International Comparative Legal Guides

Mergers & Acquisitions 2021

A practical cross-border insight into mergers and acquisitions

15th Edition

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The U.S. 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 U.S. 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 target company's board of directors and officers 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 U.S. 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 from 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 from a supermajority (*e.g.*, 66⅔%) 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 on listed companies, 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?

For a tender offer, if the target company's securities are registered under the Exchange Act (regardless of whether the target company is incorporated in the U.S.), 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 U.S., 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 U.S. may participate, the bidder must comply with general anti-fraud and anti-manipulation rules that apply to all tender offers in the U.S. 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 U.S., if a bidder is offering securities as consideration in an exchange offer (*i.e.*, a tender offer in which the consideration consists, in whole or in part, of securities) in the U.S., the bidder must register the securities with the SEC, unless an exemption from registration is available. Following the registration of securities in the U.S., 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 U.S., 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 and officers 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.

1.3 Are there special rules for foreign buyers?

Section 721 of the Defense Production Act of 1950, as amended, gives the Committee on Foreign Investment in the U.S. (CFIUS) broad authority to identify and mitigate risks to U.S. national security arising from foreign investments in U.S. businesses. Industries viewed as particularly sensitive by CFIUS include defence, aerospace, utilities, transportation, computer and electronics manufacturing, scientific and technical services, information technology and telecommunications, with increasing focus on data privacy, economic espionage and intellectual property with potential military applications. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded CFIUS's jurisdiction over previously uncovered transactions, most notably over certain non-controlling transactions, and codified certain CFIUS regulations and practices.

New regulations include mandatory short-form filings for certain foreign government-related transactions and certain transactions involving critical technology. The final tranche of regulations implementing FIRRMA came into effect in October 2020, and define when parties are required to file in connection with transactions that have a nexus to critical technology, subject to export controls. Certain investors from Australia, Canada and the United Kingdom are exempt from the mandatory filing requirements and from CFIUS's expanded authority to review non-controlling minority investments and acquisitions of certain U.S. real estate interests. The CFIUS review and investigation process is described in more detail in the responses to questions 2.13 and 2.14.

1.4 Are there any special sector-related rules?

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.

1.5 What are the principal sources of liability?

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, an exchange 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 that 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, 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. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the SEC has extraterritorial reach 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 and officers of the target company may have liability to the target company shareholders if the directors and officers fail to properly exercise their fiduciary duties when responding to an offer. Recent decisions from the Delaware courts reaffirm that disinterested and independent directors who conduct themselves in good faith should not face liability for breach of fiduciary duty claims. In particular, where the company's certificate of incorporation includes an exculpation provision, directors do not face liability for money damages for breaches of the duty of care, leaving only claims for breach of the duty of loyalty, which are more difficult to prove. On the other hand, officers of Delaware companies may have claims brought against them for breach of the duty of care, even where director liability is exculpated. Like directors, corporate officers owe fiduciary duties to the company and its shareholders but, unlike directors, officers do not have the benefit of exculpation for breaches of the duty of care. As a result, even in circumstances where claims are dismissed against directors, officers who play a role in a challenged transaction – for example, by preparing the proxy statement – may face liability if they perform their duties in a grossly negligent manner, the standard necessary to establish a breach of the duty of care.

As discussed in the responses to questions 3.3 and 8.1, 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 discussed more fully in the response to question 3.3, the deferential "business judgment rule" is applicable in going-private transactions where certain procedural safeguards are employed.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 and related rules (Hart-Scott-Rodino Act) imposes notice requirements and waiting periods in connection with the acquisition of voting securities or assets in excess of certain thresholds, as described in more detail in the response to question 2.14. Failure to comply with the Hart-Scott-Rodino Act may result in a monetary penalty of $43,280 per day.

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 comprise 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 also permits, 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 identifying potential bidders, 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, including in situations where the board has determined that the first financial adviser's relationships may present potential conflicts of interest. 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 by the target of the acquiring company's business is customary when the acquiring company is offering its securities as all or a significant 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 conduct of investment banking advisers in M&A transactions is often subject to scrutiny by Delaware courts, particularly in situations where a financial 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. In one notable case, the Delaware Supreme Court upheld the Court of Chancery's finding that a sell-side financial adviser aided and abetted the target board's violation of fiduciary duties by, among other things, failing to disclose conflicts arising from the financial adviser's attempt to be part of the buyer's financing group. A target board should take steps to design a sale process that identifies and mitigates any potential adviser conflicts, and provides appropriate oversight over advisers during a sale process.

