Global Public M&A Guide - United States

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*This content was last reviewed around June 2022.*

# Overview

## 1. Overview

[Last updated: 1 June 2022, unless otherwise noted]

**1.1 Background**

The US public merger and acquisition market remains one of the largest and most active public M&A markets in the world. Hundreds of public M&A transactions occur each year, ranging from acquisitions of smaller reporting companies for less than US$ 100 million to mega-mergers of global multinational entities with consideration in excess of US$ 5 billion. Frequent activity appears across a variety of industry sectors, including businesses from the pharmaceutical and healthcare sector (which has been particularly active) to the manufacturing, energy, food and beverage, technology and service business sectors.

The most common structures for public deals in the US are tender offers and mergers. As a result of existing detailed market practices and securities disclosure regulations, US public M&A transactions often require preparation of detailed disclosure documents describing the proposed transaction and any shareholder votes required to effect the transaction. Even when shareholder votes are required, in the absence of extensive antitrust clearance or other regulatory requirements, transactions can close quickly and expediently for both US and non-US acquirers.

This chapter discusses legal, regulatory, timing and practical considerations to assist with consideration of a US public M&A transaction.

**1.2 Scope; foreign private issuers**

The discussion in this chapter concerns acquisitions of publicly held target companies organized under the law of one of the states of the United States. It includes a discussion of certain issues under the corporate and case law of Delaware, the jurisdiction of incorporation of a majority of US public companies. There are also many non-US companies that are listed on US stock exchanges. Such companies are referred to as foreign private issuers or "FPIs" (although it should be noted that not all non-US companies qualify as "foreign private issuers"). Many, but not all, of the US federal securities laws and rules that regulate acquisitions of listed US companies also apply to acquisitions of US-listed FPIs. In some cases, however, acquisitions of US-listed FPIs are either exempt from such securities laws and rules or are governed by rules dealing specifically with FPIs.

# General Legal Framework

## 2. General Legal Framework

[Last updated: 1 June 2022, unless otherwise noted]

**2.1 Securities and corporate regulation**

The acquisition of a company listed on a US securities exchange (generally referred to in the US as a public company) requires compliance with United States federal laws and, for acquisitions of United States domestic companies, state laws. While this chapter discusses both friendly acquisitions and hostile bids, the primary focus is non-hostile transactions. However, the legal and regulatory framework discussed below applies equally to friendly and hostile transactions.

Federal securities laws – US federal securities laws generally govern the information to be provided to the target company's shareholders and procedures mandated by those laws that must be followed in an acquisition transaction. The specific securities laws applicable to the transaction will depend on the structure of the transaction, the place of organization of the target company, and the nature of the merger consideration. Specifically:

SEC beneficial ownership disclosure rules – Section 13(d) of the United States Securities and Exchange Act of 1934 (the "Exchange Act") and Regulation 13D-G of the Securities and Exchange Commission ("SEC") under the Exchange Act require disclosure upon acquisition of "beneficial ownership" of more than 5% of the voting equity securities of a company listed on a US stock exchange or registered under the Exchange Act. ("Registration" under the Exchange Act is the process by which a company becomes subject to periodic reporting obligations under the Exchange Act. Any class of security of a company that is listed on a US national stock exchange is also registered under the Exchange Act, but unlisted companies must also register under the Exchange Act if they meet certain criteria for size and number of shareholders of record.) Disclosure requirements under Section 13(d) and Regulation 13D-G are discussed in greater detail in "3. Before a Public Takeover Bid" below.

In addition, Section 16 of the Exchange Act, and the SEC rules promulgated thereunder, provide for reporting requirements and "short-swing" profit disgorgement for beneficial owners of more than 10% of the outstanding voting securities of a US public company.

SEC tender offer rules – Section 14(d) of the Exchange Act and SEC Regulations 14D and 14E under the Exchange Act regulate the information to be provided to target company shareholders in tender offers (takeover bids) at both the preliminary communication and announcement stage and in connection with the actual offer, as well as the procedure for conducting a tender offer. These rules also apply to exchange offers (in which all or a part of the acquisition consideration consists of securities). References in this chapter to tender offers generally apply equally to exchange offers. A summary of the principal procedural rules for conducting a tender offer pursuant to the SEC tender offer rules is set forth in "4. Effecting a Takeover" below. As noted below, US securities registration requirements will generally also apply to an acquisition effected pursuant to an exchange offer.

SEC proxy rules – Other acquisition structures, such as statutory mergers, consolidations, and asset sales followed by dissolution of the target company and distribution of the consideration to the target company's shareholders, require a vote or consent of the target company's shareholders to authorize the transaction. In these cases, the target company will need to solicit such approval by means of a formal proxy solicitation. When directed to the shareholders of US domestic companies, these solicitations are governed by the SEC's proxy rules, which include Section 14 of the Exchange Act and Regulations 14A and 14C. The proxy rules prescribe extensive disclosure requirements for such solicitations.

SEC going private rule – Business combination transactions by an issuer or between an issuer and an affiliate (controlling person) that have a reasonable likelihood or purpose of causing the issuer's securities to be delisted, to cease to be registered under the Exchange Act or to cease being subject to periodic reporting requirements under the Exchange Act are referred to as "going private" or "Rule 13e-3" transactions. Going private transactions are closely examined by the SEC because, among other reasons, they have the potential for abuse or coercive treatment of public shareholders by insiders who are likely to have access to non-public information, and such transactions may involve the elimination of public ownership at propitious times by management or controlling shareholders (See "8. Delisting").

SEC rules governing public offerings of securities – SEC Rule 145 under the United States Securities Act of 1933 (the "Securities Act") provides that submission to target company shareholders for a vote of a plan or agreement for a merger, consolidation, transfer of assets and certain other transactions, in which the consideration constitutes, in whole or in part, securities of another person that will be issued or distributed to the target company's shareholders, constitutes an offer or sale of a security under the Securities Act. The securities offered in such transactions, as well as securities offered by an acquirer in an exchange offer made directly to target company shareholders, must be registered under the Securities Act unless an exemption from such registration is available for the transaction. A detailed discussion of Securities Act registration requirements is beyond the scope of this chapter. It may be noted, however, that under the applicable SEC rules, the same document that solicits the votes or other action of target company shareholders in such transactions, i.e., the target company's proxy statement for a merger or consolidation or the offer to exchange distributed by the acquirer to target company shareholders, also serves as the prospectus for the acquirer's shares to be issued as the transaction consideration. If the target company in a business combination is a non-US company and otherwise meets the criteria for "foreign private issuer" status, certain exemptions from Securities Act registration requirements may be available. These are discussed in the Addendum below

State corporate law – The parties to a merger or other negotiated business combination generally have freedom of contract to establish the terms of the transaction, subject to any limitations or requirements applicable to business combinations contained in a target company's organizational documents. State corporate laws and judicial decisions under those laws govern:

procedural matters, e.g., notice, timing and voting requirements, for seeking shareholder approval under the state merger statute or in effecting a dissolution of a seller following an asset sale;

minority shareholder squeeze-outs;

in all-cash acquisitions and certain other acquisitions, the rights of shareholders who do not vote in favor of a merger to receive the judicially determined value of their shares in lieu of the merger consideration, and the procedures for doing so (generally referred to as "dissenters' rights" or "appraisal rights"); and

the duties of members of the board of directors of the target company in the context of a merger or other business combination. These duties are discussed further in "4. Effecting a Takeover – Fiduciary Duties" below.

