-108
[G]	Treatment of Cash and Property Distributions.....	9-108
§ 9:5.12	Brief Introduction to the PIPE and SPAC Investment Techniques.....	9-110
§ 9:6	Overview of Taxable and Tax-Free Acquisitions .....	9-112
§ 9:6.1	Introduction .....	9-112
§ 9:6.2	Checklist for Planning a Taxable Acquisition or Leveraged Buyout .....	9-112
§ 9:6.3	Successor Tax Liabilities in M&A.....	9-112
§ 9:7	Taxable Acquisition of the Assets of a Stand-Alone Target C Corporation.....	9-113
§ 9:7.1	Structure of the Direct Purchase of Assets Transaction.....	9-113
Diagram 9-1	Acquisition of Assets .....	9-114
§ 9:7.2	Tax Treatment to the Parties.....	9-114
§ 9:7.3	Treatment of Intangibles to the Target and the Acquirer.....	9-116
§ 9:7.4	Allocation of Purchase Price Under Section 1060 .....	9-117
[A]	General Principles .....	9-117
[B]	Treatment of Assumption of Contingent Liabilities and Making of Contingent Payments.....	9-118
[C]	Provision of Asset Acquisition Agreement Allocating Purchase Price .....	9-119
[D]	Purchase Price Allocation to Intangibles.....	9-119
[E]	Impact of the TCAJA's Bonus Depreciation.....	9-120
§ 9:7.5	Installments Sale Treatment Under Section 453(h) .....	9-120
§ 9:7.6	Treatment of Covenants Not to Compete.....	9-120
[A]	General Principles .....	9-120
[B]	Allocation to Personal Goodwill— <i>Muskat</i> .....	9-121
[C]	Reporting Requirement Under Section 1060(e) .....	9-123
§ 9:7.7	Potential Overlap with the Non-Divisive (D) Reorganization.....	9-123
§ 9:7.8	Target's Tax Covenants Relating to Pre-Closing Taxes .....	9-123

## Table of Contents

§ 9:7.9	Acquirer's Tax Covenants Relating to Post-Closing Taxes .....	9-125
§ 9:7.10	Golden Parachute Payments Under Section 280G in Asset Acquisitions .....	9-125
§ 9:7.11	Potential Personal Holding Company Tax Risk if Target Is Kept Alive .....	9-126
§ 9:7.12	Use of Partnership or S Corporation As the Acquirer.....	9-126
§ 9:8	Structure and Tax Treatment of the Parties in a Taxable Forward Merger.....	9-126
§ 9:8.1	In General .....	9-126
Diagram 9-2	Taxable Forward Subsidiary Merger.....	9-127
§ 9:8.2	Tax Consequences to the Target and Its Shareholders.....	9-128
§ 9:8.3	Tax Consequences to the Acquiring Subsidiary .....	9-128
[A]	Basis for Target's Assets.....	9-128
[B]	Potential Zero Basis Problem.....	9-129
§ 9:9	Taxable Acquisition of the Assets of a Consolidated Subsidiary .....	9-130
§ 9:9.1	General Principles .....	9-130
§ 9:9.2	Taxable Forward Merger .....	9-130
§ 9:10	Taxable Acquisition of the Stock of a Stand-Alone Closely Held Target C Corporation.....	9-130
§ 9:10.1	Structure of the Direct Purchase of Stock Transaction.....	9-130
Diagram 9-3	Stock Acquisition.....	9-131
§ 9:10.2	Basic Tax Treatment to the Parties.....	9-132
§ 9:10.3	The Section 338 Election for Stand-Alone C Corporations.....	9-133
[A]	Introduction .....	9-133
[B]	The Basic Sale and Purchase Transaction .....	9-133
[C]	Aggregate Deemed Sales Price (ADSP) and Aggregate Grossed-Up Basis (AGUB).....	9-133
[D]	Qualified Stock Purchase.....	9-134
[E]	The Election.....	9-134
[F]	The Tax Returns of the Old and New Targets.....	9-135
[G]	Elections for Subsidiaries of the Old Target .....	9-135
[H]	Effect of <i>General Utilities</i> Repeal on Section 338 Elections .....	9-136
[I]	Effect of Post-Acquisition Liquidation or Inter-Group Merger of Target—Overriding <i>Yoc Heating</i> .....	9-136
§ 9:10.4	What Should the Acquirer Pay for the Target's Stock Where No Section 338 Election Is Made? .....	9-139

§ 9:10.5	Planning for the Utilization of Target's Net Operating Losses and Other Tax Benefits	
	After a Stock Acquisition.....	9-140
[A]	Introduction .....	9-140
[B]	The Section 382 Limitation on NOLs.....	9-141
[B][1]	TCAJA's Limitation on NOLs.....	9-141
[B][2]	General Principles Under Section 382 .....	9-141
[C]	Built-In Losses and the Repeal of Notice 2008-83.....	9-143
[D]	The Economics Behind the Section 382 Limitation .....	9-143
[E]	Interface of Section 382 with the Consolidated Return Regulations in the Acquisition of a Stand-Alone Target.....	9-144
[E][1]	Introduction.....	9-144
[E][2]	Applying the Section 382 Limitation to Target's Consolidated Group.....	9-144
[E][3]	General Non-Applicability of the SRLY Rules After Target Becomes a Member of Acquirer's Consolidated Group.....	9-146
[F]	General Non-Applicability of Section 269 .....	9-147
§ 9:10.6	Section 384 Limitation on Utilizing Acquirer's Losses to Offset Built-In Gains of Acquired Subsidiary.....	9-148
§ 9:10.7	Intermediary Transaction Tax Shelters .....	9-149
[A]	Introduction .....	9-149
[B]	The <i>Diebold</i> Midco Transaction .....	9-151
[B][1]	Introduction to <i>Diebold</i> .....	9-151
[B][2]	The Second Circuit's Succinct Discussion in <i>Diebold</i> of the Difference Between a Stock and Asset Sale of a C Corporation .....	9-151
[B][3]	The Second Circuit's Discussion in <i>Diebold</i> of How a Midco Transaction Can Convert a Stock Sale into a Tax-Free Asset Sale .....	9-152
[B][4]	The Second Circuit's Discussion of the Basic Facts and Issues in <i>Diebold</i> .....	9-153
[B][5]	The Second Circuit's Holding in <i>Diebold</i> .....	9-155
[C]	The <i>Cullifer</i> Midco Transaction .....	9-156
§ 9:10.8	Indemnification Against Pre-Closing Tax Liabilities.....	9-156
§ 9:10.9	Treatment of Covenants Not to Compete.....	9-157
§ 9:10.10	Potential Applicability of Section 304 Where There Is an Overlap in Stock Ownership.....	9-157
§ 9:10.11	Structuring Sale of Stock of Sub of Holding Company.....	9-157

## Table of Contents

	<p>§ 9:11 Taxable Acquisition of the Stock of a Stand-Alone Publicly Held or Closely Held Target C Corporation in a Reverse Subsidiary (Triangular) Merger ..... 9-159</p> <p>    § 9:11.1 General Principles ..... 9-159</p> <p>Diagram 9-4 Taxable Reverse Subsidiary Merger ..... 9-160</p> <p>    § 9:11.2 Tender Offer Followed by Reverse Subsidiary Merger or Merger of Acquisition Subsidiary into Target ..... 9-161</p> <p>        [A] Tender Offer Followed by a Reverse Subsidiary Merger ..... 9-161</p> <p>        [B] Merger of a Newly Formed Acquisition Subsidiary into Target ..... 9-162</p> <p>    § 9:11.3 Planning for the Utilization of the Target's NOLs and Other Tax Benefits ..... 9-162</p> <p>§ 9:12 Taxable Acquisition of the Stock of a Consolidated Subsidiary ..... 9-162</p> <p>    § 9:12.1 Introduction to the Options ..... 9-162</p> <p>    § 9:12.2 The Joint Section 338(h)(10) Election ..... 9-163</p> <p>        [A] General Principles ..... 9-163</p> <p>        [B] Acquiring a Target That Owns Subsidiaries ..... 9-163</p> <p>        [C] When Should a Joint Section 338(h)(10) Election Be Made? ..... 9-164</p> <p>        [D] Provisions of the Stock Purchase Agreement Dealing with the Section 338(h)(10) Election ..... 9-164</p> <p>        [E] Subsidiary's Potential Liability for Selling Consolidated Group's Taxes and Seller's Indemnification of Buyer Against Pre-Closing Taxes ..... 9-165</p> <p>        [F] Treatment of Multi-Step Transactions: Turning Off the <i>King Enterprises</i> Step Transaction Doctrine ..... 9-167</p> <p>    § 9:12.3 No Section 338(h)(10) Election and No Section 338(g) Election ..... 9-169</p> <p>        [A] Introduction ..... 9-169</p> <p>        [B] Taxable Years of New Members of Consolidated Group ..... 9-169</p> <p>        [B][1] General Principles ..... 9-169</p> <p>        [B][2] Provisions of the Stock Purchase Agreement Addressing the Straddle Period Returns ..... 9-169</p> <p>        [C] Carryover of NOLs Attributable to an Acquired Subsidiary ..... 9-172</p> <p>            [C][1] General Principles ..... 9-172</p> <p>            [C][2] Allocation of NOLs ..... 9-172</p> <p>            [C][3] Carryover of NOLs Subject to Section 382 Limitation ..... 9-173</p>
--	--

[C][4]	Carryback of NOLs .....	9-173
[D]	Subsidiary's Potential Liability for Selling Consolidated Group's Taxes .....	9-174
§ 9:12.4	No Section 338(h)(10) Election, but a Section 338(g) Election .....	9-174
§ 9:12.5	Potential Section 336(e) Election on the Sale or Distribution of the Stock of a Subsidiary .....	9-175
[A]	Introduction .....	9-175
[B]	Final Regulations Under Section 336(e) .....	9-176
§ 9:12.6	Potential Disallowance of Loss on Sale of Stock of a Consolidated Subsidiary .....	9-183
[A]	Introduction .....	9-183
[B]	Mirror Subsidiaries, Related Transactions, and the Disallowance of Loss Consolidated Return Regulations .....	9-183
[B][1]	In General .....	9-183
[B][2]	The Prototypical Mirror .....	9-184
[B][3]	Introduction to the Treasury Response to "Son of Mirror" Transactions .....	9-185
[B][4]	General Disallowance of Loss Rule .....	9-187
[B][5]	General Disallowance of Loss Rule in the 2008 Final Regulations .....	9-187
[B][6]	Economic Losses .....	9-191
[B][6][a]	Introduction .....	9-191
[B][6][b]	Allowable Losses Under Treasury Regulations Section 1.1502-20(c) .....	9-192
[B][6][c]	Allowable Losses Under Treasury Regulations Section 1.1502-36 .....	9-192
§ 9:12.7	Potential Excess Loss Account .....	9-193
§ 9:13	Treatment of LBOs .....	9-194
§ 9:13.1	General Principles .....	9-194
§ 9:13.2	Tax-Free Rollover of Management's Shares Under Section 351 .....	9-194
§ 9:14	Taxable Acquisitions by and of S Corporations .....	9-195
§ 9:14.1	Introduction .....	9-195
§ 9:14.2	Taxable Acquisition by an S Corporation of the Assets of a C Corporation .....	9-196
§ 9:14.3	Taxable Acquisition by an S Corporation of the Stock of a C Corporation .....	9-197
§ 9:14.4	Taxable Acquisition by a C Corporation of the Assets of an S Corporation .....	9-197
§ 9:14.5	Taxable Acquisition by a C Corporation of the Stock of an S Corporation: Impact of Section 338(h)(10) .....	9-198

## *Table of Contents*

§ 9:15	Special Rules Applicable to Publicly Held Corporations .....	9-199
§ 9:15.1	Golden Parachute Payments Under Section 280G.....	9-199
§ 9:15.2	Impact of Section 409A on Nonqualified Deferred Compensation .....	9-201
§ 9:15.3	Greenmail Payments Under Section 5881 .....	9-202
§ 9:16	Introduction to Acquisitive Reorganizations .....	9-203
§ 9:16.1	In General .....	9-203
[A]	Introduction.....	9-203
[B]	Checklist for Planning a Reorganization .....	9-204
§ 9:16.2	Continuity of Interest.....	9-204
[A]	General Principles.....	9-204
[B]	Minimum Continuity of Interest.....	9-204
[C]	Pre- and Post-Reorganization Dispositions.....	9-205
[D]	Measuring Date for Determining if the Minimum Continuity of Interest Is Met.....	9-206
[E]	Contingent Consideration .....	9-209
[F]	Impact of Dissenters' Rights .....	9-209
§ 9:16.3	Continuity of Business Enterprise .....	9-212
§ 9:16.4	The Eight Forms of Acquisitive Reorganizations .....	9-212
§ 9:16.5	Reorganizations and the Step Transaction Doctrine .....	9-213
§ 9:17	Asset Reorganizations.....	9-215
§ 9:17.1	Direct Mergers Under Section 368(a)(1)(A) .....	9-215
[A]	General Principles.....	9-215
Diagram 9-5	Direct "(A)" Merger Reorganization Under Section 368(a)(1)(A) .....	9-216
[B]	Tax Treatment to the Parties .....	9-216
[C]	Merger of Target into a Disregarded Entity Owned by Acquirer .....	9-218
[D]	Step Transaction Doctrine: Converting a Failed "(B)" into a Good "(A)" .....	9-219
[E]	Step Transaction Doctrine: Reverse Subsidiary Merger Followed by an Upstream Merger.....	9-219
§ 9:17.2	Forward Subsidiary Merger Under Section 368(a)(2)(D) .....	9-220
[A]	General Principles.....	9-220
Diagram 9-6	Forward Subsidiary Merger Reorganization Under Section 368(a)(2)(D).....	9-221
[B]	Tax Treatment to the Parties .....	9-221
[C]	Merger of Target into a Disregarded Entity Owned by Acquiring Subsidiary .....	9-222
[D]	Addressing the Potential Failed Forward Subsidiary Merger .....	9-223

§ 9:17.3	Direct Stock for Asset Reorganization	
	Under Section 368(a)(1)(C) .....	9-224
[A]	General Principles.....	9-224
Diagram 9-7	Direct "(C)" Stock for Asset Reorganization	
	Under Section 368(a)(1)(C) .....	9-225
[B]	Tax Treatment to the Parties .....	9-225
[C]	Step Transaction Doctrine: Non-Qualifying "(B)" May Qualify As a "(C)" if Target Is Liquidated.....	9-226
§ 9:17.4	Triangular Stock for Asset Reorganization	
	Under Section 368(a)(1)(C) .....	9-226
[A]	General Principles.....	9-226
Diagram 9-8	Triangular "(C)" Stock for Asset Reorganization Under Section 368(a)(1)(C) .....	9-227
[B]	Tax Treatment to the Parties .....	9-227
§ 9:17.5	Non-Divisive (D) Reorganization Under Sections 368(a)(1)(D) and 354(b).....	9-228
[A]	General Principles.....	9-228
Diagram 9-9	Non-Divisive "(D)" Stock for Asset Reorganization Under Sections 368(a)(1)(D) and 354(b) .....	9-228
[B]	Tax Treatment to the Parties .....	9-229
[C]	The Cash Non-Divisive "(D)" .....	9-229
§ 9:17.6	Summary of Asset Reorganizations .....	9-231
§ 9:18	Stock Reorganizations and Acquisitive Section 351 Transactions .....	9-231
§ 9:18.1	Reverse Subsidiary Merger Under Section 368(a)(2)(E).....	9-231
[A]	General Principles.....	9-231
Diagram 9-10	Reverse Subsidiary Merger Under Section 368(a)(2)(E) .....	9-232
[B]	Tax Treatment to the Parties .....	9-233
[C]	Step Transaction Doctrine, Including Upstream Merger or Liquidation After a Reverse Subsidiary Merger .....	9-233
§ 9:18.2	Stock for Stock Reorganization Under Section 368(a)(1)(B).....	9-235
[A]	General Principles.....	9-235
Diagram 9-11	Stock for Stock "(B)" Reorganization Under Section 368(a)(1)(B) .....	9-236
[B]	Tax Treatment to the Parties .....	9-236
§ 9:18.3	Triangular "(B)" Reorganization Under Section 368(a)(1)(B).....	9-237
Diagram 9-12	Triangular "(B)" Reorganization Under Section 368(a)(1)(B) .....	9-238

## *Table of Contents*

§ 9:18.4	The Acquisitive Section 351 Transaction and the Horizontal Double Dummy .....	9-238
[A]	General Principles.....	9-238
Diagram 9-13	Acquisitive Section 351 Transaction.....	9-240
[B]	Tax Treatment to the Parties .....	9-240
§ 9:18.5	Summary of Stock Reorganizations and Acquisitive Section 351 Transaction .....	9-241
§ 9:18.6	Triple Drops, Section 351 and D Reorganizations.....	9-241
§ 9:19	Over and Down Reorganizations Under Section 368(a)(2)(C) .....	9-242
§ 9:20	Summary of Treatment of Parties to an Acquisitive Reorganization .....	9-242
§ 9:20.1	Introduction.....	9-242
§ 9:20.2	Target's Shareholders .....	9-242
§ 9:20.3	The Target.....	9-243
§ 9:20.4	The Acquirer, Acquiring Parent, and Acquiring Subsidiary .....	9-243
§ 9:21	Acquisitive Reorganizations Involving S Corporations .....	9-243
§ 9:22	Non-Acquisitive Reorganizations .....	9-243
§ 9:22.1	The Divisive "(D)" Reorganization: Spin-Offs .....	9-243
[A]	Introduction.....	9-243
[B]	The Divisive "(D)": Spin-Offs, Split-Offs, and Split-Ups .....	9-244
Diagram 9-14	Divisive Spin-Off Under Sections 368(a)(1)(D) and 355 .....	9-246
§ 9:22.2	The "(E)" Recapitalization.....	9-246
§ 9:22.3	The "(F)" Mere Change in Form .....	9-247
[A]	Introduction.....	9-247
[B]	The Final Regulations Dealing with the (F) Reorganization .....	9-247
§ 9:22.4	The "(G)" Bankruptcy Reorganization and "No Net Value" Exchanges .....	9-248
§ 9:22.5	Analysis of the Proxy Statement Discussion of the Tax Treatment of the IAC-Match Transaction .....	9-250
[A]	Introduction.....	9-250
[B]	The Structure of the Transaction: a "Reverse Spin-Off" .....	9-250
[C]	Analysis of the Proxy Statement Discussion of the Federal Income Tax Considerations of the IAC-Match Reverse Spin-Off .....	9-250
§ 9:23	Transaction Costs in Taxable Acquisitions and in Acquisitive Reorganizations.....	9-254
§ 9:23.1	Tension Between Expensing and Capitalizing .....	9-254

§ 9:23.2	Capitalization Regulations Applicable to Transaction Costs in M&A Transactions, Treasury Regulations Section 1.263(a)-5.....	9-255
[A]	In General .....	9-255
[B]	Simplifying Conventions and Safe Harbors .....	9-256
[B][1]	Simplifying Conventions .....	9-256
[B][2]	Success Fee Safe Harbor.....	9-256
[C]	Special Rules for Certain Acquisitive Transactions, Treasury Regulations Section 1.263(a)-5(e) .....	9-258
[C][1]	Introduction.....	9-258
[C][2]	“Covered Transactions”: Taxable Stock and Asset Acquisitions and Acquisitive Reorganizations .....	9-258
[C][2][a]	General Principles .....	9-258
[C][2][b]	Treatment of the Target in a Taxable Asset Acquisition.....	9-258
[C][3]	Inherently Facilitative Payments .....	9-259
[C][4]	The Bright Line Rule for Non-Inherently Facilitative Expenditures .....	9-260
[C][5]	Documentation of Success-Based Fees .....	9-260
[C][6]	Treatment of Capitalized Costs.....	9-260
[C][6][a]	Introduction .....	9-260
[C][6][b]	Taxable Asset Acquisition .....	9-261
[C][6][b][i]	Treatment of the Acquirer in a Taxable Asset Acquisition .....	9-261
[C][6][b][ii]	Treatment of the Target in a Taxable Asset Acquisition .....	9-261
[C][6][c]	Taxable Stock Acquisition.....	9-261
[C][6][c][i]	Treatment of the Acquirer in a Taxable Stock Acquisition .....	9-261
[C][6][c][ii]	Treatment of the Target in a Taxable Stock Acquisition.....	9-262
[C][6][d]	Acquisitive Reorganizations .....	9-262
[C][6][d][i]	Treatment of the Acquirer in an Acquisitive Reorganization.....	9-262
[C][6][d][ii]	Treatment of the Target in an Acquisitive Reorganization.....	9-262
[C][6][e]	Treasury’s Request for Views on the Treatment of Capitalizable Transaction Costs in Taxable and Tax-Free Acquisitions.....	9-263
[C][7]	Treatment of Non-Capitalized Costs .....	9-263
[C][8]	Example of Inherently Facilitative, Facilitative, and Non-Facilitative Transactions Costs.....	9-264

## Table of Contents

[C][9]	Example of Simplifying Convention in Connection with an Acquisition Transaction .....	9-265
[C][10]	Example of Characterization of Expenses in Connection with Defending Against a Hostile Takeover .....	9-266
[D]	Termination Fees Paid by a Target to a Potential Acquirer.....	9-267
[D][1]	Termination Fees Under Treasury Regulations Section 1.263(a)-5(c)(8).....	9-267
[D][2]	Tax Court Holds That Termination Fee Is Deductible— <i>Santa Fe</i> .....	9-268
[E]	Illustration of the Application of the Section 263 Regulations .....	9-269
§ 9:24	Provisions of Acquisition Agreements Dealing with Tax Issues.....	9-269
§ 9:25	Potential Use of the UPREIT Structure to Get Non-Recognition Treatment in an Acquisition.....	9-270
§ 9:25.1	Introduction .....	9-270
§ 9:25.2	Elaboration on the Structure of the Transaction.....	9-272
[A]	In General .....	9-272
[B]	Pre-Transaction Structure.....	9-272
[C]	The Transaction .....	9-273
[D]	The Post-Transaction Structure .....	9-273
[E]	The Economic Attributes of Ownership of the Exchangeable Partnership Units .....	9-274
§ 9:25.3	Does Section 721 Non-Recognition Apply to the Transaction.....	9-275
§ 9:25.4	If Section 721 Is Applicable, the Treasury Should Treat an Exchangeable Partnership Unit As a Share of Holdings .....	9-276
[A]	Introduction .....	9-276
[B]	Applicability of the Partnership Anti-Abuse Regulation .....	9-277
§ 9:25.5	Some Conclusions.....	9-279
§ 9:25.6	After-Thought on the UPREIT Example in the Partnership Anti-Abuse Regulations .....	9-279
§ 9:25.7	Burger King's Disclosure in the S-4 for the Transaction of the Tax Consequences of Receipt of an Exchangeable Partnership Unit .....	9-280
§ 9:26	Introduction to the House Republicans' Proposal for a Destination Basis Cash Flow Tax (DBCFT) and How It Morphed into the Territorial and Related Provisions of the Tax Cuts and Jobs Act (TCJA).....	9-282
§ 9:26.1	Introduction .....	9-282

§ 9:26.2	Background on the DBCFT and the Trump Reaction .....	9-283
§ 9:26.3	Outline of the Proposed DBCFT and the Reasons Behind It.....	9-284
[A]	The Cash Flow Approach and the TCAJA Analogue .....	9-284
[B]	The Destination-Basis Provision .....	9-284
[B][1]	Basic Principles .....	9-284
[B][2]	A VAT in Substance .....	9-285
[C]	The Territorial System .....	9-285
[C][1]	Basic Principles and the TCAJA Analogue .....	9-285
[C][2]	The Asserted Purposes of a Territorial System with the DBCFT: (a) Eliminating Lock-Out, (b) Simplifying Subpart F Because of the Elimination of BEPS, and (c) Avoiding Inversions; Comparison with the TCAJA .....	9-286
[C][2][a]	Eliminating the "Lock-Out Effect" .....	9-286
[C][2][b]	Simplification of Subpart F Because of an Elimination of the Tax Incentive to Engage in BEPS.....	9-286
[C][2][c]	Preventing Inversions .....	9-287
[D]	The 20% Corporate Tax Rate.....	9-287
[E]	The Uniqueness of the DBCFT and Its Treatment by the WTO .....	9-287
[F]	Potential Impact of the DBCFT on Currency Adjustment .....	9-288
[F][1]	Impact on Consumers of Imports .....	9-288
[F][2]	Combined Impact of Tax on Imports and Exemption for Exports-Trade Neutrality.....	9-288
[F][3]	Impact of Appreciation of the Dollar on U.S. Foreign Investment, and Foreign U.S. Investment.....	9-289
[G]	Analysis of the Asserted Advantages of the DBCFT .....	9-289
§ 9:26.4	Outline of the TCAJA's Territorial System: The "Cookie" (That Is, Territoriality), the "Carrot" (That Is, FDII), and the "Four Sticks" (That Is, GILTI, BEAT, Definition of Intangible, and Section 367(a) Gain Recognition) .....	9-290
[A]	In General .....	9-290
[B]	The Cookie, Territoriality.....	9-291
[C]	The Carrot, FDII.....	9-291
[D]	Stick No. 1: GILTI.....	9-292

## *Table of Contents*

[E]	Stick No. 2: The BEAT .....	9-293
[F]	Stick No. 3: Definition of Intangible .....	9-293
[G]	Stick No. 4: Gain Recognition Under Section 367(a) .....	9-295

## **Chapter 10 Financial and SEC Accounting Considerations**

§ 10:1	Scope .....	10-5
§ 10:1.1	References .....	10-7
§ 10:1.2	SEC Chair on Importance of Financial Accounting .....	10-7
§ 10:2	Introduction to Financial Accounting: The Balance Sheet, Income Statement, and Cash Flow Statement .....	10-8
§ 10:2.1	Introduction .....	10-8
§ 10:2.2	The Balance Sheet .....	10-8
§ 10:2.3	The Income Statement .....	10-12
§ 10:2.4	Relationship Between the Income Statement and the Balance Sheet .....	10-13
§ 10:2.5	Cash Flow Statement .....	10-13
§ 10:3	Introduction to the SEC's Financial Statement Requirements .....	10-14
§ 10:3.1	In General: GAAP, GAAS, and the PCAOB .....	10-14
[A]	Background .....	10-14
[B]	PCAOB Inspections and the Due Diligence Process .....	10-15
§ 10:3.2	Potential Adoption of International Financial Reporting Standards .....	10-16
§ 10:3.3	The Required Financial Statements in Form S-1 and Form 10-K—Regulation S-X .....	10-18
§ 10:4	FASB Revision of the Accounting Treatment of Business Combinations: Adoption of the "Acquisition Method" .....	10-19
§ 10:4.1	Introduction .....	10-19
[A]	The Original Purchase or Pooling Rules Under APB 16 and APB 17 .....	10-19
[B]	The 2001 Rules Under FASB Statements 141 and 142 .....	10-20
[C]	Introduction to the Current Rules Under FASB Accounting Standards Codification (ASC) 805, Business Combinations, and ASC 350, Intangibles .....	10-21
§ 10:4.2	Joint Project of FASB and the International Accounting Standards Committee (IASC) in Adopting the "Acquisition Method" .....	10-22

§ 10:4.3	FASB Accounting Standards Codification (ASC) 805, Requiring the “Acquisition Method” for Business Combinations.....	10-23
[A]	Introduction .....	10-23
[B]	The Basic Rules of the Acquisition Method.....	10-23
[B][1]	When ASC 805 Applies .....	10-23
[B][2]	The Basic Mechanics of the Acquisition Method .....	10-24
[B][3]	Determining Fair Value, General Principles for Valuing Tangible and Intangible Assets .....	10-25
[B][4]	Determining Fair Value, General Principles for Valuing Tangible Assets.....	10-25
[B][5]	Determining Fair Value, General Principles for Valuing Intangible Assets.....	10-26
[B][6]	Determining Fair Value, Valuing Intangible Assets on an After-Tax Basis .....	10-27
[C]	Measuring Goodwill .....	10-28
[D]	IBM’s Description of the Acquisition Method in Its Acquisition of Red Hat.....	10-30
[E]	Treatment of Acquisition-Related Costs .....	10-30
[F]	Treatment of Contingent Consideration and Contingent Liabilities.....	10-31
[G]	Treatment of In-Process Research and Development (IPR&D) .....	10-31
[H]	Illustration of the Purchase Method in the Sirius-XM Merger Under the Original Statement 141, the Predecessor of ASC 805.....	10-32
§ 10:4.4	Accounting Standards Codification (ASC) 305, Testing Goodwill for Impairment and Potential for Small Firms to Amortize Goodwill.....	10-37
[A]	In General .....	10-37
[B]	Illustration of an Impairment Charge for Goodwill Resulting from a Merger—AOL-Time Warner.....	10-39
[C]	HP’s Impairment Charge for Autonomy .....	10-40
§ 10:4.5	Report on the Impact of FASB Statements 141 and 142 .....	10-42
§ 10:4.6	Accounting Standards Codification (ASC) 305, Allowing Private Firms to Amortize Goodwill in Certain Circumstances .....	10-42
§ 10:5	Impact of FASB Statement 109 and FIN 48 on GAAP Accounting for Tax Positions .....	10-43
§ 10:5.1	FASB Statement No. 109.....	10-43
[A]	Introduction .....	10-43
[B]	Deferred Tax Liabilities .....	10-43

## *Table of Contents*

Table 10-1	Computation of First-Year After-Tax Income for Financial Accounting and Tax Purposes .....	10-44
Table 10-2	X's Financial Accounting Balance Sheet As of the End of Year 1 .....	10-45
[C]	Deferred Tax Assets.....	10-46
Table 10-3	Computation of First-Year After-Tax Income for Financial Accounting and Tax Purposes .....	10-47
Table 10-4	X's Financial Accounting Balance Sheet As of the End of Year 1.....	10-47
Table 10-5	Computation of After-Tax Income for Financial Accounting and Tax Purposes Year 3.....	10-48
Table 10-6	X's Financial Accounting Balance Sheet As of the End of Year 3.....	10-48
[D]	Deferred Tax Assets and Liabilities Arising in Acquisitions .....	10-49
[D][1]	Introduction.....	10-49
[D][2]	Illustration of a Deferred Tax Liability Arising in an Acquisition.....	10-49
Table 10-7	Adjustments to the Balance Sheet of Acquirer As a Result of the Acquisition of Target .....	10-50
Table 10-8	Computation of After-Tax Income for Financial Accounting and Tax Purposes Year 1 .....	10-51
Table 10-9	Adjustments to the Balance Sheet of Acquirer As of the End of Year 1.....	10-52
[D][3]	Illustration of a Deferred Tax Asset Arising in an Acquisition .....	10-53
§ 10:5.2	FIN 48 Accounting for Uncertain Taxes .....	10-54
[A]	Basic Principles .....	10-54
[B]	Impact of FIN 48 in Acquisitions .....	10-57
§ 10:6	Comparing the Treatment of Goodwill and Intangibles Under the Federal Income Tax and the Financial Accounting Rules .....	10-59
§ 10:7	Introduction to the SEC's M&A Accounting Rules When the Consideration Is Stock and Cash; Followed by a Policy Prescription.....	10-60
§ 10:7.1	In General .....	10-60
§ 10:7.2	Acquirer Issues Solely Its Stock .....	10-60
§ 10:7.3	Acquirer Pays Cash.....	10-61
§ 10:7.4	Introduction to the Relevant SEC Financial Disclosure Instructions and Rules Contained in Appendix 10E.....	10-61
§ 10:7.5	FASB's "How" and the SEC's "Where and When".....	10-63

§ 10:8	SEC's Financial Disclosure Requirements Relating to Mergers in Which More than 20% of the Stock of the Acquirer Is the Consideration—Form S-4 and Regulation S-X.....	10-63
§ 10:8.1	Introduction to the Financial Disclosures Required by SEC Form S-4, Registration Statement.....	10-63
§ 10:8.2	The Form S-4 and Reg S-X Pro Forma Disclosure Rules in Stock for Stock Acquisitions in Which More than 20% of the Stock of the Acquirer Is Issued.....	10-64
§ 10:8.3	Applicability of the Pro Forma Rules in Schwab-Ameritrade and Morgan Stanley—E*Trade .....	10-65
§ 10:8.4	The Basic Pro Forma Disclosure Rules in Article 11 of Regulation S-X .....	10-66
§ 10:8.5	Illustration of the Application of the Basic Pro Forma Disclosure Rules in Schwab-TD Ameritrade and Sirus-XM.....	10-68
§ 10:9	SEC's Financial Disclosure Requirements for a Public Acquirer Where the Consideration Is Cash or a Non-20% Stock Interest in the Acquirer—Regulation S-X.....	10-69
§ 10:9.1	Cash Acquisitions, in General.....	10-69
§ 10:9.2	The Relevant SEC Financial Disclosure Instructions and Rules Contained in Appendix 10E .....	10-69
§ 10:9.3	The Form 8-K Financial Disclosures in Cash Deals .....	10-69
§ 10:9.4	The Financial Statement Requirement of Form 8-K, Item 9.01(a) and Pro Forma Requirement of Form 8-K, Item 9.01(b) upon Completion of a Cash Acquisition or a Non-20% Stock Acquisition .....	10-70
[A]	Introduction .....	10-70
[B]	Form 8-K, Item 9.01(a), the Financial Statement Requirement.....	10-70
[B][1]	In General.....	10-70
[B][2]	Financial Statement Disclosure in IBM-Red Hat.....	10-72
[C]	Form 8-K, Item 9.01(B), the Pro Forma Requirement for Cash Mergers.....	10-72
[C][1]	In General.....	10-72
[C][2]	Application of the Basic Pro Forma Disclosure Rules in IBM-Red Hat.....	10-73

## *Table of Contents*

[D]	A Note on the Treatment of Stock Acquisitions in Which the Acquirer Issues Not More than 20% of Its Stock.....	10-73
§ 10:10	A Comparison of the Pro Forma Disclosure Requirements for Stock and Cash Mergers and a Policy Recommendation .....	10-74
§ 10:11	Push Down Accounting.....	10-75
§ 10:12	A Brief Introduction to Financial Statement Analysis.....	10-77
§ 10:12.1	Significance of Basic Accounting Rules, General Principles, and Sources.....	10-77
§ 10:12.2	Sell Side, Buy Side, and Independent Analysts.....	10-78
§ 10:12.3	Ratio Analysis: An Introduction .....	10-79
[A]	Introduction .....	10-79
[B]	Basic Factual Assumptions .....	10-80
[C]	Measuring Performance by Accounting Rates of Return.....	10-81
[C][1]	Introduction.....	10-81
[C][2]	Return on Target's Assets (ROA).....	10-81
[C][3]	Return on Investment (ROI) .....	10-82
[C][4]	Return on Common Equity (ROCE) .....	10-83
[D]	Measuring Cost Structure by Expense Ratios .....	10-83
[E]	Measuring Asset Utilization Through Turnover Ratios.....	10-84
[F]	Analyzing Working Capital Management .....	10-85
[G]	Analyzing Fixed Asset Structure and Capital Expenditures .....	10-85
[H]	Analyzing Financial Leverage and Financial Risk .....	10-86
[I]	A Final Thought on Ratio Analysis .....	10-87

## **Chapter 11 Valuation Considerations in M&A and Dealing with Investment Bankers**

§ 11:1	Scope .....	11-8
§ 11:1.1	References .....	11-10
§ 11:1.2	Valuation in the Time of COVID-19 .....	11-11
§ 11:1.3	Introduction to the book: "Corporate Valuation in M&A" .....	11-11
§ 11:2	Importance of Modern Valuation Concepts for Non-Valuation Experts .....	11-13
§ 11:2.1	Impact in Appraisal: Introduction to the <i>Technicolor</i> Appraisal Proceeding .....	11-13

§ 11:2.2	Impact of Fairness Opinions in SEC Disclosure Documents and Under Delaware Disclosure Law .....	11-15
§ 11:2.3	Impact in Other Contexts .....	11-17
§ 11:2.4	Valuation of Intangibles.....	11-17
§ 11:3	Introduction to Present Value, Net Present Value, and Internal Rate of Return.....	11-18
§ 11:3.1	Basic Concept of Present Value.....	11-18
Table 11-1	Discount Factors.....	11-19
§ 11:3.2	Basic Concept of Net Present Value .....	11-21
§ 11:3.3	Basic Concept of Internal Rate of Return.....	11-22
§ 11:3.4	Relationship Between NPV and IRR .....	11-22
§ 11:3.5	Reason for Use of NPV in Making Investment Decisions.....	11-23
[A]	In General .....	11-23
[B]	NPV and Economic Rents .....	11-23
§ 11:3.6	Capital Rationing and NPV .....	11-24
§ 11:4	Present Value of Multiyear Income Flows: The Discounted Cash Flow and Net Present Value Formulas .....	11-24
§ 11:4.1	Introduction .....	11-24
§ 11:4.2	The Five Basic Steps in Using DCF and NPV.....	11-25
§ 11:4.3	Use of DCF and Other Methodologies in Time's Acquisition of Warner .....	11-28
§ 11:5	Estimating Free (or Negative) Cash Flows and Terminal Value .....	11-28
§ 11:5.1	Introduction .....	11-28
§ 11:5.2	General Principles .....	11-29
§ 11:5.3	Estimating Cash Flows .....	11-29
§ 11:5.4	Estimate Cash Flows on an Incremental Basis .....	11-31
§ 11:5.5	Separate the Investment Decision from the Financing Decision.....	11-31
§ 11:5.6	Treat Inflation Consistently.....	11-32
§ 11:5.7	Illustration of Estimation of Free (or Negative) Cash Flows .....	11-32
[A]	In General .....	11-32
Table 11-2	Projection of Free Cash Flows .....	11-33
[B]	Estimation of Free Cash Flows in <i>Orchard</i> .....	11-33
Table 11-3	Financial Projections.....	11-34
§ 11:5.8	Use of a Formula in Estimating Free Cash Flow .....	11-35
§ 11:5.9	Estimating Terminal Value .....	11-39
[A]	Introduction .....	11-39
[B]	Estimating Terminal Value Through the Constant Growth Model .....	11-40
[C]	Estimating Terminal Value Through the Competitive Equilibrium Model.....	11-42