2.3 How long does it take?

The typical timeline for the acquisition of a public company 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 review by CFIUS over transactions that could result in foreign control of a U.S. business, or any extension of the waiting period under the Hart-Scott-Rodino Act, each 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 10 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, though the SEC has provided guidance that this extension is not required in the context of a "two-step" merger transaction of the type described in response to question 7.4. 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	■ Receive information from target. ■ Due diligence review by bidder. ■ Valuation analysis by financial advisors. ■ Draft merger agreement providing for tender offer. ■ Negotiate merger agreement providing for tender offer.
Week 3	■ Boards approve merger agreement. ■ Merger agreement executed. ■ Transaction announced. ■ Bidder drafts and files tender offer statement on Schedule TO. ■ Mail offer documents to shareholders of target company. ■ 20-business-day offer period commences. ■ Target company drafts and files recommendation statement on Schedule 14D-9.
Week 7	■ Offer period expires. ■ Bidder promptly pays for target company shares tendered. ■ 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 merger certificate; if not, target company calls shareholder meeting to approve the merger (see merger timeline and response to question 7.4 below).

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 with securities listed on the New York Stock Exchange (NYSE) or Nasdaq. The other principal U.S. securities exchanges generally have shareholder approval rules similar to that of the NYSE and Nasdaq.) The NYSE and Nasdaq do not apply the 20% issuance shareholder approval rule to foreign private issuers. In addition, a bidder will be required under the NYSE and Nasdaq rules to obtain shareholder approval for the issuance of shares if the issuance is to certain related parties and exceeds specified ownership thresholds (stock exchange-related party shareholder approval requirements have been relaxed until March 31, 2021, to facilitate capital raising following the onset of the COVID-19 pandemic). This may be relevant if a bidder issues securities to a related party to fund a portion of the purchase price. 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-listed bidder representing more than 20% of the bidder's outstanding shares:

Date	Exchange Offer
Weeks 1–2	■ Exchange information with target. ■ Due diligence review by target and bidder. ■ Valuation analysis by financial advisors. ■ Draft merger agreement providing for exchange offer.
Week 3	■ Negotiate merger agreement providing for exchange offer.
Week 4	■ Boards approve merger agreement. ■ Merger agreement executed. ■ Transaction announced.
Weeks 5–7	■ 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.
Week 8	■ File exchange offer documents and proxy statement with the SEC (review period commences; typically 30 days).

Date	Exchange Offer
Weeks 13–15	■ SEC comments received on exchange offer documents and proxy statement. ■ Respond to SEC comments.
Week 16	■ SEC declares effective registration statement included in exchange offer documents and clears proxy statement. ■ Bidder files tender offer statement on Schedule TO. ■ Mail exchange offer documents (including prospectus forming part of the registration statement) and proxy statement to shareholders of target company and bidder. ■ 20-business-day offer period commences. ■ Target company files recommendation statement on Schedule 14D-9.

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. In recent years, the SEC has often declined to comment on proxy statements for cash mergers, thereby shortening the timeline for an all-cash merger by two to four weeks. 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 (or if shares are to be issued to a related party in excess of specified thresholds) 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	■ Exchange information with target. ■ Due diligence review. ■ Valuation analysis by financial advisors. ■ Draft merger agreement.
Week 3	■ Negotiate merger agreement.
Week 4	■ Boards approve merger agreement. ■ Merger agreement executed. ■ Transaction announced.
Weeks 5–7	■ Draft proxy statement/registration statement (including prospectus).
Week 8	■ File proxy statement/registration statement (including prospectus) with the SEC (review period commences; typically 30 days).
Weeks 13–15	■ SEC comments received on proxy statement/registration statement (including prospectus). ■ Respond to SEC comments.
Week 16	■ SEC declares effective registration statement. ■ Proxy statement/prospectus mailed to shareholders of target company and acquiring company.
Week 20	■ Meetings of target shareholders and acquiring company shareholders. ■ Closing (assuming no other conditions to be satisfied). ■ Merger effective when merger certificate is filed with Secretary of State (or such later date specified therein).

