

# Table of Contents

## CHAPTER 1. INTRODUCTION TO STARTUPS AND ROLE OF THE LAWYER

- § 1:1 Introduction to startups
- § 1:2 The case for representing startups
- § 1:3 Role of the Lawyer—Legal advice versus business and financial advice
- § 1:4 Ethical considerations—Who is the client?
- § 1:5 —Should the lawyer serve as officer or director?
- § 1:6 —Stock for fees
- § 1:7 —Finder's fees
- § 1:8 —Acting as intermediary between clients
- § 1:9 Role of the patent lawyer—Trade secrets, patents and copyrights
- § 1:10 Implications of “whistleblower” provisions under Dodd-Frank Act
- § 1:11 Responsibilities of tax counsel under Circular 230
- Appendix 1-A. Attorney’s Conflict Letter—Entity with Several Founders
- Appendix 1-B. Attorney’s Conflict Letter—Two Parties to Same Transaction
- Appendix 1-C. Attorney’s Conflict Letter—Corporation and Individual Shareholders

## CHAPTER 2. FORMATION OF THE VENTURE

- § 2:1 Common mistakes made by startups
- § 2:2 Goals of the founders
- § 2:3 The business plan
- § 2:4 Corporation, partnership, sole proprietorship, or limited liability company—Basic considerations
- § 2:5 Tax characteristics of a sole proprietorship
- § 2:6 Tax characteristics of partnerships
- § 2:7 Tax characteristics of C corporations
- § 2:8 Tax characteristics of S corporations
- § 2:9 Tax characteristics of limited liability companies
- § 2:10 Employee benefit aspects of partnerships and LLCs
- § 2:11 Entity classification under the “check-the-box” regulations
- § 2:12 Self-employment tax issues

- § 2:13 Initial tax considerations—Transfers on commencement of a corporation or partnership
- § 2:14 20% deduction for qualified business income
- § 2:15 Entity conversions
- § 2:16 Entity conversion—Statutory conversion provisions
- § 2:17 Planning for losses
- § 2:18 Taxable years
- § 2:19 Organizational costs
- § 2:20 Partnership characteristics
- § 2:21 Corporation characteristics
- § 2:22 Selection of a state of organization
- § 2:23 Limited liability company characteristics—Goal
- § 2:24 Principal characteristics of LLCs—General
- § 2:25 —Formation
- § 2:26 —Requirements
- § 2:27 —Members
- § 2:28 —Limited liability
- § 2:29 —Governance provisions
- § 2:30 —Conversion
- § 2:31 —Transferring interests
- § 2:32 —Foreign LLC
- § 2:33 —Selection of a state LLC statute
- § 2:34 Principal characteristics of LLC's—Use of LLC for business joint ventures
- § 2:35 —Use of an LLC as the general partner of a limited partnership
- § 2:36 Limited liability partnerships
- § 2:37 Securities law matters
- § 2:38 Composition of board of directors
- § 2:39 Restrictive agreements between founders and previous employers
- § 2:40 Liability of corporate directors
- § 2:41 Forming the entity
- § 2:42 Curing defects in stock issuances.
- § 2:43 Due diligence.
- § 2:44 Corporate Transparency Act

- Appendix 2-A. Outline for a Business Plan
- Appendix 2-B. Executive Summary
- Appendix 2-C. Developing a Business Plan
- Appendix 2-D. General Partnership Agreement
- Appendix 2-E. General Partnership Checklist
- Appendix 2-F. Limited Partnership Agreement
- Appendix 2-G. Attorney's Exit Letter
- Appendix 2-H. Indemnification Agreement for Officers and Directors

## TABLE OF CONTENTS

Appendix 2-I-A.	Checklist for Organization of a Corporation
Appendix 2-I-B.	Checklist of Information Required to Form a Limited Liability Company
Appendix 2-J.	Characteristics of Different Business Entities
Appendix 2-K.	LLC Operating Agreement—Long Form
Appendix 2-K-A.	Checklist of Terms and Conditions of LLC Operating Agreement
Appendix 2-L-A.	LLC Operating Agreement—Short Form for Single Member
Appendix 2-L-B.	LLC Operating Agreement—Short Form for Multiple Members
Appendix 2-M.	Limited Partnership Letter of Intent and Term Sheet
Appendix 2-N.	17 Rules for VC Funding
Appendix 2-O.	Information letter to clients regarding CTA—Firm not providing reporting services
Appendix 2-P.	Sample Engagement Letter for Beneficial Ownership Reports of US Formed Companies