**2.2 Other regulatory requirements - Hart-Scott-Rodino**

Apart from industry-specific requirements and restrictions noted in 2.3 below, parties planning an acquisition should be aware that regulatory issues could arise under the Hart Scott-Rodino Antitrust Improvements Act of 1976 ("**HSR Act**").

Under the HSR Act, prior to consummation of acquisitions of assets or voting securities exceeding certain size thresholds, including open market purchases of securities in advance of a business combination, US antitrust authorities – the Department of Justice ("**DOJ**") and the Federal Trade Commission ("**FTC**") – must be notified, and details of the transaction and the parties must be disclosed in an HSR filing. At the time of writing, the current minimum transaction size which may trigger an HSR filing requirement is US$ 101 million. For transactions above US$ 101 million up to US$ 403.9 million there is also a size-of-the parties test.  For transactions above US$ 403.9 million, there is no size-of-the-parties test. The size of the parties and transaction thresholds are adjusted annually. If a filing is required, the parties may not close the transaction until the expiration or termination of a 30-day waiting period.

**2.3 Regulation of Foreign Investment - CFIUS**

Under the Defense Production Act of 1950, as most recently amended by the Foreign Investment Risk Review Act of 2018 (FIRRMA), the President has broad authority to block or require divestiture of foreign investments where they find there is a threat to national security. The President is assisted by the Committee on Foreign Investment in the United States (CFIUS or the Committee), an inter-agency committee including economic and security agencies, in the administration of their authority. CFIUS regulations implementing FIRRMA became effective on February 13, 2020.

While the fundamental powers of the President have remain unchanged for decades, recent legislation and regulation have expanded CFIUS' jurisdiction and created a two track system with pre-closing filings being mandatory for certain foreign investments, and voluntary for others. The incentive for making a voluntary CFIUS filing is legal certainty: if CFIUS clears a transaction, neither the Committee nor the President can subsequently challenge it.

Pre-closing filings are mandatory for two classes of transactions:

Substantial government interest: Transactions where a foreign person in which a foreign government has 49% or more voting interest acquires 25% or more of the voting interest in a US critical technology, critical infrastructure or sensitive personal data business.

Critical technology: Transactions where a foreign person acquires certain governance or information rights in a business that develops, tests or produces a critical technology for use in a listed sector.

Mandatory filings can be made through a short form "declaration" or a longer "notice." A mandatory declaration must be filed 30 days before closing, and possible outcomes include clearance, no-action (effectively clearance) and a requirement to file a notice, which entails a longer administrative process. Possible outcomes from a notice are clearance, clearance subject to conditions or opposition, with the formal process taking typically 45 to 90 days. Failure to make a required filing can result in penalties up to the value of the transaction.

Where CFIUS has jurisdiction and filing is not mandatory, the parties may file either a declaration or a notice. The statute provides broad discretion to the President and CFIUS, and there is little opportunity for judicial review. "National security" is not defined, and CFIUS has interpreted the term broadly. CFIUS has particular interest in transactions involving US companies (1) having sensitive government contracts, (2) operating critical infrastructure, (3) producing sensitive technologies, (4) having operations or real estate proximate to sensitive US government facilities, and, more recently, (5) (6) possessing or handling sensitive personal data of Americans. On the investor-side, CFIUS focuses in particular on investors from jurisdictions that are strategic competitors of the United States, and investors that have other attributes that give rise to security concerns, e.g., export control or sanctions compliance issues.

Finally, a filing fee is required for a notice (but not a declaration) filed with CFIUS. The filing fee amount is determined by the value of the transaction, based on the tiers set out below:

|  |  |
| --- | --- |
| Transaction Value | Fee Amount |
| $0 to $499,999.99 | $0 |
| $500,000 to $4,999,999.99 | $750 |
| $5,000,000 to $49,999,999.99 | $7,500 |
| $50,000,000 to $249,999,999.99 | $75,000 |
| $250,000,000 to $749,999,999.99 | $150,000 |
| $750,000,000 + | $300,000 |

Finally, CFIUS is now authorized to require filing fees up to the lesser of one percent of the transaction value or US$ 300,000 for notices, but not declarations.

# Before a Public Takeover Bid

## 3. Before a Public Takeover Bid

[Last updated: 1 June 2022, unless otherwise noted]

**3.1 Obligations arising at certain ownership levels**

Neither United States federal securities laws nor, with certain exceptions, state corporate laws impose acquisition-related obligations to minority shareholders (such as a mandatory bid or offer for their shares) as a consequence of reaching or exceeding any specified percentage of ownership in a public company. Similarly, neither US federal nor state corporate laws provide specific rights "automatically" (such as the right to appoint one or more directors) upon obtaining a specific percentage of ownership in a company, other than the right to use the voting power accompanying that percentage interest in accordance with the company's corporate documents and applicable law. Such specific rights may be provided by contract or granted to one or more classes of securities in a company's corporate documents.  See the discussion under "3.5 Investor Rights and Restrictions" following the table below. However, disclosure obligations and other consequences for both acquirers (including possible limitations on the acquirer's rights as a shareholder) and issuers arise when certain ownership levels are achieved. These obligations and consequences are summarized in the table below.

For the purposes of the following table, under the SEC rules: (i) "beneficial ownership" means possession of the right to vote or to direct the vote, or the right to dispose or direct the disposition of, a security; and (ii) a person is the "beneficial owner" of a security if the person has the ability to acquire beneficial ownership within 60 days of the determination date by converting a convertible security, exercising an option, warrant, or other right to purchase or subscribe for a security, or by terminating a trust or similar arrangement. In addition, when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group that they form is deemed to acquire beneficial ownership of all equity securities of that issuer beneficially owned by the group members. Some state "interested shareholder" or similar statutes mentioned in the table may provide broader definition of "beneficial ownership" than the SEC rules.