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

Date	Merger – Cash Consideration (assuming SEC Review of Proxy Statement)
Weeks 1–2	■ Due diligence review by bidder. ■ Valuation analysis by financial advisors. ■ Draft merger agreement.
Week 3	■ Negotiate merger agreement.
Week 4	■ Boards approve merger agreement. ■ Merger agreement executed. ■ Transaction announced.
Weeks 5–7	■ Draft proxy statement.
Week 8	■ File proxy statement with the SEC.
Weeks 13–14	■ SEC comments received on proxy statement. ■ Respond to SEC comments.
Week 15	■ SEC clears proxy statement. ■ Proxy statement mailed to target company shareholders.
Week 19	■ Meeting of target shareholders. ■ Closing (assuming no other conditions to be satisfied). ■ Merger effective when merger certificate is filed with Secretary of State (or such later date specified therein).

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 and regulatory conditions, including 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, and any regulatory conditions, including 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 (or if shares are to be issued to a related party in excess of specified thresholds) 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 (or if shares are to be issued to a related party in excess of specified thresholds) 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 usually are conditions to the closing of the merger.

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

Tender/exchange offer: 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 U.S. 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 many 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). In Delaware, appraisal rights are not available if target company shareholders receive only securities as consideration for their target company shares, and such securities are either listed on a national securities exchange or are held by more than 2,000 shareholders. Appraisal is generally available if the target company shareholders receive all cash or a combination of cash and securities as merger consideration. 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. Dissenting shareholders who seek appraisal are entitled to receive interest at a statutory rate that accrues on the entire amount of the merger consideration, regardless of whether the dissenting shareholder ultimately prevails on its appraisal claim; however, acquirers may choose to prepay the appraisal amount so as to reduce the statutory interest payable on such amount (5% over the Federal Reserve discount rate and generally compounded quarterly). In several recent appraisal cases, the Delaware courts have held that deal price is the most reliable indicator of fair value, absent deficiencies in the deal process.

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. generally accepted accounting principles (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.

As noted in the response to question 2.5, shareholders of a Delaware target company can bring appraisal claims if the consideration consists of all cash or a mix of cash and securities, under the circumstances described above.

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, a tender offer must be extended to all holders of securities of the same class, and the highest consideration paid to one holder in the tender offer must be paid to all target company shareholders. When the tender offer is for fewer than 100% of the securities of a class and the tender offer is oversubscribed, 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 tender 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 tender 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 exchange them for shares in 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 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 transaction or retention bonuses that become payable to such employees following the completion of the acquisition. The acquiring company may also enter into new compensation arrangements with key employees that become effective upon closing of the acquisition. In some circumstances (for example, a going-private transaction with a private equity buyer involving participation by the target management), the target board may limit the negotiating role of target company management and prohibit discussions between the target company management and the acquiror with respect to post-closing equity ownership, incentive plans and employment arrangements until after a definitive agreement is executed or its principal economic terms have been agreed.

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. Public companies subject to the federal proxy rules are required to provide 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, a target company soliciting proxies in connection with a merger or similar transaction is required 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 trustees and other stakeholders play?

In general, there is no requirement in the U.S. 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 "no-shop" provisions subject to a fiduciary out (as described in the response to question 6.2), provisions allocating antitrust and other regulatory risks (as described in the last paragraph in the response to question 6.1), and conditions to closing (as described in the response to question 7.1). In addition, agreements to acquire public company targets contain representations and warranties that typically are subject to broad materiality and "material adverse effect" 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 joint proxy statement/registration statement where the consideration includes securities of the acquiring company are described in the 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 to 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 (MD&A) of the financial condition and results of operations 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.

The proxy statement will also include the target company board's 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.

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 registration statement, the report must be disclosed.

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 company 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 joint proxy statement/registration statement 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, tender/exchange offer documents and proxy statements are required to include detailed information 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. 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 a hostile tender or exchange offer, the acquiring company often also engages, and pays a fee to, a public relations firm.

