

TABLE OF CONTENTS

CHAPTER 1

Overview: Building a Successful Partnership, Joint Venture or Strategic Alliance

Craig M. Wasserman

§ 1.01	Introduction	1-3
§ 1.02	Defining the Landscape	1-6
§ 1.03	Ten Key Questions to Consider	1-7
[1]	Is the Client's Interest in the Venture/ Alliance Primarily Strategic or Financial in Nature?	1-7
[2]	What Consequences Would Stem from a Sale of the Client's Interests in the Venture/Alliance?	1-7
[3]	Why Does It Make Sense for the Client to Partner on This Project Rather Than Go It Alone?	1-8
[4]	What Opportunities Will the Client Forego by Entering into the Venture/Alliance?	1-8
[5]	What Is the Scope of the Noncompetition and Exclusivity Provisions That Are Envisioned?	1-9
[6]	What Are the Relative Strengths That Each Party Brings to the Table? . . .	1-9
[7]	What Are the Parties' Relative Bargaining Powers, Both Up Front and Over Time?	1-10
[8]	How Much Money Does the Client Wish to Invest in the Venture, Both Up Front and Over Time?	1-10
[9]	What Are the Expected Exit Strategies, and Do All Parties Have a Shared View of the Likely Exit Scenarios?	1-11

	[10] Has the Client Adequately Considered All the Things That Could Go Wrong with the Venture/Alliance, So That the Client's Interests Can Be Adequately Protected in Such Various Downside Scenarios?	1-11
§ 1.04	Ten Key Strategies to Follow	1-13
	[1] Assemble a Core Working Team for the Project.....	1-13
	[2] Review Analogous Precedent Transactions and Collect Precedent Contracts to the Extent Available.....	1-13
	[3] Separate the Proposed Transaction into Its Core Component Parts and Carefully Review the Key Accounting, Tax and Other Financial/Structural Consideration of the Proposed Transaction	1-14
	[4] Stress Test All of the Key Strategic and Financial Premises	1-15
	[5] Create a Term Sheet Early in the Process	1-15
	[6] Create a Separate Issues List of All Key Open Legal, Financial and Structural Considerations That Will Need to Be Resolved.....	1-16
	[7] Know What Will Work Best for the Client Before Engaging the Other Side.....	1-16
	[8] Take the Offensive in Putting Forth Proposals to the Other Side.....	1-16
	[9] Avoid Ambiguities When It Comes to Drafting the Key Legal Obligations and Responsibilities of the Parties.....	1-17
	[10] Consider What Works Best for Both Sides and Be Fair When Drafting Key Terms and Provisions	1-18
§ 1.05	A Road map to the Material That Follows	1-19
§ 1.06	Joint Ventures with a Distressed Partner.....	1-20
	[1] Joint Venture Agreements as Executory Contracts.....	1-21
	[2] Application of Section 365 to Joint Venture Agreements.....	1-22

CHAPTER 2**Getting Started: Process, Timing
and Disclosure Concerns***Stephen I. Glover*

§ 2.01	Introduction	2-1
§ 2.02	Forming the Deal Teams	2-3
§ 2.03	Preparing an Issues List and a List of Tasks to Be Accomplished	2-5
§ 2.04	Timetable for the Transaction	2-6
§ 2.05	[Reserved]	2-8
§ 2.06	Due Diligence Checklist	2-9
§ 2.07	Due Diligence Checklist for Ventures That Will Operate in Foreign Countries	2-25

CHAPTER 3**Letters of Intent***Gavin D. Solotar*

§ 3.01	Letters of Intent.	3-2
	[1] In General.	3-2
	[2] Advantages and Disadvantages	3-3
§ 3.02	Letter of Intent Terms.	3-5
	[1] Formation	3-5
	[2] Governance.	3-8
	[3] Miscellaneous Provisions.	3-11
§ 3.03	Binding vs. Nonbinding Letters of Intent	3-13
	[1] The Legal Landscape	3-13
	[2] Drafting Letters of Intent to Clearly Evidence Intent.	3-19
§ 3.04	Disclosure Requirements.	3-21
§ 3.05	Form of Letter of Intent for Joint Venture Transactions	3-22
§ 3.06	Sample Joint Venture Issues List.	3-32
§ 3.07	[Reserved]	3-37
§ 3.08	Sample Term Sheets	3-38
	[1] Sample Term Sheet 1.	3-38
	[2] Sample Term Sheet 2.	3-66
	[3] Sample Term Sheet 3.	3-78
	[4] Sample Term Sheet 4.	3-85
	[5] Sample Term Sheet 5.	3-94
	[6] Sample Term Sheet 6.	3-112
	[7] Sample Term Sheet 7.	3-118

CHAPTER 4

Choice of Entity Considerations— A Comparison of Legal Entities

Stephen I. Glover and John Hess, Jr.

§ 4.01	Overview	4-1
§ 4.02	Factors to Consider When Deciding Whether to Form an Entity	4-5
§ 4.03	Factors Affecting the Choice of Entity	4-6
	[1] Tax Issues	4-6
	[2] Limited Liability	4-11
	[3] Management Structure and Statutory Formalities	4-16
	[4] Regulatory Filings and Approval	4-17
	[5] Third-Party Consents	4-18
	[6] Other Statutory Differences Between Types of Entities	4-19
	[7] Exit Strategies	4-21

CHAPTER 5

Fiduciary Duties and Legal Obligations of Joint Venture Partners

Peter J. Walsh, Jr.

§ 5.01	Overview	5-2
§ 5.02	Fiduciary Duties in General Partnerships	5-3
	[1] The Duty of Loyalty	5-5
	[2] The Duty of Care	5-7
	[3] Good Faith and Fair Dealing	5-8
§ 5.03	Fiduciary Duties in Common Law Joint Ventures	5-10
	[1] Joint Ventures Compared to Partnerships	5-10
	[2] The Requisite Existence of a Joint Venture	5-11
	[3] Nature and Extent of Joint Venture Fiduciary Duties	5-12
	[4] Enterprise Specificity	5-12
	[5] The Significance of Managerial Control	5-14
	[6] Waiver of Objections to Breaches of Duty	5-15

TABLE OF CONTENTS

xxiii

§ 5.04	Fiduciary Duties in Limited Partnerships	5-17
	[1] Fiduciary Duties of the General Partner.	5-17
	[2] Fiduciary Duties of Limited Partners	5-20
§ 5.05	Fiduciary Duties in Limited Liability Companies.	5-23
§ 5.06	Contractual Modification of Fiduciary Duties	5-26
	[1] General Partnerships.	5-26
	[2] Limited Partnerships.	5-27
	[3] Limited Liability Companies.	5-29
	[4] Joint Ventures.	5-30

CHAPTER 6

Drafting the Joint Venture Agreement

Stephen I. Glover and Alisa Babitz

§ 6.01	Introduction	6-6
§ 6.02	Choosing the Form of the Joint Venture.	6-10
	[1] Overview.	6-10
	[2] Factors Affecting the Choice of Form	6-12
	[a] Tax Issues	6-13
	[b] Limited Liability	6-16
	[c] Regulatory Filings and Approvals	6-21
	[d] Third-Party Consents.	6-22
	[e] Other Statutory Differences Between Types of Entities.	6-24
	[f] Joint Venture Formation Agreements	6-26
§ 6.03	Defining the Venture's Business and Powers	6-29
	[1] Purposes of the Business	6-29
	[a] Discussion	6-29
	[b] Sample Provisions	6-31
	[2] The Venture's Powers	6-32
	[a] Discussion	6-32
	[b] Sample Provisions	6-33
§ 6.04	Identifying Assets to Be Conveyed to the Venture	6-36
§ 6.04A	Representations Regarding Assets Conveyed to the Venture.	6-40
	[1] Overview.	6-40
	[2] Sample Provisions	6-43

