Public Take-Over Refresh: Tender Offers, Mergers, Proxy Statements and More

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Today's Discussion

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Part 1- Introduction

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US Public Companies

Source: Dealogic, Bloomberg, SIFMA estimates (as of September 2019)

Note: U.S. domiciled companies listed on U.S. exchanges. Excludes BDCs, SPACs, ETFs, CEFs, & rights offers

SPACS

Source: PitchBook | **Geography:** US
*As of September 20, 2021

US M&A Market is Hot

- Total number of deals less but value sky high
- First half of 2021, saw deals worth US$1.4t (up from US$345b in H1 2020)
- Almost double the average seen in the five years prior to the pandemic (US$784b).

One Step Takeovers

Step 1 – Statutory Long Form Merger

(the parties negotiate a merger agreement for the acquisition of the target company)

- **Requires target shareholders' approval**
- **Proxy Statement under Schedule 14A required (unless a Foreign private issuer)**
- If the merger can be approved by a select number of controlling shareholders by a consent in lieu of a meeting, then a proxy statement is unnecessary. Instead the target company would be required to comply with the rules of the SEC applicable to information statements. (Section 14(c) of the Exchange Act and Regulation 14C.)

Two Step Takeovers –

- **Tender offers are usually part of 2 step takeover**

  Step 1 - Tender Offer

  PLUS

  Step 2

  - **Short-form (Squeeze-out) Merger at 90% (some states 85%)**
    - The Bidder may implement a short-form merger, without the approval of any other shareholder of the Target, and through that short-form merger acquire all remaining Target common shares.
  - **If under 90%, by long-form Merger if agreed with the Target**
  - **251(h) Merger under Delaware Law**
  - **Compulsory Acquisition Procedures under laws of many common law countries like the UK, Australia, Hong Kong, Singapore etc.**

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Two Step v One Step

- A one-step merger transaction always requires the approval of the board of directors of the Target, so it is not available if the acquirer is proceeding on an unsolicited (or hostile) basis.
- A one-step merger will always assure the acquirer that it will receive 100% of the shares of the Target if it purchases any of the shares. This may be of significant benefit to the acquirer, particularly with respect to its financing or with respect to assurance that it will be able to realize the benefits of the proposed transaction.
- A tender offer can be completed in as little as 20 business days and without a shareholder meeting, compared to the more lengthy SEC review and proxy solicitation process required in the one-step merger structure. This may give the Bidder control (50% plus) faster than a one step alternative.

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Two Step v One Step (cont'd)

- If acquirer stock is used (in whole or in part, in combination with cash) as consideration in the acquisition, a one-step merger is almost always preferred over an exchange offer because the acquirer shares issued to Target shareholders in the transaction will need to be registered with the SEC, which requires SEC review and usually obviates any timing advantage of the two-step process.
- In certain regulated industries, the antitrust or other regulatory approval process may be lengthy, eliminating the timing advantage of using the two-step structure.
- There are frequently tax issues, particularly if the acquirer is using its shares as consideration, that may support using a single-step merger structure rather than a tender offer structure.

Compared to Alternative Takeover Methods

- **Private Transactions**
  - **Share Purchase**
  - **Asset Purchase**
  - **Long Form Merger**
  - **363 sales under the Bankruptcy Code**
- **Other Public Transactions**
  - **Scheme of Arrangement** – Court approved combination used in common law jurisdictions. Not a tender offer or a merger. If securities are issued in exchange, these are often exempt under Section 3(a)(10) under the Securities Act

Outside the United States

- Many jurisdictions don't have a merger concept so tender offers (also called takeover offers) are the most common way to effect a public company takeover.
- In the UK, takeover offers are primarily governed by the Takeover Code (administered by the Takeover Panel) which are similar in many ways to the Williams Act requirements
- Foreign Private Issuers are exempt from the proxy rules under Section 14.

Part 2- Tender Offers

What is a Tender Offer?

- A tender offer generally involves a broad solicitation by a Bidder (i.e., a company or other entity) to purchase a substantial percentage of a Target's securities for a limited period of time.
- A tender offer can be for equity or debt securities.
  - (We are going to focus on equity today.)
- The consideration in a tender offer can be cash (cash tender offer), shares (exchange offer), cash and shares or cash and other securities (like loan notes in the UK)
- A tender offer can be hostile, friendly or competing.

Williams Act(1) – Securities Exchange Act of 1934

- Exchange Act 14(e) and Regulation 14E apply to all tender offers
- Exchange Act 14(d) and Regulation 14D apply to tender offers for equity securities registered under Section 12 of the Exchange Act
- Tender offer for own securities governed by Rule 13e-4
- Going Private transactions governed by Rule 13de-3
- Exchange Offerings - Securities Offerings need to registered with the SEC under the Securities Act or an exemption must be found

  (1) 1968 amendments to the Exchange Act proposed by Senator Harrison A. Williams of New Jersey

Are you kidding me? No definition of "Tender Offer"

- Yes, the term "tender offer" is not defined in the U.S. securities laws. (1)
- Wellman v. Dickinson, 475 F. Supp. 783, 823–25 (S.D.N.Y. 1979), aff'd, 682 F.2d 355 (2d Cir. 1982) identified eight factors, the existence of one or more of which could indicate the existence of a tender offer.
- We still use this 8-factor test today.

(1) In proposed amendments to the tender offer rules in 1979, the SEC proposing a definition of "tender offer" as, among other things, an offer extended to more than ten persons; the proposed definition was withdrawn from the final rules adopted

Wellman v. Dickinson 8 Factor Test

1. the active and widespread solicitation of public shareholders for the shares of a company;
2. a solicitation made for a substantial percentage of a company's shares;
3. an offer to purchase made at a premium over the prevailing market price;
4. the terms of the offer are firm rather than negotiable;
5. the offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
6. the offer is open only for a limited period of time;
7. the shareholders are subjected to pressure to sell their shares; and
8. public announcement(s) of a purchasing program precede or accompany rapid accumulation of large amounts of the Target's securities.

Typical Tender Offer

- A typical equity tender offer is a conditional offer to buy a large number of shares at a price that is typically higher than the current price of the stock.
- **The "premium" is usually offered on the condition that the Bidder receives 50% or more (control) in the Tender Offer.**
- The offer may be subject to a number of conditions like anti-trust clearance, foreign ownership clearance and other regulatory approvals being obtained.
- It is rare for the Bidder to acquire 100% of the Target's share capital through the tender offer itself.