**Summary table of US percentage ownership consequences for acquirers and target companies.**

|  |  |  |
| --- | --- | --- |
| **Acquisition Threshold or Ownership (%)** | **Applicable Regulatory or Other Legal Requirement** | **Brief Summary of Consequences** |
| >5% beneficial ownership | * Exchange Act Section 13(d); Regulations 13D and 13G; Schedule 13D or 13G filing * Target company reporting obligations | * Acquisition of greater than 5% beneficial ownership of an issuer's voting securities must be reported to the SEC on Schedule 13D. Institutional and other passive investors not seeking to control or influence the issuer may file a "short-form" Schedule 13G. These filings are publicly available. * Public companies must disclose in their public filings the ownership interests of, certain transactions with, and certain other information regarding holders of more than 5% of their outstanding voting securities. |
| Tender offer for >5% beneficial ownership | * Exchange Act Section 14(d); Regulations 14D and 14E; Schedule TO * Target company response obligations – Schedule 14D-9 | * A tender offer conducted by a party who will have beneficial ownership of more than 5% of the target company's voting securities after completion must by conducted in accordance with the SEC tender offer rules. * Tender offer rules require a target company to recommend that shareholders accept, reject or take other action regarding the tender offer, or state that is unable to make or makes no recommendation, and to provide the reasons for its position. * Section 13(d) reporting requirements remain applicable during a tender offer.  Filings can be combined under cover of a single Schedule TO. |
| >10% beneficial ownership | * Exchange Act Section 16(a) and (b); Forms 3 and 4 | * Beneficial ownership of more than 10% of a US domestic public company's outstanding voting securities must be reported on Form 3. Changes in such ownership must be reported on Form 4. Such filings are publicly available. 10% beneficial owners are subject to forfeiture of profits on purchases and sales, or sales and purchases, of the issuer's shares within any six-month period. * Substantially the same reporting requirements and "short-swing" profit forfeiture rules generally apply to directors and executive officers of public companies. * Public companies must disclose failures to make such required filings in their proxy materials for annual meetings. |
| 10% of target company's voting shares | * Potential affiliate status under federal securities law principles | * Public sales of securities by "affiliates" may be made only pursuant to a registration statement under the Securities Act of an applicable exemption from registration. * Cashing out minority shareholders in a business combination with an affiliate may be subject to the SEC "going private" rule. * A control person may be subject to certain additional potential liabilities under US federal securities law. |
| 10%-15% of target company's voting shares | * State "interested shareholder" and other anti- takeover statutes | * These statutes "freeze" and otherwise limit or condition business combinations, e.g., mergers, between the target and an "interested shareholder", i.e., a beneficial owner of a specified percentage (generally 10% to 15% or more), of a target company's voting securities who acquired such ownership without the target company's consent. Other state anti-takeover statutes focus on voting rights, pricing and constituencies, in addition to shareholders that may be affected by a takeover. |
| 10%-20% of target company's voting shares | * Level of ownership at which shareholder rights, i.e., poison pill, plans are typically triggered (but see the discussion in 3.5, "Investor Rights and Restrictions"). | * Shareholder rights plans, ("poison pills") are established by certain target companies under state law and deter hostile (unfriendly) takeovers by making them impossibly expensive or impracticable by means of provisions that, if triggered, would drastically dilute the hostile party's ownership. |
| 50%+ of the target company's voting shares | * Level of ownership at which a shareholder controls most or all decisions (including elections to the board of directors) * Target company reporting of the change of control is required (but can be required at a lower percentage if that lower percentage affords control) | * Most (but not all) fundamental decisions of US corporations are decided by a vote of shareholders holding a majority of either the voting shares present (in person or by proxy) at a meeting and voting or by a majority of the outstanding voting shares. * As a practical matter, true control is often achieved at lower thresholds. * A target company that has undergone a change of control must file a current report on Form 8-K with the SEC disclosing the change of control. * Exchange Act Section 14(f) and SEC Rule 14f-1 require the filing and distribution to target company shareholders of certain information if a majority of the board is selected by an acquiring party without a shareholders' meeting. |
| Majority of shares entitled to vote on a merger | * Delaware General Corporation Law Section 251(h) | * Under Delaware law, a merger agreement between an acquirer and a listed target company may provide that if the acquirer conducts a tender offer and, after completion of the tender offer, holds a majority of the target company's outstanding shares entitled to vote on a merger (or any higher percentage required for such action by the target company's charter), the acquirer or an acquisition subsidiary may complete the merger of the target company into or with the acquirer without a target company shareholder vote. This statute allows for a more streamlined tender offer/squeeze-out merger process. |
| 90%+ of shares entitled to vote on a merger | * Level of ownership at which a target company may be merged into an acquiring company on a "short-form" basis | * Under the laws of Delaware and many other states, an acquirer may merge a target company into itself or its subsidiary without a target company shareholder vote if the acquirer holds 90% or more of the voting securities of the target company (usually achieved through a tender offer). |

**3.2 Disclosure of beneficial ownership of shares**

A party that makes an "acquisition" that results in the party becoming the beneficial owner of more than 5% of a class of a listed issuer's voting securities must report its beneficial ownership on either a Schedule 13D or, if the investor meets certain criteria and disclaims intent to control or influence the target company, Schedule 13G. These forms report the identity and intensions of the acquirer and can be due as quickly as a few business days after acquisition.

**3.3 Insider trading and anti-manipulative rules**

General – Several provisions of the US federal securities laws operate to prohibit the purchase or sale of shares while an insider is in possession of material, non-public information and to provide civil and criminal remedies for breaches of these laws. An "insider" generally includes officers and directors of an issuer and may, depending on the circumstances, include an owner of more than 5% of the issuer's stock. An insider or other person in possession of such information must either disclose the information before making a sale or purchase of the issuer's shares, or refrain from trading in the shares and, under certain circumstances, disclosure by an insider to a person who trades on the basis of the information can result in "tipper/tippee" liability. "Materiality" of information depends on the facts and circumstances but, generally, information is material if it would be important to an investor in making a decision to buy or sell a security.

In addition, as part of its market surveillance function, the Financial Industry Regulatory Authority (FINRA) will routinely examine trading in the shares of a target company prior to and immediately following announcement of an acquisition or other significant event, and may conduct a formal or information investigation if it detects unusual activity suggesting improper use of confidential information by parties with access to that information.

# Effecting a Takeover

## 4. Effecting a Takeover

[Last updated: 1 June 2022, unless otherwise noted]

The principal methods of acquiring 100% of a target company are tender offers (followed by a second-step "short-form" merger to squeeze out non- tendering shareholders) and "long-form" negotiated mergers that are submitted for approval by the target company's (and, in certain circumstances, the acquirer's) shareholders pursuant to a proxy solicitation in accordance with the SEC's proxy rules (Section 14 of the Exchange Act and SEC Regulations 14A and 14C). A friendly tender offer is generally carried out pursuant to a negotiated merger agreement in which the acquirer agrees: (i) to conduct a tender offer for the target company's shares at the price stipulated in the agreement in lieu of the target company seeking shareholder approval of the merger; and (ii) provided that the acquirer receives tenders of a sufficient number of target company shares (90% in most states but in Delaware an absolute majority of the outstanding voting shares unless a higher percentage of the target company's voting shares is required to approve a merger), to effect a squeeze-out merger of the target company's non-tendering shareholders.

**4.1 Preliminary matters**

No takeover code – There is no takeover code under US federal or state law. Section 14(d) of the Exchange Act and SEC Regulations 14D and 14E regulate both the information to be provided to target company shareholders in a tender offer and the procedure for conducting a tender offer. Proxy and consent solicitations in US domestic companies are governed by the SEC's proxy rules, which prescribe extensive disclosure requirements for such solicitations. State corporate laws specify various procedural matters, e.g., notice, timing and voting requirements, to be followed in acquiring a company pursuant to the state merger statute, in effecting a dissolution of a seller following an asset sale, and completing a tender offer via a statutory merger to squeeze out non- tendering shareholders. Such state corporate laws will also determine whether shareholders may seek an appraisal of their shares in lieu of accepting the merger consideration, and the procedures to follow to do so. Judicial decisions may impose additional requirements, particularly in the case of business combination transactions with controlling persons of the target.

