FROM THE CHAIR  
By Leigh Walton

I trust that many of you are planning to attend (in person or by phone) the stand-alone meeting of the Mergers & Acquisitions Committee to be held in Laguna Beach on Friday, February 3, and Saturday, February 4, 2012. Our in-person registration is solid, so we are confident that we will have an ample quorum for business and fun. Our meetings will be held at the Montage, located at 30801 South Coast Highway, Laguna Beach.

The full Committee meeting will be held Saturday afternoon, beginning at 1:00 p.m. (Pacific Time). Most of our meetings will be available by conference telephone. The dial-in information for the full Committee meeting and the Committee Forum is as follows:

- U.S. and Canada: (866) 646-6488
- International: (707) 287-9583
- Passcode: 5842737852

Dial-in information for Subcommittee and Task Force meetings is included in the schedule of meetings and other activities of our Committee starting on page 24 of this issue of Deal Points.

Full Committee Meeting

As always, we anticipate having a lively Committee meeting on Saturday. Topics include the following:

- Bruce H. Goldfarb of Okapi Partners, LLC will present “Current Proxy Solicitation and Investor Response Issues for M&A Campaigns” (topics include whether to have a merger vote or launch a tender offer, the role of proxy voting advisory firms in the process, and the impact of activist investors on a campaign);
- Our Council representative Joel I. Greenberg, Kaye Scholer LLP, will update the Committee
on options for the future of the Business Law Section’s involvement with the big ABA;

- Shaun Clark, Sheppard Mullin LLP, and Clark Hallren, Clear Scope Advisors, will present our Industry Forum focused on M&A in the entertainment industry;

- John K. Hughes, Sidley Austin LLP, and Thomson Reuters Accelus will review 2011 global M&A activity, and will make predictions for 2012;

- Our M&A Jurisprudence Subcommittee will highlight recent M&A cases of interest, including a review of Coughlan v. NXP B.V., the disturbing step transaction case;

- Appleby Global Group Services Limited will present an overview of board duties in M&A transactions involving Cayman and other offshore companies;

- Richard R. Spore, III of Bass, Berry & Sims PLC, will overview his book entitled “Guide to Business Divorce,” recently published by the ABA;

- Richard A. Climan, Dewey & LeBoeuf LLP, will offer remarks on “Drafting Traps for the Unwary M&A Practitioner;” and

- Donald J. Wolfe, Jr. and Mark A. Morton, Potter Anderson & Corroon LLP, and C. Stephen Bigler, Richards Layton & Finger P.A., will present lessons from Southern Peru, as well as a more general discussion about litigation issues (what issues are being litigated in deals, disclosure issues, how they get settled (and issues arising from those settlements)).

The schedule continues to evolve; please let me know if you have any additions to the agenda.

**Committee Forum**

Dennis J. White, Verrill Dana LLP, has organized what promises to be an excellent Committee Forum titled “Legal Project Management: A New Framework for Bringing Deals to Closing – and Getting Paid for It.” The program will overview recent developments in project management methods, practices, and tools for running M&A transactions. A major part of what all M&A lawyers do is project management – they just often do not recognize it as such. Project management practices have already infiltrated most other professions – from architecture to medicine. More and more general counsel are insisting that their lawyers adopt sophisticated project management methods to ensure that nothing is dropped, that responsibilities are coordinated, and that the deal progresses smoothly. A number of firms around the country have in recent years adopted project management protocols in response to client needs and as a way to distinguish themselves from the competition. It is a proliferating phenomenon that no deal lawyer can afford to ignore.

In addition to serving as a visibility raising event, the session is intended to be a recruiting tool for a new task force under exploration that will investigate this area. Closely linked to project management is alternative fee arrangements for deals, and we can envision the task force delving into this area as well.

Speakers, in addition to Den White, include Byron S. Kalogerou, McDermott Will & Emery LLP, and Aileen Leventon, President, QLex Consulting, Inc.

*CLE credit will be awarded for attendees of this program.*

**Subcommittee and Task Force Meetings**

Your leadership promises substantive presentations during our various Subcommittee and Task Force meetings. In particular, the inaugural meeting of our Task Force on the Revised Model Asset Purchase Agreement will be held in Laguna. Chair Edward A. Deibert, of Arnold & Porter LLP (formerly Howard Rice Nemerovski Canady Falk & Rabkin), is hoping for many enthusiastic volunteers. If you are a member just getting started with our Committee, I can relate that long-term involvement in the creation of one of our seminal model agreements is the best experience our Committee has to offer.

And on the subject of new undertakings, consider joining our recently organized Task Force on Financial Advisor Disclosures. Yvette R. Austin Smith, Stout Risius Ross, Inc., and Stephen M. Kotran, Sullivan & Cromwell LLP, relate that at our meeting in Laguna, the Task Force will review a beta version of the Disclosure Database, and consider other initiatives under consideration. And I am excited to relate that
the new Task Force on Financial Advisor Disclosures is hosting its first stand-alone event in New York City on April 19, 2012. The meeting will feature Vice Chancellor J. Travis Laster of the Chancery Court of the State of Delaware.

Our Joint Task Force on Corporate Governance in M&A Transactions is also in its formative stages. I am confident that Diane Holt Frankle, Kaye Scholer LLP, and Patricia O. Vella, Morris Nichols Arst & Tunnell LLP, would welcome your attendance. And our Task Force on Two-Step Auctions is relatively new and exciting.

When you are planning your attendance at our various meetings in Laguna, these new offerings seem very worthy of your consideration. And of course our “legacy” Subcommittees will offer their typical quality programming.

Thanks to our Sponsors

Our ability to host quality networking activities at our meetings are due in large part to the willingness of sponsors to underwrite a material portion of the costs of our events. I would very much like to thank our three sponsors for Laguna Beach: Appleby, which is sponsoring our dinner Friday night, Merrill Corporation, which is sponsoring our dinner Saturday night, and Thomson Reuters, which is sponsoring a yet-to-be determined networking opportunity. Please take the time to show your appreciation to representatives of these organizations at our meeting.

Highlights: Negotiated Buy-Outs as a Business Divorce End Game

As noted above, Richard Spore will present at our full Committee meeting on business divorces. I did not ask Richard to participate because he is my law partner. I invited him because he is the funniest lawyer I know. I promise there will be substance as well.

As an overview, Richard will explore the issues that arise when owners of a privately held company cannot get along. We M&A lawyers often leap to the conclusion that the sale of the business is the obvious response in this situation. However, a negotiated buy-out of shareholders or division of the company’s assets may allow the owners to preserve more of the business’s going concern value than a sale, or the nuclear option of a judicially administered liquidation.

Important concepts if the owners’ existing agreements do not already provide a buy-sell or other contractual mechanism for resolving the business divorce include the following:

- When a company’s assets are such that they can be divided into operationally discrete groupings, like discrete groupings of more or less fungible franchised fast food restaurant outlets, or hotels, or tracts of farmland – consider having one owner divide the assets into groups for division between the owners and having the other pick which group of assets he or she wants. Under these kinds of special circumstances, the model of “one owner divides the assets and the other owner picks” may be a good solution.

- Consider having the warring owners adopt a traditional “russian roulette” type buy-sell agreement under which either owner can offer to buy out the other, who must accept the buy-out offer or, alternatively, buy out the offeror on the same proportionate pricing and same terms. Consider whether this superficially even-handed approach may benefit one owner at the expense of the other.

- Another alternative in a business divorce when the only real dispute is the value of the interest of the owner who is to be bought out is baseball style arbitration. Each owner is required to submit a proposed value for the interest to be purchased to the arbitrator/valuator, who is limited by the terms of the arbitration agreement to choosing one of the two competing proposed valuations.

- And in the end, consider whether a sale to a third party – whether of the entire company or a particular owner’s interest in the company – may be the best answer for owners who cannot get along. In connection with this approach, the lawyer should determine whether the owners have already adopted any tag-along, drag-along, or right of first refusal provisions, or other contractual restrictions on transfer, that could help or hinder this strategy.

Remember that a buy-out or other transaction that resolves a business divorce must be documented as carefully as any other business deal. If anything, it has
to be more carefully documented since the parties to
the deal already have a proven inability to get along. Of
course, the parties should confirm the tax consequences
of their negotiated business divorce resolution before
they sign any definitive documentation, because after
they sign, it will probably be too late to restructure the
deal to address tax problems. If a business litigator is
driving the train on a business divorce, he or she needs
to make sure a deal lawyer is involved if the dispute will
be resolved with a business transaction like a buy-out.

What They Don’t Teach Law Students: Lawyering

In closing, please indulge me for a personal
statement. One of my goals as chair of our Committee
has been to devise ways to attract young lawyers –
even law students – to our group. I have long felt that
our Committee serves as an excellent educational
platform for new attorneys. In my view, law schools
have traditionally failed to effectively focus on practical
training, perhaps for fear they will be viewed over time
as just trade schools. Thus Haley v. Baxendale is still a
staple in first year contracts – although it involved an
1854 dispute about financial damages caused by the late
delivery of a crankshaft to a British miller. I have posited
that we should develop ways to fill some of these gaps.