If securities are issued as consideration, the issuer will pay to the SEC a registration fee, which is $109.10 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). In July 2020, CFIUS implemented filing fees equal to 0.15% of transaction value, not to exceed $300,000.

In the event of an unsuccessful transaction, break or termination fees may be payable under certain circumstances. Break fees are discussed in the response to question 6.1.

2.14 What consents are needed?

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 the DOJ and the statutory waiting period has expired. In a cash tender offer, a 15-day waiting period commences 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 of securities 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. Such compliance may take four to six months or longer. The rules also provide for early termination of the initial waiting period if during the initial waiting period the FTC and the 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 the DOJ, when: (1) both the "size of person" and the "size of transaction" tests are met; or (2) the "large transaction" test is met, regardless of the outcome of the size of person test. The FTC and the DOJ review the thresholds for these tests on an annual basis. For 2021, the size of person test is met if one party has total assets or annual net sales of at least $18.4 million, and the other party has total assets or annual net sales of at least $184 million. 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 $92 million. 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 $368 million.

Under the "investment only" exception to the Hart-Scott-Rodino Act and related rules, an entity can buy up to 10% of the shares of an issuer without making a filing under the Hart-Scott-Rodino Act if it does so solely for the purpose of investment with: "No intention of participating in the formulation, determination or direction of the basic business decisions of the issuer."

The DOJ and the FTC view the "investment only" exception as a narrow exception to the Hart-Scott-Rodino Act, and have brought charges against investors who have failed to make necessary pre-merger notification filings in circumstances where their conduct is alleged to be inconsistent with an investment intent (*i.e.*, no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer).

The Defense Production Act of 1950, as amended by FIRRMA, authorises CFIUS to identify and mitigate risks to U.S. national security arising from foreign investments in U.S. businesses, including those undertaken through mergers and tender offers. In rare instances, when an identified risk to national security cannot be mitigated and the parties are unwilling to abandon the transaction voluntarily, CFIUS may recommend that the President of the United States stop a transaction, or in the case of a transaction that has already closed, force the divestment of foreign interests in the U.S. business. As part of its deliberations, CFIUS is also authorised to investigate whether a prospective foreign acquirer has had dealings with a sanctioned country or entity, and whether products, technology or funds from an acquired U.S. business might be transferred to the sanctioned country as a result of the acquisition.

CFIUS is authorised to review acquisitions of real estate that may be sensitive for national security reasons, and certain non-controlling transactions in which a foreign person acquires a minority interest in a U.S. business that involves critical infrastructure, critical technologies or sensitive personal data of U.S. citizens. In the final tranche of regulations implementing FIRRMA, CFIUS defined when parties are required to file in connection with transactions that have a nexus to critical technologies subject to export controls.

CFIUS operates under a statutory timeframe that includes a 45-day initial review period and, when necessary, a second-stage 45-day investigation period, with a potential 15-day extension of the second-stage investigation phase in extraordinary circumstances. CFIUS may also ask the parties to "pull and refile", resulting in additional 45-day investigation phases. When parties stipulate that a transaction is subject to CFIUS jurisdiction, CFIUS will be required to provide comments on the draft CFIUS notice and accept the formal notice within 10 business days after submission. Foreign investors who believe they are pursuing less sensitive transactions will be permitted to submit a shorter declaration to potentially gain a faster response from CFIUS. Following submission of the new declaration, CFIUS will have 30 days to respond, either by clearing the transaction, seeking a full notice of the transaction or initiating a unilateral review of the transaction if the parties are uncooperative. Certain covered transactions will trigger the filing of mandatory declarations at least 45 days prior to closing. Declarations will be required for: (1) any covered transaction that results in a foreign government having a "substantial interest" in a Technology, Infrastructure, or Data (TID) U.S. business; and (2) certain non-controlling or controlling investments in U.S. businesses that produce, design, test, manufacture, fabricate or develop critical technologies subject to export controls.

Certain investors from Australia, Canada and the United Kingdom are exempt from the mandatory filing requirements and from CFIUS's expanded authority to review non-controlling minority investments and acquisitions of certain U.S. real estate interests, but those investors remain subject to CFIUS's "traditional" jurisdiction for transactions that would result in their control of a U.S. business. Acquisitions by investment funds with foreign limited partners are not subject to CFIUS review if certain conditions are met, including management of the fund by a U.S. general partner and limited governance by and information rights for the foreign limited partners. CFIUS actions and decisions are subject to judicial review; however, presidential actions may only be challenged on constitutional grounds.