Two Step Takeovers

- **Tender offer are usually part of 2 step takeover**

Step 1 - Tender Offer

PLUS

Step 2

- **Short-form (Squeeze-out) Merger at 90% (some states 85%)**

  The Bidder may implement a short-form merger, without the approval of any other shareholder of the Target, and through that short-form merger acquire all remaining Target common shares.
- **If under 90%, by long-form Merger if agreed with the Target**
- **251(h) Merger under Delaware Law**
- **Compulsory Acquisition Procedures under laws of many common law countries like the UK, Australia, Hong Kong, Singapore etc.**

Two Step Takeovers (con't)

- Please note that any second-step merger transaction (short-form, long-form or 251(h)) will also be subject to Rule 13e-3 (going private rules) unless the Bidder
  - implements the second-step merger within one year of the date of termination of the tender offer,
  - offers consideration in the second-step merger at least equal to the highest consideration offered during the tender offer, and
  - fully discloses in the Schedule TO its intention to implement the second-step merger.

251(h) Merger under Delaware Law

- The Bidder can implement a merger transaction (known as a 251(h) merger) under which the Bidder will acquire the remaining Target common shares for the same consideration as the Bidder paid in the tender offer if
  - the Target is incorporated in Delaware and
  - the acquirer makes a tender offer for all shares of the Target pursuant to an agreement approved by the Target board of directors and
  - following consummation of the tender offer the acquirer owns enough shares of the Target that the acquirer could approve a long-form merger without the approval of any other Target shareholder and
  - certain other conditions are met.
- Other than Rule 13e-3 (going private rules) if applicable, there are no disclosure requirements imposed by the federal securities laws with respect to the 251(h) merger.

Preliminary Discussions

- Acquisition transactions often commence with preliminary negotiations and/or discussions between the acquirer and the Target.
- As a general matter, a Target and the Bidder are not under any obligation to disclose these preliminary discussions, even if requested to confirm or deny discussions by investors, the press or the New York Stock Exchange.
- If, however, the acquirer or the Target chooses to confirm or deny rumors, it must do so accurately.
- It is also very common for preliminary discussions to take place pursuant to a negotiated confidentiality agreement or NDA.
- There is generally no restriction on the ability of a Target to provide information to a potential acquirer if the board of directors of the Target believes it is appropriate to do so.

Preliminary Purchases of Shares by the Bidder

- An acquirer may purchase shares of a Target before initiating preliminary discussions or commencing a tender offer.
- In addition, the purchase in advance of Target common shares will not impose any floor or minimum price with respect to a subsequent acquisition.
- There are no compulsory offer requirements under US tender offer rules as exist in many common law countries. Compulsory offers require a Bidder to make a tender offer for all the shares of the Target after a certain threshold of shares are acquired.

Preliminary Purchases of Shares by the Bidder

Limitations

- Limitations in NDA or Standstill. Consider whether in possession of material (price sensitive) non-public information shortly).
- Under Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), an acquirer that purchases more than 5% of the outstanding common shares of a Target must, within 10 calendar days, publicly file with SEC a disclosure statement on Schedule 13D. This disclosure statement will include various information about the acquirer, including, most importantly, its plans or proposals with respect to further acquisitions of shares of the Target or any extraordinary transaction involving the Target.
- Under the Hart-Scott-Rodino Antitrust Improvements Act, unless an exemption is available, an acquirer may not purchase more than approximately $94 million (adjusted for inflation annually) in value of common shares of a Target without filing with the United States antitrust authorities (and notifying the Target of the filing) and waiting for the expiration of a 30-day period.
- CIFIUS considerations depending on level of foreign shareholding and industry

Part 3 – 14E and 14D Rules

Regulation 14E v Regulation 14D

- All tender offers, including offers for debt securities and equity securities that are not Registered Securities (to which Exchange Act Section 14(d) and Regulation 14D do not apply), are subject to Exchange Act Section 14(e) and Regulation 14E.
- In addition to Exchange Act Section 14(e) and Regulation 14E, Section 14(d) and Regulation 14D apply to a tender offer for a class of equity securities registered under Section 12 of the Exchange Act, as a result of which the Bidder would, after completion of the offer, be the direct or indirect beneficial owner of more than 5 percent of such class of equity securities.
- I will refer to equity securities registered under Section 12 of the Exchange Act as “Registered Securities”. Remember this is not the same as being a reporting issuer with the SEC.
- Very important to keep 14E and 14D straight in cross border deals.

This presentation will not focus on Exchange Offers, but please remember that offerings of securities must also comply with the registration requirements of the Securities Act of 1933. Exchange Offers are registered on Forms S-4 and F-4.

Minimum Offer Periods – 14E

- A tender offer must remain open for a minimum of twenty U.S. business days from the time the tender offer commences. See Rule 14e-1(a).
- The primary reason for the minimum offer period is to provide investors with sufficient time to make a well-informed investment decision.
- The term “U.S. business day” means any day other than Saturday, Sunday, or a U.S. federal holiday and consists of the time period from 12:01 a.m. through 12:00 midnight Eastern (New York City) Standard Time. See Rule 14d-1(g)(3).
- A tender offer must remain open for at least ten U.S. business days after notice of a change is published, sent, or given in relation to any of the following: (i) the consideration offered, (ii) the percentage of the securities being sought, or (iii) the dealer’s soliciting fee. See Rule 14e-1(b).
- An SEC staff release states that a tender offer should remain open for at least ten U.S. business days in respect of a material change as significant as a change to the consideration offered or the percentage of the securities being sought and for at least five U.S. business days in respect of any other material change. Interpretive Release Relating to Tender Offers Rules, SEC Release No. 34-24296, 1987.