No mandatory offers; no minimum pricing – Unlike the takeover rules in certain non-US jurisdictions, neither US federal securities laws nor state corporate laws require a bidder to commence a tender offer for the shares of a company as a consequence of acquiring a specified percentage of a public company's outstanding shares. However, three states (Maine, Pennsylvania and South Dakota) have "control share cash-out" requirements under which a bidder that acquires a specified percentage of voting power must notify remaining shareholders, who can then require that the bidder purchase their shares. Similarly, US federal securities laws do not impose any minimum price at which a tender offer is to be conducted or minimum amount of merger consideration that must be paid, subject to certain limited exceptions for squeeze-outs and required disclosure of the price paid in purchases made during a specified period prior to the tender offer. Some states impose "fair price requirements", e.g., highest price paid during a specified "look-back" period, on the consideration in business combinations with holders of more than a specified percentage of the target company's outstanding shares. Certain rules regulate changes to the consideration payable in a tender offer and the consideration payable in squeeze-outs. These are discussed below.

**4.2 Making the bid public**

As noted above, a party filing a Schedule 13D is obligated to disclose its "plans and proposals" regarding the subject company, and to amend its Schedule 13D for "material changes" in the information in the Schedule. If a potential acquirer has a stake in the target company that has been disclosed in a Schedule 13D, execution of a confidentiality agreement and the conduct of due diligence entails a significant risk that the parties' discussions – even at this preliminary stage – must be disclosed as such a material change, particularly if the acquirer's initial filing stated simply that it acquired its stake "for investment," without any reference to seeking a possible business combination or other transaction with the target company.

Preliminary discussions – As a first step in acquiring the target company, the acquirer's CEO may contact the target company's CEO and set up a meeting between the two CEOs to discuss strategic alternatives available to the two companies. At this meeting, the acquirer's CEO may suggest an offer to purchase the target company for a specified amount per share or premium per share (or range thereof), as well as discuss other matters relevant to the acquisition proposal. If the target company agrees to proceed, then the parties can determine whether the acquisition will be structured as a tender offer or a merger and begin to negotiate a definitive acquisition agreement. In friendly transactions, the parties generally enter into a confidentiality agreement to permit the acquirer to conduct due diligence. This agreement typically restricts public announcements about the negotiations and enables the target company to provide material non-public information to the acquirer without violating SEC Regulation FD, which restricts selective disclosure of such information. Because negotiations and due diligence are conducted pursuant to an agreement that requires confidentiality and restricts public announcements, acquisitions in the US generally become public only upon the signing of a definitive agreement. This may be contrasted with the practice in other jurisdictions where such announcements are made earlier, particularly if the acquirer builds up its holdings to a level that obligates it to offer to purchase publicly held shares. If the target company is unwilling to proceed with negotiating a ‘friendly’ transaction, then the acquirer may consider whether to proceed on a ‘hostile’ basis, which generally means that the acquirer will make public its intentions regarding an acquisition of the target company.

Even at this preliminary stage, a potential acquirer will need to keep a record of its contacts and discussions with the target company. If the parties reach agreement for an acquisition of the target company, the disclosure document prepared for the target company's shareholders – a definitive proxy statement for a long-form merger or an offer to purchase for a tender offer – will include a detailed discussion of past contracts, transactions or negotiations between the target company (and its affiliates) and the acquirer or their respective representatives, generally including the nature of the contact, e.g., a meeting, letter, or telephone conversation, the principal participants and the substance of the contact. This disclosure is usually presented in the target company's proxy statement or the acquirer's offer to purchase under an appropriate heading, such as "Background of the Merger."

Tender offer commencement – Under the SEC tender offer rules, a tender offer is commenced when a bidder first publishes, sends or gives the means to tender securities to the target company's security holders. On the commencement date, a bidder must file a Schedule TO with the SEC together with the required exhibits (which will include the offer to purchase, a letter of transmittal and other documents required to deliver tendered shares, and the acquirer's press release announcing commencement of the offer). The bidder must deliver a copy of Schedule TO to the target company, notify the exchange on which the target company's shares are listed of the commencement of the offer, publish an advertisement (which may be in summary form) in one or more major newspapers containing specified information regarding the offer, and disseminate the tender offer materials to target company shareholders.

Pre-offer announcements – Announcements prior to formal commencement, e.g., an announcement that a bidder is considering or has determined to make a tender offer, or is in discussions with the target company regarding a possible bid, are permitted. Such announcements do not constitute "commencement" of the offer if they are filed with the SEC under cover of Schedule TO on the date of first use and designated as pre-commencement communications. Such communications may not include the means to tender shares and must contain cautionary language advising target company shareholders where to obtain the tender offer statement and to read it when it is available. These requirements also apply to a joint press release issued by an acquirer and a target company announcing their execution of a merger agreement prior to commencement of the tender offer for the target company's shares pursuant to the merger agreement.

Pre-offer announcements – Exchange offers – In exchange offers (tender offers in which the consideration will consist in whole or in part of securities of the acquirer), such announcements constitute "offers" of such securities. Ordinarily, securities may not be offered publicly unless a registration statement relating to the offered securities has been filed under the Securities Act. However, SEC Rule 165 permits such announcements prior to the filing of a registration statement for the securities to be offered in an exchange offer, provided that the announcements are filed with the SEC and comply with informational limits limitations on such pre-offer announcements.

Long-form mergers – Upon executing a definitive agreement for a long-form merger, the acquirer and target company will typically issue a joint press release and file it with the SEC. The release will generally identify the parties involved and summarize the material terms of the transaction.

Pre-solicitation announcement - Mergers - Before the target company (and, in certain circumstances, the acquirer) begin formally soliciting proxies from shareholders, the acquirer and target company may communicate orally and in writing with shareholders and other stakeholders, e.g., employees, customers and suppliers, and the market regarding the transaction, but all such written communications before or after the proxy statement is furnished must be filed with the SEC on the day of first use. They must identify the participants in the proxy solicitation and describe their direct or direct interests in the solicitation or advise shareholders where to obtain the information. Before distribution of the definitive proxy statement for the transaction, such announcements may not include a form of proxy and, like pre-commencement tender offer announcements, they must advise shareholders on where to obtain the definitive proxy statement and to read it when it is available. As with exchange offers, where the merger consideration will consist in whole or in part of securities, such announcements constitute "offers" of such securities. Rule 165, however, permits such offers prior to the filing of a registration statement for the offering, subject to that rule's filing requirements and information limitations.

**4.3 Form of consideration and pricing rules**

Form – Neither US federal securities laws nor state corporate laws prescribe the form of consideration to be paid in a tender offer or merger. Apart from a bidder's own financial resources and access to financing, factors that will influence an acquirer's choice of consideration to be offered include the following:

Tax deferral – If a significant part of the consideration payable to target company shareholders in a merger or other business combination consists of equity securities of the acquirer and the transaction otherwise satisfies the US tax law requirements for a "reorganization", target company shareholders will not recognize gain or loss on the exchange of target company shares for acquirer shares; rather, any tax on acquirer shares received as consideration is deferred until the target shareholders sell the acquirer shares. The transaction is immediately taxable to target company shareholders to the extent they receive "boot", i.e., non-qualifying consideration, such as cash or debt securities of the acquirer.

Securities Act registration; timing and availability of information – Securities to be issued as tender/exchange offer or merger consideration to shareholders of a publicly-held target company must be registered under the Securities Act. Preparation of a registration statement is a complex and time-consuming process, and the issuer and certain other parties are subject to strict liability for material misstatements in and omissions from the prospectus. For a target company that requires speedy completion of the transaction, acquirers prepared to pay cash, such as private equity funds and cash-rich strategic buyers, may have a significant advantage over an acquirer proposing to issue securities as all or part of the acquisition consideration.