## CHAPTER 3. AGREEMENTS BETWEEN THE FOUNDERS

§ 3:1	Division of stock or ownership interest
§ 3:2	Stock control arrangements—Voting trusts, irrevocable proxies and shareholders' agreements
§ 3:3	Division of responsibility
§ 3:4	Employment contracts for founders
§ 3:5	Buy-out and buy-sell agreements
§ 3:6	How to handle patents and inventions of founders
Appendix 3-A.	Shareholders' Agreement—Long Form
Appendix 3-B.	Shareholders' Agreement—Short Form
Appendix 3-C.	Irrevocable Proxy
Appendix 3-D.	Voting Trust Agreement
Appendix 3-E.	Position Details
Appendix 3-F.	Employment Agreement
Appendix 3-G-A.	Inventor's Licensing Agreement
Appendix 3-G-B.	Inventor's Assignment Agreement
Appendix 3-H.	Employee Invention and Secrecy Agreement
Appendix 3-I.	Cover Letter to Employee Invention and Secrecy Agreement

- Appendix 3-J. Corporate Buy-Sell Agreement
- Appendix 3-K. Cross-Purchase Agreement
- Appendix 3-L. Buy-Sell Agreement Checklist
- Appendix 3-M. “Shotgun” Buyout Clause

## CHAPTER 4. METHODS OF INITIAL FINANCING

- § 4:1 Informal financing
- § 4:2 Sale of equity—Common stock
- § 4:3 —Preferred stock
- § 4:4 —Convertible preferred
- § 4:5 —Hybrid preferreds
- § 4:6 —Tax considerations
- § 4:7 Sale of debt
- § 4:8 Subordination agreements
- § 4:9 Debt/equity combination—Convertible debentures
- § 4:10 Simple Agreement for Future Equity (SAFE)
- § 4:11 Debt/equity combination—Debentures with warrants
- § 4:12 —Tax considerations
- § 4:13 Joint ventures
- § 4:14 Licensing of product rights
- § 4:15 Legal and financial considerations in determining the type of financing
- § 4:16 —Subordination and security provisions
- § 4:17 —Antidilution formulas
- § 4:18 —Affirmative and negative covenants
- § 4:19 —Liquidity factors
- § 4:20 —Retention of control—Sale of equity securities
- § 4:21 —Buy-sell agreement
- § 4:22 —R&D and marketing partnerships
- § 4:23 —Collateral business arrangements
- § 4:24 —Lease transactions
- § 4:25 —Statutory restrictions
- § 4:26 —Letters of intent
- § 4:27 —Preliminary legal steps
- § 4:28 —Disclosure issues

Appendix 4-A. Top Seven Capital-Raising Mistakes to Avoid

Appendix 4-B. Subordination Agreement

## CHAPTER 5. SOURCES OF INITIAL FINANCING

- § 5:1 General
- § 5:2 Legal issues in seeking outside financing—Role of issuer’s counsel

## TABLE OF CONTENTS

- § 5:3 —Conflicts of interest
- § 5:4 —When should the company's counsel be brought into the financing process?
- § 5:5 —Team approach
- § 5:6 —Legal fees
- § 5:7 —Services of investment bankers and other professionals
- § 5:8 —Preparing the financing memorandum
- § 5:9 —Securities law issues
- § 5:10 —Tax considerations
- § 5:11 —Investors' objectives
- § 5:12 Changing capital market
- § 5:13 Venture capital funds
- § 5:14 *[Reserved]*
- § 5:15 Banks and savings and loan associations
- § 5:16 Relatives, friends and business associates
- § 5:17 Sophisticated investors—Business angels
- § 5:18 —Accelerators, Incubators, and Internet portals
- § 5:19 Investment bankers
- § 5:20 Finders
- § 5:21 Small Business Innovation Research Grants
- § 5:22 Other financing sources

Appendix 5-A. Finder's Fee Agreement for Financing

Appendix 5-B. ACA Member Directory

Appendix 5-C. Executive Summary Outline for Private Offering

Appendix 5-D. "The People's Bank"

Appendix 5-E. The Anatomy of Angel Networks

Appendix 5-F. Two Articles by Martin C. Zwilling

## CHAPTER 6. SECURITIES LAW CONSIDERATIONS

- § 6:1 Exempt offerings—General
- § 6:2 Definition of a "security"
- § 6:3 The Jumpstart Our Business Startups (JOBS) Act
- § 6:4 Regulation D exemption—Disclosure Requirements for Reporting companies
- § 6:5 —Disclosure Requirements for Nonreporting companies
- § 6:6 Statutory private offering exemptions
- § 6:7 Regulation D exemption—Introduction
- § 6:8 —Rules 504
- § 6:9 —Rule 506
- § 6:10 —Calculating net worth for purposes of the accredited investor definition

