



# ICLG

The International Comparative Legal Guide to:

## Mergers & Acquisitions 2014

**8th Edition**

A practical cross-border insight into mergers and acquisitions

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## EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 46 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

*The International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# USA

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### 1 Relevant Authorities and Legislation

#### 1.1 What regulates M&A?

The United States has a federal system of government. Accordingly, regulation of M&A activity falls within the dual jurisdiction of the federal government and the individual state in which the target company is incorporated. Generally, the federal government regulates sales and transfers of securities through the Securities and Exchange Commission (SEC), and polices competition matters through the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Other federal agencies impose additional requirements over acquisitions in certain regulated industries.

Tender offers in the United States are subject to the federal rules and regulations on tender offers and beneficial ownership reporting under the Securities Exchange Act of 1934, as amended (Exchange Act). Acquisitions completed by means of a merger are governed by the law of the state of incorporation of the target company. The solicitation of votes to approve a merger by the target company shareholders must comply with federal rules and regulations on proxy statements under the Exchange Act. If the bidder offers securities as consideration to the target company shareholders, the registration requirements of the Securities Act of 1933, as amended (Securities Act), will also apply, unless an exemption from the registration requirements is available.

The law of the state of incorporation of a company regulates the internal affairs of a company, including the fiduciary duties owed by the company's board of directors to its shareholders in responding to a takeover bid and the applicable statutory requirements for approving and effecting merger transactions. The ability of a target company to impose anti-takeover devices also will largely be determined by the law of its state of incorporation.

Many states, including Delaware (where many of the largest corporations in the United States are incorporated), have anti-takeover statutes. State anti-takeover statutes generally take one of two forms: control share acquisition statutes or business combination statutes. Control share acquisition statutes generally provide that an acquiring shareholder is not permitted to vote target company shares in excess of certain percentage ownership thresholds, without first obtaining approval of the other shareholders. Business combination statutes generally provide that after acquiring securities in the target company in excess of a specified threshold (e.g., 15%), a shareholder is barred from entering into business combination transactions with the target company for a specified period of time, unless the shareholder has obtained approval of a supermajority (e.g., 66 2/3%) of the shares

held by the target company's other shareholders or, prior to acquiring such specified ownership threshold, target company board approval. Companies incorporated in the state may opt out of the protection of the state's anti-takeover statutes in their certificate of incorporation. Delaware has a business combination statute.

Finally, the exchange upon which the company's securities are listed may impose additional rules, in particular with respect to corporate governance matters and shareholder approval for certain actions.

#### 1.2 Are there different rules for different types of company?

If the target company's securities are registered under the Exchange Act (regardless of whether the target company is incorporated in the United States), the bidder must comply with the detailed disclosure requirements of the U.S. tender offer rules, and a number of procedural requirements (including withdrawal rights for target company shareholders throughout the offer period and certain timing and offer extension requirements). If the target company's securities are not registered under the Exchange Act but the target company has security holders in the United States, or if the target company is a foreign private issuer (*i.e.*, its securities are registered under the Exchange Act) and U.S. security holders hold 10% or less of the class of securities sought in the offer, the bidder is not required to comply with the specific disclosure provisions of the U.S. tender offer rules (if the target company is a foreign private issuer and U.S. security holders hold between 10% and 40% of the class of securities sought in the offer, some of the provisions of the U.S. tender offer rules apply). Nevertheless, in any tender offer in which security holders in the United States may participate, the bidder must comply with general anti-fraud and anti-manipulation rules that apply to all tender offers in the United States. These rules prohibit the use of materially misleading statements or omissions in the conduct of any offer, prohibit market purchases of the target company's securities "outside the offer", and mandate a minimum offer period of at least 20 business days.

Regardless of whether the target company is incorporated in the United States, if the bidder is offering securities as consideration in the offer in the United States, the bidder must register the securities with the SEC, unless an exemption from registration is available. Following the registration of securities in the United States, the registrant, its directors and its officers become subject to the ongoing reporting and disclosure obligations established by the Exchange Act. The registrant, its directors and its officers will also be liable for misstatements and omissions in reports filed with the SEC. In addition, following registration of its securities in the United States, the registrant, its directors and its officers will

become subject to the ongoing corporate governance, certification and other requirements set out in the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act).

The rules governing certain M&A transactions will vary depending on the state of incorporation of the target company. The laws of the state of incorporation of a company will regulate the shareholder and board approvals required in connection with a merger transaction, or a transaction involving the sale of all or substantially all of the assets of a company, as the laws of the state of incorporation of a company are the source of statutory requirements for effecting these transactions. As described in the response to question 1.1, the fiduciary duties owed by the company's board of directors to its shareholders in responding to a takeover bid and the ability of a target company to impose anti-takeover devices will largely be determined by the law of its state of incorporation. In addition, anti-takeover statutes may vary from state to state.

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### 1.3 Are there special rules for foreign buyers?

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The Foreign Investment and National Security Act of 2007 and the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988 give the Committee on Foreign Investment in the U.S. (CFIUS) broad authority to investigate and stop transactions that threaten U.S. national security or involve U.S. "critical infrastructure" or critical technology assets. Particularly sensitive industries include defence, aerospace, utilities, transportation, computer and electronics manufacturing, scientific and technical services, information technology and telecommunications. The CFIUS review and investigation process is described in more detail in the responses to questions 1.5 and 2.14.

In addition, there are specific industries in which various levels of non-U.S. ownership or control will trigger governmental reviews or may be prohibited. They include: maritime vessels engaged in domestic trade or coastal shipping; broadcasting; newspapers; land in states restricting "alien" ownership; federal mining leases; banks or bank holding companies; primary dealers in U.S. government securities; air carriers with U.S. domestic routes; and nuclear energy facilities.

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### 1.4 Are there any special sector-related rules?

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Certain industries, such as public utilities, insurance, gaming, banking, media, transportation and mining, are highly regulated, and therefore subject to industry-specific rules that regulate the ability of any acquirer, whether U.S. or foreign, to engage in business combinations.

Additionally, certain types of entities, such as Real Estate Investment Trusts (REITs), often include in their organisational documents unique requirements with respect to changes in ownership in order to protect their tax status.

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### 1.5 What are the principal sources of liability?

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Failure to comply with the disclosure and procedural requirements applicable to a transaction may be a source of liability under the U.S. federal securities laws for the bidder or a target in a tender offer or a merger. The structure of the transaction (*i.e.*, tender offer, exchange offer or merger), the form of consideration and the involvement of target company insiders will determine the particular disclosure and procedural rules applicable to the transaction. (If a bidder owns a significant stake in a company and then wishes to take that company private, or if the bidder is a buyout group which includes members of the company's senior

management (each, a "going private transaction"), additional disclosure rules will be applicable to the transaction.) Section 14(e) of the Exchange Act prohibits material misstatements and omissions and fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer. If the transaction is structured as a merger, no solicitation, whether oral or written, may be false or misleading. This applies to any solicitation, including those prior to the delivery of a definitive proxy statement (which must be sent to a target company's shareholders before they may vote on a merger), as well as to statements included in any proxy statement/prospectus (the requirements for the use of a prospectus are discussed in the response to question 2.6). Controlling persons may also have liability for violations of the Exchange Act, unless they acted in good faith and did not directly or indirectly induce the act constituting the violation.

In a tender offer or exchange offer (*i.e.*, a tender offer in which the consideration consists in whole or in part of securities), a bidder must make its offer available to all holders of securities of the same class, and the price paid to each holder must be the best price paid to any holder of the same class of securities. Violation of this "all holders/best price" rule may subject the bidder to liability to all shareholders who were paid less consideration for their securities than any other shareholder in the offer. The all holders/best price rule is discussed in further detail in the response to question 2.5.

If a bidder offers securities as consideration for shares of the target company, the bidder, as well as its directors, principal executive officers and its underwriters, may have liability under Section 11 of the Securities Act for material false and misleading statements or omissions in the registration statement registering such securities. Defendants other than the bidder may avoid liability if they can prove they made a reasonable investigation and had a reasonable basis to believe, and did believe at the time the registration statement became effective, that there were no material misstatements or omissions. Additionally, anyone who controls another person with liability under Section 11 of the Securities Act may also have liability, unless the controlling person did not have knowledge of the material misstatement or omission.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), enacted in July 2010, contains a number of provisions intended to expand and clarify the SEC's enforcement authority with respect to violations of securities laws, including: clarifying that liability of controlling persons is joint and several for violations of the Exchange Act; providing the SEC with new authority to impose monetary penalties in administrative cease-and-desist proceedings against any person (as opposed to just the company registrant); and codifying the extraterritorial reach of the SEC to enforce the antifraud provisions of the federal securities laws so long as there exists significant conduct in the U.S. or effect on the U.S. securities markets, or some combination of the two.

Members of the target company board may have liability to the target company shareholders if the directors fail to properly exercise their fiduciary duties in responding to an offer. As discussed in the response to questions 3.3 and 8.2, the conduct of the target board will be subject to an enhanced level of scrutiny by the courts in a change of control transaction to determine if the board's conduct was reasonable. If the offer is a going private transaction, in many states, including Delaware, the conduct of the target board may be reviewed using an "entire fairness" standard, which requires that both the price and process be fair to the target company shareholders. As more fully discussed in the response to question 3.3, the highest court in Delaware is expected to issue a decision in early 2014 as to whether the more deferential business judgment rule should be applicable in going private transactions where certain procedural safeguards are employed.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

The most common methods for acquiring a U.S. public company are statutory merger, tender offer and exchange offer.

In a typical merger transaction, the acquiring company forms a new acquisition subsidiary to effect the merger. The target company is merged with the new acquisition subsidiary, and either the target company or the acquisition subsidiary will survive the merger as a wholly owned subsidiary of the acquiring company. The merger becomes effective at such time as a “certificate of merger” is filed with the secretary of state in the state in which the surviving company is incorporated, or such later time as specified therein. Upon effectiveness of the merger, all shares of the target company owned by the target company shareholders are automatically cancelled with no action required on the part of target company shareholders, and the target company shares will represent only the right to receive the merger consideration (subject to any state law appraisal rights, as described in the response to question 2.5). The merger consideration may be comprised of cash, equity or debt securities, rights, other property, or a combination of any of the foregoing. Merger transactions typically require approval of the boards of directors of the constituent companies and a vote of the shareholders of the constituent companies. However, under the laws of many states, including Delaware, a “short-form merger” can be consummated by an acquirer that owns at least 90% of the shares of the target company without target company board approval or a separate shareholder vote. As described in the response to question 7.4, Delaware amended its corporate law in 2013 to permit, in certain circumstances, the use of a “short-form merger” if the acquirer owns a sufficient number of shares to approve the merger (typically a majority of the outstanding shares) following the completion of a tender offer.

