FROM THE CHAIR

I look forward to seeing many of you next week in Los Angeles. I am confident that we will see plenty of sunshine. (As for the recent tremors, fingers will remain crossed during our entire stay...)

It is not too late to make plans to attend. You can register on site. We still have room for Saturday’s dinner. Also, as a sign of support for our latest initiative – the Women in M&A Task Force – please encourage one or more of your female colleagues to join us for the meeting.

As in prior years, our subcommittees and task forces will meet on Friday (throughout the day) and Saturday (morning). Our full Committee will meet Saturday afternoon and our Committee dinner is slated for that evening. A complete schedule is set forth at the end of Deal Points. If you will not be able to attend in person, please consider joining us by phone. You can find the dial-in information for each task force, subcommittee and the full Committee meeting in this issue.

A special note of thanks to Thomson Reuters for their sponsorship of Saturday’s dinner at Cicada. (For movie buffs, you may recognize the restaurant as the setting for one of the funnier scenes in the movie, Pretty Woman.) We should have a great evening! On behalf of the Committee, THANK YOU!

Full Committee Meeting

Our full Committee will meet on Saturday from 2:00 to 4:30 pm. During the meeting, Steve Kotran will do his annual presentation on Thomson Reuter’s latest M&A study. If you have attended Steve’s prior presentations, you know not to miss this one. In addition, the Delaware courts have been active since our last meeting, so I have asked several of our Delaware practitioners to discuss the most important recent developments. Finally, the team from Shareholder Representative Services, a sponsor from our Laguna Beach meeting, will also make a presentation to the Committee.
Committee Sponsored CLE Programs

During the Spring meeting, our Committee will sponsor two important programs. The first program – “The Shareholder Activism Playbook: Unlocking M&A Deal Value” – will be held from 2:30 to 4:30 pm on Thursday. I am pleased to report that our newest judicial advisor, Chief Justice Leo Strine, is one of the panelists. Our second program – “Women in Mergers and Acquisitions” – is slated for the 8:00 to 9:30 am slot on Saturday. Jen Muller and Leigh Walton will lead this panel and discuss their preliminary findings from a survey that they distributed to the top 60 M&A law firms, as well as leading law schools.

Both of our programs are exploring timely issues and the moderators (Vanessa Grant and Jen Muller, respectively) have put together outstanding panels. The programs both merit your time and attention. Please plan to attend!

Task Force and Subcommittee Meetings

In LA, our Task Forces and Subcommittees once again will host a number of substantive programs and discussions. If you have time, please attend one or more of these presentations.

Planning for Chicago

We are already working on the details for our next meeting – the inaugural Annual Meeting of the Business Law Section in Chicago from September 11-13, 2014. Please mark your calendar now. I will have more details to share in the coming months.

If you have any questions concerning our upcoming meetings, please reach out to me. I look forward seeing all of you.

Mark Morton
Chair

FROM THE CO-EDITORS

As two guys from a pre-Millennial generation, we are pleased to announce two technological changes that should make Deal Points more user-friendly.

First, all archived issues of Deal Points will now be “public” ABA documents – meaning, you will not have to input a username and passcode to access Deal Points.

Second, we are pleased to announce the launch of an EPUB version of the Deal Points newsletter. Previously, Deal Points was only available as a PDF and it was brought to our attention that some find the PDF version not to be web-friendly, and therefore difficult to access via smart devices. PDF files don’t always adapt well to various sized displays and devices. EPUB, short for “electronic publication,” is a convenient way for readers to access information in a reader friendly format on most mobile devices. EPUB is delivered as one zip file and the zip file creates an archive of the organizational and content files for the book. Among other things, EPUB will allow you to highlight, create personal notes and search for information with a format that feels much like an actual book. We hope you find the new EPUB accessibility as the convenience and benefit it was designed to be. If you have other thoughts on how further to make Deal Points more user friendly, please let us know.

In the meantime, we hope those who experienced this brutal winter have thawed out and we are looking forward to seeing many of you in Los Angeles.

Eric S. Klinger-Wilensky
Ryan D. Thomas
Co-Editors
Hidden Inefficiencies in M&A

By: Paul Koenig
Co-CEO, SRS|Acquiom

In most merger transactions, the parties are well served by their professional representatives, such as lawyers, bankers and accountants. Each adds considerable value to the deal process. However, the M&A industry contains numerous hidden inefficiencies that are costing the deal parties billions of dollars per year in real out-of-pocket expense as well as opportunity costs. Many of these inefficiencies receive little to no attention because they may not seem like a large number on a single deal. The result is that this waste has gone unaddressed for decades. In a market where buyers, fund managers and sellers are struggling to maximize returns and lawyers are continuously looking for ways to add value for their clients in a competitive marketplace for legal services, it is imperative that this fat in the system gets trimmed. Outlined below is an analysis of each of these inefficiencies and the cost to the industry as a whole.

Payments

Everyone understands that it would be better to get paid as soon as possible, but many deal professionals simply assume it will take a week or two to effect payments following closing of an M&A deal or the expiration of an escrow.

Based on industry data, we estimate that approximately $1.5 trillion in cash is paid each year in connection with domestic private M&A transactions. Most investors are looking to realize a 20% or higher internal rate of return on their investments in private companies, so the cost of capital is high. Therefore, each day that M&A payments are delayed costs the industry over $800 million.

According to SRS|Acquiom data, the average time for banks to pay closing consideration has been six days. That means that the value to investors of eliminating this delay is approximately $4.9 billion per year — a huge amount of opportunity cost that warrants serious attention on how to make the payments process more efficient.

Escrows

On most deals, no one pays much attention to how the escrow is invested. While preservation of capital and liquidity are the primary objectives for clear reasons, interest rates on escrow deposits over the last several years have been close to zero. In our experience, on nearly all transactions there is little to no discussion of alternative investment options or consideration of whether it is possible to achieve better results.

While it is not practical to drive venture-like or private equity-type returns from an escrow, each basis point of additional yield that can be achieved is worth approximately $22.5 million to the industry annually. Therefore, finding investment options that yield an extra 10 or 15 basis points is worth hundreds of millions of dollars in aggregate.

Stock Certificates and Paper Closings

For decades, deal closings have been completed by mailing piles of paper — letters of transmittal, information statements, transaction documents and stock certificates — back and forth between the merger parties, the stockholders and a paying agent. As with the other inefficiencies, the costs of printing and mailing have gone largely ignored. While not a huge number, we estimate that the average hard dollar cost for distributing documents to shareholders is approximately $2,250 per deal, which does not take into account the hassle, wasted time and inconvenience for stockholders to complete the paper process, or the negative environmental impact. Administrative teams at most funds are already stretched thin and are aggressively looking for ways to operate more efficiently.