## Table of Contents

[D]	Estimating Terminal Value by Reference to Price:Earnings Ratios.....	11-45
[E]	Estimating Terminal Value by Reference to Market/Book Ratios.....	11-46
[F]	Summary of Results Under the Four Methods .....	11-47
Table 11-4	Summary of Estimates of Terminal Value.....	11-47
[G]	Estimating Terminal Value in Time Warner Acquisition: Multiple of Cash Flow Method.....	11-48
[H]	Estimation of Terminal Value in <i>Orchard</i> .....	11-48
§ 11:5.10	Sensitivity Analysis .....	11-49
§ 11:5.11	Summary.....	11-49
§ 11:6	Use of the Capital Asset Pricing Model (CAPM) in Determining the Appropriate Equity Discount Rate....	11-50
§ 11:6.1	Introduction .....	11-50
§ 11:6.2	Beta: The Measure of Market Risk .....	11-51
[A]	Introduction .....	11-51
[B]	Further Elaboration on Beta.....	11-52
§ 11:6.3	Risk Free Rate and Market Risk Premium .....	11-53
§ 11:6.4	The Capital Asset Pricing Model.....	11-54
§ 11:6.5	Asset and Equity Betas .....	11-55
Graph 11-1	Asset Beta .....	11-56
Graph 11-2	Relationship Between Asset Beta and Equity Beta.....	11-58
§ 11:6.6	The Beta Levered and Unlevering Formula.....	11-59
§ 11:6.7	Fama and French Critique of CAPM .....	11-62
§ 11:6.8	Determination of the Discount Rate in <i>Orchard</i> —The Superiority of CAPM.....	11-62
[A]	The Chancellor Finds CAPM Superior .....	11-62
[B]	The Chancellor Sets Out the Elements of CAPM.....	11-63
[C]	The Chancellor Explains the Disagreements Between the Parties' Experts on the Elements of CAPM.....	11-64
[D]	The Chancellor Accepts the Supply-Side Equity Risk Premium .....	11-64
[D][1]	Brief Introduction to the Supply-Side Equity Risk Premium.....	11-64
[D][2]	<i>Orchard</i> 's Treatment of the Supply-Side Equity Risk Premium.....	11-65
[E]	The Chancellor Rejects a Company-Specific Risk Premium .....	11-66
[F]	The Chancellor Accepts a Size Premium.....	11-68
§ 11:7	Use of Arbitrage Pricing Theory (APT) in Determining the Appropriate Equity Discount Rate....	11-68

§ 11:8	Interaction Between Investment and Financing Decisions .....	11-69
§ 11:8.1	Use of the Weighted Average Cost of Capital (WACC) in Determining the Appropriate Discount Rate .....	11-69
§ 11:8.2	The Adjusted Present Value Method (APV) .....	11-71
[A]	Introduction .....	11-71
[B]	Vice Chancellor Laster's Discussion of the Use of APV in <i>Sprint/Clearwire</i> .....	11-73
§ 11:8.3	The Equity DCF: Discounting Free Cash Flows with Interest Deducted .....	11-74
§ 11:9	Application of DCF in Acquisitions That Produce Synergies .....	11-75
§ 11:9.1	Introduction .....	11-75
§ 11:9.2	Combinational Synergies Ignored in a Delaware Appraisal Action—SWS .....	11-76
§ 11:10	Illustration of the Application of DCF, NPV, and CAPM in an Acquisition Context .....	11-77
§ 11:10.1	A Hypothetical Acquisition .....	11-77
§ 11:10.2	Proxy Statement Description of DCF Analysis Used to Value Toys .....	11-79
§ 11:10.3	DCF Methods Accepted with Modifications— <i>Sunbelt, Global, Dell, Clearware, SourceHOV, and Synapse</i> .....	11-81
[A]	<i>Sunbelt and Global, 2010</i> .....	11-81
[B]	<i>Dell, 2016 and 2017</i> .....	11-82
[B][1]	The Court of Chancery's 2016 Decision .....	11-82
[B][2]	Delaware Supreme Court's 2017 Comments on the DCF Methodology Used in Dell .....	11-84
§ 11:10.4	DCF Analysis of Company's Expert Accepted "In Toto" by the Delaware Court of Chancery in an Appraisal Action— <i>Sprint/Clearwire</i> .....	11-85
§ 11:10.5	Two 2020 Cases in Which the Delaware Chancery Court Applied a DCF Analysis, One Favoring the Dissenters ( <i>SourceHOV</i> ) and One Favoring the Company ( <i>Synapse</i> ) .....	11-88
[A]	Introduction to <i>SourceHOV</i> and <i>Synapse</i> .....	11-88
[B]	<i>SourceHOV</i> Beta Analysis and Applicable Size Premium .....	11-89
[B][1]	Introduction .....	11-89
[B][2]	Treatment of Beta Levering and Unlevering in <i>SourceHOV</i> .....	11-89
[B][3]	The Applicable Size Premium in <i>SourceHOV</i> ....	11-91
§ 11:10.6	Appraised Value Using DCF Was About Half of the Deal Price— <i>Synapse</i> .....	11-92

## Table of Contents

§ 11:11	Lazard's Use of Beta, CAPM, and the Formula for Levering and Delevering Beta in Computing Conrail's WACC and Present Value .....	11-94
§ 11:11.1	Introduction .....	11-94
§ 11:11.2	Computation of Levered Beta .....	11-94
§ 11:11.3	Conversion of Levered Beta to Unlevered Beta .....	11-95
Table 11-5	Conversion of Levered Betas to Unlevered Betas .....	11-95
§ 11:11.4	Recomputation of Levered Beta for Various Debt-to-Equity Ratios .....	11-96
Table 11-6	Debt and Equity Financing Assumptions .....	11-96
Table 11-7	Computation of Levering Factors .....	11-97
Table 11-8	Computation of Levered Betas .....	11-98
§ 11:11.5	Use of CAPM to Compute Cost of Levered Equity .....	11-98
Table 11-9	Lazard's Computation of Conrail's Cost of Levered Equity Using CAPM .....	11-99
§ 11:11.6	Computation of Conrail's Weighted Average Cost of Capital .....	11-99
Table 11-10	(Part 1) Computation of Conrail's WACC .....	11-100
Table 11-10	(Part 2) Computation of Conrail's WACC .....	11-101
§ 11:11.7	Use of WACC in Determining Present Value of Conrail's Free Cash Flow .....	11-101
§ 11:11.8	Summary of Lazard's DCF Valuation Approach .....	11-104
§ 11:12	Non-DCF Valuation Techniques: Comparable Companies and Comparable Transactions .....	11-105
§ 11:12.1	Introduction to the Direct Comparisons .....	11-105
§ 11:12.2	Equivalence Between Direct Comparison and Direct Capitalization .....	11-106
§ 11:12.3	Selecting Comparable Companies and Determining Multiples .....	11-107
§ 11:12.4	Selecting the Value Indicator and the Observable Variable .....	11-109
§ 11:12.5	Accounting for Control Premiums: The Comparable Transactions Approach .....	11-112
§ 11:12.6	Applicability of the Direct Comparison Approach in Time Warner, Toys, <i>Sunbelt</i> , and <i>Global</i> .....	11-112
[A]	Introduction .....	11-112
[B]	Comparable Transactions .....	11-113
[B][1]	Time Warner .....	11-113
[B][2]	Toys .....	11-113

[C]	Comparable Companies .....	11-114
[C][1]	Time Warner.....	11-114
[C][2]	Toys .....	11-114
[D]	Comparable Methods Rejected— <i>Sunbelt</i> and <i>Global</i> .....	11-116
[E]	Comparable Companies Rejected in <i>Orchard</i> ....	11-118
§ 11:13	Contribution Analysis .....	11-119
§ 11:14	Accretion/Dilution Analysis .....	11-122
§ 11:15	Illustrative Cases Applying the Valuation Techniques Discussed in This Chapter .....	11-123
§ 11:15.1	Introduction .....	11-123
§ 11:15.2	Methods of Determining Fair Value in a 2013 Delaware Appraisal— <i>Merion Capital</i> .....	11-123
[A]	Introduction .....	11-123
[B]	Rejection of Comparable Companies and Comparable Transactions in This Case.....	11-124
[C]	Use of the DCF Method .....	11-124
[D]	Determination of Free Cash Flows .....	11-125
[E]	Determining the Discount Rate .....	11-125
[F]	The Risk Free Rate for CAPM .....	11-126
[G]	Determining Beta for CAPM .....	11-126
[H]	Determining the Equity Risk Premium for CAPM: The Supply-Side.....	11-127
[I]	The Equity Size Premium Addition to CAPM ....	11-128
[J]	Calculating Cogent's WACC and the Present Value of Its Free Cash Flows .....	11-129
[K]	Determining Terminal Value, Introduction .....	11-130
[L]	The Gordon Growth Model.....	11-130
[M]	The EBITDA Multiples Approach to Determining Terminal Value .....	11-133
[N]	Summary of DCF Valuation .....	11-134
§ 11:16	Determining if the Acquirer Has Properly Valued the Target: Introduction to Event Studies .....	11-134
Table 11-11	Target and Acquirer Information As of Announcement Date January 14, 2004 .....	11-136
Table 11-12	Merger Characteristics.....	11-136
Table 11-13	Estimated Target, Bank One, Returns.....	11-137
Table 11-14	Estimated Acquirer, J.P. Morgan Chase, Returns .....	11-138
§ 11:17	Issues in Dealing with Investment Bankers.....	11-139
§ 11:17.1	Introduction .....	11-139
§ 11:17.2	Financial Industry Regulatory Authority (FINRA) Disclosure Requirements Regarding Fairness Opinions Issued by Investment Bankers .....	11-139

## Table of Contents

	<p>§ 11:17.3 Negotiating Engagement Letters with Investment Bankers..... 11-140</p> <p>[A] Purpose ..... 11-140</p> <p>[B] The Parties, the Transaction, and Exclusivity ..... 11-141</p> <p>[C] Provision of Services..... 11-141</p> <p>[C][1] In General..... 11-141</p> <p>[C][2] Fairness Opinions and Reliance on Information Provided..... 11-141</p> <p>[C][3] Fairness Opinions: No Duty to Update..... 11-143</p> <p>[C][4] Fairness Opinions: Nondisclosure Without Investment Banker's Permission ..... 11-143</p> <p>[C][5] Fairness Opinions: Only Board Can Rely ..... 11-144</p> <p>[C][6] Information Regarding Contacts with the Company ..... 11-146</p> <p>[D] Key Man Provision ..... 11-146</p> <p>[E] Fees ..... 11-146</p> <p>[E][1] In General..... 11-146</p>	
	<p>Table 11-15 Investment Banker's 2007 Rate Card for Deals ..... 11-147</p> <p>[E][2] Work Fee ..... 11-147</p> <p>[E][3] Success Fee ..... 11-148</p> <p>[E][3][a] In General ..... 11-148</p> <p>[E][3][b] Potential Conflict of Interest with Success Fees..... 11-148</p> <p>[E][4] Break-Up Fee ..... 11-153</p> <p>[E][5] Incentive Fee..... 11-154</p> <p>[E][6] Fees for Representing the Target in a Hostile Deal..... 11-154</p>	
	<p>[F] Work by the Investment Banker in Financing the Transaction and Related Work ..... 11-154</p> <p>[G] Reimbursement for Costs and Expenses ..... 11-156</p> <p>[H] The Term and Termination ..... 11-156</p> <p>[I] Indemnification and Contribution and Limitation on Liability ..... 11-157</p> <p>[J] Confidentiality ..... 11-159</p> <p>[K] Publicity ..... 11-159</p> <p>[L] Conflicts of Interests and Trading in Securities..... 11-159</p> <p>[M] Legitimacy of Choice of Law Provision of an Engagement Letter—<i>DLJ</i> ..... 11-160</p> <p>[N] Illustration of the Provisions of an Engagement Letter—<i>Oppenheimer</i> ..... 11-162</p> <p>[O] Miscellaneous ..... 11-165</p> <p>[P] Investment Banker Engagement Letters After <i>Rural</i>..... 11-166</p>	

§ 11:17.4	When the Deal Goes Bad: Sue the Investment Banker .....	11-166
[A]	Introduction .....	11-166
[B]	Actions by the Company or the Company's Representative Against Its Investment Banker.....	11-167
[B][1]	Bear Stearns Held Liable for Negligent Advice Regarding a Tender Offer: The Ninth Circuit's Approach— <i>Daisy Systems</i> .....	11-167
[B][2]	The Importance of the Engagement Letter in Determining the Obligations of the Investment Banker: The Seventh Circuit's Approach— <i>HA-LO</i> .....	11-169
[B][3]	Citigroup Not Liable to Terra for Fraud.....	11-172
[B][3][a]	The U.S. District Court Decision .....	11-172
[B][3][b]	Second Circuit's Decision: Potential Liability of Investment Banker for Negligent Misrepresentation.....	11-175
[B][4]	Legitimacy of Malpractice Claims Against Investment Banker— <i>DLJ</i> .....	11-176
[C]	Actions by Shareholders Against Company's Investment Banker .....	11-178
[C][1]	Shareholders Sue Investment Banker on a Principal-Agent Theory: The New York Approach— <i>Lazard</i> and <i>Goldman Sachs</i> .....	11-178
[C][2]	Shareholders Sue Investment Banker for Fraud, Breach of Contract, and Breach of the Duty of Care: The Delaware Approach— <i>DFI</i> and <i>Shoe-Town</i> .....	11-180
[C][3]	Allegation That Investment Banker Violated Its Obligation to Give Target's Shareholders Hedging Advice: The Seventh Circuit's Contract Analysis— <i>Joyce v. Morgan Stanley</i> .....	11-182
[C][4]	Allegation That Target's Investment Banker Breached Contract and Other Duties to Target's Controlling Shareholder— <i>Baker v. Goldman Sachs</i> .....	11-184
[C][5]	Preclusion and the Delaware Carve-Out from SLUSA— <i>Madden</i> .....	11-189
[C][6]	Goldman's Undervaluing of Consideration Paid by Acquirer to Controller for Target, "Relative Valuation," and No Update— <i>Southern Peru</i> .....	11-195
[C][7]	Potential Aiding and Abetting Liability for Goldman— <i>TIBCO</i> .....	11-201

## Table of Contents

[C][8]	No Aiding and Abetting Liability for Merrill— <i>Zale</i> .....	11-203
[C][9]	Delaware Supreme Court Affirms Aiding and Abetting Liability for RBC— <i>Rural Acquisition</i> .....	11-207
[D]	Actions Against Investment Banker for Acquirer .....	11-211
[D][1]	Action by Target's Shareholder Against Acquirer's Investment Banker— <i>Morgan Stanley</i> .....	11-211
[D][2]	Action by Shareholders of Public Acquirer Against Acquirer's Investment Banker— <i>Inland REIT</i> .....	11-212
[E]	Action by AOL Shareholders Against Credit Suisse and Its Analysts.....	11-214
[F]	Potential Liability for Investment Banker for Target— <i>Presidio</i> .....	11-217
§ 11:17.5	Disclosures and Conflicts Involving Investment Bankers.....	11-218

## PART V

### U.S. SUBSTANTIVE ANTITRUST AND PRE-MERGER NOTIFICATION CONSIDERATIONS IN M&A

#### Chapter 12 U.S. Substantive Antitrust Analysis

§ 12:1	Scope .....	12-7
§ 12:1.1	References .....	12-10
§ 12:1.2	Antitrust in the Time of COVID-19.....	12-10
§ 12:1.3	Resolution of Antitrust Disputes with the Government by Arbitration .....	12-10
§ 12:1.4	DOJ and FTC Antitrust Merger Enforcement As of May 2023: Enhanced Scrutiny by the Biden Administration.....	12-10
[A]	In General .....	12-10
[B]	The Biden Administration's Scoreboard on Challenges As of May 2023.....	12-13
[C]	The Biden Administration's Scoreboard on Merger Challenges As of May 2024.....	12-15
[C][1]	In General.....	12-15
[C][2]	Is the Biden Administration in Fact More Aggressive in Challenging Mergers than Other Administrations? .....	12-16
[D]	FTC Loses Challenge to Activision-Blizzard Merger in District Court, but FTC Says It Will Relitigate .....	12-17

§ 12:2	The Economic Case for Antitrust Enforcement.....	12-19
§ 12:2.1	Introduction .....	12-19
§ 12:2.2	Characteristics of Pure or Perfect Competition.....	12-19
Graph 12-1	Price and Output Under Competition .....	12-21
§ 12:2.3	Characteristics of a Monopoly.....	12-21
Graph 12-2	Price and Output After Merger to Monopoly Consumer Welfare Triangle and Loss in Producer Surplus.....	12-23
§ 12:2.4	Characteristics of an Oligopoly.....	12-24
§ 12:3	Principal Antitrust Laws Governing M&A .....	12-25
§ 12:3.1	Sections 1 and 2 of the Sherman Act.....	12-25
[A]	Introduction .....	12-25
[B]	Challenge to the American Air-Jet Blue Alliance Under Section 1 of the Sherman Act .....	12-26
§ 12:3.2	Section 5 of the Federal Trade Commission Act .....	12-29
§ 12:3.3	Section 7 of the Clayton Act.....	12-30
§ 12:3.4	The HSR Pre-Merger Notification Law.....	12-31
§ 12:3.5	The Proposed SMARTER Act .....	12-31
§ 12:4	Introduction to the Supreme Court's Interpretation of Section 7 in Horizontal Mergers.....	12-33
§ 12:5	Introduction to the 1992 and 2010 DOJ/FTC Guidelines.....	12-38
§ 12:5.1	Background .....	12-38
[A]	Up to June 2023.....	12-38
[B]	What Is Coming in 2023 with the Biden Changes to the 2010 DOJ/FTC Horizontal Merger Guidelines? .....	12-39
§ 12:5.2	Introduction to the 1992 DOJ/FTC Guidelines.....	12-39
§ 12:5.3	Introduction to the 2010 DOJ/FTC Guidelines.....	12-42
[A]	Comparing the Structures of the 2010 and 1992 DOJ/FTC Guidelines.....	12-42
[B]	Overview Section of the 2010 DOJ/FTC Guidelines.....	12-44
[C]	Evidence of Adverse Competitive Effects Under the 2010 DOJ/FTC Guidelines.....	12-46
[D]	Targeted Customers and Price Discrimination Under the 2010 DOJ/FTC Guidelines.....	12-47
[E]	Mergers of Competing Buyers Under the 2010 DOJ/FTC Guidelines.....	12-48
[F]	Partial Acquisitions Under the 2010 DOJ/FTC Guidelines.....	12-49
§ 12:6	Market Definition Under the 1992 DOJ/FTC Horizontal Merger Guidelines .....	12-49
§ 12:6.1	Introduction .....	12-49

## Table of Contents

§ 12:6.2	Product Market Definition Under the 1992 DOJ/FTC Guidelines.....	12-50
§ 12:6.3	Illustration of Product Market Definition Based on Pricing Evidence—Staples.....	12-52
[A]	The 1997 Staples–Office Depot Merger.....	12-52
[B]	The 2013 Office Depot–OfficeMax Merger .....	12-53
[C]	The 2016 Staples–Office Depot Merger.....	12-54
§ 12:6.4	Illustration of Product Market Definition Based on SSNIP, Critical Loss, and Core and Marginal Customers— <i>Whole Foods</i> .....	12-57
[A]	Introduction .....	12-57
[B]	The District Court’s Discussion of the SSNIP Test and Critical Loss Analysis.....	12-57
[B][1]	Background.....	12-57
[B][2]	The Guidelines’ SSNIP Test.....	12-58
[B][3]	Focusing on Marginal and Not Core Customers .....	12-60
[B][4]	The Basic Elements of Critical Loss Analysis.....	12-61
[B][5]	The Three Steps of Critical Loss Analysis .....	12-64
[B][6]	The First Step of Critical Loss Analysis .....	12-64
[B][7]	The Second Step of Critical Loss Analysis .....	12-65
[B][8]	The Third Step of Critical Loss Analysis .....	12-66
[B][9]	The Court’s Conclusion on Critical Loss Analysis .....	12-66
[B][10]	What About the Cellophane Fallacy? .....	12-67
[C]	The Circuit Court’s Focus on Core Customers ....	12-68
[C][1]	Background.....	12-68
[C][2]	The Significance of Core Customers: Judges Brown and Tatel.....	12-69
[C][3]	Judge Tatel’s Views on Industry Studies and Statements Made by the Parties’ CEOs .....	12-74
[C][4]	Judge Tatel’s Criticism of Whole Foods’ Critical Loss Analysis .....	12-75
§ 12:6.5	Geographic Markets Definition Under the 1992 DOJ/FTC Guidelines.....	12-76
§ 12:6.6	Illustration of Geographic Market Definition— <i>Oracle</i> and <i>Penn State Hershey</i> .....	12-77
§ 12:6.7	2006 DOJ/FTC 2006 Comments on Guidelines—Market Definition .....	12-81
§ 12:6.8	Market Definition Under the 2010 DOJ/FTC Guidelines .....	12-82
[A]	In General .....	12-82
[B]	Product Market Definition .....	12-83
[B][1]	The Hypothetical Monopolist Test .....	12-83

[B][2]	Implementing the Hypothetical Monopolist Test.....	12-84
[B][3]	Critical Loss Analysis .....	12-84
[B][4]	Targeted Customers; Price Discrimination .....	12-85
[C]	Geographic Market Definition .....	12-85
§ 12:7	Application of the Committed and Uncommitted Potential Entrant Provisions of the 1992 and 2010 DOJ/FTC Guidelines.....	12-86
§ 12:7.1	Introduction .....	12-86
§ 12:7.2	Uncommitted Potential Entrant and Market Measurement—Under the 1992 DOJ/FTC Guidelines .....	12-87
§ 12:7.3	Rapid Entry Under the 2010 DOJ/FTC Guidelines .....	12-89
§ 12:8	Identifying Market Participants and Their Market Shares.....	12-90
§ 12:8.1	The 1992 DOJ/FTC Guidelines .....	12-90
§ 12:8.2	The 2010 DOJ/FTC Guidelines .....	12-91
§ 12:9	Basic Enforcement Standards Under the 1992 and 2010 DOJ/FTC Horizontal Merger Guidelines.....	12-91
§ 12:9.1	Introduction to the Herfindahl-Hirschman Index .....	12-91
§ 12:9.2	Post-Merger HHI Below 1000; the 1992 DOJ/FTC Guidelines .....	12-92
§ 12:9.3	Post-Merger HHI Between 1000 and 1800; the 1992 DOJ/FTC Guidelines.....	12-93
§ 12:9.4	Post-Merger HHI Above 1800; the 1992 DOJ/FTC Guidelines.....	12-95
§ 12:9.5	Overstatement or Understatement of Market Shares and Concentration— <i>General Dynamics</i> .....	12-96
[A]	The 1992 DOJ/FTC Guidelines .....	12-96
[B]	The 2010 DOJ/FTC Guidelines .....	12-97
§ 12:9.6	2006 DOJ/FTC Comments on the 1992 DOJ/FTC Guidelines—Concentration.....	12-97
§ 12:9.7	2010 DOJ/FTC Guideline Enforcement Standards .....	12-98
§ 12:9.8	Illustration of Concentration Analysis— <i>ProMedica</i> .....	12-100
§ 12:10	Overview of Section 2 of the 1992 DOJ/FTC Guidelines; Potential Adverse Competitive Effects of Mergers .....	12-105
§ 12:10.1	Potential Adverse Competitive Effects: An Introduction to Other Oligopoly Factors .....	12-105
§ 12:10.2	2006 DOJ/FTC Comments on Guidelines—Adverse Competitive Effects .....	12-105

## Table of Contents

§ 12:11	Lessening of Competition Through Coordinated Interactions Under the 1992 and 2010 DOJ/FTC Guidelines.....	12-106
§ 12:11.1	Introduction .....	12-106
§ 12:11.2	Conditions Conducive to Coordination; the 1992 DOJ/FTC Guidelines.....	12-108
§ 12:11.3	Conditions Conducive to Detection and Punishment—Mavericks—The 1992 DOJ/FTC Guidelines .....	12-108
§ 12:11.4	The Power Buyer Defense.....	12-109
[A]	The 1992 DOJ/FTC Guidelines .....	12-109
[B]	The 2010 DOJ/FTC Guidelines .....	12-109
§ 12:11.5	2006 DOJ/FTC Comments on Guidelines—Coordinated Interactions.....	12-110
§ 12:11.6	Coordinated Effects Under the 2010 DOJ/FTC Guidelines.....	12-111
§ 12:12	Lessening of Competition Through Unilateral Effects Under the 1992 and 2010 DOJ/FTC Guidelines.....	12-112
§ 12:12.1	Introduction .....	12-112
§ 12:12.2	35% First and Second Rule for Differentiated Products; the 1992 DOJ/FTC Guidelines .....	12-113
[A]	Basic Principles .....	12-113
[B]	The Closeness of Substitutes Rule.....	12-115
[C]	Rival Sellers Rule.....	12-115
§ 12:12.3	35% Capacity Rule for Undifferentiated Products; the 1992 DOJ/FTC Guidelines .....	12-115
§ 12:12.4	Unilateral Effects in the Courts— <i>Kraft</i> and <i>Oracle</i> .....	12-116
§ 12:12.5	2006 DOJ/FTC Comments on 1992 DOJ/FTC Guidelines—Unilateral Effects .....	12-119
§ 12:12.6	Unilateral Effects Under the 2010 DOJ/FTC Guidelines .....	12-121
[A]	Introduction .....	12-121
[B]	Pricing of Differentiated Products.....	12-121
[B][1]	In General.....	12-121
[B][2]	Upward Pricing Pressure .....	12-122
[C]	Bargaining and Auctions.....	12-124
[D]	Capacity and Output for Homogeneous Products .....	12-124
[E]	Innovation and Product Variety .....	12-124
§ 12:13	Entry Under the 1992 and 2010 DOJ/FTC Guidelines.....	12-125
§ 12:13.1	Introduction .....	12-125

§ 12:13.2	Timeliness of Entry; the 1992 DOJ/FTC Guidelines .....	12-127
§ 12:13.3	Likelihood of Entry; the 1992 DOJ/FTC Guidelines .....	12-128
§ 12:13.4	Sufficiency of Entry; the 1992 DOJ/FTC Guidelines .....	12-131
§ 12:13.5	Summary of the 1992 DOJ/FTC Guidelines.....	12-132
§ 12:13.6	2006 DOJ/FTC Comments on the 1992 DOJ/FTC Guidelines—Entry .....	12-132
§ 12:13.7	Illustration: Rejection of Entry Claims— <i>Chicago Bridge</i> .....	12-133
§ 12:13.8	Entry Under the 2010 DOJ/FTC Guidelines.....	12-134
§ 12:14	Efficiencies Under the 1992 and 2010 DOJ/FTC Guidelines .....	12-135
§ 12:14.1	Guidelines' Rationale for Considering Efficiencies.....	12-135
§ 12:14.2	Impact of Efficiencies in Coordinated Interaction and Unilateral Effects Cases; the 1992 DOJ/FTC Guidelines .....	12-136
§ 12:14.3	Dynamic Efficiencies; the 1992 DOJ/FTC Guidelines .....	12-136
§ 12:14.4	Merger-Specific Efficiencies; the 1992 DOJ/FTC Guidelines .....	12-136
§ 12:14.5	Verification; the 1992 DOJ/FTC Guidelines .....	12-137
§ 12:14.6	Cognizable Efficiencies; the 1992 DOJ/FTC Guidelines .....	12-137
§ 12:14.7	Enforcement Standards; the 1992 DOJ/FTC Guidelines .....	12-137
§ 12:14.8	Types of Efficiencies Likely to Be Considered; the 1992 DOJ/FTC Guidelines .....	12-139
§ 12:14.9	Efficiencies in the Cases and at the Agencies— <i>Heinz, Staples, Miller–Coors, Sirius–XM</i> and <i>Penn State Hershey</i> .....	12-139
[A]	<i>Heinz, Staples, Miller–Coors, and Sirius–XM</i> .....	12-139
[B]	<i>Penn State Hershey</i> .....	12-142
§ 12:14.10	2006 DOJ/FTC Comments on the 1992 DOJ/FTC Guidelines—Efficiencies .....	12-147
§ 12:14.11	Efficiencies Under the 2010 DOJ/FTC Guidelines .....	12-149
§ 12:14.12	FTC Commissioner Wright's Position on Efficiencies .....	12-149
§ 12:14.13	Efficiencies Defense in Anthem–Cigna .....	12-151
§ 12:14.14	The "Passing on of Efficiencies" Requirement Through the Lens of Hershey–Pinnacle and UPMC–Pinnacle .....	12-153
[A]	Death of Hershey–Pinnacle; Long Live UPMC–Pinnacle .....	12-153

*Table of Contents*

[B]	Introduction to the Quasi Passing-on Requirement .....	12-154
[C]	Pre-Merger Competitive GAC Market (Without Efficiencies) .....	12-157
[D]	Competitive Market with Efficiencies .....	12-157
Table A	Comparing the Results Under Competition with and Without Efficiencies .....	12-158
[E]	Monopoly Market Without Efficiencies .....	12-158
[F]	Monopoly Market with and Without Efficiencies .....	12-160
Table B	Comparing the Results Under Monopoly with and Without Efficiencies .....	12-161
[G]	Is the Passing-on Requirement Sound Policy? .....	12-161
[H]	Is the Passing-on Requirement a “Fallacy”? .....	12-161
§ 12:15	Brief Introduction to the Failing Firm Defense .....	12-162
§ 12:15.1	Introduction to the Failing Firm Provisions of the Horizontal Merger Guidelines .....	12-162
§ 12:15.2	The Failing Firm Claim in Energy Solutions .....	12-163
§ 12:16	Brief Introduction the Vertical and Conglomerate Merger Guidelines .....	12-168
§ 12:16.1	Introduction .....	12-168
§ 12:16.2	Conditions Necessary for a Potential Challenge to a Vertical Merger .....	12-169
[A]	The Guidelines .....	12-169
[A][1]	The Withdrawn 1984 Guidelines .....	12-169
[A][2]	Brief Introduction to the 2020 Vertical Merger Guidelines .....	12-171
[A][3]	Heavy Criticism of, and Strong Support for, the 2020 Vertical Merger Guidelines .....	12-173
[A][4]	In 2021, the FTC, but Not the DOJ, Withdraws the Vertical Merger Guidelines .....	12-174
[A][4][a]	The FTC’s 2021 Action on the Vertical Merger Guidelines .....	12-174
[A][4][b]	The DOJ’s 2021 Action on the Vertical Merger Guidelines .....	12-176
[A][4][c]	Timing of Forthcoming Amendments to the VMGs .....	12-177
[B]	The AT&T-Time Warner Vertical Merger .....	12-177
[B][1]	Basic Facts .....	12-177
[B][2]	The DOJ’s Challenge to the Transaction on Antitrust Grounds: In Brief .....	12-178
[B][2][a]	The Transaction .....	12-178
[B][2][b]	The Court’s Discussion of the “Antitrust Analysis of Vertical Mergers” .....	12-178

[B][2][c]	The Conceded Benefits from the Merger .....	12-181
[B][2][d]	The Court's Rejection of the Government's Three Theories of Harm.....	12-181
[B][3]	The D.C. Circuit Affirms on Appeal.....	12-183
[C]	CVS–Aetna Vertical Merger.....	12-184
[C][1]	DOJ Clears the Merger Conditioned on a Divesture, October 2018.....	12-184
[C][2]	U.S. District Court Judge's Tunney Hearing in the Case .....	12-184
§ 12:16.3	Conditions Necessary for a Potential Challenge, Under the Withdrawn 1984 Guidelines, to a Conglomerate Merger.....	12-185
§ 12:17	Merger Enforcement in the Obama, Trump and Biden Administrations .....	12-186
§ 12:17.1	Proposals Regarding Merger Enforcement in the Obama Administration.....	12-186
§ 12:17.2	Illustrative 2011 Merger Cases in the Obama Administration— <i>NYSE, AT&amp;T, H&amp;R Block</i> .....	12-189
[A]	Introduction .....	12-189
[B]	The NYSE–NASDAQ Transaction.....	12-190
[C]	The AT&T–T-Mobile Transaction.....	12-191
[D]	The H&R Block–TaxAct Transaction.....	12-193
[E]	Eleventh Circuit Upholds FTC's Divestiture Order in <i>Polypore</i> .....	12-196
§ 12:17.3	Merger Enforcement in the Trump Administration .....	12-197
[A]	Introduction .....	12-197
[B]	Policies Within the First Six Months of the Trump Administration .....	12-197
[C]	An Assessment in the Last Full Year of the Trump Administration—2020 .....	12-199
§ 12:17.4	Merger Enforcement in the Biden Administration .....	12-199
[A]	An Early Prediction in 2021 .....	12-199
[B]	President Biden's 2021 Executive Order on Competition .....	12-200
[C]	FTC Withdrawal of the Vertical Merger Guidelines .....	12-202
[D]	Biden FTC and DOJ Review of Merger Guidelines .....	12-202
[E]	Biden Antitrust Enforcement Summit in April 2022 .....	12-204
[F]	Biden DOJ and FTC Antitrust Merger Enforcement As of May 2023 .....	12-204

## Table of Contents

§ 12:18	Antitrust Challenges to Mergers by Consumers, Competitors, and Targets .....	12-205
§ 12:18.1	Introduction .....	12-205
§ 12:18.2	Actions by Consumers .....	12-205
[A]	The <i>InBev</i> Cases .....	12-205
[B]	The <i>Evanston Hospital</i> Case.....	12-207
[C]	Customer Successful in Having Court Order Its Supplier to Divest an Acquired Competitor— <i>Jeld-Wen</i> .....	12-208
§ 12:18.3	Actions by Competitors.....	12-211
§ 12:18.4	Actions by Targets .....	12-213
§ 12:19	The DOJ and FTC 2023 Merger Guidelines.....	12-215
§ 12:19.1	Introduction .....	12-215
§ 12:19.2	How the Five Steps in the 2010 Guidelines Can Assist in Applying the 2023 Guidelines .....	12-217
[A]	Introduction to the Five Steps .....	12-217
[B]	First Step.....	12-217
[C]	Second Step.....	12-217
[D]	Third Step .....	12-218
[E]	Fourth Step.....	12-218
[F]	Fifth Step.....	12-218
§ 12:19.3	Outline of the 2023 Guidelines .....	12-218
§ 12:19.4	Comments on the 2023 Guidelines .....	12-235

## Chapter 13 U.S. Pre-Merger Notification

§ 13:1	Scope .....	13-4
§ 13:1.1	References .....	13-6
§ 13:1.2	Proposed Amendments to the Pre-Merger Notification Rules As of April 11, 2021.....	13-6
§ 13:1.3	Pre-Merger Notification in the Time of COVID-19 .....	13-7
[A]	E-Filing System .....	13-7
[B]	Temporary Suspension of Early Terminations .....	13-7
§ 13:1.4	FTC's "Prior Approval Policy" Reinstated in 2021.....	13-8
§ 13:1.5	FTC's Policy on Deals It Could Not Properly Evaluate.....	13-9
§ 13:1.6	Introduction to the Proposed "Merger Filing Fee Modernization Act".....	13-10
§ 13:1.7	2023 Proposed Changes to the Pre-Merger Notification Rules .....	13-11
§ 13:1.8	Brief Introduction to the 2024 Final Amendments to the HSR Rules During the Biden Administration.....	13-16

