Table of Contents

About the Authors.................................................................vii
Preface.........................................................................................ix
Acknowledgments ......................................................................xi
Abbreviations and Terms Frequently Used ......................... xiii
Table of Chapters....................................................................xvii

Chapter 1       Why Conduct Due Diligence?
§ 1:1 Introduction.................................................................... 1-1
§ 1:2 Rewards of Due Diligence.............................................. 1-3
§ 1:3 Conclusion ..................................................................... 1-5

Chapter 2       The Due Diligence Defense Under the Federal Securities Laws
§ 2:1 Possible Defendants in a Securities Action..................... 2-1
§ 2:2 Liability Under Section 11............................................ 2-2
§ 2:3 Liability Under Section 12(a)(2)................................. 2-5
§ 2:4 Liability Under the Exchange Act............................... 2-9
§ 2:5 Liability Issues Under the Securities Offering
Reform................................................................................... 2-11

Chapter 3       When Is Due Diligence Performed?
§ 3:1 The Due Diligence Process.......................................... 3-1
§ 3:2 Due Diligence Request................................................. 3-5
§ 3:3 Due Diligence Is Ongoing............................................ 3-6
  § 3:3.1 Prior to Initial Filing or Distribution......................... 3-7
  § 3:3.2 Between Filing or Distribution and Pricing............. 3-9
  § 3:3.3 Pricing Through Closing........................................ 3-9
Chapter 4  Mechanics of Due Diligence in Securities Offerings

§ 4:1 Introduction ................................................................. 4-1
§ 4:2 Factors to Consider ....................................................... 4-1
§ 4:3 Document Review .......................................................... 4-3
  § 4:3.1 Physical Data Rooms ................................................ 4-5
  § 4:3.2 Electronic Data Rooms ............................................. 4-7
  § 4:3.3 Backup ...................................................................... 4-9
  § 4:3.4 Due Diligence Conference Calls............................. 4-12
  § 4:3.5 Background Searches ............................................... 4-14

Chapter 5  Legal Due Diligence

§ 5:1 Introduction ................................................................. 5-2
§ 5:2 Performing Legal Due Diligence ..................................... 5-3
§ 5:3 Corporate Records .......................................................... 5-3
  § 5:3.1 Charter and By-Laws ................................................ 5-3
  § 5:3.2 Minutes ..................................................................... 5-5
  § 5:3.3 Stock Books .............................................................. 5-6
  § 5:3.4 Organizational Structure ........................................... 5-7
§ 5:4 Public Filings and Financial Information ....................... 5-7
  § 5:4.1 SEC Filings ............................................................... 5-7
  § 5:4.2 SEC Comment Letters and Responses ....................... 5-8
  § 5:4.3 Comfort Letters ......................................................... 5-10
  § 5:4.4 Audited Financial Statements ...................................... 5-10
  § 5:4.5 Interim Unaudited Financial Statements ..................... 5-12
  § 5:4.6 Recent Internal Financial Statements ......................... 5-12
  § 5:4.7 Budget, Operating and Financial Plans and Projections .............................................................. 5-13
  § 5:4.8 Private Placement Memoranda or Offering Circulars .......... 5-13
  § 5:4.9 Accountants’ Letters .................................................. 5-13
§ 5:5 Corporate Agreements .................................................. 5-14
  § 5:5.1 Credit Agreements ..................................................... 5-14
  § 5:5.2 Other Financial Agreements ....................................... 5-16
  § 5:5.3 Third-Party Loan Agreements .................................... 5-17
  § 5:5.4 Material Correspondence with Lenders ....................... 5-17
  § 5:5.5 Other Agreements That Restrict Additional Indebtedness or Asset Transfers of the Company .............................................................. 5-17
§ 5:5.6 Shareholder Agreements and Registration Rights Agreements .................................................. 5-19
§ 5:5.7 Joint Venture Agreements ............................................. 5-21
§ 6:2.5 Earnings Calls and Analyst Presentations ............... 6-8
§ 6:3 Financial Due Diligence ........................................ 6-9
§ 6:4 Accounting Due Diligence ..................................... 6-17
§ 6:4.1 Accounting Policies and Procedures ..................... 6-20
§ 6:4.2 Discussions with Management and Evaluation of Internal Controls ........................................... 6-22
§ 6:4.3 Discussions with Auditors and Delivery of Comfort Letter ......................................................... 6-23

Chapter 7 Comfort Letters
§ 7:1 Purpose of Comfort Letters .................................... 7-1
§ 7:2 Procedures and Level of Comfort ............................ 7-3
§ 7:3 Requesting Comfort .............................................. 7-7
§ 7:4 Bring-Down Comfort Letters .................................. 7-8

Chapter 8 Employee Benefits Due Diligence
§ 8:1 Purpose of Employee Benefits Due Diligence .......... 8-1
§ 8:2 Gathering Information ......................................... 8-3
§ 8:3 Relevant Tax Laws ............................................... 8-5
§ 8:4 Document Review .................................................. 8-8
§ 8:4.1 Executive Compensation Arrangements ............... 8-9
§ 8:4.2 Severance Agreements or Plans ........................... 8-10
§ 8:4.3 Stock Option and Other Equity-Based Compensation Plans ...................................................... 8-11
§ 8:4.4 Retirement Plans ................................................. 8-13
§ 8:4.5 Collective Bargaining Agreements and Multiemployer Pension Plans ........................................ 8-15
§ 8:4.6 Welfare Plans ...................................................... 8-16
§ 8:4.7 Retiree Medical/Life Benefits ............................... 8-16
§ 8:4.8 Director Plans ..................................................... 8-16
§ 8:4.9 Indemnification Arrangements ............................. 8-17