Early Termination, Prompt Payment, Notice – 14E

- The SEC takes the position that once the time at which a tender offer will expire has been announced, whether at the outset of the offer or subsequently, any change to the time of expiration constitutes a material change to the offer, requiring a public announcement and a formal extension of the offer.
- Consideration must be paid or securities returned promptly after termination or withdrawal of an offer. "Promptly" in this context is generally construed to mean within three U.S. business days. See Rule 14e-1(c). See also 1999 Cross-border Proposing Release, supra note 72, at 69144 ("'prompt' payment standard is satisfied if payment is made in accordance with normal [U.S.] settlement periods").
- A Bidder must provide notice of any extension by a press release or other public announcement before the earlier of (i) 9:00 a.m. Eastern Standard Time on the next U.S. business day after the scheduled expiration of the offer and (ii) the opening of trading on the next business day after the scheduled expiration of the offer. The notice must include disclosure of the approximate number of securities tendered to date. See Rule 14e-1(d).

Response of the Target – 14E

- Within ten U.S. business days after commencement, the Target must publish or give its security holders a statement that it (i) recommends acceptance or rejection of the Bidder's offer, (ii) expresses no opinion and is remaining neutral toward the Bidder's offer, or (iii) is unable to take a position with respect to the Bidder's offer, including the reasons for the position disclosed. See Rule 14e-2(a)
- There is no mandated form of disclosure if the Target is not a reporting company and the statement is neither submitted to, nor filed with, the Commission.
- For Registered Securities, Schedule 14D-9 are required as discussed below.

Purchases outside the Tender Offer - Rule 14e-5

- Rule 14e-5 generally prohibits purchases or arrangements to purchase securities of the subject class outside of the tender offer.
- The rule aims to protect investors by preventing a Bidder "from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms."
- In the SEC's view, "the rule prohibits the disparate treatment of security holders, prohibits the avoidance of proration requirements, and guards against the dangers posed by a Bidder's purchases outside an offer that may involve fraud, deception and manipulation."
- This prohibition applies from the time the tender offer is publicly announced until it expires..
- Rule 14e-5 applies generally to the Bidder and its affiliates, the Bidder's advisers (as long as the advisers' compensation is dependent upon completion of the offer), the Bidder's dealer-manager and its affiliates, and any person acting in concert with any of the foregoing.
- Important to discuss this rule early with the financial advisers/dealer managers.
- This rule often causes issues in cross-border tender offers.

Regulation M

- Remember in the case of an Exchange Offer or other business combination transaction pursuant to which securities are offered in the United States, Regulation M under the Exchange Act may apply.
- Regulation M prohibits Bidders and Target companies (in negotiated transactions), distribution participants (principally underwriters, brokers, dealers, and other persons that have agreed to participate in a distribution of securities), and their affiliated purchasers, directly or indirectly, from bidding for, purchasing, or attempting to induce others to bid for or purchase any securities of the subject class during the period of one or five U.S. business days before the date of commencement of the offer until the offer expires or the business combination transaction is completed.

General Anti-Fraud

- The general anti-fraud provisions of the Exchange Act, including Section 14(e), Section 10(b), and Rule 10b-5, prohibit, in connection with any tender offer, the Bidder or its agents from making any untrue statement of a material fact or omitting to state any material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.
- Similarly, Bidders must not engage in any deceptive or manipulative practices, and sufficient notice and time to react must be given to Target shareholders in connection with any change in consideration or other material terms of the offer.
- Rule 14e-3 under Section 14(e) establishes a “disclose or abstain from trading” requirement that prohibits any person, other than the Bidder and its agents, who is in possession of material non-public information relating to the tender offer, from trading in the securities of the Target.

Regulation 14D

- Do Exchange Act Section 14(d) and Regulation 14D apply?
- In <u>addition</u> to Exchange Act Section 14(e) and Regulation 14E, Exchange Act Section 14(d) and Regulation 14D apply to a tender offer for a class of equity securities registered under Section 12 of the Exchange Act, as a result of which the Bidder would, after completion of the offer, be the direct or indirect beneficial owner of more than 5 percent of such class of equity securities.

Commencing a Tender Offer & Announcements

- A Bidder will have commenced its tender offer at 12:01 a.m. on the date when the Bidder first publishes, sends or gives the means to tender to security holders. See Rule 14d-2(a).
- A communication by the Bidder will not be deemed to constitute commencement of a tender offer if:

  (1) It does not include the means for security holders to tender their shares into the offer; and

  (2) All written communications relating to the tender offer, from and including the first public announcement, are filed under cover of Schedule TO. See Rule 14d-2(b).
- A Bidder must file with the SEC a tender offer statement on Schedule TO on the date of commencement of the offer. See Rule 14d-3(a)(1)
- After commencement of the offer, the Bidder must report promptly on Schedule TO material changes to information previously filed with the SEC, including additional tender offer materials, such as press releases, investor presentations, and similar materials relating to the tender offer. See Rule 14d-3(b).

Disclosure on Schedule TO

The principal disclosure requirements of Schedule TO are as follows:

- summary of the material terms of the tender offer;
- summary of past transactions and significant corporate events between the acquirer and the Target;
- background to the transaction, including the history of any negotiation between the acquirer and the Target;
- summary of the purposes of the tender offer, from the perspective of the acquirer, and any plans or proposals that relate to or would result in an extraordinary transaction involving the Target;
- brief summary of the source and amount of funds to be used in payment of the tender offer, including any material conditions to the financing;
- information regarding the directors and officers of the acquirer;

Disclosure on Schedule TO (con't)

The principal disclosure requirements of Schedule TO are as follows:

- summary of any recent transactions in the Target securities by the acquirer or certain of its related parties; and
- financial statements for the acquirer must also be provided when its financial condition is material to the decision by Target security holders whether to sell, tender or hold Target common shares. Financial statements of the acquirer are deemed not material if:
  - it is an all-cash transaction;
  - there is no financing condition; and
  - either (x) the offeror is a registrant under the Exchange Act or (y) the offer is for all outstanding Target common shares.
  - If financial statements are required and the acquirer is a foreign company, the financial statements must include a reconciliation to US GAAP.

Dissemination of "Offer to Exchange"

- The "offer to exchange" forms a substantial part of Schedule TO and must be disseminated to the Target's U.S. holders as soon as practicable on the date of commencement of a tender offer. See Rule 14d-4.
- Dissemination is typically effected by mailing or other delivery of the offer to exchange to the Target's shareholders and in certain circumstances by summary publication in a U.S. news-paper with national circulation.
- In addition, the U.S. tender offer rules provide the Bidder with the right to have its tender offer materials disseminated pursuant to the Target's shareholder lists.
- Under Rule 14d-5, the Target may elect either to provide the Bidder with its shareholder list or to distribute the Bidder's offer to exchange to its shareholders on behalf of the Bidder. See Rules Rule 14d-5(b) and (c).