§ 13:1.9	Trump's Approach to Both (1) Substantive Antitrust Enforcement of Mergers, and (2) Pre-Merger Notification.....	13-20
§ 13:2	Introduction .....	13-20
§ 13:2.1	In General .....	13-20
§ 13:2.2	Penalties .....	13-22
[A]	In General .....	13-22
[B]	The ValueAct Record Penalty.....	13-22
§ 13:2.3	Substance Over Form .....	13-24
§ 13:2.4	Annual Adjustments to HSR Thresholds .....	13-24
§ 13:2.5	FTC and DOJ Annual Report on Hart-Scott-Rodino .....	13-24
§ 13:3	Impact of HSR in Pre-Filing Period.....	13-25
§ 13:3.1	Description of the Period.....	13-25
§ 13:3.2	Transactions Subject to HSR: The Large, Mid-Market, and Small Transaction Rules .....	13-25
[A]	In General.....	13-25
[B]	The Large Transaction Rule.....	13-26
[C]	The Mid-Market Transaction Rule .....	13-26
[D]	The Small Transaction Rule .....	13-26
[D][1]	In General.....	13-26
[D][2]	Differences in the Applicability of the Small Transaction Rule in Stock and Asset Acquisitions: Treatment of Liabilities .....	13-27
[E]	Determine Threshold at the Time of Closing.....	13-27
[F]	The \$192 Million and \$368 Million Thresholds for 2021 .....	13-27
[G]	Five Situations with a Required HSR Filing Without the Acquirer Paying Cash for the Target's Stock or Assets .....	13-28
§ 13:3.3	Exemptions .....	13-30
[A]	In General .....	13-30
[B]	The "Solely for Investment" Exemption .....	13-31
[B][1]	Introduction.....	13-31
[B][2]	ValueAct Sued by DOJ .....	13-32
[C]	Exemption for Bank Holding Company Acquisitions—Mixed Transactions .....	13-33
[D]	Acquisitions in Excess of 50% of a Target's Stock .....	13-35
[E]	Proposed Exemption Section 802-15 Re De Minimis Acquisitions of Voting Securities.....	13-35
§ 13:3.4	Determining the Acquiring and Acquired Persons .....	13-36
[A]	In General .....	13-36
[B]	Determining the Acquiring and Acquired Persons in Stock Acquisitions and Asset Acquisitions for Cash .....	13-37

*Table of Contents*

[C]	Acquiring and Acquired Persons in Mergers of Stand-Alone Corporations in Exchange for Cash .....	13-38
[D]	Acquiring and Acquired Persons in Stock Acquisitions, Asset Acquisitions and Mergers in Exchange for Stock of the Acquirer.....	13-39
§ 13:3.5	Determining Whether Large or Mid-Market Transaction Rules Apply.....	13-40
§ 13:3.6	Determining Whether the Size of Transaction Rule Is Satisfied: Stock or Assets Held As a Result of the Acquisition .....	13-40
§ 13:3.7	Determining Whether the Size of Person Test Is Satisfied.....	13-42
§ 13:3.8	Secondary Acquisitions.....	13-43
§ 13:3.9	The Notification Thresholds for Partial Stock Acquisitions .....	13-44
§ 13:3.10	HSR Rules Relating to Transfers of Pharma Patent Rights .....	13-45
§ 13:3.11	Recommended Legislative and Administrative Changes to the HSR Reporting Requirements .....	13-45
§ 13:4	Preparation of the Report Form and Filing Fee .....	13-46
§ 13:4.1	General Principles Regarding Preparation of the Report Form .....	13-46
§ 13:4.2	Item 4(c) and Item 4(d) Documents .....	13-48
[A]	Item 4(c) Documents .....	13-48
[B]	Item 4(d) Documents, As Added by 2011 Amendments.....	13-51
§ 13:4.3	The Filing Fee.....	13-54
§ 13:4.4	Electronic Filing .....	13-54
§ 13:4.5	Confidentiality .....	13-54
§ 13:4.6	Associate Reporting Rules, As Added by 2011 Amendments.....	13-55
§ 13:5	Impact of HSR in Post-Filing Period .....	13-57
§ 13:5.1	In General .....	13-57
§ 13:5.2	Review of the Form by the FTC's Pre-Merger Notification Office and the Clearance Process.....	13-57
§ 13:5.3	Conduct of Merger Investigations.....	13-58
§ 13:5.4	Coordinating Merger Investigations with State Attorneys General and the European Union.....	13-59
§ 13:5.5	Basic Waiting Period Rules.....	13-59
[A]	Starting the Waiting Period: Negotiated Mergers and Asset Acquisitions and Acquisitions of the Stock of a Controlled Subsidiary.....	13-59
[B]	Starting the Waiting Period: Open Market Purchases, Tender Offers, and Certain Other Acquisitions of Stock.....	13-60

[C]	Ending the Waiting Period .....	13-61
[D]	Early Termination .....	13-62
§ 13:5.6	Second Requests: Description of the Rule and Effect on Waiting Period .....	13-62
[A]	In General .....	13-62
[B]	Model Second Request and Appeal Procedures .....	13-64
[C]	The Quick Look Procedure.....	13-64
[D]	Predictive Coding in Preparation of Second Request Under HSR .....	13-65
§ 13:5.7	Summary Table of Waiting Period Rules .....	13-66
§ 13:5.8	New HSR Rules on Withdrawing and Re-Filing a Notification .....	13-68
§ 13:6	FTC or DOJ Challenge to the Transaction .....	13-69
§ 13:6.1	In General .....	13-69
§ 13:6.2	Standard When DOJ Seeks a Permanent Injunction .....	13-70
§ 13:6.3	Standard When FTC Seeks a Preliminary Injunction .....	13-70
§ 13:6.4	Introduction to the Proposed SMARTER Act.....	13-72
§ 13:7	Jumping-the-Gun .....	13-72
§ 13:7.1	Exchange of Competitively Sensitive Information in the Due Diligence Process— <i>Omnicare</i> .....	13-72
§ 13:7.2	Jumping-the-Gun During the Post-Signing Period— <i>Smithfield</i> .....	13-75
§ 13:8	Provisions of Merger Agreements Addressing Antitrust Review Issues .....	13-77
§ 13:8.1	Introduction .....	13-77
§ 13:8.2	Elaboration on Reverse Termination Fees— Antitrust RTFs in Google and AT&T .....	13-78

## PART VI

### DOMESTIC M&A TRANSACTIONS PRESENTING UNIQUE ISSUES

#### **Chapter 14    Introduction to Leveraged Buyouts**

§ 14:1	Scope .....	14-4
§ 14:1.1	References .....	14-6
§ 14:1.2	Current State of the Private Equity (LBO) Marketplace.....	14-6
[A]	2017 Developments .....	14-6
[B]	2018 Developments .....	14-7
[C]	Report on PE Activity in 2020 and Predictions for 2021 .....	14-7

## Table of Contents

[D]	Picture of the Likely Path of PE Activity in 2021.....	14-8
[E]	Increase in PE Carveouts in 2021.....	14-9
[F]	Buffett Questions PE Reported Returns .....	14-10
[G]	An Alternative Way of Investing in PE.....	14-11
[H]	PE Developments in First Half of 2022: The Private Credit Funds .....	14-11
[I]	Wachtell Lipton's Assessment of the LBO Market in Early 2023.....	14-12
[J]	As of August 2023, PE Firms Had "Dry Power" and Were Ready to Go .....	14-14
[K]	Financing LBOs When Interest Rates Climb: the "All Equity LBO," That Is, the "Non-LBO".....	14-15
[L]	Wachtell Lipton's Assessment of the Private Equity (LBO) Market in Early 2024 .....	14-16
§ 14:2	The Principal Parties to an LBO: Illustrated Through the Getty Images LBO .....	14-17
§ 14:2.1	Introduction .....	14-17
§ 14:2.2	Shareholders of the Target Corporation .....	14-18
§ 14:2.3	Management of the Target Corporation .....	14-18
[A]	General Principles .....	14-18
[B]	The Rollover Shareholders.....	14-18
§ 14:2.4	Private Equity Firm.....	14-19
[A]	In General .....	14-19
[B]	Fund Formation Issues .....	14-20
[C]	Tax Opportunities and Issues in PE.....	14-21
[D]	Taxation of Carried Interest.....	14-21
[D][1]	In General.....	14-21
[D][2]	The TCAJA's Treatment of Carried Interests .....	14-23
[D][2][a]	Candidate Trump's Proposed Treatment of Carried Interests.....	14-23
[D][2][b]	The TCAJA's Treatment of Carried Interest Under Section 1061.....	14-23
[D][2][c]	The IRS Addresses the S Corporation Issue with Carried Interests.....	14-25
[E]	Treasury Issues Proposed Regulations on Fee Waivers.....	14-25
[F]	Private Equity Insurance.....	14-27
[G]	Why Did the "Toys 'R' Us" LBO Fail? .....	14-28
§ 14:2.5	Financial Institution.....	14-29
[A]	Introduction .....	14-29
[B]	Structuring LBO Financing.....	14-31
[C]	Bank Regulators' Leveraged Lending Guidance.....	14-32
[D]	Non-Traditional Funding Sources for LBOs .....	14-34
[E]	Amazon's Bond Sale to Finance Its Acquisition of Whole Foods.....	14-35

[F]	Use of Special Purpose Acquisition Company (SPAC) in an LBO Transaction .....	14-35
§ 14:2.6	Junk Bonds and the A/B Exchange Offer.....	14-37
§ 14:2.7	Acquisition Vehicle.....	14-39
[A]	Acquisition of a Stand-Alone Publicly Held Target in an LBO .....	14-39
[B]	Acquisition of Stand-Alone Privately Held Target in an LBO.....	14-42
[C]	Acquisition of a Subsidiary in an LBO.....	14-42
[D]	Ensuring the Deductibility of Interest .....	14-42
[D][1]	In General.....	14-42
[D][2]	Impact of the TCAJA's Section 163(j) Limitation on the Deductibility of Business Interest .....	14-43
[E]	Potential Inclusion of Reverse Break-Up Fee in the Acquisition Agreement.....	14-44
[F]	Acquisition Proposal on a Cash-Free, Debt-Free Basis.....	14-45
§ 14:3	Fiduciary Duty Standard Applicable to the Target's Board in an LBO.....	14-46
§ 14:3.1	Introduction .....	14-46
§ 14:3.2	Some Notable LBO Cases Discussed in Chapter 5 .....	14-46
§ 14:3.3	Recent Guidance from Leading Academics on Fiduciary Duties in MBOs.....	14-46
[A]	Introduction .....	14-46
[B]	Subramanian's <i>Deal Process Design</i> .....	14-47
[C]	<i>Anabtawi, Predatory Management Buyouts</i> .....	14-49
§ 14:3.4	Dell Goes Public Again.....	14-49
§ 14:4	Potential Applicability of SEC Rule 13e-3 in an LBO .....	14-52
§ 14:5	Impact of Fraudulent Conveyance Law on an LBO.....	14-52
§ 14:5.1	Introduction .....	14-52
§ 14:5.2	Section 548 of the Bankruptcy Code .....	14-52
§ 14:5.3	Addressing Fraudulent Conveyance Issues in LBOs .....	14-55
§ 14:5.4	Illustration of an Actual and Constructive Fraud Allegation in an LBO— <i>Lyondell</i> .....	14-56
[A]	Introduction to <i>Lyondell</i> .....	14-56
[B]	The Discussion in <i>Lyondell</i> of the Actual and Constructive Fraud Provisions of the Bankruptcy Code and Their Origin .....	14-59
[C]	The Impact of the Section 548(e) Exception for Certain Securities Transactions, <i>Lyondell</i> .....	14-61
[D]	Introduction to the Imputation Issue and the Actual Intent Issue in <i>Lyondell</i> .....	14-62

## Table of Contents

	[E] The Imputation Issue in <i>Lyondell</i> .....	14-63
	[F] The Actual Intent Issue in <i>Lyondell</i> .....	14-63
	[G] Some Observations on <i>Lyondell</i> .....	14-65
§ 14:6	Potential Liability of Directors for Making an Illegal Corporate Distribution in an LBO .....	14-66
§ 14:6.1	Potential Director Liability for Target's Directors in an LBO Sale— <i>Nine West</i> .....	14-67
§ 14:7	Potential Breach of Implied Covenants in Bond Indenture of Pre-LBO Bondholders and Event Protection.....	14-72
§ 14:8	Impact of Federal Reserve Margin Regulations on Acquisition Financing in an LBO .....	14-73
§ 14:8.1	Introduction .....	14-73
§ 14:8.2	The Junk Bond Ruling .....	14-73
§ 14:9	Case Study: Hypothetical LBO Based on the RJR Nabisco LBO .....	14-75
§ 14:9.1	Introduction .....	14-75
§ 14:9.2	Facts .....	14-75
Table 14-1	RJR SUMMARY BALANCE SHEET .....	14-75
Table 14-2	RJR SUMMARY FAIR MARKET VALUE BALANCE SHEET .....	14-76
Table 14-3	RJR POST-LBO SUMMARY BALANCE SHEET ....	14-77
§ 14:9.3	The Economic Rationale for the Transaction.....	14-78
§ 14:9.4	Tax Consequences to the Various Parties to the Transaction.....	14-78
§ 14:9.5	Accounting Consequences of the Transaction .....	14-79
§ 14:9.6	Fiduciary Duties of RJR's Board.....	14-79
§ 14:9.7	Do the Going Private Rules of the Securities Laws Apply to the Transaction? .....	14-80
§ 14:9.8	How Does the Board of RJR Address the Risk That the Transaction Could Be a Fraudulent Conveyance? .....	14-80
§ 14:9.9	How Does the Board of RJR Address the Risk That the Transaction Will Be an Illegal Distribution? .....	14-80
§ 14:9.10	What Is Likely to Happen to the Value of RJR's Old Debentures and to Its Preferred Stock As a Result of This Transaction? .....	14-81
§ 14:9.11	Does This Transaction Comply with the Federal Margin Rules? .....	14-81
§ 14:10	Leveraged Recapitalization: An Alternative to an LBO .....	14-81
§ 14:11	Antitrust Challenges to Club Deals.....	14-82
§ 14:11.1	Introduction .....	14-82
§ 14:11.2	2008 <i>Dahl v. Bain</i> .....	14-84
§ 14:11.3	2013 <i>Dahl v. Bain</i> .....	14-85

§ 14:11.4	The <i>Bain</i> Final Settlement.....	14-86
§ 14:11.5	How a Target Can Protect Itself.....	14-86
§ 14:12	Potential Liability of PE Firm Under ERISA for Portfolio Firm's Withdrawal Liability— <i>Sun Capital and Palladium</i> .....	14-87
§ 14:12.1	<i>Sun Capital</i> District Court 2012 Decision.....	14-87
§ 14:12.2	<i>Sun Capital</i> 2013 Circuit Court Decision.....	14-90
§ 14:12.3	The Common Control Issue Not Reached by the District and Circuit Courts in <i>Sun Capital</i> .....	14-94
§ 14:12.4	<i>Sun Capital</i> 2013 Circuit Court Decision.....	14-100
§ 14:12.5	<i>Sun Capital</i> , Federal District Court Decision March 2016.....	14-100
§ 14:12.6	<i>Sun Capital</i> Reversed by the First Circuit—2019 .....	14-104
§ 14:13	SEC Study of Private Equity Fees.....	14-106
§ 14:14	SEC Study of Systemic Risk Associated with Private Equity .....	14-107
§ 14:15	DOL Rules That Section 401(k) Plans Now Permitted to Invest in Certain Private Equity .....	14-108
§ 14:16	PEs and SPACs .....	14-110

## **Chapter 15 Introduction to Spin-Offs: Tax, Corporate, Securities, and Fraudulent Conveyance Issues**

§ 15:1	Scope.....	15-3
§ 15:1.1	References .....	15-4
§ 15:1.2	Business Reasons for Spin-Offs .....	15-5
§ 15:1.3	A Source of Information on Recent Past and Expected Spin-Offs .....	15-5
[A]	In General .....	15-5
[B]	The Proposed 2023 Alibaba Spin-Off .....	15-6
[C]	The Proposed 2023 Baxter Spin-Off .....	15-6
§ 15:2	Federal Income Tax Impact on Spin-Offs.....	15-8
§ 15:2.1	Introduction .....	15-8
§ 15:2.2	The Three Types of Section 355 Distributions: Spin-Offs, Split-Offs, and Split-Ups, and the Tax Stakes .....	15-9
[A]	The Three Distributions .....	15-9
[B]	The Tax Stakes in the Three Distributions.....	15-9
§ 15:2.3	Conditions for Tax-Free Treatment Under Section 355(a).....	15-10
§ 15:2.4	Elaboration on the Treatment of the Parties if the Conditions Are Satisfied.....	15-11
[A]	The Treatment of the Shareholders of the Distributing Corporation.....	15-11

## Table of Contents

[B]	The Treatment of the Distributing Corporation.....	15-12
[B][1]	In General.....	15-12
[B][2]	Potential Gain for the Distributing Corporation Under Sections 355(d) and 355(e) .....	15-12
§ 15:2.5	Diagram of a "(D)" Reorganization Spin-Off.....	15-13
Diagram 15-1	Divisive Spin-Off Under §§ 368(a)(1)(D) and 355 .....	15-13
§ 15:2.6	Results if the Spin-Off Does Not Qualify Under Section 355.....	15-14
§ 15:2.7	Private Rulings Under Section 355 .....	15-14
§ 15:2.8	The No "Device" Requirement .....	15-16
[A]	In General .....	15-16
[B]	Generally No Private Letter Ruling on the No "Device" Requirement .....	15-18
§ 15:2.9	The Business Purpose Requirement .....	15-19
[A]	In General .....	15-19
[B]	Generally No Private Letter Ruling on Business Purpose.....	15-20
[C]	General Guidance on Business Purpose .....	15-20
§ 15:2.10	Continuity of Interest.....	15-22
§ 15:2.11	The Active Trade or Business Requirement .....	15-22
[A]	Introduction .....	15-22
[B]	Small Amounts of Qualifying Business Assets .....	15-23
[B][1]	Background: The Yahoo Planned, but Abandoned, Spin-Off of Its Stock in Alibaba.....	15-23
[B][2]	2015 IRS Notice and Revenue Procedure on Active Trade or Business .....	15-25
[B][3]	Proposed Regulations Addressing the Small Trade or Business Issue.....	15-30
[C]	2015 Legislation Dealing with REIT Spin-Offs .....	15-34
[D]	Potential Modification of Active Trade or Business Rulings .....	15-34
§ 15:2.12	The Control Requirement .....	15-35
§ 15:2.13	Avoiding Gain Under Section 355(d).....	15-37
§ 15:2.14	Avoiding Gain Under Section 355(e)– <i>The Morris Trust and Reverse Morris Trust</i> Transactions .....	15-38
[A]	Introduction to the <i>Morris Trust</i> and Reverse <i>Morris Trust</i> Transactions.....	15-38
[B]	Introduction to Section 355(e).....	15-39
[C]	The AT&T Comcast Spin-Off Followed by Merger—A Reverse <i>Morris Trust</i> Transaction .....	15-41
[D]	Temporary Regulations Under Section 355(e) and (f) Relating to "Predecessor" and "Successor" .....	15-43

[E]	Controlled Corporation's Indemnification of Distributing Corporation Against Section 355(e) Liability.....	15-45
[F]	Generally No Private Letter Ruling on Section 355(e).....	15-45
[G]	The AT&T-Discovery 2021 Reverse <i>Morris Trust</i> Spin-Off/Split-Off.....	15-47
§ 15:2.15	Disqualified Investment Companies and the Cash-Rich Split-Off.....	15-49
[A]	In General .....	15-49
[B]	Liberty Media's Use of Cash-Rich Split-Off.....	15-50
[C]	Berkshire-Washington Post, "Cash and Stock" Rich Split-Off.....	15-51
[D]	Berkshire-P&G Cash-Rich Split-Off .....	15-52
§ 15:2.16	Leveraged Spin-Offs (Issuance of Debt As Part of a Spin-Off).....	15-53
[A]	In General .....	15-53
[B]	IRS Will Rule on Leveraged Spin-Offs.....	15-54
[C]	The Treasury Will Rule on North-South Spin-Offs.....	15-55
§ 15:2.17	Potential Impact on Split-Offs, but Not Spin-Offs, of the 2022 Inflation Reduction Act's (IRA's) 15% Alternative Minimum Tax .....	15-57
[A]	Introduction .....	15-57
[B]	Brief Description of the 15% Corporate Alternative Minimum Tax.....	15-57
[C]	Is the C-AMT Applicable to Split-Offs but Not Spin-Offs? .....	15-58
[D]	Status As of September 15, 2022 of the Treatment of Split-Offs Under the C-AMT .....	15-58
§ 15:3	Corporate Issues in Spin-Offs.....	15-59
§ 15:3.1	In General .....	15-59
§ 15:3.2	The Corporate Agreements .....	15-60
§ 15:3.3	Impact of Indenture in Split-Off— <i>Liberty Media</i> .....	15-62
§ 15:4	Federal Securities Issues Relating to Spin-Offs .....	15-62
§ 15:5	Is the Spin-Off a Fraudulent Conveyance?— <i>Campbell Soup</i> .....	15-64
§ 15:6	Business Reasons for Spin-Offs and Related Transactions .....	15-65

**Chapter 16 Bankruptcy M&A: The TWA and Lehman  
Bankruptcy Sales, and the Sears G  
Reorganization**

§ 16:1	Scope .....	16-5
§ 16:1.1	References .....	16-7
§ 16:1.2	Brief Introduction to the 2023-2024 Bankruptcy of Several Banks: Signature, Silicon Valley, First Republic, Credit Suisse, a Swiss Bank, and Republic First Bank in Philadelphia .....	16-8
[A]	Introduction .....	16-8
[B]	2023 Bankruptcy of Signature Bank .....	16-8
[C]	2023 Bankruptcy of Silicon Valley Bank .....	16-9
[D]	2023 Bankruptcy of First Republic Bank .....	16-11
[E]	Principal Reasons for these Bankruptcies .....	16-11
[F]	The 2023 Collapse of Credit Suisse, a Swiss Bank .....	16-12
[G]	Brief Introduction to the April 26, 2024, Bankruptcy of Republic First Bank in Philadelphia .....	16-13
§ 16:2	Bankruptcy Options Other than Sales Under Section 363 .....	16-15
§ 16:2.1	In General .....	16-15
§ 16:2.2	Brief Introduction to Subchapter V of the Bankruptcy Act .....	16-16
§ 16:3	Directors' Duties in the "Zone of Insolvency" .....	16-16
§ 16:4	Causes of Bankruptcy and Financial Distress— The Lehman Case Study .....	16-17
§ 16:5	Introduction to American Airlines' 2001 Purchase of TWA's Assets Under Section 363 of the Bankruptcy Code .....	16-20
§ 16:6	Introduction to the Fast Moving September 2008 Sale by Lehman of Assets Under Section 363 of the Bankruptcy Code .....	16-22
§ 16:6.1	The Sale and Initial Challenge .....	16-22
§ 16:6.2	Lehman, Rule 60(b) Challenge to the Sale Order .....	16-23
§ 16:7	Sale of Assets Under Section 363 of the Bankruptcy Code .....	16-24
§ 16:7.1	Sale of Assets, Section 363(b) .....	16-24
§ 16:7.2	Assumption of Executory Contracts and Unexpired Leases .....	16-25
§ 16:7.3	Sales Free and Clear on Non-Assumed Liabilities, Section 363(f) .....	16-26
§ 16:7.4	Under Section 363(m), an Order Approving a Sale to a "Good Faith Purchaser" Is Not Subject to Reversal on Appeal .....	16-31

§ 16:7.5	Prohibition by Section 363(n) of Collusive Bids.....	16-33
§ 16:7.6	Pre-Merger Notification Waiting Period for Sales Under Section 363.....	16-33
§ 16:7.7	No Fraudulent Conveyance in Chrysler Sale .....	16-35
§ 16:7.8	Dealing with Environmental Liabilities in Bankruptcy .....	16-36
§ 16:8	Required Business Purpose for a Section 363 Sale .....	16-37
§ 16:9	Pre-Arranged Bankruptcies and Stalking Horses.....	16-39
§ 16:10	Debtor-in-Possession Financing Provided by the Acquirer .....	16-40
§ 16:11	Bankruptcy-Related Provisions of the TWA and Lehman Asset Purchase Agreements .....	16-43
§ 16:11.1	In General .....	16-43
§ 16:11.2	Bankruptcy Procedure Provisions of Asset Acquisition Agreements .....	16-45
[A]	The TWA APA .....	16-45
[B]	The Lehman APA.....	16-46
§ 16:11.3	The Termination Fee and Overbid Requirements .....	16-46
[A]	The TWA APA .....	16-46
[B]	The Lehman APA.....	16-47
[B][1]	In General.....	16-47
[B][2]	The Break-Up Fee .....	16-47
[B][3]	Consideration of Qualified Bids, the Over-Bidding Requirement.....	16-49
[B][4]	Subsequent Bids.....	16-49
[B][5]	No Matching Right but Obligation to Negotiate .....	16-50
[B][6]	Second Circuit's Interpretation of the Lehman APA—Barclays .....	16-50
§ 16:11.4	Bankruptcy-Related Conditions to Closing.....	16-51
[A]	The TWA APA .....	16-51
[B]	The Lehman APA.....	16-52
§ 16:11.5	Distinguishing <i>Braniff</i> .....	16-52
§ 16:12	Terms of a Court Order Approving a Section 363 Sale .....	16-53
§ 16:13	Plan of Liquidation After a Sale of Assets Under Section 363—TWA .....	16-53
§ 16:14	Credit Bids in a Cramdown Plan— <i>Amalgamated</i> .....	16-54
§ 16:14.1	Introduction .....	16-54
§ 16:14.2	Background on Section 363 and Plan Sales.....	16-54
§ 16:14.3	Credit-Bid Issue in <i>Amalgamated</i> .....	16-57
§ 16:14.4	Why Did the Debtor Oppose a Credit Bid? .....	16-60

## Table of Contents

§ 16:15 The G Reorganization and the Acquisition of the Bankrupt Sears .....	16-60
§ 16:15.1 Introduction .....	16-60
[A] The G Reorganization and Cancellation of Indebtedness Income.....	16-60
[A][1] In General.....	16-60
[A][2] References.....	16-61
[B] Basic Tax Treatment in a G Reorganization .....	16-61
[C] The Principal Tax Benefit in Sears's G Reorganization: Carryover of NOLs and Credits.....	16-61
§ 16:15.2 Introduction to the G Reorganization.....	16-63
[A] In General .....	16-63
[B] Introduction to Acquisitive Reorganizations and the Continuity of Interest Requirement .....	16-63
[C] <i>Alabama Asphaltic</i> and the COI Requirement in Bankruptcy.....	16-64
[D] Section 368(a)(1)(G) Reorganization and Related Provisions.....	16-64
[D][1] The Definition of the G Reorganization.....	16-64
[D][2] The Differences and Similarities Between the G Reorganization and Other Forms of Acquisitive Reorganization.....	16-65
[D][3] The Continuity of Interest Rule for the G Reorganization .....	16-66
[D][3][a] The Legislative History.....	16-66
[D][3][b] The General COI Requirement in Bankruptcy Regulations .....	16-67
[D][3][c] The Counting of Credit Bidding Under Section 363(k) Toward Satisfaction of the COI Requirement in a G Reorganization .....	16-70
[D][3][c][i] Introduction to Credit Bidding Under Section 363(k).....	16-70
[D][3][c][ii] The Credit Bid and COI Requirement in the GM G Reorganization PLR .....	16-70
[D][4] Push Down of Target's Assets After a G Reorganization.....	16-74
[D][5] Forward Triangular G Reorganization .....	16-75
[D][6] Reverse Triangular G Reorganization .....	16-75
[D][7] Rules Relating to Title 11.....	16-75
[D][8] Overlaps Between the G and Other Forms of Reorganization.....	16-75
[D][9] Receiverships of Financial Institutions.....	16-76
[D][10] The Treatment of (1) the Creditors of the Bankrupt Target Who Receive Stock in the Acquirer, (2) the Bankrupt Target, and (3) the Acquirer .....	16-76

[D][10][a]	“Party to a Reorganization” and “Plan of Reorganization” .....	16-76
[D][10][b]	Nonrecognition to Exchanging Creditor Under Section 354, with Its “Substantially All” and “Distribution” Requirements .....	16-76
[D][10][b][i]	Introduction.....	16-76
[D][10][b][ii]	Meaning of the Term “Substantially All” in a G Reorganization .....	16-77
[D][10][b][iii]	Elaboration on the Treatment of the Exchanging Creditor of a Target in a G Reorganization .....	16-78
[D][10][c]	Exception to Nonrecognition Under Section 354 for Accrued Interest.....	16-79
[D][10][d]	Nonrecognition to Target Under Section 361.....	16-79
[D][10][e]	Nonrecognition to the Acquirer Under Section 1032.....	16-80
[D][10][f]	Basis to the Acquirer in the Assets Acquired Under Section 362.....	16-80
[D][10][g]	Carryover of Target’s NOLs and Other Tax Attributes to Acquirer Under Section 381(a).....	16-80
[D][10][h]	Non-Applicability in Bankruptcy Reorganizations of the Section 382(a) Limitation on Carryovers of Target’s NOLs and Other Tax Attributes to Acquirer Under Section 381(a).....	16-81
[D][11]	Examples of G Reorganizations in the Senate Report on the Bankruptcy Tax Act .....	16-83
§ 16:15.3	Analysis of the G Reorganization in the Sears Bankruptcy .....	16-84
[A]	Introduction .....	16-84
[B]	October 15, 2018, Initial Bankruptcy Filing .....	16-84
[B][1]	The Initial Announcement .....	16-84
[B][2]	The DIP Financing .....	16-85
[B][3]	Announcement of a Potential Going Concern Sale and the Stay.....	16-85
[C]	November 19, 2018, the Order Approving the Global Bidding Procedures.....	16-86
[D]	December 5, 2018, New Sears Initial Bid Letter .....	16-87
[E]	December 6, 2018, SEC Form 13D Filed by ESL and Related Parties Regarding New Sears Initial Bid Letter .....	16-87
[E][1]	The Terms of the Initial Bid.....	16-87
[E][2]	The New Sears \$1.8 Billion Initial Credit Bid .....	16-88
[F]	December 13, 2018, SEC Form 10-Q Description of the NOL and Credit Carryovers .....	16-88

*Table of Contents*

[G]	December 28, 2018, New Sears Final Bid Letter Offering \$4.4 Billion.....	16-88
[H]	January 2, 2019, ESL SEC Form 13D, Purpose of Transaction: Announcing the Indicative Bid by Transform Holdco LLC [New Sears] .....	16-89
[I]	January 17, 2019, Sears's SEC Form 8-K Announcing the Asset Purchase Agreement Between Sears and Transform Holdco LLC [New Sears] .....	16-89
[I][1]	Announcement of a Deal.....	16-89
[I][2]	The New Sears \$1.3 Billion Final Credit Bid .....	16-89
[I][3]	The Securities Consideration.....	16-90
[I][4]	The Aggregate Purchase Price .....	16-90
[J]	January 17, 2019, Selected Excerpts from the Initial and Amended Asset Purchase Agreement (APA).....	16-91
[J][1]	Introduction.....	16-91
[J][2]	One or More G Reorganizations if New Sears Elects .....	16-91
[J][3]	Addressing the COI Requirement in the Amended APA .....	16-92
[J][3][a]	Introduction .....	16-92
[J][3][b]	The Credit Bid COI.....	16-92
[J][3][c]	The Securities Consideration COI.....	16-93
[J][4]	Does the Credit Bid Consideration and the Securities Consideration Satisfy the 40% COI Requirement .....	16-94
[J][5]	A Caveat.....	16-94
[J][6]	The Distribution Requirement .....	16-95
[J][7]	Qualifying for the Carryover of Losses Under Section 381 and Non-Applicability of the Section 382 Limitation .....	16-95
[K]	January 19, 2019, Sale Order Attached to Notice of Auction Results and Sale .....	16-96
[L]	January 28, 2019, Unsecured Creditors' Objections to the Sale.....	16-96
[M]	February 11, 2019, Introduction to Amendment No. 1 to APA .....	16-96
[N]	February 14, 2019, SEC Form 8-K, Announcing Completion of the Acquisition .....	16-96
[O]	April 17, 2019, Excerpts from Disclosure Statement for Sears Chapter 11 Bankruptcy.....	16-96
§ 16:15.4	Post-Bankruptcy Sears Purchases Balance of Sears Hometown .....	16-97
§ 16:15.5	Supreme Court in Sears' Case—Mall of America ....	16-98

§ 16:16 COVID-19-Related Bankruptcies.....	16-99
§ 16:16.1 In General .....	16-99
§ 16:16.2 The Hertz COVID-19 Bankruptcy .....	16-99

## **Chapter 17 M&A Involving Bank Holding Companies, Including Impact of the Dodd-Frank Act**

§ 17:1 Scope.....	17-7
§ 17:1.1 References .....	17-8
§ 17:1.2 Trump Administration's Potential Repeal of Provisions of Dodd-Frank .....	17-9
[A] In General .....	17-9
[B] The 2018 Amendment to Dodd-Frank .....	17-9
[C] First Reactions to the Impact on Bank M&A of the Economic Growth, Regulatory Relief, and Consumer Protection Act.....	17-11
[D] The Federal Reserve's Initial Regulation Under the Economic Growth, Regulatory Relief, and Consumer Protection Act.....	17-12
§ 17:1.3 The Biden Administration Potentially Puts Breaks on Bank M&A.....	17-13
[A] The Biden Administration's Actions on Competition Relating Generally to Banking .....	17-13
[B] The Biden DOJ's Actions Relating Directly to Bank Acquisitions .....	17-14
[C] The FDIC's Actions Relating Directly to Bank Acquisitions .....	17-15
[D] Introduction to the OCC and FDIC 2024 Statements of Policy (That Is, the OCC SoP, and the FDIC SoP) Regarding Mergers of Financial Institutions .....	17-16
[E] Introduction to the DOJ's (1) Withdrawal from the 1995 Bank Merger [Antitrust] Guidelines, and (2) Adoption of New 2024 Bank Merger Antitrust Guidelines .....	17-16
§ 17:1.4 2023 Bank Bankruptcies: Signature, Silicon Valley, First Republic, and Credit Suisse .....	17-16
§ 17:1.5 Merger of Banc of California and PacWest in Part in Response to Bankruptcy of Silicon Valley Bank.....	17-17
§ 17:1.6 Biden Administration's 2023 Proposals for More Bank Regulation in View of the 2023 Bank Bankruptcies: Unwinding Certain Trump Administration Regulations.....	17-18

## *Table of Contents*

§ 17:1.7	Potential Need for More Rather Than Less Concentration in the Banking Industry: "Let Them Merge".....	17-21
§ 17:2	Introduction to Basic Principles of Bank Regulation.....	17-22
§ 17:2.1	Introduction .....	17-22
§ 17:2.2	National Banks.....	17-23
§ 17:2.3	State Banks.....	17-23
§ 17:2.4	Savings and Loan Associations; Thrifts .....	17-24
§ 17:2.5	Change in Bank Control Act of 1978 .....	17-24
§ 17:2.6	Introduction to Bank Holding Companies and Financial Holding Companies .....	17-24
§ 17:2.7	Increasing Pace of Bank Mergers.....	17-26
§ 17:2.8	Potential Large Acquisitions by Goldman and Morgan Stanley .....	17-26
§ 17:2.9	Introduction to the Regulation of "FinTech" Banking .....	17-27
§ 17:3	Basic Merger and Acquisition Principles Applicable to Acquisitions of Financial Holding Companies.....	17-27
§ 17:3.1	General Principles .....	17-27
§ 17:3.2	Stock Options and Exchanges As Deal Protection Measures .....	17-28
§ 17:4	Introduction to the Glass-Steagall Act: Partially Repealed by the Gramm-Leach-Bliley Act and Partially Reinstated by the Dodd-Frank Act .....	17-29
§ 17:5	Bank Holding Companies Generally .....	17-30
§ 17:5.1	Introduction to the Bank Holding Company Act ..	17-30
§ 17:5.2	Definition of a BHC .....	17-31
[A]	General Principles .....	17-31
[B]	Elaboration on the Meaning of "Control" .....	17-32
[C]	Control and Investments by Private Equity Firms in Bank Holding Companies .....	17-32
[C][1]	Introduction.....	17-32
[C][2]	Board Representation.....	17-33
[C][3]	Total Equity .....	17-34
[C][4]	Consultation with Management .....	17-34
[C][5]	Business Relationships.....	17-34
[C][6]	Covenants.....	17-34
[C][7]	What the Guidelines Do Not Address—Silos and Club Deals .....	17-35
§ 17:5.3	Impact of Section 3's Prohibition on Acquiring or Becoming a BHC Without FRB Approval.....	17-35
§ 17:5.4	Impact of Section 4's Prohibition of Acquisition by a BHC of Certain Non-Banking Businesses .....	17-36
[A]	In General .....	17-36
[B]	The Closely Related Exception in Section 4(c)(8) .....	17-37

