

CONTENTS

FOREWORD xiii

PREFACE AND ACKNOWLEDGMENTS xvii

Chapter 1 Getting Started in Mergers and Acquisition 1

Introduction • Key Terms • About Our Question-and-Answer Format • Concluding Comments • *Exhibit 1-1: Global M&A Transaction Value (1988 vs. 2018)* • *Exhibit 1-2: The M&A Process* • Notes

Chapter 2 Strategy 13

Introduction • Strategic Planning • The Role of M&A in Strategic Planning • Alternatives to M&A • SWOT Analysis • Disclosure of Strategy • Levels of Strategy • Four Types of M&A Strategy • The Search Process • Brokers and Finders • Bankers • Initial Regulatory and Legal Considerations • Concluding Comments • *Exhibit 2-1: Outline for a Typical Strategic Plan* • *Exhibit 2-2: M&A in a Strategic Decision Tree* • *Exhibit 2-3: Range of Structure for Business Collaboration* • *Exhibit 2-4: Sample SWOT Analysis Questions* • *Exhibit 2-5: Sample Checklist of Assets for Use in Complement/Supplement Analysis* • *Exhibit 2-6: Sample Checklist of Risks for Use in Seeking Complementary Acquisitions* • *Exhibit 2-7: Sample Strategy Statements* • *Exhibit 2-8: What Is Alphabet?* • *Exhibit 2-9: Examples of Options Embedded in Strategic Acquisitions* • *Exhibit 2-10: The AI Acquisition Race* • *Exhibit 2-11: Sherwin-Williams—Vertical Strategy Leads to Horizontal Move* • *Exhibit 2-12: A Guide to M&A Decisions* • *Exhibit 2-13: Opportunity Prioritization* • *Exhibit 2-14: Premerger Notification Thresholds Under Hart-Scott-Rodino* • *Appendix 2A: Types of Organizational Structure* • *Appendix 2B: Checklist of Assets* • *Appendix 2C: Horizontal Merger Guidelines* • *Appendix 2D: Tesoro Strikes Gold in California* • Notes

Chapter 3 Valuation and Modeling 113

Introduction • Valuation Fundamentals • Choosing a Valuation Approach • Comparable Companies and Transactions • Comparable Transactions Analysis • DCF Analysis • Forecasting Free Cash Flow • Calculating the Discount Rate • Ascribing a Terminal Value • Conducting Sensitivity

Analyses • The IVS Framework • Concluding Comments • *Exhibit 3-1: Valuation Approaches* • *Exhibit 3-2: Advantages and Disadvantages of Valuation Multiples* • *Exhibit 3-3: Common Multiples Used in Selected Sectors* • *Exhibit 3-4: Comparable Companies Checklist* • *Exhibit 3-5: Variations in Accounting May Affect Valuation Multiples* • *Exhibit 3-6: Comparable Transactions Checklist* • *Exhibit 3-7: Summary of Precedent Transactions* • *Exhibit 3-8: Overview of the DCF Analysis Process* • *Exhibit 3-9: Advantages of DCF Analysis* • *Exhibit 3-10: Disadvantages of DCF Analysis* • *Exhibit 3-11: Defining Free Cash Flow—Top-down Approach* • *Exhibit 3-12: Calculating Free Cash Flow—Example of Top-down Approach* • *Exhibit 3-13: Defining Free Cash Flow—Bottom-up Approach* • *Exhibit 3-14: Calculating Free Cash Flow—Example of Bottom-up Approach* • *Exhibit 3-15: Present Value Formula* • *Exhibit 3-16: WACC Formula* • *Exhibit 3-17: Cost of Common Equity Formula* • *Exhibit 3-18: Chart Showing Size Premiums by Quartile and Decile* • *Exhibit 3-19: Chart Showing Size Premiums by Decile* • *Exhibit 3-20: Exit Multiple Approach to Estimating Terminal Value* • *Exhibit 3-21: Terminal Value Model Assuming Constant Growth* • *Exhibit 3-22: Perpetuity Value Assuming No Growth in Cash Flows* • *Exhibit 3-23: Perpetuity Value Assuming 2 Percent Growth* • *Exhibit 3-24: DCF for a Business Already in Constant Growth Mode* • *Exhibit 3-25: DCF for a No. 2 Pencil Manufacturer* • Notes