- § 6:11 —Manner of the offering; general solicitation
- § 6:12 —Disclosure requirements
- § 6:13 —Need for private offering memorandum
- § 6:14 —Resale restrictions
- § 6:15 —Notice on Form D
- § 6:16 —Rule 508 good faith compliance
- § 6:17 —Federal preemption
- § 6:18 Regulation CF (Crowdfunding)—Introduction
- § 6:19 —Offering and investment limits
- § 6:20 —Crowdfunding portals
- § 6:21 —Offering Statement
- § 6:22 —Advertising Offerings prior to Form C Filing
- § 6:23 —Advertising Offerings after Form C Filing
- § 6:24 —Ongoing Reporting
- § 6:25 Regulation A exemption
- § 6:26 Foreign offering exemption (Regulation S)
- § 6:27 Intrastate offering exemption; intrastate equity crowdfunding
- § 6:28 Rules 701–703 exemption for employee stock plans
- § 6:29 Integration
- § 6:30 “Bad boy” disqualification provisions
- § 6:31 Use of non-registered finders, online matchmaking portals and demo days
- § 6:32 State blue sky laws
- § 6:33 The “Issuer’s Exemption”—Associated persons of the issuer
- § 6:34 Suitability standards
- § 6:35 Resales of restricted securities—General
- § 6:36 Resales of restricted securities under Rule 144
- § 6:37 Registration of Restricted Securities on SEC Form S-3
- § 6:38 Resales by qualified institutional buyers
- § 6:39 Minimum-maximum offerings
- § 6:40 —Escrow provisions
- § 6:41 —Extensions of offering period
- § 6:42 —Disclosure
- § 6:43 Liability of Directors and Officers
- § 6:44 Antifraud provisions
- § 6:45 Section 11 Liability
- § 6:46 Section 12 Liability
- § 6:47 Liability of lawyers and accountants
- § 6:48 —Standards of professional conduct when practicing before the SEC
- § 6:49 —Legal opinions
- § 6:50 The Private Securities Litigation Reform Act of 1995
- § 6:51 —Heightened pleading standard
- § 6:52 —Safe-harbor for forward-looking statements
- § 6:53 —Proportionate liability

## TABLE OF CONTENTS

- § 6:54 —Attorney's fees
- § 6:55 —Class action and other litigation reforms
- § 6:56 The Securities Litigation Uniform Standards Act of 1998 (“SLUSA”); the *Cyan* case; and federal forum bylaw provisions
- Appendix 6-A. Sample Memorandum to Clients: Private Offering of Securities
- Appendix 6-B. Overview of Amended Capital-Raising Exemptions
- Appendix 6-C. XYZ Technology, Inc. Offering Log

## CHAPTER 7. NEGOTIATING THE INITIAL FINANCING

- § 7:1 In general
- § 7:2 Letters of intent and term sheets
- § 7:3 Valuing the company
- § 7:4 Negotiation strategy
- § 7:5 Typical provisions of investment agreements
- § 7:6 —Purchase of security
- § 7:7 —Representations and warranties
- § 7:8 —Affirmative and negative covenants
- § 7:9 —Conditions to closing
- § 7:10 —Procedural provisions
- § 7:11 Provisions for change of control
- § 7:12 Registration rights
- § 7:13 —Piggyback rights
- § 7:14 —Demand rights
- § 7:15 —S-3 registration
- § 7:16 Liquidation preferences
- § 7:17 Conversion and antidilution provisions
- § 7:18 —Broad-based weighted average antidilution provision
- § 7:19 —Narrow-based weighted average antidilution provision
- § 7:20 —Ratchet antidilution provision
- § 7:21 —Market price antidilution provision
- § 7:22 Rights of first offer
- § 7:23 Rights of first refusal and co-sale
- § 7:24 Drag-along rights
- § 7:25 Dividend preferences
- § 7:26 Board representation; voting agreements
- § 7:27 Redemption
- § 7:28 Protective provisions
- § 7:29 Comparison of various securities
- § 7:30 —Straight debt
- § 7:31 —Debt with warrants

- § 7:32 —Convertible debt
- § 7:33 —Convertible preferred stock
- § 7:34 —Hybrid preferreds
- § 7:35 —Convertible exchangeable preferred stock (CEPS)
- § 7:36 —Convertible adjustable rate preferred stock (CARPS)
- § 7:37 —Multiple adjustable rate preferred stock (MARPS)—With adjustment based on market price
- § 7:38 —Common stock
- § 7:39 —Combinations of securities
- § 7:40 —Payment-in-kind (PIK) securities
- § 7:41 Limited partnership financing
- § 7:42 Sample Agreements