Exchange act reporting obligations – A company that files a registration statement under the Securities Act (including a registration statement for securities to be issued as the consideration in a merger or a tender offer) that is declared effective by the SEC automatically becomes subject to the periodic reporting requirements of the Exchange Act. Acquirers wishing to avoid such reporting obligations, such as many FPIs, will necessarily offer cash consideration.

Acquirer shareholder approval requirements – Exchange listing rules may apply to the acquisition of a significant minority interest in a listed company from the company or to the issuance of listed company shares as acquisition consideration. Stock exchanges require that listed companies list all outstanding shares of the listed class, as well as shares of that class issuable upon conversion of convertible securities, exercise of options, warrants and other subscription rights, etc. As a condition to such listing, both the NYSE and Nasdaq require their listed companies to obtain shareholder approval before issuing common shares that represent (or before issuing securities convertible into, or exchangeable or exercisable for, common shares that, when converted, exchanged or exercised will represent) 20% or more of the voting power of the listed issuer (measured before giving effect to such issuance and subject to certain exceptions), as well as for the issuance of shares in certain acquisitions from related parties and in transactions that would result in a change of control of the issuer, regardless of whether state corporate law requires approval by an acquirer's shareholders. Such requirements are not applicable to acquisitions for cash.

Hostile vs. friendly bids – Extensive information regarding the target company is required to be included in a registration statement for shares of an acquirer to be issued as tender/exchange offer or merger consideration. Depending on the materiality of the target company to the acquirer, that information could include the target company's historical financial statements and pro forma combined financial statements that give effect to the business combination. Such information is likely to be impractical or even impossible to obtain in a hostile acquisition, making the issuance of shares in a registered offering impracticable.

As noted above, an acquirer in an all-cash transaction will have a timing advantage over a rival bidder offering its securities. This can be especially important when the board of the target of a hostile bid determines that an all-cash acquisition of the target by a "white knight" is preferable to the hostile bidder (subject to compliance with the directors' fiduciary duties (see "4.7 Fiduciary Duties of Directors," below).

Acquirer financial statements – Under certain conditions, an acquirer is required to include its financial statements in a tender offer document furnished to target company shareholders. However, financial statements are not required to be disclosed if the consideration is cash, the tender offer is not subject to a financing condition, and either the acquirer is an Exchange Act reporting company or the offer is for all the outstanding securities of the target company. The proxy rules provide comparable accommodations for all cash transactions. See "4.5 Financing requirements," below. An acquirer having sufficient cash and/or committed financing and wishing to maintain the confidentiality of its financial statements would offer cash consideration for this reason

Availability of appraisal rights – Shareholders of a target company in all-cash mergers (including second-step squeeze-out mergers following a tender offer) generally have statutory appraisal rights. See "4.8 Appraisal Rights of Minority Shareholders," below.  Under Delaware law and many other state corporate laws, appraisal rights are not available in a merger in which the consideration consists of public company shares.

CVRs - Contingent consideration, or the right to receive an additional payment or payments such as earn-outs or milestone payments upon satisfaction of specified conditions set forth in the governing instrument for the payment (often referred to as a contingent value right, or "**CVR**"), is unusual in public company acquisitions for various reasons, including the difficulty of valuing the contingent payment for purposes of assessing the fairness of the consideration offered to target shareholders, and comparing the value of the CVR to the consideration in an all-cash or all-stock transaction. A fully transferable CVR will generally be considered a security requiring Securities Act registration and, if structured as a debt instrument (as many CVRs are), qualification of an indenture under the US Trust Indenture Act of 1939, as amended.  In some cases, such registration and a limited period of required Exchange Act reporting by the entity issuing the CVRs (generally lasting until redemption or payout of the CVRs) are an acceptable trade-off for the ability to include contingent consideration in the transaction. However, in most cases, restrictions on transferability and other limitations may obviate the need for Securities Act registration.

Pricing – Neither US federal securities laws nor state corporate laws prescribe the amount of the consideration to be paid in a tender offer or merger (other than in second-step squeeze-out mergers after a tender offer, in which both exemption from the SEC's going private rule and the Delaware law provision permitting a squeeze-out with less than 90% ownership of the target company require that the consideration in the squeeze-out be at least equal to the highest consideration paid in the tender offer). Factors affecting pricing will include the following:

SEC best price rule – SEC Rule 14d-10 requires that the consideration paid to any target company shareholder for tendered shares equals the highest consideration paid to any other security holder for such shares.

Price changes – SEC Rule 14e-1 requires that upon any increase or decrease in the tender offer consideration, the tender offer must remain open for a minimum of 10 business days following dissemination of notice of the change in consideration.

Disclosure and fairness considerations – In all tender offers and mergers, the acquirer is required to provide information regarding purchases of the target company's securities during the preceding 60 days by the acquirer and certain related parties. In addition, in going private transactions, the acquirer-affiliate is obligated to provide extensive additional disclosure regarding the proponent's belief as to the fairness of the transaction to unaffiliated shareholders of the target company and the basis for that belief.

**4.4 Conditional and unconditional offers**

US tender offer law and practice does not provide that tender offers become "unconditional" after the passage of a specified interval after commencement or another event. In a non-hostile transaction, the conditions to an acquirer's obligation to accept and pay for tendered shares are generally negotiated between the acquirer and the target company. In a hostile bid, such conditions are determined by the acquirer. Conditions may be waived by the party whose obligations are subject to satisfaction of the condition. Typical conditions to an acquirer's obligation are:

Number of shares tendered – Receipt of tenders of a number shares which, when added to any shares owned by the acquirer, will constitute at least a majority of the target company's outstanding shares (or, in some cases, the number of shares required for the acquirer to effect a short-form merger).

Availability or completion of financing – Receipt of financing to complete the purchase and payment for the target company's shares. (Obviously, an acquirer that includes this condition in its offer can be at a serious disadvantage if a competing bid is commenced by an acquirer with available or committed financing.)

Receipt of governmental consents – Receipt of pre-merger clearance (or early termination of the waiting period) under the HSR Act, and receipt of other required governmental consents, permits or approvals, such as CFIUS clearance.

Absence of legislative or judicial impediments – No enactment of any legislation that would prevent or interfere with the transactions or commencement of any judicial or administrative proceedings seeking to prevent consummation of the transaction.

Compliance with debt instruments and other contracts – Satisfaction or waiver of any conditions to or limitations on mergers or changes of control of the target company under its debt instruments, modification or removal of financial covenants in the target company's debt instruments to enable the merger to proceed, and receipt of any consents under "change of control" or similar clauses in the target company's material contracts.

Equity rollover - In a "public-to-private" acquisition by a private equity firm, the rollover of the equity held by specified shareholders, such as founders and key management members, into the new equity structure of the acquired company.(A cautionary note - if the rollover negotiations take place too early in the sale process, e.g., before agreement has been reached on price, management may be subjected to claims that they selected the bidder that offered the best terms to management, rather than the best value to all shareholders.)

No material adverse changes – Absence of material adverse changes in the business, financial condition or results of operations of the target company.

Effectiveness of registration statement – Where the consideration consists of or includes shares, effectiveness of a registration statement filed with the SEC to register such shares, and the absence of any stop order suspending the effectiveness of the registration statement.

