

Table of Contents

| | |
|--|-------|
| Foreword | vii |
| Preface to the Second Edition | ix |
| Preface to the First Edition | xiii |
| Acknowledgments | xix |
| About the Author | xxiii |
| Table of Chapters | xxv |

PART I **GETTING READY TO GO PUBLIC**

Chapter 1 An Introduction to the IPO Market

| | | |
|------------|--|------|
| § 1:1 | Introduction | 1-2 |
| § 1:2 | The Allure of IPOs | 1-2 |
| § 1:2.1 | The Advantages of Going Public..... | 1-3 |
| § 1:2.2 | The Disadvantages of Going Public..... | 1-4 |
| § 1:2.3 | IPO Expenses and Proceeds | 1-5 |
| Table 1-1 | Illustrative IPO Expenses and Net Proceeds..... | 1-6 |
| § 1:3 | When Is the Time Right? | 1-7 |
| § 1:3.1 | Is the Company Ready for the IPO Market?..... | 1-7 |
| § 1:3.2 | Is the IPO Market Ready for the Company?..... | 1-8 |
| § 1:4 | What Does It Really Take to Go Public? | 1-8 |
| Table 1-2 | Profile of Successful IPO Candidates..... | 1-8 |
| § 1:5 | A Brief History of the IPO Market | 1-9 |
| Figure 1-3 | U.S. IPOs—1996 to 2011 | 1-13 |
| Figure 1-4 | U.S. IPO Dollar Volume—1996 to 2011 | 1-13 |
| Figure 1-5 | Median IPO Offering Size—1996 to 2011 | 1-14 |
| Figure 1-6 | Median Annual Revenue of IPO Companies— 1998 to 2011..... | 1-14 |
| Figure 1-7 | Percentage of Profitable IPO Companies— 1998 to 2011..... | 1-15 |
| Figure 1-8 | Median Age of IPO Companies— 1996 to 2011..... | 1-15 |

INITIAL PUBLIC OFFERINGS

§ 1:6 Going Public Today 1-15

 § 1:6.1 Changes in the IPO Process..... 1-15

 [A] More Extensive Preparation 1-16

 [B] Additional Disclosure Requirements..... 1-16

 [C] Accounting Changes 1-16

 [D] Plain English 1-17

 [E] Lengthier (But More Transparent) SEC
 Review 1-17

 [F] Changes in Underwriting Practices..... 1-17

 [G] New Exchanges and Offering Formats 1-18

 [H] Longer Timeline..... 1-18

 [I] Streamlined Filing and Pricing..... 1-18

 [J] Heightened Scrutiny and Potential Liability 1-19

 [K] Other Regulatory Changes 1-19

 [L] The JOBS Act..... 1-19

 § 1:6.2 Impact of Corporate Governance Reforms..... 1-20

§ 1:7 Alternatives to an IPO..... 1-22

 § 1:7.1 Remaining Private..... 1-22

 § 1:7.2 Being Acquired 1-23

 § 1:7.3 A Dual Track 1-23

**Chapter 2 The Elements of Success: Building a
Startup Company for an Eventual IPO**

§ 2:1 Introduction 2-3

§ 2:2 Choice of Entity 2-3

 § 2:2.1 Corporate Structure 2-3

 [A] Advantages 2-3

 [B] Alternative Structures 2-3

 [C] Delaware Incorporation..... 2-4

 § 2:2.2 Reorganizing 2-4

§ 2:3 Rounding Out Senior Management..... 2-5

 § 2:3.1 Chief Executive Officer 2-6

 § 2:3.2 Chief Financial Officer..... 2-6

 § 2:3.3 In-House Counsel 2-7

 § 2:3.4 Board of Directors 2-7

 § 2:3.5 Advisory Board 2-7

 § 2:3.6 IPO Adjustments 2-8

§ 2:4 Outside Team Members 2-8

 § 2:4.1 Company Counsel 2-8

 § 2:4.2 Intellectual Property and Other Special Counsel 2-9

 § 2:4.3 Independent Accountants 2-9

 § 2:4.4 IPO Advisors 2-9

Table of Contents

| | | |
|-----------|--|------|
| § 2:5 | Building the Employee Team..... | 2-10 |
| § 2:5.1 | Employee Recruitment..... | 2-10 |
| § 2:5.2 | Contractual Arrangements..... | 2-12 |
| Table 2-1 | Essential Employee Agreements..... | 2-13 |
| § 2:5.3 | Employment Regulation and Policies..... | 2-14 |
| § 2:5.4 | Employment Terminations..... | 2-15 |
| | [A] Importance of Planning..... | 2-15 |
| | [B] Employer’s Obligations to a Terminated Employee..... | 2-16 |
| § 2:5.5 | Minimizing Exposure to Employment Liability..... | 2-17 |
| § 2:5.6 | Immigration Issues..... | 2-18 |
| Table 2-2 | Seeking Talent Overseas..... | 2-19 |
| § 2:5.7 | Use of Consultants and Independent Contractors..... | 2-20 |
| § 2:6 | Equity Incentives..... | 2-21 |
| § 2:6.1 | Typical Pattern of Issuances..... | 2-21 |
| | [A] Founder Shares..... | 2-21 |
| | [B] Employee Equity Grants..... | 2-22 |
| § 2:6.2 | Securities Law Compliance for Equity Grants..... | 2-23 |
| | [A] Federal Exemptions..... | 2-23 |
| | [B] State Exemptions..... | 2-24 |
| | [C] Disclosure Requirements..... | 2-25 |
| | [D] Avoiding Premature Public Reporting Obligations..... | 2-25 |
| § 2:6.3 | Stock Incentive Plans..... | 2-28 |
| | [A] Initial Stock Incentive Plan..... | 2-28 |
| | [B] Public Company Stock Incentive Plan..... | 2-29 |
| § 2:6.4 | Resales of Restricted Securities..... | 2-31 |
| § 2:7 | Intellectual Property..... | 2-32 |
| § 2:7.1 | Developing an IP Protection Program..... | 2-33 |
| Table 2-3 | Basic Intellectual Property Protection for Startup Companies..... | 2-34 |
| § 2:7.2 | Considerations by Type of Intellectual Property..... | 2-35 |
| | [A] Patents..... | 2-35 |
| | [B] Trade Secrets..... | 2-37 |
| | [C] Trademarks..... | 2-38 |
| | [D] Copyrights..... | 2-39 |
| | [E] Domain Names..... | 2-40 |
| | [F] Specialized Rights..... | 2-40 |
| § 2:8 | Funding the Company’s Operations..... | 2-41 |
| § 2:8.1 | Pre-IPO Financing Techniques..... | 2-41 |
| | [A] Bootstrapping..... | 2-41 |
| | [B] Crowdfunding..... | 2-42 |
| | [C] Angel Financing..... | 2-42 |
| | [D] Venture Capital..... | 2-43 |
| | [E] Private Equity..... | 2-43 |

INITIAL PUBLIC OFFERINGS

| | | |
|-----------|---|------|
| | [F] Growth Equity..... | 2-44 |
| | [G] Strategic Investments..... | 2-44 |
| | [H] Collaborations..... | 2-44 |
| | [I] Venture Loans..... | 2-45 |
| | [J] Bank Debt..... | 2-45 |
| § 2:8.2 | Securities Law Compliance for Financing Transactions..... | 2-46 |
| | [A] Section 4(a)(2)..... | 2-46 |
| | [B] Regulation D..... | 2-46 |
| | [B][1] Description and Requirements..... | 2-46 |
| | [B][2] General Solicitation..... | 2-48 |
| Table 2-4 | Definition of “Accredited Investor”..... | 2-49 |
| | [C] Regulation S..... | 2-51 |
| | [D] Regulation A..... | 2-52 |
| | [E] Crowdfunding..... | 2-53 |
| § 2:8.3 | Integration Issues..... | 2-55 |

Chapter 3 Corporate Housekeeping

| | | |
|---------|---|------|
| § 3:1 | Introduction..... | 3-2 |
| § 3:2 | Timing, Purpose, and Process..... | 3-3 |
| § 3:3 | Minute Books and Organizational Documents..... | 3-3 |
| § 3:3.1 | Areas of Review..... | 3-4 |
| | [A] Completeness of Minute Books..... | 3-4 |
| | [B] Written Consent Issues..... | 3-4 |
| | [C] Incumbency of Directors and Officers..... | 3-5 |
| | [D] Board and Stockholder Approvals..... | 3-5 |
| | [E] Corporate Charter and Bylaws..... | 3-6 |
| | [F] Corporate Qualifications and Good Standing..... | 3-6 |
| § 3:3.2 | Corrective Actions..... | 3-7 |
| § 3:3.3 | Best Practices for Board Minutes..... | 3-7 |
| § 3:4 | Stock, Option, and Warrant Records..... | 3-8 |
| § 3:4.1 | Areas of Review..... | 3-9 |
| | [A] Authorization of Issuances and Grants..... | 3-9 |
| | [B] Equity Grants to Foreign Employees..... | 3-9 |
| | [C] Unsatisfied Equity Commitments or Ownership Claims..... | 3-10 |
| | [D] Section 83(b) Elections..... | 3-10 |
| | [E] Stock Repurchases..... | 3-10 |
| | [F] Preferred Stock Anti-Dilution Adjustments..... | 3-11 |
| | [G] Stock Splits..... | 3-12 |
| | [H] Stock Incentive Plan Issues..... | 3-12 |
| § 3:4.2 | Corrective Action..... | 3-13 |
| § 3:5 | Contracts..... | 3-14 |
| § 3:6 | Investor Rights..... | 3-15 |

Table of Contents

| | | |
|----------|--|------|
| § 3:6.1 | Areas of Review..... | 3-15 |
| § 3:6.2 | Planning..... | 3-16 |
| § 3:7 | Securities Law Compliance | 3-17 |
| § 3:7.1 | Confirming the Availability of Exemptions from Registration | 3-18 |
| § 3:7.2 | Corrective Measures | 3-19 |
| § 3:8 | Financing Transactions..... | 3-20 |
| § 3:8.1 | Generally..... | 3-20 |
| § 3:8.2 | Areas of Review..... | 3-21 |
| | [A] Authorization of Transactions..... | 3-21 |
| | [B] Rights of First Refusal..... | 3-21 |
| | [C] Anti-Dilution Adjustments | 3-22 |
| | [D] Recap Financings..... | 3-22 |
| | [E] Security Interests..... | 3-22 |
| § 3:9 | M&A Transactions | 3-23 |
| § 3:9.1 | Areas of Review..... | 3-23 |
| | [A] Issuance of Shares and Assumption of Options | 3-23 |
| | [B] Earnout Provisions | 3-23 |
| | [C] Record Ownership of Assets | 3-24 |
| | [D] Regulatory Compliance | 3-24 |
| | [E] Disposition Issues | 3-24 |
| | [F] Unresolved Matters..... | 3-24 |
| | [G] Pending Transactions | 3-24 |
| § 3:9.2 | Other Concerns | 3-24 |
| § 3:10 | Intellectual Property Matters..... | 3-25 |
| § 3:10.1 | Generally..... | 3-25 |
| § 3:10.2 | Intellectual Property Audit..... | 3-25 |
| | [A] Components of an IP Audit | 3-25 |
| | [B] Benefits of an IP Audit | 3-27 |
| § 3:11 | Human Resources Matters | 3-28 |
| § 3:11.1 | Staffing..... | 3-28 |
| § 3:11.2 | Management Arrangements..... | 3-28 |
| § 3:11.3 | Employee Agreements..... | 3-28 |
| § 3:11.4 | Equity Incentives..... | 3-29 |
| § 3:11.5 | Employee Benefits..... | 3-29 |
| § 3:11.6 | Compliance Review..... | 3-29 |
| § 3:12 | Accounting Matters | 3-29 |
| § 3:13 | Related Person Transactions | 3-30 |
| § 3:14 | Website Cleanup..... | 3-31 |
| § 3:15 | Corporate and Capital Structure | 3-32 |
| § 3:16 | Other Business Matters..... | 3-33 |
| § 3:16.1 | Regulatory Compliance..... | 3-34 |
| § 3:16.2 | Tax Matters..... | 3-34 |
| § 3:16.3 | Legal Proceedings | 3-34 |
| § 3:16.4 | Insurance | 3-35 |
| § 3:17 | Corporate Governance Preparation | 3-35 |

