FROM THE CHAIR
By Richard E. Climan

Our 2006 Summer meeting will be held in Honolulu in early August, in conjunction with the ABA’s Annual Meeting. Committee veterans may recall that this will be our Committee’s second visit to Hawaii – the Committee met there some seventeen years ago (pre-dating even my own involvement with the Committee).

Our full Committee meeting will be held at the Marriott Waikiki Beach Resort on Saturday, August 5, from 1:00 p.m. to 4:30 p.m. It will be preceded by a full slate of subcommittee, task force and working group meetings on Friday, August 4, and on Saturday morning. Our Committee reception and dinner will take place at the Halekulani Hotel on Friday evening. Many thanks to Wilson Chu for organizing what promises to be a sumptuous feast, and to Houlihan Lokey Howard & Zukin for sponsoring this event.

I’m pleased to report that we will be joined in Hawaii by the Committee’s Judicial Liaison, Chief Justice Myron Steele of the Delaware Supreme Court, who will participate in a panel presentation on recent judicial developments of interest to M&A attorneys. Dennis Berman, the highly regarded M&A reporter for the Wall Street Journal, will also join us and will participate in the “M&A and the Media” segment of our full Committee meeting. In addition, Jim Freund, well-known author of Anatomy of a Merger (and Advisor to our Committee), will lead a discussion of the role of the M&A lawyer in resolving acquisition-related disputes; and Jennifer Muller of Houlihan Lokey will lead a presentation on the use of “stapled financing” in M&A auctions.

(continued on next page)
Our Spring meeting in Tampa was, I believe, attended by more people than any other in our Committee’s history. Joele Frank’s presentation on M&A communication strategies was excellent, and several people correctly answered our trivia question – “Bodine” (not “Clampett”) was Jethro’s last name (see Vice Chancellor Strine’s opinion in the IBP/Tyson Foods litigation).

I’m pleased to announce that Henry Lesser and John Hughes have agreed to lead our Committee’s newest subcommittee, the Private Equity M&A Subcommittee. Given the significant impact that the private equity sector is having on M&A activity both domestically and globally, the launching of this subcommittee is very timely.

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Has it already been four years? The Honolulu meeting will be my last as Committee Chair. I feel fortunate to have been given the privilege of leading the Committee during one of the most exciting periods in its rich history – a history that now spans roughly two decades.

The past four years have been a time of explosive growth for our Committee. Wilson Chu, the Chair of our Membership Subcommittee, is quick to point out that our nominal membership has more than doubled since 2002 – to about 1,850 members. The geographic diversity of our Committee’s membership has increased as well. We now have members from 47 states, five Canadian provinces and more than 25 different countries on five continents. But far more important, at least to me, is the dramatic increase we have experienced in our active membership – the number of members who generously contribute their time and effort to Committee-sponsored projects and who regularly attend our meetings.

We have also seen a marked increase in the number and breadth of the projects our Committee is pursuing. We now have a total of more than ten active subcommittees, task forces and working groups. It is my hope that the work of our newest subcommittees, task forces and working groups – including the M&A Market Trends Subcommittee, the M&A Jurisprudence Subcommittee (which includes the Annual Survey Working Group and the Judicial Interpretations Working Group), the Task Force on the Dictionary of M&A Terms and the brand new Private Equity M&A Subcommittee – will continue to provide worthwhile and interesting projects for our members for many years.

After the Honolulu meeting, Joel Greenberg will become the sixth Chair of our Committee. Joel is one of the “founding fathers” of our Committee and has been one of the intellectual forces behind our Committee ever since its inception. I’m confident that, under Joel’s leadership, the Committee will soar to yet unexplored heights.

I thank all of you for your support during my tenure as Committee Chair, and I look forward to remaining a part of this remarkable group for years to come.

**FEATURE ARTICLES**

**Exon-Florio Update: Congress Considering Changes in CFIUS Review Process for Foreign Acquisitions of U.S. Businesses**

By James R. Walther

The Exon-Florio amendment to the Defense Production Act (commonly referred to as the “Exon-Florio Provision”) is an important, though for most M&A lawyers not frequently encountered,

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federal law relating to foreign acquisitions of U.S. businesses. The firestorm of controversy sparked by the recent acquisition of Peninsular and Oriental Steam Navigation Company (“P&O”) by Dubai Ports World (“DP World”), however, has focused public attention on the Exon-Florio Provision and the federal interagency review process for foreign acquisitions of U.S. businesses that it authorizes.3

The DP World transaction and other recent transactions, including the proposed acquisition in 2005 of Unocal Corp., a large but not dominant U.S. oil company, by the China National Offshore Oil Corporation (“CNOOC”), which is 71% owned by the People’s Republic of China, have resulted in intense scrutiny by the relevant committees of the House and Senate of the Exon-Florio transaction review process and legislative proposals to change that process in a number of important ways. The proposals include changes that would impose greater formality on the process, would make mandatory what is currently a voluntary system of transaction notification filings and review and would strengthen congressional oversight of the process by expanding requirements for notification and reporting to Congress. The DP World and CNOOC transactions, as well as the congressional proposals, also illustrate (i) the continuing possibilities for conflict between the declared policy of the United States of encouraging foreign investment, on the one hand, and the concern, on the other, that certain acquisitions may endanger our national security, as well as (ii) the inherent difficulty of defining what types of acquisitions may endanger that security in light of changes over time in national defense policies, economic and technological developments and changes in international relations.

The Exon-Florio Provision

The Exon-Florio Provision was originally enacted in 1988 as an amendment to the Defense Production Act of 1950 at a time when Congress and many in the U.S. business community were concerned that the ascendancy of foreign companies in certain technologies, such as the development of computer chips, threatened the world economic standing of the United States and that foreign acquisitions of U.S. companies in key industries could jeopardize our national security.4 In this connection, a particular concern expressed in Congress at the time was that foreign acquisitions of U.S. firms could not be prevented unless the President declared a national emergency, at best an unlikely possibility, or regulators were able to invoke specific federal statutes controlling foreign ownership in particular industries.

The Exon-Florio Provision was enacted to deal with that perceived weakness by authorizing the President to suspend or prohibit proposed foreign acquisitions, mergers or takeovers of persons engaged in interstate commerce in the

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3 P&O is a U.K.-based operator of shipping ports around the world whose operations included contracts for the management of six U.S. ports. The U.S. ports involved were located in New York, New Jersey, Miami, New Orleans, Baltimore and Philadelphia. DP World is owned by the government of Dubai (one of the United Arab Emirates). Despite the fact that DP World is one of the largest port operators in the world, operating facilities not only in the Middle East, but also in India, Europe, Asia, Latin America, the Caribbean, and North America, and the further fact that the United Arab Emirates are considered allies of the United States, members of Congress and others expressed great concern that the transaction would result in foreign control of U.S. ports and that such control could jeopardize the national security.

4 Frequently cited examples include a series of proposed acquisitions by Japanese companies, culminating in the proposed sale in 1987 of Fairchild Semiconductor Co. by Schlumberger Ltd. of France to Fujitsu Ltd. of Japan. Fujitsu’s proposed acquisition of Fairchild was of particular concern because of the then existing trade relations issues between the United States and Japan and widespread concern at the time over the possible decline of the United States in international economic standing and because the Defense Department believed the transaction would pass control over a major supplier of computer chips necessary for sophisticated high-technology military equipment to Japan. Library of Congress Research Service, *CRS Report for Congress: The Committee on Foreign Investment in the United States (CFIUS), Updated June 15, 2006* (hereinafter cited as the “CSR Report”), at pages 3-4.
United States that threaten to impair the national security. The Exon-Florio Provision does not apply, however, to licensing arrangements or to formations of joint ventures, unless such formations involve the contribution of an existing domestic business to the venture and the acquisition of control of that business by a foreign person.\(^5\) The President is also authorized to require divestment in the case of transactions that have been completed, without time limit for transactions completed after the enactment of the Exon-Florio Provision. The President may direct the Attorney General to seek appropriate relief, including divestiture, in the federal courts to implement his Exon-Florio authority and the Exon-Florio Provision further states that its provision authorizing action by the President is not subject to judicial review.\(^6\)

Reflecting the origins of the Exon-Florio Provision, however, Congress directed that the presidential authority to suspend or prohibit transactions may only be exercised if the President determines that other U.S. laws are inadequate or inappropriate to protect the national security and that the President must have “credible evidence” that the foreign investment in the United States will impair national security.\(^7\)

In addition to authorizing the President to suspend, prohibit or rescind foreign acquisitions of U.S. companies, the Exon-Florio Provision authorized the establishment of a system for the review of such acquisitions by the President or his designee. That legislative grant of review authority was implemented by Executive Order of President Reagan\(^8\) delegating the transaction review process to the Committee on Foreign Investment in the United States (“CFIUS”), which was a previously established interagency task force led by the Department of the Treasury whose responsibilities up to that time had largely been limited to gathering data regarding foreign direct investment in the United States. CFIUS continues to be based in the Treasury Department and to be chaired by the Secretary of the Treasury. The other members of CFIUS (the “Members”) as currently constituted are the Secretaries of State, Defense, Homeland Security and Commerce, the Attorney General, the United States Trade Representative, the Chairman of the Council of Economic Advisers, the Director of the Office of Management and Budget, the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. The interagency coordinating and administrative functions of CFIUS are conducted by the Treasury Department’s Office of International Investment.\(^9\)

**Exon-Florio Review**

The Exon-Florio review process is a unique mixture of informality coupled with fairly detailed filing procedures, potentially serious consequences and secrecy of process (although not necessarily of end result). Interestingly, neither the Exon-Florio Provision nor the implementing regulations of the Office of International Investment define the key term “national security.”

Filings of transaction notifications with CFIUS by the parties to a proposed transaction are voluntary, in the sense that the Exon-Florio Provision does not require any such filing to be made and therefore no penalty attaches based solely on a failure to file. The serious consequences of a presidential finding that a proposed transaction threatens the national security, however, gives the parties a strong incentive to submit to the review process. In addition, the review process may be

\(^5\) 31 C.F.R. §§800.301(b)(5) and 800.302(e), Example 3.