Appendix 7-A. Letter of Intent for Convertible Preferred Stock

Appendix 7-B. Term Sheet for Convertible Preferred Stock

Appendix 7-C. Series A Convertible Preferred Stock Purchase Agreement

Appendix 7-D. Amended and Restated Certificate of Incorporation

Appendix 7-E. Investors' Rights Agreement

Appendix 7-F. Right of First Refusal and Co-sale Agreement

Appendix 7-F-1. Sample Drag-Along Provisions

Appendix 7-G. Voting Agreement

Appendix 7-J. Anti-Dilution Examples

## CHAPTER 8. COMPENSATION AND STOCK INCENTIVES FOR KEY EMPLOYEES

- § 8:1 Taxation of property as compensation—General rules
- § 8:2 —Transfer of property
- § 8:3 —Substantial risk of forfeiture
- § 8:4 —Transferability
- § 8:5 —Nonlapse restrictions
- § 8:6 —Treatment of employer
- § 8:7 Stock purchase and stock bonus plans
- § 8:8 Restricted stock grants
- § 8:9 Restricted stock—Section 83(b) election
- § 8:10 Nonqualified stock options
- § 8:11 Incentive stock options
- § 8:12 Stock appreciation rights
- § 8:13 Phantom stock
- § 8:14 Accounting considerations
- § 8:15 Partnership or LLC interests for services

## TABLE OF CONTENTS

- § 8:16 Taxation of non-qualified deferred compensation plans
- § 8:17 Excessive executive compensation
- § 8:18 Backdating of options
- § 8:19 Vesting provisions
- Appendix 8-A. Form of Equity Incentive Plan
- Appendix 8-B. Form of Nonqualified Stock Option Agreement
- Appendix 8-C. Form of Incentive Stock Option Agreement
- Appendix 8-D. Form of Stock Appreciation Rights Agreement
- Appendix 8-E. Form of Restricted Stock Agreement
- Appendix 8-F. Form of Phantom Stock Agreement
- Appendix 8-G. Memorandum to Employees Describing Different Types of Equity Incentives
- Appendix 8-H. Best Practices in Granting Employee Stock Options

## CHAPTER 9. INITIAL OPERATING PROBLEMS

- § 9:1 Trade secret, patent, trademark, mask work and copyright protection
- § 9:2 Patents
- § 9:3 Trade secret, patent, trademark and copyright protection—Trade secrets
- § 9:4 —Uniform Trade Secrets Act
- § 9:5 —Trademarks, servicemarks and trade names
- § 9:6 —Copyrights and semiconductor chip protection
- § 9:7 —Employer's rights to patents and trade secrets
- § 9:8 —Importance of written contracts
- § 9:9 —Patent rights versus trade secret rights
- § 9:10 Unfair competition—General
- § 9:11 —History of the law of unfair competition
- § 9:12 —Unfair competition as between companies and former employees
- § 9:13 —Computer Fraud and Abuse Act
- § 9:14 —Solicitation of customers by former employees
- § 9:15 —Soliciting company employees
- § 9:16 —Organization of competing business
- § 9:17 —Wrongful termination of distributorship or agency
- § 9:18 —Contractual restraints
- § 9:19 Business related torts
- § 9:20 —Inducing breach of contract
- § 9:21 —Interference with prospective advantage
- § 9:22 —Miscellaneous causes of action
- § 9:23 —Trade libel
- § 9:24 Antitrust problems—General

- § 9:25 —Product price restraints
- § 9:26 —Territorial restraints
- § 9:27 —Duration of licensing agreements
- § 9:28 —Quantity and field of use restrictions
- § 9:29 —Grant-back provisions
- § 9:30 —Tying agreements
- § 9:31 —Other pricing considerations
- § 9:32 —Unfair competition as violations of the antitrust laws
- §§ 9:33 through 9:40 *[Reserved]*
- § 9:41 Manufacturer's representative, distributor and dealer arrangements—Antitrust considerations
- § 9:42 Employment issues—Overview of federal employment statutes
- § 9:43 —Employee policies and agreements
- § 9:44 —Employee handbooks
- § 9:45 —Arbitration agreements
- § 9:46 —Confidentiality, non-solicitation and noncompete agreements
- § 9:47 Termination of employment
- § 9:48 Employment issues—Employee policies and agreements—Executive compensation agreements
- § 9:49 —Wage and hour issues
- § 9:50 —Independent contractor classification
- § 9:51 —Exempt/nonexempt classifications
- § 9:52 —Contingent workers
- § 9:53 —Employment-related insurance coverage
- § 9:54 —Employment liability insurance policy (EPLI)
- § 9:55 —Workers' compensation insurance
- § 9:56 Manufacturing facilities: Purchase or lease
- § 9:57 —Defining leases
- § 9:58 —Lease v. purchase decision
- § 9:59 —I.R.C. Section 467
- § 9:60 —Options to purchase

Appendix 9-A. Nonconfidential Submission Agreement

Appendix 9-B. Manufacturer's Distributor Agreement

Appendix 9-C. Software Developer's VAR Agreement

Appendix 9-D. Manufacturer's Bundling Distribution Agreement

Appendix 9-E. Software Developer's License Agreement

Appendix 9-F. License Agreement Checklist

Appendix 9-G. Sales Representative Agreement

Appendix 9-H. At Will Employment Agreement

Appendix 9-I. Independent Contractor or Employee? It Does Matter.