[C]	The Volcker Rule, Impact of the Dodd-Frank Act.	17-38
[C][1]	Introduction.....	17-38
[C][2]	Introduction to the Final Volcker Rule .....	17-42
[C][3]	The Impact of the Volcker Rule on Private Funds of Bank Holding Companies.....	17-44
[C][4]	Trump Administration's Potential Repeal of the Volcker Rule.....	17-45
[C][4][a]	Background.....	17-45
[C][4][b]	The 2017 Amendment to the Volcker Rule....	17-47
[C][5]	The Agencies 2018 Proposed Amendments to the Regulations Implementing the Volcker Rule.....	17-47
[C][6]	Regulations Under the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) .....	17-49
[C][7]	Amendments to the Volcker Rule.....	17-50
§ 17:5.5	Bank Holding Companies That Elect to Be Financial Holding Companies .....	17-51
[A]	Election Procedure for Becoming a Financial Holding Company.....	17-51
[A][1]	Prior to the Dodd-Frank Act .....	17-51
[A][2]	Impact of the Dodd-Frank Act .....	17-52
[B]	Permissible Activities of a Financial Holding Company .....	17-52
[C]	Post-Commencement Notice Requirement for Activities Financial in Nature.....	17-55
[C][1]	Prior to the Dodd-Frank Act .....	17-55
[C][2]	Exception for Certain Large Acquisitions, Impact of the Dodd-Frank Act .....	17-55
[D]	Pre-Commencement Notice Requirement for Activities "Complementary to a Financial Activity" .....	17-56
[D][1]	In General and Impact of the Dodd-Frank Act....	17-56
[D][2]	Determining if an Activity Is "Complementary".....	17-56
[E]	J.P. Morgan Chase's Election to Be a Financial Holding Company .....	17-58
§ 17:5.6	Financial Holding Company: Functional Regulation of Securities and Insurance Activities and Deference to Bank Regulators .....	17-59
§ 17:5.7	Restrictions on Dividends Paid by Bank Subsidiaries of a Bank Holding Company.....	17-60
§ 17:5.8	The "Source of Strength" Doctrine .....	17-61
[A]	Prior to the Dodd-Frank Act .....	17-61
[B]	Impact of the Dodd-Frank Act.....	17-62

*Table of Contents*

§ 17:5.9	Restrictions on Affiliate Transactions .....	17-62
[A]	In General .....	17-62
[B]	Affiliated Transactions, Impact of the Dodd-Frank Act.....	17-64
§ 17:6	Acquisitions of Bank Holding Companies, Including Financial Holding Companies .....	17-64
§ 17:6.1	Introduction to Acquisitions of Bank Holding Companies .....	17-64
§ 17:6.2	Factors to Be Considered by the FRB in Determining Whether to Approve an Application for an Acquisition of a Bank Holding Company .....	17-65
[A]	Introduction .....	17-65
[B]	Competitive Factor .....	17-65
[C]	Banking and Community Factors: Capital, Management, and the Community .....	17-66
[C][1]	Introduction.....	17-66
[C][2]	Financial Resources .....	17-66
[C][3]	Management Resources .....	17-67
[C][3][a]	In General .....	17-67
[C][3][b]	Impact of Managerial Resources Factor in Wells Fargo's Acquisition of Wachovia .....	17-67
[C][4]	Convenience and Needs of the Community .....	17-68
[C][4][a]	In General .....	17-68
[C][4][b]	Impact of "Convenience and Needs of the Community" Factor in Wells Fargo's Acquisition of Wachovia .....	17-68
[D]	Money Laundering .....	17-69
[E]	Supervisory Factors .....	17-69
[F]	Financial Stability, Impact of the Dodd-Frank Act.....	17-69
[F][1]	Introduction.....	17-69
[F][2]	The Approach to Financial Stability Factor in the PNC–RBC Acquisition.....	17-69
[F][3]	The Forthcoming Regulations on the Financial Stability Factor .....	17-73
[F][4]	People's United Financial Acquisition of Suffolk Bancorp—Liberalization of the Financial Stability Factor .....	17-75
[G]	Notable Post-2014 Bank Holding Company Mergers .....	17-77
[G][1]	M&T Purchase of Hudson City, Approved September 2015 .....	17-77
§ 17:6.3	Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.....	17-78
[A]	In General and Impact of the Dodd-Frank Act .....	17-78
[B]	Impact of Nationwide Deposit Cap in Wells Fargo's Acquisition of Wachovia .....	17-79

§ 17:6.4	The Public Benefit Standard in Section 4(j) in the Wells Fargo–Wachovia Transaction .....	17-80
§ 17:6.5	FRB's Discussion of the Factors in Its Order Approving Wells Fargo's Acquisition of Wachovia .....	17-81
§ 17:6.6	Concentration Limit, Impact of the Dodd-Frank Act.....	17-82
[A]	Introduction .....	17-82
[B]	The Final Concentration Limit Rule .....	17-83
[B][1]	Introduction.....	17-83
[B][2]	The General Concentration Limit .....	17-83
[B][3]	"Financial Sector Liabilities" .....	17-83
[B][4]	"Liabilities of the Resulting Company" .....	17-84
[B][5]	"Consolidated Liabilities" .....	17-84
[C]	Federal Reserve Board Determination of Aggregate Consolidated Liabilities.....	17-84
§ 17:6.7	Fed's Pre-Filing Guidance Program.....	17-85
§ 17:6.8	The 2019 BB&T–SunTrust Merger of Equals .....	17-86
§ 17:6.9	Pending Bank Mergers As of June 1, 2021 .....	17-87
§ 17:7	Antitrust Analyses in Mergers and Acquisitions of Bank Holding Companies .....	17-88
§ 17:7.1	Introduction .....	17-88
§ 17:7.2	Pre-Merger Notification.....	17-89
§ 17:7.3	Bank Merger Screening Guidelines .....	17-91
[A]	General Principles .....	17-91
[B]	The FRB's Antitrust Decisions in Wells Fargo–Wachovia.....	17-93
[C]	DOJ Request for Comments on Bank Merger Antitrust Guideline.....	17-93
[D]	President Biden's 2021 Executive Order on Competition As It Relates to Banking M&A .....	17-95
§ 17:8	Capital Adequacy Requirements for Bank Holding Companies .....	17-97
§ 17:8.1	Introduction .....	17-97
[A]	Introduction to Pre- and Post-Common Rule Capital Adequacy Provisions .....	17-97
[B]	Introduction to Pre-Common Rule Appendix A .....	17-98
§ 17:8.2	Capital Generally Should Exceed the Minimum.....	17-98
§ 17:8.3	Capital Adequacy Determined on a Consolidated Basis .....	17-99
§ 17:8.4	Capital Adequacy and Mergers and Acquisitions .....	17-99
§ 17:8.5	Definitions of Tier 1 and Tier 2 Capital .....	17-99
[A]	Introduction .....	17-99
[B]	Tier 1 Capital.....	17-99
[C]	Tier 2 Capital .....	17-101

## *Table of Contents*

§ 17:8.6	Risk-Weighted Assets and Off-Balance-Sheet Amounts .....	17-101
[A]	Introduction .....	17-101
[B]	Risk Weights .....	17-102
[B][1]	In General.....	17-102
[B][2]	Illustration of Computation of Risk Weights ....	17-103
Table 17-1	Computation of Risk Weights.....	17-103
Table 17-2	Computation of Risk-Weighted Assets.....	17-103
§ 17:8.7	Minimum Levels of Capital.....	17-104
§ 17:8.8	Summary of the Minimum Requirements for Tier 1 and Tier 2 Capital.....	17-104
Table 17-3	Tier 1 and Tier 2 Capital Rules .....	17-104
§ 17:8.9	Minimum Ratio of Tier 1 Capital to Total Assets .....	17-106
§ 17:8.10	Treasury's Capital Purchase Program Under TARP.....	17-107
§ 17:8.11	Well-Capitalized Bank Holding Company Status and Its Importance in the Wells Fargo-Wachovia Merger.....	17-107
§ 17:8.12	Countercyclical Capital Requirements, Impact of the Dodd-Frank Act.....	17-108
§ 17:8.13	Introduction to Post-Common Rule Capital Adequacy Provisions.....	17-109
§ 17:8.14	Introduction to the Enhanced Prudential Standards Under Reg. YY .....	17-114
§ 17:9	Election in 2008 by Goldman Sachs and Morgan Stanley to Become Bank Holding Companies.....	17-114
§ 17:9.1	Introduction .....	17-114
§ 17:9.2	Why They Became Bank Holding Companies ....	17-115
§ 17:9.3	How They Became Bank Holding Companies.....	17-116
§ 17:10	Acquisitions by Foreign Banks of U.S. Banks— The Impact of FBSEA.....	17-117
§ 17:10.1	Introduction to FBSEA .....	17-117
§ 17:10.2	ICBC Acquires BEA, U.S.A., 2011 .....	17-119
§ 17:10.3	Fed Approves the Industrial and Commercial Bank of China Acquisition of the Bank of East Asia .....	17-120
§ 17:10.4	Fed Approval of Establishment of U.S. Branch by Agricultural Bank of China and Bank of China .....	17-122
§ 17:11	OCC and FDIC 2024 Statements of Policy (That Is, the OCC SoP and the FDIC SoP) Regarding Mergers of Financial Institutions .....	17-123
§ 17:11.1	Introduction .....	17-123
[A]	In General .....	17-123
[B]	Review of the OCC SoP and the FDIC SoP .....	17-126

§ 17:11.2	Introduction to the OCC SoP .....	17-126
[A]	Background .....	17-126
[B]	Basic Description of the OCC SoP and Regulatory Amendments .....	17-128
[C]	OCC SoP .....	17-128
[C][1]	Introduction.....	17-128
[C][2]	General Principles of OCC Review .....	17-129
[C][3]	The Financial Stability Factor in OCC Review .....	17-131
[C][4]	The Financial and Managerial Resources, Future Prospects, and Convenience and Needs of the Community Factors in OCC Review .....	17-132
[C][4][a]	Introduction .....	17-132
[C][4][b]	Financial Resources .....	17-132
[C][4][c]	Managerial Resources .....	17-133
[C][4][d]	Future Prospects .....	17-133
[C][4][e]	The Convenience and Needs Factor in OCC Review .....	17-134
§ 17:12	FDIC Substantive Approach to Evaluating Bank Mergers .....	17-135
§ 17:13	The DOJ Withdraws from the 1995 Bank Merger [Antitrust] Guidelines and Adopts New Bank Merger Guidelines.....	17-137
§ 17:13.1	Introduction to the Issue .....	17-137
§ 17:13.2	Introduction to the DOJ's Banking Antitrust Addendum to Its 2023 Merger Guidelines.....	17-138
[A]	In General .....	17-138
[B]	The Preamble to the 2024 Banking Addendum.....	17-138
[C]	Substantive Considerations in Bank Merger Review.....	17-140
[D]	Bank Merger Review Procedures .....	17-141

## **Chapter 18      Introduction to M&A in FCC, FERC and Aviation Regulated Industries**

§ 18:1	Scope .....	18-4
§ 18:1.1	References .....	18-5
§ 18:1.2	Trump Administration's Potential Modification of FCC Merger Approval Standards .....	18-5
§ 18:2	Regulation of Telecom M&A—The Role of the Federal Communications Commission .....	18-6
§ 18:2.1	Introduction .....	18-6

*Table of Contents*

§ 18:2.2	Issues Under the 1934 and 1996 Acts .....	18-7
[A]	The FCC, the Communications Act of 1934, and the Telecommunications Act of 1996 .....	18-7
[B]	The FCC’s Transaction Team.....	18-10
[C]	Introduction to the Comcast–NBCU Joint Venture.....	18-10
[D]	Challenge to Timing of FCC’s Review Rejected, Deal Dies, and Termination Fee Paid— <i>Tegna</i> .....	18-12
§ 18:2.3	Regulation of Telephone and Cellular M&A .....	18-13
[A]	Background .....	18-13
[B]	Provision of the 1934 Act Governing Mergers and Acquisitions of Telephone and Cellular Companies .....	18-13
[B][1]	Introduction.....	18-13
[B][2]	Application of the Public Interest Standards in Sections 214(a) and 310(d) .....	18-14
[B][3]	FCC Is Monitoring Cellular Acquisitions for Compliance with Commitments .....	18-16
§ 18:2.4	Regulation of Broadcast M&A .....	18-17
[A]	Background .....	18-17
[B]	Introduction to the Broadcast Ownership Rules.....	18-17
[B][1]	In General.....	18-17
[B][2]	<i>Prometheus III</i> .....	18-17
[B][3]	The FCC Responds to <i>Prometheus III</i> .....	18-18
[B][4]	August 2016 FCC Order Re: 2014 and 2015 Review of Broadcast Ownership Rules; Diversification of Ownership; and Joint Sales Agreements .....	18-19
[B][5]	Broadcast Ownership Rules and the Supreme Court’s Decision in <i>Prometheus IV</i> .....	18-20
[B][5][a]	Broadcast Ownership Rules Before the Supreme Court’s 2021 Decision in <i>Prometheus IV</i> .....	18-20
[B][5][b]	Broadcast Ownership Rules After the Supreme Court’s Decision in <i>Prometheus IV</i> .....	18-22
[B][6]	FCC Reinstates Pre-August 2016 UHF Discount .....	18-24
[B][7]	The Impact of the Reinstatement of the UHF Discount Rule on the Sinclair–Tribune Deal .....	18-25
[B][8]	Observations on the Ownership Rules .....	18-25
[C]	Treatment of the Broadcast Ownership Rules in the Comcast–NBCU Joint Venture .....	18-26

[D]	Cert. Denied in Appeal of Third Circuit's Decision Upholding the FCC's Prohibition on Cross-Ownership of Broadcast and Newspapers .....	18-26
§ 18:2.5	Regulation of Cable M&A .....	18-26
[A]	Background .....	18-26
[B]	Prohibition Against Certain Telco-Cable Buyouts: Impact of the 1996 Act .....	18-27
[C]	Horizontal and Vertical Ownership Restrictions for Cable Operators.....	18-27
[C][1]	Introduction.....	18-27
[C][2]	Treatment of the Horizontal and Vertical Issues in the Comcast–NBCU Joint Venture.....	18-29
[D]	Section 301(d) Analysis and Conditions and Commitments in the Comcast–NBCU Joint Venture.....	18-30
[E]	FCC Issues in Comcast Merger with Time Warner Cable.....	18-32
[F]	Net Neutrality.....	18-35
[F][1]	Introduction to the Concept of Net Neutrality .....	18-35
[F][2]	President Obama's Support of Net Neutrality: First, Adopted by the FCC, Later Abandoned by the FCC During the Trump Administration .....	18-35
[F][3]	The FCC's February 26, 2014 Net Neutrality Order .....	18-36
[F][4]	Impact of the Net Neutrality on the Comcast–Time Warner Cable Transaction.....	18-39
[F][5]	Abandonment by Comcast of Its Proposed Acquisition of Time Warner Cable and Subsequent Agreement of Charter to Acquire Time Warner Cable.....	18-41
[F][6]	FCC Abandons Net Neutrality .....	18-42
§ 18:2.6	Regulation of Satellite M&A.....	18-44
[A]	In General .....	18-44
[B]	Discussion of FCC Regulatory Issues in the Sirius–XM Deal .....	18-46
[C]	AT&T's Acquisition of DirecTV .....	18-47
[C][1]	FCC Approves AT&T's Acquisition of DirecTV.....	18-49
§ 18:2.7	Regulation of Cross-Border Telecom M&A.....	18-50
[A]	Proposed Liberalization of Foreign Ownership of Broadcast Licenses.....	18-51

*Table of Contents*

§ 18:2.8	Vertical Mergers: The Case of AT&T-Time Warner.....	18-53
[A]	Basic Facts.....	18-53
[B]	FCC's Approach to the Transaction .....	18-53
[C]	The DOJ's Challenge to the Transaction on Antitrust Grounds: The District Court Opinion, in Brief .....	18-54
[D]	The D.C. Circuit's Decision, on Appeal.....	18-57
§ 18:3	Regulation of Utility M&A: The Role of the Federal Energy Regulatory Commission .....	18-58
§ 18:3.1	Introduction .....	18-58
§ 18:3.2	Role of FERC in Utility M&A.....	18-58
[A]	Description of the FERC.....	18-58
[B]	Statutes Governing FERC's Role in Mergers in the Electricity Industry.....	18-58
[C]	Regulations Governing FERC's Role in Mergers in the Electricity Industry .....	18-60
[C][1]	FERC Policy Statement on Mergers.....	18-60
[C][2]	Filing Requirements Rule As Amended in 2006 .....	18-61
[C][2][a]	Introduction .....	18-61
[C][2][b]	Horizontal and Vertical Competitive Analysis Screens .....	18-61
[C][2][c]	Cross-Subsidization Issue.....	18-62
[D]	U.S. Government Accountability Office Report on FERC's Merger Policy .....	18-62
[E]	FERC's 2016 Notice of Inquiry on Market Power .....	18-63
[E][1]	The Notice.....	18-63
[E][2]	The DOJ and FTC Response to the Notice .....	18-63
§ 18:3.3	Nuclear Regulatory Commission Action with Respect to Mergers Involving Nuclear Plants.....	18-64
§ 18:3.4	State Law Regulation of Utility Mergers .....	18-65
[A]	Case of California .....	18-65
[B]	2008 GAO Testimony Regarding State Regulation .....	18-66
§ 18:3.5	Discussion of FERC Regulatory Issues in the TXU LBO .....	18-67
§ 18:4	Introduction to the Regulation of Airline M&A.....	18-68
§ 18:4.1	Background .....	18-68
§ 18:4.2	Further on Antitrust Aspects of Airline Mergers—US Air-American Merger .....	18-71

**VOLUME 4****Table of Chapters .....** v**PART VII**  
**CROSS-BORDER CONSIDERATIONS IN M&A****Chapter 19 Introduction to Corporate, Securities, Tax,  
Antitrust, and Exxon-Florio Issues in Inbound  
Cross-Border M&A**

§ 19:1	Scope.....	19-6
§ 19:1.1	References .....	19-8
§ 19:2	The Current and Historic Economic Levels of Cross-Border Mergers and Acquisitions.....	19-8
§ 19:2.1	In General .....	19-8
[A]	Introduction .....	19-8
[A][1]	Economic Impact of Both Inbound and Outbound Addressed .....	19-9
[B]	2007 Cross-Border Mergers and Acquisitions.....	19-9
[C]	2008 Cross-Border Mergers and Acquisitions.....	19-10
[D]	2009 Cross-Border Mergers and Acquisitions.....	19-10
[E]	2010 Cross-Border Mergers and Acquisitions.....	19-11
[F]	2011 Cross-Border Mergers and Acquisitions.....	19-12
[G]	2012 Cross-Border Mergers and Acquisitions.....	19-13
[H]	2013 Cross-Border Mergers and Acquisitions.....	19-14
[I]	2014 Cross-Border Mergers and Acquisitions.....	19-14
[J]	2015 Cross-Border Mergers and Acquisitions.....	19-16
[K]	2016 Cross-Border Mergers and Acquisitions.....	19-17
[L]	2017 Cross-Border Mergers and Acquisitions.....	19-18
[M]	2017 Impact of the TCAJA on FDI and Cross-Border Mergers and Acquisitions.....	19-19
[N]	2018 Cross-Border Mergers and Acquisitions.....	19-22
[O]	2019 Through 2021 Cross-Border Mergers and Acquisitions .....	19-22
[O][1]	Introduction to Issues in Cross-Border M&A, Pre- and Post-COVID-19 .....	19-22
[O][2]	2019–2021 Levels of Cross-Border M&A.....	19-22
[O][2][a]	Introduction to UNCTAD and Its Reports ....	19-22
[O][2][b]	Some of the Principal Findings in the UNCTAD January 2020 Report on Cross-Border Investment (FDI) in 2019.....	19-23

*Table of Contents*

[O][2][c]	UNCTAD's March 26, 2020 Assessment of the Impact on COVID-19 on Cross-Border Investment .....	19-24
[O][2][d]	UNCTAD's May 13, 2020 Report on Global Trade .....	19-25
[O][2][e]	Some of the Principal Findings in the UNCTAD January 2021 Report on Cross-Border Investment (FDI) in 2020.....	19-25
[O][2][f]	Some of the Principal Findings in the UNCTAD May 2021 Report on Global Trade Trends and Forecasts .....	19-27
[O][2][g]	Level of Cross-Border M&A in the First Quarter 2021 .....	19-27
[O][2][h]	Level of FDI and Cross-Border M&A As of the Second Quarter of 2021 .....	19-28
[O][2][i]	UNCTAD's June 2022 Report on Cross-Border M&A Activity in 2021 .....	19-29
[P]	2022 Cross-Border Mergers and Acquisitions.....	19-30
[P][1]	Introduction: Inflation Hits Hard in 2022 .....	19-30
[P][2]	Cross-Border M&A During the First Quarter of 2022 .....	19-30
[P][3]	Cross-Border M&A Activity Involving Ukraine and Russia .....	19-31
[P][4]	Export Controls on Russia As a Result of Ukraine .....	19-32
[Q]	Cross-Border M&A Activity During the First Half of 2023 .....	19-32
[R]	Introduction to the Level of Cross-Border M&A During 2023 as Reported by UNCTAD in June 2024.....	19-33
[S]	Introduction to the Level of Cross-Border M&A During the First Half of 2024, As Reported by the Boston Consulting Group.....	19-35
§ 19:2.2	Inbound Cross-Border M&A from China .....	19-36
[A]	Introduction .....	19-36
[B]	Required China Regulatory Approvals .....	19-36
[C]	Chinese Investment in the United States in 2015 and 2016 .....	19-37
[D]	Potential Understatement of the Level of Cross-Border M&A Activity Between the United States and China .....	19-38
[E]	Potential Impact of the Trump Administration on Inbound Acquisitions by Chinese Companies .....	19-39

[F]	Illustration of the CFIUS-Related Provisions in a Merger Agreement for the Acquisition of a U.S. Target by a Chinese Acquirer .....	19-39
[G]	Chinese Investment into the United States from 2016 Through 2018.....	19-40
§ 19:2.3	Introduction to Wachtell's Annual Checklist for Inbound Acquisitions .....	19-41
[A]	Background .....	19-41
[B]	Introduction to Wachtell's 2023 Checklist for Successful Acquisitions in the United States.....	19-42
[C]	Introduction to Wachtell's 2024 Checklist for Successful Acquisitions in the United States.....	19-43
§ 19:3	U.S. Corporate Issues in Inbound Acquisitions .....	19-46
§ 19:3.1	Structuring the Acquisition of a Closely Held U.S. Target .....	19-46
§ 19:3.2	Structuring the Acquisition of a Publicly Held U.S. Target: The Reverse Subsidiary Merger .....	19-46
§ 19:3.3	Shareholder Voting Rule of Foreign Acquirer.....	19-47
§ 19:4	Federal Securities Issues in Inbound Acquisitions .....	19-48
§ 19:4.1	Inbound Negotiated Acquisitions .....	19-48
[A]	Acquisitions for Cash .....	19-48
[B]	Acquisitions for Securities: Form F-4.....	19-48
[C]	Issuance of American Depository Shares.....	19-49
[D]	Exemption from the Proxy and Section 16 Rules for Foreign Issuers .....	19-50
§ 19:4.2	Inbound Tender Offers and Open Market Purchases .....	19-50
§ 19:5	Federal Income Tax Issues in Inbound Acquisitions ....	19-50
§ 19:5.1	Introduction .....	19-50
§ 19:5.2	Acquisition by a Foreign Acquirer of a U.S. Target in a Taxable Acquisition.....	19-51
[A]	In General .....	19-51
[B]	Impact of the TCAJA on Inbound Taxable Acquisitions .....	19-52
§ 19:5.3	Acquisitions by a Foreign Acquiring Corporation of a U.S. Target in a Tax-Free Reorganization .....	19-52
[A]	In General .....	19-52
[B]	The Structure of the Proposed Acquisition of NYSE Euronext .....	19-53
Figure 19-1	Basic Structure of the Deal .....	19-55
Figure 19-2	Post-Transaction Ownership Structure .....	19-56
[C]	Introduction to Inversions and New Inversions.....	19-56
§ 19:5.4	While Investment in the United States Grows, U.S. Taxes Collected Does Not.....	19-57

*Table of Contents*

§ 19:6	Antitrust and Hart-Scott-Rodino Issues in Inbound Acquisitions .....	19-58
§ 19:6.1	Substantive Antitrust .....	19-58
§ 19:6.2	Hart-Scott-Rodino .....	19-58
§ 19:6.3	Possible Impact of the E.U.'s Merger Control Regulation or Antitrust Regulation in the Foreign Country Where a U.S. Target Has Foreign Operations.....	19-58
§ 19:7	Committee on Foreign Investment in the U.S. (CFIUS) Restrictions in Inbound Acquisitions.....	19-58
§ 19:7.1	Background .....	19-58
§ 19:7.2	Application of CFIUS, As Amended by FINSA and FIRRMA .....	19-61
[A]	Introduction .....	19-61
[B]	The Makeup of CFIUS; Introduction to Phase I and Phase II; and Summary of the Timing Rules.....	19-61
[B][1]	The Makeup of CFIUS.....	19-61
[B][2]	Introduction to Phase I "Reviews" and Phase II "Investigations" .....	19-62
[B][3]	Introduction to the Timing Rules .....	19-62
[C]	The Conduct of National Security Reviews and the Timing Rules.....	19-63
[C][1]	In General.....	19-63
[C][2]	The Control Concept.....	19-63
[C][3]	Initiation of a Review, "Voluntary" or "Unilateral," and the Effect.....	19-64
[C][3][a]	General Principles .....	19-64
[C][3][b]	The Advantage of a Voluntary Filing.....	19-65
[C][4]	Mandatory Declarations for Certain Acquisitions of TID Businesses .....	19-66
[C][5]	The Section 4556(f) Factors to Be Considered.....	19-66
[C][6]	The Timing Rules for the Review and the "Analysis" of the Director of National Intelligence (DNI) .....	19-67
[D]	Situations Requiring a National Security Phase II "Investigation" .....	19-67
[D][1]	In General.....	19-67
[D][2]	The Timing Rule for a Phase II Investigation....	19-68
[E]	Actions of CFIUS .....	19-68
[F]	Action by the President Within Fifteen Days.....	19-68
[G]	Certifications to Congress, Confidentiality, and Annual Report to Congress .....	19-69
[H]	Pre-Notice Consultation with CFIUS .....	19-69
[I]	Introduction to the Provisions of a Merger Agreement Addressing CFIUS Provisions.....	19-70

[J]	Introduction to the Amendments to CFIUS Made by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) .....	19-70
[J][1]	Treasury Summary of FIRRMA and Principal Provisions .....	19-70
[J][2]	The Interim Regulations.....	19-72
[J][3]	2019 Proposed Regulations Under FIRRMA Regarding "Certain Investments" and "Real Estate" .....	19-73
[J][4]	2020 Final and Interim Regulations Regarding Investments in U.S. "Real Estate" by Foreign Persons .....	19-75
[J][5]	2020 Final and Interim Regulations Regarding Certain U.S. Investments by Foreign Persons ...	19-75
[J][6]	2020 Filing Fee Authorized Under FIRRMA Adopted on April 29, 2020.....	19-76
§ 19:7.3	Some Practical Aspects in Dealing with CFIUS.....	19-77
[A]	Starting CFIUS Review with a Voluntary Notice .....	19-77
[B]	Impact of COVID-19 on CFIUS.....	19-79
[B][1]	Covington on What's Happening with CFIUS in View of COVID-19 .....	19-79
[B][2]	The "Adversarial Capital" Issue .....	19-80
[B][3]	Team Telecom.....	19-81
[C]	The Five Eyes Exemption from Certain Provisions of CFIUS .....	19-83
§ 19:7.4	Impact of CFIUS on Acquisitions of U.S. Firms by Chinese Acquirers.....	19-84
[A]	Introduction .....	19-84
[B]	The <i>Ralls</i> Decision 2013 .....	19-84
[B][1]	Introduction and District Court Decision.....	19-84
[B][2]	The Circuit Court Decision in <i>Ralls</i> .....	19-86
[B][3]	Settlement in <i>Ralls</i> .....	19-87
[C]	The 2013 Smithfield Decision .....	19-87
[D]	In December 2016, Obama Blocks a China Firm from Acquiring Aixtron, a German Company with U.S. Operations.....	19-88
[E]	Syngenta 2016.....	19-90
[F]	Economic and Security Review Commission's 2016 Proposed Changes to CFIUS to Specifically Address Acquisitions by Chinese Firms of U.S. Operations .....	19-90
[G]	Illustration of the CFIUS-Related Provisions, Including a Reverse Termination Fee, in a Merger Agreement—the Case of the Acquisition by China's Alipay of MoneyGram.....	19-92
[G][1]	Introduction.....	19-92

*Table of Contents*

[G][2]	The Representations and Warranties Provision.....	19-94
[G][3]	The Covenants Provision.....	19-94
[G][4]	The Conditions Provision.....	19-95
[G][5]	The Termination Provisions and the Reverse Termination Fee.....	19-95
[G][6]	The General Provisions .....	19-97
[G][7]	The MoneyGram–Ant Deal Abandoned .....	19-97
[H]	President Trump Blocks Acquisition by Chinese Acquirer of Lattice, a U.S. Firm.....	19-98
[I]	2018 Assessment of the Impact of CFIUS on Chinese Acquirers .....	19-100
[J]	2019 Agreement on the Divestiture of Grindr by the Chinese Owner.....	19-101
[K]	March 2020, President Trump Orders Divestiture of StayNTouch .....	19-102
§ 19:7.5	Annual Reports on CFIUS.....	19-104
[A]	2014 Annual Report to Congress Filed February 2016 .....	19-104
[B]	2015 Annual Report to Congress Filed in September 2017, with Observations on 2017 and 2018 .....	19-105
[C]	2020 Annual Report to Congress, Filed August 2021 .....	19-107
[D]	2021 Annual Report to Congress, Filed August 2022 .....	19-108
[E]	2022 Annual Report to Congress, Filed August 2023 .....	19-109
[F]	2023 Annual Report to Congress, Filed August 2024 .....	19-110
§ 19:7.6	CFIUS and SPACs .....	19-112
§ 19:7.7	CFIUS Under President Biden .....	19-113
[A]	First Observations on the Approach of the Biden Administration to CFIUS Enforcement .....	19-113
[A][1]	Predictions from the Trump White House Counsel, Don McGahn.....	19-113
[A][2]	Biden's Reversal of Trump on TikTok .....	19-114
[B]	Biden's September 2022 CFIUS Order on "Evolving National Risk".....	19-115
[C]	CFIUS Order Requiring Broader Investment Scrutiny.....	19-116
[D]	CFIUS Penalty Guidelines.....	19-117
[E]	April 2024 Proposed Amendments to the Penalty and Other Provisions of CFIUS.....	19-118
[F]	Nippon Steel's Proposed Acquisition of U.S. Steel .....	19-119

§ 19:8	U.S. Investment by Sovereign Wealth Funds .....	19-121
§ 19:9	The April 2024 Law Requiring the Divestiture of TikTok: The Protecting Americans from Foreign Adversary Controlled Applications Act.....	19-123
§ 19:9.1	Introduction .....	19-123
§ 19:9.2	Some Background from the Congressional Research Service (CRS) .....	19-124
§ 19:9.3	September 2024 Federal Appeals Court Arguments in the Case.....	19-131

**Chapter 20      Introduction to Corporate, Securities, Tax,  
Antitrust, and Investment Restriction Issues  
in Outbound Cross-Border M&A**

§ 20:1	Scope.....	20-7
§ 20:1.1	References and Wachtell Checklist for Outbound Acquisitions .....	20-9
§ 20:1.2	Current and Historic Economic Levels of Cross-Border Mergers and Acquisitions.....	20-10
§ 20:2	U.S. Issues in Outbound Acquisitions.....	20-11
§ 20:2.1	U.S. Corporate Law Issues in Outbound Acquisitions .....	20-11
§ 20:2.2	Federal Securities Law Issues in Outbound and Foreign-to-Foreign Acquisitions.....	20-11
[A]	Impact of Securities Act of 1933 on Outbound Acquisitions by U.S. Acquirer of Foreign Target in Exchange for Securities of U.S. Acquirer .....	20-11
[A][1]	In General.....	20-11
[A][2]	The 901 Exemption .....	20-12
[A][3]	Conditions Applicable to Both the Issuer and Resale Safe Harbors .....	20-12
[A][4]	Additional Conditions Applicable to the Issuer Safe Harbor.....	20-13
[A][5]	The Resale Safe Harbor, Rules 904 and 905.....	20-14
[B]	Exemption Under Williams Act and '33 Act for Foreign Tender Offers and Mergers Involving Stock of Foreign Targets Traded in U.S. Markets.....	20-15
[B][1]	Introduction.....	20-15
[B][2]	Third-Party Tender Offers .....	20-16
[B][2][a]	Introduction and the Tier I and Tier II Ownership Conditions .....	20-16
[B][2][b]	The Tier I Exemption .....	20-17
[B][2][c]	The Tier II Exemption.....	20-18

*Table of Contents*

[B][2][d]	Determining the Percentage of a Foreign Target's Shares Held by U.S. Persons .....	20-20
[B][2][e]	The Exemption for Canadian Tender Offers .....	20-21
[B][3]	Exemptions Under Rule 14e-5 Relating to Purchases Outside the Tender Offer.....	20-22
[B][4]	Exemption to the Going Private Rules Under Rule 13e-3 .....	20-22
[B][5]	Issuer Tender Offers .....	20-23
[B][6]	Interpretive Guidance Regarding Cross-Border Tender Offers, Exclusion of Foreign and U.S. Shareholders, and Vendor Placements.....	20-23
[B][7]	Exemption Under the '33 Act for Issuance of Shares in an Exchange Offer or Business Combination .....	20-24
[B][8]	Exemption from the U.S. Proxy Rules.....	20-26
[C]	Impact of Securities Fraud Provision on Cross-Border Tender Offers .....	20-26
[C][1]	Rule 10b-5 and Section 14(e) .....	20-26
[C][2]	Section 13(d).....	20-29
§ 20:2.3	Federal Income Tax Issues in Outbound Acquisitions .....	20-30
§ 20:2.4	Antitrust and Hart-Scott-Rodino Issues in Outbound and Foreign-to-Foreign Acquisitions .....	20-30
[A]	Impact of Section 7 of the Clayton Act.....	20-30
[B]	Impact of Hart-Scott-Rodino on Acquisitions of Foreign Assets and Stock.....	20-31
[B][1]	Introduction.....	20-31
[B][2]	The Exemption for Acquisitions of Foreign Assets .....	20-32
[B][3]	The Exemption for Acquisitions of Foreign Stock.....	20-33
[B][4]	HSR Rules Relating to Filing in Multiple Jurisdictions.....	20-35
§ 20:2.5	Introduction to the Foreign Corrupt Practices Act (FCPA).....	20-35
[A]	In General .....	20-35
[B]	DOJ Opinion Letter Under the FCPA.....	20-37
[C]	Practical FCPA Guidance for Outbound M&A .....	20-38
[D]	FCPA: The SEC Wins Big.....	20-38
[E]	FCPA: Use of Intermediaries .....	20-39
[F]	DOJ's New Enforcement Policy .....	20-39
[G]	Limits on the Territorial Reach of the FCPA.....	20-42
§ 20:2.6	Introduction to New Inversions.....	20-43
§ 20:2.7	Brief Introduction to the Office of Foreign Asset Control (OFAC).....	20-44

§ 20:2.8	Biden Administration's "Reverse CFIUS" Rule for Certain Investments in China, Hong Kong, and Macau.....	20-45
[A]	Background .....	20-45
[B]	June 2024 Update on the Biden Administration's "Reverse CFIUS" Rules for Certain Investments in China, Hong Kong, and Macau: The Second Round Proposed CFIUS Rules .....	20-48
§ 20:2.9	Export Controls on Russia As a Result of the War in Ukraine.....	20-52
§ 20:3	Introduction to the Structure of the European Union and Its European Commission .....	20-52
§ 20:3.1	Introduction .....	20-52
§ 20:3.2	Brexit and M&A, As of March 2017.....	20-53
[A]	Introduction .....	20-53
[B]	Brexit and M&A As of October 2019 .....	20-55
[C]	Brexit and M&A As of January 2021 .....	20-56
[D]	Brexit in 2022: Before and After Prime Minister Johnson .....	20-56
§ 20:4	EU Regulation of Antitrust Aspects of M&A.....	20-57
§ 20:4.1	The Statutory Provisions .....	20-57
§ 20:4.2	The EU's Substantive Antitrust Standard.....	20-60
[A]	The MCR .....	20-60
[B]	European Commission's 2004 Horizontal Merger Guidelines.....	20-62
[B][1]	Background.....	20-62
[B][2]	Market Definition.....	20-64
[B][3]	Measuring Market Concentration and Enforcement Standards.....	20-64
[B][4]	Possible Anticompetitive Effects of Horizontal Mergers.....	20-66
[B][5]	Entry .....	20-66
[B][6]	Efficiencies.....	20-67
[C]	Guide to Several Cases Under the 1989 MCR.....	20-67
[C][1]	Introduction to the Court of First Instance .....	20-67
[C][2]	The Substantive Standard Under the 1989 MCR and Its Relationship to the Substantive Standard Under the 2004 MCR.....	20-68
[C][3]	Single Firm Dominance—Court of First Instance's 2005 Decision in <i>GE-Honeywell</i> .....	20-68
[C][4]	Collective Dominance— <i>Gencor, Airtours, and Impala</i> .....	20-69
[D]	European Commission's Guidelines on Horizontal Cooperation Agreements .....	20-71