Additionally, in most transactions there is no legal need for the merger parties to collect stock certificates from selling stockholders. UCC §8-207 provides extensive protection to an issuer or buyer that makes a distribution to a registered owner of the securities in a merger even if the registered owner is not the true holder of the security, so long as no other person has presented the security for transfer. A comment to this section states, “The issuer may under this section make distributions of money or securities to the registered owners of securities without requiring further proof of ownership . . .” UCC § 8-207, Comment 1 (emphasis added). The comment goes on to make clear, “The issuer may under this section make distributions of money or securities to the registered owners of securities . . . Any such
distribution shall constitute a defense against a claim for the same distribution by a person, even if that person is in possession of the security certificate and is a protected purchaser of the security.” UCC § 8-207, Comment 1 (emphasis added). Despite this, many banks for years have required stockholders to submit affidavits of loss and pay surety bonds if they are unable to deliver the original stock certificate. In addition, requiring original stock certificates to be mailed back to the paying agent contributes at least two days to the opportunity cost attributed to payments delays and is a major impediment to solutions to eliminate the inefficiencies attributable to slow payments.

We estimate that the aggregate cost of unneeded bonds plus printing, copying, and mailing paper documents may approach $100 million per year.

Payment Methods

There are good reasons why parties sometimes would prefer that a payment is made by check or wire, but often a cheaper method is available that is never considered. Automated Clearing House (ACH) payments are credited to bank accounts next morning prior to bank opening hours, and cost just pennies, a fraction of the cost of a check or wire payment. For a transaction with 50 selling stockholders and two rounds of payments (closing and escrow release), the cost savings of paying by ACH can be thousands of dollars. Industry-wide, this adds up to tens of millions spent on making payments in a way that may not be necessary.

Conclusion: Hidden Costs Exceed $5 Billion

Each deal is unique and some opportunities to eliminate inefficiencies may not be available on a particular transaction. For instance, there might be good reason to place a deposit into an interest-free account or to make a payment by check. Deal practitioners should, however, consider the administrative alternatives available when advising their clients and challenge existing assumptions regarding the way certain administrative tasks have historically been handled.

Changing the default way that many of these issues are handled has the potential of delivering over $5 billion of additional value to clients while easing the administrative burden of completing the closing process. If we assume approximately 10,000 transactions per year, the savings average approximately $500,000 per deal.

Notes & Assumptions:

Payments

• U.S. private M&A:
  - Approximately 10,000 transactions annually on average (Sources: e.g., William Blair Merger Tracker M&A Markets Analysis Q4 2013, p. 8; S&P Capital IQ, SRS|Acquiom market analysis).
  - Approximately $1,000B disclosed annual deal value on average (Sources: e.g., William Blair Merger Tracker M&A Markets Analysis Q4 2013, p. 8; S&P Capital IQ, SRS|Acquiom market analysis).
  - Approximately $2,000B estimated annual deal value, including deals with undisclosed values (An analysis of the 575 private M&A transactions on which SRS|Acquiom has been engaged indicates that doubling disclosed value produces a reasonable estimate of actual total deal value because the values of the majority of deals are not disclosed).
  - Approximately $1,500B of transaction consideration paid in cash annually. A conservative estimate is that 75% of transaction consideration is paid in cash; 75% of $2,000B = $1,500B. (Sources: e.g., William Blair Merger Tracker M&A Markets Analysis Q4 2013, p. 15; Houlihan Lokey Purchase Agreement Study, For Transactions Completed in 2012 and Prior Years, SRS|Acquiom market analysis).

Escrows

• Multiple sources, including the 2012 SRS M&A Deal Terms Study indicate that for the typical deal, approximately 10% of transaction value is held back in escrow for a period of 18 months.

• Applying 10% and 18 months to annual U.S. M&A transaction consideration paid in cash of $1,500B yields an estimate of approximately $225B held in escrow on average.
Stock Certificates and Paper Closings

• Conservatively assuming 7,500 deals per year (75% of 10,000) have at least a portion of the merger consideration paid in cash and 50 shareholders per deal, we estimate the costs of printing, copying, mailing, and overnight shipments of paper documents to be $2,250 per deal, or nearly $17 million. This is based on an assumption of an average of 100 pages per mailing at a cost of $0.05/page and $20 overnight shipping charges for two mailings per shareholder.

• For stock certificates, SRS|Acquiom made conservative assumptions based on discussions with industry sources and our experience on 575 private M&A transactions:

  o 25% of deals require at least one significant shareholder to purchase a surety bond due to lost paper stock certificates = 2,500 shareholders purchasing surety bonds.
  o Assume cost of bond is 3% of a payment that is $1M on average = $30K average cost per bond
  o 2,500 x $30K = $75M per year.

Payment Methods

• Assuming 7,500 deals per year as set forth above, 50 shareholders per deal, two rounds of payments per year, and $35 payment method fees, then the total cost for payments by wire and paper check exceed $26M annually.

Court of Chancery Addresses Mixed Revlon and Entire Fairness Claim

In Frank v. Elgamal, the Court of Chancery granted in part and denied in part defendants’ motion for summary judgment as to certain claims asserted by a stockholder plaintiff in connection with a merger involving a rollover of equity by stockholders who collectively held more than a majority of a corporation’s outstanding shares. The Court found, among other things, that there were issues of material fact remaining as to whether the entire fairness standard should apply to the merger, and, assuming entire fairness applied to the merger, whether a special committee was well functioning and fully informed about the material negotiations relating to the allocation of the merger consideration.

The stockholder plaintiff brought claims against American Surgical Holdings, Inc. (“American Surgical” or the “Company”) and several of its officers and directors in connection with American Surgical’s merger with an affiliate of Great Point Partners I, LP (“GPP”). In 2009, American Surgical began exploring opportunities to sell the Company. During preliminary discussions with potential acquirors, Zak Elgamal, the CEO and a director of the Company, and Jaime Olmo-Rivas, another executive officer and director, expressed interest in rolling over between 20-30% of their American Surgical stock into stock in the surviving entity. The Company eventually received indications of interest from three potential acquirors, and the board formed a special committee (the “Special Committee”) to evaluate the offers.

After evaluating the indications of interest, the board accepted an offer from GPP pursuant to which the minority stockholders would receive $3.16 in cash per share and Elgamal, Olmo-Rivas, and two other American Surgical “key employees” (the “Rollover Group”) would receive $2.21 per share plus approximately 21% ownership of the surviving entity. In late February 2010, however, GPP revised the terms of this offer based on a material dispute as to the Company’s 2009 EBITDA. Although GPP thought it had reached a new revised deal at $2.86 per share, an internal Company email describing the revised terms of the offer suggested a range of options for the allocation of merger consideration between (i) $2.86 cash per share to minority stockholders and $2.21 plus a 16.06% interest to the Rollover Group and (ii) $2.90 per share to the minority stockholders and $2.10 per share and a 19.62% interest to the Rollover Group. Accordingly, the minority stockholders would receive a higher amount of cash to the extent that the Rollover Group received a higher allocation of stock in the surviving entity. Despite the apparent discussion of this range of options, the amended offer letter from GPP closely tracked the option that would result in a lower cash payment for the minority stockholders. The minutes from the Special Committee meeting following the receipt of the amended offer letter, however, do not reflect a discussion of the range of options. In addition, the members of the Special Committee could not recall if they discussed the range of options and did not know how the final per share figure was calculated.