Elimination of takeover defenses – Approval of the acquisition by the target company's board under any applicable "interested shareholder" statutes and waiver or amendment of any "poison pill" to enable the transaction to proceed. The target company's agreement on these points will be necessary conditions to any hostile bid. In a friendly acquisition, they will generally be provided for in the merger agreement and described to shareholders in the offer to purchase or the definitive proxy statement.

**4.5 Financing requirements**

Neither US federal securities laws nor state corporate laws expressly require that an acquirer have financing available or committed at the commencement of a tender offer. However, under SEC Rule 14e-8, it is fraudulent for a person to announce its intention to conduct a tender offer if the person does not have a reasonable belief that it will have the means available to purchase securities to complete the tender offer. Schedule TO requires that an acquirer provide information regarding the source and amount of funds it will use to acquire the target company. The offer to purchase (or a definitive proxy statement for a long-form merger) will include a description of the acquirer's financing arrangements, including the terms of the financing documents. The financing agreements will typically be filed as exhibits to the acquirer's Schedule TO. As indicated above, receipt of financing for the acquisition can be a condition to an acquirer's obligation to accept and pay for tendered shares (or, in a long-form merger, to complete the merger). However, the existence of a financing condition will be significant factor considered by the board of a target company that receives multiple offers, since "deal certainty" is a factor that a board may consider in its evaluation of competing offers. In addition, the SEC rules dispense with the need to provide financial information for the acquirer in an all-cash tender offer for all of the outstanding shares of the target company if the offer is not subject to a financing condition.  The proxy rules afford similar relief. They provide that in an all cash acquisition, specified information for the acquiring company, including its financial statements, need not be provided unless the information is material to an informed voting decision, e.g., the security holders of the target company are voting and financing is not assured. These provisions can be attractive to an acquirer that has not previously published its financial statements and wishes to continue to avoid doing so.

**4.6 Recommended and hostile offers**

In all tender offers, the target company must take a formal position (which may include a statement that it makes no recommendation) with respect to the tender offer within 10 business days after the tender offer commences. It does so by including its position in a Schedule 14D-9 disclosure statement filed with the SEC. Prior to the filing of Schedule 14D-9, the target company may issue statements regarding the offer as long as it files any written communications with the SEC on the date they are issued and includes a clear legend advising its shareholders to read the target company's formal recommendation statement when it is available. In a friendly transaction, the content of the target company's position is usually negotiated in advance and the offer to purchase or target company's proxy statement will include information regarding the board's consideration and approval of the transaction, its recommendation that target company shareholders accept the offer and tender their share or vote in favor of the merger, as the case may be, and the reasons for the board's recommendation. In a friendly tender offer, the target company's Schedule 14D-9 will be prepared in coordination with the acquirer and filed and disseminated at the time the offer commences.

**4.7 Fiduciary duties of directors**

Duties of directors; standard of conduct

Directors must act in the best interests of the corporation and its shareholders. They must exercise the degree of care that a reasonable person would employ in similar circumstances and place the interests of the corporation and its shareholders ahead of any self-interest. In the context of a "change of control transaction", the board is required to act reasonably to seek the transaction that offers the best value reasonably available for the company's shareholders.

In Delaware, courts have stressed the importance of the board being adequately informed when negotiating the sale of control of the company. This generally requires that the target company's board:

analyze the entire situation and evaluate the consideration being offered for control of the corporation in a disciplined and well documented manner;

receive financial and legal advice, negotiate diligently and ensure that it possesses all relevant material information; and

use methods or procedures that will enable the board to determine whether the consideration being provided to target company shareholders represents the best value reasonably available to the shareholders.

Some of the suggested methods for the target company's board to accomplish these ends include conducting an auction, conducting an "active" market check of other potential buyers before entering into an agreement, negotiating for inclusion of a "go-shop" clause allowing the target company to solicit interest from potential buyers for a limited period of time after signing a definitive agreement with an initial buyer or, if that is not acceptable to the acquirer, including in the definitive agreement an exception to a "no-shop" clause (a prohibition on the target company's soliciting a purchase proposal from any other party) permitting the target company to terminate the agreement with the acquirer to accept a superior, unsolicited competing offer made by a third party (the so-called "fiduciary out"), the exercise of which generally requires payment of a break-up fee by the target company to the acquirer. Usually, the target company's board will seek a "fairness opinion" from its investment bankers before approving a change of control transaction. For significant acquisitions, an acquirer may consider retaining its own investment banker to provide a similar opinion.

Fiduciary Duty Litigation

Directors of a target company defending a shareholder suit attacking a transaction for alleged violation by the directors of their fiduciary duties will seek to have the court apply the business judgment rule to their actions. Under the business judgment rule, disinterested directors are presumed to have acted in good faith in the belief that their action was in the best interests of the company, and a court will not substitute its judgment regarding the merits of a transaction for that of the directors. That presumption may be overcome by appropriate evidence that the directors did not act on an informed basis, in good faith, and in the belief that their action was in the best interests of the corporation and its shareholders.

Recent case law in Delaware has established conditions under which breach of fiduciary duty claims may be "cleansed," thereby significantly enhancing director's ability to prevail in post-closing challenges to transactions that have been approved by the target's shareholders. Under the *Corwin* line of cases in Delaware, the highly deferential business judgment standard of review applies to a post-closing action seeking damages for directors' breach of fiduciary duties in transactions that do not involve controlling shareholders, so long as the shareholder approval was "fully informed" and "uncoerced." These decisions apply well-established principles relating to proxy disclosure that only "material" information must be disclosed and a narrow view of "coercion." Accordingly, in most cases applying the *Corwin* decision, the business judgment rule has been applied and the cases have been dismissed, although several recent cases denying or reversing *Corwin* dismissals have emphasized an "informed" approval as a prerequisite to a *Corwin* defense. Subsequent cases have shown that Delaware courts will meticulously review corporate disclosures to ascertain whether the stockholders' decision was truly informed, meaning that all material facts were disclosed completely and accurately.

A key driver behind litigation alleging fiduciary breach has been the availability of counsel fees to plaintiff's counsel for benefits ostensibly provided to the target company's shareholders through their representation of the plaintiff class or the derivative plaintiff, and there are law firms that specialize in conducting such litigation. Generally, class actions and derivative actions cannot be settled without approval of the settlement by the court in which the action is brought, and the plaintiff's counsel's application for fees is considered by the court as part of its review of the settlement terms. The Delaware Supreme Court, in the *Trulia* case, questioned whether the value of the claimed "benefits" justifies approval of settlements that provide for broad releases of the claims of the plaintiff class and payment of plaintiff's counsel fees, particularly in cases in which the alleged benefit to target company shareholder involves minimal additional disclosure provided to target company shareholders, rather than a tangible benefit to shareholders. In *Trulia*, the Delaware Supreme Court stated that it would no longer approve "disclosure-only" settlements in which the supplemental disclosures do not address material misrepresentations or omissions. The response to *Trulia*in other jurisdictions has varied.