Thus I read with interest a November 20, 2011
article in the New York Times. The article, entitled “What
They Don’t Teach Law Students: Lawyering,” echoed some
of my themes and suggested many others. As we all know,
the time during which we could expect clients to pay us
to educate young lawyers has in large part passed. The
NYT article relates, “for decades, clients have essentially
underwritten the training of new lawyers, paying as much
as $300 an hour for the time of associates learning on the
job. But the downturn in the economy, and long-running
efforts to rethink legal fees, have prompted more and
more of those clients to send a simple message to law
firms: Teach new hires on your own dime.”

Further on this theme, the piece related: “Last
year, a survey by American Lawyer found that 47% of law
firms had a client say, in effect, ‘We don’t want to see
the names of first- or second-year associates on our bills.’
Other clients are demanding that law firms charge flat
fees.”

My challenge to you is to consider ways in
which we can assist young lawyers gain practical M&A
experience and become valued counselors to real

clients. Wilson Chu, K&L Gates LLP, is spearheading our
consideration of participation in a “Deal Lawyering Meet”
that will pit law schools teams against one another in the
mock negotiation of an M&A transaction (i.e., moot court
for budding M&A lawyers). Current plans are to launch
the first “Meet” in the fall in coordination with Professor
Karl Okamoto of Drexel University School of Law (who
pioneered the “Lawyering Meet” competition). Please
let Wilson know if you are interested in working on that
undertaking, and let any member of leadership know of
your ideas on this topic.

* * *

We look forward to many interesting
and productive conversations at our Committee,
Subcommittee, and Task Force meetings. And for those
attending in person, we look forward to great networking
opportunities, a break from U.S. presidential debates,
insight into the resolution of Europe’s economic crisis,
and temperate weather.

* * *

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Published by the American Bar
Association Business Law Section
Mergers and Acquisitions Committee
M&A Practice in the Early Years

By Neal H. Brockmeyer

M&A practice has changed dramatically since some of us became lawyers. There have been many technological advances in the way acquisitions are documented, negotiated and closed, as well as a number of significant legal and accounting developments affecting acquisitions. Stepping back and reflecting on how this practice has evolved over the past 50 years may be enlightening for some and undoubtedly will provide an opportunity for others to reminisce.

To keep this piece at a moderate length, I’ll concentrate on the acquisition of private companies. After covering some preliminary matters, including structuring an acquisition, the rest of the M&A process will be discussed, ending with the closing.

Preliminary Considerations and Structuring

The general process for finding a buyer hasn’t changed much, but the method of searching has become more refined for the larger acquisitions. Investment bankers can now use sophisticated computer programs to determine the areas of interest and capacity of prospective financial buyers and then go to their websites to acquire additional information. Descriptions of the larger acquisitions by public companies can be readily found through EDGAR and on their websites. This greatly expands the universe of potential buyers, including those located abroad. What has changed is the significant involvement of private equity firms in the acquisition market and the competition they now pose both among themselves and with strategic buyers.

Another change is the prevalence of controlled auctions. For many years it was thought unseemly for a seller to be talking with more than one prospective buyer at the same time, let alone conducting an auction process. While the order differs, these auctions now entail teasers, nondisclosure agreements, books, due diligence, management presentations and the submission of indications of interest and proposals. To facilitate due diligence, it once was typical for the target to establish a data room at its counsel’s office or some other off-site location with hard copies of documents for review by potential bidders. In recent years these documents are more likely to be posted in a virtual data room, which is an Internet site with controlled access. This is certainly more efficient and cost-effective for both sellers and potential buyers. Among other things, it removes the need for counsel or the investment bankers to physically monitor the removal and copying of documents. It also eliminates having to task some junior person with removing staples, folding pages, applying coffee stains and otherwise making it look like the documents had been reviewed by many others. In most of these auctions, seller’s counsel will prepare a draft of the purchase agreement, which is then sent to the potential bidders or posted in the virtual data room with the request that the bidders provide a marked copy of the agreement with their bid. This is a significant departure from the general practice of buyer’s counsel preparing the purchase agreement. It allows a target to evaluate most of the terms of a proposal, and not just the basic economics, in deciding on a buyer.

At some point after preliminary discussions had taken place between a potential buyer and seller, it was quite common to arrange for a face-to-face meeting involving the principals and counsel, even though this might require travel across the country. One of the reasons for such a meeting was to explore alternative methods of structuring a transaction. There were often corporate and securities law implications that came into play. A great deal of time during these years was also devoted to consideration of the tax law and accounting principles as applied to the various alternatives. Most M&A lawyers still have a fairly decent knowledge of the pertinent tax and accounting concepts, but we are far more likely to defer to the tax lawyers and accountants because of the increased complexity.
One of the structuring issues arose from the buyer’s use of stock as part of the purchase price. Some of these acquisitions could be structured as tax-free reorganizations under Section 368 of the Internal Revenue Code. The basic considerations remain fairly much the same, but many structural variations have made a determination of whether an acquisition can be accomplished on a tax-free basis more complicated. One of the difficulties was advising clients on how long they had to hold their stock to meet the continuity-of-interest requirement for tax purposes. Another issue related to their receipt of the stock and the ability to resell it in the public market under the federal securities law. Most relied on the exemption in Section 4(2) of the Securities Act of 1933 for the issuance, and Section 4(1) of that Act for the resale, of the stock. There was considerable uncertainty in applying these exemptions to acquisitions, particularly those involving passive investors or large numbers of shareholders. While there were some earlier “safe harbor” rules and registration forms, it was not until the SEC’s adoption of Regulation D for the issuance of the stock and Rule 144 and Form S-3 for its resale that we could chart our way with a greater degree of certainty. These changes came about in the 1970s and early 1980s.

Two particularly significant tax and accounting developments greatly affected the structure of acquisitions and are worth mentioning. The first is the repeal in 1986 of the General Utilities doctrine and the second is the elimination in 2001 of the pooling-of-interests method of accounting for acquisitions.

From a tax standpoint, many transactions had been structured to take advantage of the General Utilities doctrine, which took its name from a 1935 Supreme Court case and was then incorporated into the Internal Revenue Code. Under this doctrine, corporations could sell their assets and distribute the sales proceeds and remaining assets to their shareholders in liquidation, with only one tax being paid. In addition, under Section 338 of the Internal Revenue Code, buyers of at least 80% of the stock of a corporation could treat the transaction for tax purposes as the purchase of assets, with a step-up in basis, followed by the liquidation of the corporation. The General Utilities doctrine was repealed effective for transactions after December 31, 1986, and at the same time an exclusion of a portion of capital gains from ordinary income was eliminated, which had the effect of raising the maximum long-term capital gains rate from 20% to 28%. Not surprisingly, there was a tremendous surge in M&A activity in the second half of 1986. Many a corporate lawyer was asked, if not forced, to assist in these transactions, and all-night sessions were common as the end of that year approached. The General Utilities doctrine has been retained in Section 338(h)(10) of the Internal Revenue Code, but is limited to S corporations and wholly-owned corporate subsidiaries.

The other development was the Financial Accounting Standards Board’s elimination of the use of the pooling-of-interests accounting method for business combinations. The pooling-of-interests method was widely applied to acquisitions of businesses for stock, which allowed a transaction to be accounted for as the uniting of ownership interests in which the assets and liabilities continued to be carried at historical cost. As a result, no goodwill was recorded. The alternative was the purchase method in which any premium paid over fair market value was reflected as goodwill, which would ordinarily be amortized and expensed over a 20-year period. Since the purchase method had an impact on reported earnings of the buyer, the attorneys and accountants expended considerable effort to structure a transaction as a pooling of interests. As time went on, increasingly stricter interpretations by the accounting profession and the Securities and Exchange Commission made satisfaction of the requirements for pooling-of-interest treatment more difficult. Eventually, the FASB required that all business combinations be accounted for under the purchase method, effective June 30, 2001. While goodwill would still be recognized, as an accommodation to the business community, it would not be amortized and expensed, but was made subject to an impairment test. In 2007, the FASB expanded its overhaul of the accounting for business combinations, effective for transactions consummated after December 31, 2008. These developments required that we become familiar with entirely new accounting concepts. The changes affected not only the general accounting treatment for acquisitions, but also the accounting for earnouts, covenants not to compete and transaction-related costs.

Documenting the Transaction

Letters of intent, memoranda of understanding, term sheets and the like were commonly used in private transactions after a preliminary agreement had been reached by the parties. As is the case today, we could only hope that we would be consulted before these were signed by our clients.
At some point during the M&A process, we would be asked (normally when representing the buyer) to draft a purchase agreement that reflected the terms agreed upon by the parties. In the early years, searching for the right forms could consume a good deal of time. If we had worked on similar transactions, we could refer to bound volumes and closing clips or to the form files that we typically maintained. Otherwise, we relied on forms that had been used by colleagues in our firms. This often required visiting their offices to ask whether they had been involved in similar transactions or were otherwise aware of any forms that might be helpful. Even when suitable forms were found, the preparation of an agreement often involved a considerable amount of original drafting as the structures of the transactions and the wording of the representations and warranties and other terms evolved.