In a tender offer or an exchange offer, the acquiring company purchases stock of the target company directly from the target company shareholders. A tender offer or an exchange offer is often followed by a back-end merger (which may be short-form, as discussed above), in which the target company in the transaction is merged with a subsidiary of the acquiring company, any remaining target company shares are cancelled, and target company shareholders who did not tender their shares into the offer are only entitled to receive the merger consideration (subject to any state law appraisal rights, as described in the response to question 2.5).

### 2.2 What advisers do the parties need?

The parties in a public company acquisition transaction generally retain legal and financial advisers. The financial adviser to the acquiring company assists the acquiring company in valuing the target company and structuring its offer. Legal advisers to the acquiring company will also assist the acquiring company in structuring its offer, as well as drafting and negotiating the necessary documentation.

The financial adviser to the target company assists the target company board in reviewing any bids received and assessing their fairness, from a financial point of view. The target company board generally requests a “fairness opinion” from its financial adviser, and may retain a second financial adviser for this purpose. The board of the acquiring company may also request a fairness opinion from its financial adviser in an acquisition of a target company whose size is significant in relation to the size of the acquirer. The target company board will take advice from its legal advisers as to its fiduciary duties with respect to reviewing and responding to the

offer, and the legal advisers will participate in drafting and negotiating the transaction documentation, together with the acquiring company’s legal advisers.

The parties may also engage accounting firms to assist them in the due diligence review of the other party’s business (a due diligence review of the acquiring company’s business is customary when the acquiring company is offering its securities as all or a portion of the consideration to the target company’s shareholders). As required by the situation, environmental consultants, employee benefit consultants and other specialists may also be engaged by the parties. Legal advisers to the acquiring company and the target company will also provide expert advice as required, in particular in connection with antitrust and other regulatory matters.

The Delaware Court of Chancery, in several recent cases, has focused on the conduct of advisers in M&A transactions, particularly in situations where an adviser may have perceived conflicts of interest arising out of relationships with both the target and the acquirer that were not disclosed to its client. Given this trend of greater court scrutiny of adviser conduct and conflicts in M&A transactions, parties should take steps to design a sale process that identifies and mitigates any potential adviser conflicts.

### 2.3 How long does it take?

The typical timeline for a transaction varies depending on the structure of the transaction, the form of consideration, the conditions to be satisfied and whether the transaction is friendly or hostile. The timelines set forth below may be extended if the transaction is subject to regulatory approval, including expiration of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and related rules (Hart-Scott-Rodino Act), as described in the response to question 2.14. In addition, a bidder should assume a longer timeline if the offer is hostile and, as a result, the target company seeks to take advantage of available takeover defences.

*Cash tender offer:* In general, a cash tender offer has the shortest timeline, and can be effected 20 business days from the date offering materials are first disseminated to the target company shareholders, assuming there are no conditions that would take more than 20 business days to satisfy. If there is a change in price or in the percentage of securities being sought in the offer, the offer must be kept open for at least ten additional business days from the date of the change. Certain other material changes, including the waiver of a condition or the satisfaction of a funding or financing condition, require the offer to be kept open at least five business days after the change is made. The target company must file with the SEC a recommendation statement on Schedule 14D-9 (the requirements of which are described in the response to question 3.3) within 10 business days from the commencement of the offer. Set forth below is an indicative timeline for a friendly cash tender offer:

Date	Cash tender offer
Weeks 1-2	<ul style="list-style-type: none"> <li>■ Receive information from target</li> <li>■ Due diligence review by bidder</li> <li>■ Valuation analysis by financial advisers</li> <li>■ Draft merger agreement providing for tender offer</li> <li>■ Negotiate merger agreement providing for tender offer</li> </ul>
Week 3	<ul style="list-style-type: none"> <li>■ Boards approve merger agreement</li> <li>■ Merger agreement executed</li> </ul>

Week 3	<ul style="list-style-type: none"> <li>■ Transaction announced</li> <li>■ Bidder drafts and files tender offer statement on Schedule TO</li> <li>■ Mail offer documents to shareholders of target company</li> <li>■ 20 business days offer period commences</li> <li>■ Target company drafts and files recommendation statement on Schedule 14D-9</li> </ul>
Week 7	<ul style="list-style-type: none"> <li>■ Offer period expires</li> <li>■ Bidder promptly pays for target company shares tendered</li> <li>■ If bidder owns a sufficient number of the target company's voting securities (and is otherwise eligible to use a short-form merger), bidder files short-form merger certificate; if not, target company calls shareholder meeting to approve the merger (see merger timeline and response to question 7.4 below)</li> </ul>

listed bidder representing more than 20% of the bidder's outstanding shares:

Date	Exchange offer
Weeks 1-2	<ul style="list-style-type: none"> <li>■ Exchange information with target</li> <li>■ Due diligence review by target and bidder</li> <li>■ Valuation analysis by financial advisers</li> <li>■ Draft merger agreement providing for exchange offer</li> </ul>
Week 3	<ul style="list-style-type: none"> <li>■ Negotiate merger agreement providing for exchange offer</li> </ul>
Week 4	<ul style="list-style-type: none"> <li>■ Boards approve merger agreement</li> <li>■ Merger agreement executed</li> <li>■ Transaction announced</li> </ul>
Weeks 5-7	<ul style="list-style-type: none"> <li>■ Draft exchange offer documents (including registration statement) and proxy statement to be sent to bidder's shareholders to solicit their approval for issuance of the bidder's shares</li> </ul>
Week 8	<ul style="list-style-type: none"> <li>■ File exchange offer documents and proxy statement with the SEC (review period commences; typically 30 days)</li> </ul>
Weeks 13-15	<ul style="list-style-type: none"> <li>■ SEC comments received on exchange offer documents and proxy statement</li> <li>■ Respond to SEC comments</li> </ul>
Week 16	<ul style="list-style-type: none"> <li>■ SEC declares effective registration statement included in exchange offer documents and clears proxy statement</li> <li>■ Bidder files tender offer statement on Schedule TO</li> <li>■ Mail exchange offer documents (including prospectus forming part of the registration statement) and proxy statement to shareholders of target company and bidder</li> <li>■ 20 business days offer period commences</li> <li>■ Target company files recommendation statement on Schedule 14D-9</li> </ul>
Week 20	<ul style="list-style-type: none"> <li>■ Meeting of bidder shareholders to approve issuance of shares to target company shareholders</li> <li>■ Offer period expires</li> <li>■ Bidder promptly pays for target company shares tendered</li> <li>■ If bidder owns a sufficient number of the target company's voting securities (and is not otherwise ineligible to use a short-form merger), bidder files short-form merger certificate; if not, target company calls shareholder meeting to approve the merger (see merger timeline and response to question 7.4 below)</li> </ul>

*Exchange offer:* Any time securities are offered as consideration in an exchange offer, the acquiring company must register the securities under the Securities Act (unless an exemption from registration is available) and the timeline will likely be extended. The registration statement must be filed with the SEC along with the required exchange offer documents, and must be declared effective by the SEC before the bidder can acquire shares in the offer. The portion of the registration statement that is sent to target company shareholders is called the prospectus.

Although in most instances SEC rules permit the bidder to commence the offer before the registration statement is declared effective, in practice this is often not done because the bidder may be forced to recirculate its exchange offer documents if the SEC has material comments to the registration statement. The exchange offer must remain open for at least 20 business days once commenced; however, the offer period is generally longer in an exchange offer because it may not be completed until the SEC has declared the registration statement effective. The SEC review and comment process may take as long as approximately six to eight weeks.

The timeline may be further extended if the securities to be offered in the exchange offer represent 20% or more of the bidder's issued and outstanding share capital, in which case the bidder will be required to obtain shareholder approval for the issuance of shares from the bidder's shareholders if the bidder is a domestic company listed on an exchange with such an approval requirement. (This will be the case if the bidder is a domestic company listed on the New York Stock Exchange or NASDAQ. The other principal U.S. securities exchanges generally have shareholder approval rules similar to that of the NYSE and NASDAQ. A bidder would also be required to seek approval from its shareholders if it does not have sufficient authorised share capital to complete a transaction and as a result an amendment to its charter is required.) Set forth below is an indicative timeline for a friendly exchange offer, assuming issuance of shares by a domestic NYSE or NASDAQ

*Merger:* Because a merger requires the approval of the target company shareholders, a meeting of the target company shareholders must be convened to vote on the merger and proxy materials must be disseminated to the target company shareholders in advance of the meeting. The proxy materials must be filed with, and cleared by, the SEC before the target company uses the proxy materials to solicit the votes of its shareholders. If the target company shareholders are to receive securities of the acquiring company as consideration in the merger, such securities must be registered by means of the filing of a registration statement with the SEC, as described above. Also, as described above, if the securities to be issued by the acquiring company as consideration in the merger represent 20% or more of the acquiring company's issued and outstanding share capital and the acquiring company is a domestic company listed on an exchange with an approval requirement, the acquiring company will be required to obtain shareholder approval for the issuance of shares. Set forth below is an indicative timeline for a merger in which all or part of the consideration offered is securities in the acquiring company:

Date	Merger - stock consideration
Weeks 1-2	<ul style="list-style-type: none"> <li>■ Exchange information with target</li> <li>■ Due diligence review</li> <li>■ Valuation analysis by financial advisers</li> <li>■ Draft merger agreement</li> </ul>
Week 3	<ul style="list-style-type: none"> <li>■ Negotiate merger agreement</li> </ul>
Week 4	<ul style="list-style-type: none"> <li>■ Boards approve merger agreement</li> <li>■ Merger agreement executed</li> <li>■ Transaction announced</li> </ul>
Weeks 5-7	<ul style="list-style-type: none"> <li>■ Draft proxy statement/registration statement (including prospectus)</li> </ul>
Week 8	<ul style="list-style-type: none"> <li>■ File proxy statement/registration statement (including prospectus) with the SEC (review period commences; typically 30 days)</li> </ul>
Weeks 13-15	<ul style="list-style-type: none"> <li>■ SEC comments received on proxy statement/registration statement (including prospectus)</li> <li>■ Respond to SEC comments</li> </ul>
Week 16	<ul style="list-style-type: none"> <li>■ SEC declares effective registration statement</li> <li>■ Proxy statement/prospectus mailed to shareholders of target company and acquiring company</li> </ul>
Week 20	<ul style="list-style-type: none"> <li>■ Meetings of target shareholders and acquiring company shareholders</li> <li>■ Closing (assuming no other conditions are to be satisfied)</li> <li>■ Merger effective when merger certificate is filed with Secretary of State (or such later date specified therein)</li> </ul>

Set forth below is an indicative timeline for a merger in which all of the consideration offered is cash:

Date	Merger - cash consideration
Weeks 1 and 2	<ul style="list-style-type: none"> <li>■ Due diligence review by bidder</li> <li>■ Valuation analysis by financial advisers</li> <li>■ Draft merger agreement</li> </ul>
Week 3	<ul style="list-style-type: none"> <li>■ Negotiate merger agreement</li> </ul>
Week 4	<ul style="list-style-type: none"> <li>■ Boards approve merger agreement</li> <li>■ Merger agreement executed</li> <li>■ Transaction announced</li> </ul>
Weeks 5-7	<ul style="list-style-type: none"> <li>■ Draft proxy statement</li> </ul>
Week 8	<ul style="list-style-type: none"> <li>■ File proxy statement with the SEC</li> </ul>
Weeks 13-14	<ul style="list-style-type: none"> <li>■ SEC comments received on proxy statement</li> <li>■ Respond to SEC comments</li> </ul>
Week 15	<ul style="list-style-type: none"> <li>■ SEC clears proxy statement</li> <li>■ Proxy statement mailed to target company shareholders</li> </ul>
Week 19	<ul style="list-style-type: none"> <li>■ Meeting of target shareholders</li> <li>■ Closing (assuming no other conditions to be satisfied)</li> <li>■ Merger effective when merger certificate is filed with Secretary of State (or such later date specified therein)</li> </ul>

## 2.4 What are the main hurdles?

*Cash tender offer:* Once an offer is commenced, the main hurdle to completion is the satisfaction (or, to the extent legally permissible, waiver) of any conditions, including any minimum tender condition, regulatory conditions and expiration of the Hart-Scott-Rodino Act waiting period, if applicable.