1 Case summary prepared by Potter Anderson & Corroon LLP.
The plaintiff stockholder commenced an action claiming, among other things, that (i) the Rollover Group constituted a control group that negotiated the transaction, and thus entire fairness applied and (ii) the Special Committee did not shift the burden of proving entire fairness because it did not control the material negotiations and was not sufficiently informed.

The Court first noted that in evaluating whether the Rollover Group constituted a control group two distinct periods of time were at issue: (i) when the board decided to put the Company up for sale and (ii) when the merger consideration allocation was agreed upon. The Court concluded that the Rollover Group did not constitute a control group during the initial sales period, but held that a reasonable inference could be drawn that the members of the Rollover Group were connected in a legally significant way when the initial GPP offer was accepted; and thereafter, the control group exercised its control to select the merger allocation option most favorable to its members.

With regard to the fiduciary duty claims against the board, the Court found that the Company entered Revlon mode when the board decided to put the Company up for sale. The Court stated that to the extent the Rollover Group was a control group at the time the merger allocation was negotiated, the board’s Revlon duties may have shifted from obtaining the best price reasonably available for all of the stockholders to obtaining the best price reasonably available for the minority stockholders. Nevertheless, the Court determined that the Special Committee was disinterested, independent, and acted in good faith in adopting GPP’s revised offer as the best value reasonably available and, therefore, was entitled to judgment as a matter of law under the exculpatory provision in the Company’s charter. The Court found, however, that because there was an issue of material fact as to whether the Rollover Group selected the merger allocation without informing the Special Committee of the range of options, there was a reasonable inference that Elgamal and Olmo-Rivas may have acted in bad faith. Thus, the Court denied the grant summary judgment to the defendants with respect to those claims.

The Court also found that, if the Rollover Group was a control group, there was an issue of fact whether the Rollover Group was either on both sides of the transaction or was competing with the minority stockholders for the same consideration such that entire fairness would apply to the transaction. Likewise, there was a genuine issue of material fact whether the Special Committee was adequately informed about the range of merger allocation options and thus whether it was well functioning. The Court granted the motion for summary judgment, however, with regard to several non-director employees, who it held did not owe fiduciary duties to the stockholders.

**Court of Chancery Addresses Interest Awards in Appraisal Proceedings**

In a February 12, 2014 decision, the Court of Chancery held that a petitioner in an appraisal proceeding could not be compelled to accept “prepayment” of an appraisal award in order to stop the accrual of interest on the amount prepaid. The holding is significant because the default statutory interest rate on an appraisal award (5% over the Federal Reserve discount rate) may be viewed as very favorable by stockholders considering whether to bring appraisal claims.

Under Delaware law, appraisal is available in all private company mergers, as well as any public company merger where the consideration is anything other than shares of the surviving company or public company stock. Stockholders seeking appraisal are entitled to a judicial determination of the “fair value” of their shares (without the need to litigate fault) and, once that value is determined, to be paid in cash that fair value plus interest from the effective date of the merger through the date of payment of the judgment at 5% over the Federal Reserve discount rate absent a showing of “good cause” to depart from that rate. The interest component could be quite significant given the rate and the fact that an appraisal case could easily take a year or more.

In *Huff Fund Investment Partnership v. CKx, Inc.*, the respondent company in an appraisal proceeding sought to compel the petitioner to accept a prepayment of an appraisal award equal to what all parties agreed was the minimum “fair value” of the shares being appraised, in order to stop the accrual of interest on that amount. As argued by the respondent, “where market rates of return are low, the opportunity for . . . a near risk-free return five percent above the Federal Discount rate may penalize a respondent corporation, and may create perverse litigation and investment incentives, including

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1 Case summary prepared by Morris, Nichols, Arsh & Tunnell LLP.
The encouragement of litigation of cases without significant potential for an award above the merger consideration, and even arbitrage of appraisal claims."

The Court agreed with respondent that "compared with fault-based litigation, the opportunities for rent-seeking in appraisal actions are comparatively high." However, the Court exercised caution in deviating from the statutory default rate. The Court stated that, in drafting the appraisal statute, the legislature "made a determination as to the proper balance of the competing interests of appraisal petitioners, who have been cashed out of their preferred investment and denied the ability to invest the merger consideration in the market pending outcome of the case, and respondents, against whom too large an interest award may operate as a penalty." Comparing a prior version of the appraisal statute, which offered more discretion to the Court of Chancery in awarding interest, to the current version, the Court stated that the "General Assembly . . . made its call" and deferred to that body’s decision.

Although the Court found that a determination as to whether “good cause” existed to depart from the statutory interest rate must await the end of the appraisal proceedings, it observed that, once that end came, it could consider “a wide variety” of circumstances in its determination. Moreover, the Court specifically acknowledged the potential for abuse of the appraisal process in its reference to “opportunities for rent-seeking,” suggesting that such behavior would be among that wide variety of circumstances that would be considered in looking at the good cause question. This is an area of law that awaits further developments.

Delaware Supreme Court Affirms In re MFW, Holds that Controlling Stockholder Buyouts Can Receive Business Judgment Review if Conditioned Ab Initio on Dual Procedural Protections

In Kahn, et al. v. M&F Worldwide Corp., et al., No. 334, 2013 (Del. Mar. 14, 2014), the Delaware Supreme Court affirmed the Court of Chancery’s decision in In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013), which granted summary judgment in favor of a board accused of breaching its fiduciary duties by approving a buyout by a 43.4% controlling stockholder, where the controller committed in its initial proposal not to move forward with a transaction unless approved by a special committee, and further committed that any transaction would be subject to a non-waivable condition requiring the approval of the holders of a majority of the shares not owned by the controller and its affiliates. Stockholder plaintiffs initially sought to enjoin the proposed transaction, but withdrew their preliminary injunction application and instead sought post-closing damage relief. After extensive discovery, the defendants sought summary judgment.

The Court of Chancery held that the transaction could be reviewed under the business judgment standard, rather than entire fairness, and granted the defendants’ motion. On appeal, the Supreme Court affirmed the Court of Chancery’s decision and adopted its formulation of the standard, holding that the business judgment standard of review will be applied in controller buyouts if and only if: (i) the controller conditions the procession of the transaction on the approval of both a special committee and a majority of the minority stockholders, (ii) the special committee is independent, (iii) the special committee is empowered to freely select its own advisors and to say no definitively, (iv) the special committee meets its duty of care in negotiating a fair price, (v) the minority vote is informed, and (vi) there is no coercion of the minority.