\(^9\) The regulations of the Office of International Investment implementing the review process are set forth at 31 C.F.R. Part 800 (Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons) of the Regulations of the Office of International Investment, Department of Treasury (cited herein as “OII Regulations”).
initiated by submission of an agency notice of a proposed or completed transaction by any CFIUS Member if the Member has reason to believe, based on facts then available, that the acquisition is subject to the Exon-Florio Provision and may have adverse impacts on the national security.\textsuperscript{10}

All information submitted by the parties in connection with a filing is required to be maintained in confidence by CFIUS and its Member agencies. For this reason, among others, there is no body of reported decisions that can be used to gain an understanding of decision principles. Nor is there a formal process of reporting on the operation of the CFIUS review process to Congress, except that the President is required to transmit a written report to the Secretary of the Senate and the Clerk of the House of Representatives of the President’s determination of whether or not to take action to suspend or prohibit a transaction, including a detailed explanation of the presidential findings and specified statutory factors.\textsuperscript{11} As evidenced by the recent DP World and CNOOC transactions, however, opponents of a proposed transaction are not prevented from making their case to Congress and through public statements regarding perceived dangers of the transaction.

The Exon-Florio Provision provides for a three-stage assessment process for foreign acquisitions of U.S. businesses. The first stage is an initial transaction review period of up to 30 days that begins on the filing with the Treasury Department’s Office of International Investment of a notice containing prescribed information relating to a proposed transaction, during which period the Office circulates the filed information to the other CFIUS Members and solicits their views.\textsuperscript{12} If no potential national security concerns are identified during this review, the process may be terminated by the Office of International Investment without necessity of any further proceedings or reports. If, on the other hand, a determination is made by any of the CFIUS Members during the first stage review that a particular transaction warrants further consideration, CFIUS then invokes a formal investigation period which may extend for a period of 45 additional days and at the end of which CFIUS must make a report of its investigation to the President. Under the applicable regulations, the report must make a unanimous recommendation of the CFIUS Members to the President or, if CFIUS is unable to do so, it must submit a report to the President setting forth the differing views and present the issues for decision. The President then has up to 15 days within which to make a final determination of what action, if any, the President will take. The President is not required to follow any recommendation that may be made by CFIUS, but is required (as noted above) to report his findings and decision to Congress, which report must be in writing and must be made “immediately.”\textsuperscript{13}

Under the so-called “Byrd Amendment,” enacted in 1992 and named for its sponsor, Senator Robert C. Byrd (D-WV), CFIUS is required to invoke the 45-day investigation period, which in turn activates the mandatory 15-day presidential decision period that is required for all transactions that are subjected to formal CFIUS investigation, with respect to any transaction as to which both of the following apply:

(i) The proposed acquiror is controlled by or acting on behalf of a foreign government; and

(ii) The transaction could result in control of a person engaged in interstate commerce in

\textsuperscript{10} OII Regulations §800.401(b).

\textsuperscript{11} 50 U.S.C. app. § 2170(g) (2006). The specified factors are those described in the text accompanying footnote 19 infra.

\textsuperscript{12} The commencement 30-day review period may be deferred by the Staff Chairman of the Office of International Investment pending receipt of any required information that has not been submitted by a notifying party. OII Regulations §800.402(b)(2).

\textsuperscript{13} 50 U.S.C. app. § 1270(g) (2006).
the United States that could affect national security.14

What is “National Security”?

As mentioned above, the Exon-Florio Provision does not define the key term “national security.” The Office of International Investment has also declined to define the term in its regulations governing the CFIUS review process. As explained by the Office, it rejected proposals that its implementing regulations include such a definition “because they could improperly curtail the President’s broad authority to protect the national security, and, at the same time, not result in guidance sufficiently detailed to be helpful to parties.”15 The Office further stated, however, that: “Generally speaking, transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security.”16 Further, Treasury Department officials have stated that each CFIUS Member is expected to apply the definition of national security that is consistent with its specific legislative mandate,17 with the result that multiple views of what is included in the term are possible in the context of a single transaction review or investigation by CFIUS.

The Exon-Florio Provision does, however, include a non-exclusive list of factors that the President or the President’s designee (i.e., CFIUS) “may, taking into account the requirements of national security, consider.”18 Those factors are:

(i) Domestic production needed for projected national defense requirements;

(ii) The capability and capacity of domestic industries to meet national defense requirements, including availability of human resources, products, technology, materials, and other supplies and services;

(iii) The control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;

(iv) The potential effects of the proposed transaction on sales of military goods, equipment, or technology to any country that supports terrorism or engages in certain other threatening activities; and

(v) The potential effects of the proposed or pending transaction on U.S. international technological leadership in areas affecting U.S. national security.19

While originally thought to relate primarily or solely to matters involving technology important to, or the production of, specifically military equipment or supplies, the term can be and recurrently is argued to apply to a much broader range of commercial activities that can in some sense be said to be important to the national concerns of the United States, such as the U.S. ports involved in the DP World transaction or, even more broadly, energy production that was said to be of concern in the proposed CNOOC transaction.

To take the specific example of the U.S. ports involved in the DP World transaction, while a

15 See Appendix A to the OII Regulations, setting forth the text of the preamble to the final form of the Office of International Investment’s regulations, as published in the Federal Register at 56 Fed. Reg. 58,780 (Nov. 21, 1991).
16 Id. The preamble to the Office’s regulations concludes with the statement that the OII regulations “contemplate that persons considering transactions will exercise their own judgment and discretion in determining whether to give notice to the Committee with respect to a particular transaction,” but nonetheless invites persons seeking general guidance to contact the office of the Staff Chairman of the Office of International Investment. Id.
19 Id.
connection certainly can be drawn between maintaining the operation of principal ports for the shipment of goods and the national defense, there is little in the applicable regulations or legislative history to suggest that the protection of “infrastructure” was an originally intended purpose of the Exon-Florio Provision. It might further be questioned whether the mere contractual rights to manage the operation of ports involved in the DP World transaction pose a threat to national security sufficient to invoke the presidential authority to prohibit transactions. On the other hand, it is also true that the demands of maintaining the national security may change over time. Moreover, the list of statutory factors to be considered includes some broadly stated factors and, as noted above, is specifically stated to be non-exclusive. As a practical matter, therefore, the parties to a transaction must take into account not only prior experience under the Exon-Florio Provision and past controversies, but also any recent or reasonably foreseeable technological, economic or international developments that may affect the perception of what may be viewed as threatening the national security of the United States.

**Realities of the Review Process**

No official statistics regarding the operation of the CFIUS review process are available. A frequently cited informal source reports, however, that in the period since the enactment of the Exon-Florio Provision in 1988, CFIUS has received more than 1,500 notifications of proposed transactions, of which only 25 cases have proceeded to the formal 45-day investigation stage. Thirteen of the 25 transaction filings were withdrawn by the filing parties to the transaction upon receiving notice that CFIUS would conduct a formal 45-day investigation. Of the 12 transactions that were actually sent to the President for final determination, only one was prohibited.20

This record may be viewed, in part, as reflecting the continuing vitality of U.S. policy encouraging foreign direct investment in the United States. It is thought by many, however, to reflect as well a number of informal practices that have developed with respect to the CFIUS review process that accommodate the needs of both the parties to a proposed transaction and the federal agencies and presidential administrations who are called upon to review them.

Difficulties encountered in the review process can have serious impacts on the parties, including not only denial of the proposed transaction, but also adverse impacts on their stock prices and public image that may result from such denials or from publicity concerning the possibility of an adverse finding in the national security review process. For those reasons, well advised parties to a transaction that could in any manner be argued to raise national security issues usually approach CFIUS, its Members agencies and other potentially relevant authorities to discuss their transaction on an informal basis prior to making any filing. In such discussions, the parties to the transaction can address areas of potential concern and can propose various means of addressing any significant issues that may be raised by the CFIUS Members. For example, the parties may suggest that they would be willing to divest certain business lines or to place the management control of sensitive business activities or technology under a trust or other separate entity arrangement that would assure that they are not controlled by foreign persons or governments.

This informal approach serves the interests of the CFIUS Member agencies and other involved authorities as well, by giving them a more flexible and open-ended context in which to assess a potential transaction and its consequences. For these reasons, such informal pre-filing contacts are considered normal and are in fact encouraged for transactions that may present significant issues.

As a further informal element of the CFIUS process, if potential issues are encountered after a

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transaction notification is filed but prior to termination of the initial 30-day review period, the parties to the transaction often withdraw their filing before CFIUS is required to invoke the formal 45-day investigation period. The parties can then assess whether adjustments to the transaction that are acceptable to the relevant agencies can be made and the notification refiled. If acceptable adjustments cannot be made, the transaction may be abandoned without necessity of further proceedings under the CFIUS review process, and therefore without requirement of presidential review and notification to Congress. Critics of the current process, however, have raised concerns that this open-ended ability to withdraw and refile notifications of transactions results in a lack of accountability and may permit a proposed transaction to disappear temporarily or permanently from the security-review process.

The DP World transaction provides a useful example of the current Exon-Florio process, as well as aspects of that process that have been criticized by members of Congress and other observers and the strategic business realities that can impact even carefully planned transactions that may be perceived as affecting national security.

According to published accounts of the transaction, representatives of DP World contacted the Treasury Department on an informal basis in early October 2005 and were directed to consult with the Department of Homeland Security. In addition, Treasury officials requested an intelligence assessment from the Director of National Intelligence in November 2005. Representatives from all CFIUS Members met to discuss the transaction on December 6, 2005. DP World filed its official Exon-Florio notification 10 days later. The filing was distributed to all CFIUS Members and to the Departments of Energy and Transportation as well. The Department of Homeland Security negotiated a letter of assurances with DP World addressing issues concerning port security and, on the basis of that letter, CFIUS completed the initial 30-day review process on January 17, 2006 with a determination that the transaction did not threaten the national security and therefore did not warrant a 45-day investigation. Thus, the informal process that has developed under Exon-Florio would seem to have worked satisfactorily.

When members of Congress became aware of the transaction, however, many expressed strong concern over the national security implications of permitting control of U.S. ports to pass to foreign companies, particularly to one owned by a foreign government from the Middle East. Ultimately, DP World announced that it had decided to divest the contested U.S. port operations even though it had completed the CFIUS review process without any such requirement having been imposed on it.