TABLE OF CONTENTS

## CHAPTER 10. SECOND ROUND FINANCING

- § 10:1 Introduction
- § 10:2 Debt financing—General
- § 10:3 —Loan guaranties
- § 10:4 —Commercial bank loans
- § 10:5 —Accounts receivable financing
- § 10:6 —Inventory financing
- § 10:7 —Equipment financing
- § 10:8 —Asset lenders
- § 10:9 —Factoring
- § 10:10 —Leasing
- § 10:11 —Government lenders
- § 10:12 Equity financing—Second rounds
- § 10:13 —Down rounds
- § 10:14 —Bridge financing
- § 10:15 —High-yield debt, equity lines of credit and “toxic convertibles”
- § 10:16 Corporate partnering
- § 10:17 —Corporate partnering structures—Equity-oriented corporate partnering arrangement
- § 10:18 —Technology-driven corporate partnering arrangement
- § 10:19 —Product-driven corporate partnering arrangement
- § 10:20 —General planning and approach
- § 10:21 —Finding a corporate partner
- § 10:22 —Negotiating the corporate partnering agreement

Appendix 10-D. Bridge Financing Term Sheet

Appendix 10-F. Security Agreement

## CHAPTER 11. INITIAL PUBLIC OFFERING

- § 11:1 Introduction to IPOs
- § 11:2 Considering whether to go public—Advantages of going public—Higher stock valuation than private placement [or debt offering]
  - Ability to obtain additional financing
  - Use of stock for acquisitions
  - Value to insiders
  - Attracting key executives
- § 11:7 Disadvantages of going public—Operating in a “fishbowl”
  - Restrictions on transfers by insiders
  - Expenses of going and staying public
  - Possible loss of control
  - Estate planning—Taxes

- § 11:12 — —State “blue sky” restrictions
- § 11:13 —Effect of Sarbanes-Oxley and Dodd-Frank Acts
- § 11:14 Effect of the Jumpstart Our Business Startups (JOBS) Act
- § 11:15 Considering whether to go public—Financing alternatives
- § 11:16 —Regulation A offerings
- § 11:17 Selecting an underwriter
- § 11:18 Negotiating letter of intent
- § 11:19 —Usual terms of letter of intent
- § 11:20 — —Price range
- § 11:21 — —Amount of securities offered
- § 11:22 — —Type of underwriting
- § 11:23 — —Underwriting and other fees and expenses
- § 11:24 — —Standard conditions
- § 11:25 —Special terms of letter of intent—Right of first refusal
- § 11:26 — —Right to approve counsel and accountants
- § 11:27 — —Right to designate directors
- § 11:28 —Timing of offering
- § 11:29 —Special market-related conditions
- § 11:30 Registration process
- § 11:31 —Prefiling period—All-hands meeting; timetable
- § 11:32 — —“Gun-jumping”
- § 11:33 — —Due diligence
- § 11:34 — —Type of form to use
- § 11:35 —Filing requirements
- § 11:36 — —Blue sky qualification
- § 11:37 — —Federal pre-emption
- § 11:38 — —Filing with FINRA
- § 11:39 — —Rule 134 publicity and broker-dealer marketing efforts
- § 11:40 — —SEC comments and preeffective amendments
- § 11:41 — —Meetings with broker/dealers
- § 11:42 — —Acceleration request
- § 11:43 — —Recirculation of the preliminary prospectus
- § 11:44 —Effectiveness and the post-effective period— Effective date
- § 11:45 — —Pricing amendment
- § 11:46 — —Closing
- § 11:47 — —Prospectus filing and delivery requirements
- § 11:48 — —Post-effective amendments and stickers
- § 11:49 — —Post-closing matters
- § 11:50 — —NASDAQ listing and registration under § 12(b)
- § 11:51 Suggestions to expedite registration process
- § 11:52 —Drafting registration statement clearly
- § 11:53 — —Risk factors section