Chapter 9 Corporate Governance/Sarbanes-Oxley Due Diligence
§ 9:1 Introduction ......................................................... 9-1
§ 9:2 Disclosure Controls and Procedures .......................... 9-2
§ 9:3 Internal Controls .................................................... 9-3
§ 9:4 Filing of CEO/CFO Certifications Under Section 302 and Section 906 of the Sarbanes-Oxley Act ......................................................... 9-4
Table of Contents

§ 9:5 Code of Ethics and Any Exemptions to the Code ............ 9-6
§ 9:6 Loans to Officers and Directors ................................... 9-7
§ 9:7 Off-Balance Sheet Transactions ................................... 9-8
§ 9:8 Audit Committee Due Diligence ................................ 9-9
  § 9:8.1 Compliance with Rules ........................................ 9-9
  § 9:8.2 Disclosure Controls ............................................. 9-11
  § 9:8.3 Relationship with the Auditors ............................ 9-12

Chapter 10  Intellectual Property Diligence

§ 10:1 Overview .............................................................. 10-1
§ 10:2 Ownership of Intellectual Property .......................... 10-2
  § 10:2.1 Confidentiality Measures ................................... 10-4
  § 10:2.2 Control of Licensees .......................................... 10-4
  § 10:2.3 Research and Development .................................. 10-5
  § 10:2.4 Enforcement Measures ....................................... 10-5
§ 10:3 Use of Third-Party Intellectual Property ..................... 10-6
§ 10:4 Intellectual Property Conflicts with Third Parties ......... 10-7

Chapter 11  Environmental Due Diligence

§ 11:1 Overview .............................................................. 11-1
§ 11:2 Principal SEC Disclosure Requirements for
  Environmental Liability ................................................ 11-2
§ 11:3 Principal Accounting Standards for Environmental
  Liability ........................................................................... 11-3
§ 11:4 Principal Categories of Environmental Laws .............. 11-7
  § 11:4.1 Due Diligence of Operational or Business
    Compliance ...................................................................... 11-7
  § 11:4.2 Due Diligence of Contamination Issues ............... 11-9
  § 11:4.3 Due Diligence Relating to Exposure Claims
    and Toxic Torts ............................................................ 11-11
§ 11:5 What Are the Components of the Environmental
  Due Diligence Process in the Context of Securities
  Offerings? ......................................................................... 11-12
  § 11:5.1 Tailor the Due Diligence to the Issuer ................. 11-12
  § 11:5.2 Request and Review Documentary Information .... 11-13
  § 11:5.3 Conduct Telephone and/or In-Person Due
    Diligence Sessions .......................................................... 11-14
  § 11:5.4 Database Reviews ............................................... 11-16
  § 11:5.5 Bring-Down Environmental Diligence .................. 11-17
Chapter 12  Special Considerations for Non-U.S. Company Due Diligence

§ 12:1  Challenges of Non-U.S. Company Due Diligence .......................... 12-1
§ 12:2  Due Diligence of Non-U.S. Companies Versus U.S. Companies ............. 12-2
§ 12:3  Practical Issues and Problems in Diligencing Non-U.S. Companies ........ 12-4
  § 12:3.1  Different Legal Systems ........................................... 12-4
  § 12:3.2  Location of Documents ............................................. 12-4
  § 12:3.3  Language Barriers .................................................... 12-5
  § 12:3.4  Different Corporate Mechanics .................................... 12-5
  § 12:3.5  Non-U.S. Regulatory Requirements .................................. 12-6
  § 12:3.6  Financial Information ................................................ 12-6
§ 12:4  Specific Issues to Consider When Diligencing Non-U.S. Companies ......... 12-8
  § 12:4.1  The Foreign Corrupt Practices Act (FCPA) .......................... 12-8
  § 12:4.2  Labor Issues ............................................................ 12-9
  § 12:4.3  Competition ............................................................ 12-9
  § 12:4.4  Financial Assistance Rules ........................................ 12-9
  § 12:4.5  Investment Company Act .......................................... 12-9
  § 12:4.6  Macroeconomic Factors ............................................. 12-10

Chapter 13  The Foreign Corrupt Practices Act and the Due Diligence Process

§ 13:1  Importance of the Foreign Corrupt Practices Act ............................ 13-1
§ 13:2  FCPA Overview ................................................................... 13-2
  § 13:2.1  Anti-Bribery Provisions .............................................. 13-3
  § 13:2.2  Exception to the Anti-Bribery Provisions: Permissible Payments .... 13-4
  § 13:2.4  Accounting Provisions: Record-Keeping ................................ 13-6
  § 13:2.5  Accounting Provisions: Internal Controls ................................ 13-6
§ 13:3  FCPA Due Diligence ........................................................... 13-7
§ 13:4  Corporate FCPA Compliance Practices and Procedures ..................... 13-11

Chapter 14  Due Diligence and Shelf Takedowns

§ 14:1  Introduction ....................................................................... 14-1
§ 14:2  What Is Shelf Takedown Diligence? ........................................ 14-1
§ 14:3  The Role of Designated Underwriters' Counsel ............................ 14-7