
Structuring Venture Capital, Private Equity, and Entrepreneurial Transactions

2015 Edition

Jack S. Levin

Kirkland & Ellis LLP

Donald E. Rocap

Kirkland & Ellis LLP

Special Editors

Martin D. Ginsburg

Georgetown University Law Center

Russell S. Light

Kirkland & Ellis LLP

Professor Ginsburg, the finest tax lawyer and human being of all time, passed away on 6/27/10.

This volume is current through June 22, 2015

 **Wolters Kluwer**

Summary of Contents

<i>About the Authors and Special Editors</i>	vii
<i>Acknowledgments</i>	xi
<i>Detailed Table of Contents</i>	xv

1	Introduction	1-1
2	Structuring Start-Up Transaction	2-1
3	Structuring Newco as Flow-Through Entity	3-1
4	Structuring Growth-Equity Investment in Existing Company	4-1
5	Structuring Buyout	5-1
6	Debt and Equity Securities and Executive Deferred Compensation	6-1
7	Structuring Consolidation of Fragmented Industry	7-1
8	Structuring Turn-Around Investment in Overleveraged or Troubled Company	8-1
9	Exit Strategies: Structuring IPO or Sale of PE/VC-Financed Portfolio Company	9-1
10	Structuring Formation of Private Equity Fund	10-1

Appendix: Statutes, Rules, Regulations, and Other Precedents

<i>Summary of Contents for Precedents</i>	A-1
¶2000 Internal Revenue Code of 1986	A-3
¶2100 Treasury Regulations	A-173
¶2200 Revenue Procedures and Revenue Rulings	A-225
¶2300 Federal Securities Laws, Rules, and Regulations	A-245
¶2400 Bankruptcy Code	A-309
¶2500 State Fraudulent Conveyance Statutes	A-319
¶2600 Delaware Corporate, Partnership, and LLC Statutes	A-335
¶2700 Cases	A-405
¶2800 Other Materials	A-487

<i>Table of Internal Revenue Code Sections</i>	T-1
<i>Table of Treasury Regulations</i>	T-5
<i>Table of Treasury/IRS Rulings</i>	T-7
<i>Table of Federal Securities Laws, Rules, and Regulations</i>	T-9
<i>Table of Bankruptcy Code Sections</i>	T-11

Summary of Contents

<i>Table of State Fraudulent Conveyance Statutes</i>	T-13
<i>Table of Delaware Corporate, Partnership, and LLC Statutes</i>	T-15
<i>Table of Cases</i>	T-17
<i>Table of Other Laws</i>	T-19
<i>Table of Other Materials</i>	T-21
<i>Index</i>	I-1

Detailed Table of Contents

About the Authors and Special Editors
Acknowledgments

vii
xi

Chapter 1

Introduction

¶101	NATURE AND USE OF THIS TREATISE	1-2
¶102	GENERAL DESCRIPTION OF PRIVATE EQUITY AND VENTURE CAPITAL INVESTING	1-3
¶103	DISTINGUISHING PRIVATE EQUITY/VENTURE CAPITAL INVESTING FROM OTHER TYPES OF INVESTING	1-3
¶104	HIGH COST OF PRIVATE EQUITY/VENTURE CAPITAL MONEY	1-7
¶105	TYPICAL PRIVATE EQUITY/VENTURE CAPITAL TRANSACTIONS	1-8
	¶105.1 Traditional Start-Up Transaction	1-8
	¶105.2 Growth-Equity Transaction	1-8
	¶105.3 Troubled-Company Turn-Around Investment	1-9
	¶105.4 Leveraged or Management Buyout	1-10
	¶105.5 Industry Consolidation	1-11
	¶105.6 Exit Strategies	1-12
	¶105.7 Formation of Private Equity, Venture Capital, or Buyout Fund	1-13
¶106	HISTORY OF PRIVATE EQUITY/VENTURE CAPITAL INVESTING	1-13
	¶106.1 Ancient History	1-13
	¶106.2 Industrial Revolution and Merchant Bankers	1-14
	¶106.3 U.S. in the 1940s and Thereafter	1-15
¶107	THE SHIFTING SANDS OF FEDERAL TAX RATES	1-15
	(1) Top federal income tax rate for an individual's OI	1-16
	(2) Top federal income tax rate for an individual's LTCCG	1-16
	(3) Top federal income tax rate for an individual's QDI	1-16
	(4) Disguised additional federal individual income-based taxes	1-17
	(a) Uncapped Medicare tax on compensation and self-employment income	1-17
	(b) Uncapped Medicare tax on passive income	1-18
	(c) Scope of the two Medicare taxes	1-21
	(d) Itemized deduction disallowance	1-22
	(e) Personal exemption phase-out	1-22
	(5) Top federal income tax rate for C corp	1-22
	(6) Reduced top federal income tax rate—for individual or C corp—on business net income from U.S. production activities	1-22
	(7) Top federal individual estate tax rate	1-23
¶108	FREQUENTLY USED DEFINITIONS	1-24

Chapter 2

Structuring Start-Up Transaction

¶201	E's PROPOSED STRUCTURE—ALL COMMON STOCK	2-5
¶201.1	Code §83(a) Adverse Tax Effect on E	2-6
¶201.1.1	E's Code §83(a) OI on Bargain Purchase of Newco Stock	2-6
¶201.1.2	Several Approaches for Avoiding or Minimizing Code §83(a) OI	2-7
	(1) Property contribution	2-7
	(2) Temporal differentiation	2-7
	(3) Substantive differentiation	2-8
¶201.2	Split of Proceeds If Newco Not Successful	2-8
¶201.3	Split of Proceeds If Newco Successful	2-9
¶201.4	Interest Deduction	2-9
¶201.5	VC's Internal Rate of Return	2-9
¶201.6	E's Good-Faith Investment	2-9
¶201.7	E's Conditional Right to Retain Newco Stock	2-10
¶202	VC's PROPOSED STRUCTURE—NON-CONVERTIBLE SENIOR SECURITIES IN ADDITION TO COMMON	2-10
¶202.1	VC Senior Claim	2-10
¶202.2	E's Purchase of Common Stock	2-11
¶202.2.1	Modest Code §83(a) OI Risk	2-11
¶202.2.2	Recourse Note	2-12
¶202.2.3	Interest-Bearing Note	2-13
¶202.2.4	E's Interest Deduction	2-13
¶202.3	Vesting	2-14
¶202.3.1	Option to Repurchase from E at Cost	2-14
¶202.3.2	Time Vesting	2-14
	(1) In general	2-14
	(2) Golden parachute penalty tax rules	2-15
¶202.3.3	Performance Vesting	2-17
¶202.3.4	No Code §83(b) Election	2-17
¶202.3.5	Code §83(b) Election or Failure to Legend Certificate	2-20
	(1) Code §83(b) election	2-20
	(2) Failure to legend stock certificate	2-21
¶202.3.6	Newco Deduction	2-21
¶202.3.7	E's CG on Sale	2-24
¶202.3.8	Vesting Subsequently Imposed on Outstanding Stock	2-24
¶202.3.9	Other Issues	2-27
	¶202.3.9.1 Post-Vesting Buy-Back from E	2-27
	¶202.3.9.2 Accounting Charge	2-28
	¶202.3.9.3 Granting Stock Option to E	2-28
	¶202.3.9.4 Newco Sale of Stock to VC	2-28
	¶202.3.9.5 E's Deferred Compensation	2-28
¶203	SEVERAL ALTERNATIVE CAPITAL STRUCTURES	2-29
¶203.1	VC Convertible Debenture or Convertible Preferred	2-29
¶203.2	VC Participating Double-Dip Preferred Stock	2-30

Detailed Table of Contents

¶204	TERMS AND TAX ASPECTS OF VC's DEBENTURE AND PREFERRED STOCK	2-31
¶205	STRUCTURING CONTROL OF NEWCO's BOARD	2-31
¶205.1	No Relationship Between Equity Split and Board Seats	2-31
¶205.2	E's Proposal	2-31
¶205.3	VC's Proposal	2-31
¶205.4	Neutral-Director Compromise	2-32
¶205.5	Veto-Power-Plus-Shifting-Director Compromise	2-32
¶205.6	Protecting Newco's Directors from Personal Liability	2-32
¶206	CONTROL OVER SUBSEQUENT PRIVATE OFFERING, IPO, OR SALE OF NEWCO	2-33
¶207	SEC COMPLIANCE	2-33
¶207.1	Obligation to Register Securities with SEC	2-33
¶207.2	Exemptions from SEC Registration	2-34
¶207.3	Private Placements—SEC Reg. D	2-35
¶207.3.1	Rule 504	2-35
¶207.3.2	Reg. D Definitions and Exceptions, Including Accredited Investor and 1934 Act Reporting Company	2-36
¶207.3.3	Rule 505	2-39
¶207.3.4	Rule 506	2-41
¶207.3.5	SEC Integration Doctrine	2-46
¶207.3.6	Look Through	2-50
¶207.3.7	Form D	2-51
¶207.3.8	Proposed Reg. D Amendments	2-52
¶207.3.9	Raising Capital Without 1933 Act or 1934 Act Registration	2-53
¶207.4	Stock Sales to Service Providers—SEC Rule 701	2-54
¶207.5	California Corporation's Private Placement—SEC Rule 1001	2-56
¶207.6	Public Offering with Abbreviated Registration Statement—SEC Reg. A	2-56
¶207.7	Restrictions on Resale of Newco Securities	2-58
¶207.7.1	SEC Restricted Securities	2-58
¶207.7.2	Unrestricted Securities	2-59
¶207.7.3	Contractual Registration Rights	2-59
¶207.7.3.1	Newco Resistance	2-59
¶207.7.3.2	Piggyback Offering	2-60
¶207.7.3.3	Underwritten Offering	2-60
¶207.7.3.4	Short-Form S-3	2-61
¶207.7.3.5	Reg. A	2-61
¶207.7.4	Public Resales of Restricted Stock—Rule 144	2-61
¶207.8	Crowdfunding	2-62
¶208	COMPLIANCE WITH STATE SECURITIES LAWS	2-65
¶209	NATURE OF VC	2-65
¶209.1	VC Qualifies as SBIC	2-65
¶209.2	VC or PE Is Member of BHC Group	2-71
¶209.2.1	BHCA, Volcker Rule, and Federal Reserve Act in General	2-71
¶209.2.1.1	Reg. Y and the 5/25 Rules	2-72
¶209.2.1.2	VC Is SBIC	2-73
¶209.2.1.3	Reg. K Non-U.S. Businesses	2-74
¶209.2.1.4	Merchant Banking Activity	2-74