Target Response Document

- The Target must file with the SEC on Schedule 14D-9 as soon as practicable on the date of publication or dispatch any solicitation, recommendation, or statement made in relation to the offer to its security holders. See Rule14d-9(b)(1)
- The Target also is required to file any pre-commencement communications (such as press releases) regarding the tender offer with the SEC on Schedule 14D-9 no later than the date of release. See Rule 14d-9(a).

All-Holders & Best Price Rule

- A tender offer for Registered Securities must be made to all holders of the Target's securities. See Rule 14d-10(a)(1).
- All holders must be paid the highest consideration paid to any other holder of the Target's securities. See Rule 14d-10(a)(2).

Withdrawal Rights

- Tendering shareholders have the right to withdraw tendered securities during the initial offering period of a tender offer. See Rule 14d-7.
- Tendering shareholders also have the right to withdraw tendered securities and after the passing of sixty calendar days from the date of commencement of the tender offer if the tender offer remains open under Section 14(d)(5) of the Exchange Act (we refer to the latter as "back-end withdrawal rights").
- As a consequence of the requirement for withdrawal rights, a Bidder cannot purchase any tendered securities until the expiration of the initial offering period.
- Please note that the SEC generally takes the view that withdrawal rights must be available to Target shareholders worldwide, not only to those shareholders resident in the United States.
- Remember Withdrawal Rights are only applicable to a tender offer for Registered Securities where Exchange Act 14(d) is applicable.

Subsequent Offer Period

- A Bidder may provide for a subsequent offering period of at least three U.S. business days immediately after the termination of the initial offering period if
  - (i) the initial offering period of at least twenty U.S. business days has expired,
  - (ii) the offer is for all outstanding securities of the subject class,
  - (iii) the Bidder immediately accepts and promptly pays for all securities tendered during the initial offering period,
  - (iv) the Bidder announces the results of the tender offer, including the approximate number and percentage of securities deposited, no later than 9:00 a.m. Eastern Standard Time on the next business day after expiration of the initial offering period and immediately begins the subsequent offering period,
  - (v) the Bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period, and
  - (vi) the Bidder offers the same form and amount of consideration to security holders in both the initial and the subsequent offering period. See Rule 14d-11.
- No withdrawal rights apply during the subsequent offering period. See 14d-7(a)(2).

NOT regulated by the Tender Offer rules

- There is not any requirement under the tender offer rules for an acquirer to bid for a minimum or a maximum percentage of the Target common shares. However, a Bidder may be subject to an obligation to extend its tender offer if it changes the percentage sought.
- Partial bids, in which the acquirer is seeking less than 100% of the Target common shares, are permitted.
- Conditions are not regulated. There is not any requirement with respect to the presence or omission of conditions.

NOT regulated by the Tender Offer rules (con't)

- There is no restriction on the acquirer receiving advance binding commitments from major shareholders of the Target to support the tender offer, even if these commitments are irrevocable. It may be a violation of the acquirer's obligation to offer the same consideration to all holders if the acquirer agrees to offer different consideration to a major shareholder who commits to support the transaction.
- Notwithstanding the obligation to offer the same consideration to all holders of Target common shares, it usually will be possible for the acquirer to offer employment-based compensation to executives of the Target, even if they are shareholders.
- An acquirer should expect that any definitive agreement between the acquirer and the Target will contain further contractual restrictions on the conduct of the tender offer. Common restrictions in these agreements are limitations on the ability of the acquirer to extend the offer and on the ability of the acquirer to amend any minimum acceptance condition.

SEC Review of the Form TO

- In the case of an all-cash transaction, although the Schedule TO must be filed with the SEC, it is not subject to any pre-clearance process within the SEC.
- Accordingly, the acquirer may (and customarily does) commence the tender offer and distribute the offer to purchase to Target common shareholders before receiving comments, if any, from the SEC on the Schedule TO.
- Comments, if any, from the SEC on the Schedule TO will usually be dealt with through amendments to the Schedule TO.
- An acquirer does not need to have SEC approval of the tender offer or of any of its terms or amendments, although most acquirers will seek to respond constructively to SEC comments on the Schedule TO.
- The Bidder is required to promptly amend the Schedule TO if there is any material change in the information provided. However, the Bidder is not in general required to distribute to Target shareholders any supplement or similar document in the event of an amendment to the Schedule TO (even amendments in response to SEC comments).

Summary of Past Transactions

- In the context of any offer, shareholders and their counsel may scrutinize the summary of past transactions and significant corporate events between the acquirer and the Target for evidence of an unfair transaction process, failure to maximize price, and other potential violations of fiduciary duties in support of legal action against the Bidder and the Target.
- Where negotiations for an agreed transaction have broken down or where an offer is otherwise hostile, the description of any breakdown in negotiations may also create a sensitive disclosure issue.
- Without the Target's cooperation, certain mandated information also may not be available.
- It is important for the Bidder and its financial advisers to understand this requirement early in the process so that appropriate records of conversations and correspondence are kept and inquiries of the Bidder are timely made and recorded.

Target Projections

- Providing the Bidder with undisclosed Target projections could force an uncomfortable public disclosure of these numbers.
- Discussion of the legal implications of providing any material (price-sensitive) non-public information on Target should be discussed early in the process.

Part 4- Exchange Offers

Form S-4 and Form F-4 Registration Statements

- A US company undertaking a registered exchange offer in the United States must prepare and file with the SEC a registration statement on Form S-4. A foreign private issuer Bidder would use Form F-4.
- Both forms consolidate the Exchange Act requirements of Schedule TO and the Securities Act requirements for the registration of securities and include the prospectus/offer to exchange to be distributed to Target shareholders.
- The registration statement contains detailed information about the Bidder and the Target, the exchange offer transaction, the securities being registered, the Bidder's plans with respect to the Target, the means and effects of tendering shares, audited financial statements of both the Bidder and Target, and pro forma financial information showing the effects of the tender offer.
- The preparation of a registration statement (and the prospectus/offer to exchange contained within) can take several months and must be filed before commencement of the exchange offer.