*Table of Contents*

§ 20:4.3	Pre-Merger Notification in the EU.....	20-72
[A]	In General .....	20-72
[B]	Determining if a Concentration Has a Community Dimension .....	20-73
[C]	The Procedural Regulation and Report Form .....	20-73
[D]	December 2013 Amendments to the Procedural Regulation and Report Forms .....	20-74
[E]	2016 Consultation on Procedural and Jurisdictional Aspects of the MCR .....	20-75
[F]	2023 EU Competition Commission's Changes to the Procedural Rules for Evaluating Mergers ....	20-77
[F][1]	Introduction.....	20-77
[F][2]	The Preamble to the Merger Implementing Regulation.....	20-79
§ 20:4.4	Post-Filing Procedures Under the MCR:	
	Phase I and Phase II .....	20-80
§ 20:4.5	EU-U.S. Best Practices in Merger Enforcement ....	20-81
§ 20:4.6	European Commission Fines Illumina for Completing Acquisition Without Approval .....	20-81
§ 20:4.7	Microsoft's Proposed Acquisition of Activision:	
	(1) European Commission Clears; (2) FTC Challenge Rejected; and (3) U.K. Challenge Pending As of September 4, 2023 .....	20-82
[A]	The Transaction .....	20-82
[B]	The Antitrust (That Is, Competition) Conditions in the Merger Agreement .....	20-82
[C]	The European Commission's Action on the Transaction .....	20-85
[D]	The FTC's Action on the Transaction .....	20-85
[E]	The Extension of the Merger Agreement to Give the Parties the Opportunity to Convince the U.K.'s Competition Authority to Approve the Transaction .....	20-86
§ 20:4.8	Other National Antitrust Regimes .....	20-87
§ 20:5	EU Regulations of Corporate, Securities, Tax and Investment Restriction Aspects of M&A .....	20-88
§ 20:5.1	Scope of Regulation of Mergers and Acquisitions in the European Union.....	20-88
§ 20:5.2	The EC's 1978 Directive Regarding Corporate Law Aspects of Mergers .....	20-88
§ 20:5.3	The EC's Directives on Corporate Law Aspects of Cross-Border Mergers .....	20-90
[A]	The 2005 Directive .....	20-90
[B]	The 2019 Action .....	20-90

§ 20:5.4	The EC's 2005 Directive on Income Tax Aspects of Mergers, Asset Acquisitions, Share Exchanges, and Divisions.....	20-91
§ 20:5.5	EU's Directive on Free Movement of Capital—Prohibitions Against Investment Restrictions.....	20-93
[A]	In General .....	20-93
[B]	EU's Proposal for Screening of Foreign Direct Investment (FDI) into Member States .....	20-94
[C]	EU Investment Screening Approved, April 2019 .....	20-95
[D]	Skadden's "CFIUS Goes Global" 2022 Report .....	20-96
§ 20:5.6	The EC's 2004 Takeover Directive .....	20-97
[A]	Background .....	20-97
[B]	General Principles .....	20-98
[C]	Mandatory and Voluntary Bids.....	20-98
[D]	All Holders, Best Price Rule.....	20-99
[E]	No Frustrating Action Rule .....	20-99
[F]	Target's Position on the Takeover .....	20-100
[G]	Breakthrough Rule.....	20-100
[H]	Optional Provisions: Frustrating Actions and Breakthrough.....	20-100
[I]	Squeeze-Out Right .....	20-101
[J]	Sell-Out Right .....	20-101
[K]	Other Provisions .....	20-101
§ 20:6	The U.K.'s City Code and Scheme of an Arrangement .....	20-102
§ 20:6.1	The U.K.'s City Code on Takeovers and Mergers .....	20-102
[A]	Introduction to the Takeover Panel and the City Code .....	20-102
[B]	Keeping Track of Amendments to the U.K. Takeover Code.....	20-104
[B][1]	In General.....	20-104
[B][2]	2023 Amendments to the U.K. Takeover Code .....	20-104
[B][3]	Amendments to Rule 21, Target's Defensive Actions, of the 2023 Amended U.K. Takeover Code: Some Key Points As of December 2023 .....	20-105
[C]	The City Code and Its Application in NASDAQ's Offer for London Stock Exchange .....	20-106
[C][1]	Background.....	20-106
[C][2]	Section D, The Approach, Announcements and Independent Advice.....	20-107
[C][3]	Section E, Restrictions on Dealings.....	20-110

*Table of Contents*

[C][4]	Section F, The Mandatory Offer and Its Terms .....	20-112
[C][5]	Section G, The Voluntary Offer and Its Terms .....	20-112
[C][6]	Section H, Provisions Applicable to All Offers .....	20-113
[C][7]	Section I, Conduct During the Offer.....	20-114
[C][8]	Section J, Documents from the Offeror and the Offeree Board .....	20-117
[C][9]	Section K, Profit Forecasts.....	20-117
[C][10]	Section L, Asset Valuations .....	20-118
[C][11]	Section M, Distribution of Documentation During an Offer .....	20-118
[C][12]	Section N, Offer Timetable and Revision .....	20-118
[C][13]	Section O, Restrictions Following Offers .....	20-119
[C][14]	Section P, Partial Offers .....	20-119
[C][15]	Section Q, Redemption or Purchase by a Company of Its Own Securities .....	20-119
[C][16]	Section R, Dealings by Connected Exempt Principal Traders .....	20-119
[D]	The U.K. Consultation on, and 2011 Adoption of, Amendments.....	20-119
[E]	Assessment of the U.K.'s New Takeover Rules .....	20-121
[E][1]	Takeover Panel's Assessment of the New Rules.....	20-121
[E][2]	Deal Professor's Assessment of the New Rules.....	20-123
[E][3]	Author's Assessment .....	20-124
§ 20:6.2	U.K. Compulsory Acquisition of Minority Shares and Minority Put After a Tender Offer.....	20-124
§ 20:6.3	U.K. Companies Act Disclosure Requirements Regarding a Target's Shares.....	20-124
§ 20:6.4	Schemes of Arrangement and Merger of Public Companies in the U.K.....	20-125
[A]	Introduction .....	20-125
[B]	Schemes of Arrangement—GE's Acquisition of Amersham .....	20-126
[C]	Inbev's Acquisition of SABMiller Pursuant to a Scheme of Arrangement: The Voting Decision of the U.K. High Court.....	20-127
[D]	Mergers .....	20-128
§ 20:6.5	Impact of the U.K.'s Prospectus Requirements .....	20-128
§ 20:6.6	U.K. Investment Restriction Law Adopted in 2021.....	20-129
§ 20:7	Introduction to Employment Issues in Outbound M&A.....	20-130

§ 20:8	Issues in an Acquisition by a U.S. Acquirer of a China Target.....	20-131
§ 20:8.1	Introduction .....	20-131
§ 20:8.2	The Level of Cross-Border M&A Activity Between the United States and China .....	20-133
[A]	The Current State of Play.....	20-133
[B]	Potential Liberalizations of Investment Restrictions .....	20-134
§ 20:8.3	China's Entry into the WTO .....	20-135
§ 20:8.4	Introduction to Chinese Business Entities.....	20-136
[A]	China's Company Law .....	20-136
[A][1]	Introduction.....	20-136
[A][2]	Shares of a Publicly Held China Company Limited by Shares: "A," "B," "H," and "N" Shares .....	20-137
[A][3]	Foreign-Invested Enterprises (FIEs) .....	20-138
[A][4]	China Wholly Foreign-Owned Enterprises (WFOE).....	20-139
[A][5]	Introduction to Variable Interest Entities and the Corporate Structure of Alibaba .....	20-139
[A][5][a]	Introduction .....	20-139
[A][5][b]	Alibaba Corporate Structure Set Out in Form F-1A, Filed with the SEC on July 11, 2014 .....	20-140
§ 20:8.5	China Foreign Investment Catalogue .....	20-142
[A]	China Opens Certain Industries to Foreign Ownership.....	20-143
[B]	Elimination of Investment Restrictions in the Financial Sector.....	20-144
§ 20:8.6	Introduction to Provisions on M&A of a China Domestic Enterprise by Foreign Investors, the Foreign Investor M&A Rules .....	20-144
[A]	Introduction .....	20-144
§ 20:8.7	Acquisition of a Publicly Held China Target Pursuant to the China Takeover Code .....	20-147
§ 20:8.8	Acquisition of a China Target Through the Use of the Merger Provisions of China Company Law .....	20-148
[A]	Introduction .....	20-148
[B]	Merger Provisions of China Company Law .....	20-149
[C]	Provisions on the Merger and Division of Enterprises with Foreign Investment, the FIE Merger Regulation .....	20-149
§ 20:8.9	Asset or Stock Acquisition of a Closely Held China Target.....	20-151
[A]	Asset Acquisition .....	20-151

[B]	Stock Acquisition and H.B. Fuller's Acquisition of China's Tonsan .....	20-151
§ 20:8.10	Antitrust Review of Mergers and Acquisitions in China .....	20-152
[A]	Introduction to the Anti-Monopoly Law (AML) .....	20-152
[B]	Introduction to the Procedural Rules Under the AML and the Administrator: MOFCOM and Its Successor SAMR.....	20-153
[C]	MOFCOM's Decision in Coke's Proposed Acquisition of Huiyuan .....	20-155
§ 20:8.11	China's Corporate Income Tax, Briefly .....	20-156

## **Chapter 21 Federal Income Tax Considerations in Taxable Cross-Border M&A**

§ 21:1	Scope .....	21-5
§ 21:1.1	References .....	21-5
§ 21:1.2	Introduction to Two of Biden's Proposed Changes in the U.S. Taxation of Foreign Income .....	21-6
§ 21:2	Introduction to U.S. Federal Income Taxation of Cross-Border Transactions.....	21-8
§ 21:2.1	General Principles of International Tax .....	21-8
[A]	Purpose .....	21-8
[B]	Brief Introduction to the Source Principle.....	21-9
[C]	Brief Introduction to the Net Basis Tax on Effectively Connected Income and the Gross Basis Tax on Passive Income.....	21-9
[D]	Brief Introduction to the Allocation of Income and Expense Items .....	21-10
[E]	Brief Introduction to the Concepts of a Foreign Branch, a Foreign Subsidiary, a Controlled Foreign Corporation (CFC), and the Foreign Tax Credit .....	21-11
[E][1]	In General.....	21-11
[E][2]	Choosing a Branch or Subsidiary for U.S. Controlled Foreign Business After the TCAJA.....	21-11
[E][3]	What Is Biden's Position on the Taxation of the Active Income of Earned by Controlled Foreign Corporations (CFCs)?.....	21-12
[F]	Brief Introduction to the Impact of Tax Treaties.....	21-12
[F][1]	In General.....	21-12
[F][2]	The 2016 Model Treaty .....	21-13
[G]	Brief Introduction to the Treatment of Foreign Currency .....	21-13

[H]	Brief Introduction to the Difference in the Treatment of a Resident Alien and a Nonresident Alien .....	21-13
[I]	Brief Introduction to the Section 482 Limit on Transfer Pricing Abuses .....	21-14
§ 21:2.2	Taxation of Inbound Business Activity .....	21-14
[A]	Foreign Corporation Doing Business in the United States Through a Domestic Branch and Receiving Passive Income from U.S. Sources .....	21-14
[A][1]	General Principles.....	21-14
[A][2]	Impact of Tax Treaties.....	21-15
[A][2][a]	Impact of Treaty on the Net Basis and the Gross Basis Taxes and the Branch Profits Tax .....	21-15
[A][2][b]	Limitations on Treaty Shopping.....	21-15
[A][3]	Investments by Sovereign Wealth Funds .....	21-16
[B]	Foreign Corporation Doing Business in the United States Through a Domestic Subsidiary....	21-16
[B][1]	General Principles.....	21-16
[B][2]	Impact of Treaty on the Gross Basis Tax .....	21-17
[B][3]	Limitation on Earnings Stripping.....	21-17
[B][3][a]	Limitations on Earnings Stripping Prior to the TCAJA.....	21-17
[B][3][b]	Earnings Stripping After the TCAJA .....	21-18
[C]	Impact of the TCAJA's Beat.....	21-19
[D]	Taxation of Income from U.S. Real Property, Including the Impact of FIRPTA.....	21-21
[D][1]	Introduction.....	21-21
[D][2]	The Net Basis Election .....	21-21
[D][3]	FIRPTA's Taxation of Gain on the Disposition of U.S. Real Property.....	21-22
[D][4]	Impact of the Model Treaty on Rents and Gains from U.S. Real Property .....	21-23
§ 21:2.3	Taxation of Outbound Business Activity.....	21-23
[A]	Domestic Corporation Doing Business Abroad Through a Foreign Branch.....	21-23
[A][1]	The Worldwide System .....	21-23
[A][2]	The Foreign Tax Credit .....	21-24
[A][2][a]	The 901 Direct Credit .....	21-24
[A][2][b]	The 904 Limitation .....	21-24
[B]	Domestic Corporation Doing Business Abroad Through a Foreign Subsidiary.....	21-26
[B][1]	The Pre-TCAJA Deferral Principle .....	21-26
[B][2]	Introduction to the TCAJA's (1) "Cookie"; (2) "Carrot"; and (3) "Four Sticks" .....	21-26
[B][2][a]	In General .....	21-26

*Table of Contents*

[B][2][b]	The Cookie: Territoriality .....	21-27
[B][2][c]	The Carrot: FDII .....	21-28
[B][2][d]	Stick No. 1: GILTI .....	21-28
[B][2][e]	Stick No. 2: the BEAT .....	21-29
[B][2][f]	Stick No. 3: Definition of Intangible .....	21-30
[B][2][g]	Stick No. 4: Gain Recognition Under Section 367(a) .....	21-31
[B][3]	Definition of a CFC .....	21-31
[B][4]	Operation of Subpart F: Foreign Base Company Income .....	21-32
[B][5]	Section 956 Constructive Dividends Resulting from Investment in U.S. Property Before and After the TCAJA .....	21-33
[B][6]	Transfer of Property to a CFC in a Section 351 Transaction .....	21-34
[B][6][a]	Pre-TCAJA Applicability of Section 367 to an Outbound 351 Transaction .....	21-34
[B][6][b]	Post-TCAJA Applicability of Section 367 to an Outbound 351 Transaction, "Stick No. 4" .....	21-35
[B][7]	Separate Application of the Foreign Tax Credit .....	21-36
[B][8]	The TCAJA's Repeal of the Indirect Foreign Tax Credit for Dividends Paid by Foreign Corporations to U.S. Corporate Shareholders Owning at Least 10% of the Foreign Corporation's Stock .....	21-36
[B][9]	Impact of the TCAJA Amended Section 482 on Outbound Transactions .....	21-37
[B][10]	Impact of BEPs Transfer Pricing Project on M&A and Relationship to the TCAJA's Section 163(j) Limitation of the Deduction of Interest .....	21-37
[B][11]	M&A Impact of Apple and Other Rulings on State Aid .....	21-38
[B][12]	Avoiding Repatriation Through Stock Purchases from Related Corporations, Section 304; Before and After the TCAJA .....	21-39
[C]	Passive Foreign Investment Companies .....	21-41
§ 21:3	Inbound Taxable Stock Acquisition: Foreign Acquirer Acquires U.S. Target .....	21-43
§ 21:3.1	Introduction .....	21-43
§ 21:3.2	General Principles .....	21-43
§ 21:3.3	Illustration: InBev's Acquisition of Anheuser-Busch .....	21-44

§ 21:4	Inbound Taxable Asset Acquisitions .....	21-44
§ 21:4.1	Introduction .....	21-44
§ 21:4.2	Treatment of U.S. Target and U.S. Shareholders.....	21-44
§ 21:4.3	Treatment of the Foreign Acquirer or Its Subsidiary.....	21-45
[A]	Treatment of the Foreign Acquirer or Its Subsidiary on the Acquisition.....	21-45
[B]	Treatment of the Foreign Acquirer or Its Subsidiary on the Operations .....	21-45
[C]	Tax Treatment of the Repatriation of U.S. Profits.....	21-45
§ 21:5	Outbound Taxable Stock Acquisitions: U.S. Acquirer Acquires Foreign Target .....	21-46
§ 21:5.1	Introduction .....	21-46
§ 21:5.2	Acquisition of the Stock of a Foreign Target That Is Not a CFC .....	21-47
[A]	Acquisition of the Stock of a Closely Held Foreign Target.....	21-47
[A][1]	General Principles and the Section 338(g) Election.....	21-47
[A][2]	The Impact of the General Asset Acquisition Rule, Section 901(m) .....	21-48
[A][3]	Debt/Equity and Other Issues .....	21-49
[B]	Acquisition of the Stock of a Publicly Held Foreign Target.....	21-49
[B][1]	In General.....	21-49
[B][2]	GE's Acquisition of the U.K.'s Amersham, plc .....	21-50
§ 21:5.3	Acquisition of the Stock of a Foreign Target That Is a CFC .....	21-54
[A]	Introduction .....	21-54
[B]	Impact of Section 1248 on Sale of Stock of a CFC by a "U.S. Shareholder," Prior to and After the TCAJA.....	21-54
[B][1]	The Purpose of Section 1248 Prior to the TCAJA.....	21-54
[B][2]	The Purpose of Section 1248 After the TCAJA Where Domestic Parent Owns 100% of the Stock of Foreign Sub .....	21-55
[B][3]	Basic Illustration.....	21-55
[C]	Section 338 Election.....	21-56
[C][1]	General Principles.....	21-56
[C][2]	Impact of the Section 338 Election on the CFC Target and Its Shareholders .....	21-57
[C][3]	Required Notice to "U.S. Shareholders" of the CFC Target .....	21-58

[D]	Illustration of Provision of a Stock Purchase Agreement Addressing the Section 338 Election for a CFC.....	21-59
§ 21:5.4	Acquisition of Stock of a Lower Tier CFC: "Check-and-Sell" .....	21-60
§ 21:6	Outbound Taxable Asset Acquisitions .....	21-62
§ 21:6.1	Introduction .....	21-62
§ 21:6.2	Direct Acquisition of Foreign Target's Assets by U.S. Acquirer: Outbound Branch Operations .....	21-62
§ 21:6.3	Acquisition of Foreign Target's Assets by Foreign Subsidiary of U.S. Acquirer: Outbound Operations Through a Foreign Subsidiary .....	21-63

## **Chapter 22    Federal Income Tax Considerations in Tax-Free Cross-Border M&A**

§ 22:1	Scope and Introduction to the Impact of the TCAJA.....	22-14
§ 22:1.1	References .....	22-18
§ 22:1.2	Caveat on the Impact of the TCAJA.....	22-18
§ 22:2	Introduction to Impact of Section 367 on Acquisitive Reorganizations.....	22-19
§ 22:2.1	Introduction .....	22-19
§ 22:2.2	The 2006 Final Regulations Permitting a Merger Involving a Foreign Corporation to Qualify As an "(A)" Reorganization .....	22-20
§ 22:2.3	Overlap Between "(A)" and "(C)" Reorganizations .....	22-22
§ 22:2.4	Comments on Certain Regulations Under Section 367 .....	22-22
§ 22:3	Elaboration on Impact of Section 367 on Acquisitive Reorganizations, Section 351 Transactions, and Spin-Offs.....	22-23
§ 22:3.1	In General .....	22-23
§ 22:3.2	Purpose of Section 367 and Controlled Foreign Corporation and Related Provisions, Reflecting the Impact of the TCAJA.....	22-24
[A]	Section 367 .....	22-24
[B]	Controlled Foreign Corporation (CFC) and Related Provisions .....	22-27
§ 22:3.3	Elaboration on Structure of Section 367, Principally As Applicable to Acquisitive Reorganizations and Acquisitive Section 351 Transactions .....	22-29
[A]	Section 367(a)(1) Gain Recognition Rule for Outbound Transfers .....	22-29

[B]	Section 367(a)(5) Exception to Gain Recognition Rule for Outbound Transactions Described in Regulations.....	22-30
[C]	Section 367(a)(2) Exception to Gain Recognition Rule for Transfer of Stock or Security of Foreign Corporations .....	22-30
[D]	Pre-TCAJA Section 367(a)(3) Exception to Gain Recognition Rule for Certain Outbound Incorporations .....	22-30
[D][1]	Introduction to the Pre-TCAJA Section 367(a)(3) .....	22-30
[D][2]	Introduction to the TCAJA's Repeal of Section 367(a)(3).....	22-30
[D][3]	Impact of Section 91 on the Incorporation of a Branch That Had Losses .....	22-31
[E]	Section 367(a)(4) Exception to the Section 367(a)(2) Exception .....	22-32
[F]	Treatment of Outbound Transfers of Intangibles, Section 367(d) .....	22-32
[G]	Treatment of Outbound Contributions to Capital, Section 367(f).....	22-33
§ 22:4	Forms of Outbound, Inbound, and Foreign-to-Foreign Acquisitive Reorganizations.....	22-34
§ 22:4.1	Applicability of Section 367 to Outbound Reorganizations and Certain Foreign-to-Foreign Reorganizations .....	22-34
§ 22:4.2	Direct Outbound Transfers of Stock or Assets .....	22-34
§ 22:4.3	Indirect Outbound Transfers of Stock of a Domestic Target .....	22-34
§ 22:4.4	Inbound Acquisition of Stock or Assets .....	22-35
§ 22:4.5	Foreign-to-Foreign Transfers of Stock or Assets ....	22-35
§ 22:4.6	Summary of Outbound, Inbound, and Foreign-to-Foreign Acquisitive Reorganizations, Section 351 Acquisitive Transactions, and Spin-Offs Governed by Section 367 .....	22-36
§ 22:5	2004 Anti-Inversion Legislation, Section 7874.....	22-38
§ 22:5.1	Introduction to Inversions Generally.....	22-38
§ 22:5.2	Background on the Inversion Problem.....	22-39
§ 22:5.3	Anti-Inversion Provision Enacted by the American Jobs Creation Act of 2004, Section 7874 .....	22-40
[A]	Introduction .....	22-40
[B]	Elaboration on the Statute, Temporary Regulations, and Notice 2009-78 .....	22-42

*Table of Contents*

[C]	The Regulatory Authority Granted by the Section .....	22-42
[D]	Definition of Surrogate Foreign Corporation .....	22-43
[D][1]	The Three Conditions .....	22-43
[D][2]	Regulatory Authority Regarding the Definition of a Surrogate Foreign Corporation .....	22-44
[D][3]	Direct or Indirect Acquisition Condition .....	22-44
[D][3][a]	Indirect Acquisition Includes Stock Acquisition .....	22-44
[D][3][b]	Elaboration on Plan Element .....	22-45
[D][3][c]	Transfers with Principal Purpose of Avoiding the Purposes of the Section .....	22-45
[D][3][d]	Acquisition by Multiple Foreign Corporations.....	22-45
[D][3][e]	Acquisitions of Multiple Domestic Entities....	22-45
[D][4]	60% or 80% Ownership Condition .....	22-46
[D][4][a]	Introduction .....	22-46
[D][4][b]	The "By Reason of" Element .....	22-46
[D][4][c]	Disregard of Hook and Similar Stock.....	22-47
[D][4][d]	Disregard Stock Issued in a Public Offering....	22-47
[D][4][e]	Economically Equivalent Interests .....	22-50
[D][4][f]	The Non-Qualified Property Regulations Under Notice 2009-78.....	22-53
[D][5]	Lack of Substantial Business Activities Condition .....	22-58
[D][5][a]	Introduction .....	22-58
[D][5][b]	Expanded Affiliated Group.....	22-58
[D][5][c]	2015 Final Regulations Under Section 7874 Dealing with Substantial Business Activity .....	22-58
[E]	Satisfaction of the Definition of Surrogate Foreign Corporation by Reason of the 80% Ownership Condition.....	22-60
[E][1]	Introduction.....	22-60
[E][2]	Effect of a Conversion of Foreign Corporation to a Domestic Corporation .....	22-60
[F]	Satisfaction of the Definition of Surrogate Foreign Corporation by Reason of the 60% Ownership Condition.....	22-61
[F][1]	Introduction.....	22-61
[F][2]	Expatriated Entity .....	22-62
[F][3]	Applicable Period .....	22-62
[F][4]	Inversion Gain.....	22-62
[F][5]	Utilization of Credits in the Computation of the Tax on Inversion Gain .....	22-62

§ 22:6	Impact of Sections 367 and 7874 on Direct Outbound Transfer of Stock of U.S. Target to a Foreign Acquirer in a "(B)" Reorganization or in an Acquisitive Section 351 Transaction.....	22-63
§ 22:6.1	Introduction .....	22-63
§ 22:6.2	Impact of Section 367.....	22-63
[A]	General Principles Under Section 367 .....	22-63
[A][1]	Introduction.....	22-63
[A][2]	First Condition: 50% U.S. Shareholder Limitation.....	22-63
[A][3]	Second Condition: 50% Control Group Limitation.....	22-65
[A][4]	Third Condition: Less than 5% Shareholder Rule and the 5% Shareholder Gain Recognition Agreement (GRA) Requirement.....	22-66
[A][4][a]	In General .....	22-66
[A][4][b]	Gain Recognition Agreements .....	22-66
[A][5]	Fourth Condition: Active Trade or Business Test .....	22-71
[A][6]	Fifth Condition: Reporting Requirements .....	22-73
[A][7]	Summary of Five Conditions .....	22-74
[B]	Illustration of the Impact of Section 367 .....	22-74
Diagram 22-1	Tax-Free Outbound "B" Reorganization Under Section 368(a)(1)(B) .....	22-75
[C]	Summary of U.S. Tax Results Under Section 367 .....	22-75
[D]	Impact of Burger King UPREIT Structure on Section 367(a) .....	22-76
§ 22:6.3	General Principles Under Section 7874 .....	22-76
§ 22:6.4	Summary of U.S. Tax Results Under Section 367 Regulations and Section 7874 .....	22-77
§ 22:6.5	The DaimlerChrysler Acquisition of Chrysler As a "(B)" Reorganization or an Acquisitive Section 351 Exchange.....	22-78
§ 22:7	Impact of Sections 367 and 7874 on Indirect Outbound Stock Transactions: Reorganizations Involving the Acquisition of Stock of a U.S. Target by a Foreign Acquirer in a Triangular Reorganization Involving a Subsidiary of the Foreign Acquirer .....	22-80
§ 22:7.1	General Principles .....	22-80
[A]	Introduction .....	22-80
[B]	Indirect Outbound Forward Subsidiary Merger of U.S. Target into U.S. Subsidiary of Foreign Acquirer: The Aborted British Telecom–MCI Merger.....	22-81

Diagram 22-2	Indirect Outbound Forward Subsidiary	
	Merger Under Section 368(a)(2)(D) .....	22-82
[C]	Indirect Outbound Reverse Subsidiary Merger.....	22-83
[C][1]	Introduction.....	22-83
Diagram 22-3	Indirect Outbound Reverse Subsidiary	
	Merger Under Section 368(a)(2)(E) .....	22-84
[C][2]	The Vodafone-Airtouch Merger .....	22-84
[C][3]	The Deutsche Börse-NYSE Euronext	
	Proposed Merger .....	22-85
[D]	Indirect Outbound Triangular "(B)"	
	Reorganization .....	22-86
Diagram 22-4	Indirect Outbound Triangular "(B)"	
	Reorganization Under Section 368(a)(1)(B).....	22-87
[E]	Indirect Outbound Triangular "(C)"	
	Reorganization.....	22-88
Diagram 22-5	Indirect Outbound Triangular "(C)"	
	Reorganization Under Section 368(a)(1)(C) .....	22-89
[F]	Economic Effect of Indirect Outbound	
	Triangular Reorganizations and Impact of	
	Sections 367 and 7874 .....	22-90
[G]	Illustration of the New Inversions, the	
	Endo-Paladin-IrishCo Transaction.....	22-91
[G][1]	Introduction to the New Inversions .....	22-91
[G][2]	The Basic Structure of the Endo Transaction.....	22-91
[G][3]	The Discussion in the Endo Proxy/Prospectus	
	of the Impact of Sections 7874 and 367(a) on	
	the Basic Transaction.....	22-93
[G][3][a]	The Issues .....	22-93
[G][3][b]	Will Section 7874 Treat New Endo As a	
	Domestic Corporation? .....	22-93
[G][3][c]	How Does the Section 7874 Inversion	
	Gain Rule Apply? .....	22-94
[G][3][d]	How Does the Section 367(a)(1) Gain	
	Recognition Rule Apply? .....	22-95
[G][4]	Turning Off the Section 367(a)(1) Gain	
	Recognition Rule Through Endo's "Joe Frazier	
	Left Hook" Coming Out of the "Killer B"	
	Regulations .....	22-96
[G][4][a]	Introduction .....	22-96
[G][4][b]	The Prototypical "Killer B" Used for	
	(1) Tax-Free Repatriations, and (2) Avoidance	
	of Gross Basis Tax Together with Interest	
	Stripping.....	22-97

[G][4][c]	How the Section 367 Regulations Address the "Killer B" Used for (1) Tax-Free Repatriations, and (2) Avoidance of Gross Basis Tax Together with Interest Stripping.....	22-98
[G][4][d]	How the "Killer B" Regulations Apply in the Endo Transaction.....	22-101
[G][5]	Some Observation's on Endo's "Joe Frazier Left Hook" .....	22-105
[G][6]	Can Ali (a.k.a. IRS) Counter Endo's "Joe Frazier Left Hook"? .....	22-105
[G][7]	Does Congress Need to Enter the Fight? .....	22-106
[G][8]	Notice 2014-32 Takes Some of the Force Out of the "Joe Frazier Left Hook" .....	22-107
[G][8][a]	Introduction .....	22-107
[G][8][b]	The Glaring Defect in the Conditions in Situation (iii), the Section 367(b) Priority Rule.....	22-108
[G][8][c]	Notice 2014-32's Closing of the Glaring Defect .....	22-109
[G][8][d]	Notice 2014-32's Modifications to the Anti-Abuse Rule .....	22-110
[G][9]	The Treasury's Continuing Concern with Killer Bs, IRS Notice 2016-73 .....	22-110
§ 22:7.2	The Continuing Concern with New Inversions.....	22-114
[A]	Introduction .....	22-114
[B]	My August 12, 2014 Letter to the Secretary of Treasury Regarding Inversions .....	22-114
[B][1]	Introduction.....	22-114
[B][2]	Treasury's Current Legislative Proposal: Inverter Treated As a U.S. Corporation Rule.....	22-115
[B][3]	Proposed Additional Legislative Initiative by Treasury: <i>The CFC Taxable Disposition Rule, or the Exit Tax</i> .....	22-115
[B][3][a]	My CFC Taxable Disposition Rule .....	22-115
[B][3][b]	Secretary Clinton's Exit Tax Proposal .....	22-117
[B][4]	Administrative Action: <i>As Proposed by Professor Shay, Regulations Under Section 385 for Future Inversions</i> .....	22-118
[B][4][a]	Introduction .....	22-118
[B][4][b]	Shay 2016 Proposal on Section 385 Regulations .....	22-119
[B][5]	Administrative Action: <i>Challenging the "Note-for-Stock" Part of Current and Past Inversions</i> .....	22-120

*Table of Contents*

[B][6]	Administrative Action: <i>Fixing the “Joe Frazier Left Hook” in the Current Section 367 Regulations</i> .....	22-121
[B][7]	Administrative Action: <i>Preventing Avoidance of the Purposes of Section 956 Through Hopscotch Loans</i> .....	22-122
[B][7][a]	Introduction .....	22-122
[B][7][b]	Shay 2016 Proposal on Hopscotch Loans.....	22-123
[B][8]	Administrative Action: <i>Addressing the Gross-Ups of the Section 4985 Excise Tax</i> .....	22-124
[B][9]	A Word on the Merits of a Territorial Regime.....	22-124
[B][10]	The Treasury Should Propose an Imputation System .....	22-125
[B][11]	Concluding Thought.....	22-126
[C]	Further on the Treasury’s Authority Under Section 385 to Issue Regulations on Inversions.....	22-126
§ 22:7.3	The 2014 Inversion Notice Issued by the Treasury and IRS .....	22-128
[A]	Introduction, Reference to the 2016 Regulations, and Prototypical Inversion Transactions .....	22-128
[B]	Guide to Terms Used Here.....	22-130
[C]	Section 2 of the Notice, Regulations to Address Inversion Transactions Directly .....	22-130
[C][1]	Introduction to the Anti-“Cash Box” and Anti-“Slimming Down” Rules.....	22-130
[C][2]	Anti-“Cash Box” Regulations: Section 2.01 of the Notice, Disregarding Certain Stock of a Foreign Acquiring Corp Attributable to Passive Assets—Regulations Under Section 7874.....	22-131
[C][2][a]	Transaction of Concern As Set Out in the Notice.....	22-131
[C][2][b]	General Rule Set Out in the Notice .....	22-131
[C][2][c]	Effective Date Set Out in the Notice .....	22-132
[C][2][d]	Illustration of a “Cash Box” Transaction.....	22-132
[C][2][e]	Impact of the “Cash Box” Rule .....	22-132
[C][2][f]	Modification to the Anti-Cash Box Rule by the 2015 Inversion Notice .....	22-132
[C][3]	Anti-“Slimming Down” Regulations: Section 2.02 of the Notice, Disregarding Certain Distributions by the Domestic Target Regulations Under Sections 7874 and 367 .....	22-132

[C][3][a]	Transactions of Concern Set Out in the Notice.....	22-132
[C][3][b]	General Rule for Section 7874 Set Out in the Notice.....	22-133
[C][3][c]	General Rule for Section 367 Set Out in the Notice.....	22-134
[C][3][d]	Effective Dates Set Out in the Notice .....	22-134
[C][3][e]	Illustration of a "Slimming Down" Transaction.....	22-134
[C][3][f]	Observation on the Significance of the Anti-"Slimming Down" Rule .....	22-134
[C][3][g]	Modification to the Anti-Slimming Down Rule by the 2015 Inversion Notice.....	22-135
[C][4]	Anti-Spinversion Regulations: Section 2.03 of the Notice, Regulations Under Section 7874 Regarding Subsequent Transfers of Stock of the Foreign Acquiring Corporation .....	22-135
[C][4][a]	Basic Transaction of Concern Set Out in the Notice.....	22-135
[C][4][b]	General Rule Set Out in the Notice .....	22-135
[C][4][c]	The Spinversion Example in the Notice .....	22-136
[C][4][d]	Effective Date Set Out in the Notice.....	22-136
[C][4][e]	Observation on Spinversions .....	22-136
[D]	Section 3 of the Notice, Regulations to Address Post-Inversion Tax Avoidance Transactions.....	22-137
[D][1]	Anti-"Hopscotch" Loans: Section 3.01 of the Notice, Regulations to Address Acquisitions of Obligations and Stock That Avoid Section 956.....	22-137
[D][1][a]	Purpose of Section 956 Set Out in the Notice.....	22-137
[D][1][b]	The Section 956 Avoidance Problem Set Out in the Notice .....	22-137
[D][1][c]	The Regulations to Be Issued, Section 3.01(b) of the Notice .....	22-138
[D][1][d]	What the Notice Does Not Reach.....	22-138
[D][1][e]	Request for Comments Set Out in the Notice.....	22-138
[D][1][f]	Effective Date Set Out in the Notice.....	22-139
[D][1][g]	Illustration of a Hopscotch Loan.....	22-139
[D][1][h]	Observation on Hopscotch Loans: How Are Pre-September 22, 2014 Hopscotch Loans and Hopscotch Loans Not in Connection with Inversions Treated? .....	22-139

*Table of Contents*

[D][2]	Anti-De-Controlling of CFCs: Section 3.02 of the Notice, Regulations to Address Transactions to De-Control or Significantly Dilute CFCs .....	22-140
[D][2][a]	The De-Control Avoidance Problem Set Out in the Notice .....	22-140
[D][2][b]	The Regulations to Be Issued Under Section 7701(l) (Relating to Conduit Arrangements), Section 3.02(e)(i) of the Notice, Definition of "Specified Transaction" and "Specified Related Person" .....	22-141
[D][2][c]	Summary of the Definition of a "Specified Transaction" and "Specified Related Person" .....	22-141
[D][2][d]	Recharacterization of a "Specified Transaction": The Basic Recharacterization Rule Set Out in the Notice .....	22-142
[D][2][e]	Example of the Basic Recharacterization Rule Set Out in the Notice .....	22-142
[D][2][f]	Effective Date Set Out in the Notice .....	22-144
[D][2][g]	Illustration of the De-Control of CFC Rule .....	22-144
[D][2][h]	Questions and Observations Regarding Recharacterization .....	22-144
[D][2][i]	Modification to the Anti-De-Control Rule by the 2015 Inversion Notice .....	22-144
[D][3]	Anti-Avoidance of Section 1248 by Diluting an Interest in a CFC in a Section 367(b) Transaction .....	22-144
[D][3][a]	Background on Section 367(b) and the Transactions at Issue Set Out in the Notice, Section 3.02(e)(ii) .....	22-144
[D][3][b]	Transactions at Issue (Under Section 367(b)) Set Out in the Notice .....	22-145
[D][3][c]	Regulations Under Section 367(b) Set Out in the Notice, Section 3.03(e)(2) .....	22-146
[D][3][d]	Example of the Section 367 Rule Set Out in the Notice .....	22-146
[D][3][e]	Effective Date Set Out in the Notice .....	22-147
[D][3][f]	Illustration of Section 1248 Dilution Rule .....	22-147
[D][3][g]	Impact of the Section 1248 Dilution Example .....	22-148
[D][4]	Anti-Avoidance of Section 304(b) .....	22-148
[D][4][a]	Background on Section 304(b) and the Transactions at Issue, Section 3.03 of the Notice .....	22-148