	¶209.2.1.5	Closely Related to Banking and Financial-in-Nature Activities	2-77
	¶209.2.1.6	Volcker Rule Restrictions on Proprietary Trading	2-78
	¶209.2.2	Federal Reserve Act §23A and §23B Restrictions	2-78
	¶209.3	VC Is Insurance Company	2-81
¶210		ADDITIONAL LTCG TAX ADVANTAGES FOR INDIVIDUALS	2-81
¶211		KEY ISSUES AND APPENDIX REFERENCES	2-82

Chapter 3

Structuring Newco as Flow-Through Entity

¶301		NEWCO AS S CORP	3-4
	¶301.1	Limited Liability and General Characteristics	3-4
		¶301.1.1 General	3-4
		¶301.1.2 Limited Liability	3-4
		¶301.1.2.1 Veil Piercing	3-5
		¶301.1.2.2 Environmental Cleanup	3-5
		¶301.1.2.3 Pension Plan and Other ERISA Liabilities	3-5
		¶301.1.2.4 Shareholder Participation in Negligent or Wrongful Act	3-6
	¶301.2	Federal Income Tax Aspects	3-7
		¶301.2.1 No Entity-Level Tax	3-7
		¶301.2.2 S Corp Compared to C Corp	3-7
		¶301.2.3 S Corp Compared to Partnership or LLC	3-12
	¶301.3	State Taxation	3-14
	¶301.4	Arbitrary Tax Limitations on Use of S Corp	3-14
		¶301.4.1 One Class of Stock	3-14
		¶301.4.2 100-Shareholder Limitation	3-15
		¶301.4.3 Prohibition on Entity and Non-U.S. Shareholders	3-16
	¶301.5	Key Issues and Appendix References	3-19
¶302		NEWCO AS PARTNERSHIP	3-20
	¶302.1	Limited Liability Issues and General Characteristics	3-20
		¶302.1.1 General	3-20
		¶302.1.2 Difficulties in Achieving GP Limited Liability	3-20
		(1) Use of limited-liability entity intermediary	3-21
		(2) Qualification as LLP	3-21
		¶302.1.3 Difficulties in Achieving LP Limited Liability	3-24
		¶302.1.4 Fiduciary Duties	3-25
		(1) General	3-25
		(2) Delaware statutes	3-26
		(3) Delaware statutory ambiguity	3-27
		(4) Transactions between GP and GP's affiliate	3-28
		(5) Delaware precedents re non-waivable implied covenant of good faith and fair dealing	3-29
		(6) Delaware courts' reliance upon partnership agreement's precise language in evaluating LP's breach of fiduciary duty claim against GP	3-33

Detailed Table of Contents

	(7) Conclusion: careful drafting essential	3–35
¶302.2	Federal Income Tax Aspects	3–36
	¶302.2.1 No Entity-Level Tax	3–36
	¶302.2.2 Partnership Compared to S Corp	3–37
¶302.3	State Taxation	3–41
¶302.4	Limitations on Achieving Partnership Tax Flow-Through Treatment	3–41
	¶302.4.1 Publicly Traded Partnership Taxed as C Corp	3–41
	¶302.4.2 Check-the-Box Classification Rules	3–42
	¶302.4.3 Determining Who Is a Partner	3–43
¶302.5	Taxation of Service Provider on Receipt of or While Holding Partnership Interest	3–44
	¶302.5.1 Code §83 and LV Rather Than FV	3–44
	¶302.5.2 Partnership Character Flow-Through Regime	3–46
	¶302.5.3 Proposed Legislation Altering Partnership Character Flow-Through Regime	3–47
	¶302.5.4 Code §409A Issues	3–49
	¶302.5.5 GAAP Issues	3–50
¶302.6	IPO	3–50
	(1) Traditional IPO	3–50
	(2) Up-C Structure	3–50
¶302.7	Foreign (Non-U.S.) Person	3–52
¶302.8	Flexible Sharing Arrangements	3–52
¶302.9	Key Issues and Appendix References	3–52
¶303	NEWCO AS LLC	3–54
	¶303.1 Limited Liability and General Characteristics	3–54
	¶303.1.1 General	3–54
	¶303.1.2 Limited Liability	3–55
	¶303.1.3 Fiduciary Duties	3–56
	¶303.1.4 Other Issues	3–57
	¶303.2 Federal Income Tax Aspects	3–57
	¶303.3 State and Other Taxation	3–59
	¶303.4 Key Issues and Appendix References	3–59
¶304	TAX LIMITATIONS ON NEWCO'S DEDUCTIBLE EXPENSES	3–60
	¶304.1 Pre-Opening Start-Up Expenses and Organization Expenses	3–60
	¶304.2 Exceptions	3–60
	¶304.3 Key Issues and Appendix References	3–60

Chapter 4

Structuring Growth-Equity Investment in Existing Company

¶401	PROPOSED GROWTH-EQUITY TRANSACTION	4–4
	¶401.1 Oldco's Characteristics	4–4
	¶401.2 PE Proposed Investment	4–5
¶402	REARRANGING OLDSCO'S EQUITY THROUGH REDEMPTION	4–6
	¶402.1 Principal Tax Characteristics	4–6
	¶402.2 Principal Non-Tax Issues	4–11
	¶402.3 Redemption Example	4–12

Detailed Table of Contents

	¶402.4 Key Redemption Issues and Appendix References	4-14
	¶402.5 Issuing Additional Oldco Common Shares (or Options) to Executives	4-15
¶403	REARRANGING OLDSCO'S EQUITY THROUGH TAX-FREE RECAPITALIZATION	4-16
	¶403.1 Principal Tax Characteristics	4-16
	¶403.2 Principal Non-Tax Issues	4-24
	¶403.3 Recapitalization Example	4-25
	¶403.4 Key Recapitalization Issues and Appendix References	4-25
¶404	REARRANGING OLDSCO'S EQUITY THROUGH PREFERRED STOCK DIVIDEND PLUS FORMATION OF NEWCO TO HOLD ALL OF OLDSCO'S COMMON (AND PART OF OLDSCO'S PREFERRED) STOCK	4-27
	¶404.1 Principal Tax Characteristics of Oldco's Pro Rata Preferred Stock Dividend	4-27
	¶404.2 Example of Preferred Stock Dividend Plus Interposition of Newco to Own All of Oldco's Common (and Part of Oldco's Preferred) Stock	4-29
	¶404.3 Tax Effects of Newco's Interposition	4-31
	¶404.4 Issuing Additional Newco Common Shares (or Options) to Executives	4-32
	¶404.5 Key Issues and Appendix References on Preferred Stock Dividend Plus Interposition of Newco and Selective Issuance of New Common Stock or Options	4-33
¶405	PASSIVE SHAREHOLDER INCENTIVE TO REDUCE COMMON OWNERSHIP	4-35
¶406	OLDSCO AS PARTNERSHIP, LLC, OR S CORP	4-35
	¶406.1 Partnership or LLC	4-35
	¶406.2 S corp	4-37
¶407	IRS ANTI-ESTATE-FREEZE RULES	4-37
	¶407.1 Code §2701 Imputed Gift	4-37
	¶407.2 Avoiding Code §2701	4-38
	¶407.2.1 No-Family-Relationship Exception	4-38
	¶407.2.2 No-Applicable-Retained-Interest Exception	4-38
	¶407.2.3 Same-Class Exception	4-42
	¶407.2.4 Proportionality Exception	4-42
	¶407.2.5 Market-Quoted Securities	4-42
	¶407.3 Calculating Code §2701 Gift	4-42
	¶407.3.1 Four-Step "Subtraction Method"	4-43
	¶407.3.2 Common-Stock-10%-Minimum-Value Rule	4-45
¶408	ECONOMICS AND TAXATION OF EXECUTIVE STOCK OPTIONS	4-46
	¶408.1 NQO Tax Ramifications	4-46
	¶408.1.1 NQO Income Tax Ramifications	4-46
	¶408.1.1.1 NQO Not In-The-Money at Grant	4-47
	¶408.1.1.2 NQO In-The-Money at Grant	4-49
	¶408.1.1.3 Deep Discount NQO May Be Treated as Underlying Stock	4-49
	¶408.1.1.4 Modification of Previously Granted NQO	4-51
	¶408.1.2 Transfer Tax on NQO Gift	4-51
	(1) Vested NQO	4-51

Detailed Table of Contents

	(2) Unvested NQO	4-53
¶408.2	ISO Tax Ramifications	4-54
¶408.3	Key Issues and Appendix References on Executive Stock Options	4-55
¶409	ACCOUNTING FOR OPTIONS, STOCK SALES, AND STOCK GRANTS	4-57
¶409.1	FASB 123R and FASB Codification Topic 718 General Rules for Stock-Based Compensation	4-58
	(1) FV of stock sale or award	4-58
	(2) FV of stock option	4-58
	(3) Accrual of expense over service period	4-60
	(4) Vesting rules	4-60
¶409.2	FASB 123R and FASB Codification Topic 718 Special Situations	4-61
	(1) Award classified as liability	4-61
	(2) Option with Newco contingent cash settlement obligation	4-62
	(3) SAR	4-62
	(4) Paying for stock with a debt instrument	4-62
	(5) Partnership/LLC interest	4-63
	(6) Cheap stock issues in subsequent IPO	4-63
	(7) Award modification	4-64
	(8) Vesting acceleration	4-64
¶409.3	Illustration—NQO Tax and Accounting Aspects	4-65
	¶409.3.1 Income Tax Aspects	4-65
	¶409.3.2 FASB 123R and FASB Codification Topic 718 GAAP Aspects	4-65
¶410	NEGOTIATING POSTURE AS COMPARED TO START-UP TRANSACTION	4-66
¶411	TERMS OF PE'S DEBT AND PREFERRED STOCK	4-68
¶412	COMPLYING WITH FEDERAL AND STATE SECURITIES LAWS	4-69
¶413	NATURE OF PE	4-69
¶414	ADDITIONAL LTCG TAX ADVANTAGES FOR INDIVIDUALS	4-69

Chapter 5

Structuring Buyout

¶501	BUYOUT OF BIGCO SUBSIDIARY OR DIVISION	5-9
¶501.1	Financing \$100 Million Buyout	5-9
	¶501.1.1 Financing Structure	5-9
	¶501.1.2 Magic of Leverage	5-11
	¶501.1.3 Nightmare of Leverage	5-12
	¶501.1.4 PE's Limited Exposure	5-12
	¶501.1.5 Bifurcated Capital Structure	5-13
¶501.2	Three Separate Transactions	5-13
	¶501.2.1 Acquisition	5-14
	¶501.2.2 Debt Financing	5-14
	¶501.2.3 Equity Financing	5-14
	¶501.2.4 Key Issues and Appendix References on Buyouts in General	5-15