§ 6.05	Managing the Venture	6-45
	[1] Overview	6-45
	[2] The Managing Board	6-49
	[a] Size and Composition of the Managing Board	6-49
	[b] Quorum and Voting Requirements	6-54
	[c] Meetings	6-58
	[d] Relationship Between Managing Board and Officers	6-59
	[e] Preparation and Approval of Budgets	6-60
	[f] Changes in Composition of Board upon Default; Observer Rights	6-60.1
	[g] Sample Provisions	6-60.2
	[3] Officers	6-76
	[a] Types of Officers	6-76
	[b] Selection of Officers	6-76
	[c] Sample Provisions	6-77
	[4] The Venture's Nonexecutive Employees	6-81
	[a] Discussion	6-81
	[b] Sample Provision	6-83
	[5] Use of Advisory Committees	6-83
	[6] Other Committees	6-84
§ 6.06	Capital Structure and Ownership Interests	6-86
	[1] Ownership Interests	6-86
	[a] Discussion	6-86
	[b] Sample Provisions	6-88
	[2] Debt, Equity and Preferred Returns	6-90
	[a] Discussion	6-90
	[b] Sample Provisions	6-97
	[3] Voting Rights	6-100
	[a] Discussion	6-100
	[b] Sample Provisions	6-103
§ 6.07	Capital Contributions	6-106
	[1] Initial Capital Contribution	6-106
	[a] Discussion	6-106
	[b] Sample Provisions	6-109
	[2] Additional Capital Needs of the Venture	6-113
	[a] Discussion	6-113
	[b] Sample Provisions	6-117

TABLE OF CONTENTS

xxv

	[3] Interest and Withdrawals of Capital	6-127
	[a] Discussion	6-127
	[b] Sample Provisions	6-128
§ 6.08	Dividends and Distributions	6-131
	[1] Basic Dividend Policy	6-131
	[2] Foreign Currency Problems	6-133
	[3] Sample Provisions	6-133
§ 6.09	Accounting Issues; Books and Records; Capital Accounts; Tax Matters	6-139
	[1] Accounting Issues	6-139
	[2] Books and Records	6-140
	[3] Capital Accounts	6-142
	[4] Tax Matters	6-142
	[5] Sample Provisions	6-142
§ 6.10	Restrictions on Competition	6-149
	[1] Competition Issues	6-149
	[2] Sample Provisions	6-153
§ 6.10A	Corporate Opportunity and Related Problems	6-156
	[1] Opportunity Issues	6-156
	[2] Sample Provisions	6-163
§ 6.10B	Conflict of Interest and Other Fiduciary Duty Problems	6-170.4
§ 6.10C	Fiduciary Duties in Limited Liability Company Agreements	6-172
§ 6.11	Transfer of Interests	6-172.1
	[1] Overview	6-172.1
	[2] Rights of First Refusal; Tag-Alongs and Drag-Alongs	6-172.4
	[3] Regulatory Compliance	6-172.7
	[4] Transfers Upon Default	6-172.7
	[5] Admission to Partnership or Limited Liability Company	6-172.8
	[6] Sample Provisions	6-172.8
§ 6.12	Confidentiality	6-172.30
	[1] Discussion	6-172.30
	[2] Sample Provisions	6-172.31
§ 6.13	Business Relationships Between the Venture and Venture Parties	6-172.37
	[1] Discussion	6-172.37
	[2] Sample Provisions	6-172.38
§ 6.14	Defaults and Remedies	6-172.40
	[1] Overview	6-172.40
	[2] Specifying the Events of Default	6-172.40
	[3] Remedies for Default	6-172.41

	[a] Termination	6-172.41
	[b] Puts and Calls	6-172.42
	[c] Buy-Sell Trigger	6-172.43
	[d] Indemnification and Damages.	6-172.44
	[e] Loss of Rights	6-172.44
	[4] Sample Provisions	6-172.44
§ 6.15	Termination and Liquidation of the Venture.	6-172.47
	[1] Termination.	6-172.47
	[2] Liquidation of the Venture.	6-172.48
	[3] Sample Provisions	6-172.50
§ 6.16	Dispute Resolution Mechanisms	6-172.56
	[1] Overview.	6-172.56
	[2] Mediation	6-172.56
	[a] Discussion	6-172.56
	[b] Sample Provision.	6-172.56
	[3] Arbitration.	6-172.57
	[a] Discussion	6-172.57
	[b] Sample Provision.	6-172.59
	[4] Bouncing the Decision Upstairs	6-172.59
	[a] Discussion	6-172.59
	[b] Sample Provision.	6-172.60
§ 6.17	Exit Mechanisms.	6-172.62
	[1] Overview.	6-172.62
	[2] Triggers.	6-172.62
	[3] Termination or Withdrawal	6-172.63
	[4] Transfer Rights; Sale of Venture.	6-172.63
	[5] Puts and Calls.	6-172.64
	[6] The Buy-Sell Device	6-172.64
	[a] Discussion	6-172.64
	[b] Sample Provision.	6-172.65
	[7] Forcing an IPO.	6-172.67
	[a] Discussion	6-172.67
	[b] Sample Provision.	6-172.67
	[8] Negotiating Buy-Outs.	6-172.68
§ 6.18	Indemnification Provisions	6-172.73
	[1] Discussion.	6-172.73
	[2] Sample Provisions	6-172.75
§ 6.19	Governing Law; Forum Selection	6-172.80
	[1] Discussion.	6-172.80
	[2] Sample Provisions	6-172.81
§ 6.20	Other Provisions	6-172.84
	[1] Notices	6-172.84
	[2] Other “Boilerplate”.	6-172.84
	[3] Sample Provisions	6-172.85
§ 6.21	Ancillary Agreements	6-172.89

TABLE OF CONTENTS

xxvii

	[1] Overview	6-172.89
	[2] Technology Licensing Agreements	6-172.89
	[3] Marketing Agreements	6-172.89
	[4] Administrative Service Agreement	6-172.89
	[5] Real Estate Transfer and Asset Transfer Documents	6-172.89
	[6] Trademark Agreement	6-172.90
	[7] Transitional Services Agreement	6-172.90
§ 6.22	Sample Joint Venture Agreement: General Partnership Form	6-172.91
§ 6.23	Sample Joint Venture Agreement: Corporate Joint Venture Form	6-207
§ 6.24	Sample Joint Venture Agreement: Limited Liability Company Form	6-218
§ 6.25	Sample Joint Venture Agreement: Joint Venture Formation Agreement Form	6-220.29
§ 6.26	Exit Mechanism Issues List	6-221
	[1] Types of Exit Mechanisms	6-221
	[2] Exit Triggers	6-222
	[3] Matching Exit Mechanisms to Exit Triggers	6-223
	[4] Exit by Sale of the Venture	6-224
	[5] Exit by Sale of Venture Interest	6-225
	[6] Exit by Termination	6-225
	[7] Designing Put Rights	6-225
	[8] Designing Call Rights	6-226
	[9] Designing Buy-Sell Provisions	6-227
§ 6.27	<i>Form:</i> Sample Strategic Alliance Memorandum of Understanding	6-228
§ 6.28	<i>Form:</i> Sample Joint Venture Contribution Agreement	6-232
§ 6.29	Joint Venture Checklist of Issues	6-255
	[1] Introduction	6-255
	[2] Planning	6-255
	[a] Scope/Purpose of the Joint Venture (“JV”)	6-255
	[b] Joint Venture Form	6-256
	[c] Regulatory	6-257
	[d] Implications of JV on Existing Operations and Reporting Requirements	6-257
	[e] Tax Considerations	6-258
	[f] Employee Matters	6-258
	[g] Diligence	6-259
	[h] Accounting Considerations	6-259