*Exchange offer:* The SEC must declare effective the registration statement for the securities to be offered as consideration in the offer. Once the offer is commenced, all conditions to the offer, including the minimum tender condition, any regulatory conditions and expiration of the Hart-Scott-Rodino Act waiting period, if applicable, must be satisfied (or, to the extent legally permissible, waived). If the securities to be issued in the exchange offer represent 20% or more of the bidder's issued and outstanding share capital and the acquiring company is a domestic company listed on an exchange with an approval requirement, the bidder's shareholders will be required to approve the issuance of the new shares before the offer can be consummated.

*Merger:* The SEC must clear the proxy materials to be disseminated to the shareholders of the target company. If the consideration includes securities of the acquiring company, the SEC must declare effective the registration statement relating to such securities. (In practice, the proxy statement and prospectus are combined into a single document, which is reviewed by the SEC.) Shareholders of the target company must approve the merger. If the acquiring company is issuing new shares representing 20% or more of its share capital and the acquiring company is a domestic company listed on an exchange with an approval requirement, the acquiring company shareholders will be required to also approve



the transaction. Antitrust and other regulatory approvals may be conditions to the closing of the merger.

## 2.5 How much flexibility is there over deal terms and price?

*Tender/Exchange offers:* Under the “all holders/best price” rule (Rule 14d-10 under the Exchange Act), an offer must be open to all holders of the class of securities for which the offer is made, and the highest consideration paid to one holder in the offer must be paid to all holders. If the acquiring company increases the consideration during the offer period, the increased consideration must be paid to all tendering shareholders, regardless of whether they tendered their securities before or after the consideration was increased.

The “all holders/best price rule” applies only to the consideration paid for tendered securities in connection with a tender or exchange offer, and does not apply to employment compensation, severance or other employee benefit arrangements entered into with the target company’s shareholders who are also employees of the target company. If such compensatory arrangements are approved by the compensation committee or another committee of independent directors of the board of directors of either the bidder or the target company, they will conclusively be deemed to not constitute consideration paid for tendered securities.

Unlike certain other jurisdictions, there is no requirement in the United States that the offer price in a tender offer or exchange offer be at least as high as the price paid by the bidder for shares prior to the commencement of the offer.

As described in the response to question 2.3, a tender offer or exchange offer must remain open for at least 20 business days. Shareholders of the target company must be permitted to withdraw any securities tendered during the offer period. If the offer is made for fewer than all of the securities of the class and the offer is oversubscribed, the bidder must purchase securities from the target company shareholders on a *pro rata* basis.

*Merger:* In a merger, the terms and price are negotiated between the acquiring company and the target company, and the merger is subject to the approval of the target company shareholders. In most states, target company shareholders who do not vote to approve the merger and follow specified statutory procedures may be entitled to seek appraisal, in which case they will be entitled to the appraised value of their shares (which may be more or less than the merger consideration). However, many states (including Delaware, except as noted below) provide for an exception such that appraisal rights are not available if securities are received by target company shareholders in the merger, and such securities are either listed on a national securities exchange or are held by more than a statutorily prescribed number of shareholders (2,000 in Delaware). Appraisal rights are also available to shareholders of a Delaware target company if the acquirer effects a short-form merger following a tender offer and the acquirer owns less than 90% of the target company’s voting securities prior to the consummation of the merger, even if the consideration received by the target company shareholders is publicly traded securities. Appraisal is generally available if only cash is offered as consideration in a merger.

## 2.6 What differences are there between offering cash and other consideration?

Any time securities are offered as part of the consideration in an exchange offer or in a merger, absent an exemption, the acquiring company must register the securities under the Securities Act. In the case of an exchange offer, the registration statement must be filed with the SEC along with the required exchange offer

documents, and must be declared effective by the SEC before the bidder can acquire the shares in the offer. In the case of a merger, the proxy solicitation materials will be combined with a registration statement (including a prospectus) that must be filed with the SEC and declared effective before the proxy statement/prospectus is distributed to the target company shareholders. By registering securities with the SEC, a non-U.S. bidder becomes subject to the periodic reporting requirements of the Exchange Act and certain other ongoing corporate governance, certification, internal controls and disclosure requirements under the Sarbanes-Oxley Act.

More information about the acquiring company will be required to be disclosed to the target company shareholders if the consideration includes securities of the acquiring company. For example, the acquiring company will be required to include in its registration statement certain financial information. If the acquiring company is a foreign private issuer and its financial statements are prepared in accordance with International Financial Reporting Standards (IFRS) issued by the International Accounting Standards Board (IASB), then no reconciliation to U.S. GAAP will be required. Otherwise, if the acquiring company’s financial statements are not prepared in accordance with U.S. GAAP, a reconciliation to U.S. GAAP will be necessary.

The timing differences between offering cash and securities in a merger and in a tender/exchange offer are discussed in the response to question 2.3.

## 2.7 Do the same terms have to be offered to all shareholders?

As described in the response to question 2.5, under the “all holders/best price” rule, an offer must be extended to all holders of securities of the same class, and the highest consideration paid to one holder in the offer must be paid to all target company shareholders. When the offer is for fewer than 100% of the securities of a class and the offer is over-subscribed, the bidder must purchase shares on a *pro rata* basis from all security holders who tender. Following the announcement by a bidder of a tender offer until the expiration of the offer, the bidder is not permitted to purchase, directly or indirectly, or make arrangements to purchase, the securities that are the subject of the offer otherwise than pursuant to the offer. In a statutory merger, all shares of the same class of stock are generally treated equally, although the acquirer may agree separately with certain shareholders to treat their shares differently and outside of the merger. Such disparate treatment commonly occurs in a going private transaction, in which members of management may retain an equity interest in the target company, rather than having their shares converted into cash (like shares held by other target company shareholders) and thereafter purchasing shares from the target company’s new owners. This type of “rollover” is generally not taxable to the shareholder.

## 2.8 Are there obligations to purchase other classes of target securities?

There is no statutory requirement that an offer be extended to holders of a class of securities other than the class subject to the offer.

## 2.9 Are there any limits on agreeing to terms with employees?

The success of an acquisition often depends on whether the target company employees decide to remain with the company. To

increase the likelihood of key employees staying on, the acquiring company may agree to retention bonuses that become payable to such employees when the acquisition is complete. The acquiring company may also enter into new compensation arrangements (including golden parachute or golden handcuff agreements) with key employees that become effective upon closing of the acquisition.

Compensation arrangements entered into in connection with a merger or acquisition must be disclosed in the target company's proxy statement or recommendation statement on Schedule 14D-9. In response to requirements of the Dodd-Frank Act, the SEC has adopted rules regarding detailed disclosure of "golden parachute" arrangements between the target or acquirer, on the one hand, and senior management of each company on the other hand. Moreover, the SEC has adopted a rule requiring a target company soliciting proxies in connection with a merger or similar transaction to submit any such compensation arrangements that it has with its senior management to a non-binding advisory vote of the target company's shareholders (*i.e.*, a "say-on-golden parachute" vote). In addition, the proxy statement or recommendation statement on Schedule 14D-9 must provide target company shareholders with all material information with respect to potential conflicts of interest that could have influenced the target company management in its negotiation of the transaction, or the target company board in its approval and recommendation of the transaction.

As discussed in the response to question 2.5, in the context of a tender offer, compensatory arrangements should be approved by the compensation committee or another committee of independent directors of the board of directors of either the bidder or the target company in order to ensure that the safe harbour provisions in the all holders/best price rule will apply to such compensatory arrangements and, as a result, that such compensation arrangements will not be deemed to be consideration paid in the tender offer.

## 2.10 What role do employees, pension trustee and other stakeholders play?

In general, there is no requirement in the United States that the target company or the acquiring company consult with the employees of the target company with respect to a potential offer or merger. However, certain states (not including Delaware) have constituency statutes that permit or require the target company board to consider the interests of the target company employees when approving a merger or recommending an offer.

## 2.11 What documentation is needed?

In friendly tender/exchange offers and mergers, the acquiring company, an acquisition subsidiary of the acquiring company and the target company will enter into a merger agreement (which, if a tender or exchange offer is to be made as the "first step" of the acquisition prior to the merger, will set forth the terms and conditions of the offer). Agreements to acquire public company targets generally contain few representations and warranties, and such representations and warranties typically are subject to broad "material adverse change" qualifiers. The representations and warranties typically do not survive closing, and the acquiring company is not indemnified for any breaches of such representations and warranties. The acquiring company generally takes comfort from the fact that the target company, as a public company, is subject to the reporting and liability provisions of the U.S. federal securities laws.

*Tender offer:* In a tender offer, the bidder will file a tender offer

statement (Schedule TO) with the SEC, which will include the offer document. The contents of the tender offer statement are described in response to question 2.12.

*Exchange offer:* In an exchange offer, the registration requirements of the Securities Act will apply because the bidder is offering securities as consideration. The registration statement (which includes the bidder's prospectus) on Form S-4 (Form F-4 if the bidder is a foreign private issuer) must be filed with the SEC along with the exchange offer document on Schedule TO (in practice, the bidder's prospectus and exchange offer document are combined into a single document) and must be declared effective by the SEC before the bidder can acquire any shares in the offer. The contents of the registration statement are described in response to question 2.12.

*Merger:* After a merger agreement is executed, the acquiring company and the target company will draft a proxy statement, which is the document that will be used to solicit the approval of the merger by the target company's shareholders. The contents of the proxy statement are described in response to question 2.12.