Detailed Table of Contents

¶501.3	Key Acquisition Issues	5–16
	¶501.3.1 Purchase Price and Related Issues	5–16
	¶501.3.1.1 Purchase Price	5–16
	¶501.3.1.2 Representations, Warranties, and Indemnification	5–17
	¶501.3.1.3 Closing Conditions	5–20
	¶501.3.1.4 Transition Services	5–20
	¶501.3.1.5 Seller Paper	5–20
	¶501.3.2 Transferring Target Assets and Contracts	5–21
	¶501.3.2.1 Hard to Transfer Assets and Contracts	5–21
	¶501.3.2.2 Sales Taxes and Real Estate Transfer Taxes	5–22
	¶501.3.2.3 Real Estate Title Insurance	5–22
	¶501.3.2.4 Union Contracts	5–22
	¶501.3.3 Hart-Scott-Rodino Antitrust Filing for Acquisition	5–22
	¶501.3.3.1 Filing and Waiting Period	5–22
	¶501.3.3.2 Size of Transaction	5–24
	¶501.3.3.3 Size of Person	5–25
	¶501.3.3.4 Principal Exemptions	5–26
	¶501.3.3.5 No Antitrust Exemption	5–27
	¶501.3.3.6 References	5–27
	¶501.3.4 Protecting Newco from Target Liabilities	5–27
	¶501.3.4.1 Stock Acquisition	5–28
	¶501.3.4.2 Merger	5–28
	¶501.3.4.3 Asset Acquisition	5–29
	(1) Bulk sales act	5–29
	(2) De facto merger and successor liability	5–30
	¶501.3.4.4 Avoiding Newco Exposure	5–30
	¶501.3.5 Some Particular Target Liabilities	5–31
	¶501.3.5.1 Bigco’s Unpaid Consolidated Federal Income Taxes	5–31
	¶501.3.5.2 Target’s and Bigco’s Unpaid Pension and Other ERISA Liabilities	5–32
	(1) Target’s continuing liability for its own ERISA obligations	5–32
	(2) Target’s continuing liability for entire Bigco control group’s ERISA obligations	5–32
	(3) Definition of ERISA control group: 80%-or-greater ownership sometimes includes 50%-or-greater ownership	5–34
	(4) Target withdrawal liability for underfunded multiemployer union pension plan	5–36
	¶501.3.6 Effect of Target’s Retiree Medical and Life Insurance Benefits on Newco’s Financial Statements	5–38
	¶501.3.7 Bigco Public Announcement	5–38
	¶501.3.8 Regulated Industry	5–38
¶501.4	Key Debt Financing Issues	5–38

Detailed Table of Contents

¶501.4.1	Negotiating Bank Loan	5–38
¶501.4.2	Negotiating Subordinated/Mezz Debt, Seller Paper, or Second Lien Loans	5–39
¶501.4.3	Negotiating Relative Rights of Various Financing Parties	5–44
¶501.4.3.1	Priorities, Express Subordination, and Structural Subordination	5–44
¶501.4.3.2	Purchasing Target’s Stock	5–45
¶501.4.3.3	Purchasing Target’s Assets	5–46
¶501.4.3.4	Purchasing Target’s Stock Plus Amalgamation of Target and Newco	5–46
¶501.4.3.5	Reverse Subsidiary Cash Merger	5–47
¶501.4.3.6	Reverse Two-Party Cash Merger	5–48
¶501.4.3.7	Part Purchase Plus Part Redemption of Target’s Stock	5–48
¶501.4.3.8	Fraudulent Conveyance Risk	5–49
	(1) Target’s old creditors not disadvantaged	5–49
	(2) Target’s old creditors disadvantaged	5–49
	(3) Financial distress tests	5–50
	(4) Persons liable for fraudulent conveyance	5–54
	(5) Target shareholder receiving LBO payment through financial intermediary	5–54
¶501.4.3.9	Other Issues	5–55
	(1) Subsidiary upstream guarantee of parent’s debt	5–55
	(2) Non-U.S. corporate subsidiary’s credit support for parent’s debt creates tax issue	5–57
	(3) Effect of tax law on choice of acquisition structure	5–58
¶501.5	Key Equity Financing Issues	5–58
¶501.5.1	PE’s and Mezz Lender’s Equity	5–58
¶501.5.2	Evaluating Convertible vs. Warrants vs. Cheap Common	5–59
¶501.5.2.1	Purchasing Common Stock	5–59
¶501.5.2.2	Warrants—Tax Aspects	5–60
¶501.5.2.3	Convertible—Tax Aspects	5–61
¶501.5.2.4	Tax Allocation to Warrant or Common But Not Conversion Feature	5–61
¶501.5.2.5	SEC Rule 144 Holding Period	5–61
¶501.5.2.6	Recapitalization, Merger, or Other Tax-Free Reorganization	5–62
¶501.5.2.7	Anti-Dilution Provisions	5–62
¶501.5.3	Liabilities That May Migrate Upstream or Sideways Where PE Owns Large Amount of Newco Stock	5–62
¶501.5.3.1	Pension and Other ERISA Liabilities	5–62

Detailed Table of Contents

	(1) General ERISA group liability rules	5-62
	(2) Possible expansion of ERISA group liability where multiple PE funds (or other persons) invest in concert in Target (or in Newco which invests in Target)	5-63
	(3) ERISA group liability exception for partnership or LLC not engaged in trade or business	5-68
	¶501.5.3.2 Environmental Cleanup	5-74
	Owner/operator liability	5-74
	Veil-piercing	5-74
	Direct “operator” liability	5-74
	Meaning of control	5-75
	State law direct “operator” liability	5-75
	¶501.5.3.3 Other Liabilities	5-75
¶501.5.4	Management’s Equity	5-75
	¶501.5.4.1 General Considerations	5-75
	¶501.5.4.2 Tax Issues Because Large Portion of Newco Equity Is Preferred Stock	5-76
	¶501.5.4.3 1934 Act §13(k)(1) Executive Loan Prohibition	5-76
¶501.5.5	Board Control and Related Issues	5-82
¶501.5.6	SEC and State Securities Law Compliance	5-83
¶501.5.7	Hart-Scott-Rodino Antitrust Reporting for Newco Formation	5-83
¶501.6	Nature of PE	5-83
¶501.7	Federal Income Tax Aspects in Buyout of Bigco Subsidiary or Division	5-83
	¶501.7.1 Overview	5-83
	¶501.7.2 Alternative Acquisition Structures	5-85
	¶501.7.2.1 Summary	5-85
	¶501.7.2.2 Purchasing Target’s Stock with No Code §338(h)(10) or §336(e) Election	5-86
	¶501.7.2.3 Purchasing Target’s Assets	5-86
	¶501.7.2.4 Purchasing Target’s Stock with Code §338(h)(10) or §336(e) Election	5-86
	¶501.7.2.5 Forward Cash Merger	5-88
	¶501.7.2.6 Reverse Subsidiary Cash Merger	5-88
	¶501.7.2.7 Reverse Two-Party Cash Merger	5-89
¶501.7.3	Taxation of Bigco’s Gain	5-89
¶501.7.4	Newco’s Tax Savings from Asset SUB	5-91
	(1) Calculating PV of Newco’s tax savings from asset SUB	5-91
	(2) Amortization of Code §197 intangibles	5-91
	(3) Structuring for COB where asset FV less than asset tax basis	5-92
	(4) Threats to asset SUB	5-92
¶501.7.5	Amount of Asset SUB	5-92
	¶501.7.5.1 Newco’s Aggregate Basis	5-92
	¶501.7.5.2 Allocation of Basis Among Assets	5-93

Detailed Table of Contents

	¶501.7.6	Key Issues and Appendix References on Tax Aspects of Bigco Subsidiary or Division Buyout	5-94
	¶501.8	Additional LTCG Tax Advantage for Individuals	5-95
¶502		BUYOUT OF PRIVATE COMPANY	5-95
	¶502.1	Federal Income Tax Aspects in Private Company Buyout	5-96
	¶502.1.1	Target Is C Corp	5-96
	¶502.1.1.1	Double Tax Where Structure for Asset SUB	5-96
	¶502.1.1.2	Threats to Asset SUB	5-97
		(1) D reorganization risk	5-98
		(2) Code §351 risk	5-98
		(3) Constructive Code §351 risk	5-98
		(4) Defective Code §338 or §336(e) election risk because of Code §351	5-98
		(5) Defective Code §338 or §336(e) election risk because of Code §338 and §336(e)'s related party rule	5-99
		(6) Defective Code §338 or §336(e) election risk because of Code §304	5-99
	¶502.1.1.3	Threats to Target Shareholders' CG Treatment	5-99
	¶502.1.1.4	Threats to 15-Year Amortization of Code §197 Intangibles	5-101
	¶502.1.1.5	Consulting or Non-Compete Payments	5-102
	¶502.1.1.6	Personal Goodwill Payments	5-102
	¶502.1.2	Target Is S Corp	5-104
	¶502.1.3	Target Is Partnership or LLC	5-105
	¶502.1.4	§197 Amortization	5-105
	¶502.1.5	Summary	5-105
	¶502.2	Target Management Tax-Free Rollover	5-106
	¶502.3	Shareholder Vote and Dissenters' Rights	5-107
	¶502.3.1	Corporate Target	5-107
	¶502.3.2	Partnership or LLC Target	5-111
	¶502.4	Golden Parachute Tax Rules	5-111
	¶502.5	Other Issues	5-112
	¶502.6	Key Issues and Appendix References on Private Company Buyout	5-112
¶503		BUYOUT OF PUBLIC COMPANY	5-114
	¶503.1	One-Step vs. Two-Step Buyout	5-114
	¶503.2	Federal Income Tax Issues in Buyout of Public Company	5-115
	¶503.3	Securities and Corporate Law Issues and Negotiating Strategies	5-116
	¶503.3.1	Practical Negotiating Issues	5-116
	¶503.3.1.1	Initiating the Acquisition Process	5-116
	¶503.3.1.2	Newco's Deal Protective Provisions	5-117
		No-shop clause with fiduciary-out	5-117
		Expense reimbursement and/or breakup fee	5-117
		Go shop	5-118
		Hybrid no shop/go shop	5-119