	[i]	Confidentiality	6-260
	[j]	Letter of Intent/Term Sheet.	6-261
	[k]	Business Plans and Budgets	6-262
	[l]	Acquisition of JV Business.	6-263
	[m]	Parties.	6-264
	[n]	Venturer Services.	6-264
[3]		Specific Terms	6-265
	[a]	Governance	6-265
	[b]	Actions Requiring Consent—Either Management Board or Venturers.	6-266
	[c]	Management Board	6-268
	[d]	Meetings of Venturers.	6-269
	[e]	Management.	6-270
	[f]	Managers/Directors' and Officers' Liability Insurance.	6-270
	[g]	Reporting and Access to Information	6-271
	[h]	Auditors	6-271
	[i]	Disputes	6-271
	[j]	Distributions.	6-273
	[k]	Financing Generally.	6-273
	[l]	Financing Provided by the Venturers	6-274
	[m]	Corporate Opportunity.	6-275
	[n]	Non-Compete/Non-Solicit.	6-275
	[o]	Breaches.	6-276
[4]		Share Transfer Restrictions and Related Provisions	6-277
	[a]	General.	6-277
	[b]	Transfer to Affiliates.	6-278
	[c]	Transfer to Competitors.	6-278
	[d]	Right of First Offer and Rights of First Refusal	6-278
	[e]	Pledge of Shares	6-280
	[f]	Termination and Exit Rights.	6-280
	[g]	Put Right	6-281
	[h]	Call Right.	6-282
	[i]	Tag-along	6-282
	[j]	Drag-along	6-283
	[k]	Buy-Sell Right or Shotgun	6-283
	[l]	Registration Rights	6-284
	[m]	Treatment of Debt in an Exit by a Venturer.	6-284

[n]	Valuation of JV Equity in Exit Scenario.....	6-284
[o]	Closing Process	6-285
[p]	Miscellaneous.....	6-285

CHAPTER 7

Ancillary Agreements

Alisa Babitz and Denis A. Curran

§ 7.01	Introduction	7-3
[1]	Types of Ancillary Agreements.....	7-4
[2]	Reasons to Use Ancillary Agreements	7-6
[3]	Coordination Between Joint Venture Agreement and Ancillary Agreements.....	7-7
§ 7.02	Contributing Assets to the Joint Venture.....	7-9
[1]	Contribution Agreement.....	7-9
[a]	Defining the Assets to Be Contributed	7-11
[b]	Determining the Value of Contributed Assets.....	7-11
[c]	Representations and Warranties	7-13
[d]	Consents and Approvals	7-15
[e]	Indemnification	7-15
[f]	Continuing Rights with Respect to Contributed Assets	7-16
[2]	License Agreement.....	7-18
[a]	Defining the Intellectual Property; Improvements	7-20
[b]	Exclusivity	7-22
[c]	Fields of Use; Geographical Scope...	7-23
[d]	Determining the Value of License Agreement; Royalties	7-23
[e]	Term and Termination.....	7-25
[f]	Bankruptcy.....	7-25
[g]	Representations and Warranties	7-26
[h]	Indemnity; Products Liability	7-26
[i]	Sublicensing.....	7-27
[j]	Maintenance Obligations.....	7-27
[k]	Transferability	7-28
[l]	Consents and Approvals	7-29
[3]	Asset Sharing Agreement.....	7-29
[a]	Priority of Use	7-30
[b]	Maintenance and Upgrades.....	7-31

	[c] Security	7-31
	[d] Limits on Liability	7-32
	[e] Option to Purchase	7-32
§ 7.03	Running the Joint Venture	7-33
	[1] Services Agreement	7-33
	[a] General Terms and Conditions	7-34
	[b] Liability; Standard of Care	7-34
	[c] Term and Termination	7-35
	[d] Confidentiality; Ownership of Records and Developed Intellectual Property	7-36
	[e] Audit and Inspection Rights	7-36
	[2] Employee Leasing Arrangements	7-37
	[a] Decision to Use Employee Leasing Arrangements	7-38
	[b] Drafting Considerations for Employee Leasing Agreement	7-39
	[i] Scope; Fees	7-39
	[ii] Certain Obligations of the Leasing Participant as Employer of Leased Employees	7-40
	[iii] Term and Termination	7-40
	[iv] Confidentiality; Ownership of Records and Developed Intellectual Property	7-41
	[v] Indemnification	7-41
	[3] Branding/Marketing	7-42
§ 7.04	Ongoing Commercial Relationships	7-44
	[1] General Terms and Conditions	7-44
	[2] Exclusivity	7-44
	[3] Term and Termination; Amendment	7-45
§ 7.05	Guaranties	7-47
§ 7.05A	Research and Development Agreements	7-48
§ 7.06	Form of Contribution Agreement	7-50
§ 7.06A	Forms of Instruments of Conveyance	7-58.6
	[1] Bill of Sale	7-58.7
	[2] Assignment and Assumption Agreement ...	7-58.11
	[3] Acknowledgment and Assumption Agreement	7-58.14
	[4] Domain Name Assignment	7-58.19
	[5] Trademark Assignment Agreement	7-58.22
	[6] Copyright Assignment	7-58.25
	[7] Form of Novation Agreement	7-58.29
§ 7.06B	Form of Asset Purchase Agreement	7-58.36

TABLE OF CONTENTS

xxxi

§ 7.06C	Form of Merger Agreement	7-58.83
§ 7.07	Form of Licensing Agreement	7-59
§ 7.07A	Form of License Agreement with Royalties	7-79
§ 7.08	Form of Services and Employee Leasing Agreement	7-80.13
§ 7.08A	Form of Transitional Services Agreement	7-80.31
§ 7.09	Form of Trademark License Agreement	7-81
§ 7.10	Form of Parent Guaranty	7-91
§ 7.11	Form of Parent Guaranty of Payment	7-96
§ 7.11A	Form of Guaranty Contribution Agreement	7-104
§ 7.12	Form of Indemnification Agreement	7-104.4
§ 7.13	Form of Assignment of Rights and Confidentiality and Non-Disclosure Agreement	7-119
§ 7.14	Form of Single-Member Limited Liability Company Operating Agreement	7-128
§ 7.14A	Form of Incentive Unit Agreement	7-140
§ 7.15	Form of Certificate of Incorporation and Bylaws for a Corporation	7-155
§ 7.16	Forms of Financing Agreements	7-167
	[1] Form of Secured Promissory Note	7-167
	[2] Form of Security Agreement	7-179
	[3] Form of Pledge and Guaranty Agreement	7-196.3
	[4] Form of Line of Credit Agreement	7-196.22
§ 7.17	Forms of General Release Agreement and Mutual Release	7-197
	[1] Form of General Release Agreement	7-198
	[2] Form of Mutual Release Agreement	7-204
§ 7.18	Form of Registration Rights Agreement	7-212
§ 7.19	Form of Voting Agreement	7-248
§ 7.20	Form of Agreement to Serve on an Advisory Council	7-265

CHAPTER 8

The Role of Lawyers in Fostering Trust in Business Alliances

George W. Dent, Jr.

§ 8.01	Introduction	8-2
§ 8.02	Distinctive Features of Strategic Alliances	8-4
	[1] The Growing Importance of Strategic Alliances	8-4
	[2] Contractual Gaps in Strategic Alliances . . .	8-5

(Rel. 46)

	[3] The Importance of Trust in Strategic Alliances	8-8
	[4] The Definition of Trust	8-9
§ 8.03	The Problem of Lawyers in Strategic Alliances	8-12
	[1] Current Ignorance	8-12
	[2] The Behavior of Lawyers in Negotiations	8-12
	[3] Law Versus Trust?	8-13
	[4] The Awkward Role of Lawyers	8-16
	[5] The Role of Law in Defining the Range of Alliances	8-21
§ 8.04	The Lawyer's Role in Negotiations	8-23
	[1] Attention to the Client's Business Needs	8-23
	[2] Negotiating to Enhance Trust and Cooperation	8-25
§ 8.05	Substantive Terms in Strategic Alliances	8-32
	[1] Whether to Enter into an Alliance	8-32
	[2] Choice of Entity: Introduction	8-32
	[3] Incentive Structures	8-36
	[4] Required Performances and the Scope of the Alliance	8-39
	[5] Governance Mechanisms	8-40
	[6] Dispute Resolution and Avoidance	8-41
	[7] Termination	8-45
§ 8.06	Implications for Legal Training	8-48
	[1] Contracts and Business Organizations	8-48
	[2] Negotiation	8-49
	[3] Diversity	8-49
§ 8.07	Conclusion	8-53

