Global Public M&A Guide - United States

Effecting a Takeover

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# 4. Effecting a Takeover

[Last updated: 1 January 2025, unless otherwise noted]

The two principal methods of acquiring 100% ownership of a target public company described above are (i) the “one-step” statutory merger, which is submitted for approval by the target public company's (and, in certain circumstances, the acquirer's) board to the target public company’s (and, in certain circumstances, the acquirer's) shareholders pursuant to a proxy solicitation in accordance with the SEC's proxy rules (i.e., Section 14 of the Exchange Act and Regulations 14A and 14C issued under the Exchange Act), and (ii) the “two-step” merger, that in the first step requires consummation of a tender offer to the shareholders of the target public company under SEC rules, immediately followed by a second-step "short-form" statutory merger to squeeze out non-tendering shareholders of the target public company.

In either structure, in a friendly context, the parties would negotiate a merger agreement which would set forth (i) the price, (ii) the process for and covenants in respect of conducting either the shareholder vote or the tender offer, (iii) the process for and covenants in respect of making applicable SEC filings, (iv) in the case of a tender offer, the process for effecting the squeeze-out of non-tendering shareholders, (v) certain representations and warranties, (vi) certain interim operating covenants, (vii) procedures for dealing with interloping bidders, (viii) procedures for regulatory approvals, and (ix) termination rights and fees. See “6.1 Tender offer procedures” for additional discussion on the procedures applicable to effecting a tender offer, and “7.1 Squeeze-out procedures” for additional discussion on the procedures applicable to effecting the second step squeeze out non-tendering shareholders of the target public company, including if a tender offer fails to result in sufficient tenders of target public company shares to consummate a second-step “short-form” statutory merger.

**4.1 Preliminary matters**

(a) *No takeover code* – There is no general takeover code under US federal or state law.

For “one-step” statutory mergers, proxy and consent solicitations in US public companies are governed by the SEC's proxy rules, which prescribe extensive disclosure requirements for such solicitations.

For “two-step” mergers, Section 14(d) of the Exchange Act and SEC Regulations 14D and 14E regulate both the information to be provided to target public company shareholders in a tender offer and the procedure for conducting a tender offer.

For either transaction structure, 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, 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.

(b) *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 an acquirer to commence a tender offer as described herein for the shares of a public company as a consequence of acquiring a specified percentage of the company's outstanding shares; however, at least three states impose quasi-analogous purchase obligations on public company acquirers (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, although some US 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, US federal securities laws do not generally 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 limited exceptions for squeeze-outs. Certain rules applicable to changes in the consideration payable in a tender offer, and the consideration payable in squeeze-outs, are discussed below.

**4.2 Making the bid public**

(a) *Preliminary discussions* – There are no specific US federal regulations around preliminary business discussions, and it is common practice for such preliminary business conversations around an acquisition to be kept confidential (with the exception of certain situations such as hostile approaches, management take-privates and publicly announced “strategic review” processes). In friendly transactions, the parties generally enter into a confidentiality agreement to permit the acquirer to conduct due diligence of the public company target. This agreement typically restricts public announcements about the negotiations and enables the target public company to provide material non-public information to the acquirer without violating SEC Regulation FD, which restricts selective disclosure of such information. It is typical in the US for parties to negotiate definitive agreements in parallel with due diligence. 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 in a target public company to a level that obligates it to offer to purchase publicly held shares. If the target public 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 public company.

Even at this preliminary stage, a potential acquirer will need to keep a record of its contacts and discussions with the target public company. If the parties reach agreement for an acquisition of the target public company, the disclosure document prepared for the target public 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 contacts, transactions or negotiations between the target public 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 public company's proxy statement or the acquirer's offer to purchase the target public company’s shares under an appropriate heading, such as "Background of the Merger."

As noted above, a party filing a Schedule 13D is obligated to disclose its "plans and proposals" regarding the target public 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 public 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 public company.

(b) *Agreement Execution* – Upon executing a definitive agreement for either a “one-step” merger or a “two-step” merger, the acquirer and target public 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 acquisition transaction.