The Court further held, however, that if “after discovery triable issues of fact remain about whether either or both of the dual procedural protections were established, or if established were effective, the case will proceed to a trial in which the court will conduct an entire fairness review.” The Court also noted that the complaint in the action would have survived a motion to dismiss based on allegations attacking the fairness of the price, which called into question the adequacy of the special committee’s negotiations, thereby necessitating discovery on all of the prerequisites to the application of the business judgment rule.

1 Case summary prepared by Richards Layton & Finger, PA.
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TASK FORCE REPORTS

Joint Task Force on Governance
Issues in Business Combinations

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. At this point, we are two years into our work. We have drafts of many chapters and detailed outlines of many more, focusing on practice pointers for the common governance issues that M&A lawyers should be alert to in the deal process. There is always room for more help both in drafting and in the editorial process. Please let us know if you would like to get involved!

Our Task Force meetings are now devoted to discussing current governance issues and the practical concerns that are arising for us as practitioners in understanding and implementing key decisions. Please join us to learn or to offer your experiences - it all goes into the mix!

We had a great meeting in Laguna! Brandee Fernandez and Rama Padmanabhan of Cooley kicked off the meeting by leading a discussion about current practices regarding standstills, following the spate of standstill decisions over the last year including Koehler v. Netspend. Mike Pittenger of Potter Anderson then led a discussion about the Primedia decision and its implications for boards of directors considering a sale of a company with pending derivative claims, and current practice to minimize the risk of Primedia claims. Finally, Tom Mullen of Potter Anderson lead a discussion about the negotiation of the fiduciary terms in merger agreements and how those issues should be raised and discussed with the board.

We look forward to seeing everyone at our meeting in Los Angeles. Our agenda will be circulated to Task Force members prior to the meeting.

SPRING MEETING INFORMATION

Friday, April 11, 2014
1:00 PM – 2:30 PM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5884742049

Diane Frankel
Michael Halloran
Larry Hamermesh
Patricia Vella
Co-Chairs
TASK FORCE ON FINANCIAL ADVISOR DISCLOSURES

SPRING MEETING INFORMATION
Saturday, April 12, 2014
12:30 PM – 2:00 PM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5884742049

TASK FORCE ON LEGAL PROJECT MANAGEMENT

The Task Force on Legal Project Management in M&A Transactions held an excellent session at the recent stand-alone meeting in Laguna Beach, a welcome refuge for those attending from virtually anywhere else in the northern hemisphere.

The group reviewed the current status of various ongoing projects, including phase coding for M&A projects (replacing the ABA task codes), transaction scoping tools, and a compact between counsel that sets out a menu of tools and guidelines to facilitate efficient handling of a deal. Several projects have progressed substantially, with their draft materials having gone through several iterations as a result of working telephonic conference calls since the last in person meeting in San Francisco in August. The materials are available from the Co-Chairs and Project Manager upon request.

Task Force Co-Chairs Kalogerou and White suggested that Task Force members “test drive” the materials in real-world transactions in an effort to further refine them and make them more relevant to our practices. Project Manager Aileen Leventon offered to identify others who would field test the work of the Task Force as well.

Members were also encouraged to recruit in-house counsel to our Task Force so we might benefit from their perspective and their field testing of our efforts.

The Task Force also discussed expanding its work by starting several new projects, including:

- a task-based checklist to be used in connection with an asset purchase agreement;
- a protocol for assessing the efficiency of the way a deal was handled after it closes for the purpose of memorializing “lesson learned” to be applied in future transactions; and
- approaches to alternative fee arrangements in M&A transactions.

If you are interested in legal project management or joining this groundbreaking Task Force, you are most welcome. Hope to see or hearing from you in LA.

SPRING MEETING INFORMATION
Friday, April 11, 2014
12:00 PM – 1:00 PM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5884742049

Byron Kalogerou
Dennis J. White
Co-Chairs
Aileen Leventon
Project Manager

TASK FORCE ON TWO-STEP AUCTIONS

Thanks to everyone who participated in our Two-Step Tender Offer Task Force meeting in Laguna Beach. We had a good discussion of 251(h) issues and open questions in tender offers, led by Eric Klinger-Wilensky and covering the text and commentary prepared by Eric and Amy Simmerman. We also were joined by Jim Moloney and Ade Heyliger, both ex of the SEC, who outlined some of the securities issues in tender offers that they will address in the Agreement.

Our next meeting will be as part of the larger ABA meetings in Los Angeles. We’ll go through additional comments and plans for finalizing the Agreement and ancillary documents.
There are still a few places where we need some initial drafting, and at the meeting we’ll be setting up responsibilities for final revisions to other sections, so if you’d like to get involved or provide more comments let Rick or Mike know or come to the meeting.

We look forward to seeing you in LA!

SPRING MEETING INFORMATION
Friday, April 11, 2014
4:00 PM – 5:00 PM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code:  5884742049

Frederick H. Alexander
Michael G. O’Bryan
Co-Chairs

TASK FORCE ON THE REVISED MODEL ASSET PURCHASE AGREEMENT

At the M&A Committee’s Stand-Alone meeting in Laguna Beach, the Task Force on the Revised Model Asset Purchase Agreement (“MAPA2”) received reports from most of the nine small groups that have been formed to draft specific sections of the updated model agreement and related commentary. Excellent progress is being made by the working groups. We also discussed issues relating to inclusion of an arbitration clause in the model agreement and will decide at a future meeting whether to include it in the agreement or the accompanying commentary.

The Task Force would welcome the participation of ERISA/employment law specialists to review/update the related provisions of MAPA2. Bill Lentine from the Dykema firm has offered to lead a small group of tax specialists to review the tax provisions of MAPA2. He would welcome the assistance of other tax specialists. Please let us know if you or one of your colleagues is interested in assisting with one of these projects.

At the Spring Meeting in Los Angeles, we look forward to other groups presenting their proposed updates to the MAPA2 provisions on which they are focused and to facilitate a round-table discussion on the issues that typically arise when negotiating the indemnity provisions of an asset purchase agreement, which will help inform the commentary that is being developed about indemnity negotiations.

We hope you can join us.

JOINT TASK FORCE ON M&A LITIGATION

During the January stand-alone meeting in Laguna Beach, our Task Force met jointly with the Subcommittee on Public Company Acquisitions for a panel presentation on “Practical Things Deal Lawyers Need to Know About M&A Litigation.” The panel of Delaware litigators discussed practical, litigation-related issues about which deal lawyers should be cognizant in the context of public company M&A transactions. The topics discussed included privilege issues, waiver of privilege, document retention, and how deal counsel can help create a good (or bad) written record for litigation.