Form S-4 and Form F-4 Registration Statements

- If the SEC Staff decides to review the registration statement, it will so notify the Bidder and will provide comments on the registration statement to the Bidder.
- If the Staff's comments result in any material changes to the prospectus/offer to exchange and such document has already been distributed to the Target security holders, a supplement to the prospectus/offer to exchange would need to be re-circulated to the Target's security holders and the offer would need to be kept open, and possibly extended, for an additional period of at least five U.S. business days, depending on the changes.
- Before a Bidder may accept and settle any tendered securities, the SEC must have declared the registration statement effective.
- In the case of a registered exchange offer, the Bidder and its directors, officers, and controlling persons will be subject to liability under Section 11.

Part 5- Cross Border Offers

Excluding US Shareholders

- Non-U.S. Bidders often exclude US Shareholders by structuring their transaction to avoid the use of U.S. jurisdictional means.
- U.S. courts have generally taken the view that tender offers made outside the United States are not subject to the procedural of U.S. securities laws. The landmark case in this regard is Plessey Co. plc v. Gen. Elec. Co. plc, 628 F. Supp. 477 (D. Del. 1986).
- The SEC has “recognized that bidders who are not U.S. persons may structure a tender offer to avoid the use of the means or instrumentalities of interstate commerce or any facility of a U.S. securities exchange in making its offer and thus avoid triggering application of our rules.”
- The SEC has viewed with skepticism a purported exclusionary offer for Registered Securities.

Excluding US Shareholders

- Typical provisions to avoid U.S. Jurisdictional Means include:
- The offer documents, forms of acceptance, other shareholder communications, press releases, and offer-related materials are not made available to U.S. security holders (or their brokers, nominees, or other intermediaries).
- No money, securities, or other consideration is solicited from U.S. residents.
- The Bidder and its advisers and agents may not accept under any circumstances the delivery of any written communication relating to the offer (including a form of acceptance) that is post-marked in, bears a return address from, or otherwise appears to have been dispatched from the United States.
- No cash is issued to holders in the United States.
- No publicity regarding the offering is made in the United States.
- Various restrictive legends are added to all documentation.

Tier 1 and Tier 2 Exemptions

- The “Tier I” exemption provides relief from substantially all U.S. tender offer regulation if U.S. security holders of a “foreign private issuer” Target hold no more than 10 percent of the Target’s securities. See Rule 14d-1(c).
- The “Tier II” exemption provides limited relief from Regulations 14D and 14E where U.S. security holders of a foreign private issuer Target hold more than 10 percent but no more than 40 percent of the Target’s securities. See Rule 14d-1(d).
- Calculating US ownership under these exemptions is complex and needs attention by the full deal team.
- In the Securities Act context, Rule 802 provides exemptions from the registration provisions of the Securities Act if criteria substantially similar to the Tier I criteria are met.
- None of the cross-border regulations exempts a Bidder from the general anti-fraud, anti-manipulation, or civil liability provisions of U.S. securities laws.
- No-action and exemptive relief is also available for foreign private issuers.

Part 6- Statutory One-Step Mergers

Process and Timing

- Select a transaction structure (for example, reverse triangular merger, forward triangular merger, or forward merger). The choice of structure usually depends heavily on tax and commercial considerations.
- Execute preliminary agreements in the earliest stage of merger discussions.
- Conduct a due diligence review to learn about the target company and determine issues that are relevant to the merger.
- Determine required consents and approvals to complete the merger. These fall into the general categories of corporate approvals, statutory and other regulatory approvals, and third-party contractual consents.
- Negotiate, draft, and execute the merger agreement, disclosure schedules, and any ancillary documents.
- Make required disclosures under federal securities laws and the rules of any securities exchange on which the target's or buyer's stock is listed on (for example, the NYSE and Nasdaq). The most common disclosures (outside of the main merger transaction disclosures contained in either a registration statement or proxy statement) are press releases, current reports on the SEC's Form 8-K, and Rule 425 and Rule 14a-12 filings.

Process and Timing (cont'd)

- Other potential disclosures may relate to the registration of stock options on the SEC's Form S-8 and reporting under Sections 16 and 13(d) of the Exchange Act.
- File the proxy statement (and the Form S-4 registration statement if the buyer issues stock as merger consideration) with the SEC. The target company uses this disclosure document to inform its shareholders about the merger so that they are knowledgeable when approving or rejecting the transaction.
- A buyer issuing its stock in the merger needs to register the securities on a Form S-4 registration statement unless an exemption from registration is available. Form S-4 requires comprehensive disclosure about the buyer and its stock, including the financial statements of the buyer and pro forma financial statements of the businesses proposed to be merged.
- When the SEC clears the proxy statement (and registration statement, if applicable), the target company can distribute the disclosure document to its shareholders.
- Hold the stockholders' meeting for stockholders to vote (in person or by proxy) to approve the merger.
- Close the merger and pay target stockholders the merger consideration.

Merger Types

- Types of merger include forward mergers, forward triangular merger and reverse triangular mergers.

	Forward Merger	Forward Triangular Merger	Reverse Triangular Merger
Buyer shielded from liabilities of the target company.	No	Yes	Yes
Third-party consents necessary to avoid breaching target contracts that contain anti-assignment provisions that cover assignments by operation of law.	Yes	Yes	No, in most cases*
Generally taxed as an asset acquisition: Potential double taxation (target company and stockholders). Often a stepped-up basis in target company assets.	Yes	Yes	No
Generally taxed as a stock acquisition: Single level of taxation(shareholders only) No change in basis of target company assets.	No	No	Yes

*Not all states may follow this approach. For example, in California it is unclear whether a reverse triangular merger effects an assignment by law

Preliminary Purchases of Shares by the Bidder

Limitations

- Limitations in NDA or Standstill. Consider whether in possession of material (price sensitive) non-public information shortly).
- Under Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), an acquirer that purchases more than 5% of the outstanding common shares of a Target must, within 10 calendar days, publicly file with SEC a disclosure statement on Schedule 13D. This disclosure statement will include various information about the acquirer, including, most importantly, its plans or proposals with respect to further acquisitions of shares of the Target or any extraordinary transaction involving the Target.
- Under the Hart-Scott-Rodino Antitrust Improvements Act, unless an exemption is available, an acquirer may not purchase more than approximately $94 million (adjusted for inflation annually) in value of common shares of a Target without filing with the United States antitrust authorities (and notifying the Target of the filing) and waiting for the expiration of a 30-day period.
- CIFIUS considerations depending on level of foreign shareholding and industry

Corporate Approvals

Mergers are governed by state law and involve detailed filing requirements (such as the preparation and filing of certificates of merger). Required board and stockholder approvals are dictated by the laws of merging corporations' respective states of formation.