Chapter 4 Financing and Refinancing 203

Introduction • Financing Overview • Financing Instruments: Equity vs. Debt vs. Hybrids • Financing Sources • Highly Leveraged Transactions • Minimizing Borrowing • Determining Structure in Debt Financing • Senior Debt • Sale-Leasebacks • Pros and Cons of Preserving Debt and Lease Obligations • Seller Takeback Financing • Warrants • Working Capital Debt of the Seller • The Bank Book and Commitment Letter • Other Principal Issues in Senior Loan Agreements • High-Yield (a.k.a. “Junk”) Bonds • Bridge Loans • Equity Investment Funds • Registration Rights • Intercreditor Issues • Subordination Issues • Intercreditor Agreements • Fraudulent Conveyance and Other Litigation Concerns • Refinancing Issues • Concluding Comments • *Exhibit 4-1: The LBO of Beatrice and Its Aftermath* • *Exhibit 4-2: Sample Company’s Cash Flow and Debt Service Requirements* • *Exhibit 4-3: Sample Covenant* • *Exhibit 4-4: Subordination and Corporate Structure* • *Appendix 4A: Typical Subordination Provisions of Publicly Issued Notes* • *Appendix 4B: Typical Subordination Provisions of Privately Placed Institutional Notes* • *Appendix 4C: Typical Subordination Provisions of Seller Notes* • Notes

Chapter 5 Structuring Transactions: General, Tax, and Accounting Considerations 339

Introduction • General Considerations • Structuring Asset Transactions • Structuring Stock Transactions • Structuring Merger Transactions • General Accounting Considerations • Allocating the Price of a Transaction for Accounting Purposes • Difference Between Accounting and Tax Treatments • Tax Considerations • Basic Tax Concepts and Definitions • Basic Tax Structure: Taxable Transactions • Basic Tax Structure: Tax-Deferred Transactions • Choice of Entity • Tax Consequences in Structuring Acquisition

Debt Financing • Management Buyout Tax Basics • Postacquisition Tax Issues • Other Tax Issues • Concluding Comments • Transaction Diagrams • *Exhibit 5-1: A Guide to US (Federal) and State Codes* • *Exhibit 5-2: Forward Subsidiary Merger (FSM) vs. Reverse Subsidiary Merger (RSM)* • *Exhibit 5-3: Anatomy of a Merger, Acquisition, and Buyout Transaction* • *Exhibit 5-4: Description of Acquisition Allocation from Emcor Group, Inc.* • *Exhibit 5-5: Differences in the Purchase Price Computation* • *Exhibit 5-6: Section 368: Types of Reorganization* • *Exhibit 5-7: Stock Purchase* • *Exhibit 5-8: Asset Purchase* • *Exhibit 5-9: Taxable Forward Merger* • *Exhibit 5-10: Taxable Reverse Merger* • *Exhibit 5-11: Taxable Forward Subsidiary Merger* • *Exhibit 5-12: Tax-Free Forward Merger (A Reorganization)* • *Exhibit 5-13: Tax-Free Forward Triangular Merger* • *Exhibit 5-14: Tax-Free Acquisition of Stock for Voting Stock (B Reorganization)* • *Exhibit 5-15: Acquisition of Property for Voting Stock (C Reorganization)* • *Exhibit 5-16: Acquisition of Property for Voting Stock (D Reorganization)* • *Exhibit 5-17: National Starch Transaction (Section 351 Acquisition)* • *Appendix 5A: Meeting the Reorganization Test: US Examples from the Internal Revenue Service* • Notes