TABLE OF CONTENTS

§ 11:54	— —Use of proceeds
§ 11:55	— —Management's discussion and analysis
§ 11:56	— —Backlog information
§ 11:57	— —Competition
§ 11:58	— —Executive compensation
§ 11:59	— —Certain transactions
§ 11:60	— —Shares eligible for future sale under Rule 144
§ 11:61	— —Capital structure
§ 11:62	— —Projections
§ 11:63	— —Confidential treatment
§ 11:64	— —Identification of major customers
§ 11:65	— —New products or marketing plans
§ 11:66	—Comparing registration statements of similar issuers
§ 11:67	—Starting early—Timing is key factor
§ 11:68	—Select registration team
§ 11:69	—Start early to pick right underwriter
§ 11:70	—Estimate costs and budget for them
§ 11:71	—Cleaning up corporation
§ 11:72	—Arrange prefiling telephone conference with SEC branch chief or staff attorney who will review filing
§ 11:73	—Letter of intent
§ 11:74	—Start blue sky process early
§ 11:75	—Send out officers' and directors' questionnaires early
§ 11:76	—Importance of calendar
§ 11:77	—Carefully monitor publicity
§ 11:78	—Page-by-page review
§ 11:79	—Filing and waiting period—Introductory phone call
§ 11:80	— —Expediting filing requirements
§ 11:81	— —Filing electronically under EDGAR
§ 11:82	Accounting problems
§ 11:83	—Inclusion of all required financial statements
§ 11:84	—Predecessor financial statements
§ 11:85	—Financial statements of acquired subsidiaries
§ 11:86	—Qualified auditor's reports
§ 11:87	—Pooling versus purchase
§ 11:88	—Related party transactions
§ 11:89	—Intangible assets acquired by research and development funding
§ 11:90	—Review reports for interim periods
§ 11:91	—Computer software development costs
§ 11:92	—Waiver of salaries
§ 11:93	—Premature revenue recognition
§ 11:94	—Promotional stock

- § 11:95 Public offering methods under Title IV of the JOBS Act—Regulation A offering
  - General qualifications—Dollar ceiling
- § 11:97 —Regulation A offering—General qualifications—Investment limits
- § 11:98 —SEC Filing and Staff Review
- § 11:99 —Regulation A offering—General qualifications—Integration
- § 11:100 ——Type of issuer
- § 11:101 ——Disqualifying provisions
- § 11:102 ——Disclosure requirements
- § 11:103 ——Financial statements
- § 11:104 ——Preliminary offering circular
- § 11:105 ——The final offering circular
- § 11:106 ——“Test the waters” provisions
- § 11:107 ——Substantial compliance
- § 11:108 ——Filing of sales material
- § 11:109 Public offering methods under small business initiatives—Regulation A offering—The Trust Indenture Act
  - Reporting requirements under the Exchange Act—Scaled Disclosure
  - Transitional small business issuer
- § 11:111 —State SCOR legislation
- § 11:113 Contents of Form S-1, registration statement
- § 11:114 —Part I of Form S-1 registration statement: Information required in prospectus—Item 1: Front of registration statement and outside front cover of prospectus
  - Item 2: Inside front and outside back cover of prospectus
  - Item 3: Summary information and risk factors
  - Item 4: Use of proceeds
  - Item 5: Determination of offering price
  - Item 6: Dilution
  - Item 7: Selling security holders
  - Item 8: Plan of distribution
  - Item 11(c) Information with Respect to the Registrant: Legal proceedings
  - 11(c) Information with Respect to the Registrant: Directors, executive officers, promotions and control persons
- § 11:124 —Item 11(c) Information with Respect to the Registrant: Security ownership of certain beneficial owners and management
- § 11:125 —Item 9: Description of securities
- § 11:126 —Item 10: Interests of named experts and counsel

TABLE OF CONTENTS

§ 11:127	— —Item 12A: Disclosure of commission position on indemnification for Securities Act liabilities
§ 11:128	— —11(c) Information with Respect to the Registrant: Certain relationships and transactions and corporate governance
§ 11:129	— —11(c) Information with Respect to the Registrant: Description of business
§ 11:130	— —11(c) Information with Respect to the Registrant: Management's discussion and analysis or plan of operation
§ 11:131	— —11(c) Information with Respect to the Registrant: Description of property
§ 11:132	— —11(c) Information with Respect to the Registrant: Certain relationships and transactions and corporate governance
§ 11:133	— —11(c) Information with Respect to the Registrant: Market for common equity and related stockholder matters
§ 11:134	— —11(c) Information with Respect to the Registrant: Executive compensation
§ 11:135	— —11(c) Information with Respect to the Registrant: Financial statements
§ 11:136	— —11(c) Information with Respect to the Registrant: Changes in and disagreements with accountants on accounting and financial disclosure
§ 11:137	—Part II of registration statement: Information not required in prospectus—Item 14: Indemnification of directors and officers
§ 11:138	— —Item 13: Other expenses of issuance and distribution
§ 11:139	— —Item 15: Recent sales of unregistered securities
§ 11:140	— —Item 16: Exhibits
§ 11:141	— —Item 17: Undertakings
§ 11:142	— —Signatures
§ 11:143	Governing rules and regulations
§ 11:144	—Registration form
§ 11:145	<i>[Reserved]</i>
§ 11:146	Governing rules and regulations—Regulation S-K
§ 11:147	—Regulation S-X
§ 11:148	—SEC rules
§ 11:149	—Regulation A
§ 11:150	—Regulation C
§ 11:151	—SEC releases and no-action letters
§ 11:152	Integration of abandoned offerings
Appendix 11-A.	Comparative Analysis of Public Versus Private Offering
Appendix 11-B.	Public Offering Time Schedule