Today, many forms are readily available. Not only are forms from prior transactions maintained electronically by attorneys and firms, but many firms have prepared annotated forms for the different types of acquisitions. Forms are also available from various outside sources, such as the model agreements published by the ABA Business Law Section and in the Practising Law Institute program materials. We also have access to agreements for some of the larger private transactions through the SEC’s website.

The forms we chose were generally typewritten, which meant that they had to be marked-up and retyped. In the early 1960s they were drafted on standard typewriters with moveable carriages, and copies were made by inserting carbon paper between the pages. Unlike today, it was very rare for a lawyer to type anything, certainly not a purchase agreement, so this task was delegated to a secretary. As a young associate, you did everything you could to avoid making changes that would require a secretary to retype an agreement. Often forms were marked up and new or revised provisions were written out in long hand by the lawyer. Before recording machines came into general use, some would dictate these provisions to a secretary who would take them down in shorthand. There are still a few secretaries around who are proficient at shorthand, but that’s pretty much a lost art.

With the introduction of photocopy machines, we actually got pretty good at cutting and pasting. Paragraphs would be typed separately and copied, after which they would be cut and arranged in the desired order on a page and then recopied as complete pages. Many agreements were drafted double spaced on legal size paper, which facilitated cutting and pasting. This process didn’t work well with the first wet copiers because they produced poor-quality copies that would then dry and crinkle. It only became practical when dry copiers were introduced and improved to the point that the writing could be preserved.

Over the next few decades, typing a purchase agreement became easier. The IBM Selectric typewriter became available later in the 1960s and began replacing standard typewriters. The Selectric’s individual letters on a revolving ball made typing much faster. During this period, liquid “white out” and correction tape were also developed for making corrections. The other innovation was IBM’s MT/ST (Magnetic Tape/Selectric Typewriter) that in a rudimentary way permitted the editing, storage and manipulation of text on magnetic tape, and eliminated having to retype an entire agreement. The MT/ST was introduced as the first word processor in 1964 and became obsolete in the 1970s in favor of floppy disk-based word processing systems. While the MT/ST was certainly an improvement over using a typewriter or cutting and pasting, it still had its drawbacks. For one thing, MT/STs could be used only by a few specially trained secretaries.

It was such an effort during this early period to draft an agreement, particularly a long one, that in some cases it was actually cost-effective to have it set in type and printed by a financial or commercial printer. This of course was required for agreements that were to become attachments to proxy statements or exhibits to registration statements or other filings with the Securities and Exchange Commission. The agreements would be set in type on a linotype machine, which required spending time at the printer, but that’s another story.

Fortunately, purchase agreements were much shorter during this period, particularly the representations and warranties. The increase in length was caused to some extent by new legislation and governmental regulation. For example, the representations and warranties dealing with a target’s employee benefit plans greatly expanded after the adoption by Congress of the Employee Retirement Income Security Act of 1974 (ERISA). Similarly, the environmental representations and warranties became far more extensive in the 1970s.
with the enactment of the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act and the Resource Conservation and Recovery Act, and in the 1980s as a result of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Some of the other representations and warranties that have become lengthier over time are those dealing with tax matters and intellectual property, especially those relating to computer hardware and software.

**Distributing and Negotiating the Agreement**

Once the purchase agreement was drafted, the next problem was delivering copies to the client and the other participants in the transaction and then negotiating revisions. Sending it as an attachment to an email was of course not an option. Distribution those days was relatively easy if all the parties were local. While it was possible to send documents by air, the cost was quite high, particularly if delivery was to be expedited or couriers were to be used. The U.S. mails were therefore relied upon for the most part in delivering drafts out of the area. Turning the documents and delivering them through this process was quite time consuming, but somehow deals still were signed up and closed. Fax machines became feasible only in the mid-1970s and weren’t widely used until the 1980s. Who can forget the smell of the early faxes? The costs became more reasonable when Federal Express, UPS and other all-cargo airlines began making deliveries. It was not until 1977 that the geographic coverage of these airlines was greatly expanded through deregulation.

In negotiating an agreement, we had limited access to information about what terms were “market,” and had to rely largely on our own experience or those of colleagues in our firms. Some information could be gathered through continuing education programs and anecdotally. There were no surveys available like the Deal Points Studies to consult. For guidance in conducting negotiations, most of us turned to several books authored by James Freund.  


Concepts relating to limitations on liability evolved slowly, as did the adoption of terms such as “baskets” and “caps.” In the early years, it was unusual for the liability of sellers to be limited by contract to the purchase price, let alone a percentage of the purchase price. If any time limit were to be placed on the right to indemnification, it was typically a period well in excess of 12 or 18 months. Termination fees, and certainly reverse termination fees, were less common and were more likely to be characterized as good faith deposits. Today, we have our own M&A jargon, and terms are constantly being created for new developments and concepts. Examples include “materiality scrape,” “sandbagging/anti-sandbagging” and “MAC clause.” The current availability of model agreements and forms, as well as the surveys and analyses of deal terms, have resulted in much greater standardization in the wording of purchase agreements and, to some extent, the economic terms.

It was customary in negotiating an agreement, as it is now, to provide a copy showing all the changes that had been made from the prior draft. In order to do this, the lawyers would have to maintain a record of all changes made to the draft and mark by hand a clean copy of the revised agreement to show the changes. This was often a job for two people, one of whom would read the old draft out loud with the other marking the changes on the new draft. For a lengthy document, this could add several hours to the process of distributing agreements, and inevitably was performed late at night when everyone was already exhausted. Computer programs that compare and mark changes have eliminated this formerly tedious process.

**Closing the Acquisition**

The conditions to closing a transaction haven’t changed too much, although the wording is different in some respects. In the early years, opinions of counsel were almost always required as a condition to closing. The form and content of these opinions varied widely, leading to extensive negotiation, much to the consternation of our clients. Very little had been written on the subject and consequently there was limited guidance. Beginning in the 1970s, several helpful articles appeared that were followed by a number of reports on opinions in corporate transactions that were issued by state and local bar associations. An attempt was made in 1989 to provide some standardization for these opinions with the Silverado Summit in California and the Accord that resulted from this effort. Although the Accord was not widely accepted as the form for these opinions, the guidelines and discussion of the meanings of terms...
in the Accord and in these other articles and reports did provide some standardization of the approach and facilitated negotiation.

Several new conditions to closing have been added over the years. These include, when applicable, antitrust clearance under the Hart-Scott-Rodino Act of 1976 and foreign investment review under the Omnibus Trade and Competitiveness Act of 1988 (Exon-Florio), both of which can significantly affect the timing for closing a transaction.

It was not uncommon to experience complications at the last minute before a closing, but fortunately the cause of many of these has been eliminated. A few examples in California will suffice to demonstrate some of the issues that arose. Until 2006, the California Franchise Tax Board required that a merging corporation obtain a tax clearance certificate. For a time, this requirement even applied to a transitory California corporation that was incorporated for the sole purpose of merging into the target in a reverse triangular merger. The failure to apply for and obtain a tax clearing certificate delayed more than a few closings. Another problem in California arose involving stock certificates that originally had been issued bearing a legend under the California Corporate Securities Law to the effect that the shares could not be sold or transferred without the prior consent of the Commissioner of Corporations. If the stock certificates were not examined prior to delivery at closing, counsel could be in for a big surprise. Since the mid-1990s legends have not been required, and corporations have been permitted to remove certain of the older legends from certificates.

For those acquisitions involving a merger, filings with one or more secretaries of state or similar governmental authorities would be necessary. In the early years, original typed documents with original signatures were required, which presented some logistical problems. Photocopies were not permitted because the characters would have a tendency to disappear. We would often send undated, signed originals to be held by a service firm in the cities in which the filings were to occur. There could be a significant delay between submission and confirmation of a filing, particularly in those states, such as California, in which a substantive review was undertaken to confirm that the documents complied with the applicable corporation law. In more recent years, PDF copies with signatures can be filed, and expedited preclearance and filing can be arranged at a price, all of which make the process more manageable and less stressful.

Closings in the early years took place in person. Several days would be devoted to preparing for and conducting a closing. The various transfer documents, certificates, receipts and ancillary documents were set out a day or so in advance on a conference table in the order listed in a closing memorandum. Counsel would first examine the documents, often making last minute corrections and revisions and, after they had been approved, the parties would go around the table signing them. This might take place in one conference room or, when a financing was involved, several conference rooms, each devoted to a specific part of the transaction.

Because closings were usually attended by the principals or senior officers of the parties, a ceremony often was expected. It might involve going through the closing memorandum to show what had been accomplished and then the parties would exchange one or two significant documents, often a check, stock certificates and a receipt. This sometimes was memorialized by photographs and the distribution of ceremonial pens. Aside from having the principals feel they were actively participating in the closing, seeing the numerous documents laid out on the table gave them a sense of the effort that went into the transaction. A closing dinner or luncheon typically took place later at a nice restaurant, and plastic cubes containing the announcements or other mementos often were distributed to commemorate the acquisition.