(c) *“One-step” merger and pre-solicitation announcement* – In a friendly “one-step” merger, before the target public company (and, in certain circumstances, the acquirer) begin formally soliciting proxies from target public company shareholders, they may communicate orally and in writing with target public company shareholders and other stakeholders, e.g., employees, customers and suppliers, and the market regarding the transaction. Under SEC Rule 165 under the Securities Act and Rule 14a-12 under the Exchange Act, all such public written communications commencing with and including the first public announcement of the transaction, must be filed with the SEC on or before the day of first use. Pursuant to Rule 14a-12 under the Exchange Act, each communication 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 “pre-solicitation 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; however, SEC Rule 165 under the Securities Act permits such offers prior to the filing of a registration statement for the offering, subject to that rule's filing requirements and information limitations.

(d) *“Two-step” merger and tender offer commencement* – In a friendly “two-step” merger, the parties will execute a merger agreement that, among other things, obligates the acquirer to commence the first-step tender offer under applicable SEC rules, setting forth the agreed conditions to that offer and the consummation of the second-step merger squeezing out minority non-tendering shareholders.

Under the SEC tender offer rules, a tender offer is commenced when the acquirer first publishes, sends or gives the means to tender securities to the target public company's shareholders. On the commencement date, the acquirer 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 acquirer must deliver a copy of Schedule TO to the target public company, notify the exchange on which the target public 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 the target public company’s shareholders.

*Pre-offer announcements – Generally* – Announcements prior to formal commencement of a tender offer, e.g., an announcement that a bidder is considering or has determined to make a tender offer, or is in discussions with the target public 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 or before 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 public 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 public company announcing their execution of a merger agreement prior to commencement of a tender offer for the target public 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 under the Securities Act 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.

**4.3 Form of consideration and pricing rules**

(a) *Form* – Neither US federal securities laws nor state corporate laws prescribe the form of consideration to be paid in a tender offer or merger with a target public company or its shareholders. Apart from the acquirer’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 public company shareholders in an acquisition transaction consists of equity securities of the acquirer, and the transaction otherwise satisfies the US tax law requirements for a "reorganization", target public company shareholders will not recognize gain or loss on the exchange of target public company shares for acquirer shares; rather, any tax on acquirer shares received as consideration will be deferred until the target public company shareholders sell the acquirer shares. The transaction is immediately taxable to target public 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 public company shareholders must be registered under the Securities Act (unless an exemption is available). Using acquirer-issued securities as consideration is a practice typically reserved for acquirers that already have publicly listed shares in the US, as the process registering acquirer shares with the SEC for use in an acquisition transaction is usually incompatible with the timing constraints of most M&A deals (with the exception of back-door IPOs such as reverse mergers and SPACs). Preparation of a registration statement is a complex process, and the issuer of the to-be-registered shares and certain other parties are subject to strict liability for material misstatements in and omissions from the prospectus.

*Acquirer shareholder approval requirements* – Exchange listing rules may apply to the acquisition of a significant minority interest in a public company from the company, or to the issuance of listed public company shares as acquisition consideration. Stock exchanges require that public companies list all outstanding shares of their publicly listed class(es) of securities, as well as shares of such class(es) issuable upon conversion of convertible securities, exercise of options, warrants and other subscription rights, etc. As a condition to publicly-listing their securities, both the NYSE and Nasdaq require their public 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 public company (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 public company, 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 acquirer 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 public company to the acquirer, that information could include the acquirer’s historical financial statements and pro forma combined financial statements that give effect to the business combination. Such information, including in particular the target’s financial information required for producing pro forma financial statements, is likely to be impractical or even impossible to obtain in a hostile acquisition, making the issuance of shares in a registered offering impracticable in such situations.

*Timing generally* – An acquirer in an all-cash transaction will often have a timing advantage over a rival bidder offering its securities, due to the certainty of value and the timing for registering its shares. This can be especially important when the board of the target in 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 public 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 public 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 public company in an all-cash merger situation (including in “second-step” squeeze-out mergers following a “first-step” 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 (other than in the pharmaceutical and biotech industries, where they are fairly common) 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-shares transaction. A fully transferable CVR will generally be considered a security requiring Securities Act registration and, if structured as a debt instrument, 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, CVRs, if used, are structured to impose restrictions on transferability and other limitations to obviate the need for Securities Act registration.