If the consideration includes securities of the acquiring company, the acquiring company must also prepare and file with the SEC a registration statement on Form S-4 (Form F-4 if the acquiring company is a foreign private issuer). The contents of a proxy statement where the consideration includes securities of the acquiring company are described in response to question 2.12.

Assuming shareholders of the target company approve the merger, a certificate of merger is filed with the secretary of state in the state of incorporation in which the surviving corporation is incorporated.

## 2.12 Are there any special disclosure requirements?

*Tender offer:* The contents of the tender offer statement (Schedule TO) must include:

- a summary term sheet, with a brief description in bullet point format of the most material terms of the offer;
- basic information about the target company, including its name, address and telephone number, title and total number of shares outstanding of the class of securities being sought, the principal market where the target company securities are traded and information about the target company's share price for the last two years;
- the bidder's identity and background;
- terms of the offer;
- past contacts, transactions and negotiations between the bidder and the target company and any conflicts of interest;
- the source and amount of the bidder's funds, including any conditions to its financing;
- the purpose of the tender offer and plans of the bidder that would change the target company's management, business or corporate structure or would affect the marketability or registration of the target company's stock;
- the interest in target company securities, disclosing the target company shares owned by the bidder and transactions in target company securities by the bidder and certain persons and entities related to the bidder within the past 60 days;
- persons retained to assist in the solicitation of shares to be tendered and the terms of their compensation;
- financial statements of the bidder (audited for the last two fiscal years and unaudited for the most recent interim period available) must be included if material; financial statements are not material if: (i) the consideration consists solely of cash; (ii) the offer is not subject to a financing condition; and (iii) either the offer is for all outstanding securities of the subject class or the offeror is a public reporting company (if

financial information is required and the bidder is a foreign private issuer with financial statements prepared in accordance with IASB IFRS, then no reconciliation to U.S. GAAP will be required; otherwise, if the bidder's financial statements are not prepared in accordance with U.S. GAAP, a reconciliation to U.S. GAAP will be necessary);

- *pro forma* financial information; this is required only in cash tender offer statements when securities are to be offered in a subsequent merger or other transaction in which remaining target company securities are acquired and the acquisition of the target company is significant to the bidder (if *pro forma* financial information is required to be included, then historical financial statements of the bidder will also be required);
- additional information relating to regulatory issues, compliance with laws, litigation and applicability of antitrust laws; and
- exhibits, including tender offer materials, loan agreements relating to the financing of the transaction and contracts or arrangements between the target company and the bidder.

*Exchange offer:* The registration statement on Form S-4 (Form F-4 if the acquiring company is a foreign private issuer) must include the following information (some of which may be incorporated by reference from the bidder's or target's SEC filings, if applicable), in addition to the items set forth above for inclusion in the tender offer statement on Schedule TO:

- selected historical audited income statement and balance sheet information for the past five fiscal years for each of the bidder and the target company and selected unaudited financial information for the latest interim period and the comparable period in the preceding year;
- full audited financial statements of the bidder, including balance sheet statements for the last two fiscal years and income and cash flow statements for the last three fiscal years;
- full interim unaudited financial statements of the bidder for the most recent interim period and for the comparable period in the preceding year;
- unaudited historical and combined *pro forma* per share data for the bidder and the target company;
- prices of the bidder's and the target company's shares prior to the announcement of the offer and prior to the printing date of the prospectus/exchange offer document included in the registration statement;
- risk factors relating to the offer and to the business of the bidder, including risks relating to the combined entity;
- management's discussion and analyses of the financial condition and results of operations (MD&A) for the bidder and the target company;
- business description of the bidder and the target company;
- comparison of rights of holders of bidder securities and target company equity securities being sought in the offer;
- reconciliation to U.S. GAAP (quantitative and qualitative) unless the bidder already prepares accounts according to U.S. GAAP or is a foreign private issuer that prepares its accounts according to IASB IFRS; and
- *pro forma* consolidated balance sheet and income statement information giving effect to the merger of the bidder and the target company for the latest fiscal year and the latest interim period.

*Merger:* The contents of the proxy statement must include:

- a summary of the terms of the merger;
- the date, time and place of the meeting of target company shareholders;
- the name of the person(s) making the solicitation and a

description of their interest, direct or indirect, in any matter to be acted upon at the shareholders' meeting;

- an outline of the dissenting shareholders' rights of appraisal (if any);
- a description of the voting securities and principal holders thereof and, to the extent known, any arrangement that may result in a change of control of the target company;
- certain facts relating to the target company directors and executive officers, including their compensation;
- a description of the merger agreement and of the terms of the merger plan;
- a discussion of the status of any necessary regulatory approvals;
- a description of past contacts, transactions and negotiations between the acquiring company and the target company;
- a description of any amendment to the charter, by-laws or other organisational documents and of any other action to be taken at the general meeting; and
- a description of the voting procedures.

A description of the business and the MD&A of the acquiring company will only be required if material to an informed voting decision (*e.g.*, if there is a financing condition). In addition, if only the shareholders of the target are voting, a description of the business and the MD&A of the target are not required. Generally, in a merger in which the consideration offered is cash and only the shareholders of the target are voting, no financial or *pro forma* financial data relating to the acquiring company is required.

The content requirements for a proxy statement/prospectus where the acquiring company's securities form part of the consideration are substantially similar to the additional information required in exchange (as compared to tender) offer documents described above, and include a description of risk factors with respect to the issuer of the securities and the transaction, a business description of the issuer and the target company, the MD&A of the issuer and the target company as well as *pro forma* and historical financial statements.

In addition to the disclosure noted above, as described in the response to question 2.9, the SEC has adopted rules that require detailed disclosure in tender/exchange offer documents and proxy statements regarding "golden parachute" arrangements between the target company or acquiring company, on the one hand, and senior management of each company on the other hand.

### 2.13 What are the key costs?

In addition to fees paid to legal and financial advisers, the acquiring company will incur costs for printing and mailing the required documentation to the target company shareholders. If securities are issued as consideration, the issuer will pay to the SEC a registration fee, which in 2014 is \$128.80 per \$1 million (based on the estimated offer price of the securities to be offered as consideration). If a filing is required by the Hart-Scott-Rodino Act, as described in the response to question 2.14 below, the acquiring company is responsible for payment of the filing fee (either \$45,000, \$125,000 or \$280,000, depending on the size of the transaction) at the time of filing (in practice, the parties often share the fee). The acquiring company and/or the target company will usually retain, and pay a fee to, a proxy solicitor who will assist in the solicitation of votes or shares to be tendered. Fees will also be payable to the exchange or paying agent retained by the acquiring company to accept and pay for shares tendered into a tender or exchange offer, and to pay the merger consideration to the target company shareholders in a merger. In the event of an unsuccessful

transaction, break-up or termination fees may be payable under certain circumstances. Break-up fees are discussed in the response to question 6.1.

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#### 2.14 What consents are needed?

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The SEC must clear any definitive proxy materials before they are mailed to shareholders. If securities are offered as consideration, either in a merger or in an exchange offer, the SEC must declare effective the registration statement with respect to such securities. As described above, in a merger, the proxy statement and prospectus are usually combined into a single document that will be reviewed by the SEC. In an exchange offer, the offer document generally may be disseminated prior to the completion of the SEC's review; however, the exchange offer cannot be consummated and securities of the bidder may not be issued until the registration statement with respect to the securities to be issued is declared effective.

The Hart-Scott-Rodino Act prohibits the parties to certain transactions from consummating their transaction until after the parties have filed a notice with the FTC and DOJ and the statutory waiting period has expired. In a cash tender offer, there is a 15-day waiting period from the date the acquiring party files notice with the FTC and the DOJ. The target company must file a notice within 10 days of the acquiring company's filing. In an exchange offer or acquisition in the open market from a third party, a 30-day waiting period commences when the acquiring company files a notice with the FTC and the DOJ. The target company must file a notice within 15 days of the acquiring company's filing. In a merger or other transaction to be effectuated pursuant to an agreement between the parties, a 30-day waiting period commences when both the acquiring company and the target company file a notice with the FTC and the DOJ. During the initial waiting period, either the FTC or the DOJ may issue a request for additional information to one or both of the parties, in which event the waiting period is extended automatically until 30 days (10 days with respect to a cash tender offer) after substantial compliance with any such request. The rules also provide for early termination of the initial waiting period if during the initial waiting period the FTC and DOJ determine not to take any further action. The Hart-Scott-Rodino Act will apply, and notice will be required to be filed with the FTC and DOJ, when: (1) both the size of person and the size of transaction test are met; or (2) the large transaction test is met, regardless of the outcome of the size of person test. The size of person test is met if one party has total assets or annual net sales of at least \$15.2 million, as adjusted annually, and the other party has total assets or annual net sales of at least \$151.7 million, as adjusted annually. The size of transaction test is met if, as a result of the acquisition, the acquiring company would hold an aggregate amount of voting securities (or assets) of the target company in excess of \$75.9 million, as adjusted annually. The large transaction test is met if, as a result of the acquisition, the acquiring company would hold an aggregate amount of voting securities (and/or assets) of the target company in excess of \$303.4 million, as adjusted annually. These thresholds take effect in February 2014.

The Foreign Investment and National Security Act of 2007 and the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988 authorise the President of the United States or his designee to investigate and stop transactions, such as tender offers and mergers, which could result in foreign control of persons engaged in U.S. commerce, if such control threatens to impair U.S. national security. Any transaction that would result in foreign persons obtaining control of "critical infrastructure" or critical technology assets is statutorily deemed to affect national security. Additionally,

any entity controlled by a foreign government is subject to heightened scrutiny. CFIUS is authorised to conduct reviews and investigations of potential transactions. Review of a transaction is commenced either by voluntary notice sent by the acquiring company, or by an agency notice if the U.S. government has reason to believe that the acquisition may have an adverse impact on U.S. national security. Upon filing of a notice of the transaction by the acquiring company, CFIUS must complete a preliminary review within 30 days, and determine whether an additional 45-day investigation is necessary. The matter is then referred to the President of the United States, who has 15 days to determine, on the recommendation of CFIUS, whether the transaction poses a risk to U.S. national security. Failure to file a CFIUS notice can result in the United States government requiring that the transaction be unwound.

In recent years, we have seen increasingly rigorous scrutiny of transactions by CFIUS, with CFIUS requiring investigations in a greater percentage of transactions following the preliminary 30-day review period. Transactions in the technology and telecommunications sectors have received particular attention from CFIUS, reflecting heightened concerns arising out of transactions involving targets with access to classified government information. In addition, in an increasing number of transactions, CFIUS has required the parties to enter into mitigation agreements to address national security concerns identified during the review process.

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#### 2.15 What levels of approval or acceptance are needed?