Critics of the current Exon-Florio process not only disagreed with the substantive conclusions reached by CFIUS in the DP World matter, but also stressed concern over the secrecy of the process, as well as the lack of opportunity for congressional oversight. On the other hand, it might also be observed that it is not clear that the contractual rights to manage the operations of U.S. ports, which were actually involved in the DP World transaction, were properly the subject of Exon-Florio review. In addition, concern has been expressed by many over the years that congressional involvement in transaction reviews should be carefully limited to a general oversight role so as not to unduly politicize this important and already difficult process or to undermine the long expressed U.S. policy favoring foreign investment in the United States.

Congressional Proposals

More than two dozen bills have been introduced in Congress in response to the DP World controversy. While many of those bills relate specifically to that transaction or more generally to the question of foreign ownership of U.S. ports, a number of the bills would make substantial amendments to the Exon-Florio review process.

21 The following description is based on the CSR Report, at pages 12-13.
The most widely followed of those bills are (i) H.R. 5337, introduced on May 10, 2006 by Representative and House Majority Whip Roy Blunt (R-MO), which was unanimously approved by the Financial Services Committee of the House of Representatives on June 14, 2006 and would enact legislation to be titled the “Reform of National Security Reviews of Foreign Direct Investments Act,”22 and (ii) S. 3549, introduced on June 21, 2006 by Senator Richard Shelby (R-AL), which was unanimously approved by the Senate Banking Committee on March 30, 2006 and which would enact legislation to be titled the “Foreign Investment and National Security Act of 2006.”23

Of the two leading proposals, the Senate bill is generally described as being more stringent than the House bill, although both bills would make substantial changes to the current process. The Senate bill would require notification to Congress on the commencement of all initial transaction reviews and at both the commencement and the completion of the 45-day investigation period for each transaction that is made subject to a formal investigation. It would create a listing of foreign countries, ranked in order of assessed potential national security risk that would be required to be considered in assessing transactions. It would also provide that the initial 30-day review period under the current process could be extended by up to an additional 30 days, and would impose a mandatory 45-day investigation if the transaction involves either a foreign government or “critical infrastructure” and presents a potential threat to national security. For any transaction notification that is withdrawn and subsequently resubmitted, the Senate bill would require an up to 45-day investigation starting from the date of resubmission, including a review of the rationale for the withdrawal and resubmission.

The House bill would require notification to Congress within five days after completion of each 45-day investigation (whether or not involving a foreign government) and would require semi-annual reporting to Congress on CFIUS activities. It would also add the question whether a transaction would have a security-related impact on critical U.S. infrastructure to the list of factors to be considered in the transaction review process, provide that the Secretary of Homeland Security shall be the vice-chair of CFIUS, with the Secretary of Treasury to remain the chair of CFIUS, and would require the signatures of both the chair and the vice-chair on all CFIUS decisions. The House bill would also introduce a requirement for tracking the status of withdrawn transaction notices, including specific timeframes for resubmission, a process for tracking any actions that may be taken by parties to the transaction before resubmission of the transaction notice, and a process for tracking the implementation of any national security risk mitigation agreements entered into by a federal department or agency with the parties to a notified transaction. Lastly, the House bill would add the Director of National Intelligence to the review process in the role of neutral security analyst and not as a CFIUS Member or in any policy role.

Notwithstanding its generally more limited approach, the House bill would require a 45-day investigation for any transaction involving foreign governments, regardless of whether the national security may be threatened. In contrast, the Senate bill would mandate formal investigation for transactions involving foreign governments or critical U.S. infrastructure only if it is determined in the initial 30-day review process that the transaction raises the possibility of an impairment to national security.

Another Senate bill, S. 1797, introduced by Senator James Inhofe (R-OK) on September 29, 2005, before the DP World controversy erupted, reflected other longstanding concerns with the Exon-Florio process and would greatly expand congressional involvement in the process. S. 1797 would expand the initial 30-day review period to 60 days. It would also give Congress a greater role in the process by requiring that the findings and

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recommendations from any 45-day investigation
must be sent immediately to the House Financial
Services Committee and the Senate Committee on
Banking, Housing and Urban Affairs, as well as to
the President, and by allowing the Chairman and the ranking member of each of the Senate Banking and House Financial Services Committees to request a full 45-day investigation of investments by foreign governments or entities controlled by foreign governments.

Senator Inhofe’s bill would also add as a new statutory factor to be considered by CFIUS in its review process, “the long-term projections of the United States requirements for sources of energy and other critical resources and materials and for economic security.” This would substantially broaden the scope of the CFIUS review process. Even more dramatically, S. 1797 would provide that a transaction that the President has chosen not to suspend or prohibit under his Exon-Florio authority could not be completed for 10 legislative days after the President notifies Congress of his determination, during which time the transaction could be suspended if either house of Congress introduces a joint resolution of disapproval, whereupon the transaction would be suspended for 30 legislative days and, if during such 30-day period a joint resolution were to be enacted into law by both houses of Congress, the transaction would then be prohibited.

**Conclusion**

At this stage, it is not certain that any significant changes will be made to the Exon-Florio Provision or to the CFIUS review process. The controversy surrounding the DP World transaction and the CNOOC transaction, however, underscores the importance to the parties to a transaction of carefully considering both the Exon-Florio review process and the national security concerns to which it is directed. They also illustrate the importance of thinking carefully about the broader public policy and public relations aspects of foreign acquisitions of U.S. businesses that may be argued to involve companies, technologies or infrastructure that are important to the national security interests of the United States, even if it appears, based on prior experience and informal pre-filing agency discussions, that the transaction can be moved successfully through the Exon-Florio review process.

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**Conflicted Merger Transactions and the Latest Lessons from the Court of Chancery**

By Janine M. Salomone

Two recent decisions by the Delaware Court of Chancery, each applying the entire fairness standard of review to a conflicted merger transaction, contain important lessons for M&A counsel to Delaware corporations.

**Gesoff v. IIC Industries Inc.**

**The Gesoff Facts**

In 2000, management of CP Holdings, a foreign holding company (“CP”), determined that the costs associated with owning a majority stake in IIC Industries, a publicly traded Delaware corporation (“IIC”), outweighed the benefits and

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decided to take IIC private. Upon the advice of its U.S. counsel, who also acted as counsel for IIC (“U.S. Counsel”), CP’s management determined to proceed with a tender offer designed to increase CP’s equity interest from 79% to at least 90% of the outstanding shares of IIC. The tender offer, if successful, would enable IIC to cash out the remaining minority holders through a short-form merger.

CP management was concerned, however, that the minority stockholders of IIC were likely to negotiate aggressively regarding the price at which they would be cashed out and initiated the search for an investment bank to prepare a valuation to support the tender offer price. CP management ultimately began to consult with Jesup & Lamont, a small investment bank that had been recommended by U.S. Counsel. Shortly thereafter, the CP board met and authorized management to make a tender offer to the IIC board at a price of $13.00 per share for the minority interest. In addition, at the recommendation of U.S. Counsel, the board of directors of IIC appointed a special committee. The only member of the special committee was the sole available IIC director who was independent of CP.26 The IIC board authorized the special committee to “examine the Tender Offer and to prepare and present a recommendation to the Board and the public stockholders on the Company’s position on the Tender Offer.”27

Soon after its formation, the special committee met with representatives of, and eventually retained the services of, Jesup & Lamont. Jesup & Lamont did not volunteer information about their prior relationship with CP. In addition, U.S. Counsel was appointed to advise the special committee but continued to provide advice both to the parent, CP, and the subsidiary, IIC.28

At trial, the evidence revealed that CP’s management, with the active assistance of U.S. Counsel and Jesup & Lamont, had devised a cynical strategy for acquiring IIC’s minority shares: (i) CP would present a relatively “lowish bid” to the IIC board, (ii) IIC, already represented by CP’s U.S. Counsel, would hire Jesup & Lamont to evaluate the bid for the special committee, (iii) Jesup & Lamont would recommend a price slightly higher for the minority shares of IIC, (iv) CP would meet the higher price, and (v) Jesup & Lamont would support it and CP would proceed with the tender offer.29

Over the next several months, the parties adhered to the agreed upon scheme during negotiations. CP made a “lowish” initial offer for IIC of $10.00 per share, an amount significantly lower than the $13.00 bid the CP board had authorized management to make.30 After the receipt of the initial offer, Jesup & Lamont conducted a valuation of IIC for the special committee. Meanwhile, unbeknownst to the special committee, Jesup & Lamont continued to have surreptitious discussions with CP management that included valuation ranges for IIC. The parties ultimately agreed on a tender offer price of $10.50 per IIC share, Jesup & Lamont agreed to deliver its fairness opinion to the special committee at that offer price and the special committee announced its

26 There were in fact two independent directors, but one was too ill to serve.

27 2006 WL 1458218, at *4. The board also authorized the special committee to appoint outside auditors and/or counsel to assist the special committee in preparing its recommendation. Id.

28 At trial, the sole member of the special committee testified that U.S. Counsel “had been appointed, and I had accepted him, as my counsel” and when questioned regarding the conflict of interest in representing IIC and CP on the one hand and the special committee on the other, U.S. Counsel stated that no conflict existed. Id. at *5 nn. 38 & 40 (emphasis omitted).

29 Id. at *5.

30 Although this price was never formally offered to the special committee for consideration, there was evidence that the special committee knew the CP board initially authorized a $13.00 bid.
decision to recommend the tender offer to the stockholders.\textsuperscript{31}

Notwithstanding the special committee’s endorsement, the tender offer failed to garner sufficient support to allow for the acquisition of the remaining shares of IIC through a short-form merger. CP, undaunted, determined to accomplish the desired result by way of a long-form merger. The special committee agreed that a merger was in the best interests of the stockholders, particularly after the events of September 11. Without the benefit of an additional fairness opinion or any modification to its initial mandate, the committee concluded that the merger was fair and recommended it to the full board.\textsuperscript{32} The full board of IIC and CP, the company’s majority stockholder, subsequently approved the merger.

