

UNIVERSITY OF CINCINNATI  
COLLEGE OF LAW

**Corporate Transactions: Negotiation and Drafting**  
Course Description and Syllabus  
**SPRING 2008**

**Purpose:** The purpose of this course is to provide exposure to corporate transactions to students with some experience and interest in corporate and business law. The basic approach will be to prepare the documentation necessary to complete a corporate acquisition from start (letter of intent and confidentiality agreement) to finish (closing documents and legal opinions) with emphasis on the drafting critical provisions of a purchase agreement. During the course of the semester, we will work through the purpose and drafting of various documents. As corporate attorneys generally do, we will begin with “form” documents (borrowed from a prior transaction) that we will tailor to our particular facts. The course will include drafting exercises and some negotiation (role-playing).

By the end of the semester, students will have a basic understanding of the structure of a corporate transaction and the principal agreements that make up a young associate’s workday. Students will be comfortable with the purpose of recitals, representations and warranties, covenants, conditions precedent, closing logistics and post-closing obligations, including indemnification issues.

**BOOKS/MATERIALS:**

James C. Freund’s Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions, copyright 1975, Law Journal Seminars – Press, Inc., 111 Eighth Avenue, New York, New York (available on Westlaw – Database “ANATMERG”).

The M&A Process: A Practical Guide for the Business Lawyer, American Bar Association Committee on Negotiated Acquisitions.

*Additional readings and course materials will be made available online either through TWEN. Specific reference in the reading for each class is made to the model ABA stock purchase agreement and asset purchase agreement and ancillary documents (copies of which will be made available online).*

**Prerequisites and Recommended Courses:** Students are expected to have completed successfully courses in Contracts and Corporations. Although not required, other classes of interest to aspiring transactional lawyers include Bankruptcy, Commercial Law, Corporate Finance, Sales, Corporate Tax and Securities.

**Format:** One hour, forty minute (2 CR) class meeting each week with a combination of lecture and class participation. With a small seminar format, students are expected to attend all classes. There will be no final exam.

**Grading:** Grades will be based on class participation (50%) and drafting exercises (50%). Drafting will include the preparation of various provisions of our model acquisition documents, as well as short papers on key corporate law topics.

**Instructors:** Bob Shaffer (B.A., Yale College (1990), J.D., Univ. of Cincinnati College of Law (1996); currently in the Corporate/Finance Group at Vorys, Sater, Seymour and Pease LLP. Mr. Shaffer also has three years business experience in a closely held corporation prior to law school. He can be reached at his office for questions on any topic by phone (723-4085) or email ([rshaffer@vssp.com](mailto:rshaffer@vssp.com)).

Joe Stegbauer (B.A. Pennsylvania State University (1991), J.D., University of Cincinnati College of Law (1996); currently Associate General Counsel – Corporate & Securities at The Procter & Gamble Company. Prior to joining P&G Mr. Stegbauer was an associate in the corporate department of Taft, Stettinius & Holliser. He can be reached at his office for questions on any topic by phone at 983-2810 or e-mail at [stegbauer.ja@pg.com](mailto:stegbauer.ja@pg.com).

## SYLLABUS

### **Week 1** (1/17)                    **Introduction**

We will begin the course with a discussion of certain fundamental concepts that are crucial to effective drafting and negotiation of agreements. We will also discuss the stages and timing of “typical” acquisition transactions.

Reading Assignment: Freund, pp. 9-51 ([ANATMERG § 2.1](#) through [ANATMERG § 3.1](#)); The M&A Process, Ch 1 & Chapter 3.

### **Week 2** (1/24)                    **Letter of Intent; Confidentiality Agreement; Due Diligence**

We will discuss the pros and cons and binding effect of these two “early stage” documents, and the concept of “Due Diligence” in a corporate transaction. We will also review, among other things, the various contexts within which different clients will approach corporate transactions and the resulting emphasis and focus in any given transaction. Students will revise a form letter of intent and a confidentiality agreement for the next class based on hypothetical facts.

Reading Assignment: Freund, pp. 53-67 ([ANATMERG § 3.2](#) through [ANATMERG § 3.4](#)) and pp. 139-147 ([ANATMERG § 5.1](#)); M&A Process Chapter 5, 6 Review/Skim Model SPA and Model APA.

### **Week 3** (1/31)                    **Parties; Recitals; Purchase Price Considerations**

After review and critique of drafting assignment, we will begin to review our “form” purchase agreement and discuss structure of this critical document. We will also review the steps necessary to carry out a transaction and address some preliminary questions. Who are the appropriate parties? Why are recitals included in a contract and how do you draft them effectively? Which assets and liabilities are to be included (and excluded) in the transaction? What kind of consideration will be provided and what issues are raised by alternate forms of consideration? If time permits, students will participate in an in-class drafting exercise for a hypothetical transaction.