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In a cash tender offer or exchange offer, the bidder specifies the minimum number of shares that must be tendered in order for the transaction to succeed. Generally, if the bidder obtains a majority of the target company's shares through the offer, then following completion of the offer, the bidder acquires all of the equity interests in the target company by merging the acquisition subsidiary with the target company. Back-end mergers are described in further detail in the response to question 7.4.

The level of shareholder approval required under Delaware law for a merger is a majority of the shares issued and outstanding. The level of shareholder approval required under the principal U.S. securities exchanges for the issuance of shares in excess of 20% of a company's outstanding shares is generally a majority of the shares present (either in person or by proxy) and voting at a meeting convened for such purpose at which a quorum is present. Shareholder approval requirements vary depending on the state of incorporation of the target company and the target company's certificate of incorporation, with some requiring supermajority approval.

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#### 2.16 When does cash consideration need to be committed and available?

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Under the tender offer rules, the bidder must pay for the tendered securities accepted in an offer promptly upon closing of the offer.

In a merger, the merger consideration becomes payable upon effectiveness of the merger, at which time the target company shares are cancelled and only represent the right to receive the merger consideration (subject to state appraisal rights, if any).

While there is no legal requirement that cash consideration be committed and available prior to the above-noted times, as a practical matter the target company will look to the certainty of an acquiring company's funds in assessing a bid, particularly in an auction situation. The target company will closely scrutinise an acquiring company's financing commitments and other sources of funding in evaluating the acquiring company's ability to consummate a transaction.

### 3 Friendly or Hostile

#### 3.1 Is there a choice?

Hostile transactions may be time-consuming and difficult to complete. Some companies have in place anti-takeover protections, such as a shareholder rights plan (also known as a “poison pill”) discussed in the response to question 8.2, that increase the target company board’s bargaining power. As a practical matter, these anti-takeover devices give the target company board time to seek an alternative transaction or negotiate better terms with the hostile bidder.

Given the increasing influence of activist shareholders, it is difficult in today’s environment for a target company board to reject out of hand a bid that is economically attractive to shareholders. Even if a company is not “for sale”, the management and the board of the target company should carefully evaluate in good faith the terms of any *bona fide* unsolicited proposal to determine if the offer is in the best interests of the target company and its shareholders. However, simply because a proposal is made, directors of the target company are not obligated to put the company up for sale. After due consideration, the target company board may determine not to proceed with any proposal.

If the target company has a poison pill or the target company has not opted out of any applicable state anti-takeover statute, it will be difficult for a bidder to complete a hostile offer without the cooperation of the target company board. In addition, the Delaware Court of Chancery has recently confirmed the broad latitude a target board has in opposing an unsolicited offer. As a result, many hostile offers do not succeed and the target company has either remained independent or been acquired by a third party.

#### 3.2 Are there rules about an approach to the target?

There are no statutory limitations on the ability of a potential acquiring company to approach a target.

Before a target company provides confidential information to a potential acquiring company, it is common for the target and the acquiring company to enter into a non-disclosure agreement that restricts the disclosure and use of information provided to the acquiring company in connection with its consideration of a transaction. For a public company target, the non-disclosure agreement will often include a “standstill provision” to prevent an unsolicited approach if negotiations between the target company and the potential acquiring company do not result in a consensual transaction. The potential acquiring company will typically seek to limit the duration of any standstill provision, and will often seek to negotiate exceptions to the provision if the target enters into a transaction with another party or becomes subject to a hostile bid by a third party. In addition, the Delaware Court of Chancery recently held that even if a non-disclosure agreement does not include an express standstill provision, the “non-use” provisions in an agreement may prohibit the use of confidential information by a bidder in a hostile offer after negotiations with respect to a consensual transaction are abandoned by the parties.

#### 3.3 How relevant is the target board?

In situations involving a significant corporate transaction such as a merger or a takeover, the spotlight is often on the conduct of the target company’s board of directors. If the target company board determines to sell the company, then under the law of many states,

including Delaware, the directors have a duty to seek the best transaction reasonably available for shareholders. The courts will review the conduct of the directors under an “enhanced scrutiny” standard to assure that their conduct was reasonable. The enhanced scrutiny standard involves a review of the directors’ decision-making process and the reasonableness of the directors’ actions. If a target company’s board takes defensive action in response to an unsolicited acquisition proposal and such action is challenged, the conduct of the board will be reviewed under the enhanced scrutiny standard, as discussed in the response to question 8.2 below.

In a “going private transaction” (as described in the response to question 1.6), board members who are also: (i) significant shareholders seeking to take the target company private; or (ii) members of senior management of the target company who are part of the buyout group, will have a conflict of interest which will bar them from involvement in the target company’s evaluation of whether to entertain the going private transaction and the process for considering it against other alternatives. A greater burden will be imposed on the target company board of directors to ensure its shareholders are treated fairly. To help ensure the fairness of the process, boards of directors often will delegate to special committees consisting entirely of independent directors the task of negotiating and approving such transactions.

The Delaware Supreme Court is currently considering the appeal of a lower court decision involving a controlling shareholder going private transaction. If the case is upheld on appeal, Delaware courts will apply the deferential business judgment rule in reviewing controlling stockholder going private transaction, rather than the more rigorous entire fairness standard, so long as certain practices are followed by the target company board. If the decision is upheld, the business judgment rule will be properly invoked in a controlling stockholder going private transaction if the transaction is (i) negotiated and approved by an attentive special committee comprised of independent directors which is fully empowered to decline the transaction and to retain its own financial and legal advisors, and (ii) conditioned on the un-coerced, fully informed and non-waivable approval of a majority of the unaffiliated minority shareholders. Prior decisions state that entire fairness is the applicable standard of review in controlling stockholder going private transactions. Under the entire fairness standard, the directors bear the burden of proving the entire fairness of their actions, as to both dealing and price, except that in a going private transaction structured as a merger, this burden of proof may shift to the shareholder challenging the transaction if there is a properly functioning special committee of the target company board or the transaction is subject to the approval of a majority of the shares held by target company shareholders not standing on both sides of the transaction. If upheld on appeal, the court decision will provide an important roadmap for those planning controlling stockholder going private transactions.

If a tender offer or exchange offer is commenced, the target company board must advise its shareholders of its position with respect to the offer or that it expresses no opinion or is unable to take a position, and the reasons for the position taken, lack of opinion or inability to take a position. The duty to communicate a position on the offer applies regardless of whether the offer is friendly or hostile.

The target company board communicates its position on an offer by mailing to the target company shareholders a Solicitation/Recommendation Statement on Schedule 14D-9. Once an offer has been commenced, neither the target company, its management nor any other person is permitted to solicit, or make a recommendation to, the target company’s shareholders with respect to the offer without first filing a Schedule 14D-9 with the SEC and

appropriate trading markets and delivering it to the bidder. Schedule 14D-9 requires disclosure of information relating to:

- agreements, arrangements or understandings between the target company and the bidder and its affiliates;
- the recommendation, if any, of the target company board, and the reasons for its recommendation;
- the identity and compensation of persons retained to make solicitations or recommendations on behalf of the target company in connection with the tender offer; and
- negotiations of the target company with respect to significant transactions in response to the tender offer. If no agreement in principle has been reached and the target company board believes that disclosure would jeopardise negotiations, the target company is not required to disclose the terms of any such transaction or the parties thereto, but must disclose that negotiations are being undertaken and are in a preliminary stage.

The target company board must promptly disclose and disseminate all material changes to the information set forth in a Schedule 14D-9.

In a merger transaction, there is no requirement that the target company file and disseminate a Schedule 14D-9. As discussed in the response to question 2.11, the target company will file with the SEC and disseminate to its shareholders a proxy statement which will include the target company board's recommendation with respect to the merger, its reasons for the merger, and a description of the factors considered by the target company board in reaching its recommendation with respect to the merger.

### 3.4 Does the choice affect process?

The tender offer is the most effective structure for a hostile offer because it can be commenced and, subject to the following sentence, consummated quickly, and generally does not require the cooperation of the target company board or management. As discussed in the response to question 3.1, however, it may be difficult for a bidder to complete an offer without the cooperation of the target company board, especially if the target company has a "poison pill" or the target company has not opted out of any applicable state anti-takeover statute.

A tender offer may be combined with a proxy solicitation in which the bidder seeks to force the target company to convene a meeting of the target company shareholders for the purpose of replacing the target company's directors with the bidder's nominees who will facilitate the bidder's offer. The bidder's strategy will be influenced by the target company's certificate of incorporation and bylaws, which may limit the ability of shareholders to convene a meeting or act by written consent without the consent of the board or management, or may proscribe specific procedures for nominating directors in advance of a meeting, thereby delaying the ability of a bidder to take control of the target company's board. Furthermore, the target company's certificate of incorporation may provide for a staggered board or permit the removal of directors only for cause, in which case the bidder would not be able to obtain control of the target company board at a meeting of the target company's shareholders.

In addition, without the cooperation of the target company, the bidder's diligence will be limited to a review of publicly available information.

## 4 Information

### 4.1 What information is available to a buyer?

If the target company is public, the acquiring company will have

access to all of the target company's periodic reports filed with the SEC, including the target company's annual report on Form 10-K, interim reports for each of the first three fiscal quarters on Form 10-Q and reports of material events on Form 8-K. Material events that would require the target company to file a Form 8-K include, among other things, the entry into or termination of a material agreement, the completion of an acquisition or disposition of assets, the departure or election of officers or directors and amendments to the target company's certificate of incorporation or by-laws. The acquiring company also will have access to any registration statements that the target company has filed in connection with the issuance of securities, as well as any proxy statements that the target company has used to solicit proxies in connection with meetings of target company shareholders. Such reports, registration statements and proxy statements are available, among other places, on the SEC's website, [www.sec.gov](http://www.sec.gov). Companies operating in regulated industries may make filings with applicable government regulators that may be available to the public.

In addition, under Section 16 of the Exchange Act, officers, directors and beneficial owners of 10% of a class of equity securities of the target company are required to report to the SEC information on their shareholdings in the target company (Form 3) and changes in such holdings (Form 4). As described in the response to question 5.3, under Section 13(d) of the Exchange Act, beneficial owners of 5% of a class of equity securities of the target company are required to report to the SEC information on their shareholdings in the target company and their intentions with respect to the target company (Schedule 13D or Schedule 13G). The acquiring company will have access to all this information as it is available, among other places, on the SEC's website.

An acquiring company may also be able to obtain non-public information from a target company if both parties are willing to sign a non-disclosure agreement.