CHAPTER 9

Getting Alliances Right— The Management Perspective

James Bamford and David Ernst

§ 9.01	Introduction	9-1
§ 9.02	How Alliances Capture Value	9-3
§ 9.03	How to Execute Across the Alliance Lifecycle	9-6
	[1] Have a Clear Strategy	9-6
	[2] Choose Partners Carefully	9-6

TABLE OF CONTENTS

xxxiii

[3]	Choose the Right Structure	9-8
[4]	Take a Broader View of Governance	9-9
[5]	Establish a Robust System to Measure and Monitor Performance	9-10
[6]	Plan for Evolution and Proactively Restructure	9-13
§ 9.04	Conclusion	9-14
§ 9.05	Further References	9-15

CHAPTER 9A

Getting the Governance Right— Joint Venture Governance Guidelines

James Bamford and David Ernst

§ 9A.01	Introduction	9A-2
§ 9A.02	The Joint Venture Governance Challenge	9A-4
§ 9A.03	A Framework for Joint Venture Governance	9A-7
§ 9A.04	Governance Outcomes	9A-9
	[1] Financial Performance	9A-9
	[2] Strategic Performance	9A-9
	[3] Operational Performance	9A-9
	[4] Governance and Relationship Performance	9A-10
§ 9A.05	Joint Venture Governance Guidelines	9A-12
	[1] Structure	9A-13
	[2] Roles, Responsibilities and Reporting Relationships	9A-13
	[3] People and Incentives	9A-14
	[4] Processes and Norms	9A-15
	[5] Performance Metrics and Financial Policies	9A-18
§ 9A.06	Conclusion	9A-20
§ 9A.07	Exhibits	9A-21
	[1] Exhibit 1: Added Challenges of Joint Venture Governance	9A-21
	[2] Exhibit 2: Key Elements of Joint Venture Governance	9A-22
	[3] Exhibit 3: Examples of Joint Venture Governance System Designs	9A-23
	[4] Exhibit 4: Outcome Measures of Good Governance	9A-25
	[5] Exhibit 5: Joint Venture Governance Diagnostic	9A-26

[6] Exhibit 6: Sample Outcome of Joint Venture Governance Diagnostic	9A-27
[7] Exhibit 7: Degree of Joint Venture Independence	9A-28

CHAPTER 10

Managing the Alliance Relationship

Jeff Weiss, Danny Ertel and Sara Keen

§ 10.01 Meaning, and Importance, of Managing the Alliance Relationship	10-2
§ 10.02 Transitioning from Negotiation to Relationship Management	10-4
§ 10.03 Launching the Alliance Relationship	10-6
[1] The Relationship Launch Event.	10-6
[2] Specific Purposes of the Relationship Launch Event	10-6
[3] Notes on Key Elements of the Relationship Launch Event	10-7
[a] Defining a Common Picture of the Working Relationship	10-7
[b] Developing Relationship Management Procedural Contracts	10-7
[c] Sharing Common Tools, Strategies, and Vocabulary for Relationship Management.	10-8
[d] Developing a Common Mind-Set and Messages	10-9
[4] Comment on Additional Launches	10-9
§ 10.04 Managing the Alliance Relationship	10-10
[1] Relationship Management Responsibilities.	10-10
[a] The Alliance Relationship Manager	10-10
[b] The Management Committee	10-11
[i] Relationship Management Tasks	10-11
[ii] Conflict Resolution Processes.	10-11
[iii] Planning Processes	10-12
[2] Relationship Management Mechanisms	10-12
[a] Decision Making Process	10-12
[b] Conflict Management Mechanism	10-14
[i] A Conflict Management Process	10-14

[ii]	Common Conflict Management Model	10-15
[iii]	Common Conflict Management Tools	10-16
[iv]	Escalation Guidelines	10-19
[v]	Learning from Conflict.....	10-20
[c]	Communication Management Mechanism.....	10-20
[d]	Commitment Management Framework.....	10-21
§ 10.05	Auditing and Adjusting the Alliance Relationship.....	10-23
[1]	The Audit Questions	10-23
[2]	The Audit Process	10-24
[a]	Conducting the Audit	10-24
[b]	Analyzing the Data and Reporting the Results	10-24
[3]	The Adjustment Process.....	10-25
§ 10.06	Managing Changes that Affect the Alliance	10-26
§ 10.07	Managing the Alliance Relationship Through Termination.....	10-27
§ 10.08	Learning from Alliance Relationships	10-28
§ 10.09	Application to Joint Ventures.....	10-29
§ 10.10	Conclusion.....	10-30

CHAPTER 11

Negotiation Strategies for Joint Venture and Alliance Success

Danny Ertel and Jeff Weiss

§ 11.01	Overview: The What and the How of Negotiation	11-2
[1]	Why Everyone Focuses on the Substance	11-3
[2]	Why “Process” Matters	11-4
[3]	The Two Parts of the Process	11-5
[4]	Negotiating Successful Joint Ventures and Alliances	11-6
[a]	The Connection to the Business Strategy	11-6
[b]	Effective Preparation.....	11-7
[i]	Building and Maintaining Internal Alignment	11-7

	[ii] The Negotiator's Mandate: How Far Can You Go?	11-7
	[iii] Pre-Negotiation Negotiation	11-8
	[iv] At the Table	11-8
	[v] Decision Time	11-8
§ 11.02	Getting Ready: Effective Preparation	11-10
	[1] You Negotiate Like You Prepare	11-10
	[2] Preparation (or Lack Thereof) that Destroys Value	11-11
	[3] Preparing for Success	11-11
§ 11.03	Internal Alignment: Build It; Maintain It; or Else	11-14
	[1] Key Elements/Issues Requiring Alignment in Joint Ventures and Alliances	11-14
	[2] Processes for Building and Maintaining Alignment	11-15
	[a] Ground Rules and Expectations	11-15
	[b] The One-Text Procedure	11-18
§ 11.04	The Negotiator's Mandate: How Far Can You Go?	11-19
	[1] Management's Dilemma: Broad vs. Narrow Authority	11-19
	[2] A More Useful Construct	11-20
	[a] Authority to What?	11-20
	[b] An Evolving Mandate	11-21
§ 11.05	Pre-Negotiation Negotiation	11-22
	[1] The Negotiation Launch	11-22
	[2] Ongoing Preparation and Process Management	11-23
§ 11.06	At the Negotiation Table	11-25
	[1] What Is and Is Not Covered in This Section	11-25
	[2] Who Should Be There	11-25
	[3] Some Broad Guidelines	11-27
	[a] Focus the Discussion on Interests, Not Positions	11-27
	[b] Pay Attention to Both Relationship and Substance	11-27
	[c] Rely on Creativity and Legitimacy	11-28
	[d] Recognize "Incompleteness" Where It Is Necessary; and Define Processes for Dealing with It	11-29

TABLE OF CONTENTS

xxxvii

§ 11.07	Decision Time	11-31
[1]	An Iterative Process that Minimizes Surprises	11-31
[2]	This Deal vs. What?	11-31