Chapter 4 Accounting Preparation

| | | |
|-----------|--|------|
| § 4:1 | Overview..... | 4-2 |
| § 4:2 | The Importance of Accounting Preparation | 4-3 |
| § 4:3 | Auditor Independence..... | 4-3 |
| § 4:3.1 | Sarbanes-Oxley Act | 4-4 |
| [A] | Prohibition of Most Non-Audit Services | 4-4 |
| [B] | Pre-Approval of Services | 4-5 |
| [C] | Rotation of Audit Firm Partners..... | 4-5 |
| [D] | Reporting to Audit Committee on Critical Accounting Policies | 4-6 |
| [E] | Restrictions on Company’s Employment of Former Audit Firm Personnel | 4-6 |
| § 4:3.2 | SEC Rules | 4-6 |
| [A] | Rules Pre-Dating Sarbanes-Oxley..... | 4-6 |
| [B] | Rules Implementing Sarbanes-Oxley | 4-7 |
| § 4:3.3 | PCAOB Rules | 4-9 |
| § 4:3.4 | Independence Determinations | 4-10 |
| § 4:4 | Financial Statement Requirements..... | 4-11 |
| § 4:4.1 | Company Financial Statements | 4-12 |
| [A] | Required Time Periods and Information..... | 4-12 |
| [A][1] | Basic Requirements..... | 4-12 |
| [A][2] | Emerging Growth Companies | 4-14 |
| [B] | Accounting Standards | 4-15 |
| [B][1] | Basic Requirements..... | 4-15 |
| [B][2] | Emerging Growth Companies | 4-16 |
| [B][3] | Convergence of U.S. GAAP and IFRS..... | 4-17 |
| [C] | Audit Requirements | 4-18 |
| [C][1] | Basic Requirements..... | 4-18 |
| [C][2] | Emerging Growth Companies | 4-19 |
| § 4:4.2 | Other Financial Statements | 4-20 |
| [A] | Significant Acquisitions | 4-20 |
| [A][1] | General Requirements | 4-20 |
| Table 4-1 | Significance Tests for Acquisition Financials..... | 4-22 |
| Table 4-2 | Periods for Which Acquisition Financials Are Required | 4-24 |
| [A][2] | Exceptions..... | 4-25 |
| [B] | Significant Dispositions | 4-26 |
| [C] | Significant Equity Investments | 4-27 |
| § 4:4.3 | Relief from Financial Statement Requirements | 4-27 |
| § 4:4.4 | Mandatory Use of XBRL Interactive Data Format | 4-28 |
| § 4:5 | GAAP Codification | 4-29 |
| Table 4-3 | Examples of Codified GAAP References | 4-31 |
| § 4:6 | Acquisition Accounting | 4-32 |
| § 4:6.1 | “Fair Value” Accounting for Acquisitions..... | 4-32 |
| § 4:6.2 | Impact of Acquisition Accounting | 4-34 |

Table of Contents

| | | |
|----------|--|------|
| § 4:7 | Stock Option Issues..... | 4-35 |
| § 4:7.1 | Option Expensing | 4-35 |
| § 4:7.2 | Section 409A..... | 4-36 |
| § 4:7.3 | Cheap Stock..... | 4-38 |
| | [A] Common Stock Valuation..... | 4-38 |
| | [B] Managing Cheap Stock Issues | 4-40 |
| § 4:8 | Employee Stock Purchase Plans | 4-43 |
| § 4:9 | Revenue Recognition | 4-45 |
| § 4:10 | Restatements and Corrections of Accounting Errors..... | 4-46 |
| § 4:10.1 | Evaluating Accounting Errors | 4-46 |
| § 4:10.2 | Corrective Action..... | 4-50 |
| § 4:10.3 | Company Analysis and Recommendation | 4-51 |
| § 4:10.4 | Additional IPO Considerations..... | 4-51 |
| § 4:10.5 | Prevalence and Consequences of Restatements | 4-52 |
| § 4:11 | Accounting Treatment of Offering Expenses | 4-54 |
| § 4:12 | Other Accounting Issues | 4-54 |
| § 4:13 | Non-GAAP Financial Measures | 4-55 |
| § 4:14 | Obtaining SEC Guidance | 4-57 |
| § 4:15 | Attorney-Client Privilege and Auditor Communications..... | 4-59 |

Chapter 5 Corporate Governance

| | | |
|-----------|---|------|
| § 5:1 | Introduction | 5-3 |
| § 5:2 | Sources of Governance Requirements and Best Practices | 5-3 |
| § 5:2.1 | Primary Factors at the Time of the IPO | 5-4 |
| | [A] Stock Exchange Rules..... | 5-4 |
| | [B] SEC Rules..... | 5-4 |
| | [C] Private Company Stockholders | 5-4 |
| | [D] Managing Underwriters | 5-4 |
| § 5:2.2 | Additional Factors Once the Company Is Public..... | 5-5 |
| | [A] Public Company Stockholders | 5-5 |
| | [B] Proxy Voting Advisory Services | 5-5 |
| | [C] Governance Ratings | 5-5 |
| | [D] Public Scrutiny | 5-6 |
| § 5:2.3 | Best Practices | 5-6 |
| § 5:3 | Director Independence | 5-6 |
| § 5:3.1 | Stock Exchange Requirements | 5-6 |
| Table 5-1 | Comparison of Nasdaq and NYSE IPO Phase-In Requirements..... | 5-9 |
| § 5:3.2 | Other Independence Definitions..... | 5-10 |
| | [A] Special Definitions Relating to Board Committees | 5-10 |
| | [B] Company-Specific Definitions | 5-11 |

INITIAL PUBLIC OFFERINGS

| | | |
|---------|--|------|
| | [C] ISS's Definition | 5-11 |
| | [D] Other Definitions..... | 5-12 |
| § 5:3.3 | Antitrust Law Restrictions | 5-12 |
| § 5:4 | Board Committees..... | 5-13 |
| § 5:4.1 | Audit Committee | 5-13 |
| | [A] Composition—"Super Independence" | 5-13 |
| | [B] Composition—Expertise | 5-14 |
| | [C] Duties | 5-16 |
| | [D] PCAOB Considerations..... | 5-18 |
| | [D][1] Guidance About the PCAOB Inspection Process | 5-18 |
| | [D][2] Auditors' Communications with Audit Committees | 5-19 |
| § 5:4.2 | Compensation Committee | 5-19 |
| | [A] Composition—"Super Independence" | 5-19 |
| | [B] Composition—Other Considerations | 5-21 |
| | [C] Duties | 5-22 |
| § 5:4.3 | Nominating and Corporate Governance Committee | 5-26 |
| | [A] Composition | 5-26 |
| | [B] Duties | 5-26 |
| § 5:4.4 | Other Committees..... | 5-27 |
| | [A] Executive Committee | 5-27 |
| | [B] Risk Committee..... | 5-27 |
| | [C] Science or Technology Committee | 5-28 |
| | [D] Finance Committee..... | 5-28 |
| | [E] Strategy Committee | 5-28 |
| § 5:5 | Board Size..... | 5-28 |
| § 5:6 | Corporate Governance Guidelines | 5-29 |
| § 5:6.1 | Stock Exchange Requirements | 5-29 |
| § 5:6.2 | Key Provisions..... | 5-29 |
| | [A] Executive Sessions of Independent Directors | 5-30 |
| | [B] Independent Board Leadership | 5-30 |
| | [C] Stock Ownership Guidelines..... | 5-31 |
| | [D] Director Tenure and Retirement | 5-31 |
| | [E] Director Resignation Policies; Majority Voting..... | 5-32 |
| | [F] Limitations on Service on Multiple Boards..... | 5-32 |
| | [G] Director Evaluations | 5-32 |
| | [H] Communications from Stockholders | 5-33 |
| | [I] Diversity..... | 5-33 |
| § 5:7 | Corporate Charter and Bylaws As a Public Company..... | 5-34 |
| § 5:7.1 | Principal Purposes..... | 5-34 |
| § 5:7.2 | Additional Topics | 5-34 |

Table of Contents

| | | |
|-------------|--|-----------|
| | [A] Corporate Opportunity Provisions | 5-35 |
| | [B] Exclusive Forum Provisions | 5-35 |
| § 5:8 | Takeover Defenses | 5-37 |
| § 5:8.1 | Deciding to Implement Anti-Takeover Provisions..... | 5-37 |
| § 5:8.2 | Common Anti-Takeover Provisions | 5-37 |
| | [A] Classified Boards..... | 5-37 |
| | [B] Limitation of Stockholders' Right to Remove Directors..... | 5-38 |
| | [C] Limitation of Stockholders' Right to Increase Board Size or Fill Vacancies..... | 5-38 |
| | [D] Supermajority Voting Requirements | 5-39 |
| | [E] Prohibition of Stockholders' Right to Act by Written Consent | 5-39 |
| | [F] Limitation of Stockholders' Right to Call Special Meetings | 5-40 |
| | [G] Advance Notice Requirements | 5-40 |
| | [H] State Anti-Takeover Laws | 5-41 |
| | [I] Blank Check Preferred Stock..... | 5-41 |
| | [J] Stockholder Rights Plans | 5-42 |
| | [K] Multi-Class Capital Structures | 5-43 |
| § 5:8.3 | Takeover Defenses in IPO Companies..... | 5-44 |
| Table 5-2 | Prevalence of Takeover Defenses | 5-45 |
| Table 5-3 | Trends in Takeover Defenses Adopted by U.S. IPO Companies..... | 5-46 |
| Appendix 5A | Best Practices: When You Want to Do More Than Just Follow the Rules..... | App. 5A-1 |
| Appendix 5B | Comparison of Nasdaq and NYSE Director Independence Requirements | App. 5B-1 |

Chapter 6 Oversight, Controls, and Policies

| | | |
|---------|--|------|
| § 6:1 | Introduction | 6-2 |
| § 6:2 | Fiduciary Duties and the Duty of Oversight | 6-2 |
| § 6:3 | Controls and Procedures | 6-4 |
| § 6:3.1 | Internal Controls | 6-5 |
| | [A] Section 13(b)(2) of the Exchange Act | 6-5 |
| | [B] Sarbanes-Oxley Section 404..... | 6-5 |
| § 6:3.2 | Disclosure Controls and Procedures | 6-8 |
| § 6:4 | Policies..... | 6-9 |
| § 6:4.1 | Disclosure Policy..... | 6-9 |
| | [A] Disclosure Procedures and Guidelines | 6-9 |
| | [B] Means of Public Disclosures | 6-10 |
| | [C] Authorized Spokespersons..... | 6-10 |
| | [D] "No Comment" Policy | 6-11 |

INITIAL PUBLIC OFFERINGS

| | | |
|-----------|---|------|
| § 6:4.2 | Code of Business Conduct and Ethics | 6-11 |
| Table 6-1 | General Guidelines for Implementing Effective Corporate Policies..... | 6-13 |
| § 6:4.3 | Insider Trading Policy | 6-14 |
| | [A] Key Elements | 6-14 |
| | [B] Blackout Periods..... | 6-15 |
| | [C] Other Policy Issues..... | 6-16 |
| | [D] Market Practices..... | 6-17 |
| Table 6-2 | Persons Subject to Regularly Scheduled Quarterly Blackout Periods..... | 6-18 |
| Table 6-3 | Transactions Prohibited During Regularly Scheduled Quarterly Blackout Periods..... | 6-18 |
| § 6:4.4 | Related Person Transaction Policy | 6-19 |
| § 6:4.5 | Clawback Policy | 6-19 |
| Table 6-4 | Comparison of Clawback Provisions Under Dodd-Frank Act and Sarbanes-Oxley Act..... | 6-20 |
| § 6:4.6 | Equity Grant Policy..... | 6-21 |
| § 6:4.7 | Investment Policy | 6-23 |
| § 6:4.8 | Document Retention Policy..... | 6-23 |
| § 6:5 | Oversight Role of Company Counsel | 6-25 |
| § 6:5.1 | Impact of SEC Professional Responsibility Rules..... | 6-25 |
| § 6:5.2 | Reporting “Up the Ladder” | 6-26 |
| § 6:5.3 | QLCC Alternative..... | 6-28 |