(b) *Pricing* – As noted above, neither US federal securities laws nor state corporate laws generally 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). However, factors affecting and potentially prescribing certain pricing will include the following:

*SEC best price / all holders rule* – In a tender offer, SEC Rule 14d-10 requires that a tender offer be open to all holders of the class of a security subject to the offer and that the consideration paid to any holder for a tendered security equals the highest consideration paid to any other holder of security.

*Price changes* – In a tender offer, 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, certain rules may require the acquirer to provide information regarding purchases of the target public company's securities during the preceding 60 days by the acquirer and certain related parties. For example, in the tender offer phase of a “two-step” merger, the acquirer is required to disclose this information in its offer documents. In a “one-step” merger transaction, if the acquirer is required to file Schedule 13D as a result of beneficial ownership of target securities, this information must be disclosed under Item 5 of Schedule 13D. 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 public company and the basis for that belief, among other additional disclosures.

**4.4 Conditional and unconditional offers**

US federal securities laws governing tender offers and practice do 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 public 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.

US federal securities laws do, however, regulate the types of permissible conditions to a tender offer; specifically, under SEC guidance, a tender offer can be subject to conditions only (i) where the conditions are based on objective criteria and (ii) the conditions are not within the bidder's control. If the conditions are not objective and are within the bidder's control (e.g., the offer may be terminated for any reason or may be extended indefinitely), the SEC has taken the view that the offer would be illusory and may constitute a fraudulent, deceptive or manipulative practice under applicable securities laws.

Typical offer 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 public 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 public 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.

*Bring-down of target public company covenants* – Receipt of a bring-down certification from the target public company that the target public company has complied with any covenants to which it was subject to under the merger agreement, typically to an “in all material respects” standard.

*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 effects* – Absence of any material adverse effects on the business, financial condition or results of operations of the target public 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 public 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 public 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.

For “one-step” statutory mergers, similar conditions are typically negotiated and framed as conditions to the closing of the merger.

**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, for tender offers, 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 public company. The offer to purchase (or, typically, a definitive proxy statement for a long-form merger, in order to avoid omitting information that might be material to an investor’s investment decision) 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 public 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 certain financial information for the acquirer in an all-cash tender offer for all of the outstanding shares of the target public 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 public 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.

If a financing condition to a tender offer is waived, this will be treated as a material change to the terms of a tender offer that must be disclosed, and the period during which shareholders may tender their shares in the target public company must be extended under SEC Rule 14e-1 under the Exchange Act to permit the target public company shareholders time to evaluate the waiver (the SEC generally expects a minimum extension of 5 business days).

**4.6 Recommended and hostile offers**

In all tender offers, the target public 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 public 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 company's formal recommendation statement when it is available.

In a friendly transaction, whether a “one-step” statutory merger or a “two-step” merger, the content of the target public company's position is usually negotiated in advance and the offer to purchase or target public company's proxy statement will include information regarding the board's consideration and approval of the transaction, its recommendation that target public 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 “two-step” merger, the target public 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**

[Last updated: 1 April 2025, unless otherwise noted]

(a) *Duties of directors; standard of conduct*

Directors of a company must act in the best interests of the company 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 company and its shareholders ahead of any self-interest. In the context of a "change of control transaction", the board is generally required to comply with so-called Revlon duties 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 company 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. Additionally, as part of informing itself with respect to a potential sale, the target company's board will seek a "fairness opinion" from its investment bankers before approving a change of control transaction. Having accepted these methods, Delaware courts have nonetheless emphasized that there is no single pathway or collection of methods for a board to satisfy its fiduciary duties in this respect, and the board of a Delaware company should choose methods and run processes based on its informed and reasoned assessment of a specific situation in order to maximize shareholder value.

On the acquirer side, for significant acquisitions, particularly where acquirer shares are used as consideration, an acquirer may consider retaining its own investment banker to provide a similar opinion.

(b) *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, directors are presumed to have acted in a well-informed manner, in good faith, and in the best interests of the company. That presumption may be overcome by appropriate evidence that the directors did not act on an informed basis, in good faith, or in the belief that their action was in the best interests of the company and its shareholders. If these presumptions are not rebutted, then the court will apply the business judgment rule and will not substitute its judgment regarding the merits of a transaction for that of the directors unless it cannot be attributed to any rational business purpose.