Chapter 6 The Due Diligence Inquiry 455

Introduction • Getting Started • Duration of Due Diligence • Due Diligence Levels • Securities Laws and Due Diligence • Red Flags • Relations with the Seller • Location of Due Diligence Research • Evaluating Assets • Litigation Analysis • Emerging Legal Issues • Due Diligence After Closing • Concluding Comments • *Exhibit 6-1: VDR Menu Screen Shot* • *Exhibit 6-2: A Representative List of Virtual Data Room Providers* • *Exhibit 6-3: Some Typical Plaintiff Claims in M&A Litigation* • *Exhibit 6-4: Venn Diagram Showing Interrelationship of M&A, Due Diligence Standards, and Securities Law* • *Appendix 6A: Sample Confidentiality Agreement* • *Appendix 6B: Due Diligence Checklist* • *Appendix 6C: An Annotated Initial Document and Information Request List* • *Appendix 6D: Sample Index of VDR Documents* • Notes

Chapter 7 Negotiating the Letter of Intent and Acquisition Agreement 559

Introduction • Letter of Intent • The Acquisition Agreement • Components of the Agreement • Introductory Material • Representations and Warranties • Covenants • Conditions to Closing • Indemnity Section • Acquisitions from an Affiliated Group • Transactions Involving Public Companies • Negotiating and Documenting an MBO • Employment Agreements • Stockholders' Agreements • Concluding Comments • *Exhibit 7-1: Seller vs. Buyer Key Goals* • *Exhibit 7-2: The Safeguards-Price Negotiating Matrix* • *Exhibit 7-3: The FASB on Materiality* • *Appendix 7A: Sample Letter of Intent* • *Appendix 7B: Typical Merger Agreement and Commentary* • Notes

Chapter 8 Closing 747

Introduction • The Basics of Closing • Planning the Closing • Preclosing • Closing • Wire Transfers • Postclosing • Concluding

Comments • *Appendix 8A: Sample Closing Memorandum (Including a Detailed Schedule of Closing Documents)* • Notes

Chapter 9 Postmerger Integration and Divestitures 789

Introduction • Basic Concepts of Integration • The Postmerger Plan • Communicating the Integration Plan • Combining Company Names • Integrating Cultures • Integrating Mission, Policy, Ethics, and Vision Statements • Integrating Key Resources, Processes, and Responsibilities • Integrating Resources • Integrating Processes • Integrating Responsibilities • Commitments to Employees • Postmerger Compensation: A Complex Issue • Planning Pay Integration: A Strategic Overview • Merging Benefits Plans • Some General Postmerger Technology Considerations • Divestitures • Concluding Comments • *Exhibit 9-1: Audience Media Communications Matrix* • *Exhibit 9-2: Steps for Naming a Newly Combined Company* • *Exhibit 9-3: A Matrix for Planning Cultural Integration* • *Exhibit 9-4: Acquisition Integration Plan for Human Resources Operation* • *Exhibit 9-5: Three Brand Approaches* • *Exhibit 9-6: Sample Plan for 30-, 60-, and 90+-Day Milestones* • *Exhibit 9-7: Old Line Bank and Bay Bank Merger FAQ (Excerpts)* • *Exhibit 9-8: Marathon Patent Press Release Addressing the Dilution Issue* • *Exhibit 9-9: Sample Matrix for Postmerger Compensation Planning* • *Exhibit 9-10: Valuing the Divestiture Option* • *Exhibit 9-11: The WARN Act: Basic Provisions/Requirements* • *Appendix 9A: Sample Postmerger Press Release Highlighting Strategic Motivation* • *Appendix 9B: Sample "Assets" Checklist of Resources, Processes, and Responsibilities* • *Appendix 9C: Integration Planning Worksheet* • *Appendix 9D: Integration Timeline from a Midsized Acquirer* • *Appendix 9E: Pairwise Comparison* • *Appendix 9F: Principles for Responsible Business* • *Exhibit 9E-1: Setting Up the Pairwise Comparison Matrix* • *Exhibit 9E-2: Identifying the Useful Part of the Matrix* • *Exhibit 9E-3: Filling the Useful Part of the Matrix* • Notes