[D][4][b]	Transaction at Issue Set Out in the Notice....	22-150
[D][4][c]	Regulations to Be Issued Set Out in the Notice.....	22-151
[D][4][d]	Effective Date Set Out in the Notice.....	22-151
[D][4][e]	Example of the Section 304(b) Rule .....	22-151
[D][4][f]	Illustration of the Section 304(b) Rule .....	22-152
[E]	Section 5 Request for Comments Including Comments on Interest Stripping .....	22-152
[E][1]	In General and with Regard to Interest Stripping .....	22-152
[E][2]	Illustration of Interest Stripping.....	22-153
[E][3]	Other Possible Issues to Be Addressed in Comments.....	22-153
[E][3][a]	The Advisability of Eliminating the Section 367(b) Priority Rule in the Killer B Regulations .....	22-153
[E][3][b]	Does the Partnership Used in the Burger King Inversion in Essence Nullify the Section 367(a) Gain Recognition Rule? .....	22-153
[F]	Assessment of the Effectiveness of the Treasury's Inversion Notice.....	22-154
§ 22:7.4	The 2015 Inversion Notice Issued by the Treasury and IRS .....	22-154
[A]	Introduction to the 2015 Notice, the Companion Slides and References to the 2016 Regulations.....	22-154
[B]	Guide to Terms Used Here.....	22-155
[C]	The Prototypical Inversion .....	22-156
[C][1]	Discussion in the 2015 Inversion Fact Sheet of Prototypical Inversions and the Tax Concerns of Such Transactions .....	22-156
[C][2]	Slides Illustrating a Prototypical Inversion.....	22-157
[D]	Section 2 of the 2015 Inversion Notice: Measures Designed to "Make It More Difficult for U.S. Companies to Invert" .....	22-157
[D][1]	Strengthening the Requirement That the Former Owners of a U.S. Company Own Less than 80% of the New Combined Entity .....	22-157
[D][1][a]	The "Third-Country Anti-Cherry Picking" Rule, Section 2.02(B) of the 2015 Inversion Notice .....	22-157
[D][1][b]	The "Strengthening Anti-Stuffing of the Foreign Target" Rule, Section 2.03 of the 2015 Inversion Notice .....	22-158

*Table of Contents*

[D][2]	The “Strengthening the Substantial Business Activities Exception” Rule, Section 2.02(a) of the 2015 Inversion Notice .....	22-159
[E]	Section 3 of the 2015 Inversion Notice: Reducing the Tax Benefits of Inversions with Measures “Preventing Inverted Companies from Transferring Foreign Operations ‘Out From Under’ the U.S. Tax Net Without Paying Current U.S. Tax” .....	22-160
[E][1]	Expand the Scope of Inversion Gain for Which Current U.S. Tax Must Be Paid (Action Under Section 7874 of the Code)— Inversion Gain Provision, Section 3.01 .....	22-160
[E][2]	Expand the Scope of Inversion Gain for Which Current U.S. Tax Must Be Paid (Action Under Section 7874 of the Code)—Built-In Gain Provision, Section 3.02 .....	22-161
[F]	Section 4 of the 2015 Inversion Notice: Corrections to the 2014 Inversion Notice .....	22-161
[F][1]	Introduction to the Anti-Cash Box and Anti-Slimming Down Rules of the 2014 Inversion Notice .....	22-161
[F][2]	Anti-“Cash Box” Regulations: Section 4.01 of the 2015 Inversion Notice, Dealing with Stock Attributable to Passive Assets, Correcting Section 2.01 of the 2014 Inversion Notice .....	22-162
[F][3]	Anti-“Slimming Down” Regulations .....	22-162
[F][3][a]	Observation of the Significance of the Anti-Slimming Down Rule .....	22-162
[F][3][b]	The 2015 Inversion Notice Amendments to the Anti-Slimming Down Rule .....	22-163
[F][3][c]	Section 4.02 of the 2015 Inversion Notice Relating to “Disregard[ing] Certain Distributions by Domestic Entity,” Addition of a “De Minimis Exception” .....	22-163
[F][4]	The Anti-De-Control of CFC Rule .....	22-165
[F][4][a]	The Anti-De-Control of CFC Rule in the 2014 Inversion Notice .....	22-165
[F][4][b]	Section 4.03 of the 2015 Inversion Notice Provision Relating to “Regulations to Address Transactions to De-Control or Significantly Dilute Ownership of Certain CFCs” .....	22-165

§ 22:7.5	The 2016 and 2017 Treasury Regulations	
	Dealing Directly with Inversions .....	22-167
[A]	Introduction to the 2016 and 2017 Treasury	
	Regulations: (1) Implementing the 2014 and	
	2015 Treasury Notices, and (2) Promulgating	
	Regulations Under Section 385 .....	22-167
[B]	Introduction to the 2016 Inversion and	
	Related Transactions Regulations .....	22-169
[C]	Introduction to the Significance of the	
	Ownership Percentage, Right Sizing, and	
	Pfizer's Abandoned Inversion with Allergan.....	22-169
[D]	Clarification of the Calculation of the Ownership	
	Percentage: Implementing the Anti-Stuffing	
	Provisions of the 2015 Notice, Temporary	
	Treasury Regulations Section 1.7874-4T, and	
	Final Treasury Regulations Section 1.7874-4.....	22-171
[D][1]	The 2016 General Inversion Regs.....	22-171
[D][2]	Final Jan. 2017 Inversion Regs.....	22-172
[E]	Calculation of the Ownership Percentage: The	
	Passive Asset Rule, Which Is the Anti-Cash Box	
	Rule of the 2014 Notice, Temporary Treasury	
	Regulations Section 1.7874-7T .....	22-173
[F]	Calculation of the Ownership Percentage:	
	The Acquisition of Multiple Domestic Entities	
	Rule, the Pfizer Rule, Temporary Treasury	
	Regulations Section 1.7874-8T .....	22-174
[G]	Calculation of the Ownership Percentage:	
	The Third-Country Rule, Temporary Treasury	
	Regulations Section 1.7874-9T .....	22-178
[H]	Calculation of the Ownership Percentage:	
	The Non-Ordinary Course Distributions Rule,	
	Temporary Treasury Regulations Section	
	1.7874-10T .....	22-179
[I]	Application of the EAG Rules When There	
	Is a Related Transfer of Stock of the Foreign	
	Acquiring Corporation, Temporary Treasury	
	Regulations Section 1.7874-6T .....	22-180
[J]	The Substantial Business Activities Test,	
	the Subject to Tax Rule, Temporary Treasury	
	Regulations Section 1.7874-3T(b)(4) .....	22-183
[K]	The Anti-Hopscotch Loan Rule, Temporary	
	Treasury Regulations Section 1.956-2T(a)(4).....	22-183
[L]	The Section 7701(l) Recharacterization	
	Rule, Temporary Treasury Regulations	
	Section 1.7701(l)-4T .....	22-185

*Table of Contents*

[M]	The Section 367(b) Stock Dilution Rule, Temporary Treasury Regulations	
	Section 1.367(b)-4T(e) .....	22-186
[N]	The Section 367(b) Asset Dilution Rule, Temporary Treasury Regulations	
	Section 1.367(b)-4T(f) .....	22-187
[O]	The Section 304 Rules, Temporary Treasury Regulations Section 1.304-7T .....	22-188
[P]	The Inversion Gain Rule, Temporary Treasury Regulations Section 1.7874-11T .....	22-189
§ 22:7.6	The 2016 Treasury Proposed and Final Interest Stripping Regulations Under Section 385 .....	22-190
[A]	Introduction to the 2016 Treasury Regulations	
	(1) Implementing the 2014 and 2015 Inversion Notices, and (2) Promulgating Regulations Under Section 385 .....	22-190
[B]	Introduction to the 2016 Proposed and Final Section 385 Regulations: Treatment of Certain Interest in Corporations As Stock or Indebtedness Regulations .....	22-193
[B][1]	The Proposed Section 385 Regulations .....	22-193
[B][2]	The Final Section 385 Regulations .....	22-194
[B][3]	Impact of the TCAJA's Limitation on the Deductibility of Interest, Section 163(j) .....	22-194
[C]	Overview of the 2016 Section 385 Regs.....	22-194
[C][1]	The Proposed Section 385 Regulations: Overview.....	22-194
[C][2]	The Final Section 385 Regulations: Overview.....	22-195
[D]	The Substantiation of Related-Party Indebtedness Requirement, Treasury Regulations Section 1.385-2 .....	22-197
[D][1]	The Proposed Section 385 Regulations: Substantiation .....	22-197
[D][2]	The Final Section 385 Regulations: Substantiation .....	22-198
[D][3]	Delay in the Substantiation (Documentation) Requirement Under the Section 385 Regulations .....	22-199
[E]	Certain Distributions of Debt Instruments and Similar Transactions, Treasury Regulations Section 1.385-3 .....	22-200
[E][1]	The Proposed Section 385 Regulations: Distribution of Debt .....	22-200
[E][1][a]	Introduction .....	22-200

[E][1][b]	General Anti-Abuse Rule: Distribution of Debt .....	22-204
[E][1][c]	Exceptions to the General Rule: Distribution of Debt .....	22-204
[E][2]	The Final Section 385 Regulations: Distributions of Debt.....	22-205
[F]	Treatment of Notes Issued Within a Consolidated Group, Treasury Regulations Section 1.385-4 .....	22-207
[F][1]	The Proposed Section 385 Regulations: Consolidated Groups .....	22-207
[F][2]	The Temporary Section 385 Regulations: Consolidated Groups .....	22-207
[G]	Issuance of Final Section 385 Regulations Addressing Debt-to-Equity Issues.....	22-208
[H]	My Take on the 2016 Section 385 Regs.....	22-208
§ 22:7.7	Legal Challenge to the Treasury's April 2016 Inversion Regulations .....	22-209
§ 22:7.8	The Trump Administration and Inversions .....	22-210
§ 22:8	Impact of Section 367 and Section 7874 on Outbound Transfer of Domestic Target Assets to Foreign Acquirer in an Outbound Asset Reorganization .....	22-212
§ 22:8.1	Scope of Transaction.....	22-212
§ 22:8.2	General Principles Under Section 367 .....	22-213
[A]	Treatment of U.S. Target Before and After the TCAJA .....	22-213
[B]	Treatment of Shareholders of U.S. Target .....	22-215
§ 22:8.3	Prototype Direct Outbound Asset Reorganization.....	22-217
[A]	The Transaction .....	22-217
Diagram 22-6	Outbound "(C)" Reorganization Under Section 368(a)(1)(C) .....	22-217
[B]	Summary Tax Results Under Sections 367 and 7874 .....	22-218
§ 22:8.4	Change in Result for Triangular Outbound Asset Reorganization .....	22-218
§ 22:9	Introduction to Section 367(b) .....	22-218
§ 22:10	Scope of Regulations: Treas. Reg. § 1.367(b)-1 .....	22-221
§ 22:11	Definitions and Special Rules Under the Regulations: Treas. Reg. § 1.367(b)-2.....	22-222
§ 22:12	Inbound Asset Acquisition: Acquisition by U.S. Acquirer of the Assets of Foreign Target: Treas. Reg. § 1.367(b)-3 .....	22-223
§ 22:12.1	Introduction .....	22-223

*Table of Contents*

§ 22:12.2	Acquisition by U.S. Acquirer or Its U.S. Subsidiary of Assets of Foreign Target in an Inbound "(C)" Reorganization .....	22-225
[A]	Basic Principles .....	22-225
[B]	Illustration .....	22-226
Diagram 22-7	Inbound Triangular "(C)" Reorganization Under Section 368(a)(1)(C) .....	22-228
[C]	Summary Tax Results.....	22-229
§ 22:13	Inbound Stock Acquisitions: Acquisition by a Domestic Acquiring Corporation of the Stock of Foreign Target.....	22-231
§ 22:13.1	Introduction .....	22-231
§ 22:13.2	Illustration .....	22-231
Diagram 22-8	Inbound Reverse Subsidiary Merger Reorganization Under Section 368(a)(2)(E) .....	22-232
§ 22:13.3	Summary Tax Results.....	22-232
§ 22:13.4	Observation on the Different Treatment of Inbound Asset Reorganizations and Inbound Stock Reorganizations .....	22-233
§ 22:14	Foreign-to-Foreign Stock and Asset Reorganizations: Acquisition by Foreign Acquirer of Stock or Assets of a Foreign Target .....	22-233
§ 22:14.1	Introduction .....	22-233
§ 22:14.2	Foreign-to-Foreign Stock and Asset Reorganizations: Impact of Section 367(a).....	22-234
§ 22:14.3	Foreign-to-Foreign Stock and Asset Reorganizations: Impact of Treas. Reg. § 1.367(b)-4 .....	22-235
§ 22:14.4	Illustration in Regulations of the Concurrent Application of the Rules of Section 367(a) and (b) .....	22-237
§ 22:14.5	Further Illustration.....	22-238
[A]	A Foreign-to-Foreign Forward Subsidiary Merger.....	22-238
Diagram 22-9	Foreign-to-Foreign Forward Subsidiary Merger Under Section 368(a)(2)(D) Or Triangular "(c)" Reorganization Under Section 368(a)(1)(c) .....	22-239
[B]	Summary Tax Results.....	22-239
[C]	Impact of Rules Under Section 367(b) and Section 367(a) on DaimlerChrysler's Acquisition of Daimler-Benz .....	22-240
§ 22:15	Cross-Border Section 355 Spin-Offs .....	22-241
§ 22:15.1	Introduction to Spin-Offs .....	22-241

§ 22:15.2	Spin-Off by Domestic Distributing Corporation of Domestic Controlled Corporation to Foreign Shareholder: Treas. Reg. § 1.367(e)-1 .....	22-242
§ 22:15.3	Spin-Off by Domestic Distributing Corporation of Foreign Controlled Corporation.....	22-243
[A]	Spin-Off to Non-Qualified U.S. Persons: Treas. Reg. § 1.367(e)-1 .....	22-243
[B]	Spin-Off to Individuals, Treas. Reg. § 1.367(b)-5 .....	22-244
[C]	Impact of Sections 1248(a) and (f) on Spin-Offs by Domestic Corporations of CFCs.....	22-245
§ 22:15.4	Section 355 Spin-Off by a CFC: Treas. Reg. § 1.367(b)-5 .....	22-247

## PART VIII SPECIAL TOPICS

### **Chapter 23 State Tax Considerations in Taxable and Tax-Free M&A**

§ 23:1	Scope.....	23-5
§ 23:1.1	References .....	23-6
§ 23:1.2	Effective Date of the New Jersey and Pennsylvania Laws Discussed in This Chapter and Impact of the Tax Cuts and Jobs Act of 2017 (TCAJA) .....	23-6
§ 23:2	Basic Principles of New Jersey State Taxation, Introduction to Pennsylvania State Taxation, and Illustration of Delaware's Competitive Tax Structure ....	23-8
§ 23:2.1	New Jersey Income Tax and Basic Issues .....	23-8
[A]	The New Jersey Corporate Income Tax .....	23-8
[B]	The New Jersey Personal Income Tax.....	23-10
[C]	Basic Issues with a State Income Tax .....	23-10
§ 23:2.2	New Jersey Sales Tax and Basic Issues .....	23-11
[A]	New Jersey Sales Tax.....	23-11
[B]	Basic Issues with a State Sales Tax .....	23-11
[C]	The Supreme Court's Decision in <i>Wayfair</i> , State Taxation of Internet Sales.....	23-12
[C][1]	Introduction.....	23-12
[C][2]	Impact of Wayfair in M&A .....	23-13
§ 23:2.3	New Jersey Real Property Transfer Tax.....	23-13
§ 23:2.4	New Jersey Real Property Taxes .....	23-14
§ 23:2.5	Introduction to Pennsylvania's State Taxes.....	23-14
[A]	The Pennsylvania Corporate Income Tax .....	23-14
[B]	The Pennsylvania Personal Income Tax.....	23-14

*Table of Contents*

[C]	Pennsylvania Retail Sales Tax.....	23-15
[D]	Pennsylvania Realty Transfer Tax .....	23-15
§ 23:2.6	Illustration of the Competition in State Taxes: The Case of Delaware and DuPont .....	23-16
§ 23:3	Basic Hypothetical Facts.....	23-17
§ 23:4	Taxable Acquisition of the Assets of a Stand-Alone Target C Corporation.....	23-18
§ 23:4.1	Structure of the Direct Purchase of Assets Transactions and Federal Income Tax Treatment .....	23-18
§ 23:4.2	Tax Treatment to the Parties Under New Jersey State Tax Laws.....	23-18
[A]	New Jersey State Income Tax Impact on NJ-TC's Sale of Assets and on Steve's Receipt of the Liquidating Distribution.....	23-18
[A][1]	Impact on NJ-TC, Including Treatment of Any NOLs of NJ-TC Carried Over to 2019.....	23-19
[A][2]	Impact on Steve .....	23-19
[A][3]	Impact on NJ-AC .....	23-19
[A][3][a]	Successor Liability for State Taxes.....	23-19
[A][3][a][i]	The New Jersey Approach.....	23-19
[A][3][a][ii]	Georgia Tax Court Approach to Successor Liability in an Asset Acquisition .....	23-22
[A][3][b]	Possible Purchase of Intangibles Through a Passive Holding Company .....	23-23
[B]	New Jersey Sales Tax Impact on NJ-TC's Sale of Assets.....	23-23
[C]	New Jersey Real Property Transfer Fee in NJ-TC's Sale of Assets .....	23-25
[D]	Allocation of Responsibility of Transfer Taxes and Straddle Period Taxes .....	23-26
§ 23:4.3	Tax Treatment to the Parties Under Pennsylvania State Tax Laws .....	23-26
[A]	Pennsylvania State Income Tax Impact on PA-TC's Sale of Assets and on Steve's Receipt of the Liquidating Distribution.....	23-27
[A][1]	Impact on PA-TC, Including Treatment of Any NOLs of PA-TC .....	23-27
[A][2]	Impact on Steve .....	23-27
[A][3]	Impact on PA-AC .....	23-27
[B]	Pennsylvania Sales Tax Impact on PA-TC's Sale of Assets .....	23-28
[C]	Pennsylvania Real Property Transfer Fee in PA-TC's Sale of Assets .....	23-28
§ 23:5	Taxable Acquisition of the Stock of a Stand-Alone Closely Held Target C Corporation.....	23-29
§ 23:5.1	Structure of the Direct Purchase of Stock Transaction and Federal Income Tax Treatment .....	23-29

§ 23:5.2	Tax Treatment to the Parties Under the New Jersey State Tax Laws .....	23-29
[A]	New Jersey State Income Tax Impact on NJ-TC and Steve on the Sale by Steve of the Stock of NJ-TC .....	23-30
[B]	New Jersey Sales Tax Impact on NJ-TC upon Steve's Sale of Stock .....	23-30
[C]	New Jersey Real Property Transfer Tax Impact on Steve's Sale of Stock .....	23-30
§ 23:5.3	Tax Treatment to the Parties Under Pennsylvania State Tax Laws.....	23-32
[A]	Pennsylvania State Income Tax Impact on PA-TC and Steve on the Sale by Steve of the Stock of PA-TC.....	23-32
[A][1]	In General.....	23-32
[A][2]	Pennsylvania Supreme Court's Decision re NOLs in Nextel .....	23-33
[B]	Pennsylvania Sales Tax Impact on PA-TC upon Steve's Sale of Stock .....	23-34
[C]	Pennsylvania Real Property Transfer Tax Impact on Steve's Sale of Stock .....	23-34
§ 23:5.4	DuPont's Sale of Sub Not Taxable in Indiana .....	23-34
§ 23:6	Taxable Acquisition of the Stock of a Consolidated Subsidiary with a Section 338(h)(10) Election .....	23-38
§ 23:6.1	Structure of the Stock Purchase and Federal Income Tax Treatment .....	23-38
§ 23:6.2	Tax Treatment to the Parties Under New Jersey State Tax Laws .....	23-39
[A]	New Jersey State Income Tax Impact on NJ-TC and NJ-PC As a Result of the Section 338(h)(10) Election .....	23-39
[B]	New Jersey Sales Tax Impact on NJ-TC As a Result of the Section 338(h)(10) Election.....	23-40
[C]	New Jersey Real Property Transfer Tax Impact As a Result of the Section 338(h)(10) Election.....	23-40
§ 23:6.3	Tax Treatment to the Parties Under Pennsylvania State Tax Laws.....	23-40
[A]	Pennsylvania State Income Tax Impact on PA-TC and PA-AC As a Result of the Section 338(h)(10) Election .....	23-41
[B]	Pennsylvania Sales Tax Impact on PA-TC As a Result of the Section 338(h)(10) Election.....	23-41
[C]	Pennsylvania Real Property Transfer Tax Impact As a Result of the Section 338(h)(10) Election.....	23-41

*Table of Contents*

§ 23:7	Taxable Acquisition of the Stock of a Stand-Alone Publicly Held Target C Corporation in a Reverse Subsidiary (Triangular) Merger .....	23-41
§ 23:7.1	Structure of the Taxable Reverse Subsidiary Merger and Federal Income Tax Treatment.....	23-41
§ 23:7.2	Tax Treatment to the Parties Under New Jersey State Tax Laws .....	23-42
[A]	New Jersey State Income Tax Impact on NJ-TC and Steve in the Taxable Reverse Subsidiary Merger .....	23-42
[B]	New Jersey Sales Tax Impact in the Reverse Subsidiary Merger .....	23-42
[C]	New Jersey Real Property Transfer Tax Impact in the Reverse Subsidiary Merger.....	23-42
§ 23:7.3	Tax Treatment to the Parties Under Pennsylvania State Tax Laws.....	23-42
[A]	Pennsylvania State Income Tax Impact on PA-TC and Steve in the Taxable Reverse Subsidiary Merger .....	23-43
[B]	Pennsylvania Sales Tax Impact in the Reverse Subsidiary Merger .....	23-43
[C]	Pennsylvania Real Property Transfer Tax Impact in the Reverse Subsidiary Merger.....	23-43
§ 23:8	Tax-Free Direct Merger Reorganization Under Section 368(a)(1)(A).....	23-43
§ 23:8.1	Structure of the Merger and Federal Income Tax Treatment.....	23-43
§ 23:8.2	Tax Treatment to the Parties Under New Jersey State Tax Laws .....	23-44
[A]	New Jersey State Income Tax Impact on NJ-TC and Steve As a Result of the Tax-Free Merger .....	23-44
[B]	New Jersey Sales Tax Impact on NJ-TC As a Result of the Tax-Free Merger.....	23-44
[C]	New Jersey Real Property Transfer Tax Impact on NJ-TC As a Result of the Tax-Free Merger.....	23-45
§ 23:8.3	Tax Treatment to the Parties Under Pennsylvania State Tax Laws.....	23-45
[A]	Pennsylvania State Income Tax Impact on PA-TC and Steve As a Result of the Tax-Free Merger.....	23-45
[B]	Pennsylvania Sales Tax Impact on PA-TC As a Result of the Tax-Free Merger.....	23-46
[C]	Pennsylvania Real Property Transfer Tax Impact on PA-TC As a Result of the Tax-Free Merger.....	23-46

§ 23:9	Tax-Free Reverse Subsidiary Merger Reorganization	
	Under Section 368(a)(2)(E) .....	23-46
§ 23:9.1	Structure of the Tax-Free Reverse Subsidiary	
	Merger and Federal Income Tax Treatment.....	23-46
§ 23:9.2	Tax Treatment to the Parties Under New Jersey	
	State Tax Laws.....	23-47
[A]	New Jersey State Income Tax Impact on NJ-TC	
	and Steve As a Result of the Tax-Free Merger .....	23-47
[B]	New Jersey Sales Tax Impact on NJ-TC As a	
	Result of the Tax-Free Merger.....	23-47
[C]	New Jersey Real Property Transfer Tax Impact	
	on NJ-TC As a Result of the Tax-Free Merger.....	23-47
§ 23:9.3	Tax Treatment to the Parties Under Pennsylvania	
	State Tax Laws.....	23-47
[A]	Pennsylvania State Income Tax Impact	
	on PA-TC and Steve As a Result of the	
	Tax-Free Merger.....	23-47
[B]	Pennsylvania Sales Tax Impact on PA-TC As a	
	Result of the Tax-Free Merger .....	23-47
[C]	Pennsylvania Real Property Transfer Tax Impact	
	on PA-TC As a Result of the	
	Tax-Free Merger.....	23-48
§ 23:10	The Impact of the Apportionment Principle on the	
	Section 382 Limitation on a Target's NOLs.....	23-48
§ 23:10.1	Introduction .....	23-48
§ 23:10.2	The 2013 Express Scripts Decision in	
	Minnesota .....	23-48
§ 23:11	Guidelines for Approaching State Taxation	
	Issues in M&A .....	23-51

## Chapter 24 Joint Ventures

§ 24:1	Scope.....	24-7
§ 24:1.1	References .....	24-10
§ 24:2	Introduction to Business Aspects of JVs .....	24-10
§ 24:3	Guide to the Drafting of a JV Agreement As a	
	Limited Partnership or LLC .....	24-13
§ 24:3.1	Introduction .....	24-13
[A]	General .....	24-13
[B]	Structure of JV Agreements .....	24-15
[B][1]	The Sprint Spectrum LP JV Agreement.....	24-15
[B][2]	The MillerCoors LLC JV Operating	
	Agreement .....	24-17
[C]	2019 Arch Coal and Peabody Energy	
	Establish a Coal Production and Sale.....	24-20

*Table of Contents*

§ 24:3.2	Agreement to Form a Partnership or LLC .....	24-22
[A]	In General .....	24-22
[B]	Formation Agreements in MillerCoors JV and Citigroup–Morgan Stanley JV .....	24-22
[B][1]	Background .....	24-22
[B][2]	Review of Specific Provisions of the Formation Agreements .....	24-25
§ 24:3.3	Liability .....	24-27
[A]	Treatment of Liability in the Sprint Spectrum LP JV Agreement .....	24-27
[A][1]	Liabilities of Exclusive Limited Partners and of General Partners .....	24-27
[A][2]	Potential Liability of Shareholders of Corporate General Partner for Debts of Partnership: Illustrative Cases .....	24-27
[B]	Treatment of Liability in the MillerCoors LLC JV Operating Agreement .....	24-28
[B][1]	Introduction .....	24-28
[B][2]	Veil Piercing and Limited Liability Companies .....	24-28
§ 24:3.4	The Parties and Formation of the Entity .....	24-29
[A]	The Sprint Spectrum LP JV Agreement .....	24-29
[B]	The MillerCoors LLC JV Operating Agreement .....	24-29
§ 24:3.5	Capital Contributions .....	24-30
[A]	Treatment of Capital Contributions in the Sprint Spectrum LP JV Agreement .....	24-30
[B]	Treatment of Capital Contributions in the MillerCoors LLC JV Operating Agreement .....	24-31
§ 24:3.6	Allocation .....	24-33
[A]	Treatment of Allocations in the Sprint Spectrum LP JV Agreement .....	24-33
[B]	Treatment of Allocations in the MillerCoors LLC JV Operating Agreement .....	24-33
§ 24:3.7	Distributions .....	24-34
[A]	Treatment of Distributions in the Sprint Spectrum LP JV Agreement .....	24-34
[B]	Treatment of Distributions in the MillerCoors LLC JV Operating Agreement .....	24-34
§ 24:3.8	Management .....	24-34
[A]	Treatment of Management in the Sprint Spectrum LP JV Agreement .....	24-34
[A][1]	In General .....	24-34
[A][2]	No Fiduciary Duties and Indemnification .....	24-35
[A][3]	Deadlocks .....	24-36
[A][4]	Conversion to Corporation .....	24-36

[B]	Treatment of Management in the MillerCoors LLC JV Operating Agreement.....	24-36
[B][1]	In General.....	24-36
[B][2]	No Fiduciary Duties and Indemnification.....	24-37
[B][3]	Deadlocks and Arbitration.....	24-38
[C]	The Delaware Debate Over Default Fiduciary Duties for Alternative Entities— <i>Auriga</i> .....	24-38
§ 24:3.9	Opportunities/Non-Compete and Confidentiality .....	24-42
[A]	Treatment of Non-Compete and Confidentiality in the Sprint Spectrum LP JV Agreement.....	24-42
[A][1]	Treatment of Partnership Opportunities in the Sprint Spectrum LP JV Agreement.....	24-42
[A][2]	Treatment of Confidentiality in the Sprint Spectrum LP JV Agreement .....	24-42
[B]	Treatment of Non-Compete and Confidentiality in the MillerCoors LLC JV Operating Agreement .....	24-42
[B][1]	Treatment of the Non-Compete Provision and Stand-Still Provision in the MillerCoors LLC JV Operating Agreement .....	24-42
[B][2]	Treatment of Confidentiality in the MillerCoors LLC JV Operating Agreement .....	24-43
[C]	Illustration of Litigation Over Non-Competition Provision— <i>Time Warner</i> .....	24-43
§ 24:3.10	Related Party Transactions; Other Agreements .....	24-44
[A]	Treatment of Related Party Transactions Between the Partnership and the Partner and Related Other Agreements in the Sprint Spectrum LP JV Agreement.....	24-44
[B]	Treatment of Related Party Transactions and Information in the MillerCoors LLC JV Operating Agreement .....	24-44
[C]	The Delaware Supreme Court’s Decision on the Implied Covenant in a Master Limited Partnership Agreement—The Energy Transfer Partner’s Case, <i>Dieckman</i> .....	24-44
§ 24:3.11	Accounting, Books and Records/Information Rights .....	24-48
[A]	Treatment of Accounting, Books and Records in the Sprint Spectrum LP JV Agreement .....	24-48
[B]	Treatment of Information Rights in the MillerCoors LLC JV Operating Agreement.....	24-49

## *Table of Contents*

§ 24:3.12	Adverse Act, Including Bankruptcy of Venturer.....	24-49
[A]	Treatment of an Adverse Act in the Sprint Spectrum LP JV Agreement.....	24-49
[B]	Treatment of Insolvency or Criminal Indictment in the MillerCoors LLC JV Operating Agreement .....	24-49
§ 24:3.13	Dispositions of Interest/Change of Control and Assignment .....	24-50
[A]	Treatment of Dispositions of Interest in the Sprint Spectrum LP JV Agreement: ROFR, Tagalong, and ROFO .....	24-50
[A][1]	In General.....	24-50
[A][2]	Right of First Refusal .....	24-50
[A][3]	Tagalong Rights and Drag-Along Rights.....	24-50
[A][4]	Conversion to a Corporation Followed by an IPO.....	24-51
[A][5]	Right of First Offer.....	24-51
[B]	Treatment of Dispositions of Interest in the MillerCoors LLC JV Operating Agreement: ROFO and Purchase As a Result of a Change of Control.....	24-51
[C]	Modification to the Alcoa-Alumina JV Agreement Resulting from Alcoa's Spin-Off .....	24-52
§ 24:3.14	Dissolution and Winding Up.....	24-56
[A]	Treatment of Dissolution and Winding Up in the Sprint Spectrum LP JV Agreement .....	24-56
[A][1]	In General.....	24-56
[A][2]	Buy/Sell.....	24-56
[B]	Treatment of Dissolution and Winding Up in the MillerCoors LLC JV Operating Agreement .....	24-57
§ 24:3.15	Miscellaneous.....	24-58
[A]	Treatment of the Miscellaneous Provision in the Sprint Spectrum LP JV Agreement .....	24-58
[B]	Treatment of Miscellaneous Provisions in the MillerCoors LLC JV Operating Agreement .....	24-58
§ 24:3.16	Concluding Thoughts on Drafting JV Agreements .....	24-58
§ 24:4	Federal Income Tax Treatment of JVs, Including LLCs Treated As Partnerships .....	24-59
§ 24:4.1	Introduction .....	24-59
§ 24:4.2	Classification of a JV As a Corporation or Partnership for Federal Income Tax Purposes.....	24-60
[A]	The Entity Classification Regulations: The "Check-the-Box" Regulations .....	24-60
[B]	Treatment of Entity Classification in the MillerCoors LLC JV Formation Agreement .....	24-60

§ 24:4.3	Federal Income Tax Considerations in Organizing a JV, Including an LLC Treated As a Partnership .....	24-61
[A]	General .....	24-61
[B]	Partnership or LLC JV Contributions Not Involving Liability Assumptions or Boot Distributions .....	24-62
[B][1]	General Principles .....	24-62
[B][2]	Illustration .....	24-63
[B][3]	Treatment of Contributions in the MillerCoors LLC JV Formation Agreement and the Citigroup–Morgan Stanley JV Formation Agreement .....	24-63
[C]	Boot Distributions to Contributing Partnership or LLC JV Venturers .....	24-64
[C][1]	General Principles .....	24-64
[C][2]	Illustration .....	24-64
[D]	Allocations of Pre-Contributed Gain or Loss .....	24-65
[D][1]	General Principles .....	24-65
[D][2]	Illustration .....	24-65
[E]	Distribution of Built-In Gain Property .....	24-65
[E][1]	General Principles .....	24-65
[E][2]	Illustration .....	24-66
[F]	Treatment of Pre-Contributed Gain on Distribution of Other Property .....	24-66
[F][1]	General Principles .....	24-66
[F][2]	Illustration .....	24-66
[F][3]	Treatment of Pre-Contributed Gain in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-67
[G]	Assumption or Transfer of Liabilities in a Section 721 Transaction .....	24-67
[G][1]	General Principles .....	24-67
[G][2]	Illustration .....	24-70
[G][3]	Treatment of Section 1.752-7 Contingent Liabilities in the MillerCoors LLC JV Operating Agreement .....	24-71
[H]	Disguised Sales .....	24-71
[H][1]	General Principles, Section 707 .....	24-71
[H][2]	Illustrations .....	24-72
[H][3]	Leveraged Partnerships and the Section 707 Regulations .....	24-74
[H][4]	Addressing Disguised Sales in the MillerCoors LLC JV Formation Agreement and the Citigroup–Morgan Stanley JV Formation Agreement .....	24-75

*Table of Contents*

[I]	Capital Accounts and Impact of Contributions of Property.....	24-77
[I][1]	General Principles.....	24-77
[I][2]	Illustration.....	24-78
[I][3]	Addressing Capital Accounts in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-79
[J]	Partnership Interest Distributed for Services .....	24-79
[K]	Taxable Year of JV.....	24-79
[L]	Tax Matters Partner.....	24-80
[L][1]	General Principles.....	24-80
[L][2]	Designation of the Tax Matters Partner in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-80
§ 24:4.4	Federal Income Tax Considerations in Operating a JV, Including an LLC Treated As a Partnership .....	24-80
[A]	General .....	24-80
[B]	The Partnership As a Flow-Through Entity .....	24-81
[C]	Basic Rules Governing Allocations of Items to the Venturers.....	24-82
[D]	Limitation on the Deductibility of Partnership Losses.....	24-83
[E]	Determination of the Venturer's Basis (Outside Basis) for Its Interest.....	24-83
[F]	Partnership Return and Year of Inclusion .....	24-84
[G]	Transaction Between a Venturer and His Partnership or LLC JV .....	24-85
[H]	Section 704(b) Rules Regarding Partnership Allocations .....	24-85
[H][1]	General Principles.....	24-85
[H][2]	The Substantial Economic Effect Test, Deficit Capital Account Makeup or QIO .....	24-86
[H][2][a]	General Principles .....	24-86
[H][2][b]	Addressing the QIO in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-87
[H][3]	Introduction to the Rules Regarding Allocations Under Section 704(b) Attributable to Nonrecourse Debt.....	24-88
[H][3][a]	In General .....	24-88
[H][3][b]	Minimum Gain and Nonrecourse Deductions .....	24-89
[H][3][c]	Allocations of Nonrecourse Deductions and Minimum Gain Chargebacks.....	24-89

[H][3][d]	Illustration of the Minimum Gain, Nonrecourse Deductions, and Minimum Gain Chargeback .....	24-90
[H][3][e]	Treatment of Allocations Under Section 704(b) Attributable to Nonrecourse Debt in the MillerCoors LLC JV Operating Agreement and Sprint Spectrum LP JV Agreement .....	24-90
[H][4]	Treatment of "Regulatory" and Curative Allocations in the MillerCoors LLC JV Operating Agreement and Sprint Spectrum LP JV Agreement .....	24-91
[I]	2014 Proposed Regulations Relating to Distributions Resulting in a Reduction of Interest in Section 751(b) Property, Inventory and Unrealized Receivables .....	24-91
§ 24:4.5	Federal Income Tax Considerations in the Sale or Liquidation of a JV, Including an LLC Treated As a Partnership .....	24-93
[A]	General .....	24-93
[B]	Issues Concerning Allocations of Partnership or LLC JV Income upon Changes in Venturers' Interests .....	24-93
[B][1]	The Varying Interest Rule .....	24-93
[B][2]	Treatment of Allocations of JV Income upon Changes in Venturers' Interests in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-94
[C]	Introduction to Sales and Liquidations of Partnership and LLC JVs and of Interests Therein .....	24-95
[C][1]	General Principles .....	24-95
[C][2]	Illustration of Section 743 Adjustment .....	24-96
[C][3]	Optional Basis Adjustment and Allocation of Basis in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement .....	24-96
[C][4]	The Final May Department Store Regs on Distributions by a Partnership to a Corporate Partner of Stock in the Partner .....	24-97
[D]	The Capital Account Maintenance Rules upon Sale of a Partnership or LLC JV Interest and upon Distribution of Partnership or LLC JV Property .....	24-99
[D][1]	In General .....	24-99