Many commentators have remarked that there has been a significant decline in Delaware-based mergers and acquisitions litigation, and have attributed the decline to the *Corwin* line of cases and the heavy scrutiny now being applied to "disclosure only" settlements under *Trulia*. In an apparent response to these obstacles, prospective plaintiffs have demanded access to company books and records under Section 220 of the Delaware General Corporation Law, which provides stockholders with the right to inspect corporate records on demand "for any proper purpose." Access is sought as a means of obtaining information and documents to bolster a complaint -- specifically, to anticipate a *Corwin* defense to the action e.g., by obtaining information relevant to whether the stockholder vote was fully informed, as required by *Corwin*, or whether the stockholder proposing the transaction to be voted on actually exercised control over the company such that a *Corwin* defense would be unavailable. The Delaware court has ordered inspection over defendants' objections in such cases.  While the court has interpreted the "proper purpose" standard to require that a shareholder seeking access have only a "credible basis" for its request, there must still be a showing of some facts that, if borne out through investigation, could potentially lead to a cause of action.

**4.8 Appraisal rights of minority shareholders**

Under virtually all US state corporate laws, once a merger is approved by target company shareholders and completed, the merger is binding on all target company shareholders, regardless of whether they voted in favor of the merger (or had no vote because the merger was effected as a short form merger without shareholder approval). However, under most state corporate laws, target company shareholders in an all cash merger who properly exercise any dissenters' rights available to them under applicable state law (which generally requires that such shareholders vote against or refrain from voting on the merger) or the target company's organizational documents will generally have the right to seek appraisal, i.e., a court determination of the fair value of their shares, and to receive the appraised value of their shares, rather than the merger consideration.

# Timeline

## 5. Timeline

[Last updated: 1 June 2022, unless otherwise noted]

Set forth below are illustrative alternative timelines for  negotiated, "friendly" acquisitions (i) for cash, conducted as a "two-step" transaction (a tender offer followed by a short-form merger) and as a "one- step" long-form merger, and (ii) as a stock-for-stock transaction, again, conducted as a "two-step" transaction (a share exchange offer followed by a short-form merger) and as a "one- step" long-form merger. The cash two-step transaction generally has a shorter timeline, regardless of whether it is effected in reliance on DGCL 251(h) after acquisition of simple majority ownership, or as an "old regime" two-step transaction after acquisition of 90% ownership (or such other percentage as may be required for a short-form merger under the applicable state corporate law). The principal factor increasing the time required for a one-step transaction is SEC review of, and comment on, the target company's proxy statement and subsequent revision of the proxy statement or other appropriate responses to the SEC's comments. A tender offer for a two-step transaction can be commenced without any SEC review of the acquirer's Schedule TO. However, SEC comments may be issued after commencement of the tender offer and could require amendments to the offer to purchase (which, if material, could obligate the acquirer to extend the offer period) or to the target company's Schedule 14D-9. In a stock-for-stock transaction, the timeliness will generally be the same regardless of whether the acquisition is effected as a two-step transaction or a one-step transaction. That is because, in either transaction form, it will be necessary to file a registration statement with the SEC to register the stock or other securities issuable as merger consideration unless a registration exemption is available under SEC rules.  The registration statement, if required, will be subject to review and comment by the SEC staff before it is declared effective, and neither a one-step nor a two-step merger that includes registered share consideration may be consummated before such effectiveness.  A number of events, some noted in the timelines, can extend the time frames set forth including, but not limited to, a second request for information by the FTC or DOJ under HSR (the tables do not reflect the additional review time requested by the FTC and DOJ due to the coronavirus pandemic), a CFIUS review of the transaction, extensions of the tender offer period if tenders of the desired number of target company shares have not been received, or postponement of a shareholders' meeting to obtain the required shareholder vote.

Set out below are overviews of the main steps for a public stock-for-stock transaction in the US (two-step and one-step merger) and overviews of the main steps for an all cash tender offer/merger (two-step and one-step merger).  For the sake of simplicity, the steps set forth below assume the target corporation is incorporated under Delaware law, the prevailing jurisdiction of choice for most US corporations.

**5.1 Indicative timeline of a two-step merger**

Click here to view the diagram [US\_1](https://resourcehub.bakermckenzie.com/en/-/media/global-public-ma-handbook/files/2022-version/timeline_usa_1_2022.pdf?sc_lang=en)

**5.2 Indicative timeline of a one-step merger**

Click here to view the diagram [US\_2](https://resourcehub.bakermckenzie.com/en/-/media/global-public-ma-handbook/files/2022-version/timeline_usa_2_2022.pdf?sc_lang=en)

**5.3 Indicative timeline of a two-step all cash tender offer/merger**

Click here to view the diagram [US\_3](https://resourcehub.bakermckenzie.com/en/-/media/global-public-ma-handbook/files/2022-version/timeline_usa_3_2022.pdf?sc_lang=en)

**5.4 Indicative timeline of a one-step all cash merger**

Click here to view the diagram [US\_4](https://resourcehub.bakermckenzie.com/en/-/media/global-public-ma-handbook/files/2022-version/timeline_usa_4_2022.pdf?sc_lang=en)

# Takeover Tactics

## 6. Takeover Tactics

[Last updated: 1 June 2022, unless otherwise noted]

**6.1 Tender offer procedures**

Under Section 14(d) of the Exchange Act and SEC Regulations 14D and 14E, tender offers in the US must be conducted in accordance with the following requirements (in addition to applicable disclosure requirements):

Duration – The offer must be held open for at least 20 business days. The offer must remain open for a minimum of 10 business days (pursuant to an extension, if necessary) following an increase or decrease in the percentage of the target company shares sought in the offer, the consideration offered, or the soliciting dealer's fee (or five business days in certain other cases). Extensions must be announced by press release issued by the earlier of 9:00 a.m. Eastern time and the opening of trading on the exchange where the securities are listed on the day following the scheduled expiration date.

All holders; best price – The offer must be made to all holders of the class of securities subject to the offer, and all tendering holders, including those who tendered prior to an increase in the offered consideration, must receive the same consideration per share.

Withdrawal rights; subsequent offering period – Tendered securities may be withdrawn at any time while the offer remains open. After termination of the offer period and acceptance of tendered shares, the acquirer may continue to accept shares for a "subsequent offering period" of from three to 20 business days. Statutory withdrawal rights are not available for shares tendered during a subsequent offering period.

Purchases outside the offer – Subject to certain exceptions, from the time the offer is first announced to the expiration date, the acquirer and its affiliates, the acquirer's dealer-manager and its affiliates, and a financial advisor to any of them if the advisor's compensation depends on the successful completion of the tender offer, may not purchase or arrange to purchase securities subject to the offer, or securities convertible into or exchangeable for such securities, other than pursuant to the tender offer. The exceptions include purchases outside the offer in certain tender offers for the shares of foreign private issuers in accordance with the target's home country law, subject to compliance with specified conditions, including disclosure.

Pro rata acceptance – In an offer for less than all outstanding securities of the class being sought, if a greater number of securities than the maximum number sought are tendered, acceptance of tendered shares must be pro rata.

Prompt payment or return – The tender offer consideration must be paid, or tendered securities must be returned, promptly after termination or withdrawal of the offer.

Target company position – The target company must take a formal position regarding the tender offer within 10 business days after commencement of the offer by filing and distributing a Schedule 14D-9. In a friendly transaction, the target company's Schedule 14D-9 is usually filed contemporaneously with the acquirer's Schedule TO, which includes the offer to purchase that is provided to target company shareholders, and the Schedule 14D-9 is distributed to target company shareholders together with the offer to purchase.

