Detailed Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Committee Chairs’ Preface</td>
<td>vii</td>
</tr>
<tr>
<td>Task Force Co-Chairs’ Preface</td>
<td>ix</td>
</tr>
<tr>
<td>Co-Chair Biographies</td>
<td>xiii</td>
</tr>
<tr>
<td>Contributing Authors</td>
<td>xv</td>
</tr>
<tr>
<td>Contributing Author Biographies</td>
<td>xvii</td>
</tr>
<tr>
<td>CHAPTER 1: Introduction</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER 2: Fiduciary Duties of Directors Generally in a Business Combination</td>
<td>5</td>
</tr>
<tr>
<td>Duty of Care</td>
<td>7</td>
</tr>
<tr>
<td>Duty of Loyalty</td>
<td>9</td>
</tr>
<tr>
<td>Business Judgment Rule</td>
<td>11</td>
</tr>
<tr>
<td>Entire Fairness</td>
<td>12</td>
</tr>
<tr>
<td>Enhanced Scrutiny</td>
<td>14</td>
</tr>
<tr>
<td>Sale of Control</td>
<td>14</td>
</tr>
<tr>
<td>Defensive Measures</td>
<td>15</td>
</tr>
<tr>
<td>Actions Interfering with Stockholder Vote</td>
<td>17</td>
</tr>
<tr>
<td>Disclosure Obligations and Benefits of Disclosure</td>
<td>18</td>
</tr>
<tr>
<td>The Litigation Process</td>
<td>20</td>
</tr>
<tr>
<td>Commencement</td>
<td>20</td>
</tr>
<tr>
<td>Expedited Discovery</td>
<td>20</td>
</tr>
<tr>
<td>Preliminary Injunction</td>
<td>21</td>
</tr>
<tr>
<td>Settlement</td>
<td>21</td>
</tr>
<tr>
<td>Post-Closing Damages Claims</td>
<td>22</td>
</tr>
<tr>
<td>Protection of Directors Through Indemnification and Exculpation Provisions</td>
<td>22</td>
</tr>
<tr>
<td>Key Lessons from This Chapter</td>
<td>24</td>
</tr>
</tbody>
</table>

xxix
CHAPTER 3: Identifying and Managing Conflicts of Interest . . . 25

Introduction ................................................................. 25
Director Conflicts of Interest and Lack of Independence ............ 27
  What Are They? .......................................................... 27
  Conflicts of Interest ...................................................... 27
  Lack of Independence ................................................... 29
Impact of Director Conflict or Lack of Independence ............... 32
Identifying Director Conflicts of Interest ............................... 34
Judging the Materiality of Relationships and Interests ............... 36
Managing Director Conflicts of Interest ................................. 36
  In General ................................................................. 36
  Use of an Independent Board Committee ............................. 38
  Majority of the Unaffiliated Stockholder Vote ....................... 40
  Recusals and Abstentions ............................................. 41
Officer and Management Conflicts of Interest ......................... 43
  Importance of Management ............................................ 43
  How Management Conflicts Arise .................................... 44
  Identifying Officer and Management Conflicts ...................... 45
  Properly Handling Officer and Management Conflicts .............. 46
Identifying and Managing Controlling Stockholder Conflicts ....... 49
  When Do They Arise? ................................................... 49
Managing Controlling Stockholder Conflicts .......................... 53
  Special Committees and “Majority of the Minority” Stockholder Votes ................................................... 53
  Practical Guidance ...................................................... 54
Conclusion—Making a Record ............................................. 56

CHAPTER 4: Exploring Strategic Alternatives and Responding to Unsolicited Approaches—Starting the Process . . . 57