\textbf{The Gesoff Decision}

Plaintiffs challenged the going private transaction, asserting that the merger was the product of unfair dealing and that the merger consideration of $10.50 per share was an unfair price. The Court found that the entire fairness standard of review was applicable and determined that defendants had failed to satisfy their burden to establish fair dealing and fair price.\textsuperscript{33} When examining the special committee process, the Court noted that the question of fair dealing was completely dependent on the quality of negotiations between the special committee and CP. In this case, the process employed by the IIC special committee was the result of the manipulative scheme designed by the CP board, its management and advisors that “fails at the very threshold to establish fair dealing.”\textsuperscript{34} The Court continued:

\begin{quote}
Indeed, redolent as they are with cynicism and corruption, the facts in this case serve as a singular example of the pitfalls inherent in organizing any sort of self-dealing transaction.\textsuperscript{35}
\end{quote}

In support of its conclusion, the Court noted that the initial flaw in the process lay in the appointment of a single member special committee, noting that the facts of this case illustrate precisely the reason why such committees have been viewed traditionally by the Delaware courts as a “worrisome portent of unfair dealing”\textsuperscript{36} that in and of itself requires a higher level of judicial scrutiny. The Court emphasized that a second committee member might have provided a moderating influence throughout the negotiation process and could well have ameliorated missteps in judgment by the sole committee member.

The Court also found the special committee’s mandate to be fatally flawed because it failed to articulate clearly whether the special committee had the unilateral power to recommend or disapprove the merger. Indeed, the Court found that the testimony of the sole member of the special committee evidenced that he was unsure whether he had the power to veto the transaction.\textsuperscript{37}

\textsuperscript{31} The full IIC board, however, declined to make a recommendation with respect to the tender offer.
\textsuperscript{32} The special committee did make some inquiries and obtained additional information as to whether the price continued to be fair. The sole member of that committee testified that he determined that the price remained fair because he believed the events of September 11, 2001 had negatively impacted the company’s principal assets which consisted of a hotel chain. He also expressed concern that a revised fairness opinion might have produced a lower valuation.
\textsuperscript{33} The Court further noted that while most of the case law surrounding parent–subsidiary mergers has focused on the ways in which a defendant can effectively shift the burden of entire fairness, by the time a case comes to trial, the standards for shifting the entire fairness burden and those factors establishing fair dealing are intertwined. The Court ultimately awarded the appraisal claimants $14.30 per share and all other claimants damages based on the difference between the merger consideration and $14.30 per share.
\textsuperscript{34} Gesoff, at *13.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} The Court also noted that serious doubt existed as to whether the special committee’s mandate was sufficient to permit it to evaluate only the initially contemplated tender
Third, and most critically, the Court expressed dismay concerning the lack of independent legal and financial advice. With regard to the financial advisors, the Court remarked:

Jesp & Lamont were effectively selected by CP . . . . That conflict of interest robs Jesup & Lamont’s fairness opinion of its value as an indicator of fairness, and is itself an indicator that the parties did not structure the process in a way that was entirely fair .... Here, as shown indisputably at trial, Jesup & Lamont were actively and persistently disloyal to the special committee and to its aims of ensuring a fair transaction for IIC’s minority stockholders.38

The Court determined that the divided loyalties displayed by Jesup & Lamont effectively undermined the special committee’s ability to negotiate with CP in an arm’s-length manner consistent with the fundamental concept of fair dealing.

The Court found the special committee’s choice of counsel even more damaging to the process. Since U.S. Counsel had advised CP from the beginning on its approach to the tender offer and since U.S. Counsel was beholden to a board entirely dominated by CP for his job as IIC’s outside counsel, the Court concluded he was irreparably conflicted. The Court found that the legal advisor’s lack of independence constituted substantial evidence that the merger resulted from unfair dealing.39

Beyond the conflict of interest, however, the Court expressed serious doubts regarding U.S. Counsel’s ability competently to advise the special committee:

[T]he ramshackle way in which the merger between IIC and CP was organized raises, to say the least, very serious doubts about [the U.S. Counsel]’s familiarity and competence to give a client advice about Delaware fiduciary duty law.40

Collectively, the Court concluded, this case presented the rare situation “in which the special committee’s advisors are of little use in establishing the entire fairness of the merger transaction.”41

Moreover, the Court found that the negotiations between CP and the special committee were suffused with substantive unfairness. In particular, the Court found an email exchange between U.S. Counsel, CP management and Jesup & Lamont, which outlined the steps for the transaction, including the making of a “lowish” offer, disturbing “enough to cast a dark shadow over the entire merger process”42 and evidence that CP was orchestrating an unfair process with a predetermined result from the start.43

The Gesoff Lessons

For those corporate practitioners working with special committees, the Gesoff decision offers a number of useful lessons, including the following:

• Composition of the Special Committee —
    Delaware courts draw comfort from multiple-member committees. It is

40 Id.
41 Id.
42 Id.

43 The Court also rejected the defendant’s argument that the merger price was fair because it reflected the significant negative impact of the terrorist attacks on September 11, 2001, finding that the defendants had failed to produce sufficient evidence to demonstrate that IIC’s value actually declined as a result of September 11th. Although the Court found the merger was unfair to the minority stockholders, the Court concluded that the sole member of the special committee was entitled to exculpation under Section 102(b)(7) as the Court found no evidence to suggest that he was personally conflicted or received a personal benefit from the transaction, nor was there any evidence of his collusion with CP. Moreover, the Court found no evidence that the special committee member knew or should have known the price and process were unfair.

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38 Id. at *14.
39 Id. at *15.
advisable, whenever possible, to include more than one director on a special committee.

- **Clear and Complete Mandate** — A special committee’s mandate should be clearly documented and at a minimum must include the power to “say no” to the proposed transaction. Counsel for the special committee should review that mandate with the special committee to ensure that each member understands the committee’s role.

- **Independent Advisors** — The divided loyalties of the special committee’s expert advisors directly affected the outcome in *Gesoff*. As the Court notes: “[n]o evidence in this case suggests that [the special committee] was able to rely on his conflicted and inexperienced advisors for the help he so obviously needed.”44 As the *Gesoff* decision and several other recent decisions of the Delaware Court of Chancery have shown,45 the engagement of independent advisors is crucial to the success of the special committee process. In light of the inherent conflicts associated with parent-subsidiary transactions, counsel should resist the temptation to serve multiple constituencies and instead should persuade the client that it is better served by having separate independent counsel for the special committee.

- **Knowledgeable Advisors** — In *Gesoff*, the Court questioned whether the special committee’s counsel had the requisite familiarity and expertise to render advice about Delaware fiduciary duty law. In light of that fact, a special committee should satisfy itself that its choice of counsel is competent to provide the required level of legal service.46

- **Arm’s-Length Negotiations** — If the parties in a parent–subsidiary merger determine to establish an independent bargaining structure through the use of a special committee, a Delaware court will scrutinize the negotiations to determine whether they have, in fact, resulted in arm’s-length bargaining. Any attempt by the parent to control or undermine any facet of the negotiations jeopardizes the process and creates a substantial risk that the transaction, if challenged, will be subject to entire fairness review.

**Oliver v. Boston University**

**The Oliver Facts**

Boston University (“BU”) was the controlling stockholder in Seragen, Inc. (“Seragen”), a financially troubled biotechnology company. Seragen’s board had six members, three of whom were closely affiliated with BU. From its initial public offering in 1992, Seragen suffered frequent and substantial cash crises due to its failure to launch a product in the marketplace. As a result, Seragen, BU and certain of its directors and affiliates entered into a series of financial transactions pursuant to which those insiders contributed or facilitated the company’s access to

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44 *Gesoff*, at *15.


46 See also, 8 Del. C. § 141(e) (“A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member’s duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation’s officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.”).
much needed capital in exchange for additional equity or contractual rights.\textsuperscript{47}

Seragen nonetheless was unable to overcome its financial problems and the board began to explore strategic alternatives. In August 1998, Seragen agreed to merge with Ligand Pharmaceuticals, Inc. (“Ligand”) in a transaction that provided approximately $75 million in total merger consideration and was conditioned upon no more than 10% of the shares of common stock seeking appraisal.

The expected merger consideration was not, however, sufficient to satisfy all of Seragen’s obligations to its creditors and stockholders. As a result, BU and the other large holders of preferred stock negotiated among themselves both the discount that each would take on its investment and the amount of the merger proceeds that would be allocated to the common stockholders. While BU and the other large holders of preferred stock ultimately reached an agreement on how to allocate all of the merger consideration (the “Accord Agreement”), they did so without the input of the minority common stockholders and without adopting any procedures to ensure the fairness of the allocation to the minority stockholders.

The \textit{Oliver Decision}

After the consummation of the merger, the minority stockholders of Seragen commenced an action asserting a variety of derivative and direct claims relating to the effect of the Accord Agreement on their share of the merger consideration. In evaluating those claims, the Court applied the entire fairness standard because a majority of the Seragen board was either directly interested in the allocation of the merger consideration or otherwise beholden to the controlling stockholder. The defendants were unable to demonstrate that the allocation of the merger consideration was the product of fair dealing, because they had not employed any process to represent the interests of the minority stockholders. The Court ultimately concluded that the relative allocation to the minority stockholders was insufficient.

Perhaps the most interesting of the several challenges asserted by the plaintiffs from the perspective of the M&A practitioner were those relating to the value of certain unasserted derivative claims that existed as of the date of the merger. Plaintiffs alleged in this regard that the board had failed to account for the value of those claims springing from the pre-merger financial transactions that had occurred between Seragen and its controlling stockholder, BU, and BU affiliates.\textsuperscript{48}

In examining those derivative claims, the Court adopted a standard of “inquiry notice” for determining which claims should have been considered in the allocation of merger proceeds. The Court stated that, under the inquiry notice standard, knowledge of a claim on the part of the directors occurs when the directors become “aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of injury.”\textsuperscript{49}

\textsuperscript{48} The notion that a corporation should consider the value of its derivative claims in connection with a determination of the value of the corporation in a merger is not unprecedented in the Delaware courts. \textit{See Kohls v. Duthie}, 765 A.2d 1274, 1287-88 (Del. Ch. 2000) (denying derivative plaintiffs’ motion for a preliminary injunction against management buy-out transaction where the special committee’s expert valued existing derivative claims and such valuation was the product of “logical methodology” and could properly be accounted for in the context of any subsequent appraisal action if the derivative plaintiffs lost standing to maintain their claim as a result of the consummated merger).