**6.2 Deal protection**

In a negotiated transaction, the acquirer can enter into agreements with the target company and its shareholders to protect the deal from competing offers. The availability of such measures will depend upon the applicable state corporate law, but such measures may include:

Agreements with shareholders – An acquirer can enter into agreements with one or more significant shareholders in which they agree to tender their shares into the acquirer's tender offer or vote in favor of the proposed merger, as the case may be. Depending on the jurisdiction, an irrevocable proxy may be used to enforce the tender/voting agreement. Acquirers should bear in mind that an agreement that grants an acquirer the right to acquire the shares or to direct the voting of the shares may constitute the acquirer as the beneficial owner of the shares covered by the agreement under Section 13(d) of the Exchange Act and obligate the acquirer to file a Schedule 13D prior to the actual purchase or other acquisition of the subject shares.

"No-shop" clauses – A "no-shop" provision in a merger agreement limits the target company's ability to seek or facilitate competing bids, subject only to the fiduciary duties of the target company's directors. As noted above, a target company may insist on the ability to conduct an "active" market check of the merger terms through a "go-shop" clause permitting the target company to solicit other bids for a negotiated period of time or a "passive" market check allowing the target company to entertain a superior, competing offer made after public announcement of the merger agreement but without solicitation of other bids. An acquirer may also negotiate for the right to match any such superior offer.

Break-up fees – A break-up fee is a termination fee paid by a target company to compensate an acquirer for termination of the merger agreement in favor of a competing bidder. A balance is required between the amount necessary to compensate the buyer and a fee so high that the cost of bearing the break-up fee discourages competing bidders. Alternatively, in some cases, bidders will agree to pay a reverse break-up fee, i.e., a fee payable by the bidder to the target upon termination, as consideration for the right to terminate the merger agreement upon specified conditions.

Shareholder rights plans – An acquirer can enter into an agreement with the target company requiring the target company to adopt a shareholder rights plan to discourage third parties from accumulating shares in the open market sufficient to maintain a "blocking position".

In US public company transactions, representations and warranties by a target company do not survive the closing of the transaction, and post- closing indemnification rights and/or escrow of a portion of the merger consideration (which are customary in private company acquisitions) as well as representation and warranty insurance (increasingly common in private company acquisitions) are generally not available to the acquirer.

# Squeeze-out of Minority Shareholders after Completion of the Takeover

## 7. Squeeze-out of Minority Shareholders after Completion of the Takeover

[Last updated: 1 June 2022, unless otherwise noted]

**7.1 Squeeze-out procedures**

Completing the merger – Under US state corporate laws, once a merger has been authorized in accordance with statutory requirements, i.e., by shareholder vote or action of the acquirer if it holds the requisite number of shares, it is completed by filing articles or a certificate of merger in the state or states of organization of the parties to the merger. Upon completion of the merger, it is binding on all target company shareholders, regardless of whether they voted in favor of the merger (or had no vote because the merger was effected as a short-form merger without shareholder approval).

Effecting the squeeze-out – The merger agreement will provide for the conversion of the securities of the target company into the merger consideration. Upon completion of the merger, the outstanding shares of the target company (other than shares owned by the acquirer) cease to be outstanding and are converted into the right to receive the merger consideration, subject to the rights of dissenting shareholders who perfect their appraisal rights to receive the appraised value of their shares. In the case of a negotiated long-form merger, completion of the merger eliminates all public shareholders; in a second-step short-form merger following a tender offer, the squeeze-out eliminates shareholders who did not tender their shares into the offer.

Asset deals – In a takeover effected as an asset acquisition, in lieu of a squeeze-out, all shareholders of the target company would be eliminated through dissolution and liquidation of the target company, with the consideration received by the target company in the asset sale being distributed to the shareholders. Both the sale of all or substantially all of the target company's assets and the dissolution and liquidation of the target company would be submitted to shareholders of the target company for approval. As previously noted (see "4.8 Appraisal Rights of Minority Shareholders"), Delaware law does not provide appraisal rights for dissenting shareholders in asset sales. Other state corporate laws vary in this respect. In an asset deal, in addition to the complexity of transferring all of the assets of a public company, it is necessary to provide for possible unknown or contingent liabilities of the target company. In contrast, in both a long-form and a short-form statutory merger, this issue does not arise because all of the target company's liabilities – known or unknown, fixed or contingent – become the obligations of the acquirer by operation of law upon the merger's effectiveness (or remain the obligations of the target company if the target company becomes a subsidiary of the acquirer in the merger). For these reasons, acquiring a public company through an asset acquisition is rare.

# Delisting

## 8. Delisting

[Last updated: 1 June 2022, unless otherwise noted]

In US parlance and M&A practice, "going private" refers to a takeover transaction that usually includes a squeeze-out of public shareholders effected by an affiliate (or by an affiliate acting with an outside party), which could be a controlling shareholder or shareholder group or the target company's management. The object of a going private transaction is to cause the target company to become privately held. However, a public company may terminate its SEC periodic reporting requirements without going completely private. This is sometimes referred to as "going dark" because the company is no longer obligated to furnish information to the SEC. This requires that the company both delist from the stock exchange where is it listed *and* de-register under the Exchange Act.

**8.1 Delisting**

A stock exchange will generally delist the shares of a listed company upon notice to the exchange by the issuer. The exchange can also delist a company for violations of the exchange's continuing listing requirements, such as a share price below the minimum price mandated by those requirements or failure to comply with SEC reporting requirements. Following delisting, however, the company will continue to be subject to SEC reporting requirements because the delisted shares will continue to be registered under the Exchange Act as long as the delisted company has at least 300 shareholders of record (1,200 if the company is a bank, a bank holding company or a savings and loan holding company). Additional steps beyond delisting must be taken to terminate the company's SEC reporting obligations.

**8.2 Deregistration and termination reporting**

To terminate Exchange Act registration and SEC reporting obligations, a company must file a Form 15 with the SEC certifying that the class of securities registered under the Exchange Act is held of record by:

less than 300 persons (1,200 if the company is a bank, a bank holding company or a savings and loan holding company); or

less than 500 persons if its total assets have not exceeded US$ 10 million on the last day of each of its last three fiscal years.

Deregistration is effective 90 days following filing of the certification, but reporting obligations are suspended immediately. Reporting obligations are reinstated if the certification is withdrawn or denied.

**8.3 Take-private transactions**

You may also refer to Baker McKenzie's [Global Guide to Take-Private Transactions](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAWHb%2FPDBPVvgoynF5xh3j3s&amp;nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&amp;attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAeuDFUqE5GaTc%3D&amp;fromContentView=1), which covers some of the noteworthy features and requirements applicable to take-private transactions.

# Private investment in public equity - PIPE

## PIPE

[Last updated: 1 June 2022, unless otherwise noted]

Please refer to Baker McKenzie's [Global PIPE Guide](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAVSwlzHifk1Y4A4d%2BBG8qtI&amp;nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&amp;attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAevPtp6Dbiv5k%3D&amp;fromContentView=1) for the features and requirements applicable to PIPE transactions.

# Contacts

## 9. Contacts within Baker McKenzie

The following are the most appropriate contacts within Baker McKenzie for inquiries about public M&A in the United States: William Rowe, Thomas Hughes, Michael DeFranco, Piotry Korzynski, Craig Roeder, Roger Bivans, Amar Budarapu, and Mark Mandel.

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