Chapter 7 Pre-IPO Acquisitions

| | | |
|---------|--|-----|
| § 7:1 | Introduction | 7-2 |
| § 7:2 | Business Challenges | 7-3 |
| § 7:2.1 | Generally..... | 7-3 |
| § 7:2.2 | Challenges of Acquisitions Concurrent with an IPO.... | 7-3 |
| | [A] Management Distraction | 7-3 |
| | [B] Business Integration..... | 7-4 |
| | [C] Structuring | 7-4 |
| | [D] Financial Statements..... | 7-4 |
| § 7:3 | Selected Legal Issues..... | 7-5 |
| § 7:3.1 | Securities Law | 7-5 |
| | [A] Exemptions from Registration..... | 7-5 |
| | [B] Securities Law Integration..... | 7-5 |
| | [C] Antifraud Rules | 7-6 |
| | [D] Resale Restrictions | 7-6 |
| | [E] Cash Earnout As a Security | 7-7 |
| § 7:3.2 | Fiduciary Duties..... | 7-7 |
| | [A] Deal Protection Provisions..... | 7-8 |
| | [B] Fiduciary Exceptions Following <i>Omnicare</i> | 7-8 |
| § 7:3.3 | Antitrust Law..... | 7-9 |

Table of Contents

| | | |
|-----------|--|------|
| | [A] Hart-Scott-Rodino Act..... | 7-9 |
| | [B] Foreign Antitrust Law | 7-11 |
| | [C] Pre-Closing Activities..... | 7-11 |
| Table 7-1 | Antitrust DOs and DON'Ts Between Signing and Closing | 7-12 |
| | [D] Post-Closing Antitrust Challenges | 7-13 |
| § 7:4 | Tax Considerations..... | 7-13 |
| § 7:4.1 | Valuation Issues | 7-13 |
| § 7:4.2 | “Golden Parachute” Rules | 7-14 |
| § 7:4.3 | Limitations on Use of NOLs | 7-16 |
| § 7:5 | Accounting Matters | 7-17 |
| § 7:5.1 | Financial Statement Requirements | 7-17 |
| § 7:5.2 | Acquisition Accounting..... | 7-18 |
| § 7:5.3 | Sarbanes-Oxley Section 404..... | 7-19 |
| § 7:6 | Structural Issues in Acquisitions of Venture Capital-Backed Companies | 7-21 |
| § 7:6.1 | Effect of Preferred Stock Rights..... | 7-21 |
| § 7:6.2 | Indemnification and Escrow Arrangements..... | 7-22 |
| § 7:6.3 | Treatment of Stock Options, Restricted Stock, and Warrants..... | 7-22 |
| § 7:7 | Special Considerations in California M&A Deals..... | 7-24 |
| § 7:7.1 | California Corporations Code’s Business Combination Provisions | 7-24 |
| | [A] Section 1101—Equal Treatment Requirements | 7-24 |
| | [B] Section 1201—Mandatory Class Votes | 7-25 |
| | [C] Section 1203—Fairness Opinion in “Interested Party” Transaction | 7-25 |
| | [D] Section 603—Potential Pre-Closing Notification of Shareholder Action by Written Consent..... | 7-26 |
| | [E] Sections 500–511—Dividend and Repurchase Restrictions | 7-26 |
| | [F] Section 2115—“Quasi-California” Provisions..... | 7-26 |
| § 7:7.2 | Deal Lockups | 7-27 |
| § 7:7.3 | Fairness Hearings..... | 7-28 |
| § 7:7.4 | Non-Competition Agreements..... | 7-29 |
| § 7:7.5 | Stock Options | 7-30 |
| § 7:7.6 | Jury Trial Waivers..... | 7-31 |
| § 7:8 | IPO Implications of Concurrent M&A Activity | 7-31 |
| § 7:8.1 | Disclosure of IPO Plans to Target..... | 7-31 |
| § 7:8.2 | Form S-1 Disclosure Obligations | 7-32 |
| § 7:8.3 | Due Diligence | 7-32 |
| § 7:8.4 | Additional Stockholders | 7-32 |
| § 7:8.5 | Registration Rights..... | 7-33 |

Chapter 8 Financial Planning for Executives of Pre-IPO Companies

| | | |
|-----------|--|------|
| § 8:1 | Introduction | 8-2 |
| § 8:2 | Loans to Directors and Executive Officers..... | 8-3 |
| § 8:2.1 | Prohibition on Personal Loans Under Sarbanes-Oxley Section 402..... | 8-3 |
| § 8:2.2 | Resolving Outstanding Loans | 8-3 |
| [A] | Repayment | 8-3 |
| [B] | Forgiveness | 8-4 |
| § 8:3 | Restricted Stock | 8-4 |
| § 8:3.1 | Description | 8-4 |
| § 8:3.2 | Federal Income Tax Treatment | 8-5 |
| [A] | Section 83(b) Elections | 8-5 |
| [B] | Tax Withholding | 8-6 |
| [C] | Tax Strategies | 8-7 |
| § 8:4 | Stock Options..... | 8-7 |
| § 8:4.1 | Incentive Stock Options..... | 8-7 |
| [A] | Requirements | 8-7 |
| [B] | Federal Income Tax Treatment..... | 8-8 |
| [C] | Tax Strategies | 8-9 |
| Table 8-1 | ISOs: Exercise Now or Later? | 8-10 |
| § 8:4.2 | Non-Statutory Stock Options | 8-10 |
| [A] | Description..... | 8-10 |
| [B] | Federal Income Tax Treatment..... | 8-11 |
| [C] | Tax Strategies | 8-12 |
| Table 8-2 | NSOs: Exercise Now or Later? | 8-12 |
| § 8:4.3 | Reverse-Vesting Stock Options | 8-13 |
| § 8:5 | Estate Planning..... | 8-13 |
| § 8:5.1 | Taxation of Individuals and Assets | 8-13 |
| [A] | Gift Tax..... | 8-14 |
| [B] | Estate Tax..... | 8-14 |
| [C] | GST Tax..... | 8-14 |
| [D] | Income Tax | 8-14 |
| [E] | Future Tax Treatment..... | 8-14 |
| § 8:5.2 | Basic Wealth Transfer Planning Techniques..... | 8-15 |
| § 8:5.3 | Advanced Pre-IPO Techniques | 8-15 |
| [A] | Irrevocable Trusts..... | 8-16 |
| [B] | Grantor Retained Annuity Trusts | 8-17 |
| Table 8-3 | Examples of Use of GRAT for Pre-IPO Stock..... | 8-18 |
| § 8:5.4 | Valuation Issues | 8-19 |
| § 8:5.5 | Transfer Restrictions and Securities Law Issues | 8-20 |
| § 8:5.6 | Related Matters..... | 8-21 |

Table of Contents

| | | |
|-----------|--|------|
| | [A] Will | 8-21 |
| | [B] Healthcare Proxy | 8-21 |
| | [C] Durable Power of Attorney..... | 8-22 |
| | [D] Asset Protection Techniques | 8-22 |
| § 8:5.7 | Role of Company Counsel | 8-22 |
| § 8:6 | Section 409A | 8-22 |
| § 8:6.1 | General Provisions | 8-23 |
| § 8:6.2 | Application to Deferred Compensation Arrangements..... | 8-23 |
| | [A] Salary or Bonus Deferrals..... | 8-23 |
| | [B] Bonus Plans | 8-24 |
| | [C] Severance Arrangements | 8-24 |
| § 8:6.3 | Six-Month Delay for Key Employees of Public Companies | 8-25 |
| § 8:7 | Rule 10b5-1 Trading Plans | 8-25 |
| § 8:7.1 | Requirements | 8-26 |
| § 8:7.2 | Benefits and Drawbacks..... | 8-27 |
| Table 8-4 | Pros and Cons of Rule 10b5-1 Trading Plans..... | 8-27 |
| § 8:8 | Antitrust Reporting Obligations | 8-28 |
| § 8:8.1 | Application to Acquisitions of Voting Securities | 8-28 |
| § 8:8.2 | Thresholds for HSR Reporting..... | 8-29 |
| § 8:8.3 | Exemptions | 8-30 |
| § 8:8.4 | Penalties and Corrective Filings..... | 8-30 |

Chapter 9 Assembling the IPO Team

| | | |
|---------|---|------|
| § 9:1 | Introduction | 9-2 |
| § 9:2 | Management and Employees..... | 9-3 |
| § 9:2.1 | CEO and CFO | 9-3 |
| § 9:2.2 | New Positions | 9-3 |
| | [A] Controller..... | 9-3 |
| | [B] Additional Finance and Accounting Staff..... | 9-3 |
| | [C] General Counsel | 9-4 |
| | [D] Investor Relations Personnel..... | 9-4 |
| | [E] Stock Plan Administrator..... | 9-4 |
| | [F] Internal Auditor | 9-5 |
| | [G] Webmaster..... | 9-5 |
| § 9:3 | Board of Directors | 9-6 |
| § 9:3.1 | Board Composition | 9-6 |
| § 9:3.2 | Compensation for Outside Directors..... | 9-7 |
| § 9:4 | Company Counsel..... | 9-8 |
| § 9:4.1 | Selection Criteria | 9-8 |
| § 9:4.2 | Sample Questions/Requests for Company Counsel Candidates | 9-10 |

INITIAL PUBLIC OFFERINGS

| | | |
|---------|---|------|
| § 9:5 | Independent Accountants..... | 9-11 |
| § 9:5.1 | Big 4 or Not? | 9-11 |
| § 9:5.2 | Switching Auditors Prior to an IPO | 9-12 |
| § 9:5.3 | Sample Questions/Requests for Independent Accountant Candidates..... | 9-13 |
| § 9:6 | Managing Underwriters..... | 9-15 |
| § 9:6.1 | Identifying Candidates | 9-16 |
| § 9:6.2 | Bases for Evaluating Potential Managing Underwriters | 9-17 |
| | [A] Track Record | 9-17 |
| | [B] Team Members | 9-17 |
| | [C] Commitment to the Company | 9-18 |
| | [D] Distribution Reach and Mix | 9-19 |
| | [E] Aftermarket Support | 9-19 |
| | [F] Prestige and Reputation | 9-19 |
| | [G] Client Satisfaction..... | 9-20 |
| | [H] Economic Factors | 9-20 |
| | [I] Financial Strength and Stability..... | 9-20 |
| | [J] Other Capabilities | 9-21 |
| § 9:6.3 | The Selection Process | 9-21 |
| | [A] Selecting Managing Underwriters | 9-21 |
| | [B] Designating Lead Managing Underwriters..... | 9-22 |
| | [C] Selecting Co-Managers..... | 9-22 |
| | [D] Being Evaluated by the Underwriters..... | 9-23 |
| | [E] Confidentiality Agreements | 9-23 |
| § 9:6.4 | Sample Questions/Requests for Managing Underwriter Candidates..... | 9-24 |
| § 9:7 | Underwriters' Counsel | 9-29 |
| § 9:8 | Consultants and Advisors | 9-29 |
| § 9:8.1 | Compensation Consultant..... | 9-29 |
| § 9:8.2 | Investor Relations Firm | 9-30 |
| § 9:8.3 | Road Show Consultant | 9-30 |
| § 9:8.4 | Accounting Consultant | 9-31 |
| § 9:8.5 | IPO Consultant..... | 9-31 |
| § 9:9 | Outside Vendors | 9-31 |
| § 9:9.1 | Financial Printer | 9-31 |
| § 9:9.2 | Transfer Agent..... | 9-32 |
| § 9:9.3 | Banknote Company | 9-32 |
| § 9:9.4 | Virtual Data Room Provider | 9-32 |
| § 9:9.5 | Electronic Road Show Host..... | 9-32 |
| § 9:9.6 | Option Administrator | 9-33 |
| § 9:10 | Changes in the IPO Team | 9-33 |