At our next Task Force meeting, we plan to provide an update on our multi-forum litigation project and discuss potential new projects. In addition, we will be engaging in an interactive discussion about evolving trends and issues in M&A litigation that have relevance to both transactional attorneys and litigators. In particular, we plan to discuss the Delaware Court of Chancery’s decision in In re Information Management Services, Inc. Derivative Litigation (Del. Ch. Sept. 5, 2013), in which the Court held that communications between executives and their individual counsel made using company email accounts were not privileged because there was no reasonable expectation of privacy. We will discuss potential implications for...
this holding in the M&A context, including whether it might be applicable to situations in which rollover management in a third party M&A transaction communicates with their separate counsel through company email accounts or to situations in which counsel communicates with an outside director using the director’s email account through his or her outside employer. We will also provide an update on recent decisions involving forum selection bylaws and mandatory arbitration bylaws.

**SPRING MEETING INFORMATION**
Saturday, April 12, 2014
11:00 AM – 12:00 PM
JW Marriott, Diamond Ballroom Salon 6, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 6550809121
Mike Pittenger
Myron Steele
Co-Chairs

**SUBCOMMITTEE REPORTS**

**ACQUISITIONS OF PUBLIC COMPANIES SUBCOMMITTEE**

Our Subcommittee meeting was well attended during our stand-alone meeting in February in Laguna Beach. For that meeting, we combined our Subcommittee meeting with our colleagues from the Joint Task Force on M&A Litigation and jointly hosted a presentation on “Practical Things Deal Lawyers Need to Know About M&A Litigation.” We were joined by prominent Delaware litigators Don Wolfe and Mike Pittenger from Potter Anderson and Kevin Coen from Morris Nichols, who walked us through the practical, litigation-related issues that we as deal lawyers should be aware of in the context of an acquisition of a public company (given the resulting litigation arising out of those transactions). It was a very informative discussion.

Our next Subcommittee meeting will be held at the Spring Meeting in Los Angeles. Given the increase in cross-border public company M&A activity, we thought we would put a little “international” flair into this meeting. As part of that, Jen DiNucci will be leading a discussion on public-company cross-border acquisitions structured as “inversion” transactions. Nicholas Dietrich will also be reviewing for the Subcommittee the proposed legislative changes in Quebec addressing permissible defensive measures in response to unsolicited takeovers in Canada. In addition, Mark Morton will review for us the Delaware Supreme Court’s recent decision in the MFW matter, as well as some practical considerations in controlling-stockholder transactions that arise in light of that decision. We will also hear from the leaders of our various Task Forces – Financial Advisor, Corporate Governance in M&A Transactions, and the Two-Step Task Force – as to the status of their projects.

Our Subcommittee dinner during our Los Angeles meeting will be held on Friday, April 11, 2014 at The California Club. Cocktails begin at 6:30pm, with dinner starting at 7:00pm. We hope to see many of you there.
INTERNATIONAL M&A SUBCOMMITTEE

The International M&A Subcommittee met from 10:30 a.m. to 12:00 p.m. on Friday, January 31, 2014, in connection with the 2014 Stand-Alone Meeting of the Mergers and Acquisitions Committee in Laguna Beach, CA.

Introductions

Two of the co-chairs of the Subcommittee, Freek Jonkhart and Franziska Ruf, introduced themselves and advised that the other co-chair, Keith Flaum, had unfortunately been unable to attend the meeting. The Subcommittee members then proceeded to introduce themselves. It was noted with great pleasure that the participants present included a very diverse group of corporate, academic and private practitioners from many countries around the world.

Status of Current Projects

Public Company Takeovers Project

Daniel Rosenberg of Speechly Bircham, London, gave a short summary of the current status of the Subcommittee’s Public Company Takeovers Project that he and Franziska Ruf of Davies Ward Phillips & Vineberg, Montréal, are leading. The editorial team, which, in addition to Daniel and Franziska, comprises Diane Frankle of Kaye Scholer, Silicon Valley, Sophie Lamonde of Stikeman Elliott, Montréal, Rick Silberstein of Gómez-Acebo & Pombo, Spain, and Patricia Vella of Morris Nichols Arsht & Tunnell, Delaware, are in the process of reviewing the submissions received from the various jurisdictions, with a view to providing comments to the contributors pursuant to such first edit review. Approximately one-half of first edit reviews were reported to be currently underway, with comments having been provided to the contributors. A second edit review will be conducted following completion of the first edit review and prior to publication of the work.

Attorney-Client Privilege; Legal Files; Post-Closing Legal Representation

Glenn West (Weil, Gotshal and Manges, New York) and Hermann Knott (Luther, Germany), gave a presentation on the circumstances under which the attorney-client privilege regarding pre-closing legal advice to Seller/Target passes to Buyer. The analysis included whether Seller will be prevented from using the information of its previous lawyer in post-closing disputes, a review of the relevant case law in the US compared with that in European jurisdictions and a consideration of the language in the acquisition agreement which would allow Seller to preserve privilege.

New Challenges to International Merger Filings

A panel chaired by the former Commissioner of the Canadian Competition Bureau, Melanie Aitken (now a partner with Bennett Jones, Washington), and which included Simon Pridds (Freshfields Bruckhaus Deringer, UK) and Craig Waldman (Jones Day, San Francisco), reviewed the panelists’ recent experience with competition filings, in particular in China, the EU and the US. The panelists shared their observations about the relatively new Chinese system for merger review (MOFCOM), the more aggressive stance being taken by the Obama administration on anti-trust matters in the US, the protracted and somewhat unpredictable EU “pre-filing consultation” process (with a similarly more aggressive stance being taken by the current commissioner and an expanding timetable) and the new Canadian “second request”-like suspensory powers.
International Survey of Financial Advisors

Yvette R. Austin Smith (The Brattle Group, New York) described the new project initiated by the Financial Advisors Task Force which will be co-sponsored by the International Mergers & Acquisitions Subcommittee. The survey aims at providing M&A Committee members with practical, hands-on knowledge of the role of, and the interaction with, financial advisors in mergers and acquisitions in foreign jurisdictions in light of the differing litigation landscape and local practice. Members of the M&A Committee were invited to indicate their interest in participating in this new project, being co-led by Yvette and Yan Pecoraro (Portolano Cavallo, Rome).

Subcommittee Website

Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:

- Presentation notes of Glenn West and Hermann Knott on Attorney-Client Privilege.
- Presentation notes of Melanie Aitken, Simon Priddis and Craig Waldman on International Merger Filings.
- Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

SPRING MEETING INFORMATION

Saturday, April 12, 2014
11:00 AM – 12:30 PM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5884742049
Keith Flaum
Freek Jonkhart
Franziska Ruf
Co-Chairs

MEMBERSHIP SUBCOMMITTEE

We are pleased to report that our total Committee membership as of March 10, 2014 is 4,459, which is an increase of 7 members since our last report in December. While it is a small increase overall, we are still pleased that the numbers grew and we will continue to focus on programs and events that keep our members engaged and attract new ones.

Our membership is comprised of residents of 49 states which has remained constant for the past couple of years. Our members now hail from 54 countries across the world which is 4 more than we had in December. This further proves that our Committee is becoming more and more international and we feel that number will continue to grow.

