Global Public M&A Guide - United States

General Legal Framework

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# 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:

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| 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.

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