Table of Contents

PART II
GOING PUBLIC

Chapter 10 An Overview of the IPO Process

| | | |
|-------------|---|-------|
| § 10:1 | Introduction | 10-2 |
| § 10:2 | Securities Law in a (Tiny) Nutshell..... | 10-3 |
| § 10:3 | Roles of IPO Participants..... | 10-3 |
| Figure 10-1 | Principal Relationships Among IPO Participants..... | 10-4 |
| § 10:3.1 | Company Management | 10-5 |
| § 10:3.2 | Board of Directors and Board Committees | 10-6 |
| § 10:3.3 | Company Counsel | 10-7 |
| § 10:3.4 | Independent Accountants | 10-8 |
| § 10:3.5 | Pre-IPO Stockholders | 10-8 |
| § 10:3.6 | Managing Underwriters | 10-9 |
| § 10:3.7 | Research Analysts | 10-10 |
| § 10:3.8 | Underwriters' Counsel..... | 10-10 |
| § 10:3.9 | Securities and Exchange Commission | 10-11 |
| § 10:3.10 | Other Participants..... | 10-11 |
| | [A] FINRA..... | 10-11 |
| | [B] Financial Printer | 10-11 |
| | [C] Stock Exchange | 10-12 |
| | [D] Transfer Agent..... | 10-12 |
| | [E] Banknote Company | 10-12 |
| | [F] DTC..... | 10-12 |
| | [G] CUSIP | 10-13 |
| | [H] Virtual Data Room Provider..... | 10-13 |
| | [I] Electronic Road Show Host..... | 10-13 |
| | [J] Compensation Consultant..... | 10-13 |
| | [K] Investor Relations Firm..... | 10-13 |
| | [L] Road Show Consultant | 10-13 |
| | [M] Accounting Consultant | 10-14 |
| § 10:4 | Public Company Education | 10-14 |
| § 10:4.1 | Informal and Formal "Schooling" | 10-14 |
| § 10:4.2 | Common Approaches to the "Curriculum" | 10-15 |
| | [A] Potential Liability..... | 10-15 |
| | [B] Corporate Governance | 10-16 |
| | [C] Sarbanes-Oxley Act; Dodd-Frank Act; JOBS Act | 10-16 |
| | [C][1] Sarbanes-Oxley Act..... | 10-16 |
| | [C][2] Dodd-Frank Act | 10-16 |
| | [C][3] JOBS Act..... | 10-17 |
| | [D] Periodic Reporting..... | 10-17 |

INITIAL PUBLIC OFFERINGS

| | | |
|-------------|--|-------|
| | [E] Public Communications | 10-18 |
| | [F] Insider Trading and Reporting..... | 10-18 |
| | [G] Section 16 Reporting..... | 10-18 |
| | [H] Financial Planning for Executives | 10-18 |
| | [I] Post-IPO Resales | 10-18 |
| | [J] Foreign Corrupt Practices Act..... | 10-19 |
| § 10:5 | Impact of the JOBS Act | 10-20 |
| § 10:5.1 | Overview | 10-20 |
| § 10:5.2 | “IPO On-Ramp”..... | 10-20 |
| | [A] Definition of “Emerging Growth Company” | 10-20 |
| | [B] IPO Relief..... | 10-21 |
| | [C] Post-IPO Benefits | 10-24 |
| § 10:5.3 | Adoption of Emerging Growth Company Standards | 10-25 |
| § 10:5.4 | General Solicitation in Rule 506 and Rule 144A Placements | 10-26 |
| § 10:5.5 | Application of the JOBS Act to Existing Public Companies | 10-26 |
| § 10:5.6 | Required SEC Studies | 10-27 |
| § 10:5.7 | SEC Rulemaking and Market Practices..... | 10-28 |
| § 10:6 | Sequence and Timing of Events in the IPO Process..... | 10-28 |
| § 10:6.1 | Six to Twelve Months Before the Organizational Meeting | 10-29 |
| Figure 10-2 | Illustrative IPO Timetable..... | 10-30 |
| § 10:6.2 | Three to Six Months Before the Organizational Meeting | 10-31 |
| § 10:6.3 | One to Three Months Before the Organizational Meeting | 10-31 |
| § 10:6.4 | The Organizational Meeting..... | 10-32 |
| § 10:6.5 | One to Two Months After the Organizational Meeting..... | 10-33 |
| § 10:6.6 | One to Three Months After the Initial Form S-1 Filing/Confidential Submission..... | 10-33 |
| § 10:6.7 | Three to Four Months After the Initial Form S-1 Filing/Confidential Submission..... | 10-34 |
| Table 10-3 | Top Ten List | 10-35 |

Chapter 11 The Quiet Period and Other Publicity Issues

| | | |
|----------|--------------------------------|------|
| § 11:1 | Introduction | 11-2 |
| § 11:2 | Legal Framework | 11-3 |
| § 11:2.1 | Section 5 | 11-3 |
| | [A] Pre-Filing Period..... | 11-4 |
| | [B] Waiting Period..... | 11-4 |
| | [C] Post-Offering Period | 11-5 |

Table of Contents

| | | |
|------------|---|-------|
| § 11:2.2 | Permissible Communications | 11-5 |
| | [A] Rule 163A—Communications More Than Thirty Days Before Filing..... | 11-5 |
| | [B] Rule 169—Factual Business Communications... | 11-6 |
| | [C] Rule 135—Notice of Intent to Conduct Public Offering | 11-8 |
| | [D] Section 5(d)—“Test-the-Waters” Communications | 11-8 |
| § 11:2.3 | Free Writing Prospectuses | 11-9 |
| § 11:3 | SEC Enforcement | 11-10 |
| § 11:3.1 | Monitoring for Violations | 11-10 |
| § 11:3.2 | Remedies for Violations | 11-10 |
| § 11:3.3 | Cautionary Tales About Pre-IPO Publicity..... | 11-11 |
| Table 11-1 | Example of Rescission Risk Disclosure in Prospectus..... | 11-12 |
| § 11:4 | Planning for the Quiet Period..... | 11-14 |
| § 11:4.1 | Management Education | 11-14 |
| § 11:4.2 | External Communications Policy | 11-14 |
| § 11:4.3 | Legal Review | 11-15 |
| § 11:4.4 | Adherence to Established Disclosure Practices | 11-15 |
| § 11:4.5 | Coordination with Underwriters | 11-15 |
| § 11:5 | Living with the Quiet Period..... | 11-16 |
| § 11:5.1 | Public Disclosure of IPO Plans | 11-17 |
| | [A] Pre-Filing Announcements..... | 11-17 |
| | [B] Post-Filing Announcements | 11-18 |
| § 11:5.2 | Announcement of IPO Plans to Employees..... | 11-18 |
| § 11:5.3 | Communications with Customers, Suppliers, and Other Third Parties..... | 11-20 |
| § 11:5.4 | Communications with Existing Investors..... | 11-20 |
| § 11:5.5 | Press Releases..... | 11-20 |
| § 11:5.6 | Media Coverage | 11-21 |
| § 11:5.7 | Company Website | 11-22 |
| § 11:5.8 | Blogging | 11-23 |
| § 11:5.9 | Social Networking Websites | 11-24 |
| § 11:5.10 | Industry Trade Shows | 11-24 |
| § 11:5.11 | Scientific Conferences | 11-25 |
| § 11:5.12 | User Conferences | 11-25 |
| § 11:5.13 | Non-Deal Road Shows | 11-26 |
| § 11:5.14 | Investor Conferences..... | 11-26 |
| § 11:5.15 | Analysts | 11-28 |
| § 11:5.16 | Awards | 11-29 |
| § 11:5.17 | Directed Share Program | 11-29 |
| § 11:5.18 | Employee Stock Purchase Plan | 11-30 |
| § 11:5.19 | IPO Participation Rights | 11-30 |
| § 11:5.20 | Distribution of the Form S-1 | 11-31 |

INITIAL PUBLIC OFFERINGS

§ 11:6 Leaks 11-32
 § 11:6.1 How Do Leaks Occur? 11-32
 § 11:6.2 Responding to Leaks 11-32
§ 11:7 Restrictions on Research Analyst Coverage 11-33
 § 11:7.1 FINRA Restrictions 11-33
 § 11:7.2 Securities Act Restrictions 11-35
 § 11:7.3 Consequences of Research Quiet Periods 11-36

Chapter 12 Potential Liability and the Purposes of Due Diligence

§ 12:1 Introduction 12-2
§ 12:2 What Is Due Diligence? 12-3
§ 12:3 Purposes of Due Diligence 12-3
§ 12:4 Potential Liability 12-4
 § 12:4.1 Section 11 12-4
 § 12:4.2 Other Sources of Liability 12-5
 [A] Section 12 12-5
 [B] Rule 10b-5 12-6
 [C] Section 17(a) 12-6
 [D] Controlling Person Liability 12-7
 [E] SEC Enforcement Proceedings 12-7
 [F] Blue Sky Laws 12-7
 § 12:4.3 Additional Considerations in Assessing Liability 12-8
 [A] Rule 159 12-8
 [B] PSLRA 12-8
 [C] Punitive Damages 12-8
 [D] Liability for Plaintiff's Attorney Fees 12-9
 [E] Bankruptcy Discharge 12-9
§ 12:5 The Due Diligence Defense 12-9
 § 12:5.1 Due Diligence Defense Under Section 11 12-9
 § 12:5.2 Similar Defenses Under Other Securities Law Provisions 12-11
§ 12:6 The Company's Perspective 12-11
§ 12:7 Directors and Officers 12-12
 § 12:7.1 Duties and Responsibilities 12-12
 § 12:7.2 Establishing the Due Diligence Defense 12-13
 [A] *Escott v. BarChris Construction Corp.* 12-13
 [B] Steps Commonly Taken to Establish a Due Diligence Defense 12-15
Table 12-1 Establishing a Due Diligence Defense 12-15
 § 12:7.3 Indemnification and Exculpation Arrangements 12-16
 [A] Corporate Charter and Bylaws 12-16
 [B] Indemnification Agreements 12-17

Table of Contents

| | | |
|-----------|--|-------|
| | [C] Expense Advancement Provisions | 12-17 |
| | [D] Exculpation Provisions | 12-17 |
| | [E] SEC's Position on Indemnification | 12-18 |
| § 12:7.4 | D&O Insurance | 12-18 |
| | [A] The ABCs of D&O Insurance..... | 12-19 |
| | [B] Procuring D&O Insurance | 12-20 |
| § 12:7.5 | Putting the Risk of Personal Liability in Perspective | 12-21 |
| § 12:8 | Selling Stockholders..... | 12-23 |
| § 12:9 | Underwriters | 12-24 |
| § 12:9.1 | Motivations for Diligence | 12-24 |
| § 12:9.2 | Diligence Standards | 12-26 |
| | [A] Regulatory Guidance | 12-26 |
| | [B] Case Law..... | 12-27 |
| § 12:9.3 | Indemnification of Underwriters | 12-28 |
| § 12:10 | Due Diligence in an IPO | 12-30 |
| § 12:10.1 | Overview | 12-30 |
| § 12:10.2 | The Due Diligence Process | 12-31 |
| | [A] Management Integrity..... | 12-31 |
| | [B] Retention of Professionals..... | 12-31 |
| | [C] Information Requests..... | 12-32 |
| | [D] Diligence Sessions..... | 12-32 |
| | [E] Independent Verification | 12-33 |
| | [F] Follow-Up..... | 12-33 |
| | [G] Drafting Coordination | 12-33 |
| | [H] Updating and Bring-Down | 12-34 |
| | [I] Comfort Letters..... | 12-34 |
| | [J] Legal Opinions | 12-36 |
| | [K] Documentation | 12-37 |
| § 12:10.3 | Company Cooperation and Assistance | 12-37 |

Chapter 13 Preparing the Form S-1

| | | |
|------------|--|------|
| § 13:1 | Introduction | 13-2 |
| § 13:2 | Contents of the Form S-1..... | 13-3 |
| § 13:2.1 | Prospectus | 13-3 |
| Table 13-1 | Illustrative Emerging Growth Company Comments | 13-4 |
| | [A] Front Cover..... | 13-5 |
| | [B] Prospectus Summary..... | 13-6 |
| | [C] Risk Factors..... | 13-7 |
| | [D] Special Note Regarding Forward-Looking Statements | 13-8 |
| | [E] Use of Proceeds | 13-8 |
| | [F] Dividend Policy | 13-9 |
| | [G] Capitalization..... | 13-9 |