Today, most closings are conducted remotely through the exchange of signature pages in PDF files. Stock certificates and stock powers, or other transfer documents, are typically sent to buyer’s counsel in trust pending the closing and funds are transferred by wire rather than by check. It’s becoming rare, except in the case of the sale of smaller closely-held companies, to be in the same room with the parties and counsel. As a matter of fact, it’s not unusual to never have met with lawyers on the other side of a transaction, or for that matter our own clients. Closing dinners or luncheons still take place, but are far less common.

Following the closing, the transaction documents were bound together with vinyl or leather bindings. Green seemed to be the color of choice for many, but occasionally black, maroon or even two colors were used.
These would then be placed in the lawyer’s bookcases as evidence of his or her accomplishments. It is more common now to deliver to the client and put in the file soft cover binders of the original, signed documents, and then burn a copy into a CD for future reference by the lawyers. Thankfully, this avoids running out of space in our bookcases. In prior years we used the preparation of an index and the assembly of these documents as a training exercise for young lawyers, but today it’s more likely to be put together by a paralegal.

*   *   *

It’s difficult to judge the extent to which these technological developments and other changes, aside from shortening and, to some extent, simplifying the M&A process, have been beneficial. I do sometimes wonder, however, whether transactions are moving at too fast a pace, and about the effect that providing comments and revising documents in real time may have on the quality of the legal work. There was something to be said for putting the draft of an agreement in the mail and actually thinking about it while it made its way to the other participants. Perhaps the increased availability of forms and the standardization of many of the provisions of purchase agreements has made this less of a worry. Another observation is that we don’t spend as much time with the young lawyers on a project explaining some of the techniques and nuances of the practice. For private practice, this is one of the results on the high billing rates for our young lawyers and the pressure on billable hours. Fortunately, the in-house training in our firms and through continuing education programs has improved and expanded, and law schools are even providing helpful courses dealing with the M&A practice. In any event, participating in the M&A process remains one of the most challenging and rewarding areas of the legal practice.

*   *   *

Delaware Law and Disclosures Relating to Financial Advisors in M&A Transactions

By Timothy R. Dudderar and Daniel A. Mason

Corporate boards rely upon financial advisors to perform essential functions in M&A transactions, including designing, implementing and overseeing sale processes, as well as evaluating and ultimately opining on the fairness of the consideration offered to the target company’s stockholders. Given the importance of the financial advisor’s role in M&A transactions, legal challenges to such transactions often focus on disclosures concerning the foundation of the financial advisor’s fairness opinion, the financial advisor’s fee structure and potential conflicts of interest.

Legal challenges to M&A transactions often play out before the courts of the State of Delaware, which have issued several recent decisions addressing such financial advisor-specific issues. This article will analyze and discuss the significance of several recent decisions issued by the Delaware Court of Chancery addressing the materiality and disclosure of (i) potential conflicts of financial advisors and (ii) an acquiring company’s own projections.

The Duty of Disclosure Under Delaware Law

Delaware law has long recognized a duty of disclosure, derived from the fiduciary duties of loyalty and due care, owed by corporate directors to their company and its stockholders. In the context of an M&A transaction where the board is requesting stockholder action, the duty of disclosure requires that the directors “disclose fully and fairly all material information within the board’s control[].” A plaintiff challenging a transaction on the basis of omitted or inadequate disclosures must demonstrate “a substantial likelihood that the disclosure of the omitted fact would have been

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viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”

Where stockholders seek injunctive relief to prevent the consummation of a challenged transaction, disclosure issues are typically the centerpiece of such request, as material disclosure deficiencies are best remedied through injunctive relief rather than post-transactional awards of monetary damages.³

**Potential Conflicts and Fees**

Though questions regarding financial advisor compensation and independence are certainly not new to Delaware courts,⁴ the issue was recently brought to the fore in *Del Monte*, wherein Vice Chancellor Laster states the following:

> Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.⁶

The specific alleged conflict in *Del Monte* was the participation of the Del Monte board’s financial advisor (Barclays Capital) in the buy-side financing (so-called “staple” financing) of the acquisition of Del Monte by a group of private equity firms. The Court’s decision did not focus upon the disclosure of this potential conflict—indeed, Barclays’ participation in the buy-side financing had been disclosed to Del Monte’s stockholders—but rather the Court’s concern that such participation potentially affected the integrity of the sale process and Barclays’ advice to the Del Monte board.

Several months before *Del Monte*, Vice Chancellor Laster addressed a stockholder challenge to a transaction premised, in part, upon the target company’s alleged failure to adequately disclose its financial advisors’ significant prior work for the acquiror. In *In re Art Technology Group Shareholders Litigation*, plaintiffs sought to preliminarily enjoin the stockholder vote on the acquisition of Art Technology Group (“ATG”) by Oracle Corporation, claiming in part that ATG’s proxy statement failed to disclose extensive prior work that its financial advisor, Morgan Stanley, had performed for Oracle. In the section concerning Morgan Stanley’s fairness opinion, the proxy provided that “[t]he two years prior to the date of its opinion, Morgan Stanley has provided financial advisory services for [ATG] and Oracle and has received fees in connection with such services.” Plaintiffs argued that this statement was incomplete and misleading as discovery had revealed an extensive amount of advisory and financial services work performed by Morgan Stanley for Oracle over the previous five years and comparatively minimal work for ATG.

Vice Chancellor Laster expressed his discomfort with the proxy’s terse disclosure of Morgan Stanley’s prior work for Oracle “given the magnitude of the fees on the Oracle side,” and found the lack of disclosure of such prior work “material.”⁵ The Vice Chancellor reasoned that knowledge of Morgan Stanley’s “historical buy-side work ... might cause ... a stockholder to believe that Morgan Stanley had some interest in pleasing the buyer or maintaining good relations to the buyer.”⁶ On that basis, the Vice Chancellor enjoined the stockholder vote and ordered ATG to disclose the following information:

1. The aggregate compensation paid by Oracle to [Morgan Stanley] during each of 2007, 2008, 2009, and 2010 and (ii) a description of the nature of the services provided by Morgan Stanley to Oracle.⁷

Vice Chancellor John Noble has also recently addressed the materiality of disclosures concerning

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³  See In re Staples, Inc. S’holders Litig., 792 A.2d 934, 960 (Del. Ch. 2001) (“[O]ur cases recognize that it is appropriate for the Court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected.”).

⁴  See, e.g., Khanna v. McMinn, 2006 WL 1388744, at *25 (Del. Ch. May 9, 2006) (finding that plaintiff had sufficiently pled reasonable doubt that transaction was valid exercise of business judgment where financial advisor had provided bridge loan to target); In re Toys “R” Us, Inc. S’holders Litig., 877 A.2d 975, 1000 (Del. Ch. 2005) (addressing potential conflict of target’s financial advisor who had expressed a desire to provide buy-side financing).

⁵  In re Del Monte Foods Co. S’holders Litig., 25 A.3d 813, 832 (Del. Ch. 2011).


significant, prior work by a target’s financial advisor for the buyer. In *In re Ness Technologies, Inc. Shareholders Litigation*, the stockholder plaintiffs challenged a merger on the partial basis that the proxy lacked detail regarding prior work the financial advisors for the target board (and special committee thereof) had performed for the buyer. Vice Chancellor Noble authorized expedited discovery regarding that disclosure, reasoning as follows:

If the amount of business that one of the financial advisors has done with [the buyer] or its affiliates is material, then the failure to disclose fully the extent of that business could violate the duty of disclosure. By contrast, if the amount of business involved is not material to either financial advisor, then the existing disclosures would likely be adequate.

Vice Chancellor Noble also provided recent guidance on disclosure issues involving the structure and amount of a financial advisor’s compensation. In *In re Atheros Communications, Inc. Shareholder Litigation*, plaintiffs sought to preliminarily enjoin Qualcomm Incorporated’s acquisition of Atheros Communications, Inc., alleging, among other things, that Atheros’s proxy statement failed to fully or adequately disclose the fee arrangement between Atheros’s board and its financial advisor, Qatalyst Partners. The proxy statement disclosed the following:

> [Qatalyst] will be paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which will be paid upon completion of the Merger.

Vice Chancellor Noble held this disclosure to be inadequate because it failed to divulge the amount of compensation that Qatalyst would receive, and “perhaps more importantly” that 98 percent of the fee was contingent upon the completion of the Qualcomm merger. While noting that there is nothing inherently wrong with a financial advisor receiving a fee contingent upon the occurrence of a transaction, the lack of disclosure in this instance was problematic because “the differential between compensation scenarios may fairly raise questions about the financial advisor’s objectivity and self-interest.” Although the Vice Chancellor declined to draw a bright line rule providing for disclosure of contingent fees above or below any specific ratio, he held as follows:

> [l]t is clear that an approximately 50:1 contingency ratio requires disclosure to generate an informed judgment by the shareholders as they determine whether to rely upon the fairness opinion in making their decision to vote for or against the Transaction.