CHAPTER 12

Delaware Limited Partnership Law

Ellisa Opstbaum Habbart

§ 12.01	Introduction and Summary	12-3
§ 12.02	History of the Delaware Revised Uniform Limited Partnership Act	12-7
§ 12.03	Important Provisions of DRULPA	12-10
[1]	Partnership Name	12-10
[2]	Formation	12-12
[3]	Amendment and Correction of the Certificate	12-15
[4]	Admission of Limited Partners	12-17
[5]	Classes of Partners	12-18
[6]	Limited Partner Protection from Liability	12-18
[7]	Certain Limited Partner Voting Rights	12-22
[8]	Meetings of Limited Partners	12-24
[9]	Information Rights of Limited Partners	12-25
[10]	Rights and Obligations of General Partners	12-28
[11]	Remedies for General Partner Breach of Partnership Agreement	12-30
[12]	Rights and Obligations of Limited Partners	12-30
[13]	Indemnification and Limitation of Fiduciary Liability	12-31
[14]	Contributions	12-33
[15]	Allocation of Profits and Losses	12-34
[16]	Distributions	12-34
[17]	Withdrawal of Partners	12-35
[18]	Distributions and Liability for Their Return	12-38
[19]	Assignment and Redemption of Limited Partnership Interests	12-39
[20]	Dissolution and Winding Up of the Limited Partnership	12-40
[21]	Limited Partnership Mergers	12-46

	[22] Domestication, Transfer and Conversion of Limited Partnerships	12-48
	[a] Domestication	12-49
	[b] Transfer and Continuance	12-50
	[c] Conversion	12-51
	[23] Series of Limited Partnerships	12-52
	[24] Derivative and Class Actions	12-53
	[25] Contested Matters and Votes	12-55
	[26] Foreign Limited Partnerships	12-55
	[27] Filing Fees and Annual Taxes	12-57
§ 12.04	References	12-58.1
	[1] Statutory Citations	12-58.1
	[2] Other Sources	12-58.1
§ 12.05	<i>Forms</i> —Delaware Secretary of State	12-58.2
	[1] Reservations of Limited Partnership Name	12-58.2
	[2] Consent to Use of Name	12-58.2
	[3] Certificate of Limited Partnership	12-58.3
	[4] Certificate of Merger of Two Delaware Limited Partnerships	12-59
	[5] Certificate of Merger of a Delaware Corporation and a Delaware Limited Partnership	12-60
	[6] Certificate of Merger and a Delaware Limited Partnership and a Delaware General Partnership	12-61
	[7] Certificate of Merger of a Foreign Limited Partnership into a Delaware Limited Partnership	12-62
	[8] Certificate of Cancellation of Certificate of Limited Partnership	12-63
	[9] State of Delaware Limited Partnership Tax Notice	12-64
	[10] Certificate of Foreign Limited Partnership	12-65
	[11] Registered Limited Liability Limited Partnership Application Form	12-66
§ 12.06	Annotated Form of Basic Delaware Limited Partnership Agreement	12-67

CHAPTER 13**Nonentity Strategic Alliances***Craig M. Wasserman*

§ 13.01	Overview	13-2
§ 13.02	Illustrative Alliances	13-5
§ 13.03	Key Issues in Creating a Strategic Alliance	
	Without a Jointly Owned Entity	13-8
	[1] Avoiding a Fiduciary Relationship	13-8
	[2] Specifying the Parties' Property	
	Ownership Rights.....	13-9
	[3] Protecting Against Potential Legal	
	Liabilities Associated with the	
	Alliance.....	13-11
§ 13.04	Governance Mechanisms for Nonentity	
	Strategic Alliances	13-13
	[1] The Use of Marketing or Business	
	Plans	13-13
	[2] The Alliance Committee	13-14
§ 13.05	Dispute Resolution	13-16
	[1] Resolving Governance Disputes	13-16
	[2] Resolving Legal Disputes	13-18
	[3] Resolving Disputes Over Financial	
	Computations	13-19
§ 13.06	Revenue Shares and Other Economic Sharing	
	Arrangements	13-21
§ 13.07	Exclusivity, Noncompetes and Defining the	
	Scope of the Alliance.....	13-23
§ 13.08	Termination and Unwind Provisions	13-25
§ 13.09	Drafting Contractual Alliances: Structure and	
	Outline of an Illustrative Credit Card	
	Co-Branding Agreement.....	13-27
	[1] Article I: Definitions, General Provisions,	
	Rules of Construction	13-27
	[2] Article II: Establishment of a Joint	
	Marketing and Co-Branded Program ...	13-28
	[3] Article III: Marketing Plan	13-30
	[4] Article IV: Account Creation and	
	Administration	13-32
	[5] Article V: Intellectual Property	13-33
	[6] Article VI: Compensation	13-34
	[7] Article VII: Additional Covenants of	
	Purchaser	13-35

PARTNERSHIPS/JOINT VENTURES/STRATEGIC ALLIANCES

[8] Article VIII: Confidentiality 13-35

[9] Article IX: Representations and
Warranties. 13-36

[10] Article X: Indemnification. 13-37

[11] Article XI: Term and Termination 13-37

[12] Article XII: General 13-38

TABLE OF CONTENTS

CHAPTER 14

Special Issues in Financial Services Joint Ventures and Alliances

Richard K. Kim

§ 14.01	Overview	14-4
§ 14.02	Joint Ventures and Alliances to Engage in Banking Activities	14-5
[1]	Regulatory Implications	14-5
[a]	Overview of Different Banking Vehicles	14-5
[i]	National Banks	14-6
[ii]	State-Chartered Banks.....	14-6
[iii]	Federal Savings Associations...	14-6
[iv]	State-Chartered Savings Association	14-6
[v]	Nonbank Banks.....	14-7
[vi]	Implications of Owning or Investing in a Bank vs. a Thrift	14-9
[b]	The Relevant Statutes	14-10.1
[i]	Bank Holding Company Act ...	14-11
[ii]	Change in Bank Control Act ...	14-16
[iii]	Thrift Statutes	14-17
[iv]	OTS Acquisition of Control Regulations	14-18
[v]	Significant Consequences of “Control”.....	14-21
[vi]	Interstate Banking and Branching	14-23
[vii]	Enforcement Actions by Federal Bank Regulators	14-25

[2]	Illustrative Transactions to Engage in Banking	14-26
[a]	Allied Irish Bank, p.l.c. and M&T Bank Corporation	14-26
[b]	Merrill Lynch and HSBC Holdings plc	14-26
[c]	Morgan Stanley and Mitsubishi	14-27
[d]	Grupo Santander's Investment in Sovereign Bancorp, Inc.	14-27
§ 14.03	Joint Ventures and Alliances to Engage in Securities Brokerage	14-28.1
[1]	Securities Brokerage Regulatory Framework	14-28.1
[2]	Illustrative Transactions to Engage in Securities Brokerage	14-30
[a]	NationsBank Corporation and Dean Witter	14-30
[b]	Prudential Financial, Inc. and Wachovia Corporation	14-32
[c]	Morgan Stanley and Smith Barney	14-32.1
§ 14.04	Joint Venture and Alliances to Engage in Asset Management	14-33
[1]	Asset Management Regulatory Framework	14-33
[a]	"Assignment" of Mutual Fund Investment Advisory Contracts	14-33
[b]	Exemption Under Section 15(a)	14-34
[c]	"Assignment" of Other Investment Advisory Contracts	14-35
[d]	"Assignment" of Distribution Agreements	14-36
[e]	Section 15(f) "Safe Harbor" Requirements	14-36
[f]	Fund Disclosure Documents and SEC Filings	14-37
[g]	Retention of Key Personnel	14-38
[h]	Regulatory Considerations and Due Diligence	14-38
[2]	Illustrative Transactions to Engage in Asset Management	14-39
[a]	Wells Fargo & Company and Nikko Securities Co. Ltd	14-39
[b]	J.P. Morgan & Co. Inc. and American Century Companies	14-39

TABLE OF CONTENTS

vii

[c]	Merrill Lynch & Co., Inc. and BlackRock, Inc.	14-40
§ 14.05	Joint Ventures and Alliances to Engage in Insurance Activities	14-41
[1]	Insurance Regulatory Framework	14-41
[a]	Regulatory Issues and the Role of State Insurance Authorities	14-41
[b]	Control Regulations Applicable to Insurance Deals	14-42
[c]	The Approval Process	14-42
[d]	Approval Criteria	14-43
[2]	Illustrative Transactions	14-44
[a]	Continental and CNA	14-44
[b]	Warburg Pincus and Arch Capital ...	14-44
[c]	AIG, Chubb and Goldman Sachs	14-45
§ 14.06	Conclusion	14-46