INITIAL PUBLIC OFFERINGS

| | | | |
|------------|-----|--|-------|
| | [H] | Dilution | 13-10 |
| | [I] | Selected Financial Data | 13-10 |
| | [J] | MD&A | 13-10 |
| | [K] | Business | 13-12 |
| | [L] | Management | 13-14 |
| Table 13-2 | | Am I an Officer? | 13-17 |
| | [M] | Executive Compensation | 13-19 |
| | [N] | Related Person Transactions | 13-20 |
| | [O] | Principal and Selling Stockholders | 13-21 |
| Table 13-3 | | What Will Be Disclosed About Me? | 13-22 |
| | [P] | Description of Capital Stock | 13-24 |
| | [Q] | Shares Eligible for Future Sale | 13-24 |
| | [R] | Material U.S. Tax Considerations for Non-U.S. Holders of Common Stock | 13-25 |
| | [S] | Underwriting | 13-25 |
| | [T] | Legal Matters | 13-26 |
| | [U] | Experts | 13-26 |
| | [V] | Where You Can Find More Information | 13-27 |
| | [W] | Financial Statements and Notes | 13-27 |
| | [X] | Other Sections | 13-28 |
| | [Y] | Back Cover | 13-28 |
| | [Z] | Emerging Prospectus Practices | 13-28 |
| § 13:2.2 | | Length of the Prospectus | 13-29 |
| Table 13-4 | | Typical Prospectus Length | 13-30 |
| § 13:2.3 | | Cover and Part II of Form S-1 | 13-31 |
| § 13:2.4 | | Material Contracts | 13-32 |
| | [A] | Filing Requirements | 13-32 |
| | [B] | Confidential Treatment Requests | 13-33 |
| | [C] | Representations and Warranties Contained in Exhibits | 13-35 |
| § 13:2.5 | | Other Exhibits | 13-37 |
| § 13:2.6 | | Signature Requirements | 13-37 |
| | [A] | Required Signatures | 13-37 |
| | [B] | Powers of Attorney | 13-37 |
| § 13:3 | | Plain English | 13-38 |
| § 13:3.1 | | Overview | 13-38 |
| § 13:3.2 | | Practical Application | 13-39 |
| § 13:3.3 | | Words to Avoid | 13-39 |
| Table 13-5 | | Words to Avoid | 13-40 |
| § 13:4 | | The Organizational Meeting | 13-40 |
| § 13:5 | | The Form S-1 Drafting Process | 13-42 |
| § 13:5.1 | | The Role of Company Counsel | 13-42 |
| § 13:5.2 | | Getting Ready to Draft | 13-43 |
| § 13:5.3 | | Staging the Drafting | 13-43 |
| | [A] | Business | 13-43 |
| | [B] | MD&A and Other Financial Disclosures | 13-44 |

Table of Contents

| | | |
|------------|--|-------|
| | [C] Management and Executive Compensation Disclosures..... | 13-45 |
| | [D] Risk Factors..... | 13-46 |
| | [E] Exhibits | 13-47 |
| | [F] Balance of Form S-1 | 13-47 |
| | [G] Pacing Items..... | 13-47 |
| § 13:5.4 | Drafting Sessions | 13-48 |
| § 13:5.5 | Board and Committee Involvement..... | 13-50 |
| § 13:5.6 | Document Form and Control | 13-51 |
| § 13:5.7 | Drafting: What Does Not Work..... | 13-52 |
| § 13:5.8 | A Summary of Drafting Roles..... | 13-53 |
| Table 13-6 | Traditional Drafting Roles: Which One Will You Be? | 13-53 |

Chapter 14 Selling Stockholders

| | | |
|------------|---|-------|
| § 14:1 | Introduction | 14-2 |
| § 14:2 | Background..... | 14-2 |
| § 14:2.1 | Registration Rights..... | 14-2 |
| § 14:2.2 | Nature and Prevalence of Selling Stockholders | 14-3 |
| Table 14-1 | Prevalence of Selling Stockholders..... | 14-5 |
| § 14:3 | Advantages and Disadvantages..... | 14-5 |
| § 14:3.1 | The Company's Perspective..... | 14-5 |
| § 14:3.2 | The Selling Stockholders' Perspective | 14-6 |
| [A] | Loss of Upside..... | 14-6 |
| [B] | Potential Liability..... | 14-6 |
| [C] | Uncertain Terms | 14-7 |
| [D] | Section 16 Risk | 14-8 |
| [E] | Higher Sales Commission..... | 14-8 |
| [F] | Other Expenses | 14-8 |
| § 14:4 | Process and Documentation..... | 14-9 |
| § 14:4.1 | Waivers and Amendments | 14-9 |
| § 14:4.2 | Registration Rights Notice | 14-9 |
| § 14:4.3 | Selling Stockholder Documents | 14-10 |
| [A] | Questionnaires | 14-10 |
| [B] | Power of Attorney | 14-11 |
| [C] | Custody Agreement..... | 14-11 |
| [D] | Stock Power and Medallion Guarantee..... | 14-11 |
| [E] | IRS Form W-9 | 14-12 |
| § 14:5 | Deal Complications..... | 14-13 |
| § 14:5.1 | Disclosure | 14-13 |
| § 14:5.2 | Pricing..... | 14-13 |
| § 14:5.3 | Cashless Exercises..... | 14-14 |
| § 14:5.4 | Logistics | 14-14 |
| § 14:5.5 | Foreign Selling Stockholders | 14-15 |

Chapter 15 Stock Exchange Listing

§ 15:1 Introduction 15-2

§ 15:2 Listing Choices 15-2

 § 15:2.1 Background 15-2

 § 15:2.2 The Hegemony of Nasdaq and the NYSE..... 15-3

 [A] Nasdaq 15-4

 [B] New York Stock Exchange..... 15-5

§ 15:3 Selecting an Exchange 15-5

 § 15:3.1 Selection Criteria 15-5

 [A] Listing Standards 15-6

 [B] Cost..... 15-6

 [C] Prestige..... 15-6

 [D] Image 15-6

 [E] Volatility, Liquidity, and Trading Execution 15-7

 [F] Competitor Listings 15-7

 [G] Insider Sales 15-7

 § 15:3.2 Current Picture 15-7

§ 15:4 Listing Requirements..... 15-8

 § 15:4.1 Quantitative Listing Standards 15-8

 § 15:4.2 Corporate Governance Standards 15-9

§ 15:5 Listing Process and Documentation..... 15-11

 § 15:5.1 Overview 15-11

 § 15:5.2 Phases of the Listing Process 15-11

 [A] Eligibility Review 15-11

 [B] Initial Application and Supporting Materials 15-12

 [C] Review of Application 15-12

 [D] Selection of Market Makers 15-13

 [E] Listing Approval..... 15-13

 [F] Final Documentation 15-13

 [G] Opening Day..... 15-14

§ 15:6 Related Matters 15-14

 § 15:6.1 Trading Symbol..... 15-14

 § 15:6.2 Transfer Agent..... 15-16

 § 15:6.3 DTC Eligibility 15-16

 § 15:6.4 DRS Eligibility 15-16

 § 15:6.5 CUSIP Number..... 15-17

 § 15:6.6 Exchange Act Registration 15-17

§ 15:7 Voluntary and Involuntary Delisting..... 15-18

Appendix 15A Summary of Stock Exchange Listing Requirements and Fees..... App. 15A-1

Table of Contents

Chapter 16 Initial Filing or Confidential Submission of the Form S-1

| | | |
|-----------|---|-------|
| § 16:1 | Introduction | 16-2 |
| § 16:2 | “At the Printer” | 16-2 |
| § 16:3 | EDGAR Filer Codes | 16-3 |
| § 16:4 | SEC Registration Fee | 16-7 |
| § 16:5 | Filing the Form S-1 | 16-8 |
| § 16:5.1 | Formatting | 16-8 |
| § 16:5.2 | Final Pre-Filing Review | 16-9 |
| § 16:5.3 | EDGAR Transmission | 16-10 |
| § 16:5.4 | Confidential Submission | 16-11 |
| [A] | Overview | 16-11 |
| [B] | Eligibility | 16-11 |
| [C] | Advantages and Disadvantages | 16-12 |
| [D] | Accounting Standards Election | 16-13 |
| [E] | Submission Mechanics | 16-13 |
| [F] | Confidential Treatment Requests | 16-14 |
| § 16:6 | Required Consents | 16-15 |
| § 16:6.1 | Auditors | 16-15 |
| [A] | Initial Form S-1 Filing | 16-15 |
| [B] | Form S-1 Amendments | 16-16 |
| [C] | Prospectuses | 16-16 |
| [D] | Dating of Auditor Consents | 16-16 |
| § 16:6.2 | Counsel | 16-17 |
| § 16:6.3 | Other Experts | 16-17 |
| § 16:6.4 | Director Nominees | 16-18 |
| § 16:6.5 | Customers | 16-18 |
| § 16:6.6 | Industry Analysts | 16-19 |
| § 16:7 | Confidential Treatment Request | 16-19 |
| § 16:8 | Related Filings | 16-20 |
| § 16:8.1 | FINRA Filing | 16-20 |
| § 16:8.2 | Stock Exchange Listing | 16-21 |
| § 16:8.3 | CUSIP Number | 16-21 |
| § 16:8.4 | Exchange Act Registration | 16-21 |
| § 16:8.5 | Blue Sky Filings | 16-21 |
| § 16:9 | Next-Generation EDGAR | 16-21 |
| § 16:10 | Board and Committee Approvals | 16-22 |
| § 16:10.1 | Items for Board Approval | 16-22 |
| [A] | Governance Matters | 16-23 |
| [B] | IPO Matters | 16-23 |
| [C] | Other IPO Preparation Matters | 16-24 |
| [D] | Public Company Matters | 16-25 |
| § 16:10.2 | Role of Committees | 16-25 |
| § 16:10.3 | Sequencing and Other Considerations | 16-26 |

INITIAL PUBLIC OFFERINGS

§ 16:11 Stockholder Approvals 16-27
 § 16:11.1 Generally..... 16-27
 § 16:11.2 Delaware Considerations 16-28
§ 16:12 Immediate Next Steps 16-28
 § 16:12.1 Press Release 16-29
 § 16:12.2 Employee Announcement 16-29

Chapter 17 The SEC Review Process

§ 17:1 Introduction 17-1
§ 17:2 SEC Overview..... 17-2
 § 17:2.1 SEC Structure, Functions, and Players 17-3
 § 17:2.2 Corp Fin..... 17-4
§ 17:3 The Review Process 17-5
 § 17:3.1 Overview 17-5
 [A] Generally..... 17-5
 [B] Review of Confidential Submissions..... 17-6
 § 17:3.2 Standard of Review 17-7
Table 17-1 Mustang Ranch: Too Much Disclosure?..... 17-8
 § 17:3.3 Initial Comments 17-9
 § 17:3.4 The Company’s Initial Response..... 17-12
 § 17:3.5 Subsequent Comments and Responses..... 17-14
 § 17:3.6 “Appeals” and Waivers During the Review Process ...17-16
 § 17:3.7 Timing and Comment Data 17-19
Table 17-2 Elapsed Time Between Form S-1 Filings and
SEC Comment Letters 17-20
Table 17-3 Distribution of SEC Comments 17-21
§ 17:4 Tips for a Smooth Review Process..... 17-22
 § 17:4.1 Working with the Staff..... 17-22
 § 17:4.2 Managing the Timeline..... 17-22
Table 17-4 Tips for a Good Relationship with SEC
Examiners..... 17-23
§ 17:5 What SEC Review Does and Does Not Mean..... 17-24
§ 17:6 Confidentiality Issues..... 17-25
 § 17:6.1 Public Release of Comment Letters and
Responses..... 17-25
 § 17:6.2 Confidential Treatment Requests Under Rule 83 ...17-27
 § 17:6.3 Return of Supplemental Materials Under
Rule 418(b)..... 17-32

Chapter 18 Marketing the Offering

§ 18:1 Introduction 18-2
§ 18:2 Preliminary Prospectus 18-2

Table of Contents

| | | |
|------------|--|-------|
| § 18:2.1 | Printing and Distribution | 18-3 |
| § 18:2.2 | Determining Price Range and Number of Shares | 18-4 |
| § 18:2.3 | Flash Results | 18-6 |
| § 18:3 | Free Writing Prospectuses | 18-9 |
| § 18:3.1 | Requirements | 18-10 |
| § 18:3.2 | Use of Free Writing Prospectuses | 18-12 |
| Table 18-1 | Illustrative Timeline for Use of Post-Effective Free Writing Prospectus to Convey Updated Offering Information | 18-13 |
| Table 18-2 | Illustrative Timeline for Use of Pre-Effective Free Writing Prospectus to Convey Material Company Developments | 18-14 |
| § 18:4 | Road Show | 18-16 |
| § 18:4.1 | Overview | 18-16 |
| § 18:4.2 | Requirements | 18-16 |
| § 18:4.3 | Management Preparation | 18-17 |
| § 18:4.4 | The Launch | 18-18 |
| § 18:4.5 | Schedule | 18-20 |
| Table 18-3 | Illustrative Road Show Schedule | 18-20 |
| § 18:5 | Electronic Road Show | 18-21 |
| § 18:5.1 | Overview | 18-21 |
| § 18:5.2 | Requirements | 18-22 |
| § 18:6 | Rules of the Road | 18-23 |
| § 18:6.1 | Legal Review | 18-23 |
| § 18:6.2 | Availability of Documents | 18-23 |
| § 18:6.3 | Consistency with Preliminary Prospectus | 18-24 |
| § 18:6.4 | Q&A Sessions and Other Investor Follow-Up | 18-24 |
| § 18:6.5 | Attendance | 18-25 |
| § 18:6.6 | Forward-Looking Statements | 18-25 |
| § 18:6.7 | Presentation Slides | 18-25 |
| § 18:6.8 | Potential Liability | 18-26 |
| § 18:7 | Impermissible Offering Communications | 18-26 |
| § 18:8 | Pre-Marketing Activities | 18-27 |
| § 18:8.1 | “Test-the-Waters” Communications | 18-28 |
| § 18:8.2 | Preliminary Road Shows | 18-29 |
| § 18:9 | Unconventional Marketing Techniques | 18-30 |
| § 18:9.1 | Underwritten IPOs | 18-30 |
| Table 18-4 | Underwritten IPOs with Unusual Marketing Twists | 18-31 |
| § 18:9.2 | Direct IPOs | 18-32 |
| § 18:10 | Directed Share Programs | 18-33 |
| § 18:10.1 | Overview | 18-33 |
| § 18:10.2 | Potential Risks | 18-34 |
| § 18:10.3 | Minimizing the Risks | 18-35 |
| § 18:11 | Insider Purchases in IPO | 18-36 |