Under the DGCL, mergers require the following:

- Board approvals from the buyer (the merger subsidiary in the case of a forward or reverse triangular merger) and the target company declaring the advisability and approval of the merger agreement (8 Del. C. § 251(b)). In a forward or reverse triangular merger, the board (and stockholder) approval of the merger subsidiary is a mere formality since the merger subsidiary is usually wholly-owned by the buyer.
- Approval of the merger agreement by at least the holders of a majority of the outstanding stock of the target company entitled to vote on the merger (8 Del. C. § 251(c)), but a higher approval threshold or separate class approval may apply if: specified in the target's organizational documents; or Delaware's business combination statute applies.
- For forward mergers, consent from at least a majority of the buyer's stockholders, except when: there are no changes to the certificate of incorporation of the buyer; shares of stock of the buyer (the surviving company) immediately after the merger are identical to shares of stock of the buyer immediately before the merger; and the shares of buyer common stock issued in the merger do not exceed 20% of the buyer's common stock outstanding immediately prior to the merger.(8 Del. C. § 251(f)).

Special Committees

Role of Special Committees

- It may be advisable for a board to create a special committee to evaluate, negotiate, and approve a merger proposal on behalf of the board. In transactions that involve a real or potential conflict of interest for the board of directors, the full board frequently appoints a special committee of independent and disinterested directors to provide assurance that the board's decision has not been coerced or unduly influenced by the conflicted directors. Special committees can also be useful in transactions involving a controlling stockholder, even if the directors themselves are independent and disinterested in the transaction.
- To preserve the integrity of the review process and protect the interests of the target company's stockholders, the special committee should also be advised by its own disinterested and independent legal and financial advisors

20% Rule

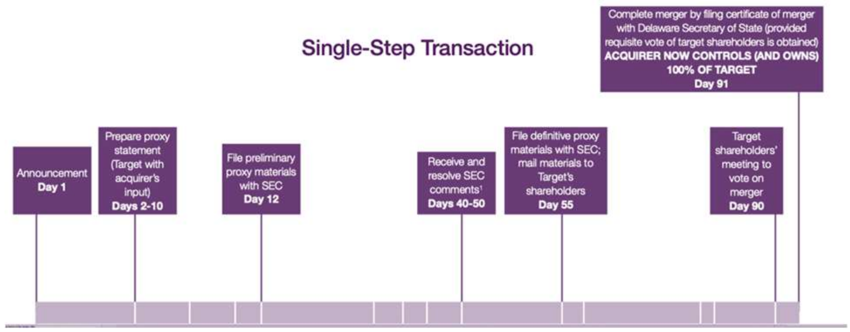
- If the buyer is issuing more than 20% of its outstanding shares as consideration for the merger, the applicable securities exchange may require stockholder approval.
- For more information on the requirements of Nasdaq and NYSE concerning the so-called 20% rule, see Nasdaq Rule 5635 and NYSE Listed Company Manual § 312.03

Part 7 – Proxy Statements

Proxy Rules

- The proxy rules promulgated under the Securities Exchange Act of 1934, as amended (Exchange Act) are among the many rules and regulations that apply in public mergers. The proxy rules are principally contained in Regulation 14A of the Exchange Act (Regulation 14A) and regulate the solicitation of proxies when a shareholders' vote is required to approve certain corporate actions, such as a merger
- A company must deliver a proxy statement to its shareholders before it can solicit proxies for a shareholders' meeting (Rule 14a-3(a), Exchange Act). In the case of a merger, the proxy rules require the target company to make substantial disclosures of information about the merger so that shareholders can make an informed decision when voting on the transaction.
- A merger proxy statement is filed with the SEC and is subject to the SEC's review. If the SEC has comments to the preliminary proxy statement, the target company may need to amend its merger proxy statement before it files its definitive proxy statement with the SEC and delivers it to its shareholders. This SEC review can affect the timing of the public merger

One Step Merger Timing with Proxy



Where are the rules for Proxies?

- Schedule 14A: Information Required in Proxy Statement.
- Regulation 14A: Solicitation of Proxies (Rules 14a-1 to 14b-2, Exchange Act).
- Regulation S-K, including Regulation M-A.
- The rules and requirements of the securities exchange on which the target's securities are listed.
- Company law of the target’s jurisdiction of incorporation or organization
- The target company's organizational documents.

Letter From the Chairman of the Board or Chief Executive Officer

Although not required by Schedule 14A, the target company usually includes a letter to its shareholders from its chairman of the board, chief executive officer (CEO), or both. This letter appears as the first page of the proxy materials. The letter typically:

- Gives a brief description of the merger transaction (including the merger consideration payable).
- States that the target company's board of directors has determined that the merger agreement and the transactions contemplated by the merger agreement are advisable and have been approved by the board. This language generally tracks the target board's resolutions approving the merger agreement. These resolutions can vary state by state depending on the statutory board approval requirements of the target's jurisdiction of incorporation.
- States that the target company's board recommends that the target's shareholders vote in favor of the merger and other proposals described in the merger proxy statement.
- Encourages the shareholders to vote.

Typical Proposals

The letter usually also identifies the proposal on which the shareholders are asked to vote. Typical proposals that a target company includes in a merger proxy statement include:

- **Merger proposal**. A proposal to approve the merger transaction. For mergers in Delaware, the shareholders must approve the adoption of the merger agreement in order to approve the merger transaction (DGCL § 251(c)). It is important to check the corporate laws of the target company's state of incorporation to confirm the appropriate matters requiring shareholder approval for mergers because different states can have different requirements.
- **Golden parachute proposal**. A proposal to approve on a non-binding, advisory basis any golden parachute compensation that may become payable to the target's named executive officers as required by the Dodd-Frank Act and codified under Rule 14a-21(c) of the Exchange Act.
- **Adjournments or postponements proposal**. A proposal to approve any necessary adjournments or postponements of the target shareholders' meeting for the purpose of soliciting additional proxies if there are insufficient votes to approve the merger proposal. This proposal is typically included by the target company so that it can have extra time, if needed, to solicit additional proxies to pass the merger proposal.
- **Other business**. A proposal to transact any other business that may properly come before the shareholders' meeting or any adjournment or postponement thereof.