Detailed Table of Contents

	Matching right for Newco	5-119
	Newco options	5-119
	Timing of deal protective provisions	5-120
	Validity issues	5-120
¶503.3.2	Federal Securities Laws	5-120
¶503.3.2.1	Disclosing Negotiations with Target	5-120
¶503.3.2.2	Equity Ownership Disclosure	5-121
¶503.3.2.3	Limits on Insider Trading	5-124
¶503.3.2.4	Tender Offer Rules	5-125
¶503.3.2.5	Federal Margin Regulations	5-128
¶503.3.2.6	Going Private Rules	5-130
¶503.3.2.7	Proxy Rules and Shareholder Vote	5-131
¶503.3.3	State Laws	5-133
¶503.3.3.1	Target Board’s Fiduciary Duty in Corporate Context	5-133
¶503.3.3.2	Use of Independent Committee, Majority Vote of Disinterested Shareholders, and/or Other Measures to Protect Target Corp’s Directors	5-134
¶503.3.3.3	Fiduciary Duties in Partnership/LLC Context	5-136
¶503.3.3.4	Additional Pro-Target LBO Terms	5-136
	Reverse breakup fee	5-137
	Stub equity	5-137
¶503.3.3.5	Target Shareholder Vote	5-137
¶503.3.3.6	Other State Law Takeover Issues	5-138
¶503.3.3.7	Key Issues and Appendix References on Management’s Fiduciary Duties	5-138
¶503.4	Other Issues	5-139
¶504	GAAP ACQUISITION ACCOUNTING FOR THE BUYOUT	5-139
¶504.1	Importance of Acquisition Accounting	5-139
¶504.2	Overview of Acquisition Accounting	5-140
	Accounting at the Newco level	5-140
	Accounting at the Target level	5-141
¶504.3	Effect on Newco of GAAP Purchase Accounting for the Acquisition (Including Goodwill)	5-143
¶504.4	Effect on Target of GAAP Accounting for the Acquisition (Including Goodwill)	5-144
¶504.5	More Detail on GAAP Purchase Accounting Rules	5-146
	(1) Identity of acquirer	5-146
	(2) Goodwill	5-146
	(3) Identifiable assets other than goodwill	5-147
	(4) FV measurement	5-147
	(5) Elimination of part-purchase accounting	5-147
	(6) Acquisition date	5-148
	(7) Measurement date and valuation methodology for Newco stock and other consideration	5-148
	(8) Contingent consideration	5-148
	(9) Target contingent assets and liabilities	5-148
	(10) Seller indemnification	5-149

Detailed Table of Contents

(11)	In-process R&D	5-149
(12)	Replacement of Target stock-based compensation awards with Newco stock-based awards	5-149
(13)	Newco's acquisition costs	5-150
(14)	Certain assets and liabilities not recorded at acquisition-date FV	5-150
(15)	Termination costs	5-150
¶504.6	More Detail on Structuring and Tax Issues	5-150
¶504.6.1	Use of Transitory MergerCo	5-150
¶504.6.2	Use of Newco Partnership/LLC to Acquire Target	5-151
¶504.6.3	Use of Recap Structure to Acquire Target	5-152
¶504.6.4	Avoiding Target-Level Push-Down Purchase Accounting While Achieving Tax SUB for Target's Assets Without Double Tax on Target's Ultimate Sale	5-153
¶504.7	Key Accounting Issues and References	5-154

Chapter 6

Debt and Equity Securities and Executive Deferred Compensation

¶601	SUBORDINATED DEBT AND PREFERRED STOCK	6-5
¶601.1	Subordinated Debt Sample Terms and Tax Ramifications	6-5
¶601.1.1	Maturity and Interest Payments	6-5
¶601.1.2	Subordination	6-5
¶601.1.3	Typical Remedies	6-6
¶601.1.4	Front-End Interest Holiday	6-6
¶601.1.5	Holder's Tax on, and Newco's Deduction for, Interest and OID	6-6
	(1) Stated interest required to be paid at least annually	6-6
	(2) OID	6-6
	(3) QSI definition	6-7
	(4) Debenture issued for property	6-8
	(5) De minimis OID exception	6-8
	(6) Interest holiday	6-9
	(7) Allocation OID	6-9
	(8) Effect of Newco financial difficulties on holder	6-10
	(9) Imputed interest	6-10
	(10) Debenture tax basis build up	6-10
¶601.1.6	Six Hurdles to Newco's Interest and OID Deduction	6-10
¶601.1.6.1	Subjective Debt/Equity Test	6-11
	(1) DER	6-11
	(2) Overlap	6-13
	(3) Projected ability to service debt	6-14
	(4) Reasonable terms	6-14
	(5) Act like creditor	6-14

Detailed Table of Contents

		¶601.1.6.2 Code §279—Subordinated Debentures with Warrants or Conversion Privileges	6–15
		¶601.1.6.3 Code §163(e)(5)—OID and PIK Debentures	6–18
		¶601.1.6.4 Code §163(j) Test #1—Interest Payable to “Related” Lender Which Is TEO or FP (or Fund with TEO or FP Partners)	6–20
		¶601.1.6.5 Code §163(j) Test #2—Interest Payable on Debt “Guaranteed” by “Related” Person Who Is TEO or FP (or Possibly by Fund with TEO or FP Partners)	6–22
		¶601.1.6.6 Code §163(l)—Debt Payable in, or by Reference to Value of, Issuer Equity	6–24
	¶601.1.7	Key Issues and Appendix References	6–26
¶601.2		Preferred Stock Sample Terms and Tax Ramifications	6–27
	¶601.2.1	Redemption Terms	6–27
	¶601.2.2	Dividends	6–28
	¶601.2.3	Typical Remedies for Newco Failure to Pay Preferred Dividends or Timely Redeem Preferred	6–28
	¶601.2.4	No Deduction for Dividends or Preferred OID	6–29
	¶601.2.5	Dividend and Preferred OID Taxation	6–29
		(1) Stated dividends	6–29
		(2) PIK dividend	6–30
		(3) Dividend added to liquidation/redemption amount	6–30
		(4) Dividend not added to liquidation/redemption amount	6–30
		(5) Preferred OID	6–31
		(6) Preferred stock issued for property	6–31
		(7) Allocation OID	6–31
		(8) Evergreen preferred stock	6–32
		(9) Significant participation in corporate growth	6–33
		(10) Preferred stock tax basis build up	6–33
	¶601.2.6	Preferred Stock FV Below Face	6–33
		¶601.2.6.1 Management Code §83 and §409A Issues	6–33
		¶601.2.6.2 PE Preferred OID Issue	6–34
	¶601.2.7	Preferred Stock Redemption Treated as Dividend	6–35
	¶601.2.8	Key Issues and Appendix References	6–39
¶601.3		Comparison of Subordinated Debt and Preferred Stock	6–40
¶602		EXECUTIVE DEFERRED COMPENSATION TAX PENALTIES	6–42
	¶602.1	Introduction	6–42
	¶602.2	Code §409A Deferred Compensation Tax Penalties	6–43
		¶602.2.1 Summary	6–43
		¶602.2.2 Code §409A Deferred Compensation Definition and Related Rules	6–44
		(1) Deferred compensation definition	6–44
		(2) Written plan requirement	6–50
		(3) Employer’s or service provider’s taxable year	6–52
		(4) Vesting	6–53

Detailed Table of Contents

¶602.2.3	Code §409A Constructive Receipt—Deferral Requirements	6–54
¶602.2.4	Consequences of Failure to Comply with Code §409A Constructive Receipt Deferral Rules	6–56
	(1) Penalties for failure	6–56
	(2) Aggregation rules	6–57
	(3) Limited relief	6–58
¶602.2.5	Deemed Funding Rules	6–59
¶602.2.6	Code §409A’s Scope: Employees, Independent Contractors, Partners	6–61
	(1) Employees and independent contractors	6–61
	(2) Partnerships and LLCs	6–61
¶602.2.7	Application of Code §409A to Specific Compensation Arrangements	6–62
¶602.2.7.1	Cash Payment	6–62
	(1) Annual or long-term bonus	6–62
	(2) Severance	6–64
	(3) Commission or other contingent compensation	6–65
¶602.2.7.2	Equity-Based Compensation	6–66
	(1) NQO	6–66
	NQO in-the-money at grant	6–66
	20% penalty also applies to exercise-year appreciation	6–66
	No double taxation	6–67
	Short-term deferral exception	6–67
	Calculating amount by which NQO is in-the-money each year	6–67
	NQO on service recipient stock	6–67
	Post-grant NQO extension	6–68
	Post-grant exercise price reduction	6–69
	Post-grant modifications other than extension or exercise price reduction	6–69
	Substitution of BuyerCo NQO for Newco/Target NQO	6–69
	Extraordinary dividend before NQO exercise	6–70
	Canceling NQO in exchange for deferred payment right	6–72
	Net exercise	6–73
	Right to cancel NQO on sale of company	6–73
	Deep discount option may be treated as underlying stock	6–73
	§409A-compliant NQO	6–74
	Service provider deduction where underlying stock is forfeited or declines in FV	6–74
	(2) ISO	6–75

	(3) SAR	6-75
	(4) Restricted stock unit	6-76
	(5) Restricted stock	6-77
¶602.2.8	Effective Date Issues	6-78
	¶602.2.8.1 Constructive Receipt Deferral Rules	6-78
	¶602.2.8.2 Deemed Funding Event Rules	6-79
¶602.2.9	Employer Deduction	6-79
¶602.3	Code §457A Deferred Compensation Rules Covering Wholly or Partially Tax-Indifferent Employers	6-79
	¶602.3.1 Summary	6-79
	¶602.3.2 Code §457A's Consequences	6-82
	¶602.3.3 S corp	6-82
	¶602.3.4 Effective Date	6-83
¶602.4	Interrelationship Between Code §457A and Code §409A	6-83

Chapter 7

Structuring Consolidation of Fragmented Industry

¶701	STRUCTURE #1: CORPORATE HOLDING COMPANY WITH CORPORATE SUBSIDIARIES	7-5
	¶701.1 Factual Situation	7-6
	¶701.2 Analysis of Structure #1	7-6
	¶701.2.1 Consolidated Federal Income Tax Return	7-7
	¶701.2.2 Offset of Income and Losses Within Consolidated Group	7-9
	¶701.2.3 Tax-Free Transfer of Funds Within Consolidated Group	7-10
	¶701.2.4 Limitation on Amount of NewSub Stock Issued to Management and/or Mezz Lenders	7-10
	¶701.2.5 Limited Liability Protection for Newco's Owners	7-11
	¶701.2.6 Newco's Limited Liability Protection from NewSub Obligations	7-11
	¶701.2.7 Newco IPO or Tax-Free Merger	7-12
	¶701.2.8 Selling Newco	7-12
	¶701.2.9 Selling Portion of Newco	7-13
¶702	STRUCTURE #2: PARTNERSHIP OR LLC HOLDING COMPANY WITH CORPORATE SUBSIDIARIES	7-14
	¶702.1 Factual Situation	7-15
	¶702.2 Analysis of Structure #2	7-15
	¶702.2.1 No Consolidated Federal Income Tax Return	7-15
	¶702.2.2 No Offset of Income from One NewSub Against Losses of Newco or Another NewSub	7-15
	¶702.2.3 Difficulties in Making Tax-Free Transfers of Funds Between Various NewSubs	7-16
	¶702.2.4 No Limitation on Amount of NewSub Stock Issued to Management and/or Mezz Lenders	7-16
	¶702.2.5 Limited Liability for Newco's Owners	7-17
	¶702.2.6 Newco Limited Liability Protection from NewSub Obligations	7-17