The Board’s Decision to Explore Strategic Alternatives .............. 58
  Preparation for a Potential Transaction ............................... 61
    Organize a Deal Team ................................................ 61
    Consider Retention Incentives for Management and Employees ................................................... 61
    Establish Proper Board Oversight and Process Controls ........ 62
    Confidentiality and Communication Controls ........................ 62
    Perform Initial Review of Target .................................. 62
    Identify and Deal with Potential Show Stoppers .................. 63
    Evaluate Transaction Structures and Sales Process ............... 63
    Maintain Performance ................................................ 64
Board’s Response to External Pressures to Sell—Bidders and Activist Stockholders ........................................ 64
  Unsolicited Bidders ..................................................... 64
  Stock or Debt Acquisitions ............................................. 65
  Public Disclosure of Bid and Media/PR Campaign .................. 66
### Detailed Table of Contents

Proxy Fight or Submission of Stockholder Proposals .......... 66
Tender Offer ................................................................ 66
Activist Stockholders .................................................... 66

**CHAPTER 5: Board Process in Considering Sales Transactions** ..................................... 69

- Engaging Deal Counsel ............................................. 70
- Meetings of the Board or Committee Generally ............. 72
- Process Oversight ...................................................... 75
  - Before a Sales Process Begins ................................. 76
  - Regular Meeting Updates and Briefings .................. 77
  - Oversight of Management ...................................... 77
  - External Communications; Need for One Spokesperson .. 78
- Use of Transaction Committee ................................... 79
- Creating a Record of Board Deliberation ....................... 80
- Dangers of Electronic Communications and Social Media .... 82

**CHAPTER 6: Engagement and Use of the Financial Advisor . . . 85**

- The Role of the Financial Advisor .............................. 85
  - Market Intelligence and Strategic Advice .................... 86
  - Financial Advice .................................................. 86
  - Sell-Side Coordinator .......................................... 87
  - Buy-Side Coordinator .......................................... 87
  - Fairness Opinion .................................................. 88
    - Introduction .................................................... 88
    - Purpose of Fairness Opinions ............................... 89
    - Ability to Rely on Advisors .................................. 89
    - Issues with Fairness Opinions .............................. 90
- Engaging the Financial Advisor .................................... 94
- Conflicts of Interest for Financial Advisors ..................... 97
  - Fee Structure .................................................... 99
  - Relationship with Management .............................. 103
  - Relationships with Counterparties .......................... 104
  - Ownership/Investments ........................................ 105
  - Buy-Side Financing Provided by the Target Advisor ........ 106
  - Managing Financial Advisor Conflicts ....................... 108
  - Second Banker Retention ....................................... 110
- Conclusion ............................................................ 112

**CHAPTER 7: Negotiation of Confidentiality and Standstill Agreements** ...................... 115

- Introduction ....................................................... 115
- When Should a Target Company Enter into an NDA? .......... 116
The NDA Can Be an Important Tool to Control the Integrity of the Sales Process 119
Standstill Provisions in an NDA 120

CHAPTER 8: Special Committees 125
When to Form a Special Committee 126
When Special Committees are Advisable 126
Transactions Involving Controlling Stockholder 126
Majority of Board Conflicted 128
Other Conflicts 128
Benefits of a Special Committee 129
When Special Committees May Not Be Advisable 131
Special Committee Composition 132
Process for Selection of Committee Members 132
Size 133
Disinterested and Independent 134
Ability to Devote Time and Attention 140
Skills and Experience 140
Temperament and Ability to Carry Out the Special Committee’s Charge 141
Choice of Committee Chair 141
Formation of Committee 141
Form the Committee as Early as Possible to Get the Full Benefit 142
Written Charter 143
Clear Mandate and the Power to Say No 143
Full Authority of the Board 146
Ability to Engage Advisors 147
Special Committee Members’ Compensation 147
The Special Committee Process 148
Courts Analyze Numerous Factors to Determine if a Committee Was Well Functioning 149
Special Committee Is Functioning Properly When It Interposes Arm’s-Length Bargaining 149
Special Committees Should Have Full Information, Remain Fully Informed and Be Active 150
Special Committees Should Select Independent and Experienced Advisors 151
Dealing with Conflicted or Potentially Conflicted Management 153
Dealing with Counsel 155
Attorney-Client Privilege for the Special Committee 157
Confidentiality 159
Reporting to the Board 160
Conclusion 160
**Detailed Table of Contents**