Chapter 10 Special Issues for M&A in Public Companies 937

Introduction • General Considerations • Proxy Voting • Dodd-Frank, Sarbanes-Oxley, and M&A • Duties of Care and Loyalty • Director Responsibilities in Responding to Unsolicited Bids • M&A Forms • Tender Offer Basics • Proxy Solicitations • Going Private • Merger Disclosure Issues • Insider Trading • Financing the Two-Step Public Transaction with Debt • Takeover Defenses • State Laws Related to Takeover Defense • Concluding Comments • *Exhibit 10-1: Some Typical Plaintiff Claims in M&A Litigation* • *Exhibit 10-2: Federal Class Actions on M&A 2010–2018* • *Exhibit 10-3: Likely Responses to Tender Offers Versus Management Promises* • Notes

Chapter 11 Workouts, Bankruptcies, and Liquidations 1019

Introduction • General Considerations • Workouts • Bankruptcy • State Insolvency Proceedings • Investing Opportunities: Structuring the Purchase of a Troubled Company • Structuring a Buyout to Minimize Insolvency

Risk • Financing Alternatives for Companies with Losses • Accounting/Tax Issues for Companies with Losses • Liquidation • Concluding Comments • Diagrams Showing Various Structures for Reorganizations and Workouts of Insolvent Companies • *Exhibit 11-1: Definitions of Bankruptcy* • *Exhibit 11-2: Average Corporate Debt Recovery Rates Measured by Ultimate Recoveries, 1987–2018* • *Exhibit 11-3: Business vs. Computer Bankruptcies* • *Exhibit 11-4: Some Common Consolidation Scenarios Applying ASC 810* • *Exhibit 11-5: The 10 Largest Bankruptcies in the United States (by Total Assets Pre-Bankruptcy)* • *Exhibit 11-6: Structure Posing No Fraudulent Conveyance Risk* • *Exhibit 11-7: Structure Posing Fraudulent Conveyance Risk via Guarantee* • *Exhibit 11-8: Structure Posing Fraudulent Conveyance Risk via Transfer of Loan Recipient* • *Exhibit 11-9: Structure Posing Fraudulent Conveyance Risk via Simple Merger* • *Exhibit 11-10: Structure Posing Fraudulent Conveyance Risk via Distribution to Target Shareholder* • *Exhibit 11-11: Structure Posing Risk of Fraudulent Conveyance in Multistep Transaction Involving Small Stock Purchase and Large Loan* • *Exhibit 11-12: Structure Posing Fraudulent Conveyance Risk via Transfer of Risk to a Subsidiary* • Notes

Chapter 12 Global Deals: Structuring for Success 1073

Introduction • Nontax Inbound: Issues Regarding Foreign Investment in the United States • Nontax Outbound: Acquisitions Involving Assets Located Outside the United States • Foreign Exchange • Other Global Realities • Financing Outbound Transactions • International Tax and Disclosure Considerations • Tax Considerations in Inbound Acquisitions • Tax Considerations in Outbound Acquisitions • Concluding Comments • *Exhibit 12-1: Examples of Eurocurrencies* • *Appendix 12-1: Meeting the Reorganization Test: Foreign Examples from the Internal Revenue Service* • Notes

Landmark and Recent M&A Legal Cases 1137

Cases Alleging Impropriety in Purchasing (or Disclosing an Offer to Purchase) a Company or Controlling Shares • Cases Alleging Impropriety in the Valuation and/or Sale of a Business, Assets, or Controlling Shares • Cases Involving M&A Agreements or Other Contracts • Cases Alleging Violation of Antitrust Laws • Cases Alleging Violations of Health, Safety, and Labor Laws in an M&A Context • Cases Dealing with Jurisdiction or Right to Sue Following a Merger • Additional Cases

INDEX 1207