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 initial review period. Transactions in the information and communications sectors and transactions involving Chinese investors have received particular attention from CFIUS. The complexity of the acquired businesses and the data privacy and cybersecurity issues implicated by their technologies and services are a likely contributor to the number of cases requiring second-stage investigations. Before recommending a transaction, CFIUS may require parties to mitigate national security concerns identified during the review process. Prospective buyers and sellers of sensitive businesses should be aware of the options available to allocate risk, including mitigation covenants, pre-emptive divestitures and reverse termination fees.

2.15 What levels of approval or acceptance are needed?

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. These 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.

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

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 8.1, 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 significant 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. As discussed in the response to question 8.1, a target board has broad latitude to take defensive action in opposition to an unsolicited offer, so long as the board's conduct is reasonable. 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. 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 (commonly referred to as "Revlon duties"). Except in circumstances described below, 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 8.1 below. If a change-of-control transaction is approved by a majority of fully informed and uncoerced shareholders, the transaction would be reviewed under the deferential "business judgment rule" instead of the enhanced scrutiny standard, essentially extinguishing fiduciary duty claims and leaving only claims for waste. This provides a potentially powerful litigation tool to corporate directors and officers, so long as shareholders are fully informed when considering a transaction.

In a going-private transaction (as described in the response to question 1.5), 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 that 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's 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 deferential "business judgment rule" (as opposed to the far more stringent "entire fairness" standard) will be the applicable standard for reviewing a controlling shareholder going-private transaction if, from the start of substantive economic negotiations, the transaction is: (i) negotiated and approved by an attentive special committee comprising independent directors, which is fully empowered to decline the transaction and to retain its own financial and legal advisers; and (ii) conditioned on the uncoerced, fully informed and non-waivable approval of a majority of the unaffiliated minority shareholders. If such practices are not followed by the target board in a controlling shareholder going-private transaction from the start of substantive economic negotiations, "entire fairness" will be the applicable standard of review. Under the "entire fairness" standard, the directors bear the burden of proving the entire fairness of their actions, as to both dealing and price. 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 if 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 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, including any actions the target is taking in response to an unsolicited bid. Failure to disclose actions taken in response to an unsolicited bid could result in an SEC enforcement action and fines.

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 by-laws, 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. Although most companies have eliminated staggered boards, the target company's certificate of incorporation may provide for staggered director terms (typically in three classes) and 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 special meeting of the target company's shareholders or at a single annual meeting.

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, https://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 registered 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 is also 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 publicly 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. Materiality is determined by applying a probability/magnitude test to assess the likelihood of a transaction and its potential impact on the company. 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 prompt 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 negotiations regarding 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 an announcement required and what will become public?

There is no statutory trigger in the U.S. 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, including projections provided to the adviser by the target company for use in its analysis. 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 is 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.

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. In addition, if a potential bidder has taken a substantial step or steps to commence a tender offer, then any person in possession of material non-public information about the tender offer is prohibited from trading in the target company's stock.

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. There are certain exceptions to these restrictions. For example, a bidder or its representative may purchase shares to settle certain derivative securities during the offer period if the derivative securities were purchased prior to the announcement of the offer in the ordinary course of business, and not to facilitate the offer. A bidder or its representative may also convert, exchange or exercise a security into securities that are the subject of the offer during the offer period, if the security was owned 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 giving the SEC authority to broaden the definition of beneficial ownership, as well as to shorten the reporting window for filing on Schedule 13D; however, the SEC, to date, has not adopted new rules addressing these perceived shortfalls in the existing beneficial ownership reporting regime.

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 (either in response to a superior proposal or where an intervening event is deemed to have occurred). 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. In a relatively small number of deals, the merger agreement may include a "naked no vote" termination fee, meaning a termination fee that is payable if the target shareholders vote down a transaction in the absence of the target company board withdrawing its recommendation. The termination fee in this scenario would typically be lower than termination fees payable in the circumstances described above (not more than 1% of the target company equity value), so as to avoid any perception of coercion.