\textsuperscript{49} 2006 WL 1064169, at *20. The Court added that a decision by the board as to the value of those potential claims would be accorded the protection of the business judgment presumptions (unless rebutted by the plaintiffs).

\textsuperscript{47} The challenged transactions included a loan guarantee transaction in which BU and two BU affiliates provided the guarantees, two separate issuances of preferred stock to BU and its affiliates, and a sale of Seragen’s operating division to BU, in which Seragen retained the right to buy back the division for the sale price plus expenses and interest.
Applying this standard, the Court concluded that the directors were on notice of the potential derivative claims arising from a series of earlier self-interested transactions between the corporation and BU and its affiliates and the Court found that the Seragen board effectively ignored the potential derivative claims when negotiating the Accord Agreement. In the Court’s view, those claims could have been used to bolster the position of the minority stockholders in dividing the merger proceeds.\(^{50}\)

**The Oliver Lessons**

As with Gesoff, several lessons may be gleaned from the Oliver decision, including the following:

- **Inquiry Notice** — Directors are charged with knowledge of a potential derivative claim when they become aware of sufficient facts to put a person of ordinary intelligence and prudence on inquiry that, if pursued, would lead to the discovery of injury. When retained in connection with a sale of the company, corporate counsel needs to undertake an inquiry sufficient to determine whether any such claims exist and to ensure that they are taken into account in determining an appropriate merger price.

- **Valuation of Potential Derivative Claims** — The existence of potential derivative claims, by itself, may provide bargaining leverage to a stockholder. Therefore, when negotiating the allocation of merger consideration among various stockholder interests, the board should consider whether potential derivative claims (arising out of prior conflict transactions or other circumstances) exist and, if so, should take them into account when determining the relative entitlement of various stockholder interests to the merger consideration.

**Conclusion**

Gesoff and Oliver are timely reminders that conflicted merger transactions require careful attention to process and form. Delaware courts will critically evaluate a special committee process to determine whether the committee is a fully functioning and independent body that is effectively representing the minority stockholders’ interests. When providing advice on the formation of special committees, corporate practitioners should focus on the composition of the special committee, the clarity of its mandate, and the independence, competence and expertise of its financial and legal advisors. If a special committee has been properly formed and has hired independent and knowledgeable advisors, a court is more likely to conclude that it is able to function properly and engage in arm’s-length negotiations. The Gesoff decision also sounds a cautionary note for legal advisors -- special committees should select a legal advisor who has the requisite expertise to advise the committee with respect to the committee’s fiduciary duties (and other legal responsibilities). The Oliver decision highlights the peculiar concerns that may arise when a corporation is considering how to allocate merger consideration. In that circumstance, Delaware courts view potential derivative claims, whether of low or even no value, as an important bargaining tool for minority stockholders. Therefore, corporate practitioners should advise boards to consider whether such potential derivative claims exist and, if so, seek to determine their value with the assistance of appropriate experts.

\(^{50}\) For reasons beyond the scope of this discussion, however, the Court ultimately concluded that a nil value should be assigned to the derivative claims and found that the failure to consider those derivative claims therefore amounted to a mere procedural flaw in negotiating the Accord Agreement, which warranted an award of only $1.00 in nominal damages for the directors’ breach of their duty of loyalty.
M&A “Nugget” – The “Fraud Exception” to Limitations on Indemnification

Recently, Wilson Chu, Rick Climan and Joel Greenberg participated in a webcast for DealLawyers.com in which they presented a series of M&A “nuggets.” An edited transcript of one of the “nuggets” presented by Rick Climan is set forth below:

Many of you are no doubt aware that sellers generally seek significant contractual limitations on their potential indemnification obligations in a definitive agreement for the acquisition of a privately held company. These negotiated limitations may take the form of a dollar ceiling or “cap” on the amount of the sellers’ potential indemnification liability, a “basket” designed to eliminate immaterial indemnification claims by the buyer and a specified survival period beyond which indemnification claims cannot be made by the buyer. Of course, buyers can be expected to engage in vigorous negotiations regarding the dollar amounts of the indemnification cap and basket as well as the duration of the specified survival period. But buyers generally do not succeed in eliminating these limitations entirely.

Even if buyers can’t completely eliminate these limitations on their indemnification rights, however, they may attempt to mitigate the effect of these limitations by seeking specific exceptions – provisions in the acquisition agreement stating that the limitations won’t apply in certain specified circumstances.

One exception to these limitations that buyers sometimes request is the so-called “fraud exception” – an express statement that the cap, basket and time limitation will not apply in certain circumstances tied to the commission of a fraud. If a fraud exception is to be included in the acquisition agreement, the sellers’ attorney must pay particularly close attention to the actual wording of the exception, because subtle differences in verbiage can have a significant impact on the sellers’ potential liability.

As Vice Chancellor Strine recently confirmed in his decision in the ABRY Partners case, public policy will preclude a party from contractually limiting its liability for its own fraud. So if the buyer’s attorney seeks a statement in the acquisition agreement to the effect that the contractual limitations on indemnification are not intended to affect the common law liability of a seller for that seller’s own fraud, the sellers’ attorney might normally not object to this. After all, this is merely a restatement of a well recognized legal principle.

But sometimes the buyer’s counsel seeks something different. The buyer’s counsel might, for example, attempt to expand the exception clause so that it refers to something beyond fraud – to “fraud or willful misconduct,” for example. This type of expanded language may be controversial because the additional words may not have as well established a meaning as “fraud” (which we know must be pleaded with particularity and which typically requires proof of a number of distinct elements, such as scienter and reliance).

The buyer’s counsel may also seek to expand the scope of the fraud exception in other ways. For example, the buyer may attempt to word the exception to say generally that the limitations on indemnification won’t apply “in the event of fraud.” Now this particular formulation does not really make it clear whose fraud will make the indemnification limitations inapplicable, leaving open the possibility that a completely innocent seller which did not itself commit fraud may be obligated to indemnify the buyer without limitation, beyond the negotiated dollar cap and after the expiration of the negotiated survival period, for the consequences of a fraud committed by someone else – by another, unrelated seller, for example. This is a result that is not necessarily compelled by law, and needless to say, a result that many sellers and their counsel might find objectionable.
So the lesson for the sellers’ counsel is pretty clear here. If you’re going to agree to include a contractual fraud exception to the limitations on your clients’ indemnification obligations, make sure the exception is drafted very narrowly.

**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

We met twice in Tampa during the Business Law Section’s Spring meeting, and had a great dinner, thanks to Nat Doliner, on Friday evening.

On Friday we tackled the redrafted Voting Agreement, providing comments to Bryan Davis and Pete November. We requested that all the “threshold” issues be moved to introductory commentary, and that the drafters add a summary paragraph listing those preliminary matters for consideration: (1) who should be the parties, (2) impact of Omnicare and other Delaware decisions on use and terms of voting agreements, (3) gun-jumping, (4) proxy solicitation, and (5) Williams Act considerations. We discussed the treatment of Omnicare and agreed on commentary changes and shortened the discussion of the impact of Orman. We requested that the discussion of the “mirrored voting” and “tail” provisions be moved to the appropriate sections of the Voting Agreement. We discussed the commentary on “old” proposed Rule 159 and proxy solicitation and made suggestions for additional considerations. We agreed to eliminate the “constructive transfer” definition in favor of a revised definition of sale. All other comments should be sent to Bryan and Pete as soon as possible, so that they can prepare a revised draft for the Committee’s stand-alone meeting in Dallas in October 2006.

On Saturday we discussed the conditions draft with Lori Anne Czepiel and Phil Stamatakos, and covered Sections 5.2 through 5.6. All other comments are requested to be submitted to Lori Anne and Phil as soon as possible. As part of this discussion we concluded that the corresponding covenants discussion in Section 4.4 required amendment to add a discussion about the registration process (i.e., calls to the staff, limited or full review, and process for clearing comments and timing). David Bronner agreed to provide that commentary. We also decided that the definition of required stockholder approval in the representations in Sections 2.2(a) and 3.2 required revisions to explain the various possible votes and their impact. Henry Lesser and Hal Leibowitz will prepare those revisions. Lori Anne agreed to revise the discussion of the MAE definition and carve-outs.

Our next meeting is in Honolulu on Friday, August 4, from 1:00 p.m. to 4:00 p.m., in Ballroom 2, 3rd Floor, of the Marriott Waikiki Beach Resort. We will cover the Exclusivity Agreement, continue our discussion of Sections 2 and 3 [Representations and Warranties] and consider revisions prepared by Henry Lesser and David Bronner. We also are expecting the revised commentary for the Termination section including the Delaware commentary, and revisions to Section 1 for deal lawyer perspectives on various issues relating to pricing and exchange ratios and related matters.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

**Task Force on the Dictionary of M&A Terms**

The goal of the Task Force on the Dictionary of M&A Terms is to develop a working tool that will be useful for every lawyer that participates in an M&A transaction, from the summer associate to the seasoned negotiator. We continue to make progress on the text of the M&A Dictionary as we have added a number of financial terms as well as some terms with broad international usage. We have also added common game theory terms that arise in the context of M&A negotiations. We are targeting to move to the editorial review phase late this Fall.
We will have a Task Force meeting in Honolulu where we will have an open discussion on adding additional terms as well as reviewing definitions and assigning new drafting and review assignments. The meeting will be held on Saturday, August 5, from 11:00 a.m. to 1:00 p.m., in Milo I, 2nd Floor, of the Marriott Waikiki Beach Resort. This Fall we intend to hold several conference calls between meetings. We welcome new participants as well as seasoned veterans to help us finalize the project.

David A. Katz  
Chair
Mark A. Morton  
Vice Chair

Task Force on Joint Ventures

The ABA is expecting to publish the Model Joint Venture Agreement late this Summer. (Please see the advertisement on this page for information about ordering your copy.) Thus, there will not be a meeting of the “model agreement” part of the Joint Venture Task Force in Honolulu. We will discuss in the Fall stand-alone meeting whether we should have a partnership supplement.