## Table of Contents

[D][2]	Treatment of the Capital Account Maintenance Rules upon Sale of a JV Interest and upon Distribution of JV Property in the MillerCoors LLC JV Operating Agreement and the Sprint Spectrum LP JV Agreement..... 24-100
§ 24:5	Antitrust Aspects of JVs ..... 24-100
§ 24:5.1	Introduction, <i>Texaco, American Needle</i> , and JV Guidelines ..... 24-100
§ 24:5.2	FTC and DOJ 2000 JV Guidelines ..... 24-104
[A]	Per Se and Rule of Reason ..... 24-104
[B]	Per Se Analysis and Illustration ..... 24-105
[C]	Rule of Reason Analysis and Illustration ..... 24-106
[D]	Analysis of Some JVs As Mergers and Illustration ..... 24-107
[E]	Analysis of Non-Compete Provisions ..... 24-108
[F]	Application of the JV Guidelines to the MillerCoors JV ..... 24-108
§ 24:5.3	Applicability of Hart-Scott-Rodino Pre-Merger Notification to Joint Ventures ..... 24-110
[A]	In General ..... 24-110
[B]	Corporate JV and Non-Corporate JV Large Transaction Rules ..... 24-111
[C]	Corporate JV and Non-Corporate JV Mid-Market Transaction Rules ..... 24-112
[D]	Application of HSR to the MillerCoors LLC JV and the Sprint Spectrum LP JV ..... 24-113
§ 24:5.4	The DOJ's 2023 Section 1 Challenge to the American Airlines-Jet Blue Boston JV ..... 24-114
§ 24:6	International Aspects of JVs: Federal Income Taxes and Antitrust Treatment ..... 24-116
§ 24:6.1	Introduction ..... 24-116
§ 24:6.2	Introduction to the Treatment of International JVs for Federal Income Tax Purposes ..... 24-116
[A]	Characterization of Foreign LLCs ..... 24-116
[B]	Agreements with Foreign Owners on Classification of Foreign JV ..... 24-117
[C]	Inbound and Outbound Section 721 Transactions ..... 24-117
[C][1]	Introduction ..... 24-117
[C][2]	Inbound Section 721 ..... 24-117
[C][3]	Outbound Section 721 ..... 24-118
[D]	Taxation of Foreign Venturers on U.S. Partnership Operations and U.S. Venturers on Foreign Partnership Operations ..... 24-118
[D][1]	Introduction ..... 24-118

[D][2]	Inbound Partnership or LLC JV Operations ....	24-118
[D][3]	Outbound Partnership or LLC JV	
	Operations .....	24-119
§ 24:6.3	European Commission's Antitrust Analysis	
	of JVs.....	24-119
[A]	Introduction .....	24-119
[B]	The MCR's Applicability to JVs.....	24-119
[B][1]	General Principles.....	24-119
[B][2]	Applicability of the MCR to the	
	MillerCoors LLC JV .....	24-121

## **Chapter 25 Checklist Guide to Structuring M&A Transactions**

§ 25:1	Scope.....	25-2
§ 25:2	Issues Common to All Transactions.....	25-3
	§ 25:2.1 Checklist.....	25-3
§ 25:3	Structuring a Negotiated Stock Acquisition of a Stand-Alone Closely Held Corporation or a Subsidiary.....	25-6
§ 25:3.1	Planning Issues .....	25-6
[A]	Introduction .....	25-6
[B]	Acquirer Issues .....	25-7
[C]	Selling Shareholder Issues .....	25-7
§ 25:3.2	Checklist .....	25-7
§ 25:4	Structuring a Negotiated Reverse Subsidiary Merger to Acquire a Stand-Alone Closely Held Corporation.....	25-9
§ 25:4.1	Planning Issues .....	25-9
[A]	Introduction .....	25-9
[B]	Acquirer Issues .....	25-10
[C]	Selling Shareholder Issues .....	25-10
§ 25:4.2	Checklist .....	25-11
§ 25:5	Structuring a Negotiated Acquisition of All or Substantially All of the Assets of a Stand-Alone Closely Held Corporation, a Division, or a Subsidiary.....	25-13
§ 25:5.1	Planning Issues .....	25-13
[A]	Introduction .....	25-13
[B]	Acquirer Issues .....	25-13
[C]	Target and Its Shareholder Issues .....	25-14
§ 25:5.2	Checklist .....	25-14
§ 25:6	Structuring the Acquisition of a Stand-Alone Publicly Held Corporation in a Negotiated Merger.....	25-16
§ 25:6.1	Planning Issues .....	25-16
[A]	Introduction .....	25-16

## Table of Contents

[B]	Acquirer Issues .....	25-17
[C]	Target Board Issues.....	25-17
§ 25:6.2	Checklist.....	25-18
§ 25:7	Structuring a Hostile Tender Offer for the Stock of a Publicly Held Corporation, Including the Target's Defensive Actions, Followed by a Second Step Freeze-Out Merger.....	25-21
§ 25:7.1	Planning Issues .....	25-21
[A]	Introduction .....	25-21
[B]	Acquirer Issues .....	25-22
[C]	Target Board Issues.....	25-23
§ 25:7.2	Checklist .....	25-23
§ 25:8	Structuring a Negotiated Tender Offer for the Stock of a Publicly Held Corporation and Second Step Freeze-Out Merger.....	25-29
§ 25:8.1	Planning Issues .....	25-29
[A]	Introduction .....	25-29
[B]	Acquirer Issues .....	25-30
[C]	Target Board Issues.....	25-30
§ 25:8.2	Checklist .....	25-30
§ 25:9	Dealing with Activist Shareholders .....	25-34

## Chapter 26 Ethical Issues in M&A

§ 26:1	Scope .....	26-3
§ 26:1.1	References .....	26-3
§ 26:1.2	The Musk Challenge to Wachtell Lipton's Fee for Representing Twitter.....	26-4
§ 26:2	First Issue: Competence and Diligence.....	26-9
§ 26:2.1	Introduction .....	26-9
§ 26:2.2	Discussion Under the Model and New York Rules .....	26-9
[A]	Competence Under the Model and New York Rules .....	26-9
[B]	Guidelines to Competence for the M&A Attorney .....	26-10
[C]	Diligence Under the Model and New York Rules.....	26-13
[D]	Law Firm Potentially Liable for Failing to Advise on Available Legal Forms and Risks Associated with the Forms— <i>Katten Muchin</i> .....	26-14
[E]	Who Is Responsible for Financial Advice? The Law Firm or the Accounting Firm— <i>Nucci v. Buchanan</i> .....	26-17
§ 26:2.3	A Cut and Paste Error—Proskauer, a Leading NYC Law Firm .....	26-19

§ 26:3	Second Issue: Dual Representation.....	26-21
§ 26:3.1	Introduction .....	26-21
§ 26:3.2	Discussion Under the Model and New York Rules .....	26-22
§ 26:4	Third Issue: Success Fees .....	26-24
§ 26:4.1	Introduction .....	26-24
§ 26:4.2	Discussion Under the Model and New York Rules .....	26-24
§ 26:4.3	Contingent Fees for the Lawyers for Shareholder Plaintiffs in M&A Litigation.....	26-25
§ 26:5	Fourth Issue: Truthfulness in Negotiations .....	26-29
§ 26:5.1	Introduction .....	26-29
§ 26:5.2	Discussion Under the Model and New York Rules .....	26-29
§ 26:6	Fifth Issue: Confidentiality Requirements .....	26-31
§ 26:6.1	Introduction .....	26-31
§ 26:6.2	Discussion Under the Model and New York Rules .....	26-32
§ 26:7	Sixth Issue: Conflict of Interest .....	26-36
§ 26:7.1	Introduction .....	26-36
§ 26:7.2	Discussion Under the Model and New York Rules— <i>Rohm and Haas and Airgas</i> .....	26-37
§ 26:7.3	Mylan’s Current Conflict Claim Against Kirkland & Ellis.....	26-44
§ 26:8	Seventh Issue: Representing the Corporation: The SEC’s “Up-the-Ladder” and Related Rules and the Model and New York Rules.....	26-48
§ 26:8.1	Introduction .....	26-48
§ 26:8.2	Discussion.....	26-49
[A]	The Model and New York Rules .....	26-49
[B]	The SEC “Up-the-Ladder Rules” .....	26-50
[B][1]	Introduction.....	26-50
[B][2]	Requirement of a Lawyer to Report Evidence of a Material Violation to Issuer’s Chief Legal Officer, Chief Executive Officer, or a Qualified Legal Compliance Committee .....	26-51
[B][2][a]	Introduction .....	26-51
[B][2][b]	Reports Not Made to a QLCC .....	26-51
[B][2][b][i]	Report to the Chief Legal Officer or the Chief Executive Officer Where There Is Evidence of a Material Violation .....	26-51
[B][2][b][ii]	Responsibility of Issuer’s Chief Legal Officer.....	26-52
[B][2][b][iii]	When the Lawyer Must Go Further “Up-the-Ladder” .....	26-53

## Table of Contents

[B][2][c]	Reports Made to a QLCC .....	26-53
[B][3]	Application of the "Up-the-Ladder Rules" to the Hypothetical .....	26-55
[C]	Comparing the "Up-the-Ladder Rules" with the Model and New York Rules .....	26-56
[D]	SEC Rule 102(e) Disciplinary Actions Against Attorneys— <i>Heinen and Carter</i> .....	26-57
[E]	SEC Actions Under Sections 15(c)(4) and 21C of the '34 Act— <i>Kern</i> .....	26-59
[F]	Aiding and Abetting Liability Under Rule 10b-5— <i>National Student Marketing and Fehn</i> .....	26-61
[G]	The Proposed "Noisy Withdrawal Rules" .....	26-65
§ 26:9	Other Ethical Issues .....	26-66
§ 26:9.1	Introduction .....	26-66
§ 26:9.2	Lessons When Conducting an Internal Investigation, Who Is the Client?— <i>KeoL Gates</i> .....	26-66
§ 26:9.3	Retention of Attorney Client Privilege in M&A, <i>Great Hill</i> .....	26-70
§ 26:9.4	RICO Claim Against a Lawyer for Certain Ecuadorians Against Chevron .....	26-72
§ 26:10	Conclusion .....	26-73

## Chapter 27 Deal Lawyer's Guide to Health Care M&A

§ 27:1	Scope .....	27-10
§ 27:1.1	References .....	27-12
§ 27:1.2	Special Considerations in the Drafting of Acquisition Agreements for Health Care Deals ....	27-13
§ 27:1.3	The Meaning of the Terms: PPACA, ACA, and Obamacare .....	27-13
§ 27:1.4	The Quality and Costs of American Health Care Compared to the Quality and Costs in Other OECD Countries .....	27-13
§ 27:1.5	Potential Impact of COVID-19 on Health Care M&A .....	27-15
§ 27:1.6	Health Care Deals During COVID: the First Quarter of 2021 .....	27-16
§ 27:1.7	Health Care Deals During COVID: the Second Quarter of 2021 .....	27-16
§ 27:1.8	DOJ's Withdrawal of Outdated Health Care Enforcement Policies .....	27-17
§ 27:1.9	Wachtell's Assessment of Healthcare M&A As of January 2024 and FTI's Assessment As of September 2024 .....	27-18

§ 27:2	Guide to the Antitrust Discussions in This Chapter .....	27-19
§ 27:2.1	Introduction .....	27-19
§ 27:2.2	FTC and DOJ Antitrust Guidelines.....	27-21
[A]	Overview .....	27-21
[B]	FTC's Three New 2016 Guidelines on Health Care Enforcement and Policy .....	27-21
§ 27:2.3	Significant Antitrust Enforcement in the Health Care Sector .....	27-23
§ 27:2.4	2022 Potential Impact on Health Care Resulting from a Revision of the Horizontal Merger Guidelines .....	27-24
§ 27:3	The Deal Lawyer's Guide to the Structure and Regulation of the Health Care Industry.....	27-25
§ 27:3.1	Introduction to the "Five Ps" of the Health Care Industry.....	27-25
§ 27:3.2	Patients .....	27-25
[A]	In General .....	27-25
[B]	Employer-Based Insurance.....	27-25
[C]	Individual Insurance .....	27-26
[D]	The Uninsured.....	27-27
[E]	Impact of PPACA .....	27-28
[E][1]	Individual Mandate, Tax Credit, the Supreme Court's 2012 Decision, and the TCAJA Repeal.....	27-28
[E][1][a]	The Establishment of the Individual Mandate .....	27-28
[E][1][b]	The TCAJA's Repeal of the Individual Mandate .....	27-29
[E][2]	No FSA, HSA, or MSA Benefit for Over-the-Counter Drugs.....	27-29
[E][3]	Employer Credits and Mandate .....	27-30
[E][3][a]	Introduction .....	27-30
[E][3][b]	Final Regulations on the Employer Mandate .....	27-30
[E][4]	Summary of the Impact of PPACA on the Uninsured.....	27-31
[E][5]	Supreme Court Upholds Tax Credit for Insurance Premiums— <i>King v. Burwell</i> .....	27-32
[E][6]	The Efforts by President Trump and the Republicans to Repeal and Replace PPACA a/k/a Obamacare in Early 2017 .....	27-32
§ 27:3.3	Providers .....	27-37
[A]	In General .....	27-37
[B]	The Overarching Concern with Fraud and Abuse .....	27-37
[B][1]	Introduction.....	27-37

## Table of Contents

[B][2]	Federal False Claims Act, 31 U.S.C. § 3729 <i>et seq.</i> .....	27-39
[B][2][a]	DOJ Publishes Guidance on the False Claims Act.....	27-42
[B][3]	Federal Civil Monetary Penalties Statute, 42 U.S.C. § 1320a-7a.....	27-43
[B][4]	Federal Health Care Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b.....	27-44
[B][5]	Federal Health Care Fraud Statute, 18 U.S.C. § 1347 .....	27-48
[B][6]	Corporate Integrity Agreement and Certificate of Compliance Agreement .....	27-49
[B][7]	False Claims Act and AKS Recoveries .....	27-50
[C]	Physicians .....	27-51
[C][1]	Introduction.....	27-51
[C][2]	Professional Service Corporations and Professional Entities .....	27-52
[C][3]	Corporate Practice of Medicine .....	27-53
[C][4]	Illustration of Applicability of the False Claims Act to a Physician .....	27-54
[C][5]	Illustration of Applicability of Federal Civil Monetary Penalties Statute to a Physician .....	27-55
[C][6]	Illustration of Applicability of Federal Health Care Fraud Statute to a Physician .....	27-55
[C][7]	Illustration of Applicability of AKS to a Physician .....	27-56
[C][8]	Regulatory Exception from AKS for Physicians.....	27-56
[C][8][a]	In General .....	27-56
[C][8][b]	Investments in Group Practice Exception to AKS .....	27-58
[C][8][c]	Investment Interests Exception to AKS.....	27-58
[C][8][d]	Employment Exception to AKS.....	27-60
[C][8][e]	Ambulatory Surgical Center Exception to AKS .....	27-60
[C][9]	Stark Prohibition on Physician Self-Referral, Impact of PPACA .....	27-61
[C][9][a]	Introduction to Stark.....	27-61
[C][9][b]	General Prohibition Under Stark .....	27-62
[C][9][c]	General Statutory Exceptions Under Stark to Ownership and Compensation Prohibitions .....	27-63
[C][9][d]	Statutory Exceptions Under Stark to Ownership Prohibition for Public Companies .....	27-64

[C][9][e]	Statutory Exception Under Stark to Ownership Prohibition for Hospitals .....	27-65
[C][9][e][i]	Introduction to the Whole Hospital Exception Under Stark.....	27-65
[C][9][e][ii]	Impact of PPACA on the Hospital Exception Under Stark.....	27-65
[C][9][f]	Statutory Exceptions Under Stark Relating to Other Compensation Arrangements.....	27-70
[C][9][g]	Statutory Exception Under Stark for Bona Fide Employment Relationships .....	27-70
[C][9][h]	Definition of Fair-Market Value Under Stark ....	27-71
[C][9][i]	Regulatory Exceptions Under Stark Related to Compensation .....	27-72
[C][9][j]	Regulatory Exception Under Stark for Fair-Market Value Compensation .....	27-73
[C][9][k]	Reporting Requirements Under Stark .....	27-74
[C][9][l]	Illustration of Applicability of the Ownership Provisions of Stark.....	27-75
[C][9][m]	Illustration of Applicability of the Compensation Arrangement Provisions of Stark and AKS .....	27-75
[C][10]	General Antitrust Issues Affecting Physicians.....	27-76
[C][10][a]	Introduction .....	27-76
[C][10][b]	<i>Maricopa</i> , Price Fixing Per Se Violation.....	27-77
[C][10][c]	<i>IDA</i> , Refusal to Deal, Rule of Reason Violation.....	27-77
[C][10][d]	<i>CDA</i> , Restriction on Advertising, Rule of Reason, No Violation.....	27-79
[C][10][e]	<i>North Texas</i> , Messenger Model, Inherently Suspect .....	27-83
[D]	Hospitals .....	27-86
[D][1]	Introduction.....	27-86
[D][1][a]	In General .....	27-86
[D][1][b]	Importance of Medicare to the Financing of Many Hospitals .....	27-88
[D][2]	Certificates of Need .....	27-88
[D][3]	Corporate Practice of Medicine .....	27-88
[D][4]	Illustration of Applicability of Federal Civil Monetary Penalties Statute to a Hospital.....	27-89
[D][5]	Illustration of Applicability of Anti-Kickback Statute to a Hospital .....	27-90
[D][6]	Illustration of Applicability of the Stark Law and AKS to a Hospital.....	27-90
[D][7]	HCA's Corporate Integrity Agreement .....	27-90
[D][8]	Non-Profit Hospitals; Impact of PPACA .....	27-91

## Table of Contents

[D][9]	PPACA's Accountable Care Organizations .....	27-92
[D][9][a]	Introduction .....	27-92
[D][9][b]	Final Shared Savings Rules for ACOs and the FTC/DOJ Statement.....	27-96
[D][10]	General Antitrust Issues Affecting Hospitals ...	27-98
[D][10][a]	Introduction .....	27-98
[D][10][b]	<i>Jefferson Parish and Sutter, Tying</i> .....	27-98
[D][10][c]	The <i>Noerr-Pennington</i> Doctrine— <i>Mercatus</i> .....	27-101
[D][10][d]	State Action Immunity from Enforcement of Section 7 of the Clayton Act— <i>Phoebe</i> .....	27-104
[E]	Provider Consolidation, ACOs and Antitrust: Two Views .....	27-107
[E][1]	The View of Catalyst for Payment Reform .....	27-107
[E][2]	The View of FTC Commissioner Brill .....	27-110
§ 27:3.4	Pharma.....	27-112
[A]	In General .....	27-112
[B]	FDA's Policy on Fraud .....	27-115
[C]	Pfizer's Corporate Compliance Agreement.....	27-116
[D]	Impact of PPACA .....	27-116
[E]	General Antitrust Issues Affecting Pharma .....	27-117
[E][1]	Introduction.....	27-117
[E][2]	Reverse Payments, <i>Cipro</i> .....	27-117
[E][3]	FTC's Rethink on Antitrust Scrutiny of Pharma M&A .....	27-120
[F]	Patents and Drugs .....	27-121
§ 27:3.5	Producers and Manufacturers of Medical Devices .....	27-122
[A]	In General .....	27-122
[B]	FDA's Policy on Fraud .....	27-123
[C]	Impact of PPACA .....	27-123
[D]	General Antitrust Issues Affecting Producers .....	27-123
[D][1]	Introduction.....	27-123
[D][2]	Monopolization, <i>Dentsply</i> .....	27-123
§ 27:3.6	Payors.....	27-125
[A]	In General .....	27-125
[B]	Insurance Companies, HMOs, PPOs and POSS.....	27-125
[C]	State Regulation of Insurance Companies, HMOs, PPOs and POSSs .....	27-126
[C][1]	In General.....	27-126
[C][2]	Colorado Regulation .....	27-126
[C][2][a]	Insurance Companies .....	27-126
[C][2][b]	HMOs .....	27-127
[C][3]	California Regulation.....	27-128

[D]	Medicare and Medicare Advantage .....	27-131
[D][1]	Introduction.....	27-131
[D][2]	Basic Medicare.....	27-131
[D][3]	The Four Parts of Medicare .....	27-132
[D][4]	The Prescription Drug Benefit and the Doughnut Hole.....	27-133
[D][5]	Financing Medicare.....	27-134
[D][6]	Medigap Insurance and Medicare Prescription Drug Plans, Part D.....	27-134
[D][7]	Medicare Advantage.....	27-134
[E]	Impact of PPACA .....	27-135
[E][1]	Insurance Reforms.....	27-135
[E][2]	Annual Fee on Health Insurers .....	27-136
[E][2][a]	In General .....	27-136
[E][2][b]	Determination of "Net Premium Written" .....	27-137
[E][2][c]	Definition of Amount of Net Premium Written That Is "Taken into Account" .....	27-137
[E][2][d]	Applicable Amount.....	27-138
[E][2][e]	Illustration of Computation of Fee.....	27-138
[E][3]	Medicare Advantage.....	27-138
[E][4]	Minimum Medical Loss Ratios.....	27-138
[F]	General Antitrust Issues Affecting Payors .....	27-140
[F][1]	Introduction to the McCarran-Ferguson Act.....	27-140
[F][2]	Illustration of McCarran-Ferguson Antitrust Exemption— <i>Ocean State</i> .....	27-140
[G]	Brief Introduction to Medicaid .....	27-144
§ 27:3.7	Changes and Delays As of March 2014 in Implementing PPACA .....	27-147
§ 27:3.8	Due Diligence in Health Care Deals .....	27-149
§ 27:4	Acquisitions of Physician Practices; Including Formation of JVs .....	27-149
§ 27:4.1	Introduction .....	27-149
§ 27:4.2	Impact of Corporate Practice of Medicine Doctrine .....	27-151
§ 27:4.3	Anti-Kickback Exception for the Sale of Practice and Employment .....	27-152
[A]	Introduction .....	27-152
[B]	Exception to AKS for Sale to Another Physician.....	27-152
[C]	Exception to AKS for Sale to a Hospital.....	27-152
[D]	Fact-Specific Determination That AKS Is Not Applicable .....	27-153
§ 27:4.4	Stark Exception for the Sale of Practice and Employment.....	27-154
§ 27:4.5	Illustration of the Relationship Between FCA, AKS and Stark in a Sale of Practice.....	27-157

## Table of Contents

§ 27:4.6	Addressing FCA, AKS and Stark in the SPMC's Merger Agreement .....	27-161
§ 27:4.7	Non-Competes .....	27-162
§ 27:4.8	Tail Malpractice Insurance .....	27-162
§ 27:4.9	Antitrust Issues Affecting Physician Mergers and JVs .....	27-163
[A]	Introduction .....	27-163
[B]	Section 7 of the Clayton Act and HSR .....	27-163
[C]	Physicians' Business JVs .....	27-164
[C][1]	Introduction .....	27-164
[C][2]	Physician Network Business JVs .....	27-164
[C][3]	Multiprovider Network Business JVs .....	27-167
[D]	Acquisitions and Mergers of Physician Practices .....	27-168
[D][1]	Introduction .....	27-168
[D][2]	Pennsylvania's Challenge to the Geisinger Acquisition of Lewistown Hospital and Associated Physician Practice .....	27-168
[D][3]	FTC's Challenge to St. Luke's Acquisition of Idaho Physician Practice .....	27-169
[D][3][a]	Introduction .....	27-169
[D][3][b]	Analysis of District Court's Opinion .....	27-170
[D][3][c]	Ninth Circuit Affirms in <i>St. Luke's</i> .....	27-181
[E]	Connecticut Attorney General's Report on the Impact of Acquisitions by Hospitals of Physicians' Practices .....	27-182
[E][1]	Introduction .....	27-182
[E][2]	Recommendation for Pre-Merger and Facility Fee Reporting .....	27-184
[F]	FTC's Challenge to Texas Anesthesiology Physician Practice (That Is, USAP) "Roll-Up" Strategy .....	27-185
§ 27:5	Acquisitions of Hospitals; Including Formation of JVs .....	27-187
§ 27:5.1	Introduction .....	27-187
§ 27:5.2	Approach to FCA, AKS, Stark and Other Health Care Compliance Issues .....	27-188
§ 27:5.3	Certificate of Need .....	27-191
§ 27:5.4	Tail Malpractice Insurance .....	27-191
§ 27:5.5	Special Issues in the Acquisition of a Non-Profit Hospital .....	27-192
[A]	Introduction .....	27-192
[B]	Sale of Assets Provision in Massachusetts .....	27-193
[C]	Attorney General Approval in Massachusetts .....	27-194
[D]	Medicare Reimbursement in Mergers of Nonprofit Hospitals— <i>Central Iowa</i> .....	27-195

§ 27:5.6	Antitrust Issues Affecting Hospital Mergers and JVs.....	27-199
[A]	Introduction .....	27-199
[B]	Section 7 of the Clayton Act and HSR.....	27-199
[B][1]	Introduction.....	27-199
[B][2]	Judge Posner's 1986 Decision in <i>Hospital Corporation of America</i> .....	27-200
[B][3]	Judge Posner's 1990 Decision in <i>Rockford</i> .....	27-203
[B][4]	Eleventh Circuit's 1991 Decision in <i>University Health</i> .....	27-206
[B][5]	Iowa District Court's 1995 Decision in <i>Mercy</i> .....	27-207
[B][6]	Eighth Circuit's 1996 Decision in <i>Freeman</i> ....	27-209
[B][7]	Sixth Circuit's 1997 Decision in <i>Butterworth</i> .....	27-209
[B][8]	N.Y. District Court's 1997 Decision in <i>Long Island</i> .....	27-211
[B][9]	Eighth Circuit's 1999 Decision in <i>Tenet</i> .....	27-213
[B][10]	The FTC's 2007 Decision in <i>Evanston Hospital</i> .....	27-214
[B][11]	<i>Phoebe</i> , Supreme Court and Settlement .....	27-217
[B][11][a]	The Supreme Court's 2013 Decision in <i>Phoebe</i> .....	27-217
[B][11][b]	Settlement of the <i>Phoebe</i> Case .....	27-218
[B][12]	Ohio District Court's 2011, FTC's 2012, and Sixth Circuit's 2014 Decisions in <i>ProMedica</i> .....	27-219
[B][12][a]	The District Court's 2011 Decision .....	27-219
[B][12][b]	The FTC's 2012 Decision .....	27-221
[B][12][c]	Sixth Circuit's 2014 Decision in <i>ProMedica</i> .....	27-221
[B][12][d]	Supreme Court Lets <i>ProMedica</i> Stand .....	27-226
[B][13]	DOJ/FTC Statement on Enforcement Policy on Hospital Mergers .....	27-226
[B][14]	Illinois Hospital Merger Enjoined, <i>OSF</i> .....	27-227
[B][15]	Seventh Circuit Holds That Patients Can Proceed with a Class Action Section 7 Claim— <i>Northshore</i> .....	27-229
[B][16]	Pennsylvania's Challenge to the Geisinger Acquisition of Lewistown Hospital .....	27-230
[B][17]	FTC and Pennsylvania Challenge Penn State Hershey Medical Center's Proposed Merger with PinnacleHealth System.....	27-232
[B][17][a]	The FTC's Announcement of a Challenge.....	27-232

## Table of Contents

[B][17][b]	District Court and Third Circuit Decisions in <i>Penn State Hershey</i> ..... 27-233
[B][17][c]	The Abandonment of the Penn State Hershey–Pinnacle Merger ..... 27-239
[B][17][d]	Announcement of Potential Affiliation Between Pinnacle and UPMC, Which Was Consummated..... 27-240
[B][17][e]	My Take, As a Central Pennsylvanian, on the Proposed Acquisitions of PinnacleHealth by Penn State Hershey and UPMC ..... 27-241
[B][17][f]	Further on Penn State Hershey–Pinnacle and UPMC–Pinnacle ..... 27-242
[B][18]	West Virginia’s Use of a Certificate of Public Advantage to Defeat FTC Challenge to a Hospital Merger—Cabell Huntington Hospital ..... 27-242
[B][19]	After <i>Evanston</i> , Another Chicago North Shore Hospital Merger Case— <i>Advocate Health Care</i> ..... 27-244
[B][19][a]	Introduction ..... 27-244
[B][19][b]	Advocate Prevails in the District Court, FTC Fails to Establish a Geographic Market ..... 27-244
[B][19][c]	Advocate Loses in the Seventh Circuit, Court Remands on the Geographic Market Issue ..... 27-247
[B][19][d]	The Merger Is Terminated ..... 27-248
[B][20]	Efficiencies Defense in Hospital Mergers ..... 27-249
[B][21]	Agencies Concerned with Vertical Health Care Hospital Mergers, Notwithstanding AT&T–Time Warner ..... 27-250
[B][22]	Professor Greaney’s Concern with Vertical Mergers in the Health Care Industry Generally ..... 27-251
[B][23]	FTC Abandons Appeal of District Court Decision Rejecting FTC’s Challenge to Merger of Two Philly Hospitals ..... 27-252
[B][24]	Another Third Circuit Hospital Merger Case; This Time Enjoined— <i>Hackensack Meridian</i> ..... 27-253
[C]	Hospital JVs ..... 27-255
[C][1]	Introduction ..... 27-255
[C][2]	Hospital JVs Involving High-Tech or Other Expensive Health Care Equipment ..... 27-255

[C][3]	Hospital JV Involving Specialized Clinical or Other Expensive Health Care Services .....	27-256
[C][4]	Hospital JV Involving Joint Purchasing Arrangements .....	27-257
§ 27:5.7	Consolidation of Hospitals and Insurance Firms.....	27-258
[A]	Introduction .....	27-258
[B]	The Highmark–West Penn Affiliation .....	27-258
[B][1]	Introduction.....	27-258
[B][2]	The DOJ’s Antitrust Decision .....	27-260
[B][3]	The Pennsylvania Insurance Department’s Approval and Determination Order .....	27-262
§ 27:6	Acquisitions of Pharma Companies .....	27-264
§ 27:6.1	Introduction .....	27-264
§ 27:6.2	FDA Issues .....	27-264
§ 27:6.3	Pfizer’s CIA and Wyeth’s Investigations .....	27-266
§ 27:6.4	Antitrust Issues Affecting Pharma Mergers .....	27-266
[A]	Introduction .....	27-266
[B]	Pfizer–Wyeth Settlement with FTC .....	27-267
§ 27:6.5	The Express Scripts–Medco Pharmacy Benefit Merger.....	27-269
§ 27:6.6	Potential More Vigorous Antitrust Enforcement Approach to Pharma Mergers .....	27-270
§ 27:7	Acquisitions of Medical Device Manufacturers .....	27-271
§ 27:7.1	Introduction .....	27-271
§ 27:7.2	FDA Issues .....	27-271
§ 27:7.3	Antitrust Issues Affecting Medical Device Mergers.....	27-274
[A]	Introduction .....	27-274
[B]	Boston Scientific–Guidant Settlement with FTC .....	27-275
§ 27:8	Acquisitions of Health Insurers and Health Plans .....	27-277
§ 27:8.1	Introduction .....	27-277
§ 27:8.2	Description of the Insurance Business Aspects of the Cigna–Great-West Transaction ....	27-277
[A]	Introduction to the Transaction.....	27-277
[B]	The Concept of Reinsurance .....	27-278
[C]	Transfer of the Health Care Insurance Assets....	27-279
[C][1]	Transferred Assets.....	27-279
[C][2]	Definition of Business .....	27-280
[C][2][a]	In General .....	27-280
[C][2][b]	Definition of Insurance Contracts .....	27-280
[C][2][b][i]	In General.....	27-280
[C][2][b][ii]	Definition of Stop Loss Insurance.....	27-281
[C][2][c]	Definition of Reinsurance Contracts .....	27-281
[C][2][d]	Definition of Administered Contracts .....	27-281

*Table of Contents*

[D]	Assumption of Health Care-Related Liabilities.....	27-282
[D][1]	In General.....	27-282
[D][2]	Insurance Liabilities.....	27-282
[D][2][a]	In General .....	27-282
[D][2][b]	Definitions of Ceded Reinsurance Agreements and Assumed Reinsurance Agreements.....	27-284
[D][3]	Indemnity Reinsurance Agreements and Net Reinsurance Premium.....	27-284
[D][4]	Representation Regarding Business Reinsurance Agreements.....	27-285
[E]	Transfer of the Stock of the Health Care Insurance Subsidiaries.....	27-286
[F]	Renewal Rights.....	27-286
[G]	Representations and Covenants Regarding Compliance with Health Care Laws.....	27-287
[H]	Other Insurance-Related Representations.....	27-289
§ 27:8.3	State Regulatory Approvals .....	27-289
[A]	In General .....	27-289
[B]	Change of Control Regulations in Colorado .....	27-289
[B][1]	Acquisitions of Insurance Companies.....	27-289
[B][2]	Acquisitions of HMOs and Approval in Cigna-Great-West.....	27-292
[C]	Change of Control Regulation of Health Care Plan in California.....	27-293
[D]	Addressing Change of Control Regulations in the Cigna-Great-West Transaction.....	27-294
§ 27:8.4	Antitrust Issues Affecting Insurer Mergers .....	27-296
[A]	Introduction .....	27-296
[B]	Illustration: DOJ's Settlement in the UnitedHealth-Pacificare Deal .....	27-296
[C]	Aetna's Acquisition of Humana and Anthem's Acquisition of Cigna.....	27-301
[C][1]	Introduction.....	27-301
[C][2]	Aetna-Humana Merger, Blocked, January 23, 2017, Abandoned February 14, 2017 .....	27-303
[C][3]	Anthem-Cigna Merger, Blocked, February 8, 2017, Terminated by Cigna on February 14, 2017 .....	27-306
[C][4]	Anthem-Cigna Loses in the D.C. Circuit Court: Efficiencies Defense Rejected .....	27-310
[D]	DOJ Clears Cigna-Express Scripts Merger in September 2018 and CVS-Aetna Merger in October 2018 .....	27-312
[D][1]	Cigna-Express Scripts.....	27-312

[D][2]	CVS–Aetna .....	27-312
[D][2][a]	DOJ Clears .....	27-312
[D][2][b]	Not So Fast: The Tunney Act Hearing .....	27-313

## Chapter 28 Shareholder Activism, Merger Arbitrage, and Short Sales

§ 28:1	Scope .....	28-9
§ 28:1.1	References .....	28-10
[A]	In General .....	28-10
[B]	April 2024 ABA, Business Law Section Program on Recent Shareholder Activism .....	28-13
§ 28:2	Recent Activist Campaigns .....	28-14
§ 28:2.1	Three 2014 Activist Campaigns .....	28-14
§ 28:2.2	Activism Increased in 2020 Notwithstanding COVID-19 .....	28-15
§ 28:2.3	Lazard Report on Shareholder Activism Campaigns for the First Quarter of 2022 .....	28-16
§ 28:2.4	Sullivan & Cromwell Report on Shareholder Activism As of December 2022 .....	28-17
§ 28:2.5	Lazard Report on Shareholder Activism Campaigns in “Early 2023” .....	28-18
§ 28:2.6	Goldman Sachs Report on Shareholder Activism As of May 30, 2023 .....	28-19
§ 28:2.7	Martin Lipton’s Annual Reports on “Dealing with Activist Hedge Funds and Other Activist Investors” .....	28-20
[A]	Martin Lipton’s 2023 Annual Report on Shareholder Activism .....	28-20
[B]	Martin Lipton’s 2024 Annual Report on Shareholder Activism .....	28-22
§ 28:2.8	Impact in 2023 on Shareholder Activism of the SEC’s 2021 Adopted Universal Proxy Rules .....	28-23
[A]	Introduction .....	28-23
[B]	December 2022 Sullivan & Cromwell Report on the Impact of the Universal Proxy Rules .....	28-25
[C]	April 2023 Lazard Report on the Impact of the Universal Proxy Rules .....	28-25
[D]	May 18, 2023, Report on the Impact of the Universal Proxy Rules on the Successful Proxy Contest at Zevra Therapeutics .....	28-26
[E]	May 30, 2023, Goldman Sachs Report on the Impact of the Universal Proxy Rules and the Proposed Amendment to the Shareholder Proposal Rule .....	28-31

## Table of Contents

[F]	July 2023 Skadden Arps Report on the Impact of the Universal Proxy Rules .....	28-31
[G]	August 29, 2023, Martin Lipton Report on the Impact of the Universal Proxy Rules.....	28-32
[H]	Wachtell Lipton's May 2024 Report on Activism.....	28-32
[I]	"Eight Hot Topics in Activism" As of Early 2024.....	28-36
[J]	The Key Shareholder Activism Trends to Emerge from 2023 .....	28-37
§ 28:3	Hedge Fund; Activism; and Activist Hedge Fund? .....	28-38
§ 28:3.1	What Is a Hedge Fund?.....	28-38
§ 28:3.2	SEC Commissioner Gallagher on Activism: An Introduction.....	28-40
§ 28:3.3	SEC Commissioner Gallagher on Activist Hedge Funds.....	28-41
§ 28:4	What Is the Basic Mode of Operation of Activist Hedge Funds and the Reactions of the Targets? .....	28-41
§ 28:5	Stock Market Reactions to Hedge Fund Activism .....	28-42
§ 28:5.1	The "One-Day Pops" in Pershing Square/Valeant–Allergan and Icahn Capital–Family Dollar Stores .....	28-42
Table 28-1	Calculations of Pershing Square/Valeant's "One-Day Pop" .....	28-42
Table 28-2	Calculations of Icahn Capital's "One-Day Pop" .....	28-43
§ 28:5.2	Returns from M&A Activism .....	28-43
§ 28:6	How Are Activist Hedge Funds and Their Investments Structured? .....	28-45
§ 28:6.1	Introduction .....	28-45
§ 28:6.2	The Structure of the Pershing Square/Valeant Acquisition of the Stock of Allergan .....	28-45
[A]	Introduction .....	28-45
[B]	The Pershing Square Side of the Transaction.....	28-46
[C]	The Valeant Side of the Transaction .....	28-48
§ 28:6.3	The Structure of the Icahn Acquisition of the Stock of Family Dollar Stores .....	28-48
§ 28:7	Assets Under Management (AUM) at Activist Hedge Funds.....	28-49
§ 28:7.1	Introduction .....	28-49
§ 28:7.2	Decline in Both Returns and AUM in 2018 .....	28-49
§ 28:8	Who Are the Targets of the Activist Hedge Funds? .....	28-50
§ 28:9	Does Activism Generate Shareholder Value? .....	28-51
§ 28:10	General Tactics of Activist Hedge Funds.....	28-52

