

# 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	<i>[Reserved]</i>
§ 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. Zwillig

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

- § 7:32 —Debt with warrants
- § 7:33 —Convertible debt
- § 7:34 —Convertible preferred stock
- § 7:35 —Hybrid preferreds
- § 7:36 — —Convertible exchangeable preferred stock (CEPS)
- § 7:37 — —Convertible adjustable rate preferred stock (CARPS)
- § 7:38 — —Multiple adjustable rate preferred stock (MARPS)—With adjustment based on market price
- § 7:39 —Common stock
- § 7:40 —Combinations of securities
- § 7:41 —Payment-in-kind (PIK) securities
- § 7:42 Limited partnership financing
- § 7:43 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-H. Capitalization Worksheet With Instructions
- Appendix 7-I. Method for Calculating Amount of Growth Capital Needed
- Appendix 7-J. Anti-Dilution Examples
- Appendix 7-K. Exit Ratios and their Implications for Venture Investment Valuations
- Appendix 7-L. Typical Venture Capital Fund Term Sheet

## **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



## TABLE OF CONTENTS

§ 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
§ 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

## TABLE OF CONTENTS

- 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.

## 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 —Nonconventional Lenders
- § 10:12 —Government lenders
- § 10:13 Equity financing—Second rounds
- § 10:14 —Down rounds
- § 10:15 —Private investment in public equity (PIPEs)
- § 10:16 Effect of SEC's 2008 Amendments to Rule 144 on PIPE's; Form S-3 shelf offerings
- § 10:17 Equity financing—Bridge financing
- § 10:18 —High-yield debt, equity lines of credit and "toxic convertibles"
- § 10:19 Corporate partnering
- § 10:20 —Corporate partnering structures—Equity-oriented corporate partnering arrangement
- § 10:21 — —Technology-driven corporate partnering arrangement
- § 10:22 — —Product-driven corporate partnering arrangement
- § 10:23 —General planning and approach
- § 10:24 —Finding a corporate partner
- § 10:25 —Negotiating the corporate partnering agreement
- § 10:26 Mergers with public companies
- § 10:27 —Blind pools and SPACs
- § 10:28 —Public shells
- § 10:29 —Reverse merger/PIPEs

- § 10:30 —Penny stocks
- § 10:31 —Sale of PIPO's under Rule 144 A
- § 10:32 Private activity bonds
- § 10:33 Cancellation of Debt ("CODI") Issues
- Appendix 10-A. Term Sheet for Down Round
- Appendix 10-B. The "Shell Game"
- Appendix 10-C. Sample PIPE Agreement
- Appendix 10-D. Bridge Financing Term Sheet
- Appendix 10-E. Money-Finder and Public Shell Scams
- 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]
- § 11:3 — —Ability to obtain additional financing
- § 11:4 — —Use of stock for acquisitions
- § 11:5 — —Value to insiders
- § 11:6 — —Attracting key executives
- § 11:7 — —Disadvantages of going public—Operating in a "fishbowl"
- § 11:8 — —Restrictions on transfers by insiders
- § 11:9 — —Expenses of going and staying public
- § 11:10 — —Possible loss of control
- § 11:11 — —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

## TABLE OF CONTENTS

§ 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
§ 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
- § 11:96 — —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

## TABLE OF CONTENTS

§ 11:110	—Reporting requirements under the Exchange Act— Scaled Disclosure
§ 11:111	— —Transitional small business issuer
§ 11:112	—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
§ 11:115	— —Item 2: Inside front and outside back cover of prospectus
§ 11:116	— —Item 3: Summary information and risk factors
§ 11:117	— —Item 4: Use of proceeds
§ 11:118	— —Item 5: Determination of offering price
§ 11:119	— —Item 6: Dilution
§ 11:120	— —Item 7: Selling security holders
§ 11:121	— —Item 8: Plan of distribution
§ 11:122	— —Item 11(c) Information with Respect to the Registrant: Legal proceedings
§ 11:123	— —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
§ 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 *[Reserved]*
- § 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



## TABLE OF CONTENTS

§ 12:11	—Additional requirements of Section 12 reporting companies
§ 12:12	— —Section 16(a) reports—General; definitions
§ 12:13	— — —Reports required under Section 16(a)
§ 12:14	— — —“Derivative securities” concept
§ 12:15	— —Schedule 13D
§ 12:16	— —Schedule 13G
§ 12:17	— —Proxy material
§ 12:18	— — —Delivery
§ 12:19	— — —Enhanced disclosure
§ 12:20	— — —“Say-on-Pay” and “Pay Ratio” Disclosure
§ 12:21	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
§ 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 squeeze
- § 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

## TABLE OF CONTENTS

§ 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 FOUNDERS’ 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
§ 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 Special issues in asset sale agreements
- § 14:32 Exchanges exempt under § 3(a)(10)
- § 14:33 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-J. Sellers’ Business Checklist in Selling the  
Company

TABLE OF CONTENTS

Appendix 14-K. Checklist for Buying a Company

Appendix 14-L. Summary of Deal Points in 2009 ABA Study

**APPENDICES**

APPENDIX Bibliography

**Table of Laws and Rules**

**Table of Cases**

**Index**