Detailed Table of Contents

	¶702.2.7	Newco IPO or Tax-Free Merger	7-17
	¶702.2.8	Selling Newco	7-18
	¶702.2.9	Selling Portion of Newco	7-19
¶703		STRUCTURE #3: PARTNERSHIP OR LLC HOLDING COMPANY WITH PARTNERSHIP OR LLC SUBSIDIARIES	7-20
	¶703.1	Factual Situation	7-20
	¶703.2	Analysis of Structure #3	7-22
	¶703.2.1	No Entity-Level Tax	7-22
	¶703.2.2	Offset of Income and Losses	7-22
	¶703.2.3	Tax-Free Transfer of Funds Between Businesses	7-22
	¶703.2.4	No Limitation on Amount of NewSub Ownership Interest Issued to Management and/or Mezz Lenders	7-23
	¶703.2.5	Limited Liability Protection for Newco's Owners	7-23
	¶703.2.6	Newco Limited Liability Protection from NewSub Obligations	7-24
	¶703.2.7	Newco IPO or Tax-Free Merger	7-24
	¶703.2.8	Selling Newco	7-25
	¶703.2.9	Selling Portion of Newco	7-25
¶704		STRUCTURE #4: SINGLE CORPORATE STRUCTURE	7-26
	¶704.1	Factual Situation	7-26
	¶704.2	Analysis of Structure #4	7-27
	¶704.2.1	One Federal Income Tax Return	7-27
	¶704.2.2	Offset of Income and Losses Within Single Income Tax Return	7-27
	¶704.2.3	Tax-Free Transfer of Funds Between Businesses	7-27
	¶704.2.4	No Ability to Issue Stock of Particular Business to Management and/or Mezz Lenders	7-28
	¶704.2.5	Limited Liability Protection for Newco's Owners	7-28
	¶704.2.6	No Newco Limited Liability Protection from Obligations of Particular Business	7-28
	¶704.2.7	Newco IPO or Tax-Free Merger	7-28
	¶704.2.8	Selling Newco	7-28
	¶704.2.9	Selling Portion of Newco	7-29
¶705		STRUCTURE #5: SINGLE PARTNERSHIP OR LLC STRUCTURE	7-29
	¶705.1	Factual Situation	7-30
	¶705.2	Analysis of Structure #5	7-30
	¶705.2.1	No Entity-Level Tax	7-30
	¶705.2.2	Offset of Income and Losses	7-30
	¶705.2.3	Tax-Free Transfer of Funds Between Businesses	7-31
	¶705.2.4	No Ability to Issue Ownership Interests in Particular Business to Management and/or Mezz Lenders	7-31
	¶705.2.5	Limited Liability Protection for Newco's Equity Owners	7-31
	¶705.2.6	Protection from Obligations of a Particular Business	7-32
	¶705.2.7	Newco IPO or Tax-Free Merger	7-32
	¶705.2.8	Selling Newco	7-32
	¶705.2.9	Selling Portion of Newco	7-32
¶706		STRUCTURE #6: NO HOLDING COMPANY—DIRECT OWNERSHIP OF INDIVIDUAL CORPORATIONS BY SHAREHOLDERS	7-33

Detailed Table of Contents

¶706.1	Factual Situation	7-33
¶706.2	Analysis of Structure #6	7-34
¶706.2.1	No Consolidated Federal Income Tax Return	7-34
¶706.2.2	No Offset of Income from One NewSub Against Losses of Another NewSub	7-34
¶706.2.3	Difficulties in Making Tax-Free Transfers of Funds Between Various NewSubs	7-34
¶706.2.4	No Limitation on Amounts of NewSub Stock Issued to Management and/or Mezz Lenders	7-34
¶706.2.5	Generally No Newco Entity-Level Liabilities	7-34
¶706.2.6	NewSub Limited Liability Protection from Obligations of Another NewSub	7-35
¶706.2.7	IPO or Tax-Free Merger of the Enterprise	7-35
¶706.2.8	Selling the Enterprise	7-35
¶706.2.9	Selling Portion of the Enterprise	7-35
¶707	STRUCTURE #7: NO HOLDING COMPANY—DIRECT OWNERSHIP OF INDIVIDUAL PARTNERSHIPS OR LLCs BY OWNERS	7-36
¶707.1	Factual Situation	7-36
¶707.2	Analysis of Structure #7	7-36
¶707.2.1	No Entity-Level Tax	7-36
¶707.2.2	Offset of Income and Losses	7-37
¶707.2.3	Tax-Free Transfer of Funds Between Businesses	7-37
¶707.2.4	No Limitation on Amount of NewSub Ownership Interests Issued to Management and/or Mezz Lenders	7-37
¶707.2.5	Limited Liability Protection for Enterprise's Equity Owners	7-37
¶707.2.6	Newco Limited Liability Protection from Obligations of NewSub	7-37
¶707.2.7	Newco IPO or Tax-Free Merger	7-37
¶707.2.8	Selling the Enterprise	7-37
¶707.2.9	Selling Portion of the Enterprise	7-37
¶708	OTHER KEY ISSUES	7-37
¶709	APPENDIX REFERENCES	7-38

Chapter 8

Structuring Turn-Around Investment in Overleveraged or Troubled Company

¶801	THE FAILED BUYOUT	8-4
¶802	ALTERNATIVE RESTRUCTURING TRANSACTIONS	8-7
¶802.1	Transaction #1—Partial Payments to Creditors in Cash, New Debt, and Common Stock Where Badco Has No Market-Traded Debt Securities	8-7
¶802.1.1	\$20 Million New Equity	8-7
¶802.1.2	Stock Cancellations	8-7
¶802.1.3	Creditor Compromises	8-7
¶802.1.4	Badco's Post-Restructuring Stock Ownership and Balance Sheet	8-8

Detailed Table of Contents

¶802.2	Transaction #2—Badco’s Subordinated Debt Is Market Traded	8–9
¶802.3	Fact Pattern Variations	8–10
¶803	TAX RULES APPLICABLE TO DEBT RESTRUCTURING	8–11
¶803.1	Key Badco Tax Issues	8–11
¶803.2	Amount of Debt Cancellation	8–11
¶803.3	Debt Cancellation Triggering Events	8–11
¶803.4	Valuing Consideration Issued by Badco in Restructuring	8–12
	(1) General rule: FV	8–12
	(2) Debt not market traded: face	8–12
	(3) Debt is market traded: FV	8–13
	(4) Possible recharacterization of new debt as equity	8–13
¶803.5	Meaning of Market Traded	8–14
¶803.6	Alternative Tax Treatments of Debt Cancellation	8–16
¶803.7	Cancellation of Debt Income	8–16
¶803.8	AR-Instead-of-CODI Bankruptcy/Insolvency Exception	8–17
	¶803.8.1 Insolvency Requirement for Non-Bankruptcy Restructuring	8–17
	¶803.8.1.1 Meaning of Insolvency	8–17
	¶803.8.1.2 Effect of Equity Capital Infusion on Insolvency Determination	8–18
	¶803.8.2 Order of AR	8–19
	¶803.8.3 Timing of AR	8–19
	¶803.8.4 Insufficient Tax Attributes to Reduce	8–20
	¶803.8.5 Group of Corporations	8–20
¶803.9	2009–10 CODI (and OID) Deferral Election—Now Expired	8–21
	¶803.9.1 Effect on CODI	8–21
	¶803.9.2 Effect on OID	8–21
	¶803.9.3 Acceleration of §108(i) Deferred CODI and OID	8–22
¶803.10	New-Debt-Not-Materially-Different CODI Exception	8–23
¶803.11	Shareholder-Contribution CODI Exception	8–25
¶803.12	Related Person Acquires Badco Debt	8–26
¶803.13	Key Issues and Appendix References on Badco’s CODI and AR	8–27
¶804	TAX RESULTS OF ALTERNATIVE RESTRUCTURING TRANSACTIONS	8–29
	¶804.1 Transaction #1—No Market-Traded Debt	8–29
	¶804.2 Transaction #2—Market-Traded Debt	8–31
¶805	TAX RAMIFICATIONS WHERE BADCO IS S CORP, PARTNERSHIP, OR LLC	8–34
¶806	APPLICATION OF CODE §163(e)(5) AHYDO RULES TO DEBT RESTRUCTURING	8–38
¶807	APPLICABLE SEC AND OTHER DISCLOSURE RULES	8–38
	¶807.1 Exemptions from 1933 Act Registration	8–38
	¶807.2 Form S-4 Registration	8–40
	¶807.3 State Securities Laws	8–40
	¶807.4 Other SEC Implications	8–40
	¶807.5 Hart-Scott-Rodino Antitrust Reporting	8–40
	¶807.6 Key Issues and Appendix References on Securities Law Impediments to Restructuring	8–40
¶808	BINDING DISSENTING CREDITORS TO RESTRUCTURING	8–41
	¶808.1 Non-Bankruptcy Restructuring	8–41

Detailed Table of Contents

¶808.2	Pre-Packaged or Pre-Arranged Bankruptcy	8-41
	(1) Pre-packaged bankruptcy	8-41
	(2) Pre-arranged bankruptcy	8-41
	(3) Disadvantage of pre-packaged or pre-arranged bankruptcy	8-42
¶808.3	Procedure for Pre-Packaged or Pre-Arranged Bankruptcy	8-42
¶808.4	Cram Down of Non-Consenting Class	8-43
¶808.5	Restructuring Under State Compromise or Arrangement	8-44
¶809	BADCO'S ABILITY TO USE ITS REMAINING NOL/NOLCF	8-45
¶809.1	NOL/NOLCF Reduction for DC	8-45
¶809.2	Limitations on NOLCF	8-45
¶809.3	Code §382 NOL Taint	8-45
¶809.4	Code §382 NOL Elimination	8-47
¶809.5	Built-In Losses	8-47
¶809.6	Built-In Gains	8-47
¶809.7	Code §382 Pro-Taxpayer Bankruptcy Exception	8-47
	¶809.7.1 Code §382(l)(5): §382 Taint Not Applicable to Certain Bankruptcies	8-47
	¶809.7.2 Code §382(l)(6): Pro-Taxpayer Bankruptcy Stock FV Calculation Where §382 Taint Applies	8-48
¶809.8	Code §269 Elimination	8-49
¶809.9	Devices to Deter Changes in Badco Shareholders	8-49
¶809.10	Key Issues and Appendix References on Future Usage of Badco's Pre-Workout NOLs	8-50
¶810	CODE §384 LIMITATION ON USE OF BADCO'S NOLCF AGAINST NEW TARGET'S BIG	8-51