We saw a slight decrease in our numbers across the working groups, with the most notable jumps occurring with associate (nonlawyer) members (-4.38%). The number of Canadian members decreased a bit to 210 from 215, another 2% drop which was consistent from the last report.

A word on our Subcommittees and Task Forces: The M&A Trends Subcommittee is still our largest group with 1,556 members, up approximately 2% from 1,527 members, and the Private Equity Subcommittee right on its heels dropping slight this quarter to 1,372 members from 1,424 in December. The two biggest increases in members can be found within the Legal Project Management Task Force, which saw a 29% increase from 59 to 76 members, and the Governance Issues in Business Combinations Task Force, rising from 179 members in December to 212 members, a 18.5% increase. Here are some of the other relevant numbers:

<table>
<thead>
<tr>
<th>Category</th>
<th>Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisitions of Public Companies</td>
<td>835 (down 877)</td>
</tr>
<tr>
<td>M&amp;A Jurisprudence</td>
<td>735 (down 765)</td>
</tr>
<tr>
<td>Joint Ventures</td>
<td>714 (down 775)</td>
</tr>
<tr>
<td>Dictionary of M&amp;A Terms</td>
<td>626 (down 663)</td>
</tr>
</tbody>
</table>

We thank you for your involvement and look forward to seeing you all in sunny Los Angeles.

Tracy Washburn Bradley
Mireille Fontaine
Tatjana Paterno
Co-Chairs
M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee is currently comprised of the following two working groups and three project 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. After publication, the Annual Surveys are posted in an on-line library, called the M&A Lawyers’ Library, which members of the Mergers and Acquisitions Committee can access from the Committee’s home page on the ABA website (http://apps.americanbar.org/dch/committee.cfm?com=CL560000). The tenth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions is included in the February 2014 issue of The Business Lawyer, which should be published soon.

• 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 the M&A Lawyers’ Library. Currently, the Library contains thirteen memoranda, and we expect to post several more to the Library in the near future.

• The Library Index Project Group is creating a topic index for the M&A Lawyers’ Library, which will allow on-line visitors to the library to search the material in the Library by topic.

• The Jurisdictional Project Group is creating a chart, with supporting analysis, comparing the jurisprudence in the federal and state courts of Delaware, New York, California and Texas, concerning some of the more commonly litigated topics in M&A jurisprudence. We believe this will be a very instructive and useful tool for M&A practitioners who are involved in multi-jurisdictional transactions.

• The Damages Project Group is preparing a comprehensive analysis of the types of damages that are recoverable in common M&A litigation contexts, and the methods that courts have used, or allowed the parties to use, to calculate damage awards.

At our meeting in Los Angeles, we plan to discuss recent court decisions, including the recent Delaware Chancery Court decision in American Capital Acquisition Partners, LLC, v. LPL Holdings, Inc., which is summarized below, and the memo that is being prepared by Frederic Smith and Mike Pittenger on stockholder representatives and obligations imposed on non-signing shareholders and other parties in M&A transactions. We will also discuss the progress of the Project Groups and future additions to the Library.

We welcome all interested M&A Committee members to join our Subcommittee. The M&A Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary. Not only can our working groups and project groups use additional help on current projects, but we also have a virtually unlimited pool of topics to work on in the future.

We are also 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 e-mail either to Scott Whittaker at swhittaker@stonepigman.com or to Mike O’Bryan at mobryan@mofo.com. Please state in your email why you believe the case merits inclusion in the survey. We need you to help identify cases!

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.

Decision to be Discussed at the Los Angeles Committee Meeting


The Delaware Court of Chancery held recently that a buyer may have breached the implied covenant of good faith and fair dealing in an acquisition agreement by “pivoting” sales away from the target company after closing, making it difficult for the company to hit earnout targets. However, the court found that the buyer’s alleged pre-signing misrepresentations about its technological ability to help the target meet the targets did not breach the implied covenant.

Background

LPL Holdings purchased Concord Capital Partners from American Capital Partners pursuant to a stock purchase agreement for consideration that included an earnout based on aggregate gross margin. Covenants in the SPA required the buyer to operate the target “so as to permit the appropriate identification and calculation of Net Revenues,” but the SPA did not have any general best efforts covenants with respect to operating the business so as to meet or exceed the earnout targets. Several of the target’s executives also signed employment agreements providing for, among other things, bonuses based on revenue targets.

Prior to signing the SPA, the parties discussed the business that the target could conduct after closing and the buyer’s ability to provide or obtain the technology needed to operate that business. The SPA did not include any specific covenants by the buyer with respect to its technology platform, but the plaintiffs said that the parties “anticipated” that only minimal changes were required to the buyer’s platform for the target and buyer to work together and “create synergies” based on the buyer’s current operations. The plaintiffs said that they had therefore declined a competing offer that had a potentially higher upfront payment and overall value but did engage in the same business as the buyer and thus did not present the same opportunity for synergies.

After the closing, however, technology problems made it difficult for the target to take advantage of the “anticipated” synergies. Plaintiffs also alleged that the buyer and another buyer entity agreed to “pivot” sales away from the target, that the target was told to “stand down” with respect to certain business relationships, that the other buyer entity instructed target staff not to recommend the target’s services, and that the buyer reassigned target employees, with the result that the earnout targets were missed.

Court Analysis

The court noted that the implied covenant of good faith and fair dealing requires parties to a contract to “refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party ... from receiving the benefit of the bargain.” However, the implied covenant serves only as a “gap-filler” where the parties failed to anticipate some contingency.

The court found that taken together, the SPA’s contingent purchase price provision, the compensation targets in the employment agreements, and the provision for the calculation of revenue in order to determine the plaintiff’s payments demonstrated that, “had the parties contemplated that the [buyer] might affirmatively act to ‘gut’ [the target] to minimize payments under the SPA and employment agreements,” the parties would have agreed otherwise. Accordingly, the court found a breach of the implied covenant. The court found that the seller also had alleged damages because it said that they turned down other offers that had larger upfront payments and that both parties anticipated synergies.
from the transaction, making it at least “reasonably conceivable” that they would have reached the earnout targets.

However, the court dismissed the claim that the implied covenant of good faith and fair dealing required the buyer to make technological adaptations and to exert efforts to achieve the technological capability that the parties had “anticipated.” The court noted that, as the seller related in its fraud claim, the parties had discussed technology questions during negotiations, but didn’t put any specific covenants into the SPA. The court dismissed the seller’s claim that the buyer “diverted” its attention away from the technology issue, pointing to the seller’s allegation in its fraud claim that the buyer had an incentive to address the technology issues and to the SPA’s integration clause.

The court dismissed the seller’s fraud claim, noting the SPA’s non-reliance clause.

Conclusion

• In an earnout context, sellers should consider reflecting in the contract any representations or promises made by buyers as to their current capabilities or willingness to operate or change their or the target’s business so as to enhance the potential earnout.

