Committee Chairs’ Preface

It is with great excitement that we introduce The Role of Directors in M&A Transactions—A Governance Handbook for Directors, Management and Advisors. This Handbook is the result of tremendous effort by the members of a Joint Task Force of the Mergers and Acquisition Committee and the Corporate Governance Committee of the American Bar Association Business Law Section. That Joint Task Force, co-chaired by four veteran M&A practitioners with deep experience in dealing with the governance issues that arise in M&A transactions, and comprised of deal lawyers from across North America, has produced a timely and valuable resource, which will be used by many directors, management, M&A lawyers and other advisors in every future public company transaction in which they are involved, and in many private company transactions as well.

The statutes governing how boards must behave in connection with an M&A transaction are not very long. Conversely, the jurisprudence interpreting those statutes is vast. Over the years, the Delaware courts, and courts of other jurisdictions, have rendered thousands of decisions passing judgment on the behavior of boards in connection with M&A transactions. A lawyer who is representing a company that is involved in or considering an M&A transaction is called upon to synthesize this body of law into easy to understand advice to board members, many of whom are unfamiliar with transaction processes and issues, have busy schedules, and may be unprepared to deal with the unexpectedly important role thrust upon them by an M&A transaction. By summarizing the important aspects of good board process and describing the legal duties of the board at various points during the process, this Handbook will provide invaluable guidance to boards, as well as the lawyers advising them, as they plan for and oversee M&A transactions.
M&A lawyers advising boards must also keep in mind that in recent years, litigation over public company transactions has skyrocketed. Despite efforts by some courts to curb what is viewed as unnecessary litigation, it remains true that most public company M&A deals valued at over $100 million incur at least one lawsuit. Therefore, anyone who sits on the board of a public company that is involved in an M&A transaction should be prepared to have his or her actions and decisions scrutinized and possibly challenged in court. Using this Handbook will help lawyers advise boards about how to conduct an M&A process that can withstand the scrutiny that has become the “new normal” in the world of M&A.

We congratulate and thank Task Force Co-Chairs Diane Frankle, Patricia Vella, Larry Hamermesh and Mike Halloran, and all of the contributing authors, for this excellent publication.

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Task Force Co-Chairs’ Preface

In early 2011, John Stout and Leigh Walton, the then-current Chairs of the ABA Business Law Section’s Corporate Governance Committee and Mergers and Acquisitions Committee, respectively, were chatting about the work of their two Committees. This conversation led to the idea for a joint project by the two Committees to develop a practical handbook covering the corporate governance issues that arise in business combination (or more colloquially, “M&A”) transactions. This seemed like a perfect way to get our Committees working together on a project that would benefit both our Committee members and the greater public. There is a great deal of interest among directors and their advisors in these issues, given a number of cases (like In re Southern Peru, Del Monte, and Rural Metro) where courts had found that directors did not seem to understand their roles in the M&A process.

Both Committees approved the joint project and Leigh and John each recruited two Chairs for the Joint Task Force: Diane Frankle and Patricia Vella from the M&A Committee and Larry Hamermesh and Mike Halloran from the Corporate Governance Committee. Each of the Co-Chairs had extensive background in M&A and the corporate governance issues arising in those transactions.

We kicked off the project at the November 2011 Business Law Section meeting in Washington, D.C. Our first “mission statement” was “to provide an analytical framework, with practical examples, for identifying and dealing with governance issues commonly arising in the planning and implementation of business combinations.” Our target audience was to be directors, management, experienced deal counsel, mid-level to senior corporate associates, in-house counsel, and bankers. We wanted a practical handbook that was both readable and covered governance issues that arise in most M&A deals, and other issues that might not arise in every deal, but are common and require good counseling and process. By “goverance issues” we meant issues in which the board of directors provides oversight. Above all, we wanted to create useful guidance, not a scholarly tome.
The Role of Directors in M&A Transactions

We recruited authors from both Committees; eventually we had more than 20 contributing authors! They are listed on the Contributing Authors page, and we would not have this Handbook without their hard and excellent work. Our Task Force meetings convened up to four times a year. Initially, we discussed the Handbook’s scope, mission, and a list of topics to be covered; our meetings generated lots of ideas and enthusiasm. We developed a list of chapters, and drafts of the chapters started flowing in.

As content developed, the meetings gave us a chance to have a robust (and sometimes geeky) discussion about the key issues that boards confronted in M&A transactions and our advice about these issues—for example, why have a special committee? What about single-bidder deals? What should boards know about email and social media? What do boards really need to know about standstill provisions? What are the rules of the road in hiring financial advisors? The Task Force discussions gave our authors practical guidance on their work product. Thanks to all our loyal Task Force members for attending these valuable meetings and for all the great discussion that provided “grist for the mill.” You all made this Handbook more valuable!

Some authors went above and beyond. We particularly want to thank Richard De Rose, who wrote two chapters. We also really appreciated Jim Walther taking on an important chapter late in the game and providing excellent drafts in an intensive review cycle, and Jim Griffin providing much-needed text for a footnote on an important topic. As an editorial board, we were the beneficiaries of not only top-notch drafting, but also endless patience on the part of all of our authors as we worked through multiple drafts of 16 chapters. And we thank our two quality control reviewers, Joel Greenberg and Steve Bigler, who read the entire manuscript and gave us valuable input.

Truth be told, we had fun as Co-Chairs. Our calls were rarely boring. We laughed a lot, and each of us brought passion and drive, as well as lots of deal experience, to this project. We will miss those hour- to two-hour-long calls, often weekly, to review drafts, and the funny emails in between. But we are glad to say that this baby is ready to roll!

Thanks to all of our respective Committee Chairs for their support from beginning to end during this long process (initially we projected two to four years for this project, but as usual, the work stretched out a good bit longer than we had hoped!). We were lucky to have had enthusiastic encouragement during this project from John Stout, Holly Gregory and Bruce Dravis, Chairs of the Corporate Governance Committee, and
Leigh Walton, Mark Morton and Scott Whittaker, Chairs of the Mergers and Acquisitions Committee.

We hope you will enjoy this Handbook as much as we enjoyed working together to get it published!

Diane Holt Frankle
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Co-Chairs, Joint Task Force of the ABA Business Law Section's Corporate Governance and Mergers and Acquisitions Committees, on Governance Issues Arising In Business Combination Transactions