Chapter 9

Exit Strategies: Structuring IPO or Sale of PE/VC-Financed Portfolio Company

¶901	INITIAL PUBLIC OFFERING	9-5
	¶901.1 Methods for Reselling Restricted Securities	9-6
	¶901.2 1933 Act Registration Statement on Form S-1	9-6
	¶901.3 Underwritten Offering	9-6
	¶901.4 Primary vs. Secondary Sales	9-7
	¶901.5 Stock Exchange Listing vs. Nasdaq Stock Market	9-7
	¶901.6 Simplified Form for Small Business Issuer	9-7
	¶901.7 Short-Form 1933 Act Registration Statement for Subsequent Offerings	9-8
	¶901.8 Blue Sky Compliance	9-8
	¶901.9 No Gun Jumping	9-8
	¶901.10 Balanced Prospectus	9-8
	¶901.11 IPO Where Portfolio Company Was Formed as a Partnership or LLC	9-9
	(1) Traditional IPO	9-9
	(2) Up-C structure	9-9
	¶901.12 Post-IPO Obligations	9-11
¶902	1933 ACT REGISTERED PUBLIC OFFERINGS SUBSEQUENT TO IPO	9-12
	¶902.1 Short-Form Registrations	9-12
	¶902.2 Form S-3	9-13

Detailed Table of Contents

¶902.3	Demand and Piggyback Registrations	9–13
¶903	SEC RULE 144 SALES, GENERALLY BUT NOT EXCLUSIVELY AFTER IPO	9–14
¶903.1	Public Information	9–14
¶903.2	Volume Limitation	9–15
¶903.3	Manner of Sale	9–15
¶903.4	6-Month or 1-Year Rule 144 Holding Period	9–16
¶903.4.1	Commencement of Holding Period	9–17
¶903.4.2	Purchase from Person Other Than Portfolio Company or Portfolio Company Affiliate	9–17
¶903.4.3	Exchange or Conversion	9–17
¶903.4.4	Warrant	9–18
¶903.4.5	Other Tacking Rules	9–19
¶903.4.6	Unvested Securities	9–19
¶903.4.7	Incorporation of Partnership or LLC	9–20
¶903.5	SEC Notification	9–20
¶903.6	Partnership Fund Distribution in Kind	9–21
¶903.7	Rule 701 Securities	9–23
¶904	RESALES OF PORTFOLIO COMPANY UNRESTRICTED SECURITIES BY PORTFOLIO COMPANY AFFILIATE	9–23
¶904.1	Portfolio Company Affiliate	9–23
¶904.2	Portfolio Company Non-Affiliate	9–24
¶905	SALE OF PORTFOLIO COMPANY TO BUYERCO FOR BUYERCO STOCK, DEBT, AND/OR CASH	9–24
¶905.1	BuyerCo Stock as Principal Consideration	9–24
	(1) Tax aspects	9–24
	(2) SEC aspects	9–25
¶905.2	BuyerCo Debt Instrument as Part of Consideration	9–26
	(1) Tax aspects	9–26
	(2) SEC aspects	9–26
¶905.3	BuyerCo Asset SUB	9–27
¶905.4	Representations, Warranties, and Indemnification from Portfolio Company’s Shareholders	9–27
	¶905.4.1 Representations and Warranties	9–27
	¶905.4.2 Survival	9–27
	¶905.4.3 Deductible and/or Ceiling	9–28
	¶905.4.4 Escrow or Other Security	9–28
	¶905.4.5 Assumption of Liabilities	9–28
¶906	ADDITIONAL LTCG TAX ADVANTAGES FOR INDIVIDUALS	9–28
¶906.1	Code §1202 LTCG Rate Reduction to 14% (or 7% or 0%) on “Qualified Small Business Stock”	9–29
	(1) Qualified shareholder	9–30
	(2) Stock acquired at original issuance and post-8/10/93	9–31
	(3) 5-year holding period	9–31
	(4) Stock acquired for cash or other qualified consideration	9–33
	(5) U.S. C corp issuer	9–33
	(6) \$50 million maximum assets at issuance	9–33
	(7) Active business	9–35
	(8) No redemptions	9–35
	(9) Calculating amount of gain qualifying for §1202 reduced tax rate	9–37
	(10) Offsetting short positions	9–38

¶906.2	Code §1045 Tax-Free Rollover for “Qualified Small Business Stock”	9–38
	(1) Qualified small business stock	9–39
	(2) Qualified shareholder	9–40
	(3) Holding period of new §1202 stock	9–40
¶907	LEVERAGED DIVIDEND OR RECAPITALIZATION	9–41
¶908	EXECUTIVE COMPENSATION ISSUES WHERE COMPANY BECOMES PUBLICLY HELD—\$1 MILLION DEDUCTION LIMIT	9–42
¶908.1	Basic Deduction Limit	9–43
¶908.2	Exception #1: Privately Held Corporation	9–43
¶908.3	Exception #2: Plan or Agreement in Place When Privately Held Corporation Becomes Publicly Held	9–44
¶908.4	Exception #3: Executive Not a “Covered Employee”	9–45
	(1) In general	9–45
	(2) Ambiguities in definition of covered employee	9–46
	(3) 6/07 IRS guidance	9–49
	(4) Primacy of SEC reporting principles	9–50
	(5) Proposed legislation	9–50
¶908.5	Exception #4: Performance-Based Compensation	9–51
	¶908.5.1 Non-Discretionary, Pre-Established, Objective Performance Goal	9–51
	¶908.5.2 Compensation Committee Comprised Solely of 2 or More Outside Directors	9–52
	¶908.5.3 Shareholder Disclosure and Approval	9–52
	¶908.5.4 Compensation Committee Certification	9–53
¶908.6	Exception #5: Compensation Not Paid for Services as an Employee	9–53
¶908.7	Manifestly Unsound Tax Policy	9–54
¶909	APPENDIX REFERENCES	9–55

Chapter 10

Structuring Formation of Private Equity Fund

¶1001	PARTNERSHIP VERSUS CORPORATE FORM FOR PE FUND	10–6
	¶1001.1 PE Fund in Partnership Form	10–6
	¶1001.2 PE Fund in Corporate Form	10–12
	¶1001.3 Industry Standard Generally Limited Partnership Form	10–12
	¶1001.4 Key Tax Issues and Appendix References	10–13
¶1002	PROFIT AND LOSS ALLOCATIONS BETWEEN GP AND LPs	10–13
	¶1002.1 Profit Allocation	10–13
	¶1002.2 Loss Allocation	10–13
	¶1002.3 Income from Short-Term Investments	10–14
	¶1002.4 Buyout Fund Multiple Partnership Structure	10–14
¶1003	TIMING OF DISTRIBUTIONS TO GP AND LPs	10–14
	¶1003.1 Pro-LP Alternative—Full Payout	10–15
	¶1003.2 Pro-GP Alternative—Distribute Net Profits First	10–15
	¶1003.3 Middle Ground—FV Capital Account Test	10–15
	¶1003.4 Alternative Middle Ground—Distribute Contributed Capital and Expenses on Realized Investments First	10–16
	¶1003.5 GP Tax Distributions	10–16

Detailed Table of Contents

¶1004	MANAGEMENT FEE TO GP (OR TO MANAGEMENT COMPANY)	10-16
(1)	Industry standard management fee calculation	10-16
(2)	Alternative management fee calculation popular in 1980s	10-17
(3)	Management fee reduction after approximately 5 years	10-17
(4)	Management fee offset for other fees earned by GP	10-18
(5)	Management fee reduction by portion allocable to GP	10-18
(6)	Management fee reduction in exchange for enhanced allocation of LTCG and dividend income	10-18
(7)	Formation of management partnership or LLC separate from GP entity	10-19
¶1005	LIFE OF PE FUND AND RELATED ISSUES	10-20
¶1006	VESTING AND TAX ASPECTS OF PE PRINCIPALS' INTERESTS IN GP ENTITY	10-21
¶1006.1	Nature of GP Entity	10-21
¶1006.2	Vesting of GP Interest	10-21
¶1006.3	GP Recognition of §83 OI on Receipt (or Vesting) of GP Interest	10-22
(1)	GP interest as property	10-22
(2)	1993 revenue procedure adopted LV approach	10-24
(3)	2001 revenue procedure adopted deemed §83(b) election	10-26
(4)	2005 proposed regulations	10-27
(5)	5/10 House bill	10-28
¶1006.4	Taxation of PE Principal on Partnership's Flow-Through Income and on Gain from Sale of GP Entity: Carried Interest Taxation	10-29
(1)	Partnership character-flow-through rules	10-29
(2)	Pre-2010 carried-interest-recharacterization legislative proposals	10-30
(3)	2010 House and Senate bills aimed at investment and real estate activities	10-30
	Investment services partnership interest	10-31
	Possible application to operating entity	10-32
	Qualified capital interest	10-34
	Family partnership	10-34
	Loans	10-35
	Change in services	10-36
	Pure investor in upper-tier entity with carried interest	10-36
	Enterprise value tax	10-37
	Disqualified interest	10-37
	House and Senate competing effective dates and OI recharacterization percentages	10-38
	Regulatory authority	10-38
	40% penalty	10-38
	Pre-effective date self-help	10-39
	Medicare tax	10-39
(4)	2011 Obama administration bill aimed at investment and real estate activities	10-40
(5)	2012 and 2013 bills aimed at investment and real estate activities	10-40
(6)	Broader legislative proposals covering all partnership/LLC activities	10-41
¶1006.5	Code §409A Issues	10-41