**CHAPTER 9: Conditioning the Deal on Approval by a Majority of the Unaffiliated Shares**

- Legal and Practical Consequences of Conditioning the Deal on Approval by a Majority of the Unaffiliated Shares ................................................. 162
- Structuring the Vote ........................................................................... 165

**CHAPTER 10: Sales Process for a Sale of Control** ................................ 169

- The Board’s Role in Determining the Contours of a Sales Process ................................................................. 170
- Types of Sales Processes; Advantages and Disadvantages of Each ................................................................................. 172
  - Auctions ......................................................................................... 173
  - Non-Auction Market Checks ......................................................... 174
    - Active Pre-Signing Market Check ............................................... 175
    - Passive Pre-Signing Market Check ............................................. 175
    - Passive Post-Signing Market Check .......................................... 176
    - Active Post-Signing Market Check ............................................ 176
- Considerations in Choosing the Right Sales Process ................. 176
  - Limited Versus Broad Auctions .................................................. 176
  - Auctions Versus Less Formal Market Checks ......................... 178
- The Auction Process ....................................................................... 179
  - Initial Steps in Auction Process .................................................. 179
- Selected Issues Arising in the Sales Process ................................. 184
  - Financing ....................................................................................... 184
  - Exclusivity ..................................................................................... 185
  - Disclosure in Connection with a Sales Process ..................... 186
- Negotiated Sale to a Single Bidder ................................................... 187
- Post-Signing Market Checks ............................................................. 189
  - “Window Shops”—Permitting Target Board to Consider Alternatives ................................................................. 189
  - “Go-Shop” Provisions—Solicitation of Alternative Bids Post-Signing ................................................................. 191
- Conclusion ....................................................................................... 193

**CHAPTER 11: Negotiation of Deal Protection Provisions** ............... 195

- Evaluating the Reasonableness of Deal Protections ................. 197
- Specific Types of Deal Protection Provisions ............................. 200
  - Protecting the Transaction from Alternatives ..................... 200
    - No-shop provisions ................................................................. 200
  - Advance notice and information rights of buyer .................. 203
The Role of Directors in M&A Transactions

Confidentiality and standstill requirements ........................................ 203
Enforcing standstill agreements ....................................................... 203
Obtaining Stockholder Approval ..................................................... 204
Stockholder meeting and proxy solicitation ....................................... 204
Board recommendation to the stockholders ...................................... 204
Termination Rights and Fees .......................................................... 208
Termination for a Superior Proposal ................................................ 208
Termination upon a change of recommendation ............................... 208
Termination upon target breach of no-shop ...................................... 209
Termination fee payable upon termination for a Superior Proposal, change of recommendation, or breach of no-shop ........................... 209
Termination fee payable upon a “naked no-vote” ............................... 210
“Tail” termination fee for post-termination alternative transactions .......... 210
Reverse termination fees ............................................................... 211
Stockholder Commitments to Support the Transaction ..................... 211
Voting agreements ........................................................................ 211
Conclusion .................................................................................... 213

CHAPTER 12: Buyer Issues ................................................................. 215
Due Diligence ................................................................................... 215
Problem Acquisitions: Buyer Diligence Cases ............................... 220
Material Adverse Change Provisions .............................................. 223
Judicial Interpretations of MAC Clauses ........................................... 225
Value of MAC Clauses .................................................................. 236
Conflicts of Interest and The Risk of Aiding and Abetting Claims ......... 238
Conflicts of Interest Create Buyer Issues ......................................... 238
Conflicts of Interest May Expose Buyers to Risk of Aiding and Abetting Claims ................................................................. 240
Antitrust Issues ............................................................................ 244
Financing the Transaction ............................................................... 249
Deal Protections ........................................................................... 252
Going Hostile .............................................................................. 258
Mergers of Equals ....................................................................... 259
Investor Relations; Communications to the Market ....................... 262
Appraisal Lawsuits ..................................................................... 263