### 4.2 Is negotiation confidential and is access restricted?

In general, there is no duty to disclose material information under the federal securities laws, absent (1) an inaccurate, incomplete or prior disclosure by the target company, (2) a leak attributable to the target company, (3) the target company or its officers or directors engaging in purchases or sales of the target company's securities, or (4) specific disclosure requirements of an SEC form then being applicable, such as a registration statement (in the event either party is in the process of registering its securities), a periodic report, such as a Form 10-K or Form 10-Q (if one is then due), a current report on Form 8-K (if the actions in question trigger disclosure under one of the line items of the form), or a proxy statement (depending on the subject of the proxy statement, a duty to disclose may or may not be implicated). As a particular application of this rule, initial confidential contact from a party seeking to acquire all or part of the target company, or preliminary discussions following such contact, should not trigger disclosure obligations, assuming no circumstances exist which created such an obligation. In many cases, such contact or preliminary negotiation would in any event not be "material", particularly if not pursued. Even if material discussions are commenced, the general rule that disclosure is not required still applies. However, because information with respect to a potential transaction may be "material", ongoing care needs to be taken to avoid triggering any of the prompt disclosure exceptions to the general rule. For example, care should be taken to avoid making statements that could give rise to an affirmative disclosure obligation if facts change.

There is no requirement that preliminary merger negotiations be disclosed in the periodic reports of the target company or the acquiring

company. This position is based on the SEC's policy of balancing the informational needs of investors against the risk that premature disclosure of negotiations may jeopardise completion of the transaction. However, where one of the parties is in the process of registering securities for sale under the Securities Act, the SEC requires disclosure of material probable acquisitions and dispositions of businesses. To accommodate the need for confidentiality of negotiations, the SEC permits registrants not to disclose in registration statements the identity and the nature of the business sought if the acquisition is not yet probable and the board of directors of the registrant determines that the acquisition would be jeopardised.

Neither rumour nor speculation in the market nor unusual trading activity in the target company's stock would *per se* create an affirmative disclosure obligation under the federal securities laws. However, unusual trading activity may create practical pressure that results in a decision by a target company to disclose preliminary merger negotiations.

There is no legal requirement that a company restrict access to information with respect to merger negotiations, however, selective disclosure of material non-public information is prohibited. If a person acting on behalf of a public company provides material non-public information to an investment professional or shareholder who may trade on the information, the company must make public disclosure of that information by filing a current report on Form 8-K. The disclosure requirement is not triggered if the recipient of the material information has agreed to hold it confidential. As a practical matter, companies engaged in merger negotiations generally will limit the number of persons who are aware of the discussions so as to avoid premature leaks to the market that may jeopardise completion of the transaction. In addition, persons with material non-public information (such as the pendency of a merger or offer) must refrain from trading shares of the target company or the acquiring company while in possession of such information, and must not disclose such material non-public information to persons who then trade on the basis of such information.

#### 4.3 When is announcement required and what will become public?

There is no statutory trigger in the United States requiring announcement or commencement of an offer for a company, however under the Exchange Act, an issuer is required to file a current report on Form 8-K if it enters into a material agreement not in the ordinary course of business, describing the material terms of the agreement.

All material past contacts, transactions and negotiations between the acquiring company and the target company will be disclosed in the offer document or the proxy solicitation materials, as well as, for certain types of transactions, the acquiring company's purpose for the transaction and plans for the target company following the transaction. Any time securities are being offered as part of the consideration, the exchange offer document or proxy statement/prospectus will include risk factors, a business description of the acquiring and target company, an MD&A of the acquiring and target company, as well as pro forma and historical financial statements. Any time a report or opinion has been received from a third party (*e.g.*, a fairness opinion from the target company's financial adviser) and such report is referred to in the proxy statement or the prospectus, the report must be disclosed, as well as information about the methodology used by the third party in reaching its opinion. If the target company provided projections to the acquiring company and such projections would be material to an investor's decision whether to vote in favour of a merger or tender its securities into an offer, the target company would be

required to disclose the projections. See the response to question 2.12 for further detail.

#### 4.4 What if the information is wrong or changes?

The acquiring company must update and correct information disseminated to the target company shareholders if that information becomes inaccurate or materially misleading. If any material change is made by the acquiring company to the offer document in a tender offer or exchange offer, the offer must be kept open at least five additional business days after such change, and at least 10 additional business days if there is a change in the price or the percentage of securities sought in the offer. If a material change is made to a proxy statement, the proxy statement must be supplemented and recirculated to shareholders sufficiently in advance of the shareholders meeting at which their vote is being sought. Although there is no minimum statutory time period, 10 calendar days between the dissemination of the supplement and the meeting date is generally considered by legal professionals to be sufficient.

A target company must promptly disclose and disseminate all material changes in the information set forth in Schedule 14D-9.

The acquiring company often negotiates a material adverse change condition in the merger agreement. Accordingly, if information about the target company changes between the signing of the agreement and the closing of the merger or tender offer, and such change is likely to have a material adverse effect on the target company, the acquiring company may have the ability to terminate the merger or the tender offer being made pursuant to the merger agreement.

## 5 Stakebuilding

#### 5.1 Can shares be bought outside the offer process?

There is no prohibition on the bidder purchasing shares of the target company in advance of an offer (assuming the bidder is not in possession of material non-public information, which would prohibit such purchases). However, from the time of public announcement of a tender offer or exchange offer until the offer expires, the bidder is prohibited from directly or indirectly purchasing shares, or making arrangements to purchase shares, outside of the offer.

Although permitted, stakebuilding may limit the ability of the bidder to implement a business combination under state law because of the applicability of state anti-takeover statutes, as discussed in the response to question 1.1. Generally, in "friendly" non-contested takeover transactions, the board of directors of the target company, by resolution, waives application of state anti-takeover laws. However, if the target company is subject to a control share acquisition statute or a business combination statute and the bidder's initial acquisition of shares was not approved in advance by the target company board, as discussed in the response to question 1.1, the bidder will be restricted in its ability to vote its target company shares or to effect a business combination transaction for a period of time.

#### 5.2 Can derivatives be bought outside the offer process?

A bidder or a representative acting on its behalf may not, during the offer period, purchase or arrange to purchase securities that are the subject of the offer or securities that are immediately convertible into, exchangeable for, or exercisable for such securities. A participant in an offer may purchase shares to settle a derivative during the offer

period only if the derivative was purchased prior to the announcement of the offer in the ordinary course of the participant's business, and not to facilitate the offer. A participant in an offer may also convert, exchange or exercise derivatives into securities that are the subject of the offer during the offer period, if the participant owned the derivative before announcement of the offer.

### 5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Pursuant to Section 13(d) of the Exchange Act, any person or group of persons who acquires beneficial ownership of greater than 5% of a class of registered equity securities is required to file with the SEC a statement that discloses certain information relating to such person's ownership of the subject securities. Such statement must be filed on Schedule 13D within 10 days of crossing the 5% ownership threshold. Pursuant to Rule 13d-3 under the Exchange Act, a person or group of persons will be deemed to have beneficial ownership of a security if such person or group of persons, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power or investment power with respect to such security. Voting power includes the power to vote, or to direct the voting of, the security, and investment power includes the power to dispose of, or to direct the disposition of, the security. A person will also be deemed to beneficially own a security if such person has the right to acquire voting or investment power over that security within 60 days through the exercise of any warrant, option or right, conversion of a security or pursuant to the power to revoke a trust or discretionary account.

The purpose of Schedule 13D is to give investors information about the acquiring party, its intentions and the likelihood of a change in corporate control. Schedule 13D requires, among other things, disclosure of the following information: (i) the identity and background of the holder; (ii) the purpose of the acquisition of securities (*e.g.*, to seek control of the target company) and any plans or proposals with respect to the disposition of such securities, the acquisition of additional securities or any extraordinary corporate transactions involving the target company; (iii) the source and amount of funds used in making the purchases; and (iv) the existence of any contract, arrangement, understanding or relationship between the holder and any person with respect to any securities of the target company. Amendments to Schedule 13D must be filed promptly after a material change, which may consist of a change in intent or a change in the percentage of shares owned (a 1% change in ownership is considered material).

Some investors use derivatives and other synthetic positions to gain the economic benefits of ownership of a security without obtaining voting rights, and therefore without requiring disclosure of the investor's position. The Dodd-Frank Act amended Section 13 of the Exchange Act such that, pending SEC rule-making, disclosure of such positions will be required.

Certain persons otherwise required to file a Schedule 13D who beneficially own less than 20% of a class of registered equity securities and do not seek to influence control of the target company may file a short-form Schedule 13G with the SEC in lieu of filing a Schedule 13D.

### 5.4 What are the limitations and consequences?

As discussed in the responses to questions 5.1 and 5.2, from the time of public announcement of a tender/exchange offer until the offer expires, the bidder is prohibited from directly or indirectly

purchasing shares, or making arrangements to purchase shares, outside of the offer.

## 6 Deal Protection

### 6.1 Are break fees available?

Merger agreements typically provide for termination or break fees payable by the target company if the agreement is terminated upon the acceptance of a competing offer or the withdrawal by the target company board of its recommendation of the acquiring company's offer. Termination fees of approximately 3% of the target company's equity value are not uncommon. A larger fee may be justifiable if it is granted at the end of an auction process, the price being paid by the acquiring company is at the high end of the target company banker's "fairness range", or if a lengthy pre-closing period is anticipated. In any event, the size of the break fee should not be so large as to deter a rival bidder. Although rare, it may be possible for multiple fees to be payable by the target company in the event of the successive termination of agreements.

Merger agreements may also include so-called "reverse termination fees" that penalise acquirers who do not complete transactions. These fees were initially included in transactions that were not subject to a financing condition, and were payable solely if the acquirer was unable to secure financing for the transaction. In the event the acquirer otherwise failed to close the transaction for any other reason in breach of its obligations under the merger agreement, the target company would be entitled to seek equitable remedies, such as specific performance, or monetary damages. Subsequently, during the height of the private equity boom, private equity acquirers came to rely on the payment of a reverse termination fee to cap damages to which a target company might otherwise be entitled if the acquirer failed to complete a transaction for any reason and to preclude the availability of equitable remedies such as specific performance. Acquisition agreements that provided for the payment of a reverse termination fee and precluded the target from pursuing all other claims for breach of contract were subject to some criticism because they in effect provided the acquirer with an "option" to acquire the target company, subject only to the payment of the reverse termination fee in the event the acquirer determined not to complete the transaction. In recent years, most acquisition agreements for transactions involving private equity buyers have employed a more stringent reverse termination fee remedy structure that allows the buyer to pay a reverse termination fee and avoid closing the transaction only if the buyer's debt financing is unavailable notwithstanding the buyer's efforts; otherwise, the seller would have the ability to require the buyer to draw upon its financing and close the transaction. Some recent acquisition agreements have included bifurcated reverse termination fees, where a higher fee is payable if the buyer's financing is available but the buyer does not close.