## Appendix 11-C. Due Diligence Guidelines

## CHAPTER 12. OPERATING PUBLIC COMPANIES

- § 12:1 SEC reporting requirements
- § 12:2 Modernization of smaller company capital raising and disclosure requirements
- § 12:3 SEC reporting requirements—Section 15(d) companies
- § 12:4 —Section 12(g) companies
- § 12:5 —Section 12(b) companies
- § 12:6 —Reporting requirements for companies subject to Section 15(d) only
- § 12:7 —Annual reports on Form 10-K
- § 12:8 —Quarterly reports on Form 10-Q
- § 12:9 —Periodic reports on Form 8-K
- § 12:10 —Reporting requirements for Smaller Reporting Companies
- § 12:11 —Additional requirements of Section 12 reporting companies
  - Section 16(a) reports—General; definitions
  - Reports required under Section 16(a)
  - “Derivative securities” concept
  - Schedule 13D
  - Schedule 13G
  - Proxy material
  - Delivery
  - Enhanced disclosure
  - “Say-on-Pay” and “Pay Ratio” Disclosure
  - Rule 14a-19: “Universal” proxy cards
- § 12:22 SEC reporting requirements—Additional requirements of Section 12(g) reporting companies—Annual reports to shareholders
  - § 12:23 Disclosure controls and procedures
  - § 12:24 —Penalties for failure to file periodic reports
  - § 12:25 —Audit committees
    - § 12:26 —Audit committee member independence
    - § 12:27 —Disclosures regarding the audit committee
    - § 12:28 —Audit committee financial expert
    - § 12:29 —Audit committee pre-approval of non-audit services
    - § 12:30 —Audit committee communications with auditors
    - § 12:31 —Selective disclosure: Regulation FD; social media
    - § 12:32 —Earnings announcements; non-GAAP financial measures
    - § 12:33 —Management’s report on internal control over financial reporting and accountant’s attestation

TABLE OF CONTENTS

§ 12:34	—Officer certifications
§ 12:35	—Code of ethics
§ 12:36	Shelf-offering and Form S-3 eligibility
§ 12:37	Liabilities of officers, directors and 10% shareholders—General
§ 12:38	—Short-swing profits liability under Section 16(b)
§ 12:39	—Short-swing profits based on “derivative securities” concept
§ 12:40	—Exclusions
§ 12:41	—Third-party options
§ 12:42	—Exercises and conversions
§ 12:43	—Purchase
§ 12:44	—Matching
§ 12:45	—Profits
§ 12:46	—Profits on short-term options
§ 12:47	—Transactions between an issuer and its directors or officers
§ 12:48	Insider trading liability
§ 12:49	—Restriction on insider trades during pension fund blackout periods
§ 12:50	—Rules 10b-5, 10b5-1 and 10b5-2
§ 12:51	—Insider Trading Sanctions Act of 1984
§ 12:52	—Insider Trading and Securities Fraud Enforcement Act of 1988
§ 12:53	—Who is liable
§ 12:54	—Liability to purchasers of securities
§ 12:55	—Criminal penalties
§ 12:56	—Securities Enforcement Remedies and Penny Stock Reform Act of 1990
§ 12:57	—Corporate compliance procedures
§ 12:58	The Nasdaq stock market and exchange listings
§ 12:59	—Reporting requirements of the Nasdaq stock market listing—Filing of reports and notices
§ 12:60	—Prompt disclosure
§ 12:61	—Corporate governance
§ 12:62	—Eligibility requirements for OTC Bulletin Board; OTC Markets distinguished; FINRA Rule 6490
§ 12:63	Shareholders’ meetings and SEC proxy rules
§ 12:64	—Proxy rules
§ 12:65	—Annual report to shareholders
§ 12:66	—Conduct of shareholders’ meetings
§ 12:67	Acquisition of other businesses
§ 12:68	—Tax issues in acquisitions
§ 12:69	—Corporate and securities issues
§ 12:70	—Hart-Scott-Rodino Antitrust Improvements Act of 1976
§ 12:71	Executive compensation