On the internationalizing front, the questionnaire is ready to be mailed out to various law firms around the globe and we would like a small team of volunteers to follow up on getting the responses. There will be a short meeting in Honolulu on Friday, August 4, from 7:00 a.m. to 8:00 a.m. (note new time), to discuss the completion of this project. The meeting will be held in Milo I, 2nd Floor, of the Marriott Waikiki Beach Resort. We look forward to seeing you there.

Thomas B. Hyman, Jr.  
Alison J. Youngman  
Co-Chairs

Model Joint Venture Agreement with Commentary - Special 40% discount for all Committee Members

Order your copy now for August 2006 delivery! This latest publication from the Committee on Negotiated Acquisitions provides a complete draft of a Model Joint Venture Agreement based on a hypothetical fact pattern including incisive commentary explaining the meaning and function of each provision. A checklist is also provided addressing the issues surrounding the formation of the Joint Venture and the ongoing legal rights and obligations of the parties. The Agreement plus other related documents are replicated on a companion CD-ROM and ready for tailoring to your transaction.

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Task Force on the Model Stock Purchase Agreement

The text of the revised agreement is in the editorial review stage. The Editorial Working Group continues to meet in conference calls and stand-alone meetings to work on the document. Once the text has been finalized, the Editorial Working Group will turn its attention to commentary and will be coordinating its efforts with the M&A Jurisprudence Subcommittee. At that juncture, additional drafting assignments should become available for Task Force members.

Robert T. Harper
Chair

SUBCOMMITTEE REPORTS

International M&A Subcommittee

The International M&A Subcommittee met in Tampa in connection with the Business Law Section’s Spring meeting. The Subcommittee discussed the status of its current projects and Subcommittee members’ ideas for future projects. Suggestions for future projects included: (i) a study and topical report on the laws and regulatory schemes of principal jurisdictions to regulate foreign investment in those jurisdictions, (ii) a summary of transactional and post-transaction dispute resolution practices in the various jurisdictions (litigation, arbitration, other), and (iii) a survey and report on the extra-territorial effect of various jurisdictions’ M&A regulatory schemes. We also discussed enhancement of our page on the Committee’s website to facilitate communication among Subcommittee members, as well as to make the website more useful for locating lawyers qualified to advise on business transactions in particular jurisdictions.

A topical report was made by Jim Walther on the U.S. Exon-Florio Amendment and the related CFIUS (Committee on Foreign Investment in the United States) inter-agency review process for sensitive acquisitions, from a national security standpoint, of U.S. businesses by non-U.S. acquirors. Following this report members of the Subcommittee described the regulatory regimes of their countries relating to in-bound foreign investment. Daniel Rosenberg then made a presentation regarding the newly effective EU takeover regime, including practical impacts of the regime on M&A practice. Other members of the Subcommittee added their views on this subject as well.

The meeting concluded with a general discussion by Subcommittee members regarding new legal developments in their jurisdictions relevant to M&A practice and particular issues they had encountered.

Our next meeting will be in connection with the ABA Annual Meeting in Honolulu. The Subcommittee will meet on Friday, August 4, from 8:00 a.m. to 10:00 a.m., in the Leahi Ballroom, 2nd Floor, of the Marriott Waikiki Beach Resort. We will have conference telephone arrangements for those who will not be able to attend the Annual Meeting in person. Dial-in information will be emailed to Subcommittee members and will be posted on the ABA website. We encourage everyone who has an interest in international M&A transactions to participate in the meeting, whether or not you desire to become a continuing member. Questions and practical observations regarding international M&A matters are welcome at our meetings from members and nonmembers alike.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

With over 1800 members, the Committee is now officially the second largest committee in the Business Law Section (behind the perennial leader - the Committee on Federal Regulation of Securities). Based on anecdotal accounts from the ABA, our Committee has the enviable reputation of being the
most active committee in terms of volume of published works.

Since our Spring Meeting in Tampa, membership has increased by almost 30% due in part to broad interest in the Committee’s recently-released Private Target and Public Target Deal Points Studies, which were made available free of charge to Committee members on the Committee’s website.

Subcommittee Vice Chairs Hendrik Jordaan and Deb Telman are continuing our project to conduct a survey on “In-House Counsel’s Use of Outside M&A Counsel.” This survey is being co-sponsored by the Business Law Section’s Corporate Counsel Committee.

In addition, Michael Hollingsworth is leading the effort to conduct a survey of our members to determine how the Committee can better cater to current and prospective members’ interests.

After the Honolulu meeting, Hendrik Jordaan will take over as Chair of the Membership Subcommittee. During the current administration (i.e., since September 2002), we’ve seen Committee membership grow by 246% (to 1869 as of July 16, 2006 from 758 as of September 1, 2002). Membership has grown in virtually all respects from increased geographic (including non-U.S. lawyers), racial and gender diversity to increased participation by corporate counsel and non-legal deal professionals. Our reputation as a “working” committee that produces highly-practical and thought-leading M&A offerings will continue to generate high interest in the deal community.

It has been my pleasure to serve as your Membership Subcommittee Chair. As many of you know, Hendrik is full of energy and ideas. Under his leadership, I look forward to overtaking Federal Regulation of Securities to (soon) become Numero Uno!

Wilson Chu
Chair

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee has two working groups. The Annual Survey Working Group identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, which is published annually in *The Business Lawyer*. The Judicial Interpretations Working Group examines judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The Judicial Interpretations Working Group will meet in Honolulu on Saturday, August 5, from 7:00 a.m. until 9:00 a.m., in Milo I, 2nd Floor, of the Marriott Waikiki Beach Resort. The Annual Survey Working Group will meet immediately after the Judicial Interpretations Working Group, in the same room, from 9:00 a.m. until 10:00 a.m.

Annual Survey Working Group

The fourth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions appeared in the February 2006 issue of *The Business Lawyer*, which was distributed this past week. Our working group is now collecting 2006 cases for consideration for inclusion in our next annual survey. We are asking all members of the Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at swhittaker@stonepigman.com or to Jon Hirschoff at jhirschoff@fdh.com. You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 348-5777. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a
controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

**Decisions to be Discussed at the Honolulu Committee Meeting**

*Clanton v. Inter.Net Global, L.L.C., 435 F.3d 1319 (11th Cir. 2006).*

*Clanton v. Inter.Net Global, L.L.C.* involved successor liability issues under New York law in the context of a claim by the target company sellers for a post-closing purchase price holdback payment. After the closing, the buyer transferred to a subsidiary the assets, but not the liabilities, of the acquired company. The sellers sought payment of the holdback amount from the subsidiary after the buyer filed for Chapter 11 bankruptcy.

PSINet, an internet company, acquired ZebraNet, a smaller internet company, pursuant to an October 1999 merger agreement (the “Agreement”). PSINet paid $5,436,328 at closing and, pursuant to the Agreement, was obligated to pay an additional $992,250, plus interest (the “Additional Payment”) by April 2001. The Court of Appeals referred to this obligation as a “holdback liability,” but its opinion does not explain the nature of the holdback. Presumably it was in the nature of security for indemnification obligations of the sellers under the Agreement.

The Agreement prohibited assignments of the Agreement without the consent of the other party, but allowed PSINet to “assign this Agreement to any subsidiary or affiliate prior to or after the Closing, by prior written notice to the [plaintiffs].” In March 2000, PSINet transferred the assets acquired from ZebraNet to a newly created subsidiary, Inter.Net Global, L.L.C. (“Inter.Net”), pursuant to a contribution agreement. The contribution agreement contained the following clause: “[Inter.Net] hereby does assume and agree to pay, perform and discharge all debts, obligations, contracts and liabilities of [PSINet] properly allocable and attributable to or arising from the Transferred Assets of every kind, character or description . . . provided, however, that [Inter.Net] shall not assume any debt, obligation, contract or liability of [PSINet] not specifically assumed as provided above.” The contribution agreement contained no reference to PSINet’s obligation to make the Additional Payment, and PSINet did not notify the plaintiffs that the Agreement was being assigned to the subsidiary. PSINet continued to list the Additional Payment as a liability on its financial statements.

On March 1, 2001, PSINet sold Inter.Net pursuant to an agreement expressly stating that PSINet retained the obligation to make the Additional Payment. Three months later, on May 31, 2001, PSINet filed for Chapter 11 bankruptcy, listing the Additional Payment as unsecured debt. The plaintiffs (to whom the Additional Payment was to be made) filed proofs of claim in the bankruptcy proceeding, and also commenced a lawsuit in Alabama state court against Inter.Net, which had the case removed to federal court.
Plaintiffs claimed that Inter.Net was liable for the Additional Payment as successor to PSINet. Specifically, plaintiffs claimed that when PSINet transferred the assets formerly owned by ZebraNet, it also necessarily transferred the obligation to make the Additional Payment.

The District Court ruled that under the contribution agreement, Inter.Net had assumed liability for the Additional Payment, granting partial summary judgment in favor of plaintiffs, but granted Inter.Net’s motion for judgment on all of plaintiffs’ other claims. The court found the language of the contribution agreement “unambiguous” and “broad enough to encompass the [Additional Payment] because such liability is clearly attributable to and is arising from” the assets transferred to the subsidiaries. That liability, said the court, occurred in consequence of or on account of PSINet’s acquisition of the ZebraNet assets conveyed pursuant to the . . . contribution agreements.”

The Court of Appeals for the 11th Circuit, having determined that New York law was applicable pursuant to choice of law clauses in the Agreement and in the contribution agreement, referred to the familiar four situations where an asset sale can give rise to successor liability. It discussed only the express or implied agreement test, stating in a footnote without explanation that the other three tests “are inapplicable here.”

The Court of Appeals found the contribution agreement to be unambiguous as to the liabilities assumed, holding that the Additional Payment was not “allocable and attributable to or arising from” the assets acquired from ZebraNet, specifically customer relationships and computers and office furniture. The court reasoned that under the assumption of liabilities clause, Inter.Net assumed responsibility for contracts and liabilities specific to the customers acquired, and assumed liabilities directly related to office furniture and computers transferred, and that “[i]n contrast, the [obligation to make the Additional Payment] is not allocable or attributable to any of the specific assets formerly owned by ZebraNet and transferred to Inter.Net under the Contribution Agreements . . . .” The court observed in a footnote that the Additional Payment obligation arose from the prior acquisition, rather than from the transferred assets themselves.