More recently, in *In re Orchid Cellmark Inc. Shareholder Litigation*, Vice Chancellor Noble distinguished *Atheros* in the context of a challenge to a tender offer. Plaintiffs alleged inadequate disclosures concerning the terms of the financial advisor’s engagement agreement, which allegedly restricted the scope of the financial advisor’s engagement and “facially excluded” a potential transaction involving the sale of the company’s U.K. operations. Vice Chancellor Noble disagreed with plaintiffs’ interpretation of the engagement agreement, finding that it pertained to a broader range of possible transactions and would “arguably” cover such a sale. In the absence of any evidence that the company would have attempted to avoid paying the financial advisor’s fee in relation to such a sale, Vice Chancellor Noble held that “unlike the terms of engagement in *Atheros*, the terms of the financial advisor’s engagement here do not create an unavoidable conflict of interest that requires a curative disclosure.”

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11 *id.* at *1* and n.3.
12 *id.* at *3*.
14 *id.* at *8*.
15 *id.*
The foregoing decisions provide the following key takeaways and practice points:

- In view of the central role of financial advisors in M&A transactions, practitioners should expect courts to require full and fair disclosure concerning such advisors’ compensation and potential material conflicts.

- To permit clients to adequately and appropriately address, mitigate and disclose a financial advisor’s potential conflicts, practitioners should consider including in the financial advisor’s engagement letter provisions requiring the financial advisor to notify the client of any such conflicts, as well as other protections or conditions to the extent a conflict arises.

- Practitioners should proceed with caution where a financial advisor has an interest or relationship that is potentially or conceivably adverse to those of its client, such as a significant, prior relationship with a transactional counterparty.

- Where stockholders are entitled to vote upon an M&A transaction, stockholders should be afforded material information concerning (i) the source, amount or contingent-nature of a financial advisor’s compensation and (ii) the nature or extent of a financial advisor’s actual or potential conflicts of interest. The failure to disclose such material information may lead a court to enjoin the contemplated transaction.

### Disclosure To An Acquiror’s Stockholders of Projections Provided To Its Financial Advisor

In two recent opinions, the Court of Chancery has provided guidance concerning the potential materiality of an acquiror’s projections in the context of a strategic acquisition upon which the acquiror’s stockholders are entitled to vote. It is long-settled that stockholders of Delaware corporations are entitled to a “fair summary” of the substantive work performed by a board’s financial advisors in the context of a merger vote or tender offer. At minimum, such summary should generally include a description of the valuation exercises underlying the financial advisor’s fairness opinion, the “key assumptions” used in performing such exercises, and the range of values thereby generated. Although a “fair summary” under Delaware law does not require the disclosure of projections provided to or relied upon by the company’s financial advisor in every instance, the Court of Chancery has consistently suggested—at least in the context of target company stockholders being asked to vote on a cash-out transaction—that projections of future performance provided to or relied upon by the financial advisor are “clearly” material to the stockholders’ decision.

The utility and materiality of cash flow estimates and projections in the cash-out context is readily apparent, as stockholders must decide whether to stay the course or, alternatively, to accept the offer on the table and thereby forsake an interest in future cash flows. But the materiality of such projections to an acquiror’s stockholders in voting upon a stock issuance in connection with a proposed acquisition is less clear. In the course of negotiating or validating an appropriate exchange ratio, an acquiror may consider its projections alongside those of the target. In doing so, an acquiror may render its own projections material to its stockholders’ assessment of such ratio, especially where projections are relied upon by the acquiror’s financial advisor in opining on the fairness of the projections.

In *In re S1 Corporation Shareholders Litigation*, Vice Chancellor Donald Parsons, Jr., considered a stockholder challenge to the preliminary proxy statement issued by S1 Corporation in connection with a stock-for-stock merger with Fundtech, Ltd., following which S1’s
stockholders would own approximately 55 percent of the merged entity.²⁹ In connection with the contemplated merger, S1's stockholders were required to approve various proposals, including the issuance of shares to Fundtech's stockholders pursuant to the exchange ratio specified in the S1-Fundtech merger agreement. S1's financial advisor, Raymond James, used and considered certain projections and cash flow estimates in rendering its opinion that the exchange ratio was financially fair. S1 had provided Raymond James with its own projections through 2016; Fundtech's internal projections through 2012; and S1's projections for Fundtech from 2012 through 2016.³⁰ Plaintiffs sought to enjoin the vote on the S1-Fundtech merger on the basis, among others, that S1 had failed to disclose such projections and free cash flow estimates in its preliminary proxy. S1 and its board opposed expedition, arguing that S1’s projections for Fundtech were necessarily speculative and, in any case, the projections were immaterial to S1’s stockholders in the context of S1’s proposed stock-for-stock acquisition of Fundtech, which differed significantly from the context in which Delaware courts had previously required disclosure of financial projections.

In granting plaintiffs’ motion for expedited proceedings, Vice Chancellor Parsons acknowledged that this was not the “standard situation” wherein projections must be disclosed, i.e., one in which stockholders face the end of their investment.³¹ He noted, however, that S1 was asking its stockholders to dilute themselves through a stock issuance, and that a “very important aspect” of such decision, that a stockholder “would want to know,” is the propriety of the exchange ratio and projections underpinning the financial advisor’s fairness opinion.³² On the limited record and facts presented, Vice Chancellor Parsons held that the omitted projections were “beyond relevant” and might be material, and therefore plaintiffs were entitled to expedited discovery as to that claim.³³

Vice Chancellor Noble addressed a similar fact pattern in Gaines v. Narachi,³⁴ in which a stockholder of AMAG Pharmaceuticals, Inc., sought to preliminarily enjoin AMAG’s proposed merger with Allos Therapeutics, Inc., pursuant to which AMAG stockholders would own 61 percent of the resultant entity. Morgan Stanley had provided AMAG’s board with a fairness opinion concerning the exchange ratio under the proposed merger. The stockholder plaintiff alleged that AMAG’s proxy statement omitted material information by failing to disclose the forecasted free cash flows that Morgan Stanley had used in performing its discounted cash flow analysis.³⁵ Vice Chancellor Noble initially denied plaintiff’s motion for expedited proceedings, holding that such disclosure claims were not colorable. In subsequently granting plaintiff’s motion for reconsideration, the Vice Chancellor acknowledged that the predicate rationale for requiring disclosure of free cash flow estimates is absent in relation to a strategic acquisition, as the acquiror’s stockholders are not being cashed out.³⁶ Vice Chancellor Noble nevertheless concluded that plaintiff’s claims were sufficiently colorable to warrant expedited treatment, and therefore ordered the parties to supplement the record regarding the nature and source of the cash flow estimates and to submit briefs addressing their materiality.³⁷

The foregoing decisions provide the following key takeaways and practice points:

- Under Delaware law, stockholders asked to vote upon a proposed merger or tender their shares are entitled to a fair summary of the substantive work performed by a financial advisor on behalf of their corporation’s board of directors.

- In the cash-out context, a target corporation’s stockholders are generally entitled to disclosure of the target’s reliable projections, to the extent provided to and relied upon by the board’s financial advisor, in connection with their voting or tender decision.

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²⁹ Id. at 8.
³⁰ Id. at 24.
³¹ Id. at 28.
³² Id. at 17-18.
³³ Id. at 28. The preliminary injunction hearing was cancelled after Fundtech accepted an alternative transaction and the merger agreement was terminated, thereby mooting plaintiffs’ claims.
³⁵ 2011 WL 4822551, at *1.
³⁶ Id.
³⁷ Id. at *2.
• In two recent rulings, the Court of Chancery has suggested that, where an acquiror’s stockholders are entitled to vote in connection with a proposed stock-for-stock merger, the acquiror may need to disclose its own reliable projections to the extent provided to and relied upon by the acquiror’s financial advisor.

• In the recent rulings, the Court of Chancery did not determine that an acquiror’s projections are, in fact, material to its stockholders in the context of a stock-for-stock merger; rather, the Court merely determined at a preliminary stage that such claims were colorable. Accordingly, the materiality of such disclosures arguably remains an open question.

Conclusion

In light of the decisions discussed, corporate directors should remain vigilant and attentive to their financial advisors’ potential conflicts and, where such conflicts arise and are material, ensure their adequate and appropriate disclosure. Further, Delaware corporations—including those pursuing strategic acquisitions—should approach the provision of projections and cash flow information to their financial advisors with the expectation that public disclosure of the information may ultimately be required, as a financial advisor’s reliance upon the information may undercut any contention that it is immaterial to the stockholders’ consideration of the merits and adequacy of the proposal before them.

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TASK FORCE REPORTS

Joint Task Force on Governance Issues in Business Combinations

The Joint Task Force on Governance Issues in Business Combinations is one of our new Task Forces. Our Committee is pleased to have launched our first Joint Task Force with another Committee, in this case the Corporate Governance Committee. John Stout, the new Chair of the Corporate Governance Committee, and one of our Committee members, John Houston, initially came up with the seeds of this idea and it was proposed at our Committee’s New Projects Subcommittee meeting in Toronto. We have been asked to Co-Chair the Task Force for our Committee, and we are very excited to be sharing this role with Mike Halloran and Larry Hamermesh from the Corporate Governance Committee.