- § 12:72 —Qualified retirement plans
- § 12:73 —Nonqualified deferred compensation plans
- § 12:74 —Insurance benefits
- § 12:75 —Fringe benefits
- § 12:76 —Limit on deductible compensation
- § 12:77 Changes in management control—General
- § 12:78 —Preventive measures
- § 12:79 —Squeeze-out techniques
- § 12:80 —Legal basis for squeeze-out techniques
- § 12:81 —Principle of majority control
- § 12:82 —Business judgment rule
- § 12:83 —Remedies of the squeezee
- § 12:84 —Contractual and other arrangements to resolve conflicts and break deadlocks
- § 12:85 —Importance of early prevention of conflicts
- § 12:86 —Corporate deadlock
- § 12:87 Standards of professional conduct for attorneys—“Up the ladder” reporting
- § 12:88 Abusive “Naked” Short Sales and Market Manipulation

Appendix 12-A. Annual Schedule of Events: SEC Filings Required for § 12(g) Companies

Appendix 12-B. Nasdaq Listing Guide

Appendix 12-C. Questionnaire for Directors, Executive Officers and 5% or More Shareholders

Appendix 12-D. Script for Annual Shareholders’ Meeting for Election of Directors

Appendix 12-E. Attorney’s Letter Outlining Issuer’s Obligations Reporting Under the Exchange Act

Appendix 12-F. Attorney’s Memorandum Outlining Insider Trading Liabilities Under Rule 10b-5

Appendix 12-G. Attorney’s Memorandum Outlining Insider Trading Liability Under § 16 of the Exchange Act

Appendix 12-H. Policy Statement on the Prevention of Insider Trading

Appendix 12-I. Form of Certification

## **CHAPTER 13. PLANNING FOR LIQUIDITY OF THE FOUNDER’S STOCK**

- § 13:1 Public sale of founders’ stock
- § 13:2 Sale of founders’ stock—Rule 144 sales
- § 13:3 Public sale of founders’ stock—Underwritten secondary offering

TABLE OF CONTENTS

§ 13:4	—Shelf registration
§ 13:5	Private sale of founders' stock
§ 13:6	Sale of control
§ 13:7	Tax consequences on sale
§ 13:8	Dissolution of company
§ 13:9	Restructuring and workouts
§ 13:10	Valuation of a privately held company
Appendix 13-A.	Form of Rule 144 Seller's Representation Letter
Appendix 13-B.	Value Judgment

## CHAPTER 14. SPECIAL PROBLEMS IN SALES OR MERGERS OF THE COMPANY

§ 14:1	Preliminary considerations in sale of the company
§ 14:2	Valuation
§ 14:3	Preliminary considerations in sale of the company— Restrictive agreements
§ 14:4	—Sale of control
§ 14:5	—Nondisclosure agreements
§ 14:6	—Purchase options
§ 14:7	—Lock-up agreements and breakup fees
§ 14:8	—Letters of intent
§ 14:9	—Finder's agreements
§ 14:10	—Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976
§ 14:11	Securities law considerations
§ 14:12	Ethical considerations for the lawyer
§ 14:13	Sale of "stock"
§ 14:14	Disclosure of merger negotiations
§ 14:15	Rule 145 transactions
§ 14:16	Short-swing profits rule
§ 14:17	Proxy rules
§ 14:18	Covenants not to compete
§ 14:19	Employment agreements
§ 14:20	Special stock provisions—Earnouts
§ 14:21	—Holdbacks
§ 14:22	Survival of Representations and Warranties
§ 14:23	Special stock provisions—Indemnification provisions
§ 14:24	—Registration rights
§ 14:25	Tax considerations of selling shareholders
§ 14:26	—Forms of reorganization
§ 14:27	—Receipt of boot
§ 14:28	Judicial requirements in reorganization
§ 14:29	Tax considerations of buyer
§ 14:30	Due diligence
§ 14:31	Exchanges exempt under § 3(a)(10)

- § 14:32 Representing the Buyer in an Acquisition
- Appendix 14-A. Nondisclosure Agreement With Merger Candidate
- Appendix 14-B. Option To Purchase Coupled With Management Agreement
- Appendix 14-C. Letter of Intent for Acquisition
- Appendix 14-D. Finder's Fee Agreement for Acquisition
- Appendix 14-E. Statutory Merger Agreement
- Appendix 14-F. Stock Purchase Agreement
- Appendix 14-G. Asset Purchase Agreement
- Appendix 14-H. Founders' Checklist in Determining Whether to Sell or Retain the Company
- Appendix 14-I. Sellers' Business Checklist in Selling the Company
- Appendix 14-J. Checklist for Buying a Company

## **APPENDICES**

APPENDIX Bibliography

**Table of Laws and Rules**

**Table of Cases**

**Index**