An increased level of antitrust enforcement activities by the United States government has resulted in buyers and sellers spending more time negotiating regulatory provisions in acquisition agreements in order to achieve the appropriate balance of risk sharing between the parties. In several recent transactions with a high degree of regulatory uncertainty, the acquisition agreements included substantial reverse termination fees for failure to obtain regulatory approvals. Substantial fees for failure to obtain regulatory approvals continue to be the exception, and most acquisition agreements have either no fee or a more modest fee payable by the buyer if regulatory approvals are not obtained.



## 6.2 Can the target agree not to shop the company or its assets?

“No shop” covenants are common in merger agreements and are aimed at preventing target companies from seeking other buyers once they have agreed to be acquired by the acquiring company. A typical no shop covenant prohibits the target company from soliciting alternative acquisition proposals from, providing information to, or engaging in discussions with, third party buyers. In light of the target company board’s fiduciary duties, however, such covenants typically contain an exception permitting the target company board to engage in discussions with (and provide information to) a third party that approached the target company on an unsolicited basis if engaging in such discussions is reasonably likely to lead to a superior proposal. A “superior proposal” is often defined as a financially superior, all cash offer for all shares, not subject to financing and reasonably likely to be consummated.

Additionally, merger agreements may include “go shop” provisions, which specifically permit a target company’s board of directors to seek out superior proposals for a specified period of time (typically 30-45 days) after the signing of a definitive merger agreement and provide for a lower break up fee if a superior proposal resulting in an alternative transaction is received during the go shop period. Acquirers may be willing to accept a go shop provision if a target company enters into an agreement on an accelerated timeframe without engaging in a full auction process. Go shop provisions are far more typical in agreements involving private equity buyers, but a target company may also request a go shop provision from a strategic buyer. Strategic buyers frequently reject such requests, as they are unwilling to permit target management to shop an agreed transaction to third parties and proactively share sensitive, confidential information with third parties (including competitors) that may not result in a superior proposal for the target company. The presence of a go shop provision can give target company directors additional comfort that they will be able to seek out the best value reasonably available to shareholders while allowing the target company to lock up a favourable transaction.

## 6.3 Can the target agree to issue shares or sell assets?

Subject to the fiduciary duties of the target company board, deal protection devices, such as the issuance of shares to a “white knight”, are permissible. The target company may also enter into a significant joint venture, sell assets, or agree to buy assets that might cause an antitrust problem for a potential interloper. Such deal protection devices will be reviewed by the Delaware courts under the “enhanced scrutiny” standard (standards in other jurisdictions are often, although not uniformly, similar) described below in the response to question 8.2. As applied to deal protection devices, the enhanced scrutiny standard requires that there be reasonable grounds to believe that an interloping bid would not be in the best interests of the target company and its shareholders, and that the deal protection devices implemented by the target company board are a reasonable response to the perceived threat of an interloping bid.

In transactions involving a change in control, deal protection devices must not preclude the target company board from obtaining the best value reasonably available to shareholders.

## 6.4 What commitments are available to tie up a deal?

In a merger, certain target company shareholders may enter into a voting agreement with the acquiring company in which such shareholders agree to vote in favour of the transaction and against a

competing transaction, or may grant the acquiring company an irrevocable proxy to vote their shares in favour of the transaction and against a competing transaction. Target company shareholders may also enter into arrangements with an acquirer in a tender/exchange offer in which shareholders agree to tender their shares into the offer. Such agreements are common in situations where there are one or more large shareholders (other than institutions), however; use of such arrangements with large shareholders in a target company may limit the ability of the parties to use a short-form merger in Delaware following a tender offer which results in a bidder owning less than 90% of the target’s outstanding shares.

Arrangements that totally lock up a transaction are prohibited under Delaware law. For example, a voting agreement from a majority shareholder combined with a “force the vote” provision (*i.e.*, a requirement in the merger agreement that the shareholder meeting be convened to vote on the transaction even if the target company board withdraws its recommendation) was found by a Delaware court to be impermissible. The court applied the enhanced scrutiny standard described below in the response to question 8.2 to find the combination of such a voting agreement and a force the vote provision to be coercive and preclusive.

Although less common than shareholder voting agreements or agreements by target shareholders to tender their shares into an offer, the target company or certain target company shareholders may enter into a stock option agreement with the bidder to secure the bidder’s right to acquire shares of the target company. The typical stock option agreement with a target company provides for an option to purchase 19.9% of the outstanding shares of the target company at a price equal to the trading price on the day before the transaction was announced. These agreements, however, will likely be invalidated if used to preclude or prematurely end the bidding process. A variation on the stock option is the cash put, in which the acquirer has the right to put the stock option to the seller in the event of a competing bid, at a price equal to the difference between the exercise price of the option and the price of the competing bid.

As described in the response to question 3.2, non-disclosure agreements for a public company target often include a “standstill provision” to prevent an unsolicited approach if negotiations between the target company and the potential acquiring company do not result in a consensual transaction. These standstill provisions often restrict a bidder from making any public or private request to the target board to waive or amend the standstill. Particularly in an auction process, the merger agreement may include a provision restricting the target from waiving or amending the standstill provision with any other bidders. These merger agreement provisions are frequently referred to as “don’t ask, don’t waive” provisions. In a recent Delaware case, the court held that “don’t ask, don’t waive” provisions are not *per se* invalid; however, such provisions should be disclosed to shareholders prior to their approval of a transaction. Because these provisions (particularly when combined with a no-shop covenant described in the response to question 6.2) may limit the competition in an auction, they should be used with care and for value-maximising purpose consistent with directors’ fiduciary duties in order to withstand judicial scrutiny.

## 7 Bidder Protection

### 7.1 What deal conditions are permitted and is their invocation restricted?

The parties have wide latitude to impose conditionality on the

consummation of a merger, and a bidder may make its tender/exchange offer subject to the satisfaction or waiver of objective conditions. In a tender offer or exchange offer, the commitment to accept shares tendered is usually conditioned on the tendering of a minimum number of shares and the receipt of regulatory approvals, and in many situations, the absence of a material adverse change in the business or financial condition of the target company. Conditions to a tender/exchange offer must be objective, and any determination with respect to their satisfaction cannot be subject to the discretion of the bidder. Additional conditions, such as a financing condition or completion of other related transactions, may be imposed by the bidder; however, such conditionality may decrease the credibility of the offer and make the offer more susceptible to an interloping bid. In a merger, conditions often include approval by the target company shareholders, approval of the acquiring company shareholders (if a sufficient number of new shares are being issued), receipt of regulatory approvals, and the absence of a material adverse change in the business or financial condition of the target company and, in some cases, the acquiring company (if the acquiring company's securities are part of the merger consideration).

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## 7.2 What control does the bidder have over the target during the process?

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In a negotiated transaction, the merger agreement will generally include covenants that obligate the target company to operate its business in the ordinary course between signing and closing. Actions outside of the ordinary course, including specific actions set forth in the agreement, may not be taken by the target company without the prior consent of the acquiring company. The merger agreement will generally provide that if the target company fails to materially comply with the "course of conduct" covenants then the acquiring company will not be obligated to close the acquisition.

The merger agreement may also include a material adverse change condition. If there is a material adverse change in the business or financial condition of the target company after the merger agreement is signed but prior to the closing, the acquiring company will not be required to close. In a tender offer or exchange offer, the conditions to the offer will generally mirror the conditions in the merger agreement. As a general matter, it remains difficult for a buyer to prove that a material adverse change has occurred in the business or financial condition of the target company, and to avoid its obligation to close on that basis.

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## 7.3 When does control pass to the bidder?

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In general, antitrust laws in the United States prohibit merging parties from implementing integration plans or otherwise coordinating competitive activities prior to the consummation of an offer or the effectiveness of a merger. Overly restrictive "course of conduct" covenants (as described above in the response to question 7.2) may be deemed as transferring control to the acquiring company prior to the closing, and may therefore be in violation of United States antitrust laws.

The response to question 7.4 discusses additional difficulties a bidder may have in obtaining control of the target company board in the context of a hostile transaction.

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## 7.4 How can the bidder get 100% control?

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Generally, if the bidder obtains a majority of the target company's

shares through a tender offer or exchange offer, then following completion of the offer, the bidder will acquire all of the equity interests in the target company by merging the acquisition subsidiary with the target company. (As indicated in the response to question 2.15, shareholder approval requirements vary depending on the state of incorporation of the target company and the target company's certificate of incorporation.) In most states (including Delaware), if a bidder owns fewer than 90% of the shares of a company following the completion of the offer, then the merger can only be accomplished through a vote of the target company shareholders, unless the parties agree in the merger agreement to permit the bidder to use a "short-form merger" to acquire the remaining target company shares following the completion of a tender offer in the circumstances described below. If a short-form merger is not available, then the bidder will effect a long-form merger to obtain 100% control of the target company. This will require that a proxy statement be prepared, cleared with the SEC and mailed to the target company's shareholders, a process that generally takes two to three months.

Depending on the state of incorporation of the target company, if following the completion of an offer, a bidder owns at least 90% of the shares of the target company, then a short-form merger can be effected by the bidder promptly following consummation of the offer without a vote of the target company shareholders by filing a certificate of merger with the secretary of state in the state in which the surviving company is incorporated. In 2013, Delaware amended its corporate law to permit, in certain circumstances, the use of a short-form merger if the bidder owns a sufficient number of shares to approve the merger (typically a majority of the outstanding shares) following the completion of the offer. Two-step merger agreements (providing for a merger following the completion of a tender offer) may include a "top-up option", which allows an acquirer that has completed an offer to purchase additional shares from the target company to get to the ownership percentage necessary to complete a short-form merger. However, given the availability of short-form mergers following tender offers in which the bidder owns less than 90% of the outstanding target shares, the use of top-up options has decreased significantly.

At the effective time of the merger, all target company shares not held by the acquirer will be cancelled and represent only the right to receive the merger consideration (subject to appraisal rights, if any) and, accordingly, the acquiring company will have 100% control of the target company.

In a hostile transaction, it may be more difficult for the bidder to obtain complete control of the target company, even if such bidder has obtained a majority of the target company voting shares in a tender or exchange offer (which, as discussed below in the response to question 8.2, will not occur if a target company has adopted and not waived its "poison pill"), since a merger (other than a short-form merger) also requires the approval of the board of directors of the target company. It is also unlikely that a hostile bidder can benefit from the new Delaware short-form merger rules, since parties may only avail themselves of the lower short-form merger ownership levels if the merger agreement so provides (and hostile bids are generally made by a bidder directly to shareholders, with no merger agreement).

While most companies have eliminated staggered board structures, if the target company board members have staggered terms (and thus cannot be removed without cause), the bidder will have to wait until the expiration of their respective terms before replacing any board members and obtaining control of the board. (In practice, however, target company directors often agree to resign once change of control has passed to a bidder in a tender offer or exchange offer.)