CHAPTER 14A

Challenges in Designing Effective Compliance and Risk Management Structures for Financial Services Joint Ventures

Eugene A. Ludwig and Sarah Bloom Raskin

§ 14A.01	Introduction	14A-2
§ 14A.02	Compliance and Risk Management for Financial Institutions	14A-4
[1]	Examples of Financial Services Joint Ventures	14A-4
[2]	The Increased Importance of Compliance and Risk Management	14A-5
[3]	Regulatory Expectations Regarding Compliance and Risk Management Systems	14A-7
[a]	The Fundamentals of a Sound Compliance System	14A-7
[b]	The Fundamentals of a Sound Risk Management System	14A-9
§ 14A.03	Issues of Compliance and Risk Management Within Financial Services Joint Ventures	14A-10
[1]	Compliance and Risk Management: Assessing the Risks of a Joint Venture	14A-10

[2]	Compliance and Risk Management Within the Joint Venture	14A-12
[3]	Compliance and Risk Management Systems in the Joint Venture: How Much Oversight by Each Parent?	14A-12.1
[4]	Compliance and Risk Management Systems Within the Joint Venture: Outsourcing	14A-12.1
[5]	Resolving Differences Between Parent Firms Regarding Risk Taking and Compliance	14A-14
§ 14A.04	Practical Advice	14A-15

CHAPTER 15

Special Issues in Real Estate Joint Ventures

Stephen G. Gellman

§ 15.01	Overview	15-2
§ 15.02	Capital Contributions	15-3
	[1] Initial Capital Contributions	15-3
	[2] Additional Capital Contributions	15-4
	[3] Failure to Make Capital Contributions	15-5
§ 15.03	Fees and Other Compensation to the Venturers	15-8
§ 15.04	Distributions	15-10
§ 15.05	Management of the Venture	15-11
	[1] Overview	15-11
	[2] Major Decisions	15-11
	[3] Standards and Procedures for Major Decisions	15-14
	[4] Authority of Managing Venturer	15-14
	[5] Transactions with Affiliates	15-15
	[6] Competitive Projects	15-15
	[7] Indemnities	15-15
§ 15.06	Transfers of Venture Interests	15-17
	[1] Overview	15-17
	[2] Permitted Transfers	15-17
	[3] Transfers to Third Parties	15-17
	[4] Closing Procedures for Transfers	15-18
	[5] Pledges of Partnership Interests	15-18
§ 15.07	Events of Default	15-20
§ 15.08	Buy-Sell Procedures; Dispute Resolution	15-21

CHAPTER 16**Minority Strategic Investments***Stephen I. Glover*

§ 16.01	Basic Structural Issues	16-2
§ 16.02	Due Diligence Issues	16-7
§ 16.03	Impact of Purpose on Structure	16-10
§ 16.04	Equity vs. Debt	16-12
§ 16.05	Common Stock vs. Preferred Stock.....	16-15
§ 16.05A	Shareholder Approval Requirements Under Stock Exchange Rules	16-17
§ 16.06	Pricing and Size of Equity Investment	16-19
§ 16.07	Minority vs. Majority Equity Investments.....	16-21
§ 16.08	Performance-Based Adjustments in the Investor's Equity Stake.....	16-23
§ 16.09	Investments in Public Companies vs. Investments in Private Companies.....	16-25
§ 16.10	Terms of Preferred Stock	16-34
§ 16.11	Governance Issues.....	16-36
§ 16.12	The Right to Board Representation	16-37
§ 16.12A	Target Board of Director Conflicts of Interest....	16-40
§ 16.12B	<i>Form</i> : Conflicts Committee Charter.....	16-42
§ 16.13	Class Voting Rights for Preferred Stock	16-45
§ 16.14	Approval and Blocking Rights.....	16-48
§ 16.15	Operating and Financial Covenants	16-51
§ 16.16	Information Rights	16-52
§ 16.17	Standstill Agreement.....	16-54
§ 16.18	Investor Puts and Target Calls.....	16-56
§ 16.19	Preemptive Rights.....	16-59
§ 16.20	Investor's Right of First Refusal	16-60
§ 16.21	Drag-Along, Tag-Along Rights, and Co-Sale Rights	16-62
§ 16.22	Options to Acquire Additional Target Equity...	16-64
§ 16.23	Cross-Investments by the Target and the Investor	16-67
§ 16.24	Staged Acquisitions.....	16-68
§ 16.25	Restrictions on Transfer and Lock-Up Agreements	16-70
§ 16.26	Registration Rights	16-73
§ 16.27	Terms of Debt Investment	16-74.3
§ 16.28	Corporate Law Issues in Strategic Investments ...	16-74.5
§ 16.29	Securities Law Issues in Strategic Investments....	16-74.9
§ 16.30	Tax Issues	16-74.11
§ 16.31	Accounting Issues	16-74.12

§ 16.32	Antitrust Issues	16-74.14
§ 16.33	Forms of Business Relationships	16-74.16
	[1] Joint Ventures	16-74.16
	[2] Technology Licensing Agreement	16-74.18
	[3] Marketing Agreement	16-74.18
	[4] Supply Agreement	16-74.18
	[5] Employee Sharing Agreement	16-74.19
§ 16.34	Documentation	16-74.20
§ 16.34A	Terms of Select Strategic Investments	16-74.22
§ 16.35	<i>Form:</i> Term Sheet for Series C Preferred Stock	16-80.12
§ 16.36	<i>Form:</i> Stock Purchase Agreement for Strategic Investment Made at Time of the Initial Public Offering	16-80.29
§ 16.37	<i>Form:</i> Stock Purchase Agreement Providing for Strategic Investment in a Public Company . . .	16-91
§ 16.38	<i>Form:</i> Warrant to Acquire Common Stock of a Public Company	16-94
§ 16.38A	<i>Form:</i> Warrant to Acquire Common Stock of a Private Company	16-113
§ 16.39	<i>Form:</i> Registration Rights Agreement	16-123

CHAPTER 17

Antitrust Considerations

William C. Pelster

§ 17.01	Introduction	17-2
§ 17.02	The Statutory Framework	17-3
	[1] The Sherman Act	17-3
	[2] The Clayton Act	17-3
	[3] The Federal Trade Commission Act	17-5
	[4] The National Cooperative Research and Production Act	17-5
	[5] The Hart-Scott-Rodino Antitrust Improvements Act	17-6
	[6] Other Antitrust Laws	17-7
§ 17.03	Analytical Framework for Competitor Collaborations	17-8
	[1] <i>Per Se</i> Illegality	17-8
	[2] Rule of Reason and Efficiencies	17-9
	[3] Single Entities	17-11
	[4] Merger Analysis	17-12
	[5] Spillover Effects	17-13
§ 17.04	Analysis of Joint Venture Transactions	17-15

TABLE OF CONTENTS

xi

[1]	Naked Agreement to Restrain Trade	17-15
[2]	Merger Analysis	17-17
[3]	Spillover Effects	17-18.2
[4]	Ancillary Restraints	17-18.3
[5]	Access to Joint Ventures	17-19
[6]	Joint Venture Guidelines	17-21
§ 17.05	Licensing of Intellectual Property	17-24.1