Other Parts of Proxy

Typical proposals that a target company includes in a merger proxy statement include:

- **Notice of Meeting**: Date time and location of the meeting and record dates are described.
- **Voting Information**: The vote required for approval of each proposal, quorums, completing voting cards etc are described.
- **Summary**. The target company must include a summary section, written in plain English, giving an overview of the material terms of the proposed merger (Item 14(b)(1),Schedule 14A and Item 1001, Regulation M-A). Because the summary must begin on the first or second page of the disclosure documents provided to the shareholders (Instruction 2 to Item 1001, Regulation M-A), the summary usually begins on the first numbered page of the merger proxy statement.
- **Questions and Answers**. While not required, the target company often includes a short question and answer section immediately following the summary to answer some of the fundamental questions that the target's shareholders may have concerning the merger.
- **The Meeting**. This includes information about the shareholders' meeting being held to approve the merger.

Background of the Merger

- The target company must describe any negotiations, transactions, and material contacts with the buyer (or between its affiliates and the buyer's affiliates) during the periods covered by financial statements included or incorporated by reference in the merger proxy statement (Item 14(b)(7), Schedule 14A). Even if financial statements are not required to be included or incorporated by reference, however, targets still typically include a background of the merger section that describes the negotiations, transactions, and material contacts between the parties.
- The background of the merger section provides a detailed chronology of events leading up to the execution of the merger agreement including:
- Dates of meetings;
- Names of persons and parties in attendance; and
- A brief summary of matters discussed in these meetings and negotiations.

Background of the Merger (cont'd)

- Because this section can be the most difficult to draft, a working draft of this section should be started by counsel early in the process and circulated for review by those persons most knowledgeable about the events described before finalizing the merger proxy statement. Frequently this section requires substantial input from the target company's and buyer's management, directors (in some cases), and financial and legal advisors because of the fact-intensive nature of the disclosure.
- The parties can be particularly sensitive about how the disclosure is presented in the background of the merger section because they want to communicate to the target's shareholders that the target's board satisfied its fiduciary duties in considering the merger and acted fairly, taking into account all its available options.
- Presenting full disclosure has become even more important in recent years due to the cleansing effect of a fully informed, uncoerced shareholder vote by the disinterested shareholders under *Corwin v. KKR Fin. Holdings LLC* (125 A.3d 304 (Del. 2015)) which reverts the standard of review for a breach of fiduciary duty claim back to the deferential business judgment rule in mergers that do not involve a controlling shareholder.
- In anticipation of any potential litigation that may result from the merger transaction, counsel should also pay close attention to ensuring that the background of the merger section does not contradict and generally conforms to the target company's board minutes relating to the merger transaction.

Recommendations and Opinions

- The target company must describe its reasons for engaging in the transaction (Item 14(b)(4), Schedule 14A and Item 1004(a)(2)(iii), Regulation M-A). The target company usually does this by summarizing its board's reasons for recommending the merger to its shareholders. Typically, the disclosure:
  - Indicates that the target's board consulted with its management and financial and legal advisors when considering the merger.
  - Lists (usually in bullet point format) the main positive and negative factors that the target's board used during its deliberations (and any weight ascribed to these factors), ultimately stating its conclusion to recommend the merger.
- The target company must include information on any reports, opinions, or appraisals from an outside party that materially relate to the merger. This section is included in nearly all merger proxy statements because most public target companies retain an investment banking firm to provide an opinion on the fairness of the transaction and financial advice and analysis throughout the merger.

Interests of Directors and Executive Officer

- The target company must describe any substantial interest that its directors or executive officers have in the merger.
- This section describes the circumstances under which the directors and executive officers have an interest (typically financial) in the merger that is different from the interests of the other shareholders (Instruction to paragraph (a) of Item 5, Schedule 14A). The type of disclosure often relates to:
  - Payments due to executive officers on a change of control of the target company, sometimes referred to as golden parachute payments or arrangements.
  - Severance agreements and retention agreements entered into in contemplation of the merger.
  - Employment arrangements following the merger (if applicable).
  - Matters relating to stock options or other equity benefit plans triggered by the merger.
  - Potential indemnification and insurance coverage available under certain agreements and circumstances.

Other areas related to the Merger

Typical proposals that a target company includes in a merger proxy statement include:

- **Material US Federal Tax Consequences**: The target company must describe the US federal income tax consequences of the merger to the shareholders of the target company, if material (Item 14(b)(4), Schedule 14A and Item 1004(a)(2)(vii), Regulation M-A).
- **Regulatory Approvals**: The merger proxy statement must include information about the federal or state regulatory requirements and approvals that must be complied with or obtained in connection with the merger, along with the status of the parties' compliance with such requirements or receipt of such approvals (Item14(b)(5), Schedule 14A). The most common regulatory approvals relate to antitrust matters (such as HSR), CIFIUS and possibly other regulatory approvals from foreign authorities with jurisdiction over the merger.
- **Merger Agreement**: A detailed summary of the merger agreement and other applicable agreements. The merger proxy statement must include a description of any present or proposed material agreement, arrangement, understanding, or relationship between the buyer (or any of its executive officers, directors, controlling persons, or subsidiaries) and the target company (or any of its executive officers, directors, controlling persons, or subsidiaries) (Item 14(b)(7), Schedule 14A and Item 1011(a)(1), Regulation M-A).

Financial Data

- Under certain circumstances, a proxy statement must include certain specified financial data relating to the parties to a transaction (Items 14(b)(8)-(11) and 14(c), Schedule 14A).
- Financial data is rarely required for all-cash mergers unless the information is material to an informed voting decision. For example, the financial statements of the buyer may be required if buyer financing is not assured (see Instruction 2(a) to Item 14, Schedule 14A).
- Financial data is typically required in a merger involving stock consideration that is registered under the Securities Act on Form S-4 or Form F-4. In those cases the target company should furnish the information required by Form S-4/Form F-4 instead of the Schedule 14A information (see Instruction 1 to Item 14, Schedule 14A and Practice Note: Registration Statement: Form S-4and Business Combinations: Selected Financial Information and Pro Forma Financial Information). **See Exchange Offers below**.