In addition, depending on the applicability of state anti-takeover statutes and anti-takeover provisions in the target company's certificate of incorporation, the bidder may be precluded from acquiring securities not tendered into the offer or voting such shares for a period of time after the offer. Transactions that receive prior approval of the target company board are generally exempt under state anti-takeover statutes and anti-takeover provisions in the target company's certificate of incorporation.

## 8 Target Defences

### 8.1 Does the board of the target have to publicise discussions?

There is no obligation for the target company board to inform its shareholders if an offer is received. Management and the board of the target company should carefully evaluate in good faith the terms of any *bona fide* unsolicited proposal to determine if the offer is in the best interests of the company and its shareholders. If the target company board decides that it is not in the best interests of the target company and its shareholders to sell the company, there is no obligation to negotiate with the third party or disclose the proposal.

As discussed in the response to question 4.2, discussions between the target company and a potential acquiring company should not trigger disclosure obligations, assuming no circumstances exist which created such an obligation.

### 8.2 What can the target do to resist change of control?

The Delaware courts have established that target company directors may take reasonable steps to resist hostile bids; the actions of the target company board, however, will be subject to the "enhanced scrutiny" of the courts. In circumstances where a threatened change of control is presented and the target company takes defensive action in response, the Delaware courts have imposed an initial burden on the directors to show that: (1) they had reasonable grounds to believe that a threat to corporate policy and effectiveness existed; and (2) that the defensive measures were reasonable in relation to the threat posed. The first element is satisfied by a showing of good faith and reasonable investigation. The second element is satisfied by a showing that the directors' defensive response is neither preclusive nor coercive and is within the range of reasonableness.

Some U.S. companies have implemented shareholder rights plans or "poison pills". These plans are designed to deter coercive takeover tactics and encourage third parties attempting to acquire a company to negotiate with the target company board. Shareholder rights plans generally provide for the dilution of an unsolicited buyer's target company shares upon the occurrence of a triggering event (usually the acquisition of 15% of the target company's shares), unless the acquisition of target company shares by the buyer is approved by the target company board. The target board has the authority to withdraw the rights plan without shareholder approval, giving the board tremendous bargaining power with a hostile acquirer. Shareholder rights plans are not designed to prevent a fair offer for the entire target company, but rather give the target company board time to consider alternative transactions or negotiate better terms with the bidder. When a target company enters into a friendly negotiated merger agreement, it agrees to waive applicability of the poison pill to such transaction. Recent court challenges to shareholder rights plans in Delaware have led to mixed results, with the court confirming the use of a poison pill in the context of protecting corporate assets such as net operating loss

carry-forwards (the use of which may be limited or impaired if a company experiences an "ownership change") and rescinding a shareholder rights plan adopted solely to protect a company's "corporate culture".

Since 2002, the number of companies with poison pills has been steadily declining and today only about 7% of Fortune 500 companies maintain a shareholder rights plan. This trend is a reaction to institutional investors and certain advisory services who are strongly opposed to poison pills that are adopted by a company's board of directors without being submitted to shareholders for their approval. Most large companies have concluded that the best approach is not to adopt or renew an expiring shareholder rights plan, but to wait until circumstances warrant the adoption of such a plan to address a specific threat.

### 8.3 Is it a fair fight?

As described above, in a change of control transaction, deal protection devices may not preclude the target company from obtaining the best value reasonably available to shareholders. Once the target company board reaches a decision to pursue a sale of the target company, then the Delaware courts have concluded that the directors must seek to achieve the transaction that presents the best value reasonably available to the shareholders. If the sale decision is made in the face of an unsolicited acquisition proposal, and the target company is seeking other buyers (particularly if company insiders are participating in one or more buying groups), the courts will likely place even greater scrutiny on the fairness of the process. "Tilting the level playing field" may be allowed, but only if the board determines in good faith that it is in furtherance of the effort to achieve the best transaction reasonably available for shareholders.

## 9 Other Useful Facts

### 9.1 What are the major influences on the success of an acquisition?

An offer has the highest likelihood of success if the offer price is at a substantial premium to the market price and if the offer is subject only to customary conditions. The composition of the shareholder base is also an important factor to consider in assessing the likelihood of success of an offer. A bid for a target company with "activists" in its shareholder base may be more likely to succeed, as activists have become increasingly likely to apply pressure to a target company board to influence the target company's strategy, particularly if the target company's stock has been underperforming.

### 9.2 What happens if it fails?

A bidder is not prohibited from making a new offer for the target company if its initial offer is unsuccessful.

## 10 Updates

### 10.1 Please provide a summary of any relevant new law or practices in M&A in the United States.

The volume of M&A transactions involving U.S. targets was \$1.04 trillion in 2013, an increase of 11.3% from 2012. U.S. deal activity

was the bright spot in an otherwise relatively muted global M&A market in 2013. In light of continuing economic uncertainty and volatility in other markets, U.S. targets were attractive to buyers seeking to deploy cash and take advantage of low interest rates as well as the perceived safety of investing in the United States. Ten of the 15 largest transactions announced worldwide in 2013 involved a U.S. target.

Increasingly, activist shareholders have been seeking to influence the strategic direction of companies, and in many instances they have garnered support for their ideas from mainstream institutional investors. Encouraged by activists, many boards have been reassessing the strategic fit of noncore businesses, often resulting in divestitures or spin-offs.

Improving U.S. economic conditions could boost boardroom confidence levels and encourage M&A activity that boards previously may have put on hold. In addition, shareholders are

playing a more active role as drivers of M&A activity, encouraging boards to consider divestitures, spin-offs and company sales. Corporate cash balances remain at historically high levels, and acquisition financing continues to be available on attractive terms. Equity markets have been stable, and stock prices are at near-record highs, creating attractive acquisition capital for potential corporate acquirers; however, this may often be offset by increased acquisition costs and a decreased number of undervalued targets. Financial sponsors continue to sit on large reserves of capital to be deployed for acquisition-related investment, and private equity portfolio company exits should continue apace in 2014. While political, fiscal and monetary uncertainties persist in the U.S. and levels of M&A activity in recent years have failed to compare with the historic highs of the pre-2008 market, present factors have led to cautious optimism that we will see more robust levels of U.S. M&A activity in 2014.



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Ann Beth Stebbins is a corporate partner in Skadden's New York office concentrating primarily on mergers and acquisitions. Ms. Stebbins spent eight years in the firm's London office and has been involved in a variety of transactions representing acquirers, targets and financial advisers. For example, Ms. Stebbins has represented Apax Partners in its acquisition of Advantage Sales & Marketing and Tivit, a leading technology service provider in Brazil; J.C. Penney in its acquisition of the Liz Claiborne business; Pharmaceutical Product Development Inc. in its sale to The Carlyle Group and Hellman & Friedman; Empresas Polar in its joint venture with PepsiCo and Grupo Embotelladoras Unidas, S.A.B de C.V. forming the exclusive distributor of Pepsi products in Mexico; Deutsche Bank as financial adviser to Vale S.A. in connection with Vale's acquisition of Bunge Ltd.'s fertilizer assets in Brazil; WildBlue Communications, Inc. in its acquisition by Viasat Inc.; Valeant Pharmaceuticals International in the sale of its European subsidiaries to Meda A.B.; Endo Pharmaceuticals Holdings Inc. in its acquisitions of Indevus Pharmaceuticals, Inc. and Penwest Pharmaceuticals; Citibank Banking Corporation in its sale of Citi Technology Services, Ltd. to Wipro Limited; the Special Committee of the board of directors of Golden Telecom, Inc. in connection with Vimpel-Communications' US\$4.2 billion acquisition of Golden Telecom; Basell AF in its \$22.2 billion acquisition of Lyondell Chemical Company; Daimler Chrysler AG in its sale of a minority interest in Chrysler Corporation to Cerberus Capital Management L.P.; Alcatel in its US\$13.4 billion merger with Lucent Technologies Inc.; Gold Fields Limited in its defence against a hostile US\$7 billion bid from Harmony Gold Mining Company Limited; Goldman Sachs, Morgan Stanley and Rothschild as financial advisers to Aventis SA in the US\$68 billion acquisition of Aventis by Sanofi-Synthelabo; Westfield Group in its US\$5 billion acquisition, together with Simon Property Group and the Rouse Company, of the assets of Rodamco North America, N.V.; and Gucci Group N.V. in its successful defence against a hostile takeover attempt by LVMH Moët Hennessy Louis Vuitton S.A.



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Kenneth M. Wolff is a corporate partner based in Skadden's New York office. He concentrates on mergers and acquisitions (including private equity transactions) as well as securities law and corporate governance matters. Mr. Wolff has advised corporate and private equity clients in connection with a wide variety of U.S. and cross-border corporate transactions, including negotiated and contested acquisitions, leveraged buyouts, strategic investments and joint ventures, tender offers, spin-offs and corporate reorganisations. Mr. Wolff also has advised several of the firm's investment banking clients in transactional work and has represented clients in equity and debt offerings. Mr. Wolff's representations and transactions include advising Imerys, a France-based industrial minerals producer, in its \$1.6 billion acquisition of AMCOL International Corporation; Veritas Capital, a private equity firm, in the \$381 million acquisition of Anaren, Inc., a manufacturer of communications equipment, by an affiliate of The Veritas Capital Fund IV, L.P.; Pfizer Inc. in the approximately \$11.9 billion divestiture of its infant nutrition business to Nestlé S.A.; Express Scripts, Inc. in its \$29.1 billion acquisition of Medco Health Solutions, Inc. This transaction was recognised in the 2012 Financial Times "US Innovative Lawyers" report; HCP, Inc., a REIT, in its \$6.1 billion acquisition of the real estate assets of HCR ManorCare, Inc.; Becker Underwood, Inc., a producer of non-pesticide agricultural products, in its \$1 billion acquisition by BASF, a chemical company; Veritas Capital in its approximately \$525 million acquisition of CPI International, Inc., a manufacturer of electronic devices that produce microwaves, radio frequency and power; Apax Partners LLP in its acquisition of a majority stake in Brazilian IT and business process outsourcing company TIVIT Terceirização de Tecnologia e Serviços SA; XTO Energy Inc., an oil and gas explorer and producer, in its approximately \$41 billion acquisition by Exxon Mobil Corporation; PBM Holdings, Inc. and PBM Nutritionals, LLC, a manufacturer and marketer of store brand infant formulas and nutritional products, in its approximately \$808 million acquisition by Perrigo Company; and Express Scripts, Inc. in its \$4.675 billion acquisition of WellPoint Inc.'s NextRx subsidiaries. In 2011, Mr. Wolff was one of only five corporate finance attorneys named in Law360's list of "Rising Stars", and he also was selected by Crain's New York Business in its "40 Under Forty" list. In 2007, Mr. Wolff was named in The New York Times as one of the "next generation of deal makers" under the age of 40.

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