Detailed Table of Contents

¶1007	DEPARTMENT OF LABOR PLAN ASSET REGULATIONS	10-42
	¶1007.1 PE Fund with ERISA Investors Is Subject to ERISA	10-42
	¶1007.2 Four Exceptions	10-42
	¶1007.2.1 Less Than 25% Benefit Plan Investors	10-42
	¶1007.2.2 Venture Capital Operating Company	10-43
	¶1007.2.3 Benefit Plan Investor Buys Publicly Offered Securities Meeting 3 Tests	10-46
	¶1007.2.4 PE Fund Is Investment Company Registered Under ICA	10-46
	¶1007.3 Strategic Considerations in Choosing Between 4 Exceptions	10-46
¶1008	INVESTMENT COMPANY ACT OF 1940	10-47
	¶1008.1 Investment Company Definition	10-47
	¶1008.2 ICA §3(c)(1) 100-or-Fewer Exemption	10-48
	¶1008.3 Two Look-Through Rules	10-50
	¶1008.4 ICA §3(c)(7) QP Exemption	10-52
	¶1008.5 Anti-Pyramiding Restrictions	10-57
	¶1008.6 Employee Securities Company	10-57
	¶1008.7 Key Issues and Appendix References	10-58
¶1009	PRIVATE PLACEMENT OF PE FUND'S EQUITY INTERESTS	10-58
¶1010	INVESTMENT ADVISERS ACT OF 1940	10-61
	¶1010.1 PE Fund GP's Status as Investment Adviser	10-61
	¶1010.2 IAA Registration and Carried Interest Prohibition	10-61
	¶1010.2.1 SEC Registration	10-61
	¶1010.2.2 State IA Registration	10-62
	¶1010.2.3 Carried Interest Prohibition	10-62
	¶1010.2.4 Avoiding Carried Interest Prohibitions	10-62
	¶1010.3 IAA Exceptions to SEC's Carried Interest Prohibition	10-63
	(1) §3(c)(7) QP fund statutory exception	10-63
	(2) SEC "heavy-hitter" regulatory exemption	10-63
	(3) U.S. non-resident	10-65
	(4) BDC	10-65
	¶1010.4 IAA Registration Exemptions	10-65
	¶1010.4.1 All Related Alter Ego IAs Treated as One	10-65
	¶1010.4.2 Seven IAA-Registration Exemptions	10-66
	¶1010.5 Certain IAA Provisions Applicable to All IAs	10-71
	¶1010.6 Key Issues and Appendix References	10-71
¶1011	BROKER-DEALER REGISTRATION	10-71
	(1) Portfolio company transaction fees	10-72
	(2) Sales of fund LP interests	10-73
¶1012	PLACEMENT AGENTS, GOVERNMENT AGENCY LPS, POLITICAL CONTRIBUTIONS, AND TAX DEDUCTION DENIAL FOR PLACEMENT AGENT FEES	10-74
	¶1012.1 Placement Agents Generally	10-74
	¶1012.2 Placement Agent 1934 Act Registration	10-74
	¶1012.3 SEC Pay-to-Play Rules	10-75
	Summary of SEC pay-to-play rule	10-75
	SEC pay-to-play rule in more detail	10-76
	Prohibition on compensation, not contributions	10-78
	SEC penalties	10-78
	Rule covers both SEC-registered adviser and some exempt advisers	10-78
	¶1012.4 Tax Deductions for Placement Agent Fees	10-78
¶1013	PE FUND AS SBIC	10-79

Detailed Table of Contents

¶1014	VOLCKER RULE COMPLIANCE WHERE BHC INVESTS IN PE FUND	10–82
¶1014.1	Volcker Rule Prohibitions	10–82
¶1014.2	Volcker Rule Exclusions	10–83
	(1) Covered fund exclusions	10–83
	(2) BHC group co-investments	10–85
	(3) Restricted profit interest	10–85
¶1014.3	Volcker Rule Exemptions	10–85
	¶1014.3.1 Organized and Offered Exemption	10–85
	¶1014.3.2 Non-U.S. BHC Group Acting Solely Outside the U.S.—The SOTUS Exemption	10–87
	¶1014.3.3 Miscellaneous Exemptions	10–88
¶1014.4	Volcker Rule §23A and §23B Restrictions	10–88
¶1014.5	Volcker Rule Effective Date	10–88
¶1015	SECONDARY SALES OF PE FUND LP INTERESTS	10–89
¶1015.1	Confidentiality	10–90
¶1015.2	Required Consents and Related Rights	10–90
¶1015.3	Typical Sale Conditions	10–91
¶1015.4	All-Partner Giveback	10–92
¶1015.5	Allocation of Income and Losses Between Buyer and Seller	10–92
¶1015.6	Adjustment to Tax Basis for PE Fund Assets	10–92
¶1015.7	Transfer of LP Interest to Joint Venture with New Financing Party	10–94
¶1016	AVOIDING CORPORATE TAXATION	10–94
¶1016.1	PTP Definition	10–95
	(1) In general	10–95
	(2) Readily Tradable definition	10–95
	(3) Not-more-than-100-partners safe harbor	10–96
	(4) 2% safe harbor	10–97
	(5) No-PE-fund-involvement safe harbor	10–99
¶1016.2	Qualifying Income Exception	10–99
¶1017	PE FUND GAAP REPORTING TO EQUITY OWNERS	10–101
¶1018	PE FUND’S ERISA EXPOSURE FOR BANKRUPT PORTFOLIO COMPANY’S UNDERFUNDED PENSION PLAN AND OTHER ERISA OBLIGATIONS	10–102

Appendix

Statutes, Rules, Regulations, and Other Precedents

¶2000	INTERNAL REVENUE CODE OF 1986	A–3
	§1(a) and (h)	A–5
	§11(a) and (b)	A–8
	§61(a)	A–9
	§83 (omitting (c)(4))	A–9
	§108 (omitting (c)(1)(B), (c)(2)–(5), (d)(8)–(10), (f), (g), and (h)(3)–(5))	A–11
	§162(m) (omitting (m)(4)(G))	A–17
	§163 (omitting (b), (c), (d)(4)(E), (d)(6), (e)(2)(C), (e)(5)(F), (e)(3), (e)(4), (e)(6), (f), (g), (h)(2)(E), (h)(3)(D), (h)(3)(E), (h)(4)(A)(ii), (h)(4)(B), (h)(4)(D)–(F), (h)(5), (j)(3)(C), (k), (l)(5), (m) and (n))	A–19

Detailed Table of Contents

§195 (omitting (b)(3))	A-28
§197 (omitting (f)(5) and (f)(10))	A-29
§199 (omitting (b)(3), (d)(1)(C), (d)(3)–(4), (d)(6)–(8), and (d)(9)(B)–(C))	A-33
§243(a)–(c) (omitting (b)(1)(B), (b)(2)(B), and (b)(3))	A-37
§246A (omitting (c)(3), (d)(2), and (d)(4))	A-37
§269	A-39
§279 (omitting (c)(5))	A-40
§280G (omitting (e))	A-42
§301 (omitting (e) and (f))	A-45
§302 (omitting (b)(5) and (f))	A-46
§305 (omitting (e) and (f))	A-48
§306 (omitting (f))	A-49
§311	A-52
§312(a)	A-52
§316(a)	A-52
§317	A-53
§318(a)	A-53
§331 (omitting (c))	A-54
§332(a) and (b)	A-55
§334	A-56
§336 (omitting (d)(1)(B), (d)(2), and (d)(3))	A-56
§337 (omitting (b)(2) and (d))	A-57
§338 (omitting (b)(3), (e), (f), (h)(3)(C), (h)(4–9), (h)(10)(C), (h)(11–16), and (i))	A-57
§351 (omitting (c), (e)(2), and (h))	A-59
§354(a) (omitting (a)(3))	A-62
§356 (omitting (b) and (d)(2)(C))	A-62
§358 (omitting (b), (c), and (g))	A-64
§368 (omitting (a)(2)(H) and (a)(3))	A-65
§382 (omitting (l)(2) and (l)(7))	A-68
§384 (omitting (e))	A-77
§385	A-79
§409A	A-80
§421 (omitting (c))	A-84
§422 (omitting (c)(3))	A-85
§424 (omitting (j))	A-87
§447(d)(2)(C)(i) and (e)	A-89
§453(a)–(d), (f), and (k)(2)	A-89
§453A (omitting (b)(3) and (4))	A-91
§453B (omitting (e))	A-93
§465(a)(1) and (2)	A-94
§469 (omitting (c)(3), (c)(5), (c)(7), (d), (f), (h)(3), (i), (j), (k), and (m))	A-94
§483 (omitting (d)(2)–(4), (e), and (g))	A-97
§511(a)(1)	A-98
§512(a)(1), (b)(1), (b)(4), (b)(5), (c)(1), and (e)	A-98
§513(a)	A-99
§514(a), (b)(1) (omitting (E)), (c)(1), (c)(2)(A), (c)(6), and (d)	A-100
§691(a)–(c) (omitting (b)(2) and (c)(3))	A-102
§§701–761 (omitting §702(d), §704(f), §706(b)(4)(B), (b)(5), (d)(2)–(4), §721(c)–(d), §724, §734(e), §735, §743(f), and §761(f) and (g))	A-104
§871(a) and (b) (omitting (a)(1)(B), (a)(1)(D), and (a)(3))	A-124
§875	A-125

Detailed Table of Contents

§881(a) (omitting (a)(4))	A-125
§882(a)–(c) (omitting (c)(1)(B) and (c)(4))	A-126
§1001 (omitting (e))	A-126
§1014(a) and (c) (omitting (a)(4))	A-127
§1017 (omitting (b)(4), (c), and (d))	A-127
§1032(a)	A-129
§1045	A-129
§1059 (omitting (c)(3)(C), (d)(2), (d)(4), (d)(5), (e)(2), and (e)(3))	A-129
§1202 (omitting (a)(2))	A-132
§§1272–1275 (omitting §1272(a)(2), (a)(6), (b), §1274(b)(3), (c)(3)(A), (c)(3)(B), (c)(3)(E), (e), §1274A, and §1275(a)(1)(B), (a)(3), (b), (c)(2)–(4))	A-138
§§1361–1378 (omitting §1361(b)(3)(E), (c)(2)(A)(vi), (c)(2)(B)(vi), (f) and (g), §1362(e)(5) and (6), §1366(d)(4), (f)(1) and (g), §1368(f), §1371(d), §1373, §1374(d)(7)(D), and §1375(c))	A-143
§1411	A-163
§1501	A-164
§1504(a) and (b)	A-165
§4999	A-166
§7704	A-166
§7872 (omitting (c)(1)(F), (c)(2)(C), (f)(11), (g) and (h))	A-168
¶2100 TREASURY REGULATIONS	A-173
Treas. Reg. §1.83-1–1.83-8 (omitting -3(c)(4) example 2, -3(j)(2), -3(k), -3(l), -6(a)(5), -6(a)(6), -7(a)(1)–(2), -7(c), -7(d), and -8(b))	A-173
Treas. Reg. §1.305-1(b)(1), (c), -5(a), (b), (d) examples 4, 5, 7, 8, 9, and 10, -7(a), (b), and (c)(1)–(2)	A-189
Treas. Reg. §1.336-1 (omitting (a)(2), (b)(5)(ii)–(v), (b)(6)(ii)(B), (b)(10), (b)(13), (b)(16)–(18), and (c))	A-196
Treas. Reg. §1.336-2 (omitting (b)(1)(i)(B)(2)(iv), (b)(1)(i)(B)(3), (b)(2)(i), (b)(2)(ii)(B)–(C), (b)(2)(iii)–(vi), and (e)–(k))	A-198
Treas. Reg. §1.338(h)(10)-1 (omitting (e) examples 3, 4, 6–9, 11–14 and (f)–(h))	A-200
Treas. Reg. §1.351-1 and -2 (omitting -1(a)(3)(ii), -1(c)(6)(ii), and -2(e))	A-205
Treas. Reg. §1.1361-1(a), (b), (e), (g)(1)(i), (l) (omitting -1(b)(6) and -1(l)(7))	A-209
Treas. Reg. §1.1502-6	A-218
Treas. Reg. §301.7701-2 (omitting (c)(2)(iii)–(v), (d), and (e)) and -3 (omitting (b)(8)(ii)–(v), (c)(1)(ii), (c)(1)(v), (c)(1)(vi), (d)(4), (e) through (h)) (“Check-the-box” regulations)	A-219
¶2200 REVENUE PROCEDURES AND REVENUE RULINGS	A-225
Rev. Proc. 93-27	A-225
Rev. Proc. 2001-43	A-226
Rev. Rul. 69-6	A-227
Rev. Rul. 73-427	A-229
Rev. Rul. 75-502	A-230
Rev. Rul. 75-512	A-232
Rev. Rul. 76-364	A-233
Rev. Rul. 76-385	A-233
Rev. Rul. 78-250	A-235