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 company'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 shareholders’ decision was truly informed, meaning that all material facts were disclosed completely and accurately. Additional challenges by plaintiff shareholders have focused on the involvement of and potential benefits accruing to a controlling shareholder which, if true and without the ab initio implementation of other measures, results in the transaction being reviewed not under the lenient business judgment rule but the more stringent standard of entire fairness.

In addition, confusion created by case law addressing the standard of review applicable to transactions and other dealings with controlling shareholders ultimately prompted the Delaware legislature to amend the statutory section on conflict of interest transactions with the goal of providing greater certainty to parties approaching, negotiating and structuring transactions involving controlling shareholders to limit the risk of fiduciary duty litigation.  Specifically, Section 144 of the Delaware General Corporation Law was amended in March 2025 to codify, among other things, certain safe harbors for controlling shareholder transactions.  Under amended Section 144(b), transactions (other than statutorily defined "going private transactions") involving a controlling shareholder now receive safe harbor from both equitable relief and damages liability if they are either (1) approved or recommended for approval by an independent board committee consisting of at least two directors in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee, or (2) approved or ratified by the informed, uncoerced, affirmative vote of a majority of the votes cast by the corporation’s disinterested shareholders. For going private transactions with controlling shareholders, both approvals are required for safe harbor, codifying such previous similar approval requirements for obtaining deferential business judgment review of such transactions from the *Corwin* line of cases while eliminating the requirement from those cases to precondition ab initio the approval of the transaction on both approvals.  The March 2025 statutory amendments also limit controller liability to breaches of loyalty or improper benefits, shielding controlling shareholders from damages for breaches of the duty of care in their capacity as controllers.  These statutory amendments do not prevent a party that does not utilize the safe harbors above from asserting existing defenses under common law.

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. More recently, Delaware raised the bar for plaintiffs even further, requiring that the supplemental disclosure be “plainly material” for any mootness fee to be awarded. The response to *Trulia* in other jurisdictions has varied.

There has been a significant decline in Delaware-based mergers and acquisitions litigation, with many commentators contributing the decline to the *Corwin* line of cases, clarifications by courts on when injunctive relief is not available, and the heavy scrutiny now being applied to "disclosure only" settlements under *Trulia*. In an apparent response to these obstacles, plaintiff shareholders of target public companies have repurposed many of their claims as violations not of fiduciary duties but of US federal securities laws. If the disclosures by the target public company are materially misleading or omit material information, then the target public company shareholders’ actions may be enjoined until the missing information is provided with reasonable time for the target public company shareholders to review it. In practice, however, many claims of defective disclosures are strategic; many plaintiff public company shareholders choose not to file a complaint with a court and instead send letters to the target public company (some attaching draft complaints that are never filed) asserting that the target public company’s disclosures are materially misleading. If a target public company issues additional public disclosures addressing these alleged gaps, then the plaintiff target public company shareholders again claim that they created a benefit and/or are entitled to a mootness fee. US federal courts have increasingly criticized the value of such disclosures and any claim for fees by plaintiffs’ counsel.

Plaintiff shareholders have pressed other forms of litigation in response to these trends in Delaware and US federal courts. Some prospective plaintiff shareholders have asserted less common causes of action for fraudulent statements or behavior under the laws of US states where individual shareholders reside. Other prospective plaintiff shareholders have demanded access to company books and records under Section 220 of the Delaware General Corporation Law, which provides shareholders 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 shareholder vote was fully informed, as required by *Corwin*, or whether the shareholder 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. Moreover, in response to a substantial increase in the volume of Section 220 claims and demands for corporate books and records beyond board-level materials, the March 2025 amendments to the Delaware General Corporation Law noted above also amended Section 220 of the Delaware General Corporation Law to narrow the scope of corporate books and records available for inspection absent a heightened showing by the shareholder of its compelling need for the records and that the specific records requested are necessary and essential to further the shareholder's proper purpose.

**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, whether a one-step or two-step 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 and, in case of a two-step merger, refrain from tendering into the first step tender offer) 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.

©Copyright © 2025 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.

**Internal content**: This is internal Content and may be used as a reference. Do not distribute the Content outside the Firm.