§ 28:11	Specific Tactics of Activist Hedge Funds .....	28-53
§ 28:11.1	Proxy Contests by Activist Hedge Funds .....	28-53
[A]	Introduction.....	28-53
[B]	Short Slates and Control Slates.....	28-54
[C]	Results of Proxy Contest 2013–2016 .....	28-54
Table 28-3	Results of Proxy Contests, 2013–2016 .....	28-55
[D]	The Picture of Proxy Contests 2016–2018.....	28-55
Table 28-4	Number of Proxy Contests and Election	
	Outcomes 2016–2018 .....	28-56
	[E] Impact of Concentrated Ownership on Activist	
	Proxy Contests.....	28-56
	[F] Board Seats Obtained by Activists, 2017–2021 .....	28-56
§ 28:11.2	Appraisal Actions by Activist Shareholders .....	28-57
§ 28:11.3	Activist Hedge Funds Tactics in M&A.....	28-59
[A]	Introduction.....	28-59
[B]	Challenging the Deal .....	28-59
[C]	Putting the Target in Play.....	28-60
[D]	Bumpitrage .....	28-61
[D][1]	In General.....	28-61
[D][2]	Bumpitrage in 2018 .....	28-61
[E]	Lessons on Activism in M&A .....	28-62
§ 28:11.4	Activist Hedge Funds “Hushmail” Tactic.....	28-62
[A]	In General.....	28-62
[B]	Potential Impact of the Greenmail Excise Tax or State Anti-Greenmail Provisions .....	28-65
§ 28:11.5	The “Wolf Pack” Tactic .....	28-66
[A]	In General.....	28-66
[B]	The Author’s View on the Applicability of the Group Concept in Section 13(d)(3) to “Wolf Packs” .....	28-67
§ 28:11.6	Staying Below 10% to Avoid Section 16(b).....	28-68
§ 28:11.7	Strategies Followed by Activists in 2014 and 2015 .....	28-68
Table 28-5	Types of Activists’ Campaigns, 2014–2015 .....	28-68
§ 28:11.8	Success Rate for Activists’ Campaigns 2010 to 2015.....	28-69
Table 28-6	Success Rate of Activists’ Campaigns, 2010–2015 .....	28-69
§ 28:11.9	M&A-Related Activism 2015 to 2018 .....	28-69
Table 28-7	M&A-Related Activism 2015–2016.....	28-69
§ 28:11.10	Introduction to Activist Merger Arbitrage.....	28-70
§ 28:11.11	Goldman’s Picture of the Types of Shareholder Activism from 2006 Through Early 2023.....	28-70
§ 28:11.12	Post-2021 Developments .....	28-70

## Table of Contents

§ 28:12 Post-May 2014 Major Activity of Activist Shareholders.....	28-71
§ 28:12.1 The Period from May 2014 to December 31, 2014.....	28-71
[A] Assessment of Deal Professor .....	28-71
§ 28:12.2 Notable Activity in 2015 .....	28-72
[A] New Kind of Solo Activist Shareholder at GM .....	28-72
[B] DuPont's Defeat of Proxy Contest with Activist Trian, and Subsequent Merger with Dow .....	28-73
§ 28:12.3 Assessment of Activist Activity for 2017 .....	28-75
§ 28:12.4 Introduction to Activity in 2018.....	28-76
§ 28:12.5 Post-2021 Developments .....	28-78
§ 28:13 The Principal Legal Issues Presented by Activist Campaigns .....	28-79
§ 28:13.1 Introduction .....	28-79
§ 28:13.2 Comments of SEC Chair Mary Jo White on the Tools Shareholders Have for Influencing Boards .....	28-79
§ 28:13.3 Compliance with Section 13(d) .....	28-80
[A] Introduction.....	28-80
[B] SEC'S Proposed Amendments to the Section 13 Beneficial Ownership Rules.....	28-81
§ 28:13.4 Compliance with Schedule 13G and 13F.....	28-81
[A] Introduction.....	28-81
[B] The 45-Day 13G Filer Rule.....	28-81
[C] The 10-Day, After End of Month, 10% 13G Filer Rule .....	28-82
[D] The 10-Day After Trigger 13G Filer Rule .....	28-82
[E] The 45-Day Investment Manager 13F Filer Rule ....	28-83
[F] Summary of 13G and 13F Rules .....	28-83
[G] Summary of 13G and 13F Rules.....	28-83
Table 28-8	
§ 28:13.5 Perry, an Activist Hedge Fund That Filed a 13G When It Should Have Filed a 13D .....	28-84
§ 28:13.6 Proposed Change to the Section 13F Reporting Requirement.....	28-85
§ 28:13.7 Compliance with Hart-Scott-Rodino .....	28-86
§ 28:13.8 Insider Trading Issue, Including Under Rule 14e-3, in Pershing Square/Valeant, Co-Bidder Deals .....	28-87
§ 28:13.9 Compliance with the Proxy Rules in the Event of a Proxy Contest.....	28-87
§ 28:13.9 Consideration of the Role of Proxy Advisors.....	28-87
§ 28:13.10 Read the Bylaws, Special Meetings, and Sunlight.....	28-88
[A] Read the By-Laws and Other Corporate Documents .....	28-88
[B] Special Meetings .....	28-89
[C] Sunlight Bylaws As Backups to Section 13(d).....	28-89

§ 28:13.11	Impact on Activism of DOL's 2016 Interpretative Release on Voting Policies .....	28-90
§ 28:13.12	Advice to Boards in Responding to Activist Hedge Funds .....	28-91
[A]	Introduction.....	28-91
[B]	A Checklist of Issues .....	28-91
Table 28-9	Checklist of Issues .....	28-92
§ 28:13.13	Fiduciary Duty Issues Governing the Target's Defensive Measures Including the Deployment of a Poison Pill .....	28-99
[A]	Introduction.....	28-99
[B]	Anti-Activist Poison Pill.....	28-100
[C]	The Pill During COVID.....	28-100
§ 28:13.14	Breach of Fiduciary Duty by Activist, but No Damages— <i>PLX</i> .....	28-101
§ 28:13.15	Chief Justice Strine's Call for Greater General Disclosure by Activist, but Not of the "Secret Sauce" .....	28-102
[A]	The General Disclosure Proposal .....	28-102
[B]	This Author's View on Mandatory Enhanced General Disclosure .....	28-102
§ 28:14	Fiduciary Duties and the Two-Trigger Pill, 10% for 13d Filers, 20% for 13g Filers— <i>Third Point</i> .....	28-103
§ 28:14.1	Background .....	28-103
§ 28:14.2	Description of the Acquisition of Stock of Sotheby's by Activist Hedge Funds and Others ....	28-104
§ 28:14.3	Sotheby's View That the Hedge Funds Had a Short-Term View .....	28-105
§ 28:14.4	Advice from Sotheby's Lawyers, Wachtell, Lipton, and Investment Banker, Goldman Sachs .....	28-105
§ 28:14.5	Discussions About Returning Capital and the "Hedgies" Keep Buying.....	28-106
§ 28:14.6	Third Point's Form 13D and Letter to Sotheby's.....	28-107
§ 28:14.7	Sotheby's Adopts a Poison Pill.....	28-108
§ 28:14.8	Third Point's Request for a Waiver of the 10% Trigger and Sotheby's Response.....	28-108
§ 28:14.9	Brief Summary of the Court's Reasoning in Denying Third Point's Motion for a Preliminary Injunction Re Its Request for a Waiver of the 10% Trigger and Sotheby's Response .....	28-109
§ 28:14.10	Consistent with <i>Yucaipa</i> .....	28-113
§ 28:14.11	The Proxy Contest .....	28-113

## Table of Contents

§ 28:15	The Short-Term, Long-Term Debate.....	28-113
§ 28:15.1	Introduction to Martin Lipton's Position That Activist Hedge Funds Harm Long-Term Investment and His Proposed Regulatory Changes, Including Closing of the 10-Day Window and Reporting of Derivative Positions Under Section 13(d) .....	28-113
[A]	In General.....	28-113
[B]	Lipton in January 2015 on Short-Termism .....	28-115
[C]	Lipton's Proposed Solutions Including Closing the 10-Day Window and Disclosing Derivative Positions .....	28-116
§ 28:15.2	Bebchuk's Position That Activist Hedge Funds Do Not Harm Long-Term Investment.....	28-118
§ 28:15.3	The Rejection by Professors Gilson and Gordon of the Short-Term Thesis.....	28-118
§ 28:15.4	Sorkin's Observation About the Turnover of the Average Portfolio .....	28-119
§ 28:15.5	View of Sullivan & Cromwell on Short-Termism .....	28-119
§ 28:15.6	Views of Activist Insight and Marc Weingarten, a Lawyer Who Represents Activists .....	28-120
§ 28:15.7	Position of Professors Coffee and Palia on Short-Termism .....	28-120
§ 28:15.8	View of SEC Chair on Short-Termism .....	28-121
§ 28:15.9	SEC Commissioner Gallagher on Short-Termism .....	28-122
§ 28:15.10	The Opposite Conclusions of Two 2015 Academic Studies of the Short-Termism Thesis .....	28-125
§ 28:15.11	Martin Lipton's Response to the Hedge Fund Activism and Long-Term Firm Value Article.....	28-126
§ 28:15.12	Chief Justice Strine's "Middle Ground" Approach to Activism.....	28-127
[A]	Chief Justice Strine's 2014 <i>Columbia Law</i> <i>Review Article</i> .....	28-127
[B]	Chief Justice Strine's 2017 <i>Yale Law Journal</i> Article .....	28-128
§ 28:15.13	Professor Roe's Economic Attack on the Short-Termism Thesis.....	28-128
§ 28:15.14	A 2016 Summary Analysis of the Various Positions on Activism of Bebchuk, Lipton, Strine and Others .....	28-129
§ 28:15.15	This Author's Views on the Short-Termism Debate .....	28-129
[A]	Campaigns Are Not Likely to Be Short and if Short May Benefit Shareholders .....	28-129

[B]	Activists Provide a Unique and Valuable Service.....	28-129
[C]	The Proxy Advisors As Arbitrators .....	28-130
[D]	The DCF Finance Investment Model.....	28-130
[E]	Going Private and the Long Term.....	28-130
[F]	Summary .....	28-130
§ 28:16	Should the 10-Day Window Be Closed? .....	28-131
§ 28:16.1	The Use of the 10-Day Window in Pershing Square/Valeant–Allergan and Icahn–Family Dollar Store .....	28-131
§ 28:16.2	Wachtell Lipton's Petition Asking the SEC to Close the 10-Day Window.....	28-132
§ 28:16.3	Bebchuk's Argument Against Closing the 10-Day Window .....	28-133
§ 28:16.4	Argument by Professor's Gilson and Gordon Against Closing the 10-Day Window, and (2) Requiring Disclosure of Derivative Positions.....	28-134
§ 28:16.5	Self-Help in Closing the 10-Day Window.....	28-134
§ 28:16.6	Position of Professors Coffee and Palia on the Closing of the 10-Day Window .....	28-135
§ 28:16.7	The SEC's Position on the Closing of the 10-Day Window .....	28-135
§ 28:16.8	Introduction to the Proposed Brokaw Act .....	28-136
§ 28:16.9	Chief Justice Strine's Position on the Closing of the Section 13(d) Window .....	28-137
§ 28:16.10	This Author's View on Closing the 10-Day Window: An Absolute 10% Cap .....	28-137
§ 28:17	Should Disclosure of Derivative Positions Be Required Under Section 13(d)? .....	28-138
§ 28:17.1	Background on the Use of Derivatives in CSX to Avoid Reporting Under Section 13(d) .....	28-138
§ 28:17.2	The Private Ordering in Response to CSX: Changing Definition of Beneficial Ownership in Pills and Advance Notice By-Laws.....	28-139
§ 28:17.3	Approach of the U.K.'s Financial Conduct Authority to Derivative Disclosures .....	28-139
§ 28:17.4	Wachtell Lipton's Petition Asking the SEC to Require Disclosure of Derivative Positions .....	28-139
§ 28:17.5	The Position of Professors Hu and Black on "Empty Voting" and the Need for Derivative Disclosure Under Section 13(d) .....	28-140
§ 28:17.6	Introduction to the Proposed Brokaw Act .....	28-140
§ 28:17.7	Chief Justice Strine's Position on Disclosure of Derivative and Other Positions.....	28-141
§ 28:17.8	This Author's View on Disclosure of Derivative Positions .....	28-141

## *Table of Contents*

§ 28:18	Activists and the “Tipping Fee” and “Golden Leash” Issue .....	28-141
§ 28:18.1	Introduction .....	28-141
§ 28:18.2	The Council of Institutional Investors Request That the SEC Provide More Transparency on Golden Leashes.....	28-143
§ 28:18.3	Professor Shill’s Support of Golden Leashes and Vice Chancellor Laster’s Skepticism .....	28-144
§ 28:18.4	This Author’s Tentative View on Golden Leashes .....	28-147
§ 28:19	The Pershing Square/Valeant Co-Bid for Allergan—The Potential Game Changer .....	28-147
§ 28:19.1	Introduction .....	28-147
§ 28:19.2	What Happened to the Allergan Stock Price on the Announcement of the Pershing Square/ Valeant Position? .....	28-148
§ 28:19.3	The Agreement Between Pershing Square and Valeant .....	28-148
§ 28:19.4	Allergan Common Stock Purchased by PS Fund 1, LLC .....	28-150
§ 28:19.5	PS Fund 1, LLC’s Options and Forward Purchase Contracts on Allergan Common Stock .....	28-150
§ 28:19.6	Treatment of Options Under Section 13(d).....	28-151
§ 28:19.7	Treatment of Options Under Hart-Scott-Rodino .....	28-152
[A]	What Is the Facial Impact Under HSR Pre-Merger Notification? .....	28-152
[A][1]	In General.....	28-152
[A][2]	Why Didn’t Valeant Acquire Its Own Toe-Hold? .....	28-154
[B]	What Is the HSR Flaw in the Pershing Square/ Valeant Structure? .....	28-155
[B][1]	Introduction.....	28-155
[B][2]	Comparing the Options Used by (1) Pershing Square with Regard to Allergan, and (2) Icahn with Regard to Family Dollar Stores.....	28-156
[C]	What the FTC Should Do About the Treatment of Options .....	28-157
[D]	Recommended Legislative Change to the HSR Reporting Requirements .....	28-157
[E]	2023 Proposed Changes in HSR Reporting Rules .....	28-158
§ 28:19.8	Did Pershing Square Engage in Insider Trading?.....	28-158
[A]	Introduction .....	28-158

[B]	Rule 10b-5.....	28-158
[C]	Rule 14e-3 .....	28-159
§ 28:19.9	California Federal District Court Case Against Allergan and Valeant.....	28-160
§ 28:19.10	Actavis to Buy Allergan; Pershing Square and Valeant Walk; but with a Nice Pay-Day.....	28-162
§ 28:19.11	In Early 2017, Pershing Square Finally Bails Out of Valeant .....	28-163
§ 28:20	Environmental, Social and Governance (ESG) Related Activism .....	28-164
§ 28:20.1	Introduction .....	28-164
§ 28:20.2	The Surge of ESG Litigation, a Form of Shareholder Activism .....	28-164
§ 28:20.3	The Impact of ESG on M&A.....	28-164
§ 28:20.4	Related Concept: CDP, the "Carbon Disclosure Project".....	28-165
§ 28:21	Brief Introduction to Merger Arbitrage .....	28-165
§ 28:21.1	What Is Merger Arbitrage?.....	28-165
§ 28:21.2	Potential Impact on the Market's Reaction to the Target's Stock .....	28-166
§ 28:21.3	Activist Merger Arbitrage, an Introduction to a New Strategy .....	28-167
§ 28:21.4	Merger Arbitrage Under the Biden Administration's Antitrust Policy.....	28-167
§ 28:21.5	Illustration of a Merger Arbitrage Opportunity As of September 2023—The JetBlue–Spirit Airlines Acquisition.....	28-168
§ 28:22	Brief Introduction to Short Selling and How "Icahn Got Icahn'd".....	28-171
§ 28:22.1	Introduction .....	28-171
§ 28:22.2	Brief Introduction to Short Selling.....	28-172
§ 28:22.2	Brief Introduction to How "Icahn got Icahn'd" .....	28-173
[A]	Introduction to the Businesses of Icahn Enterprises .....	28-173
[B]	Stock Price of Icahn Enterprises on March 1, 2023, and May 1, 2023, the Day Before the Announcement by Hindenburg .....	28-174
[C]	Stock Price of Icahn Enterprises on May 3, 2023, the Day After the Announcement by Hindenburg and September 19, 2023, the Day This Section Was Written.....	28-174
[D]	An Introduction to the Hindenburg Report That Made the Short Sale of Icahn Enterprises a Profitable Strategy.....	28-175

## Table of Contents

[E]	An Introduction to the May 10, 2023 Response of Icahn to the Hindenburg Report.....	28-177
[F]	Potential That the U.S. Attorney May Be Interested in the Transaction.....	28-177
[G]	More to Come .....	28-177

## VOLUME 5

<b>Table of Chapters.....</b>	<b>v</b>
-------------------------------	----------

<b>Appendices in Volume 5 .....</b>	<b>V5-App.-1</b>
-------------------------------------	------------------

Appendix 1A	Guide to the Economic and Financial M&A-Related Factors Addressed in Chapter 1, with the Associated Figure or Figures, if any, Illustrating the Factor, May 29, 2025 .....	App. 1A-1
Appendix 2A	Taleo–JobFlash Asset Acquisition Agreement.....	App. 2A-1
Appendix 2B	Fortress–SMLB Stock Purchase Agreement.....	App. 2B-1
Appendix 2C	Sirius–XM Reverse Subsidiary Stock Merger Agreement.....	App. 2C-1
Appendix 2D	Toys “R” Us Reverse Subsidiary Cash Merger Agreement.....	App. 2D-1
Appendix 2E	Koch–Georgia Pacific, Tender Offer/Merger Agreement with Top-Up Option .....	App. 2E-1
Appendix 2F	Mars–Wrigley Merger—Reverse Break-Up Fee Provisions.....	App. 2F-1
Appendix 2G	InBev–Anheuser-Busch Cross Border Cash Merger, Termination and Third-Party Beneficiary Provisions.....	App. 2G-1
Appendix 2H	H&R Block–Option One Asset Purchase Agreement.....	App. 2H-1
Appendix 2I	International Paper–Weyerhaeuser Asset Purchase Agreement.....	App. 2I-1
Appendix 2J	Yildiz–Campbell Soup Stock Purchase Agreement.....	App. 2J-1
Appendix 2K	Oracle–Siebel Horizontal Double Dummy Merger Agreement.....	App. 2K-1
Appendix 2L	Bank of America–LaSalle Bank Stock Purchase Agreement.....	App. 2L-1
Appendix 2M	J.P. Morgan–Bear Stearns Reverse Subsidiary Merger Agreement—Deal Protection Devices.....	App. 2M-1

Appendix 2N	Bank of America—Countrywide, Direct Subsidiary Merger into Limited Liability Subsidiary.....	App. 2N-1
Appendix 2O	Dow Chemical Acquisition of Rohm and Haas in an “Ironclad” Reverse Subsidiary Cash Merger with a “Ticking Fee” .....	App. 2O-1
Appendix 2P	Pfizer—Wyeth Merger Agreement, Provisions Related to Cash and Stock Considerations, Financing, and Termination and Reverse Termination Fees.....	App. 2P-1
Appendix 2Q	Sample Transitional Services Agreement Relating to the Purchase of a Division.....	App. 2Q-1
Appendix 2R	Cerberus’s Acquisition of DynCorp, Double Trigger Termination and Reverse Termination Fees.....	App. 2R-1
Appendix 2S	Burger King Two-Step or One-Step Merger Agreement.....	App. 2S-1
Appendix 2T	Sanofi’s Acquisition of Genzyme—The CVR.....	App. 2T-1
Appendix 2U	Dell’s Acquisition of Compellent, Requirement That Compellent Adopt a Poison Pill .....	App. 2U-1
Appendix 2V	Documents Relating to the Tender Offer by Mallinckrodt Plc for the Stock of Cadence Pursuant to a February 2014 Merger Agreement with a Section 251(h) Second Step Merger Provision .....	App. 2V-1
Appendix 3A	Confidentiality Agreement, Koch—Georgia Pacific .....	App. 3A-1
Appendix 3B	Acquirer’s Due Diligence Checklist for Target .....	App. 3B-1
Appendix 3C	Letter of Intent, PerfectData—Sona.....	App. 3C-1
Appendix 3D	Exclusivity Agreement Between Citigroup and Wachovia .....	App. 3D-1
Appendix 3E	Amylin 2007 Private Placement of Convertible Notes, Indenture Provisions Relating to Mergers and Change of Control.....	App. 3E-1
Appendix 3F	Settlement and Release Agreement Relating to Verizon’s Acquisition of Certain Yahoo Operating Assets, Exhibit C to the April 24, 2017 Yahoo Proxy Statement for the Transaction .....	App. 3F-1

*Table of Contents*

Appendix 5A	MCI's Poison Pill.....	App. 5A-1
Appendix 5B	MCI-Verizon Deal Protection Devices .....	App. 5B-1
Appendix 5C	TXU LBO, Go-Shop; Break-Up and Reverse Break-Up Fees; Financing; Regulatory Approvals.....	App. 5C-1
Appendix 5D	LinkedIn's Certificate of Incorporation, Bylaws, and S-1 Discussion of Capital Stock and Anti-Takeover Provisions.....	App. 5D-1
Appendix 5E	Guide to Directors' Fiduciary Duties in M&A Transactions.....	App. 5E-1
Appendix 6A	Evercore IPO Documents .....	App. 6A-1
Appendix 6B	Evercore Form 10-K, for Year Ended December 31, 2007 .....	App. 6B-1
Appendix 6C	Evercore Free Writing Prospectus, May 15, 2007 .....	App. 6C-1
Appendix 6D	Oracle Annual Proxy Statement for 2008.....	App. 6D-1
Appendix 6E	IBM Note Offering on Automatic Shelf Registration Statement, October 2008 .....	App. 6E-1
Appendix 6F	Morgan Stanley–Mitsubishi Registration Rights Agreement.....	App. 6F-1
Appendix 6G	Citadel Private Offering Circular for a Rule 144A Offering.....	App. 6G-1
Appendix 6H	Acies SPAC IPO and Merger Documents ....	App. 6H-1
Appendix 7A	Sirius Form 8-K Reporting Merger with XM.....	App. 7A-1
Appendix 7B	Sirius–XM Rule 165 Investor Presentation .....	App. 7B-1
Appendix 7C	Sirius Prospectus and Sirius and XM Joint Proxy Statements, October 2, 2007 .....	App. 7C-1
Appendix 7D	Toys Rule 14a-12 Statement on Form 8-K Reporting Merger .....	App. 7D-1
Appendix 7E	Toys Reverse Subsidiary Cash Merger Proxy Statement Schedule 14A for a Cash Merger .....	App. 7E-1
Appendix 7F	SEC Comment Letter on Sirius Prospectus and Sirius and XM Joint Proxy Statements.....	App. 7F-1
Appendix 7G	Selected Statutory and Regulatory SEC Provisions Relating to the Acquisition of a Publicly-Held Target in a Negotiated Merger.....	App. 7G-1

Appendix 7H	Rule 14a-12 Notice/Press Release in the Acquisition by Elon Musk of Twitter, April 25, 2022 .....	App. 7H-1
Appendix 7I	Twitter and X Holding (Musk) Reverse Subsidiary Merger Agreement.....	App. 7I-1
Appendix 7J	Excerpts from the Twitter Proxy Statement for Its Merger with X Holdings (Musk) in 2022.....	App. 7J-1
Appendix 7K	Rule 425 Notice of Merger Agreement in the Acquisition by Capital One of Discover, February 19, 2024.....	App. 7K-1
Appendix 7L	Capital One Acquisition of Discover: Reverse Subsidiary Merger Agreement for a Stock for Stock Acquisition, Annex A to the Registration Statement for the Proxy Statement Dated As of February 19, 2024 .....	App. 7L-1
Appendix 7M	Capital One Acquisition of Discover: (1) S-4a Preliminary Proxy Statements for Capital One and Discover, and (2) Capital One Registration Statement for the Stock-for-Stock Reverse Subsidiary Merger Dated As of February 19, 2024, and to Be Completed in 2025.....	App. 7M-1
Appendix 8A	Microsoft's Bear Hug Letter to Yahoo! .....	App. 8A-1
Appendix 8B	Oracle's Schedule TO for Tender Offer for PeopleSoft .....	App. 8B-1
Appendix 8C	Oracle's Summary Advertisement for Tender Offer for PeopleSoft.....	App. 8C-1
Appendix 8D	Oracle's Offer to Purchase in Tender Offer for PeopleSoft.....	App. 8D-1
Appendix 8E	PeopleSoft Schedule 14D-9.....	App. 8E-1
Appendix 8F	Getty Images, Going Private Management Buyout on Schedule 13E-3 .....	App. 8F-1
Appendix 8G	Biogen 2008 Amendments to Advance Notice By-Laws .....	App. 8G-1
Appendix 8H	CF Industries' S-4 for Exchange Offer for Terra.....	App. 8H-1
Appendix 8I	CF Industries' Proxy Statement for Contested Election of Directors of Terra.....	App. 8I-1
Appendix 8J	NRG's Fight Letter in Response to Exelon's Proxy Contest.....	App. 8J-1
Appendix 9A	The BK-Tim Hortons Pre-Transaction Structure .....	App. 9A-1

*Table of Contents*

Appendix 9B	Summary of the BK-Tim Hortons Pre-Transaction Structure ..... App. 9B-1
Appendix 9C	The BK-Tim Hortons Transaction ..... App. 9C-1
Appendix 9D	Post-Transaction BK-Tim Hortons Structure ..... App. 9D-1
Appendix 9E	Checklist for Planning a Taxable Acquisition and Leveraged Buyout (LBO) .... App. 9E-1
Appendix 9F	Checklist for Planning Reorganizations .... App. 9F-1
Appendix 10A	Accounting and Financial Provisions of Sirius-XM Prospectus/Proxies, October 2, 2007 ..... App. 10A-1
Appendix 10B	Sirius Financial Statements Included in Form 10-K for 2007 ..... App. 10B-1
Appendix 10C	Oracle Form 8-Ks Regarding the Completion of Its Acquisition of BEA Systems for Cash and the Filing of the Required Financials ..... App. 10C-1
Appendix 10D	Pfizer S-4 for Acquisition of Wyeth, June 17, 2009—Financial Statements .... App. 10D-1
Appendix 10E	SEC (1) M&A Financial Reporting Provisions of Form 8-K, Form 10-K, Form S-4, Rule 165, Rule 14a-12, and Schedule 14A, and (2) Regulation S-X, Provisions Relating to Financial Reporting Generally and of M&A Transactions ..... App. 10E-1
Appendix 10F	IBM'S 2019 Acquisition of Red Hat for \$35 Billion in Cash; Form 8-K and 10-K Reports of Required Financial Disclosures ..... App. 10F-1
Appendix 10G	Accounting Provisions of the Proxy Statement/Registration Statement Pursuant to Which Morgan Stanley Acquired E*Trade in a Stock for Stock Merger in 2020 in Which Morgan Stanley Issued Less than 20% of Its Stock ..... App. 10G-1
Appendix 10H	Accounting Provisions of the Proxy Statement/Registration Statement Pursuant to Which Schwab Acquired TD Ameritrade in a Stock for Stock Merger in 2020 in Which Schwab's Shareholders Had a Vote Because of the Issuance of More than 20% of Schwab's Stock in the Acquisition ..... App. 10H-1

**VOLUME 6**

<b>Table of Chapters.....</b>	<b>v</b>	
<b>Appendices in Volume 6 .....</b>	<b>V6-App.-1</b>	
Appendix 11A	S-4 Discussion of Financial Advisor's Fairness Opinion for Sirius in Its Acquisition of XM .....	App. 11A-1
Appendix 11B	Lazard's Computation of Conrail's Weighted Average Cost of Capital.....	App. 11B-1
Appendix 11C	Lazard's Discounted Cash Flow Analysis of Conrail.....	App. 11C-1
Appendix 11D	Wasserstein and Shearson Valuation of Warner.....	App. 11D-1
Appendix 11E	Proxy Statement Discussion of Financial Advisor's Fairness Opinion for Toys .....	App. 11E-1
Appendix 11F	Sample Buy-Side Investment Banker Engagement Letter.....	App. 11F-1
Appendix 11G	Sample Sell-Side Investment Banker Engagement Letter.....	App. 11G-1
Appendix 13A	Antitrust Provisions of the Whirlpool- Maytag Merger Agreement .....	App. 13A-1
Appendix 13B	Antitrust Provisions of the Dow Chemical-Rohm and Haas Merger Agreement.....	App. 13B-1
Appendix 14A	Solvency Opinions in Time's Acquisition of Warner.....	App. 14A-1
Appendix 14B	Getty Images, Rollover Commitment Letter for Management Buyout.....	App. 14B-1
Appendix 14C	Getty Images, Equity Commitment Letters for Management Buyout .....	App. 14C-1
Appendix 14D	Getty Images, Senior Secured Credit Facilities Commitment Letter for Management Buyout .....	App. 14D-1
Appendix 14E	Pinnacle S-4 Exchange Offer in an "A/B" Exchange for Notes Issued in an LBO.....	App. 14E-1
Appendix 15A	Morgan Stanley's Spin-Off of Discover .....	App. 15A-1
Appendix 15B	Discover's Form 10 Registration Statement Filed Pursuant to Section 12 of the '34 Act.....	App. 15B-1
Appendix 15C	AT&T-Comcast Spin-Off and Merger....	App. 15C-1
Appendix 16A	TWA Bankruptcy Sale Under Section 363 to American .....	App. 16A-1

*Table of Contents*

Appendix 16B	Lehman Bankruptcy Sale Under Section 363 to Barclays .....	App. 16B-1
Appendix 16C	Sears Bankruptcy Sale to ESL Hedge Fund in a Combined Section 363 Sale and G Reorganization.....	App. 16C-1
Appendix 17A	J.P. Morgan Chase–Bank One Merger of Financial Holding Companies .....	App. 17A-1
Appendix 18A	TXU LBO, Regulatory Approvals.....	App. 18A-1
Appendix 19A	InBev N.V./S.A., a Belgian Corporation, Acquires Anheuser-Busch, a U.S. Target, for Cash.....	App. 19A-1
Appendix 19B	Acquisition by Vodafone, a U.K. Company, of AirTouch, a U.S. Target, for Stock and Cash Under Section 368(a)(2)(E) .....	App. 19B-1
Appendix 19C	CFIUS Provisions of the March 2, 2017 Preliminary Proxy Statement and Merger Agreement for the Acquisition of MoneyGram, a U.S. Target, by Alipay, a U.K. Subsidiary of a Chinese Company.....	App. 19C-1
Appendix 20A	NASDAQ Stock Market Offer for London Stock Exchange Pursuant to U.K.'s City Code.....	App. 20A-1
Appendix 20B	GE's Acquisition of the U.K.'s Amersham in a Scheme of Arrangement .....	App. 20B-1
Appendix 22A	Acquisition by British Telecom of MCI in a Forward Subsidiary Merger Under Section 368(a)(2)(D) .....	App. 22A-1
Appendix 22B	Acquisition by DaimlerChrysler of Chrysler and Daimler-Benz in a Combination "(B)" Reorganization and Section 351 Exchange .....	App. 22B-1
Appendix 22C	Acquisition by a Newly Formed Irish Holding Company of Both (1) Endo, a U.S. Corporation and the Real Acquirer, and (2) Paladin, a Canadian Corporation and the Real Target, Through a Structure Similar to Horizontal Double Dummy: Acquisition of (1) Endo in a Reverse Subsidiary Merger, and (2) Paladin in a Canadian Arrangement .....	App. 22C-1
Appendix 22D	Slides Illustrating (1) a Prototypical Inversion Transaction, and (2) the Impact of Treasury and IRS Notice 2014-52.....	App. 22D-1

Appendix 22E	Slides Illustrating (1) a Prototypical Inversion Transaction, and (2) the Impact of Treasury and IRS Notice 2015-79.....	App. 22E-1
Appendix 24A	MillerCoors LLC JV Formation Agreement.....	App. 24A-1
Appendix 24B	MillerCoors LLC JV Operating Agreement.....	App. 24B-1
Appendix 24C	Sprint Spectrum LP JV Agreement .....	App. 24C-1
Appendix 24D	Citigroup–Morgan Stanley JV Formation Agreement.....	App. 24D-1
Appendix 27A	Acquisition of Southern Plains Medical Center by First Physicians Capital Group.....	App. 27A-1
Appendix 27B	Acquisition of Hospital Corporation of America.....	App. 27B-1
Appendix 27C	Acquisition by RehabCare of Triumph Health Care.....	App. 27C-1
Appendix 27D	Pfizer Acquisition of Wyeth .....	App. 27D-1
Appendix 27E	Boston Scientific Acquisition of Guidant.....	App. 27E-1
Appendix 27F	Cigna's Acquisition of Great-West Health Care.....	App. 27F-1
Appendix 28A	Pershing Square and Valeant's Joint Bid for Allergan—Schedule 13D Filed, April 21, 2014 .....	App. 28A-1
Appendix 28B	Pershing Square and Valeant's Joint Bid for Allergan—Structure of Purchasing Entities and 13D Reporting Parties.....	App. 28B-1
Appendix 28C	Pershing Square/Valeant Joint Bid for Allergan—Percentage of Stock Owned from the Date of First Purchase to the 13D Filing Date.....	App. 28C-1
Appendix 28D	ICAHN Capital LP and Related Parties Acquisition of Stock of Family Dollar Stores—Form 13D, Filed May 27, 2014 .....	App. 28D-1
Appendix 28E	ICAHN Capital LP and Related Parties Acquisition of Stock of Family Dollar Stores—Structure of Purchasing Entities and 13D Reporting Parties.....	App. 28E-1
Appendix 28F	ICAHN Capital LP and Related Parties Acquisition of Stock of Family Dollar Stores—Percentage of Stock Owned from the Date of First Purchase to the 13D Filing Date.....	App. 28F-1

*Table of Contents*

Appendix 28G	Pershing Square/Valeant Joint Bid for Allergan; ICAHN Acquisition of Stock of Family Dollar Stores—Summary Data on Percentage of Stock Owned from the Date of First Purchases to the 13D Filing Dates .....	App. 28G-1
Appendix 28H	Form 13F Filed by Third Point Re Its Investment in Sotheby's, for Quarter Ended March 31, 2013 .....	App. 28H-1
Appendix 28I	Form 13G Filed by Morgan Stanley Re Purchase of Stock of Sotheby's, February 3, 2014 .....	App. 28I-1
Appendix 28J	Initial Schedule 13D Filed by Third Point Re Purchase of Stock of Sotheby's, August 26, 2013 .....	App. 28J-1
Appendix 28K	Letter from Third Point to Sotheby's Concerning Sotheby's Operations, Filed as Exhibit 99.3 to Amended Form 13D, October 2, 2013 .....	App. 28K-1
Appendix 28L	Sotheby's 2014 Proxy Statement, March 24, 2014.....	App. 28L-1
Appendix 28M	Third Point's Proxy Statement Re Sotheby's, March 28, 2014.....	App. 28M-1
Appendix 28N	Third Point Investor Presentation Re Proxy Contest, April 2014 .....	App. 28N-1
Appendix 28O	Press Release and Settlement Agreement Between Third Point and Sotheby's, Filed As Exhibits 99.7 and 99.8 to Third Point's Amended Form 13D, May 6, 2014.....	App. 28O-1
Appendix 28P	Sullivan & Cromwell, LLP, Publication on Adjusting to Activist Shareholders, Published August 22, 2013.....	App. 28P-1
Appendix 28Q	Hindenburg Research's 2023 Short-Selling Campaign Against Icahn Enterprises L.P., Led by World Famous Risk Arbitrager: Carl Icahn .....	App. 28Q-1
<b>Table of References</b>	.....	TR-1
<b>Table of Cases</b>	.....	T-1
<b>Index</b>	.....	I-1