CHAPTER 18

Tax Issues

Dora R. Arash and Elizabeth S. Bluestein

§ 18.01	Overview	18-4
§ 18.02	Making Sure that the Partnership Is Taxed as a Partnership	18-6
	[1] Partnership Classification	18-6
	[a] Classification for Federal Income Tax Purposes (“Check the Box”)	18-6
	[b] Single-Member LLCs	18-6
	[2] The Anti-Abuse Regulations	18-7
	[3] Judicial Anti-Abuse Doctrines	18-8
§ 18.03	Loss Limitation Rules	18-9
	[1] Overview	18-9
	[2] IRC Section 704(d) Basis Limitations	18-9
	[a] Overview	18-9
	[b] Share of Liabilities	18-10
	[c] Losses Exceeding Basis	18-10
	[3] At-Risk Limitations	18-11
	[a] The Amount Deemed At-Risk	18-11
	[b] Qualified Nonrecourse Financing	18-11
	[c] Losses Exceeding At-Risk Amount	18-12
	[4] Passive Loss Limitations	18-12
	[a] Passive Activities	18-12
	[b] Suspended Losses	18-12
	[5] Excess Business Loss Limitation	18-13
§ 18.04	Allocations of Income and Loss and Distributions of Cash	18-14
	[1] Overview	18-14
	[2] Definitions of Capital Accounts and Other Tax-Related Terms	18-15
	[a] Use of Definitions	18-15
	[b] Example of Long Form Definitions	18-15
	[c] Example of Short Form Definitions	18-19
	[d] Savings Language	18-19

	[e] “Net” vs. “Gross” Allocations	18-20
[3]	Loss Sharing Schemes	18-21
	[a] Loss Allocations: Benefit or Burden?	18-21
	[b] Drafting for Downside Scenarios	18-22
	[i] Offsetting Previously Allocated Income	18-22
	[ii] Fixed Loss Sharing Ratio	18-23
	[iii] Loss Sharing Between General and Limited Partners	18-24
	[iv] Impact of Nonrecourse Financing	18-25
[4]	Cash Distribution and Income Allocation Schemes	18-27
	[a] Liquidating Distributions	18-28
	[i] Distributions in Accordance with Capital Accounts	18-28
	[ii] Distributions That Are Not in Accordance with Capital Accounts	18-28
	[b] Understanding Pre-Liquidation Cash Distributions	18-29
	[c] Coordinating the Income Allocation and Cash Distribution Schemes	18-30
	[d] Minimum Distributions to Meet Tax Liabilities	18-31
	[e] Certain Income and Cash Sharing Schemes	18-32
	[i] Recapture of Previously Allocated Loss	18-32
	[ii] Equal Sharing	18-33
	[iii] Preferential Return of Capital to Limited Partners	18-34
	[iv] Preferential Return of Capital Plus Preferred Return to Limited Partners	18-35
	[v] Preferential Return of Capital Plus Preferred Return to Limited Partners, Followed by Subordinated Return to General Partner	18-35
	[vi] Allocation Scheme Involving Two Classes of Limited Partners	18-36

TABLE OF CONTENTS

xiii

[vii]	Allocations Involving an Operating Partnership	18-41
[viii]	Adjustments Designed to Prevent Simultaneous Positive and Negative Capital Accounts	18-43
[ix]	Targeted Income Allocation Scheme	18-43
[x]	Curative Allocations	18-45
[xi]	De Minimis Ownership Interests	18-45
[5]	Special Allocations to Achieve Specific Objective.	18-46
[a]	Allocation Rules	18-46
[b]	Syndication Expenses	18-47
[c]	Partner Loans	18-48
[d]	Accounting for Noncompensatory Options.	18-48
[6]	Deficit Capital Accounts	18-49
[a]	Deficit Capital Account Restoration Provisions.	18-49
[b]	Qualified Income Offset	18-50
[7]	Minimum Gain Chargeback.	18-51
[8]	Miscellaneous Important Provisions	18-52
[a]	Noncash Distributions	18-52
[b]	Consistency of Reporting	18-52
§ 18.05	Taxation of Partnership Interests Received for Services	18-53
[1]	Introduction.	18-53
[2]	Distinction Between Capital Interest and Profits Interest	18-53
[3]	Receipt of Capital Interest for Services	18-54
[a]	Tax Consequences to Service Partner	18-54
[b]	Tax Consequences to the Partnership	18-55
[4]	Receipt of Profits Interest for Services	18-56
[a]	Liquidation Method of Valuing Profits Interest	18-56
[b]	The <i>Campbell</i> Case	18-56
[c]	Revenue Procedures 93-27 and 2001-43	18-57
[d]	Section 1061	18-58
§ 18.06	Contributions of Property	18-59
[1]	Overview.	18-59

	[2] Depreciation and Gain or Loss When the Agreed Value of Property Differs from Its Basis	18-60
	[3] Valuing Contributed Property at Zero	18-61
	[4] Issuance of Noncompensatory Options	18-61
§ 18.07	Distributions of Property	18-63
	[1] Distribution of Marketable Securities	18-63
	[2] Recognition of Pre-Contribution Gain Upon Certain Distributions of Property	18-63
§ 18.08	Withholding on Partnership Distributions and Dispositions	18-65
§ 18.09	IRC Section 754 Election	18-66
§ 18.10	Partnership-Level Tax Assessments and Appointment of Partnership Representative	18-67
§ 18.11	Tax Shelter Registration and other Regulations	18-69
	[1] Overview	18-69
	[2] Tax Shelter Registration	18-69
	[3] Exceptions	18-69
	[4] Notification of Tax Shelter Registration Number	18-70
	[5] Disclosure	18-70
	[6] Investor List	18-71
	[7] Penalties	18-71
	[8] Planning Considerations	18-71

CHAPTER 19

Securities Law Issues

Stephen I. Glover, R. McMillan Price, and David P. Patch

§ 19.01	Introduction	19-4
§ 19.02	Venture Interests as Securities	19-6
§ 19.03	Applicability of Section 5 of the Securities Act to the Offer and Sale of Venture Interests	19-9
§ 19.04	Private Placement Exemption Under Section 4(a)(2)	19-11
§ 19.05	Regulation D Safe Harbors	19-16
	[1] Rule 504 Exemption	19-16
	[2] Former Rule 505 Exemption	19-17
	[3] Rule 506(b) Exemption	19-17
	[4] General Solicitation	19-18
	[5] Rule 506(c)	19-19

TABLE OF CONTENTS

xv

[6]	Calculating the Number of Purchasers	19-19
[7]	Accredited Investor Definition.	19-20
[8]	Required Disclosure	19-23
[a]	Issuers Not Subject to Exchange Act Reporting Requirements	19-24
[b]	Information to Be Furnished by Reporting Issuers.	19-24
[9]	Limitations on Resale.	19-25
[10]	Notice of Sales	19-26
[11]	Insignificant Deviations from Requirement of Regulation D	19-26
[12]	Integration	19-26
[13]	Placement Procedures.	19-26
§ 19.06	Section 4(a)(5) Exemption	19-28
§ 19.07	Section 4(a)(6) Exemption	19-29
§ 19.08	Section 4(a)(7) Exemption	19-31
§ 19.09	Regulation S Exemption for Offshore Offers and Sales	19-33
§ 19.10	Intrastate Offering Exemption	19-37
§ 19.11	Offerings Under Rule 147A	19-40
§ 19.12	Offerings Under Rule 144A	19-41
§ 19.13	Regulation A Exemption and Small Business Offerings	19-43
§ 19.14	Rule 701 Exemption for Offerings to Employees	19-44
§ 19.15	Fraud Liability and Disclosure Documents	19-46
§ 19.16	Integration Issues.	19-47
§ 19.17	State Blue Sky Laws.	19-49
§ 19.18	Post-Formation Capital Raising Activities by Joint Ventures	19-50
§ 19.19	Initial Public Offerings by Joint Ventures.	19-51
[1]	Reasons for Engaging in an Initial Public Offering.	19-51
[2]	Structuring the IPO: Primary vs. Secondary Offering	19-51
[a]	Market Perception	19-52
[b]	Tax Issues	19-52
[c]	Venture Capital Needs.	19-52
[d]	Complete Exit by a Partner.	19-52
[e]	Partial Exit by the Partner.	19-53
[3]	Creating an IPO Ready Venture	19-53
[a]	Incorporation	19-53
[b]	Revised Charter and Bylaws.	19-54
[c]	Takeover Defenses.	19-55