Our Task Force project is to prepare a Handbook on Governance Issues in Business Combinations. Prior to our inaugural meeting at the Fall Meeting of the Business Law Section in Washington D.C., we circulated initial thoughts on a handbook. We had almost 50 participants in person and on conference call at that first meeting! We had a robust discussion of this project, with lots of great ideas about the scope of and timeline for completing the handbook. We then developed a refined outline for the project.

The mission statement for the handbook is “to provide an analytical framework, with practical examples, for identifying and dealing with governance issues commonly arising in the planning and implementation of business combinations.” We want to make governance issues more transparent and provide practical advice for the M&A practitioner facing common governance problems. Our target audience will include experienced deal counsel, mid-level to senior corporate associates, in-house counsel, bankers, and directors.

We sent out a revised outline of the handbook organized by chapters to all who indicated an interest in the project. The entire handbook is estimated at about 200 pages but it could be longer depending on the treatment of the various topics. We want to be sure to cover practical, real world situations. We have asked our initial participants to volunteer for chapters or subchapters – initially volunteers are preparing detailed
outlines of the various chapters, and then they will tackle first drafts of the chapters. There are 25 chapters, many 4-5 pages, covering topics such as the special committee process, the shopping and auction process, negotiation of deal lockups, and Section 203. We will pay particular attention to various types of conflicts and the tools to deal with those conflicts. So far, eight chapters have been “spoken for” so there is still a lot of opportunity to dive in to this project!

If you are interested in seeing the detailed outline, or participating in our discussions on this exciting drafting project, please come to our next Task Force meeting in Laguna Beach, California, from 1:30 p.m. until 3:00 p.m., on Friday, February 3. You can also contact Tricia Vella at (302) 351-9349 or pvella@mнат.com and Diane Frankle at (650) 319-4518 or diane.frankle@kayescherler.com.

Diane Holt Frankle
Patricia O. Vella
Co-Chairs

Task Force on Financial Advisor Disclosures

As 2012 begins, we have some exciting news from the Task Force on Financial Advisor Disclosures. We hope you are able to participate and attend the following meetings.

February 3–4 Meeting

The Task Force will convene for a working session during the M&A Committee’s stand-alone meeting in Laguna Beach. Our task force is scheduled to meet on Friday, February 3, from 9:30 a.m. until 11:00 a.m. (Pacific Time). At the meeting we will review, and solicit feedback on, a beta version of the Disclosure Database. In addition, we hope to discuss some of the great suggestions we’ve received from members thus far about other task force initiatives and undertakings. For those who cannot attend in-person, we will certainly have a dial-in number. We are also considering a web-based meeting to facilitate viewing of the database by those not in attendance. If this is of interest to you, please contact the Task Force chairs.

April 19 Meeting

The Task Force will hold its first stand-alone meeting in New York City. We are very pleased to announce that Vice Chancellor J. Travis Laster of the Chancery Court of the State of Delaware will be our featured speaker at this meeting. Additional details will be forthcoming; however, please save the date. At a later date, we will require attendees to RSVP so that we do not exceed our capacity.

A Reminder

If you have not already done so (and to learn more about the Task Force on Financial Advisor Disclosures), please register for the Task Force on the ABA website. The link is accessible through the “Task Force” link on the M&A Committee website.

Yvette R. Austin Smith
Chair

Task Force on New Projects

At the ABA Annual Meeting in Toronto, the Task Force on New Projects met and discussed a number of ideas for new projects that could be undertaken by the M&A Committee, including updating the Model Asset Purchase Agreement and forming a task force on governance issues in business combinations. A task force for each of those projects is now up and running and both will be meeting at the stand-alone meeting in Laguna Beach. In Toronto, our Task Force also discussed possible work projects focused on project management and protecting minority interests, and a “Deal Lawyer Meet” that could be scheduled to coincide with the Spring Meeting in Las Vegas.

The Task Force on New Projects will not be meeting in Laguna Beach, but does plan to meet at the Spring Meeting in Las Vegas. We welcome your ideas, which can be provided either to Bruce Cheatham at bruce.cheatham@bgllp.com or John Clifford at john.clifford@mcmillan.ca.

Bruce Cheatham
Chair
John Clifford
Vice Chair

Task Force on the Revised Model Asset Purchase Agreement

I am very excited for the kick-off meeting in Laguna Beach for the work on the Revised Model Asset Purchase Agreement. We are open to all volunteers.
I hope everyone who decides to get involved will find this process to be enjoyable and also interesting. I especially encourage any new members joining the M&A Committee to get involved. I think working on a project like this is one of the best ways to see the great work that our Committee does, while also developing good working relationships with other members. If you are unable to make it to Laguna Beach, but want to be involved, please send me an email (Edward.Deibert@aporter.com) and we will add you to our working group list. For the rest of you, I look forward to seeing you on February 3, at 11:00 a.m.

Ed Diebert
Chair

Task Force on Two-Step Auctions

The goal of our Task Force is to prepare a seller-friendly form of tender offer agreement for a public company acquisition. We’ll also have alternative provisions reflecting what a buyer might request, and commentary explaining the various provisions and positions (similar to what was done in the recently completed Model Merger Agreement for a buyer-friendly merger agreement).

We’re scheduled to meet on Saturday, February 4, from 10:30 a.m. until 12:00 p.m. (Pacific Time), in Laguna Beach, as part of the M&A Committee’s stand-alone meeting. We’ll have a dial-in number for those who can’t make it. At the meeting, we’ll discuss changes in the text of the agreement and the commentary available at that time, and identify other issues. Let us know if you’d like to work on the text or the comments – Task Force members are already at work, but we could use more people to help with drafting and provide additional perspectives. Come early and sign up for your favorite issue! You also can email Rick or me in advance of the meeting.

We have a new webpage, under the Task Force’s links on the M&A Committee page on the ABA Business Law Section website. Please visit the website to add your name to the Task Force roster. We’ll post updates on the site as time goes on.

We look forward to seeing you in Laguna Beach.

Michael O’Bryan
Rick Alexander
Co-Chairs

SUBCOMMITTEE REPORTS

Acquisitions of Public Companies Subcommittee

The meeting of the Acquisitions of Public Companies Subcommittee to be held during the M&A Committee’s stand-alone meeting in Laguna Beach is scheduled for Friday, February 3, from 3:00 p.m. until 4:30 p.m. We have some interesting topics scheduled for discussion at our Subcommittee meeting.

Jim Moloney (Gibson, Dunn & Crutcher in Newport Beach) will discuss with us “What Public Company M&A Lawyers Need to Know about Reg M-A.” Jim is the Chair of the Business Combinations/Proxy Statement Subcommittee of the ABA’s Federal Regulation of Securities Committee, was formerly Special Counsel at the SEC, and was one of the primary draftspersons of Reg M-A. Jim will discuss some of the issues that public company M&A counsel should be aware of when advising buyers and sellers in their communication strategies relating to the announcement of the transaction. In addition, Yvette Austin Smith (Stout Risius Ross), Co-Chair of our Financial Advisor Task Force, and Steve Bigler (Richards, Layton & Finger) will lead a discussion surrounding the financial analysis performed by investment bankers in rendering their fairness opinion to the target board. In that discussion, we will hear some of the nuances of that analysis, and things that target counsel should be on the lookout for in representing target boards in a sale process. As many of you know, there have been a number of recent cases from the Court of Chancery that focus on this area, so this will be a timely presentation.

We will also hear from the leaders of our various Task Forces – Financial Advisor, Corporate Governance in M&A Transactions, and Two-Step Auctions – as to the status of their projects and where they might need some assistance. For those of you looking to become more involved with the Subcommittee, joining one of our Task Forces would be a great opportunity. There is a lot to do.

As is our tradition, we do not hold a separate Subcommittee dinner at our stand-alone meeting. However, we will hold a Subcommittee dinner at the Spring Meeting in Las Vegas. We’ve secured Bouchon (Thomas Keller’s restaurant) for our dinner, which will be
held on Friday, March 23, 2012. I hope you can join us.

I look forward to seeing everyone in sunny Laguna Beach!

Jim Griffin
Chair

International M&A Subcommittee

The International M&A Subcommittee met on Friday, August 5, 2011, in connection with the Annual Meeting of the ABA in Toronto, Canada.

M&A in Israel

The meeting began with a presentation by Daniel Gamulka of Gross Kleinhendler Hodak Halevy Greenberg & Co, Israel, on M&A in Israel, which was followed by a Q&A session.

Public Company Takeovers Project

Franziska Ruf of Davies Ward Phillips & Vineberg, Montréal, summarized the current state of play on the Subcommittee’s Public Company Takeovers Project she is leading with Daniel Rosenberg of Speechly Bircham, London.

International JV Agreement Project

Mireille Fontaine of Gowlings, Montréal, joined by phone and summarized the progress of the Subcommittee’s International JV Project she is leading with Freek Jonkhart of Loyens & Loeff NV, Rotterdam.