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 involving private equity buyers that were not subject to a financing condition, and were payable solely if the buyer 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. Private equity acquirers have come 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 fails to complete a transaction and to limit the availability of equitable remedies such as specific performance. In recent years, most acquisition agreements for transactions involving private equity buyers have employed a 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.

An increased level of antitrust enforcement activities by the U.S. and foreign governments in recent years 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, including reverse termination fees and ticking fees in transactions with a high degree of regulatory uncertainty. 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 result in a superior proposal. A "superior proposal" is often defined as a financially superior offer for a majority of shares, reasonably likely to be consummated. No-shop covenants generally permit the target company board to terminate the merger agreement or change its recommendation if the failure to do so would be reasonably likely to violate the fiduciary duties of the target company board.

Additionally, merger agreements occasionally include "go-shop" provisions, which specifically permit a target company's board of directors to seek 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 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 more common 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 find the best value reasonably available to shareholders (*i.e.*, satisfying the Revlon duties described in response to question 3.3) 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 8.1. 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's shareholders an irrevocable proxy to vote their shares in favour of the transaction and against any 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 involving one or more large shareholders (other than institutions).

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 8.1 to find the combination of such a voting agreement and a force-the-vote provision to be coercive and preclusive.

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. To the extent these standstill provisions do not automatically fall away on announcement of entry into a competing transaction (which is common), such non-disclosure agreements sometimes restrict a bidder from making any public (and sometimes 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, and 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 a 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 effect 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 effect on 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).

As noted above, the acquiring company often negotiates a material adverse effect condition in the merger agreement. Accordingly, if an event affects the target company between the signing of the agreement and the closing of the merger or tender offer, and such event 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. As a general matter, it remains difficult for a buyer to prove that a material adverse effect has occurred in the business or financial condition of the target company, and to terminate a merger agreement or an offer on that basis. In October 2018, the Delaware Court of Chancery issued the first opinion in Delaware (subsequently affirmed by the Delaware Supreme Court) finding, after trial, that the acquirer in a merger transaction could appropriately terminate the merger agreement because of a material adverse effect on the target company. In its analysis, the court noted that determining whether a material adverse effect has occurred is a fact-specific inquiry, and grounded its finding on the fact that the decline in the target's business was durationally significant with no sign of abating, and could not be attributed to industry decline or other exceptions to the definition of material adverse effect included in the merger agreement. Acquiring companies in several transactions signed (but not closed) prior to the onset of the COVID-19 pandemic, refused to close and asserted that the pandemic constituted a material adverse effect on the business of the target company. Many of the disputes arising from these transactions have been settled. In December 2020, the Delaware Court of Chancery rendered its first decision in a case arising out of the failure of an acquiring company to close following the onset of the pandemic, and ruled that, under the merger agreement in question, the pandemic was not a material adverse effect, because the definition of "material adverse effect" in the merger agreement excluded "calamities".

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

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 "conduct of business" covenants then the acquiring company will not be obligated to close the acquisition. In the post-COVID-19 failure to close case described above in the response to question 7.1, the acquiring company also asserted that actions taken by the target company in response to the pandemic were outside of the target company's ordinary course of business. The Delaware Court of Chancery ruled that the target company breached the ordinary course of business covenant, and the acquiring company was not obligated to close the transaction.

The merger agreement may also include a material adverse effect condition. If there is a material adverse effect on 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 discussed in response to question 7.1, it remains difficult for a buyer to prove that a material adverse effect has occurred on the business or financial condition of the target company, and to avoid its obligation to close on that basis.

7.3 When does control pass to the bidder?

In general, antitrust laws in the U.S. 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 "conduct of business" 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 U.S. 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.

7.4 How can the bidder get 100% control?

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.)

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. Delaware permits, 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, since the adoption of statutes, like Delaware's, permitting 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.

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.

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 8.1, 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 accomplish a short-form merger at the lower ownership levels described above in the second paragraph of this response because such short-form mergers are only available 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 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) 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 extreme dilution of an unsolicited buyer's target company shares upon the occurrence of a triggering event (usually the acquisition of 10% or 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 company board has the authority to adopt and 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 to give the target company board time to consider alternative transactions or negotiate better terms with the bidder. When a target company enters into a negotiated merger agreement, it agrees to waive applicability of the poison pill to such transaction.