Reading Assignment: Freund, pp. 75-80, 147-227 ([ANATMERG § 4.1](#) through [ANATMERG § 4.2](#), [ANATMERG § 5.2](#) through [ANATMERG § 6.4](#));

M&A Process Chapter 7 & 8; Model SPA Section 2 (2.1-2.6) and review applicable “Definitions” Section 1; corresponding Sections of Model APA

**Weeks 4,5,6      Representations and Warranties**

2/7, 2/14, 2/21

During the first week, we will discuss these essential terms of every transaction. The second and third weeks will feature student led discussions, in-class drafting exercises and negotiation of terms among student sub-groups. We will identify standard qualifiers (e.g., materiality, knowledge, reasonableness) and discuss the function of Schedules and the typical path of negotiation. We will also revisit the concept of Due Diligence and discuss how representations function as a tool for discovery of issues.

Reading Assignment: Freund, pp. 229-284 ([ANATMERC § 7.1](#) through [ANATMERC § 7.5](#)); M&A Process Chapter 11; Model SPA Sections 3 and 4, and Exhibit 1 (Disclosure Letter); Corresponding Sections in Model APA

**Week 7                      Covenants; Conditions Precedent; Closing Deliverables & Opinions**

2/28

We will discuss the importance of detailed closing requirements, including covenants regarding the operation of the business and obtaining critical “third party” approvals or consents for closing. We will also analyze one of the lawyer’s most important conditions to closing – the delivery of a legal opinion. If time permits, we will briefly discuss ethical issues in corporate transactional representation.

Reading Assignment: Freund, pp. 285-325 ([ANATMERC § 8.1](#) through [ANATMERC § 8.5](#)); M&A Process Chapter 9; Model SPA Sections 5 through Section 9, Exhibit 7.4(a) Opinion of Counsel to Sellers, and Exhibit 8.4 Opinion of Counsel to Buyer; Corresponding Model APA Sections

**Weeks 8,9                Indemnification**

3/6, 3/13

In the first week we will look at the purpose and procedure for seeking indemnification in a contract. Part of our analysis will feature concepts of “Buyer Beware” and consideration of escrows or holdbacks for certain acts. After a brief discussion of typical indemnification provisions and how they may be limited (e.g., time limitations, baskets, caps), we will work on drafting appropriate indemnities for a hypothetical transaction. The second week will feature student led discussions and continued drafting work.

Reading Assignment: Freund, pp. 363-388 ([ANATMERC § 10.1](#) through [ANATMERC § 10.3](#)) and Model SPA Section 10 and corresponding Model APA Sections.

**SPRING BREAK 3/22**

**Week 10                Boilerplate**

3/20

Although not necessarily the most important part of an agreement, boilerplate provisions provide discreet areas for drafting discussion and are frequently

underemphasized. We will highlight arbitration, force majeure and other dangerous provisions like survival and integration clauses that can be damaging if the attorney loses focus in his/her review of these “standard” terms.

Reading Assignment: Freund, pp. 389-399 ([ANATMERG § 11.1](#)); “A LITIGATOR’S PERSPECTIVE ON THE DRAFTING OF COMMERCIAL CONTRACTS” ([1524 PLI/Corp 533](#)) Model SPA Section 11; Corresponding Model APA Sections.

## **SPRING BREAK 3/27**

### **Weeks 11,12 Closing Documents; the “Closing”**

4/3, 4/10

There will be an overview of basic closing documents, including the inevitable “side letter.” Students will prepare a “Closing Checklist” for a hypothetical transaction and draft certain required closing documents. We will discuss the evolution of the closing of a transaction and consider the impact (positive and negative) on transactional attorneys of changes in technology. In the second week, we will conduct our final student led discussion and draft a “side letter” to seal the deal and close over 11<sup>th</sup> hour issues..

Reading Assignment: Freund, pp. 419-448 ([ANATMERG § 12.1](#) through [ANATMERG § 12.4](#)); M&A Process Chapter 12-14; Model SPA Exhibit 2.4(a)(ii) Release, Exhibit 2.4(a)(iii) Employment Agreement, Exhibit 2.4(a)(iv) Noncompetition Agreement, Exhibit 2.4(b) Non-Negotiable Promissory Note, and Exhibit 2.4(c) Escrow Agreement; Selected Model APA Sections.

### **Week 13 Other Corporate Financing & Outsourcing Transactions**

4/17

Time permitting, we will examine venture capital transactions and/or outsourcing agreements or other corporate transactions that business attorneys engage in on a regular basis.

Reading Assignment: TBD;

### **Week 14 Summary and Critique**

4/24

The final class session will be used to finalize outstanding issues and complete all assignments. We will set aside time for students to critique the semester with the instructors and to complete required evaluations.

We may invite guest speakers to join the class during the semester to speak on relevant topics of interest, including business executives and their view of transactional lawyers. We will modify the schedule accordingly to accommodate these special circumstances.