INITIAL PUBLIC OFFERINGS

§ 18:11.1 Regulation M 18-36
§ 18:11.2 Disclosure Requirements 18-37
§ 18:11.3 FINRA Restrictions 18-38
§ 18:11.4 Underwriter Loans 18-38
§ 18:11.5 Other Considerations..... 18-39
§ 18:12 Lockup Agreements 18-40

Chapter 19 Demystifying the Underwriting Process

§ 19:1 Introduction 19-2
§ 19:2 Underwriting Basics 19-3
 § 19:2.1 The Players 19-3
 [A] Principal Players..... 19-3
 [B] Key Personnel..... 19-4
 § 19:2.2 Basic Structure 19-5
 [A] Overview 19-5
 [B] Share Distribution and Purchase Price
 Discounts 19-5
Table 19-1 Different Purchase Prices in the Distribution
 Chain 19-6
 [C] Evolving Industry Practices 19-6
 [D] Underwriting Discounts..... 19-7
Table 19-2 Median Underwriting Discount by Offering Size 19-8
 § 19:2.3 Contractual Arrangements..... 19-8
 [A] Overview 19-8
 [B] Agreement Among Underwriters 19-9
 [C] Selected Dealers Agreement 19-10
§ 19:3 Distribution and Bookbuilding Process 19-10
 § 19:3.1 Forming the Underwriting Syndicate..... 19-10
 § 19:3.2 Preparing the Sales Forces..... 19-11
 § 19:3.3 Building the Book 19-12
Table 19-3 Example of Bookbuilding..... 19-14
 § 19:3.4 Confirming Sales; Aftermarket Price
 Stabilization 19-15
 § 19:3.5 Share Allocations 19-17
§ 19:4 Underwriting Agreement 19-19
 § 19:4.1 Purchase and Sale of the Shares 19-20
 § 19:4.2 Representations and Warranties..... 19-21
 [A] Purposes 19-21
 [B] Company Representations 19-21
 [C] Selling Stockholder Representations 19-24
 [D] Underwriter Representations 19-25
 § 19:4.3 Closing Arrangements 19-25
 § 19:4.4 Default Provisions..... 19-26
 § 19:4.5 Company Covenants 19-27

Table of Contents

| | | |
|------------|--|-------|
| § 19:4.6 | Payment of Offering Expenses | 19-28 |
| § 19:4.7 | Disclaimer of Fiduciary or Advisory Relationship | 19-30 |
| § 19:4.8 | Indemnification and Contribution Arrangements..... | 19-30 |
| | [A] Indemnification Obligations of the Company..... | 19-31 |
| | [B] Indemnification Obligations of Selling Stockholders..... | 19-31 |
| | [C] Indemnification Obligations of the Underwriters | 19-32 |
| | [D] Enforcing Indemnification and Contribution Obligations..... | 19-33 |
| § 19:4.9 | Miscellaneous Provisions | 19-34 |
| § 19:5 | Economics of Underwriting | 19-35 |
| § 19:5.1 | Allocating Underwriting Compensation | 19-35 |
| Table 19-4 | Illustrative Breakdown of Underwriting Discount..... | 19-36 |
| § 19:5.2 | Profitability | 19-37 |
| § 19:6 | FINRA Review of Underwriting Arrangements | 19-37 |
| § 19:6.1 | Corporate Financing Rule | 19-39 |
| § 19:6.2 | Prohibited Arrangements | 19-40 |
| § 19:6.3 | Mandatory Underwriter Lockup | 19-41 |
| § 19:6.4 | Conflicts of Interest | 19-41 |
| § 19:7 | Research Analysts..... | 19-42 |
| § 19:7.1 | Separation of Research Analyst and Investment Banking Functions | 19-44 |
| | [A] Research Reports | 19-45 |
| | [B] Compensation of Analysts..... | 19-45 |
| | [C] Solicitation of Investment Banking Business | 19-46 |
| | [D] Analyst Participation in Offering Process | 19-46 |
| | [E] Research Quiet Periods | 19-46 |
| | [F] Restrictions on Personal Trading..... | 19-47 |
| | [G] Expanded Disclosures | 19-47 |
| § 19:7.2 | Implications for IPOs..... | 19-48 |
| | [A] Relationships with Analysts..... | 19-48 |
| | [B] Due Diligence | 19-48 |
| | [C] Timing of Managing Underwriter Selections | 19-49 |
| | [D] Analyst Participation in IPO Process | 19-49 |
| | [E] Timing of Research Reports | 19-50 |
| | [F] IPO Scheduling | 19-50 |
| | [G] Relationships with Investment Bankers..... | 19-50 |
| | [H] Avoiding Violations..... | 19-51 |

Chapter 20 Effectiveness, Pricing, Trading, and Closing

| | | |
|-----------|--|-------|
| § 20:1 | Introduction | 20-2 |
| § 20:2 | Overview..... | 20-3 |
| § 20:3 | Effectiveness of the Form S-1 | 20-4 |
| § 20:3.1 | Timing of Effectiveness | 20-4 |
| § 20:3.2 | Acceleration Requests | 20-5 |
| [A] | Acceleration Request Requirements | 20-5 |
| [B] | SEC Consideration of Acceleration Requests | 20-6 |
| § 20:3.3 | Avoiding Premature Effectiveness | 20-7 |
| § 20:4 | Form 3 Filings | 20-8 |
| § 20:4.1 | Who Is Required to File | 20-8 |
| § 20:4.2 | Filing Considerations | 20-9 |
| § 20:5 | Pricing | 20-10 |
| § 20:6 | Conveying Updated Information Prior to Time of Sale | 20-11 |
| § 20:7 | Pricing Outside the Range or Changing the Offering Size | 20-14 |
| § 20:7.1 | Overview | 20-14 |
| § 20:7.2 | Pricing Below the Range or Reducing the Offering Size | 20-17 |
| § 20:7.3 | Pricing Above the Range or Increasing the Offering Size | 20-19 |
| § 20:7.4 | Pre-Effective Amendments to Reflect Offering Changes | 20-22 |
| § 20:7.5 | Post-Effective Amendments to Reflect Offering Changes | 20-23 |
| § 20:7.6 | Preparing for Offering Changes..... | 20-23 |
| § 20:8 | Final Prospectus | 20-24 |
| § 20:8.1 | Adding Price-Dependent Information to Final Prospectus..... | 20-24 |
| § 20:8.2 | Final Prospectus Filing and Delivery Requirements | 20-25 |
| § 20:9 | Trading | 20-26 |
| § 20:9.1 | First-Day Trading..... | 20-26 |
| § 20:9.2 | Stock Performance Expectations and Results..... | 20-27 |
| § 20:9.3 | Insider Purchases in the Aftermarket | 20-27 |
| § 20:10 | Closing | 20-28 |
| § 20:10.1 | IPO Settlement Cycle | 20-28 |
| § 20:10.2 | Closing Actions..... | 20-29 |
| [A] | Typical Closing Deliveries | 20-29 |
| [B] | Exercising the Over-Allotment Option..... | 20-31 |
| [C] | Other Closing Matters | 20-31 |
| § 20:11 | Related Matters | 20-31 |
| § 20:11.1 | Transfer Agent Arrangements | 20-31 |
| § 20:11.2 | Press Releases..... | 20-32 |
| § 20:11.3 | Form 4 Filings..... | 20-32 |

Table of Contents

| | | |
|--------------|--|------------|
| § 20:11.4 | Section 13 Filings | 20-33 |
| § 20:11.5 | Investor Relations Section of Website | 20-33 |
| § 20:11.6 | Registration Statement on Form S-8..... | 20-34 |
| § 20:11.7 | Exchange of Stock Certificates | 20-34 |
| § 20:12 | Looking Beyond the Closing..... | 20-34 |
| § 20:12.1 | Post-Offering Quiet Period..... | 20-34 |
| § 20:12.2 | Investor Relations | 20-35 |
| § 20:13 | Pricing But Not Closing | 20-35 |
| § 20:13.1 | Failure to Close Due to External Events..... | 20-36 |
| § 20:13.2 | Failure to Close Due to Adverse Company Developments | 20-36 |
| Table 20-1 | Firm-Commitment IPOs That Priced But Did Not Close | 20-37 |
| § 20:13.3 | Failure to Close Due to Underwriter Issues | 20-38 |
| § 20:14 | Abandoning the IPO..... | 20-38 |
| § 20:14.1 | When an IPO Is Canceled | 20-38 |
| § 20:14.2 | When an IPO Is Delayed | 20-39 |
| § 20:14.3 | Aftermath of a Failed IPO..... | 20-40 |
| Appendix 20A | Examples of Pricing Below the Range or Reducing the Offering Size | App. 20A-1 |
| Appendix 20B | Examples of Pricing Above the Range or Increasing the Offering Size | App. 20B-1 |
| Appendix 20C | How Do You Compare? Some Facts About the IPO Market | App. 20C-1 |

**Chapter 21 Out-of-the-Ordinary IPOs—Special Issues for
Special Issuers**

| | | |
|----------|--|-------|
| § 21:1 | Introduction | 21-5 |
| § 21:2 | Dual Tracks | 21-5 |
| § 21:2.1 | Rationale..... | 21-5 |
| § 21:2.2 | Challenges and Implications..... | 21-6 |
| [A] | Importance of Confidentiality..... | 21-6 |
| [B] | Disclosure Issues..... | 21-6 |
| [C] | Selection of Legal Advisors..... | 21-7 |
| [D] | Selection of Financial Advisors | 21-7 |
| [E] | Potential for Conflicted Motivations..... | 21-7 |
| [F] | Board Duties | 21-8 |
| [G] | Valuation Impact..... | 21-8 |
| [H] | Timing Considerations | 21-8 |
| [I] | Contractual Arrangements with Bidders..... | 21-9 |
| [J] | Sale Terms..... | 21-9 |
| [K] | Unwinding the IPO..... | 21-10 |
| [L] | Extra Effort and Expense | 21-10 |
| § 21:2.3 | Outlook..... | 21-10 |