• Governing law matters. American Capital shows the relatively high (but not insurmountable) bar to an implied covenant claim in Delaware, consistent with the recent Delaware Supreme Court ruling in Winshall v. Viacom (Del. Supreme, 2013 (reviewed in our forthcoming Survey of 2013 cases)) and the Chancery Court decision in Squid Soap (Del. Ch. 2009) (reviewed in our Survey of 2010 cases)). Compare Massachusetts, where a court found that “various aspects” of an agreement, including the absence of negating language, supported an implied “reasonable efforts” term (Sonoran Scanners, 1st Cir. 2009 (reviewed in our Survey of 2009 cases)).

• Even in Delaware, the implied covenant of good faith and fair dealing may have some impact.

To join the M&A Jurisprudence Subcommittee, please email either Scott Whittaker at swhittaker@stonepigman.com, Jon Hirschoff at jhirschoff@fdh.com, or Mike O’Bryan at mobryan@mofo.com, or simply come to the Subcommittee meeting in Los Angeles.

Scott T. Whittaker  
Subcommittee Chair  

Michael G. O’Bryan  
Chair - Annual Survey Working Group  

Jon T. Hirschoff  
Chair - Judicial Interpretations Working Group  

Project Group Chairs:  
Rikki L. Bagatell – Library Index Project  
Brian S. North – Jurisdictional Project  
Lisa J. Hedrick – Damages Project

SPRING MEETING INFORMATION  
Friday, April 11, 2014  
8:00 AM – 9:30 AM  
JW Marriott, Diamond Ballroom Salon 5, Fourth Level  
(866) 646-6488 (US and Canada)  
(707) 287-9583 (International)  
Conference Code:  5884742049

M&A MARKET TRENDS SUBCOMMITTEE  

At our last meeting in Laguna we reviewed the status of our recent pending publications; Tasha Hutchins of Practical Law Company reviewed the state of the M&A market; Melissa DiVincenzo of Morris Nichols shared highlights from the 2013 U.S. Strategic Buyer / Public Target Deal Points Study; Jessica Pearlman of K&L Gates shared highlights from the U.S. Private Target Deal Points Study; and Cam Rusaw of Davies Ward shared highlights from the first ever Canadian Public Target Deal Points Study.

Our next meeting will be at the spring meeting in Los Angeles. The agenda includes:

• A review of pending publications;  
• An update on the state of the M&A market;  
• Highlights from the PLC Deal Protections Study;
• A discussion of the practice implications of the Great Hill decision; and

• A “Tales from the Trenches” presentation

I look forward to seeing you in Los Angeles.

SPRING MEETING INFORMATION
Saturday, April 12, 2014
9:30 AM – 11:00 AM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code:  5884742049

Hal Leibowitz
Chair

PRIVATE EQUITY M&A SUBCOMMITTEE

The Private Equity M&A Subcommittee met in Laguna Beach, California on Friday, January 31, 2014 as part of the M&A Committee’s stand-alone meeting being held there. The Subcommittee discussed events and developments affecting the Private Equity and broader M&A markets during the past four months since the Subcommittee’s previous gathering.

The Subcommittee also received presentations and materials from the following on the referenced topics: (i) Jennifer Muller, Managing Director, Houlihan Lokey (San Francisco), reviewed recent trends and developments in the M&A and Private Equity markets from a financial perspective; (ii) Jennifer Muller also reviewed selected findings from Houlihan Lokey’s 2013 Going Private Transaction Study, an annual report Houlihan has published reviewing certain features from selected transactions effected by financial buyers; (iii) Andrew T. Greenberg, CEO of GF Data Resources, reviewed financial data and deal trends that GF Data collects, aggregates, and distributes on Private Equity transactions in the $10 million-$250 million range; and (iv) Ohio State Law Professor Steven M. Davidoff, who writes on M&A and Private Equity topics in his capacity as “The Deal Professor” for The New York Times’ popular Dealbook section, participated in a Q&A session with the Subcommittee on certain deal-related issues from 2013, focusing on certain notable transactions as well as case law and statutory developments during the period. The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.

SPRING MEETING INFORMATION
Friday, April 11, 2014
9:30 AM – 11:00 AM
JW Marriott, Diamond Ballroom Salon 5, Fourth Level
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code:  5884742049

John K. Hughes
Chair

DEAL PEOPLE

The 2014 ABA Business Law Section Spring Meeting will, for the first time, feature an M&A Committee-sponsored program focused on increasing the role of women in M&A. Our Committee is fortunate to have the active participation and leadership of many successful women, two of whom are profiled in this edition of Deal People. 1

About Deal People – Deal People is a feature in Deal Points that highlights members of the Mergers and Acquisitions Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

John F Clifford
McMillan LLP
Toronto, Canada

1 In other Deal People news, not long after Cian McCourt (New York City office of the Irish firm, A&L Goodbody) returned from the M&A Committee’s Laguna Beach meeting, Cian’s wife Polly gave birth to a baby daughter ... on the streets of New York (with the help of the doorman at their apartment) ... while Cian was stuck in New York traffic trying to get to her. The event was widely reported in the press in the US and elsewhere (see http://www.bbc.com/news/world-us-canada-26356708 and http://www.thelawyer.com/analysis/behind-the-law/al-goodbody-weathers-media-storm-after-partners-baby-born-on-ny-street/3016934.article). Parents and daughter ... perhaps a future Woman in M&A ... all are doing fine. Congratulations Cian!
Leigh Walton- a partner in Bass, Berry & Sims’ Nashville office, where she focuses her practice on corporate, securities, and mergers and acquisitions in the healthcare and the distilled spirits industries (she relates that the two are synergetic). Because many of you know Leigh as an M&A lawyer through her leadership roles with our Committee – including Chair of the Committee from 2009-2012, I asked her to name a couple of her passions outside of law. She quickly responded – politics and travel.

Leigh traces her passion for politics and travel to her upbringing on a farm in rural Virginia, where she witnessed many of the racial and political changes that occurred in the United States during the 50’s and 60’s. Her first taste of politics was in the late 1950’s, when her father ran for the county Board of Supervisors, and as a young girl she kept records of contacts with potential voters. He won, and Leigh was proud.

Leigh relates, “Looking back on this seemingly minor election, how would involvement at this local level of government stir a dedication to politics?” The answer is that, as it turns out, her father was a leader in the effort to end segregation in the Virginia public schools, in contrast to the actions of neighboring Prince Edward County.

Since Leigh has vowed never to run for public office, she stays actively involved in other ways – usually as a fundraiser for candidates on the national, state and local levels. Leigh was the first to encourage Nashville’s current mayor to run for office, and served as his treasurer in both his successful elections. She is now acting as the treasurer for another civic leader running for mayor. If elected, she would be Nashville’s first woman mayor.

Leigh also is an avid traveler and has been on many great adventures, often on bicycle. (Her most recent trip was to Myanmar, and yes it was a bike trip.) “As we all realize, our world (including our work) is complex, mandating consistent attention to a variety of issues.” Leigh adds, “This is why I enjoy completely different environments and cultures. It forces me to slow down and see things differently – religion, language, money, food, geography, standards of living and thought patterns.”