Detailed Table of Contents

Rev. Rul. 79-273	A-235
Rev. Rul. 85-106	A-237
Rev. Rul. 90-95	A-239
Rev. Rul. 98-21	A-241
¶2300 FEDERAL SECURITIES LAWS, RULES, AND REGULATIONS	A-245
Securities Act of 1933	A-246
§2(a)(1), (4), (11), (12)	A-246
§3(a)(9), (10), (11)	A-246
§3(b) (omitting (2)(D))	A-247
§4(a)(1), (2), (3), (4), (6)	A-247
§4(b) (omitting (b)(1))	A-248
§5 (omitting (d) and (e))	A-248
1933 Act Rules and Regulations	A-249
SEC Rule 144	A-249
SEC Rule 145	A-258
SEC Rule 147	A-260
SEC Reg. D	A-263
SEC Rule 701	A-275
Securities Exchange Act of 1934	A-278
§10 (omitting (a))	A-278
§12(a) and (g)	A-279
§13(k)(1)	A-280
1934 Act Rules and Regulations	A-280
SEC Reg. §240.10b-5	A-280
SEC Reg. §240.10b5-1	A-280
Investment Company Act of 1940	A-282
§2(a)(2), (3), (9), (13), (24), (42), (43), (46)–(48), (51)	A-282
§3(a), (b), (c)(1), (c)(3), (c)(7)(A), (c)(7)(E)	A-285
§6(b)	A-287
§48(a)	A-288
§55(a)	A-288
Investment Company Act Rules and Regulations	A-289
SEC Reg. §270.2a51-1	A-289
SEC Reg. §270.2a51-2	A-292
SEC Reg. §270.2a51-3	A-293
SEC Reg. §270.3a-1	A-294
SEC Reg. §270.3a-2	A-294
SEC Reg. §270.3a-3	A-295
SEC Reg. §270.3c-1	A-295
SEC Reg. §270.3c-5	A-295
SEC Reg. §270.3c-6	A-296
Investment Advisers Act of 1940	A-297
§202(a)(11)	A-297
§202(a)(22)	A-298
§203(a), (b), (l), and (m)	A-298
§203A(a) and (b)	A-299
§205	A-300
§208(d)	A-301
§215	A-301
§222	A-302

Detailed Table of Contents

Investment Advisers Act Rules and Regulations	A-302
SEC Reg. §275.203A-1	A-302
SEC Reg. §275.203A-2	A-303
SEC Reg. §275.205-3 (the “heavy-hitter rule”)	A-303
SEC Reg. §275.206(4)-5	A-305
¶2400 BANKRUPTCY CODE	A-309
§101(5), (22), (31), (32), and (51A)	A-309
§501(a)	A-311
§544(b)(1)	A-311
§546(e)	A-311
§547(b) and (c)	A-311
§548 (omitting (a)(2), (d)(2)(B)–(D), (d)(3), and (d)(4))	A-312
§550	A-314
§741(7) and (8)	A-314
§1125(a)(1), (b), (f), and (g)	A-315
§1145 (omitting (a)(3), (a)(4), and (d))	A-316
¶2500 STATE FRAUDULENT CONVEYANCE STATUTES	A-319
Uniform Fraudulent Transfer Act (omitting §11–§13)	A-319
Uniform Voidable Transactions Act (omitting §13–§16)	A-324
Uniform Fraudulent Conveyance Act (omitting §13 and §14)	A-330
Examples of Statute of Elizabeth States	A-332
Virginia §55-81	A-332
South Carolina §27-23-10	A-333
¶2600 DELAWARE CORPORATE, PARTNERSHIP, AND LLC STATUTES	A-335
Del. General Corporation Law	A-337
§102(a)(4), (b)(2), (b)(4), (b)(6), and (b)(7)	A-337
§145 (omitting (d), (e), (h), (i), and (k))	A-338
§146	A-340
§154	A-340
§160	A-340
§170(a)	A-341
§172	A-342
§173	A-342
§174	A-342
§202	A-343
§203 (omitting (b)(2), (d), and (e))	A-344
§244	A-346
§251	A-347
§252	A-350
§253 (omitting (f) and (g))	A-352
§259(a)	A-353
§261	A-354
§262 (omitting (f), (i), and (l))	A-354
§263(a)	A-357
§264(a)	A-357
§265 (omitting (c), (g), and (i))	A-358
§266 (omitting (d), (f), (i), and (j))	A-359
§267	A-360

Detailed Table of Contents

§271	A-361
§302	A-361
§388 (omitting (c), (g), and (j))	A-362
§390 (omitting (c), (h), and (i))	A-363
Del. Revised Uniform Limited Partnership Act	A-364
§17-108	A-364
§17-208	A-364
§17-211(a), (b), (h), and (l)	A-365
§17-212	A-366
§17-214 (omitting (c) and (i)-(o))	A-366
§17-215 (omitting (c) and (f))	A-367
§17-217 (omitting (c))	A-368
§17-218(a)-(f) and (j)	A-369
§17-219 (omitting (i))	A-371
§17-301(d)	A-373
§17-302 (omitting (c))	A-373
§17-303	A-374
§17-401	A-376
§17-402(a)	A-376
§17-403(b)	A-377
§17-404	A-377
§17-405 (omitting (c))	A-378
§17-501	A-378
§17-502(a)(1)	A-378
§17-503	A-378
§17-504	A-379
§17-602(a)	A-379
§17-603	A-379
§17-604	A-379
§17-605	A-380
§17-607	A-380
§17-702(a) and (d)	A-380
§17-704	A-381
§17-705	A-381
§17-801	A-381
§17-804	A-383
§17-901(a)	A-384
§17-902	A-384
§17-907 (omitting (d))	A-384
§17-1101 (omitting (a), (g), and (h))	A-384
Del. Limited Liability Company Act	A-385
§18-101(7), (10), and (11)	A-385
§18-108	A-385
§18-207	A-385
§18-209(a), (b), (g), and (i)	A-386
§18-210	A-387
§18-212 (omitting (c) and (f))	A-387
§18-214 (omitting (c) and (j))	A-388
§18-215(a), (b), (c), (e), (f), (g), and (i)	A-389
§18-216 (omitting (i))	A-391
§18-301(d) and (e)	A-393
§18-302 (omitting (c) and (e))	A-393

Detailed Table of Contents

§18-303	A-394
§18-401	A-394
§18-402	A-395
§18-403	A-395
§18-404 (omitting (c))	A-395
§18-407	A-396
§18-501	A-396
§18-502(a)	A-396
§18-503	A-396
§18-504	A-396
§18-602	A-397
§18-603	A-397
§18-604	A-397
§18-605	A-397
§18-607	A-398
§18-702(a), (b), and (e)	A-398
§18-704	A-399
§18-705	A-399
§18-801	A-399
§18-804	A-400
§18-901(a)	A-401
§18-902	A-402
§18-907 (omitting (d))	A-402
§18-1101 (omitting (f), (g), and (h))	A-402
§18-1107(a)	A-403
¶2700 CASES	A-405
In re International Radiator Co.	A-405
Turner v. Bernstein	A-406
Malone v. Brincat	A-408
Edelman v. Fruehauf Corp.	A-409
Hanson Trust PLC v. ML SCM Acquisition Inc.	A-414
Mills Acquisition Co. v. Macmillan, Inc.	A-430
Paramount Communications Inc. v. QVC Network Inc.	A-450
In re Fort Howard Corp. Shareholders Litigation	A-461
Black & Decker Corp. v. American Standard, Inc.	A-473
¶2800 OTHER MATERIALS	A-487
1916 Uniform Limited Partnership Act §7	A-487
1985 Revised Uniform Limited Partnership Act §§303, 607, 608, and 901	A-488
2001 Uniform Limited Partnership Act §§201(a), 303, 404, 508, 509, and 901(a)	A-490
American Bar Association Model Rule of Professional Conduct 1.7	A-493
The American Law Institute Federal Income Tax Project, Reporter’s Study Draft 6/1/89, Subchapter C Supplemental Study, Harvard Professor William D. Andrews, pp. 13-37	A-496
Sheffield and Kimball, Organizing the Corporate Venture, (Practising Law Institute, “The Partnership Tax Practice Series: Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances,” vol. 11, 2014), §301-§304	A-508

Detailed Table of Contents

Divide and Conquer: Why and How to Bifurcate Your LBO's Equity Structure, by Jack S. Levin, Sanford E. Perl, and Shelly M. Hirschtritt (Venture Capital Review, Winter-Spring 2004, as subsequently updated to cover developments through publication of this treatise)	A-513
Liquidity Alternatives for Venture Capital and Private Equity Investors in Thinly Traded Public Companies, by Mark B. Tresnowski and Gerald T. Nowak (Venture Capital Review, Winter 2004-05, as subsequently updated to cover developments through publication of this treatise)	A-526
Testimony Before the House Ways and Means Committee of Jack S. Levin (regarding proposed LBO Tax legislation), 2/2/89	A-538
<i>Table of Internal Revenue Code Sections</i>	T-1
<i>Table of Treasury Regulations</i>	T-5
<i>Table of Treasury/IRS Rulings</i>	T-7
<i>Table of Federal Securities Laws, Rules, and Regulations</i>	T-9
<i>Table of Bankruptcy Code Sections</i>	T-11
<i>Table of State Fraudulent Conveyance Statutes</i>	T-13
<i>Table of Delaware Corporate, Partnership, and LLC Statutes</i>	T-15
<i>Table of Cases</i>	T-17
<i>Table of Other Laws</i>	T-19
<i>Table of Other Materials</i>	T-21
<i>Index</i>	I-1