INITIAL PUBLIC OFFERINGS

| | | |
|------------|--|-------|
| § 21:3 | Issuers Subject to Reduced Disclosure Requirements..... | 21-10 |
| § 21:3.1 | Emerging Growth Companies..... | 21-11 |
| § 21:3.2 | Smaller Reporting Companies | 21-12 |
| | [A] Background | 21-12 |
| | [B] Relaxed Disclosure Rules | 21-13 |
| | [B][1] Overview..... | 21-13 |
| | [B][2] Gaining and Losing Eligibility | 21-13 |
| | [B][3] Scaled Disclosure..... | 21-15 |
| Table 21-1 | Scaled Disclosure Under Regulation S-K..... | 21-16 |
| | [C] Implications for IPO Companies | 21-19 |
| | [D] Relationship of Smaller Reporting Company Category to Other Public Company Categories..... | 21-20 |
| | [E] Outlook..... | 21-21 |
| § 21:4 | Issuers Facing Special Considerations | 21-22 |
| § 21:4.1 | Venture Capital–Backed IPOs | 21-22 |
| | [A] Overview..... | 21-22 |
| | [B] IPO Considerations..... | 21-23 |
| | [B][1] Heightened Urgency | 21-23 |
| | [B][2] Investor Involvement..... | 21-23 |
| | [B][3] Selling Stockholders..... | 21-24 |
| | [B][4] Audit Committee Membership..... | 21-24 |
| | [B][5] Transition in Board Membership..... | 21-24 |
| | [B][6] Section 16 Issues | 21-25 |
| | [B][7] Potential Conflicts of Interest..... | 21-25 |
| | [C] Outlook..... | 21-26 |
| § 21:4.2 | Life Sciences IPOs..... | 21-26 |
| | [A] Overview..... | 21-26 |
| | [B] IPO Considerations..... | 21-27 |
| | [B][1] Complex Operations..... | 21-27 |
| | [B][2] IPO Challenges | 21-28 |
| | [B][3] Advisors | 21-28 |
| | [B][4] Post-IPO Funding | 21-29 |
| | [C] Outlook..... | 21-29 |
| § 21:4.3 | Private Equity–Backed IPOs | 21-29 |
| | [A] Overview..... | 21-29 |
| | [B] IPO Considerations..... | 21-30 |
| | [B][1] Company Profile..... | 21-30 |
| | [B][2] Prior Public Company History | 21-30 |
| | [B][3] Capital Structure and Needs..... | 21-30 |
| | [B][4] Possible Exemptions from Corporate Governance Requirements..... | 21-30 |
| | [B][5] Captive Relationships | 21-30 |
| | [B][6] Disclosure Issues | 21-31 |
| | [B][7] Potential Conflicts of Interest..... | 21-31 |
| | [C] Outlook..... | 21-31 |

Table of Contents

| | | |
|----------|--|-------|
| § 21:4.4 | Special-Purpose Acquisition Companies | 21-32 |
| | [A] Overview | 21-32 |
| | [B] General Characteristics | 21-33 |
| | [B][1] Management Team | 21-33 |
| | [B][2] Insider Ownership and Restrictions | 21-33 |
| | [B][3] Proposed Acquisition | 21-33 |
| | [B][4] Stockholder Approval..... | 21-34 |
| | [B][5] Transformation of Stockholder Base..... | 21-34 |
| | [B][6] Liquidation and Return of Funds..... | 21-34 |
| | [C] Advantages and Disadvantages | 21-35 |
| | [D] IPO Terms and Process | 21-35 |
| | [D][1] Offering Terms..... | 21-35 |
| | [D][2] Prospectus Disclosures..... | 21-37 |
| | [D][3] Marketing the Offering | 21-37 |
| | [D][4] Regulatory Review..... | 21-37 |
| | [D][5] Post-Offering Matters | 21-38 |
| | [E] Outlook..... | 21-38 |
| § 21:5 | Non-Traditional IPOs | 21-39 |
| § 21:5.1 | Spin-Off IPOs | 21-39 |
| | [A] Overview | 21-39 |
| | [B] IPO Considerations..... | 21-40 |
| | [B][1] Transaction Planning | 21-40 |
| | [B][2] Establishment of Subsidiary | 21-40 |
| | [B][3] Parent-Subsidiary Relationship | 21-41 |
| | [B][4] Controlled Company Rules | 21-41 |
| | [B][5] Separate Counsel | 21-41 |
| | [B][6] Additional Form S-1 Disclosures | 21-41 |
| | [C] Outlook..... | 21-42 |
| § 21:5.2 | Form 10 IPOs | 21-42 |
| | [A] Overview | 21-42 |
| | [B] Advantages and Disadvantages | 21-43 |
| | [C] Offering Process | 21-44 |
| | [C][1] Pre-Financing Preparation..... | 21-44 |
| | [C][2] The Private Placement..... | 21-44 |
| | [C][3] Public Company Preparation | 21-45 |
| | [C][4] Governance Preparation for Stock Exchange Listing..... | 21-45 |
| | [C][5] Form 10 Registration Statement..... | 21-45 |
| | [C][6] PIPE Financing | 21-46 |
| | [C][7] Resale Form S-1 | 21-46 |
| | [C][8] Over-the-Counter Trading..... | 21-46 |
| | [C][9] Stock Exchange Listing | 21-46 |
| | [D] Outlook..... | 21-46 |
| § 21:5.3 | Rule 144A IPOs | 21-47 |
| | [A] Overview | 21-47 |
| | [B] Advantages and Disadvantages | 21-48 |

INITIAL PUBLIC OFFERINGS

| | | | |
|----------|--------|--|-------|
| | [C] | Private Trading Performance | 21-49 |
| | [D] | Offering Process | 21-50 |
| | [D][1] | The Placement Process | 21-50 |
| | [D][2] | Public Company Preparations | 21-51 |
| | [E] | Size and Nature of Market..... | 21-51 |
| | [F] | Outlook..... | 21-52 |
| § 21:5.4 | | Reverse-Merger IPOs..... | 21-52 |
| | [A] | Overview | 21-52 |
| | [B] | Transaction Considerations | 21-54 |
| | [B][1] | Merger Agreement | 21-54 |
| | [B][2] | Due Diligence..... | 21-54 |
| | [B][3] | SEC Filing and Review..... | 21-54 |
| | [B][4] | Blue Sky Laws..... | 21-55 |
| | [C] | Outlook..... | 21-55 |
| § 21:5.5 | | Tracking Stock IPOs | 21-55 |
| | [A] | Overview | 21-55 |
| | [B] | IPO Considerations..... | 21-56 |
| | [C] | Outlook..... | 21-56 |
| § 21:5.6 | | Post-Bankruptcy IPOs | 21-56 |
| | [A] | Overview | 21-56 |
| | [B] | IPO Considerations..... | 21-57 |
| | [B][1] | Fresh-Start Accounting | 21-57 |
| | [B][2] | Bankruptcy Disclosures | 21-57 |
| | [B][3] | Offering Limitations | 21-57 |
| | [B][4] | Additional “Underwriter” Disclosures | 21-58 |
| | [B][5] | Exchange Listing | 21-58 |
| | [C] | Outlook..... | 21-58 |
| § 21:6 | | Cross-Border IPOs | 21-58 |
| § 21:6.1 | | Foreign Companies Conducting IPOs in the U.S. Market | 21-58 |
| | [A] | Overview | 21-58 |
| | [B] | “Foreign Private Issuer” Status | 21-59 |
| | [C] | American Depositary Shares..... | 21-59 |
| | [D] | Relaxed Disclosure Requirements for Foreign Private Issuers | 21-60 |
| | [D][1] | IFRS Financial Statements..... | 21-61 |
| | [D][2] | Modified Disclosure in Form F-1 | 21-61 |
| | [D][3] | Partial Relief from Corporate Governance Requirements..... | 21-62 |
| | [D][4] | Less Extensive Exchange Act Reporting | 21-63 |
| | [D][5] | Other Exemptions..... | 21-64 |
| | [D][6] | Confidential SEC Review..... | 21-64 |
| | [E] | Increased Burdens for Foreign Companies | 21-65 |
| | [F] | Termination of Reporting Obligations | 21-65 |
| | [G] | Outlook..... | 21-66 |

Table of Contents

| | | |
|----------|---|-------|
| § 21:6.2 | U.S. Companies Conducting IPOs in Foreign Countries | 21-66 |
| | [A] Overview | 21-66 |
| | [B] Advantages of a Foreign Market..... | 21-66 |
| | [C] Drawbacks of a Foreign-Market IPO..... | 21-67 |
| | [C][1] U.S. Securities Law Issues | 21-67 |
| | [C][2] Reincorporation | 21-68 |
| | [C][3] Additional Challenges and Limitations | 21-69 |
| | [D] Outlook..... | 21-69 |
| § 21:6.3 | Listing on AIM | 21-70 |
| | [A] Overview | 21-70 |
| | [B] Admission Process | 21-70 |
| | [B][1] No Regulatory Review..... | 21-70 |
| | [B][2] Nomad Arrangements | 21-71 |
| | [B][3] Appointment of Market Maker..... | 21-71 |
| | [B][4] Pre-Offering Publicity Practices | 21-72 |
| | [B][5] Due Diligence..... | 21-72 |
| | [B][6] Placement Arrangements..... | 21-72 |
| | [B][7] Scope of Disclosure..... | 21-72 |
| | [B][8] Investor Agreements | 21-73 |
| | [C] Outlook..... | 21-73 |

PART III

BEING PUBLIC: SELECTED POST-IPO TOPICS

Chapter 22 First Days As a Public Company

| | | |
|------------|---|-------|
| § 22:1 | Introduction | 22-3 |
| § 22:2 | Company Reporting Obligations | 22-3 |
| § 22:2.1 | Classification of Public Companies | 22-4 |
| § 22:2.2 | Exchange Act Reporting | 22-6 |
| Table 22-1 | Principal Exchange Act Filings and Due Dates | 22-6 |
| | [A] Annual Reports on Form 10-K..... | 22-6 |
| | [B] Quarterly Reports on Form 10-Q..... | 22-9 |
| Table 22-2 | The First Earnings Release..... | 22-10 |
| | [C] Current Reports on Form 8-K..... | 22-12 |
| Table 22-3 | Form 8-K Triggering Events..... | 22-13 |
| | [D] Annual Reports on Form 11-K (Employee Savings and Similar Plans) | 22-14 |
| | [E] Transition Reports..... | 22-15 |
| | [F] Form 12b-25 (Late Filings)..... | 22-16 |
| | [G] Form SD (Specialized Disclosure Report)..... | 22-17 |

INITIAL PUBLIC OFFERINGS

| | | |
|------------|---|-------|
| § 22:2.3 | Additional Information Requirements | 22-18 |
| | [A] Proxy Statements | 22-18 |
| | [A][1] Overview | 22-18 |
| | [A][2] SEC Filing Requirements | 22-19 |
| | [A][3] Contents of Annual Meeting Proxy Statement | 22-19 |
| | [A][4] E-Proxy Rules | 22-21 |
| | [A][5] Stockholder Proposals and Proxy Access.... | 22-22 |
| | [B] Annual Reports to Stockholders..... | 22-23 |
| | [C] Provision of Proxy Statement and Annual Report to Plan Participants..... | 22-23 |
| Table 22-4 | The First Annual Meeting of Stockholders | 22-24 |
| | [D] California Disclosure Requirements | 22-26 |
| § 22:2.4 | Use of Plain English in Exchange Act Filings | 22-27 |
| § 22:2.5 | SEC Review of Exchange Act Reports | 22-27 |
| § 22:2.6 | EDGAR Submissions As a Public Company | 22-28 |
| § 22:3 | Non-GAAP Financial Measures | 22-29 |
| | § 22:3.1 Overview | 22-29 |
| | § 22:3.2 Requirements and Prohibitions..... | 22-30 |
| | § 22:3.3 Industry Practices..... | 22-31 |
| | § 22:3.4 SEC Interpretive Guidance | 22-31 |
| § 22:4 | Officer Certification Requirements..... | 22-33 |
| | § 22:4.1 Section 302 Certification | 22-33 |
| | § 22:4.2 Section 906 Certification | 22-35 |
| | § 22:4.3 Sub-Certifications | 22-35 |
| § 22:5 | Preparation and Certification of SEC Filings..... | 22-36 |
| | § 22:5.1 The High Stakes of Disclosure Obligations | 22-36 |
| | § 22:5.2 Development and Documentation of Process..... | 22-37 |
| | § 22:5.3 Formation of Disclosure Committee | 22-37 |
| | § 22:5.4 Establishment of Controls and Procedures | 22-38 |
| | § 22:5.5 Preparation of SEC Filings..... | 22-40 |
| | § 22:5.6 Review of Draft SEC Filings..... | 22-43 |
| | § 22:5.7 Timetable for Timely Quarterly Reporting..... | 22-45 |
| Table 22-5 | Illustrative Quarterly Reporting Timetable..... | 22-45 |
| § 22:6 | Individual Reporting and Liability..... | 22-47 |
| | § 22:6.1 Applicability of Section 16..... | 22-47 |
| | § 22:6.2 Reporting Beneficial Ownership | 22-48 |
| | [A] Ownership That Must Be Reported | 22-49 |
| | [B] Trusts | 22-50 |
| | [C] Transition Periods | 22-51 |
| | [D] Procedures for Preparing, Filing, and Posting Section 16 Reports..... | 22-51 |
| | [E] Sanctions for Failure to File | 22-52 |
| § 22:6.3 | “Short-Swing” Profits | 22-52 |
| | [A] Generally..... | 22-53 |
| | [B] Directors and Officers | 22-53 |