Connecting her two passions, travel has informed Leigh’s involvement in civic affairs. For example, her time spent in developing countries created an acute awareness of the importance of decent, affordable housing. These experiences have motivated her in her work with Nashville’s public housing authority for over a decade.

Leigh’s support of public life and travel has also influenced her thinking about the role of women in society. She has observed that countries who fail to afford opportunities to women do it in two primary ways. First, the culture deprives women of the chance to be educated. Second, it deprives them of the freedom to make decisions about marriage and child birth. These recognitions have informed many of her activities to foster women’s effective contribution to our society.
Jen Muller – a Managing Director of Houlihan Lokey’s San Francisco office, is a senior member of the firm’s transaction opinion group and regular advisor to boards of directors that are navigating M&A transactions. She currently is Vice-Chair of the ABA M&A Committee and Co-chair of the Committee’s Task Force on Women in M&A.

Those of you who know Jen know that she travels frequently to speak about M&A-related topics, and maintains a very busy practice. She also is an enthusiastically committed runner; a passion that Jen says helps her to do her job and manage life’s competing demands. “Running is a time for me to think about the forest, not just the trees. I think I serve my clients better as a result; by taking time to think about the broader, more strategic issues.”

Jen has witnessed much positive change for women in her nearly 20 years at Houlihan Lokey. She recalls that when she joined the firm, there was only one woman in a senior role. She was capable, confident and inspiring, and became mentor for Jen and a promoter of Jen’s career. Houlihan now has six women Managing Directors, including Jen. They talk regularly and discuss how to promote women both within the firm and externally, and use their networks of female clients and contacts to enhance their careers and build Houlihan’s business.

Jen’s commitment to advancing women in M&A made her an obvious choice to Co-chair the Committee’s Task Force on Women in M&A. She leads by example in the promotion and support of her female colleagues. She looks for appropriate opportunities to involve junior women on mandates and often invites more junior women to work with her to develop presentations, and to give them a speaking role.

Jen recalls recently speaking to a business school class about M&A trends. The presentation went well, and, after the presentation was done, a student observed that it was a rare event in the school to see a woman speak. Clearly, there’s lots of work to do.
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We have streamlined the whole process and eliminated the hassle. Being quick adds up quickly for your clients.

See Hidden Inefficiencies in M&A in this issue.

COMMITTEE MEETING MATERIALS
AGENDA AND DIAL-IN INFORMATION FOR 2014 SPRING MEETING
PLEASE NOTE THAT TIMES LISTED ARE PACIFIC TIME
PROGRAMS (INCLUDING THOSE THE COMMITTEE IS CO-SPONSORING) ARE SHADED IN BLUE
US AND CANADA DIAL IN NUMBER: (866) 646-6488
INTERNATIONAL DIAL IN NUMBER: (707) 287-9583

Thursday, April 10, 2014

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<tr>
<th>Meeting</th>
<th>Time</th>
<th>Location</th>
<th>Passcode</th>
</tr>
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<tbody>
<tr>
<td><strong>What Every Business Lawyer Needs to Know But They Did Not Teach You in Law School</strong></td>
<td>10:30 AM – 12:00 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 1 &amp; 2, Fourth Level</td>
<td>N/A</td>
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<td><strong>Antitrust Issues Raised in Mergers and by Restraints in Non-Merger Agreements</strong></td>
<td>10:30 AM – 12:30 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 4, Fourth Level</td>
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<tr>
<td><strong>The Shareholder Activism Playbook: Unlocking M&amp;A Deal Value</strong></td>
<td>2:30 PM – 4:30 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 3, Fourth Level</td>
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### Friday, April 11, 2014

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<th>Time</th>
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<tr>
<td>M&amp;A Jurisprudence</td>
<td>8:00 AM – 9:30 AM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
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<td>Private Equity M&amp;A</td>
<td>9:30 AM – 11:00 AM</td>
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<td>5884742049</td>
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<td>Calling All Deal Lawyers: Use Your Skills to Help Prevent</td>
<td>10:30 AM – 12:30 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 4, Fourth Level</td>
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<td>and Resolve Disputes!</td>
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<td>Revised Model Asset Purchase Agreement Task Force</td>
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<td>5884742049</td>
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<td>Legal Project Management Task Force</td>
<td>12:00 PM – 1:00 PM</td>
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<td>5884742049</td>
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<td>Governance Issues in Business Combinations Joint Task Force</td>
<td>1:00 PM – 2:30 PM</td>
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<td>Acquisition of Public Companies</td>
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<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
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<td>Prosecution, Defense and Settlement of M&amp;A</td>
<td>2:30 PM – 4:30 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 3, Fourth Level</td>
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<td>Stockholder Litigation – A Solution in Search of a Problem</td>
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<tr>
<td>Two-Step Auction Task Force</td>
<td>4:00 PM – 5:00 PM</td>
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<tr>
<td>Meeting of Committee Chair and Vice Chairs, Subcommittees,</td>
<td>5:00 PM – 5:45 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
</tr>
<tr>
<td>Task Force and Working Group Chairs</td>
<td></td>
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</tbody>
</table>

### Saturday, April 12, 2014

<table>
<thead>
<tr>
<th>Meeting</th>
<th>Time</th>
<th>Location</th>
<th>Passcode</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women in Mergers and Acquisitions</td>
<td>8:00 AM – 9:30 AM</td>
<td>JW Marriott, Platinum Ballroom Salon C, Second Level</td>
<td>N/A</td>
</tr>
<tr>
<td>Exiting the Venture Backed Company: Jurisprudence and Practice</td>
<td>8:00 AM – 10:00 AM</td>
<td>JW Marriott, Gold Ballroom Salon 1, First Level</td>
<td>N/A</td>
</tr>
<tr>
<td>Gay Marriage and the Repeal of DOMA: What Every Business</td>
<td>8:00 AM – 10:00 AM</td>
<td>JW Marriott, Diamond Ballroom Salon 1 &amp; 2, Fourth Level</td>
<td>N/A</td>
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<tr>
<td>Lawyer Needs to Know</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Market Trends</td>
<td>9:30 AM – 11:00 AM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
</tr>
<tr>
<td>M&amp;A Litigation Joint Task Force</td>
<td>11:00 AM – 12:00 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 6, Fourth Level</td>
<td>6550809121</td>
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<tr>
<td>International M&amp;A</td>
<td>11:00 AM – 12:00 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
</tr>
<tr>
<td>Financial Advisor Task Force</td>
<td>12:30 PM – 2:00 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
</tr>
<tr>
<td>Mergers &amp; Acquisitions Full Committee Meeting</td>
<td>2:00 PM – 4:30 PM</td>
<td>JW Marriott, Diamond Ballroom Salon 5, Fourth Level</td>
<td>5884742049</td>
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