This case can serve as a reminder of the need for counsel to sellers to consider whether security for a holdback obligation, or the use of an escrow of any part of the purchase price held back, may be advisable in the circumstances of certain acquisitions.


Maryville Hotel Association I, L.L.C. v. IHC/Maryville Hotel Corporation involved a claim that an acquisition of the corporate grandparent of an LLC member constituted an indirect transfer of the member’s interest in the LLC, and thereby triggered the right of first offer provisions of the LLC operating agreement.

Maryville Hotel Association I, L.L.C. (“MHA”) and IHC/Maryville Hotel Corporation (“IHC”) were both 50% owners of Maryville Centre Hotel Limited Liability Company (“MCHLLC”). The Operating Agreement of MCHLLC (the “Agreement”) stated that “no Member shall have the right to sell or otherwise dispose of its Company Interests, or any part thereof, directly or indirectly, except as provided herein below in this Article XIV.” The Agreement went on to provide that before a member could transfer its interest in MCHLLC, the member must first offer to sell the membership interest to the other member. IHC was a wholly owned subsidiary of Patriot American Hospitality, which in turn was a wholly owned subsidiary of Wyndham International, Inc.
In June 2005, Winn Acquisitions, Inc., an affiliate of The Blackstone Group, purchased 100% of the outstanding common stock of Wyndham. MHA then filed this suit, arguing that the transfer of Wyndham stock constituted an “indirect” transfer of IHC’s membership interest in MCHLLC.

In support of its position, MHA cited *H-B-S Partnership v. AIRCOA Hospitality Services, Inc.*, 114 P.3d 306 (N.M. Ct. App. 2005), in which the court held that a right of first refusal provision in a partnership agreement was triggered by the sale of a partner’s corporate great-great grandparent’s stock. The right of first refusal provision at issue in *H-B-S Partnership* applied to “any direct or indirect transfer including, without limitation: the transfer of any equity interest in a Partner which is a corporation, ... if the transfer ... results in a change in control of such corporation.” The right of first refusal provision at issue in *H-B-S Partnership* also specifically provided that a direct or indirect transfer included “a transfer resulting by operation of law, or as a result of any merger, consolidation or similar action.”

The United States District Court for the Eastern District of Missouri, applying Missouri law, dismissed MHA’s claim, holding that the term “indirectly,” as used in the MCHLLC Agreement, was insufficient to indicate an intent of the parties to trigger the right of first offer in the context of a sale of the equity interest of a member. In reaching this conclusion, the court noted that the MCHLLC Agreement did not contain language defining “indirect” in the broad manner of the partnership agreement at issue in *H-B-S Partnership*.

The court also interpreted the language of the Agreement as imposing another requirement for the right of first offer to be triggered. Specifically, the court noted that under the Agreement each member was prohibited from disposing of “its” interest in MCHLLC. According to the court, the use of the term “its” imposed a requirement that the MCHLLC member must have an active role in the transaction at issue. Thus, according to the court, “regardless of the scope of ‘indirectly’ in the circumstances of this case defendant must have sold or disposed of its interest in the MCHLLC.” Since IHC did not play an active role in the sale of Wyndham’s stock, this requirement was not met.

This case highlights the importance of including contractual provisions that define terms such as “directly or indirectly,” which are susceptible of varying interpretations. The holding in this case is also interesting in its interpretation of the Agreement as requiring active participation by the LLC member in the transaction in order to trigger the right of first offer. Under the court’s reasoning, even if the language of the Agreement had included a definition of “indirect” that encompassed a transfer of the equity of a member’s upstream parent, the right of first offer would not have been triggered.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s April 2006 meeting in Tampa. Attendees at that meeting discussed the status of the work of the teams that have been formed to research and prepare memoranda pertaining to the jurisprudence interpreting more than 20 different provisions of M&A agreements and ancillary documents. We discussed at length the memorandum prepared by Arman Kuyumjian and John Cermak on the potential liability of a third party bidder for tortious interference with a “no-shop” agreement. Based on the discussions at the Tampa meeting, that memorandum has been revised, and we hope to present a report on that topic at the full Committee meeting in Honolulu. We also discussed research techniques as well as
the scope and format of work product and potential new projects.

The next meeting of the Judicial Interpretations Working Group will be in Honolulu on Saturday, August 5, from 7:00 a.m. until 9:00 a.m., in Milo I, 2nd Floor, of the Marriott Waikiki Beach Resort in connection with the ABA’s Annual Meeting.

We have a number of new projects that we would like to start and invite new members to join us. To join, please email Jim Melville at jcm@kskpa.com with a copy to Scott Whittaker at swhittaker@stonepigman.com or simply attend our working group meeting in Honolulu.

Scott T. Whittaker  
Subcommittee Chair  
Jon T. Hirschoff  
Chair - Annual Survey Working Group  
James C. Melville  
Chair - Judicial Interpretations Working Group

M&A Market Trends Subcommittee

At our meeting in Tampa, Subcommittee Co-Chair, Wilson Chu, and Subcommittee Vice Chair, Keith Flaum, led the standing room only crowd in a discussion highlighting the recently-released Private Target and Public Target Deal Points Studies. (Unfortunately, Co-Chair Larry Glasgow was down-for-the-count in his hotel room – the victim of a bowl of bisque through which the lobster had the last laugh.)

One of the points raised, for example, was the use of legal opinions. In the Private Target Deal Points Study, we found that legal opinions (not including tax opinions) were required from target’s counsel 73% of the time:

<table>
<thead>
<tr>
<th>Opinion of Target’s Counsel (Not Including Tax Opinion)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(All deals: includes simultaneous sign-and-close deals)</td>
</tr>
<tr>
<td>Not Required**</td>
</tr>
<tr>
<td>Required*</td>
</tr>
<tr>
<td>73%</td>
</tr>
<tr>
<td>27%</td>
</tr>
</tbody>
</table>

*Typically as a condition to closing, but including opinions required in a “Closing Deliveries” covenant.  
**Does not account for opinions that may have been required or delivered outside of the express terms of the agreement.

In contrast, legal opinions (also not including tax opinions) from target’s counsel in public target deals were required only 7% of the time:

<table>
<thead>
<tr>
<th>Opinion of Target’s Counsel (Not Including Tax Opinion)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Not Including Tax Opinion)</td>
</tr>
<tr>
<td>No Condition</td>
</tr>
<tr>
<td>Includes Condition</td>
</tr>
<tr>
<td>93%</td>
</tr>
<tr>
<td>7%</td>
</tr>
</tbody>
</table>

Attempts to explain the seemingly stark difference included observations that deal lawyers “are finally” recognizing the limited value that legal opinions provide in the public target diligence process. As the thinking goes, a legal opinion from the target’s counsel in a public target deal does not provide much additional comfort to a
buyer because a public target has already been through underwriter due diligence (and any related “clean-up” process) and is subject to the discipline of SEC reporting requirements. On the other hand, a legal opinion from the target’s counsel in a private target deal may be of some value due, in part, to the discipline inherent in the opinion process.

Plans are underway to produce studies to be released in 2007. Wilson Chu and Larry Glasgow will continue to lead the Private Target Deal Points Study. Keith Flaum will continue to lead the Public Target Deal Points Study. While most members of the respective working groups have re-upped, more volunteers are always welcome.

Wilson Chu
Lawrence Glasgow
Co-Chairs

**Private Equity M&A Subcommittee**

I’m delighted to tell you about the formation of a new subcommittee that will have its official launch at our meeting in Honolulu.

We all know that the private equity community has been a significant driver of M&A activity in recent years. Indeed, the excellent forum that was held in Tampa in April highlighted the increasing participation of private equity firms, individually and through “clubs,” in acquisition activity and identified some of the distinguishing issues raised in private equity M&A deals.

For the past year I have been chairing a subcommittee on private equity transactions and documents under the aegis of the Business Law Section’s Committee on Venture Capital and Private Equity, chaired by Chip Lion. At the same time, under Rick Climan’s leadership, the Committee on Negotiated Acquisitions has been looking for ways to sharpen its focus on private equity M&A (the Tampa forum was an example) and to provide to you an enhanced opportunity for the exchange of knowledge, ideas and experience about private equity M&A transactions.

After discussions amongst Chip, Rick and myself, the two committees have decided that the optimum forum is a new subcommittee of the Committee on Negotiated Acquisitions to be called the Private Equity M&A Subcommittee. The Committee on Negotiated Acquisitions is the only committee within the Business Law Section dedicated solely to M&A and many of you spend a fair amount of your time on private equity M&A transactions. Existing Committee projects like tracking deal terms, tracking M&A jurisprudence and compiling the M&A Dictionary can very usefully be expanded to include a private equity component. Also, by giving the members of the existing Private Equity Transactions and Documents Subcommittee an opportunity, without forgoing their interest in the other topics addressed by Chip’s committee (including private equity), to join with members of the Committee on Negotiated Acquisitions interested in private equity M&A transactions, we will avoid duplication of effort and scheduling conflicts and be able to serve the needs of the two groups with a single outlet.

Rick has kindly invited me to chair this new subcommittee and Chip has graciously accepted my resignation from the existing subcommittee so that I can focus my attention on what I hope will be a vibrant addition to the activities of the Committee on Negotiated Acquisitions. I am delighted to report that John Hughes has agreed to serve as vice chair.

In addition to contributing to the existing Committee projects mentioned above, my hope is that this new subcommittee will develop a variety of other ways to share knowledge and experience. For instance, while John and I have no current plans to undertake any model documentation project, members could certainly share valuable precedents for all sorts of documents, including some that are not easily accessed (club agreements, appropriately redacted, come to mind). In addition, there are many possibilities for programs (you may recall that...
the Committee on Venture Capital and Private Equity collaborated on a well-attended program in Chicago last summer on private equity controlled auctions). And, perhaps most exciting from my perspective, we have the opportunity to create our own informal discussion group and feature at every meeting a topic of specific relevance to private equity M&A practitioners, perhaps with outside participants. It is my hope that, given the breadth of our national membership on the Committee on Negotiated Acquisitions, as well as the many members outside the U.S. who regularly participate in the Committee’s activities, we will be able to capitalize on the opportunity to create a lawyers’ forum for private equity M&A unique in its geographic coverage and depth of experience.