The number of companies with poison pills had steadily declined in the last decade, with less than 2% of S&P 500 companies maintaining a shareholder rights plan. Institutional investors and certain proxy advisory services 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 a shareholder rights plan, but to wait until circumstances warrant the adoption of such a plan to address a specific threat. The months following the onset of the COVID-19 pandemic saw a significant uptick in the adoption of shareholder rights plans by companies in the sectors most affected by the market disruptions and volatility resulting from the pandemic. Influential proxy advisory services issued guidance for the 2020 proxy season, which gave companies more latitude to implement short-term rights plans (less than 12 months in duration) with a reasonable triggering threshold.

8.2 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 value reasonably available for shareholders. In a recent case, the Delaware Court of Chancery refused to dismiss a claim that the CEO, intending to tip the playing field in favour of his preferred private equity buyer, failed to disclose his conflicts of interest to the target company board.

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 may be more 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 your jurisdiction.

"A Tale of Two Halves" is the best way to describe M&A activity in the U.S. in 2020, with robust deal activity in the second half of the year making up for a virtual standstill in dealmaking during the second quarter of the year following the onset of the COVID-19 pandemic. M&A activity in the second quarter of the year shrunk 65% by value compared to the first quarter of 2020. Deal volume surged in the third quarter and continued into the fourth quarter of 2020. In fact, deal volume in the fourth quarter of the year was the highest on record, signalling momentum for M&A activity going into 2021. Despite the recovery in the second half of the year, M&A activity for the 2020 year still experienced a decline of 21% by deal value when compared to 2019.

The technology and telecommunications sectors were the most active sectors for U.S. M&A activity in 2020, with 1,289 deals announced with a value of $385.6 billion, representing an increase in value by 57% when compared to 2019. These sectors also proved to be COVID-resistant in 2020, as businesses performed well during the pandemic and valuations remained high. The largest tech deal announced in 2020 was the $35.6 billion acquisition of Xilinx by Advanced Micro Devices. We anticipate that the technology sector will continue to drive M&A activity as companies seek to incorporate technology into their businesses.

COVID-19 severely impacted numerous industries, most notably hospitality, events, travel and retail. Since the onset of the pandemic, more than 250 companies with aggregate liabilities in excess of $200 million sought bankruptcy protection in the U.S. The swell of corporate bankruptcies has led to a boom in M&A involving distressed targets. We expect this trend to continue into 2021, as companies struggle to survive the uncertainties associated with the pandemic.

The year 2020 could be referred to as the "Year of the SPAC" – special purpose acquisition companies. SPACs raise money through initial public offerings (IPOs), and use the funds, usually coupled with a PIPE (private investment in public equity), to complete a subsequent business combination within a specified time period – usually 24 months. SPAC IPOs raised $82.4 billion in 2020, more than six times the amount raised in 2019. We anticipate a significant increase in SPAC business combinations in 2021, as recently launched SPACs seek investment opportunities. We also anticipate more activity with private equity portfolio companies, as private equity sponsors explore SPAC business combinations as an alternative exit structure to the more traditional IPO.

We expect 2021 to be a strong year for M&A activity in the U.S. With a new administration and the rollout of a vaccine for COVID-19, we expect to see a release of pent-up demand from buyers who were waiting for more visibility on some of the uncertainties that exist in the global economic and political environment. We also expect to see private equity sponsors as active participants in the M&A market, as they seek opportunities created by the disruption resulting from the COVID-19 pandemic. Activists, who largely sat on the sidelines during 2020, may be less reluctant to wage campaigns this year against companies that have not adjusted to business conditions in a post-COVID world. These campaigns may include business combination transactions for weaker companies that may not have the wherewithal to survive on a stand-alone basis.

We will be keeping our eye on the priorities of the Biden administration – in particular, any changes in the level of scrutiny of transactions by regulators, including the DOJ and FTC on the antitrust front and CFIUS for national security reviews. While the focus to date has been on the tech sector, companies in other industries that control data collection and distribution are likely to draw regulatory attention that could slow the timeline of M&A transactions and increase deal closing risk.

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