Foreign Direct Investment Project

Frank Picciola of Heenan Blaikie, Montréal, summarized the current status of the Subcommittee’s current Foreign Direct Investment Laws. Frank will circulate a summary of the jurisdictions that still require input in order to enable Subcommittee members to volunteer to assist.


Programs and Projects

It was noted that the Subcommittee would be presenting a program the following Sunday on “Change of Control Transactions Involving Dual-Class Share Structures.” The program is being chaired by Iain Scott of McCarthy Tétrault, Montréal, and would feature presentations by Joel Greenberg of Kaye Scholer, New York, Charles Kraus of Stikeman Elliott, Calgary, Jeffrey MacIntosh of the University of Toronto Faculty of Law, and Jennifer Muller of Houlihan Lokey Howard & Zukin, San Francisco.

The following subjects were proposed as possible topics:

- Kimmo Mettälä of Krogerus, Helsinki, suggested a program on the use of representations and warranties insurance in M&A transactions.
- Jim Walther suggested a program on FCPA/anticorruption law compliance: How to assess the risks before committing to a transaction and how to fix what you bought.
- Katrien Vorlat suggested a presentation/program on employment law impacts on M&A transactions before, during, and after the deal is done (a topic originally proposed by her at an earlier meeting).
- Director liability issues after the deal is done: You’re not in Kansas (London, Toronto) any more.

Other suggestions remaining on the agenda from earlier meetings were:

- Changes in the UK Takeover Code/comparison with developing U.S. (and other) takeover practice.
- Developments in Global M&A: Does Anybody Remember the Crisis and What Did We Learn?
- Use of new supranational corporate entities in M&A (Societas Europaea, etc.).
- Cross-border distressed company acquisitions.
- Return of nationalization risk in cross-border M&A.
- International comparison of disclosure requirements and restrictions on “stake-building.”

Current Developments Discussion

The meeting concluded with our customary general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice. Points raised included the following:
• Jim Doub of Miles & Stockbridge, Baltimore, referred to a “perfect storm” that is developing on attorney-client privilege. The privilege, to the extent it exists, is being further eroded in Europe, especially for in-house counsel. Since discovery in Europe is limited, the concern there is not acute. However, it could be an issue for a U.S. practitioner, for whom the attorney-client privilege is sacred, if the privilege would be deemed to be waived by the disclosure to the business client or its in-house counsel residing outside the U.S. in a country where the privilege is not protected.

• André Perey of Blake Cassels & Graydon, Toronto, referred to reliance issues where representations and warranties insurance was used in an M&A transaction, if the insurer wanted access to the buyer’s due diligence files.

• Daniel Rosenberg updated the meeting on the forthcoming changes to the UK public company takeover regime which are intended to redress the balance away from the current tactical advantages which a hostile bidder is considered to hold over a target company. He noted that, as anticipated at the Boston meeting, the proposed changes had been adopted without material change and that they would come into effect on September 19, 2011. The changes include a requirement for a potential bidder to be indentified in the announcement commencing an offer period and requiring potential offerors to clarify their intentions towards the target within four weeks of being identified (the “put up or shut up” rule), a new prohibition on deal protection measures and break fees in most circumstances, and greater required disclosure in various areas including offer-related fees and expenses, offeror financial information, and the offerors’ intentions towards target employees.

Next Meeting

The Subcommittee’s next meeting will be held in connection with the M&A Committee’s stand-alone meeting and will take place at the Montage in Laguna Beach. The International M&A Subcommittee will meet Friday, February 3, from 12:30 p.m. until 2:30 p.m.

Subcommittee Website

Our website may be accessed at http://apps.americanbar.org/dch/committee.cfm?com=CL560016. The website contains the following information:

• Presentation notes of Daniel Gamulka on M&A in Israel.

• The latest materials from the Subcommittee’s Foreign Direct Investment Project and International Dispute Resolution Project.

• Details of the Subcommittee’s publications, future meetings, other work-in-progress, and other past program materials.

We look forward to seeing you in Laguna Beach.

Daniel P. Rosenberg
James R. Walther
Co-Chairs

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 and reports to the Committee on 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 work product of the Judicial Interpretations Working Group consists of memoranda summarizing our findings regarding these acquisition agreement provisions and M&A issues. The memoranda are posted in an on-line library, designated as the M&A Lawyers’ Library, which members of the M&A Committee can access from the Committee’s home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL560000).

The Annual Survey Working Group will meet in Laguna Beach on Friday, February 3, from 8:00 a.m. until 9:00 a.m., in Gallery II at the Montage. The Judicial Interpretations Working Group will meet immediately thereafter, from 9:00 a.m. until 10:00 a.m., in the same room. Dial-in information for the meetings will be sent to members of the Subcommittee as soon as it becomes available from the ABA.

Annual Survey Working Group

The ninth Annual Survey of Judicial Developments
Pertaining to Mergers and Acquisitions will be published in the February 2012 issue of The Business Lawyer. We thank all Committee members who participated in that effort. At the Committee meeting in Laguna Beach, we will discuss Coughlan v. NXP, B.V., summarized below, and other cases of sufficient interest identified during our working group meeting. At the Working Group meeting, we will begin our efforts to select cases for inclusion in the 2012 annual survey.

We are asking all members of the M&A Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Jon Hirschoff at jhirscroff@fdh.com or to Michael O’Bryan at mobryan@mofo.com. Please state in your email 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 exclusively 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.

To join our working group, please email Jon Hirschoff at jhirscroff@fdh.com or Michael O’Bryan at mobryan@mofo.com, or simply attend the working group meeting in Laguna Beach.

Decision to be Discussed at the Laguna Beach Committee Meeting

Delaware Court Applies Step Transaction Doctrine to Treat Two-Step Asset Transfer as a Single Transaction, Triggering Acceleration Provision.

In Coughlan v. NXP, B.V.,¹ the Delaware Chancery Court applied the “step transaction doctrine” to a two-step transfer of assets, and found that two separate contractual steps, taken together, triggered a contingent payment acceleration provision in the agreement by which the transferor had acquired the assets. The court also stated that it would have come to the same conclusion by applying equitable principles.

Background

In late 2007, NXP, B.V. (“NXP”) and GloNav, Inc. (“GloNav”) merged. GloNav became NXP’s wholly owned subsidiary, and GloNav’s shareholders received cash plus rights to additional payments contingent on the future performance of GloNav’s IP assets. The merger agreement provided for acceleration of the contingent payments if NXP transferred, other than to a subsidiary of NXP, (i) a majority of GloNav stock, (ii) all or substantially all of GloNav’s assets, (iii) a majority of NXP stock or (iv) all or substantially all of NXP’s assets. However, acceleration would not occur if the transferee assumed NXP’s obligations under the merger agreement with respect to the contingent payments. The court’s opinion addressed two questions: (i) whether the obligations had been assumed (the court held yes) and (ii) whether the step transaction doctrine applied (the part of the opinion discussed in this summary).

In 2008, NXP and STMicroelectronics (“ST”) formed a joint venture (the “JV”) into which NXP contributed its wireless business, including GloNav’s IP assets, in exchange for a 20% interest. NXP effected its contribution in two steps:

Step 1: Transfer GloNav’s assets to NXP’s newly created, wholly owned subsidiary, WH2.

Step 2: Transfer NXP’s WH2 shares to the JV.

NXP contended that the first step avoided acceleration because WH2 was a subsidiary of NXP, and the second avoided acceleration because neither GloNav stock or assets nor NXP stock or assets were transferred.

Court Analysis

Application of Step Transaction Doctrine

The court explained that the step transaction doctrine “treats the ‘steps’ in a series of formally separate but related transactions involving the transfer of property as a single transaction[] if all the steps are substantially linked.” The court noted that the step transaction doctrine would apply if any one of three different tests were satisfied:

**End Result Test.** If “the separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result.”

**Interdependence Test.** If “the steps are not independently significant and have meaning only as part of the larger transaction.”

**Binding Commitment Test.** If “at the time the first step is entered into, there is a binding commitment to undertake the later steps.”

The court found that NXP’s two-step transfer satisfied each of the tests. Treating the two-steps as a single transfer of assets, the court held that it triggered the acceleration provision for a transfer of all or substantially all of GloNav’s assets.

Whether the Step Transaction Doctrine Applies is a Question of the Parties’ Intent

The court further affirmed that “the controlling principle in applying the step transaction doctrine . . . is the effectuation of the parties’ intentions as expressed in, or reasonably inferred from, their agreement.”

Engaging in traditional contract interpretation, the court determined that the intent of NXP and GloNav in adopting the acceleration provision “was to ensure that the [s]tockholders would continue to receive their bargained-for [c]ontingent [p]ayments in the event that NXP sold GloNav,” and that application of the step transaction doctrine to such a sale was therefore appropriate.