Table of Contents

| | | |
|--------------|---|------------|
| | [C] 10% Stockholders | 22-54 |
| | [D] "Purchase" and "Sale" | 22-54 |
| | [E] Determination of "Profit" | 22-54 |
| | [F] Common Exemptions | 22-55 |
| § 22:6.4 | Short Sales | 22-55 |
| § 22:6.5 | Cashless Option Exercises Under the Sarbanes-Oxley Act | 22-55 |
| § 22:6.6 | Trading Restrictions During Pension Fund Blackout Periods..... | 22-56 |
| § 22:6.7 | Section 13 Reporting..... | 22-57 |
| | [A] Beneficial Ownership | 22-57 |
| | [B] Schedule 13D | 22-57 |
| | [C] Schedule 13G | 22-58 |
| § 22:7 | Insider Trading | 22-59 |
| § 22:7.1 | Generally..... | 22-59 |
| § 22:7.2 | Definition of Material Nonpublic Information | 22-60 |
| § 22:7.3 | Rule 10b5-1 Trading Plans..... | 22-61 |
| § 22:7.4 | Sanctions | 22-62 |
| § 22:7.5 | Insider Trading Policy | 22-62 |
| § 22:8 | Section 162(m) | 22-62 |
| § 22:8.1 | Transition Rules | 22-63 |
| § 22:8.2 | Performance-Based Compensation..... | 22-64 |
| § 22:9 | Inadvertent Investment Company Issues | 22-65 |
| § 22:9.1 | Overview | 22-65 |
| § 22:9.2 | Investment Company Status | 22-66 |
| § 22:9.3 | Avoiding Investment Company Regulation | 22-66 |
| | [A] Private Investment Companies | 22-67 |
| | [B] One-Year Safe Harbor | 22-67 |
| | [C] R&D Safe Harbor..... | 22-67 |
| | [D] 45% Asset/Income Test | 22-68 |
| | [E] SEC Exemptive Relief..... | 22-69 |
| § 22:9.4 | Planning Considerations..... | 22-69 |
| Appendix 22A | Summary of Public Company Obligations and Consequences | App. 22A-1 |

Chapter 23 Investor Relations and Other Public Communications

| | | |
|----------|---|------|
| § 23:1 | Introduction | 23-2 |
| § 23:2 | Legal Background..... | 23-3 |
| § 23:2.1 | Duties to Disclose, Update, and Correct | 23-3 |
| § 23:2.2 | Antifraud Rules | 23-4 |
| | [A] Rule 10b-5..... | 23-4 |
| | [B] Entanglement and Adoption | 23-4 |
| § 23:2.3 | PSLRA Safe Harbor | 23-5 |

INITIAL PUBLIC OFFERINGS

| | | |
|------------|---|-------|
| | [A] Applicability | 23-5 |
| | [B] Written Statements Versus Oral Statements | 23-5 |
| § 23:2.4 | Regulation FD | 23-6 |
| | [A] Company Representatives Subject to Regulation FD | 23-7 |
| | [B] Recipients Triggering Public Disclosure Obligation | 23-7 |
| | [C] Disclosures Not Subject to Regulation FD..... | 23-7 |
| | [D] Intentional and Non-Intentional Disclosures ... | 23-8 |
| | [E] Manner of Required Public Disclosure..... | 23-9 |
| | [F] Liability and Enforcement | 23-10 |
| § 23:3 | Interactions with Securities Analysts and Investors | 23-10 |
| § 23:3.1 | Conference Calls with the Investment Community | 23-11 |
| Table 23-1 | Sample Disclaimers for Conference Calls | 23-13 |
| § 23:3.2 | One-on-One Calls or Meetings..... | 23-14 |
| § 23:3.3 | Limited-Access Forums..... | 23-16 |
| § 23:3.4 | Other Interactions with Securities Analysts | 23-17 |
| | [A] Review of Analyst Reports..... | 23-17 |
| | [B] Distribution of Analyst Reports | 23-18 |
| | [C] Endorsement of Analyst Projections | 23-18 |
| | [D] Confidential Disclosure to Analysts | 23-18 |
| § 23:4 | Guidance on Future Financial Results | 23-19 |
| § 23:4.1 | Electing to Provide Guidance..... | 23-19 |
| § 23:4.2 | Minimizing the Potential Risks of Providing Guidance..... | 23-20 |
| § 23:5 | Press Releases | 23-22 |
| § 23:5.1 | Press Release Versus Form 8-K; Timing..... | 23-22 |
| § 23:5.2 | Press Release Guidelines | 23-22 |
| § 23:6 | Media Relations..... | 23-25 |
| § 23:7 | Company Website..... | 23-26 |
| § 23:7.1 | Overview | 23-26 |
| § 23:7.2 | Posting of Governance Information and SEC Filings | 23-27 |
| | [A] Section 16 Reports | 23-27 |
| | [B] Accelerated Filers | 23-27 |
| | [C] Code of Ethics..... | 23-27 |
| | [D] NYSE Rules | 23-27 |
| | [E] Other Governance Materials..... | 23-28 |
| § 23:7.3 | Administration of the Website | 23-28 |
| § 23:7.4 | Website Content | 23-30 |
| § 23:7.5 | Third-Party Links..... | 23-31 |
| § 23:7.6 | Legends and Disclaimers | 23-32 |
| § 23:8 | Social Media | 23-33 |

Table of Contents

Chapter 24 Post-IPO Liquidity, Fundraising, and Acquisitions

| | | |
|----------|--|-------|
| § 24:1 | Introduction | 24-2 |
| § 24:2 | Registration Statements on Form S-8..... | 24-3 |
| § 24:2.1 | Overview | 24-3 |
| § 24:2.2 | Resales | 24-3 |
| § 24:2.3 | Timing Considerations | 24-4 |
| § 24:3 | Rule 144 | 24-4 |
| § 24:3.1 | Overview | 24-4 |
| § 24:3.2 | Sales by Affiliates | 24-5 |
| [A] | Current Public Information | 24-5 |
| [B] | Holding Period for Restricted Securities..... | 24-6 |
| [C] | Limitation on Amount of Securities Sold | 24-6 |
| [D] | Manner of Sale..... | 24-7 |
| [E] | Notice of Sale..... | 24-7 |
| § 24:3.3 | Sales by Non-Affiliates | 24-7 |
| § 24:3.4 | Special Rule for Shell Companies | 24-8 |
| § 24:4 | Rule 701 | 24-8 |
| § 24:5 | Other Resale Considerations | 24-9 |
| § 24:5.1 | Threshold Issues | 24-9 |
| § 24:5.2 | Insider Trading..... | 24-10 |
| § 24:5.3 | Section 16 Liability | 24-10 |
| § 24:5.4 | Reporting Obligations | 24-10 |
| § 24:6 | “Short-Form” Registration on Form S-3 | 24-11 |
| § 24:6.1 | Advantages | 24-11 |
| § 24:6.2 | Eligibility..... | 24-12 |
| [A] | Company Requirements..... | 24-12 |
| [B] | Transaction Requirements..... | 24-12 |
| [B][1] | Primary Offerings of Securities | 24-12 |
| [B][2] | Primary Offerings of Non-Convertible Securities (Other Than Common Stock) ... | 24-13 |
| [B][3] | Rights Offerings, Reinvestment Plans, Conversions, and Exercises..... | 24-14 |
| [B][4] | Secondary Offerings | 24-14 |
| § 24:7 | Secondary Public Offerings | 24-14 |
| § 24:7.1 | Overview | 24-14 |
| § 24:7.2 | Registration Requirements | 24-14 |
| § 24:7.3 | Underwritten Secondary Public Offerings | 24-15 |
| § 24:7.4 | Resale “Shelf” Registrations | 24-16 |
| § 24:8 | Follow-On Public Offerings | 24-16 |
| § 24:8.1 | Registration and Disclosure Requirements | 24-17 |
| [A] | Form S-1 | 24-17 |
| [B] | Form S-3 | 24-18 |
| [C] | Shelf Offerings..... | 24-18 |
| [D] | WKSI Shelf Offerings | 24-18 |

INITIAL PUBLIC OFFERINGS

| | | |
|-----------|---|-------|
| | [E] At-the-Market Offerings | 24-19 |
| | [F] Hybrid Public-Private Offerings..... | 24-19 |
| § 24:8.2 | Stockholder Approval | 24-21 |
| § 24:8.3 | FINRA Clearance | 24-22 |
| § 24:8.4 | Deal Process..... | 24-23 |
| § 24:8.5 | Outlook..... | 24-24 |
| § 24:9 | Rule 144A Placements..... | 24-24 |
| § 24:9.1 | Deal Process..... | 24-25 |
| § 24:9.2 | Stockholder Approval | 24-26 |
| § 24:9.3 | Private Resales of Rule 144A Securities | 24-26 |
| § 24:9.4 | Exchange Offers; Public Resales of Rule 144A Securities..... | 24-27 |
| § 24:9.5 | Advantages | 24-27 |
| § 24:9.6 | Outlook..... | 24-28 |
| § 24:10 | PIPE Financings..... | 24-29 |
| § 24:10.1 | Deal Process..... | 24-29 |
| § 24:10.2 | Stockholder Approval | 24-31 |
| § 24:10.3 | Outlook..... | 24-32 |
| § 24:11 | Private Debt Financing..... | 24-32 |
| § 24:12 | Selected Public Company M&A Issues | 24-34 |
| § 24:12.1 | General Considerations | 24-34 |
| § 24:12.2 | Due Diligence | 24-35 |
| § 24:12.3 | Merger Agreement | 24-35 |
| § 24:12.4 | SEC Involvement | 24-36 |
| § 24:12.5 | Stockholder Approval..... | 24-37 |
| § 24:12.6 | Cash Tender Offers | 24-38 |

**PART IV
GLOSSARY AND FORMS**

| | | |
|-----------------------------|---|----------|
| Glossary | G-1 | |
| Table of Forms | F-1 | |
| Form 1 | Organizational Meeting Agenda and Checklist | Form 1-1 |
| Form 2 | Timetable and Responsibility Checklist (Non-Emerging Growth Company) | Form 2-1 |
| Form 3 | Timetable and Responsibility Checklist (Emerging Growth Company) | Form 3-1 |
| Form 4 | Due Diligence Request List | Form 4-1 |
| Form 5 | Filing Day Checklist..... | Form 5-1 |

Table of Contents

| | | |
|--|---|-----------|
| Form 6 | Confidential Submission Checklist..... | Form 6-1 |
| Form 7 | Preliminary Prospectus Checklist..... | Form 7-1 |
| Form 8 | Effective Day Checklist | Form 8-1 |
| Form 9 | Closing Day Checklist | Form 9-1 |
| Form 10 | Director, Officer, and 5% Stockholder Questionnaire (NASDAQ Company) | Form 10-1 |
| Form 11 | Director, Officer, and 5% Stockholder Questionnaire (NYSE Company)..... | Form 11-1 |
| Form 12 | Selling Stockholder Questionnaire | Form 12-1 |
| Form 13 | FINRA Questionnaire (Issuer) | Form 13-1 |
| Form 14 | FINRA Questionnaire (Individual) | Form 14-1 |
| Form 15 | Executive Compensation Questionnaire | Form 15-1 |
| Form 16 | Audit Committee Charter (Nasdaq Company)... | Form 16-1 |
| Form 17 | Audit Committee Charter (NYSE Company)... | Form 17-1 |
| Form 18 | Compensation Committee Charter (Nasdaq Company)..... | Form 18-1 |
| Form 19 | Compensation Committee Charter (NYSE Company) | Form 19-1 |
| Form 20 | Nominating and Corporate Governance Committee Charter (Nasdaq Company) | Form 20-1 |
| Form 21 | Nominating and Corporate Governance Committee Charter (NYSE Company)..... | Form 21-1 |
| Form 22 | Corporate Governance Guidelines (NYSE Company) | Form 22-1 |
| Form 23 | Code of Business Conduct and Ethics | Form 23-1 |
| Form 24 | Insider Trading Policy..... | Form 24-1 |
| Form 25 | Related Person Transaction Policy..... | Form 25-1 |
| Form 26 | Disclosure Policy | Form 26-1 |
| Form 27 | Disclosure Controls and Procedures | Form 27-1 |
| Form 28 | Restated Certificate of Incorporation (Public Delaware Corporation) | Form 28-1 |
| Form 29 | Amended and Restated Bylaws (Public Delaware Corporation) | Form 29-1 |
| Table of Initial Public Offerings | | T-1 |
| Table of Cases | | T-5 |
| Index | | I-1 |