Our first meeting will take place between 10 a.m. and 12:00 p.m. on Friday, August 4, in Milo III, 2nd Floor, at the Marriott Waikiki Beach Resort. Rick, John and I hope that you will attend. We want to hear from you as to what you would be most interested in seeing the new subcommittee undertake and, as you already know, the activities of the Committee thrive on and reward active and regular participation. I will lead a discussion on current going private issues for private equity buyers and I hope to get lots of input from you.

John and I would be delighted to hear from you with your intentions regarding attending the inaugural meeting as well as your ideas. We are not yet at the stage of asking anyone else to volunteer for a task so you don’t have to be concerned that speaking up now means signing up now! Our initial goal is to have a well-attended inaugural meeting with a lively and constructive discussion of what we are going to undertake and a valuable initial discussion forum.

We hope you are as excited as we are about this new subcommittee and look forward to seeing you in Hawaii. In the meantime, you can join the Private Equity M&A Subcommittee at our page on the Committee’s website at the below address: http://www.abanet.org/dch/committee.cfm?com=CL560015

On a personal note, my thanks to Chip for having given me the chance to serve as chair of one of the subcommittees of the committee that he chairs and for being so open to the unusual idea of migrating a subcommittee from one committee to another. Also, my thanks to Rick for creating this opportunity for all members of the Committee on Negotiated Acquisitions.

Henry Lesser
Chair

Programs Subcommittee

The Committee is sponsoring a program entitled “Looking East: Investment in China” at the Annual Meeting. Developed by the International M&A Subcommittee, the program will feature a panel presentation by four experienced M&A specialists whose practices are focused on cross border M&A and joint venture transactions in China. The panel will discuss practical aspects of doing deals in China, with a particular focus on differences in M&A practice in China as compared with the United States. The panel will cover topics ranging from pricing and negotiation to deal structure and due diligence issues. The panel will also address in-bound transactions by Chinese companies seeking acquisitions in the United States. International M&A Subcommittee Co-Chair James Walther, Mayer, Brown, Rowe & Maw LLP (Los Angeles) will be the moderator, and the panelists will be Matt Adler, DLA Piper Rudnick Gray Cary (Beijing); Alex Q. Cai, Concord & Co. (Shanghai); John C. Cole, Simmons & Simmons (Shanghai); and Ryan Reynoldson, KPMG Hauzhen (Beijing). The presentation is scheduled for Saturday, August 5, from 11:00 a.m. to 1:00 p.m.

The Committee is also co-sponsoring, with the Environmental, Energy and Natural Resources Law Committee and the Committee on Corporate Counsel, a program on Climate Change and International M&A Transactions on Friday, August 4, from 9:00 a.m. to 11:00 a.m. The program is co-moderated by Stephen J. Hume and John Cole, with Alison Youngman also presenting as a panelist on this program.
This Fall we are planning a Committee Forum chaired by Mark Morton on fairness opinions and related issues.

Thomas M. Thompson
Chair

**Technology Subcommittee**

This spring we received news that the website of the Committee was the most visited site in the entire Business Law Section and that the M&A Market Trends Subcommittee page was the second most visited site. Much of this activity resulted from the decision to make the Deal Points Studies prepared by the M&A Market Trends Subcommittee available only on the website and only to Committee members. The web page has now proven itself to be very efficient both (i) in distributing timely information to a wide group within the Business Law Section, and (ii) in creating substantial interest among Business Law Section members in joining our Committee. We encourage other subcommittees and task forces that are interested in accomplishing one or the other (or both) of those goals through distribution of a portion of their work via the web to contact our Subcommittee. If you haven’t visited the site recently, the address for the website is: http://www.abanet.org/dch/committee.cfm?com=CL560000. To log onto the site, use your ABA membership number as your username and your last name as your password.

Work continues on the Committee’s extranet. That site will serve as a depository for our documents in progress and will help coordinate the sharing of document drafts and other information. The template has been developed and the Task Force on the Model Stock Purchase Agreement has committed to be the first to make use of the space. Other subcommittees and task forces that are interested in sharing their work through the extranet site should contact me. The extranet is protected in two ways: (i) only Committee members can access any of the subcommittee or task force pages, and (ii) the site itself is password protected. We do not expect our initial experience with the extranet to be flawless, but we anticipate that it will eventually become the principal means by which documents are shared among our Committee members.

George M. Taylor, III
Chair

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**COMMITTEE MEETING MATERIALS**

**MEETING OF COMMITTEE ON NEGOTIATED ACQUISITIONS**

Saturday, August 5, 2006
1:00 p.m. – 4:30 p.m.

Leahi Ballroom
Marriott Waikiki Beach Resort

**AGENDA**

1. **WELCOME / INTRODUCTIONS**
2. **SUBCOMMITTEE AND TASK FORCE REPORTS**
   - Subcommittees
     - International M&A (Daniel Rosenberg/Jim Walther)
     - M&A Jurisprudence (Scott Whittaker)
       - Annual Survey Working Group (Jon Hirschoff)
       - Judicial Interpretations Working Group (Jim Melville)
M&A Market Trends
(Wilson Chu/Larry Glasgow/Keith Flaum)
Membership (Wilson Chu)
Newsletter – Deal Points (Mike Reilly)
Private Equity M&A (Henry Lesser)
Programs (Tom Thompson)
Technology

- Task Forces
  Acquisitions of Public Companies (Diane Frankle/Steve Knee)
Dictionary of M&A Terms (David Katz/Mark Morton)
Joint Ventures (Tom Hyman/Alison Youngman)
Model Stock Purchase Agreement (Scott Whittaker)

3. Recent and Upcoming Programs
- Negotiating the Acquisition Agreement (ABA Video Webcast, April 19, 2006)
- Closing the Deal (ABA Audio Webcast, May 16, 2006)
- Programs presented in Honolulu (Tom Thompson)
- Mock negotiation presentation at Columbia Law School (Oct. 25, 2006)
- Eleventh Annual National Institute on Negotiating Business Acquisitions (Las Vegas, Nov. 2-3, 2006)
- Future Committee-sponsored programs

4. Upcoming Committee Meetings
- 2006 Fall stand-alone meeting (to be held in Dallas, Oct. 20-21, 2006)
- 2007 Spring meeting (to be held in Washington, D.C., March 15-17, 2007, in conjunction with the Spring Meeting of the ABA’s Section of Business Law)
- 2007 Summer meeting (to be held in San Francisco, Aug. 9-12, 2007, in conjunction with the ABA’s Annual Meeting)

5. Recent Judicial Developments
(Scott Whittaker/Jon Hirschoff)

6. Delaware Developments
(Chief Justice Myron Steele/Danielle Gibbs/Don Wolfe/Mark Morton)
- Oliver v. Boston University (Del. Ch., Apr. 2006)
- Gesoff v. IIC Industries Inc. (Del. Ch., May 2006)
- In re The Walt Disney Derivative Litigation (Del., Jun. 2006)
- Bebchuk v. CA, Inc. (Del. Ch., Jun. 2006)

7. Regulatory Developments
(Henry Lesser)
- Status of proposed amendments to SEC Rule 14d-10 (tender offer “best price” rule)
- Status of proposed NASD Rule 2290 (fairness opinions)

8. M&A and the Media
(Dennis Berman, The Wall Street Journal)

9. The Role of M&A Lawyers in Resolving Acquisition-Related Disputes
(Jim Freund)

10. Stapled Financing
(Jennifer Muller/David Katz)
11. **SPECIAL PURPOSE ACQUISITION CORPORATIONS (“SPACs”)** (Mark Morton)

12. **REPORT BY JUDICIAL INTERPRETATIONS WORKING GROUP:** Tortious interference with exclusivity agreements  
   (John Cermak/Arman Kuyumjian)

13. **“MARKET CHECK”**
   - **PUBLIC TARGETS:** Break-up fee triggers  
     (Keith Flau)
   - **PRIVATE TARGETS:** Defining “knowledge”  
     (Wilson Chu/Larry Glasgow)

14. **OTHER BUSINESS**

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**COMMITTEE ON NEGOTIATED ACQUISITIONS**

**2006 SUMMER MEETING – HONOLULU**

**AUGUST 4-5, 2006**

**SCHEDULE OF MEETINGS AND OTHER ACTIVITIES**

Meetings and programs will be held at the Marriott Waikiki Beach Resort.

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**Friday, August 4, 2006**

7:00 a.m. – 8:00 a.m. – *Milo I, 2nd Floor*  
Task Force on Joint Ventures

8:00 a.m. – 10:00 a.m. – *Leahi Ballroom, 2nd Floor*  
International M&A Subcommittee

10:00 a.m. – 12:00 p.m. – *Milo III, 2nd Floor*  
Private Equity M&A Subcommittee

1:00 p.m. – 4:00 p.m. – *Ballroom 2, 3rd Floor*  
Task Force on Acquisitions of Public Companies

4:00 p.m. – 5:00 p.m. – *Ballroom 2, 3rd Floor*  
Meeting of Committee Chair and Vice Chairs, and Subcommittee, Task Force and Working Group Chairs and Vice Chairs

7:00 p.m. – *Halekulani Hotel*  
Committee Reception and Dinner

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**Saturday, August 5, 2006**

7:00 a.m. – 9:00 a.m. – *Milo I, 2nd Floor*  
Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee

9:00 a.m. – 10:00 a.m. – *Milo I, 2nd Floor*  
Annual Survey Working Group of the M&A Jurisprudence Subcommittee

10:00 a.m. – 12:00 p.m. – *Milo III, 2nd Floor*  
M&A Market Trends Subcommittee

11:00 a.m. – 1:00 p.m. – *Oahu Room, 3rd Floor*  
Program – Looking East: Investing in China

11:00 a.m. – 1:00 p.m. – *Milo I, 2nd Floor*  
Task Force on the Dictionary of M&A Terms

1:00 p.m. – 4:30 p.m. – *Leahi Ballroom, 2nd Floor*  
Full Committee Meeting