The court considered an earlier draft of the acceleration provision, rejected by NXP, that would have provided for acceleration in any situation where NXP ceased to be the owner of the GloNav assets, either directly or though a wholly owned subsidiary, which would more clearly have covered transactions such as NXP’s two-step transfer. The court rejected NXP’s argument that the narrower provision in the final agreement should be construed literally in light of the drafting history, finding that “nothing in the … drafting history … suggests that the acceleration was not meant to occur upon a series of interdependent transactions that, when analyzed substantively rather than hyper-technically, clearly fits within the transactions enumerated in [the acceleration provision]” and that NXP’s suggested construction would “render those provisions meaningless.”

Application of Equity

The court also stated that, even without the step transaction doctrine, it would treat the transactions together “as a matter of equity,” since “equity regards substance rather than form.”

Disposition

The court nonetheless held that the JV had assumed NXP’s obligations to GloNav’s former shareholders under the merger agreement, thereby avoiding acceleration.

Implications

Use Caution in Relying Solely on Technical Structuring Distinctions

NXP shows that the extent to which a party can rely on technical structuring distinctions to avoid triggering undesirable contract provisions may be limited, particularly where a court might find that the
parties’ intent was otherwise. Instead, when considering whether a structuring distinction will be honored, parties should consider the purpose of preexisting contract provisions and how that might affect the interpretation of the contract if some ambiguity is deemed to exist. On the other hand, parties also cannot always rely on courts to ignore literal interpretations of contracts, as the courts in some cases have held parties to a fairly technical reading in certain contractual settings.

Courts Will Not Apply the Step Transaction Doctrine If Parties Do Not Intend It

The NXP opinion is clear that “a court should refrain from applying the step transaction doctrine to interpret a contract if doing so would contravene the parties’ intent.” A party with obligations triggered by a specified type of transaction, and who wants flexibility to structure transactions that may be close, in form or effect, to the triggering type of transaction without triggering the obligations, thus may want to consider including an interpretation provision stating that the step transaction doctrine shall not apply, helping to ensure that only a transaction of exactly the type specified will trigger the obligations. By being explicit, drafters can avoid the uncertainty created by the step transaction doctrine.

Judicial Interpretations Working Group

After years of effort by members of the Judicial Interpretations Working Group, the M&A Lawyers’ Library went live prior to our August meeting in Toronto. The focus of our Working Group is now to add to the content of the library.

We welcome all interested Committee members to join our Working Group. The Judicial Interpretations Working Group is a good way to become involved in the Committee, especially for younger Committee members because extensive M&A transactional experience is not necessary. We have working group teams in various stages of preparation of memoranda regarding additional acquisition agreement provisions and M&A issues, and we have a virtually unlimited pool of topics to work on in the future.

As indicated above, the Laguna Beach meeting of the Judicial Interpretations Working Group will be held on Friday, February 3, from 9:00 a.m. until 10:00 a.m., in Gallery II at the Montage, immediately following the Annual Survey Working Group meeting. We plan to discuss (i) the M&A Lawyers’ Library, (ii) the memo on enforceability of pre-transaction letters of intent authored by Sarita Nair, and (iii) the status of other memos in progress.

To join our working group, please email Scott Whittaker at swhittaker@stonepigman.com or simply attend the working group meeting in Laguna Beach.

Jon T. Hirschoff
Subcommittee Chair
Michael G. O’Bryan
Chair - Annual Survey Working Group
Scott T. Whittaker
Chair - Judicial Interpretations Working Group

M&A Market Trends Subcommittee

Congratulations are in order: please join me in applauding study chairs Hal Leibowitz, Wilson Chu, and me (yes, it hurts my shoulder to pat myself on the back like this) on the release of (i) the 2011 Strategic Buyer/Public Company Target M&A Deal Point Study (comparing deal points in transactions from 2010 to what we saw in prior iterations of the study), and (ii) the 2011 Private Target M&A Deal Points Study (comparing deal points in transactions from 2010 to what we saw in prior iterations of the study), respectively. Kudos to all of you who worked really hard on these studies – I’ve heard lots of positive feedback and enthusiasm about these new versions of the studies already. I would love to hear about the use of the studies in practice, so please feel free to contact me with any tales from the trenches.

At our meeting in Toronto, Canada in August we heard from Jen Muller on updated data on the state of the M&A market and we explored the “sandbagging” provision in-depth: Mark Danzi and Craig Menden conducted a mock negotiation of a “sandbagging” provision; we revealed the preliminary “sandbagging” data from the

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10 Another recent case, Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH, 2011 WL 1348438 (Del. Ch. Apr. 8, 2011), also suggests that creative transaction structuring might not always work, holding that the acquisition of a company in a reverse triangular merger in certain circumstances may constitute an assignment of an agreement by that company.

11 See, e.g., Benchmark Capital Partners IV, L.P. v. Vague, 2002 WL 1732423 (Del. Ch. July 15, 2002) (holding that changes to a corporation’s certificate of incorporation in connection with a merger did not trigger a provision requiring preferred stockholder approval to amend the certificate of incorporation).
then-unpublished 2011 Private Target Deal Points Study; and Professor Charles Whitehead of Cornell Law School gave us a preview of his essay for the Delaware Journal of Corporate Law entitled “Sandbagging: Default Rules and Cost-Bearing in Acquisition Agreements.”

Our next meeting is in Laguna Beach on Saturday, February 4, from 9:00 a.m. until 10:30 a.m. (Pacific Time). At that meeting, we will hear from the following:

- Jen Muller of Houlihan Lokey will update us on the M&A Market from the banker’s perspective;
- Paul Koenig of Shareholder Representative Services will pull back the curtain on post-closing disputes and how we as drafters can avoid them;
- Ashley Hess and Claudia Simon will conduct a mock negotiation on the bring down closing condition in private target acquisitions;
- Claudia will discuss the bring down closing condition data from the 2011 Private Target Deal Points Study;
- Steve Kotran and Michael O’Bryan will conduct a mock negotiation on termination fee triggers in public target acquisitions;
- Hal Leibowitz will discuss the termination trigger data from the 2011 Strategic Buyer/Public Company Target Deal Points Study; and
- Scott Whittaker and Brian North will provide us with insights regarding the judiciary’s view of our negotiated issues.

The dial-in number and passcode for the meeting for those of you who cannot attend in person is as follows:

- U.S. and Canada: (866) 646-6488
- International: (707) 287-9583
- Passcode: 5842737852

I look forward to seeing you in Laguna Beach.

Jessica Pearlman
Chair

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Toronto on Saturday, August 6, 2011, as part of the M&A Committee’s meetings being held in Toronto in conjunction with the ABA’s Annual Meeting. The Subcommittee discussed events and developments affecting the Private Equity markets during the past four months since the Subcommittee last gathered. The Subcommittee also received presentations and materials from the following guest speakers: (i) Rahul Suri, Managing Director in the M&A Group at BMO Capital Markets in Toronto, spoke on the general M&A and PE environment; (ii) Chris Young, Managing Director and Head of Contested Situations at Credit Suisse in New York, and former Head of M&A Research at ISS, spoke on the impact of activism and rise of hostile activity on Private Equity; (iii) Mike Casey from the Emerging Markets Private Equity Association in Washington, D.C., spoke on the surge of Private Equity deal activity in Emerging Markets; and (iv) Jeff Davis, Vice President and Associate General Counsel at Ontario Teachers’ Pension Plan, spoke on Ontario Teachers’ direct investment activities and what it is like doing direct investment deals worldwide as inside counsel for a large Canadian pension fund. The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.

John K. Hughes
Chair
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Friday, February 3, 2012
Annual Survey Work Group of the M&A Jurisprudence Subcommittee
8:00 a.m. – 9:00 a.m.
Gallery II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 7184872096

Task Force on Distressed M&A
8:30 a.m. – 10:00 a.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
9:00 a.m. – 10:00 a.m.
Gallery II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 7184872096

Task Force on Financial Advisor Disclosures
9:30 a.m. – 11:00 a.m.
Gallery I

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 6513805024
Private Equity M&A Subcommittee
10:00 a.m. – 12:00 p.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Task Force on the Revised Model Asset Purchase Agreement
11:00 a.m. – 12:30 p.m.
Gallery II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 7184872096

Task Force on M&A Dictionary
11:30 a.m. – 12:30 p.m.
Gallery I

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 6513805024

International M&A Subcommittee
12:30 p.m. – 2:30 p.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Joint Task Force on Governance Issues in Business Combinations
1:30 p.m. – 3:00 p.m.
Gallery II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 7184872096

Acquisitions of Public Companies Subcommittee
3:00 p.m. – 4:30 p.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs
4:30 p.m. – 5:30 p.m.
Gallery I

Committee Dinner
Mozambique
1740 S. Coast Highway
Laguna Beach, CA 92651

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Saturday, February 4, 2012

M&A Market Trends Subcommittee
9:00 a.m. – 10:30 a.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Task Force on Two-Step Auctions
10:30 a.m. – 12:00 p.m.
Gallery I

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 6513805024

Full Committee Meeting
1:00 p.m. – 3:30 p.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852

Committee Forum
3:30 p.m. – 4:30 p.m.
Grand Ballroom I and II

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5842737852
Committee Dinner
French 75 Bistro
1464 S. Coast Highway
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Reception:  7:00 p.m.
Dinner:  8:00 p.m.

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