CHAPTER 13: Section 203 Issues ....................................................... 267
How Does Section 203 Work? ......................................................... 267
Who Is an Interested Stockholder? .................................................. 268
The Impact of Section 203 On an Interested Stockholder Provides Deterrence .......................................................... 271
**Detailed Table of Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 203 Approvals or Waivers</td>
<td>272</td>
</tr>
<tr>
<td>In Connection with a Merger Agreement</td>
<td>272</td>
</tr>
<tr>
<td>Need for Approvals or Waivers Related to Discussions with Interested Stockholders Prior to Execution of Merger Agreement</td>
<td>273</td>
</tr>
<tr>
<td>Request for a Waiver</td>
<td>275</td>
</tr>
<tr>
<td>Standard of Review</td>
<td>275</td>
</tr>
<tr>
<td>Factors for Consideration</td>
<td>275</td>
</tr>
<tr>
<td>Standstill</td>
<td>276</td>
</tr>
</tbody>
</table>

**CHAPTER 14: Post-Announcement Deal Derailers** | 279 |
| Target Board Responses to Competing Bidders | 280 |
| Superior Proposal Provisions Shape the Target’s Response | 283 |
| Disclosure of the Competing Bid to the Buyer and Matching Rights | 284 |
| Disclosure to Target Stockholders | 285 |
| Engaging with a Competing Bidder | 286 |
| Stockholder Opposition | 287 |
| Intervening Material Financial or Operational Developments | 289 |
| Material Adverse Change Disputes | 290 |
| Failure to Meet Other Conditions Precedent | 291 |
| Conclusion | 294 |

**CHAPTER 15: Governance Issues in Non-Delaware Jurisdictions** | 295 |
| Director Fiduciary Duty | 296 |
| Limits on Director Monetary Liability | 297 |
| Director Fiduciary Duties in the Context of a Business Combination | 297 |
| California | 297 |
| Maryland | 299 |
| Pennsylvania | 300 |
| Other Constituency Statutes | 300 |
| Massachusetts | 300 |
| New Jersey | 301 |
| New York | 301 |
| Pennsylvania | 301 |
| Maryland | 302 |
| Business Combinations with Interested Stockholders | 302 |
| Maryland | 303 |
| Massachusetts | 303 |
| New York | 304 |
| California | 304 |
Merger and Acquisition Voting Requirements .................. 305
California .......................................................... 305
Connecticut ......................................................... 307
Maryland ........................................................... 307
Massachusetts ....................................................... 307
Minnesota ............................................................ 308
New Jersey .......................................................... 308
New York ............................................................. 308
Appraisal Rights ................................................. 309
Conclusion ......................................................... 309

CHAPTER 16: Private Company Issues ......................... 311
Competing Interests of Preferred and Common Stockholders . 311
In re Trados: An Illustrative Court Decision Addressing
Competing Interests of Preferred and Common .................. 313
Whose Interests Must the Directors Protect? ................. 320
Sale vs. No Sale ................................................... 323
Allocation of Merger Consideration ............................... 323
Management Incentive Plans .................................... 324
Earnouts and Indemnification .................................... 324
Conflicted Board Members ....................................... 326
Revlon and the Private Company Sale Process ............... 329
Market Check Reliance .......................................... 329
Exclusivity .......................................................... 330
The Timing of Stockholder Approvals and Its Impact
on Fiduciary “Out” and Fiduciary Change in
Recommendation Provisions .................................... 330
Voting Agreements ................................................. 331
Conclusion .......................................................... 332

Index ................................................................. 333