[d]	Impact of the Sarbanes-Oxley Act and Renewed Focus on Corporate Governance	19-59
[e]	Dodd-Frank Wall Street Reform and Consumer Protection Act (The “Dodd-Frank Act”).....	19-67
[f]	Selection of Directors for the Public Venture Company	19-71
[4]	Securities Act Registration Basics.....	19-71
[5]	Gun Jumping and Other Disclosure Issues Before Filing	19-73
[6]	Communications During the Waiting Period	19-79
[7]	Special Disclosure Issues.....	19-81
[a]	Risk Factors	19-81
[b]	Selected Financial Data.....	19-82
[c]	Use of Proceeds.....	19-83
[d]	Management’s Discussion and Analysis	19-83
[e]	Description of Business.....	19-90
[f]	Certain Relationships.....	19-91
[g]	Principal Stockholders.....	19-92
[h]	Shares Available for Sale	19-93
[i]	Financial Statement Requirements ...	19-93
[j]	The JOBS Act and Compensation Disclosure	19-95
[k]	Part II of the Registration Statement. . .	19-95
[8]	Registration Under the Exchange Act.....	19-95
[9]	Listing on Exchanges.....	19-96
[10]	The Role of the Underwriters and the Underwriting Agreement	19-96
[11]	Investment Company Act Issues in Venture IPOs	19-98.2
[12]	Schedule 13G Filings by Venture Partners Following a Venture IPO	19-98.4
[13]	Application of Section 16 to Venture Partners in Venture IPOs.....	19-98.5
[14]	Application of Regulation M to Venture Partners in Venture IPOs.....	19-98.5
§ 19.20	Application of Securities Laws to Transfers of Joint Venture Interests	19-99
[1]	Rule 4(1½) Exemption.....	19-99
[2]	Section 4(a)(7)	19-100
[3]	Rule 144 Transfers.....	19-101

TABLE OF CONTENTS

xvii

	[4] Resales Pursuant to Rule 144A.....	19-104
	[5] Regulation S Resales	19-104
	[6] Registered Transfers.....	19-104
	[7] Registration Rights.....	19-105
§ 19.21	Disclosure Issues for Venture Partners	19-107
	[1] Disclosure of Preliminary Joint Venture Negotiations	19-107
	[2] Application of Regulation FD to Disclosures About Joint Ventures.....	19-108
	[3] A Venture Partner's Obligation to Report Material Joint Venture Agreements, the Formation of a Joint Venture, or the Transfer of a Venture Interest on Form 8-K	19-109
	[4] Disclosure of Joint Venture Activities in Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q	19-114
	[a] Discussion of Business, Properties, and Legal Proceedings	19-114
	[b] MD&A	19-115
	[c] Discussion of Transactions with Joint Venture	19-115
	[d] Exhibits	19-115
	[e] Obligation to Include Joint Venture Financial Statements	19-116
§ 19.22	Liability Under the Securities Laws.....	19-117
	[1] Liability Under Section 11 in Connection with Public Offerings.....	19-117
	[2] Liability Under Section 12(a)(2) of the Securities Act in Connection with Public Offerings.....	19-118
	[3] Controlling Person Liability Under Section 15 of the Securities Act in Connection with Public Offerings.....	19-120
	[4] Liability Under Section 17(a) of the Securities Act in Connection with Public Offerings.....	19-121
	[5] Liability Under Rule 10b-5 in Connection with Public and Private Offerings.....	19-121
	[6] Other Rule 10b-5 Liability.....	19-122
	[7] Other Liabilities	19-123
§ 19.23	<i>Form</i> : Sample Accredited Investor Questionnaire	19-124

CHAPTER 20

Intellectual Property Issues Arising Out of the Formation and Operation of Joint Ventures

David Kennedy

§ 20.01	Introduction	20-2
§ 20.02	Overview of Intellectual Property Rights	20-4
	[1] Patents	20-4
	[2] Copyrights	20-5
	[3] Trademarks	20-7
	[4] Trade Secrets	20-8
	[5] Summary	20-8
§ 20.03	Preliminary Considerations	20-10
	[1] Due Diligence	20-10
	[a] Baseline Level of Due Diligence	20-10
	[b] Extended Level of Due Diligence	20-12
	[c] Results of Due Diligence Investigation	20-14
	[2] Representations and Warranties	20-15
	[3] Risk Allocation Issues	20-17
§ 20.04	Allocation of Intellectual Property Rights	20-19
	[1] Nature of Ownership and Exclusive License Rights	20-22
	[2] Nature of Nonexclusive License Rights	20-23
	[3] Nature of Joint Ownership	20-24
	[a] Joint Ownership of Patents	20-25
	[b] Joint Ownership of Copyrights	20-27
	[c] Joint Ownership of Trademarks and Trade Secrets	20-29
	[d] Contractual Provision as to Joint Ownership	20-30
	[e] Difficulties Presented by Joint Ownership Arrangements	20-31
§ 20.05	Allocation of Venture Intellectual Property Rights upon Venture Dissolution or Exit of Venturer	20-33
§ 20.06	Other Selected Issues	20-36
	[1] Ancillary Agreements Relating to the Joint Venture	20-36
	[2] Bankruptcy Issues	20-37
	[3] Protecting the Venture's Intellectual Property Rights	20-41

CHAPTER 21**Integrating, Retaining and Providing Benefits
and Incentives to Employees of a Joint Venture***Jeannemarie O'Brien*

§ 21.01	Introduction	21-2
§ 21.02	Key Considerations in Structuring Compensation for the Joint Venture Management Team	21-3
§ 21.03	Retaining and Providing Incentives to Joint Venture Employees.	21-5
[1]	Equity Compensation Awards Based on Equity in the Joint Venture	21-5
[a]	Securities Law Considerations	21-6
[i]	Rule 701	21-7
[ii]	Regulation D of the Securities Act	21-8
[b]	Other Securities Law Issues and Corporate Law Concerns	21-10
[i]	Section 12 of the Exchange Act	21-10
[ii]	Blue Sky Laws	21-10
[iii]	Living with Minority Shareholders	21-11
[c]	Deferred Compensation Legislation	21-12
[i]	Generally	21-12
[ii]	Service Recipient Stock	21-12.1
[iii]	Fair Market Value.	21-12.1
[2]	Cash Bonus Based on Joint Venture Performance	21-12.2
§ 21.04	Qualified Retirement and Welfare Benefit Plan Key Considerations.	21-13
[1]	Level of Benefits	21-13
[2]	How Benefits Will Be Provided	21-13
[3]	Specific Issues with the Alternative Approaches to Providing Pension Benefits.	21-14
[4]	Other Big Picture Issues	21-15
[5]	Sample Employee Benefits Covenant	21-16
§ 21.05	Leased Employees.	21-35
§ 21.06	Restrictions on Soliciting and/or Hiring Employees.	21-36
§ 21.07	Disclosure of Compensation for Publicly Registered Joint Ventures.	21-37

Appendices

APPENDIX A: Contribution Agreement By and Among Phillips Petroleum Company, Duke Energy Corporation and Duke Energy Field Services L.L.C., dated as of December 16, 1999.	A-1
APPENDIX B: Governance Agreement By and Among Phillips Petroleum Company, Duke Energy Corporation and Duke Energy Field Services L.L.C., dated as of December 16, 1999.	B-1
APPENDIX C: Retail Brokerage Company Formation Agreement by and between Wachovia Corporation and Prudential Financial, Inc., dated February 19, 2003.	C-1
APPENDIX D: Amended and Restated Program Agreement by and between Sears, Roebuck and Co., Sears Intellectual Property Management Company and Citibank (USA) N.A. dated as of July 15, 2003, Amended and Restated as of November 3, 2003.	D-1
APPENDIX E: Form 8-K filed by CIT Group Inc. on September 9, 2004 relating to an agreement between CIT and Dell Inc., Along with Related Agreements	E-1
APPENDIX F: Exhibits from Form 8-K Report of unscheduled material events or corporate changes filed by Citigroup Inc. on January 13, 2009, relating to the agreement between Morgan Stanley and Citi to form a Joint Venture.	F-1
INDEX	I-1