The Proxy Card

The proxy card is the document that allows a shareholder to participate in voting on the merger at the meeting, whether or not that shareholder attends the meeting, by granting a proxy. The proxy card must contain the following information (Rule 14a-4(a) and (b)):

- On whose behalf the proxy is being solicited in bold face type. In a negotiated, all-cash merger, the proxy card is prepared by the target company and states that the proxy is being solicited by the board of directors of the target company.
- Who acts as proxy for the shareholder. Typically the proxy card proposes to appoint several executive officers, usually including the general counsel, to act as proxies.
- A list of the proposals to be voted on.
- A space for shareholders to vote "for" or "against," or to abstain from voting for each proposal, including the merger proposal.
- Space for the shareholder to date the proxy card.

Filing the Merger Proxy Statement

- The target company must file its preliminary proxy statement with the SEC at least ten days before it intends to mail proxy materials to its shareholders (Rule 14a-6(a). The SEC notifies the target company within ten days after filing whether or not there will be any review.
- If the SEC chooses not to review the proxy statement, the target company can file a definitive version of the proxy statement, which is usually identical to the preliminary proxy statement (except that information such as the meeting date, record date, and other date-specific matters are filled in), as soon as necessary and can begin mailing the definitive proxy statement to its share holders.
- If the SEC notifies the target company that it intends to review the merger proxy statement, the target company must delay its plans for mailing. The review process for a merger proxy statement is similar to the review process for a registration statement, except that the SEC typically provides its first set of comments in less days. If the SEC has comments from its review, it sends the target company a comment letter.
- The target company is required to respond to the SEC's comments by sending a letter to the SEC and filing an amended preliminary proxy statement that includes revisions to take into account the SEC's comments. The response letter is required to address each comment made by the SEC.
- The length of time of the SEC review process is largely determined by the number and type of comments, the parties' reactions to the comments, and whether the parties wish to question any of the SEC's requests for revisions. The review process can take weeks or months, and the ability to accelerate this process is often dependent on who at the SEC is reviewing the filing.

Examples of Typical SEC Comments on a Merger Proxy

- “Throughout this section you discuss that the board considered “potential standalone strategic alternatives.” Please expand your discussion of the nature of these alternatives and why other transactions were favored over these alternatives.”
- “Please tell us what consideration you have given to including risk factor disclosure about the impact of the exclusive forum provisions in the merger agreement and your partnership agreement, on investors.”
- “Please disclose here the total amounts your directors and executive officers may potentially receive in connection with the proposed merger, including potential change in control payments.”
- “We note the disclaimer [that the parties and their financial advisors] do not assume “any responsibility for the validity, accuracy or completeness” of the projections. Please revise to eliminate the statement that these parties do not bear any responsibility for disclosure that was prepared and included in this Schedule 14A.”

Examples of Typical SEC Comments on a Merger Proxy (cont'd)

- "Rule 14a-6(a) requires that the form of proxy be on file for ten calendar days, yet no form of proxy appears to have been transmitted. Please amend the filing to include the form of proxy, or advise. In addition, please ensure that both the preliminary proxy statement and form of proxy are clearly marked as being preliminary. See Rule 14a-6(e)(1)."
- "We note the statement in the first sentence of the tenth paragraph of the opinion attached as Annex C that [the financial advisors] and Company's opinion may not be used without its prior written consent. Please revise the disclosure in this section to state, if true, that [the financial advisor] and Company has consented to the use of its opinion in this document."
- "We note the limitations on reliance by shareholders in the fairness opinion provided by the [financial advisor]. Specifically, we note the statements that the opinion is furnished for the use of the Special Committee and "may not be used for any other purpose without the [financial advisors] prior written consent." Additionally, we have similar concerns with the statement that the opinion "should not be construed as creating any fiduciary duty on [the financial advisor's] part to any party." Please have the advisor revise the opinion to remove these limitations on reliance by shareholders. Alternatively, please disclose the basis for the advisor's belief that shareholders cannot rely upon the opinion to support any claims against the [financial advisor] arising under applicable state law."

Examples of Typical SEC Comments on a Merger Proxy (cont'd)

- "We note the disclosure on page X that ABC does not intend to revise its projections. Please revise this disclosure, as publicly available financial projections that no longer reflect management's view of future performance should either be updated or an explanation should be provided as to why the projections are no longer valid."
- "We noticed the inclusion of cautionary language that indicates that XYZ undertakes no obligation to update… "even in the event that any of the assumptions underlying the financial projections are shown to be in error or change except to the extent required by applicable federal securities law." Please advise us as to the circumstances that could arise where all of the assumptions shown are in error yet XYZ would bear no obligation to update. To the extent that no such circumstances exist, please revise the disclosure to remove the implication that compliance with the federal securities law is the exception in such instances, especially in the context of the proposed transaction. Consequently, it appears that XYZ does have an ongoing obligation to update and that the disclaimer appears to have been incorrectly cited as a matter of fact and law."
- "We note your disclosure that "information concerning the subject matter of the representations, warranties and covenants may change after the date of the merger agreement." Please be advised that, notwithstanding the inclusion of a general disclaimer, you are responsible for considering whether additional specific disclosures of material information regarding material contractual provisions are required to make statements in the proxy statement not misleading."

Examples of Typical SEC Comments on a Merger Proxy (cont'd)

- "We note your statement that investors "are not third-party beneficiaries under the merger agreement and should not rely on the representations, warranties and covenants or any descriptions…" While we recognize that you also advise investors to read your SEC disclosures, we believe that the cited language strongly implies that the information contained in the merger agreement is not disclosure subject to the federal securities laws. Please revise to remove this implication. We will not object if you advise readers that the information in the merger agreement should be read in conjunction with the other disclosures in the company's filings with the SEC."
- "Please delete the XXX sentence in the second paragraph of this section, as well as the statement that the merger agreement's inclusion in the filing is not intended "to provide investors with any other factual information regarding ABC, DEF, XYZ or their respective business," as they inappropriately imply that readers should not rely on the representations, warranties and covenants described in this section and in the merger agreement."
- "We note that you may employ various methods to solicit proxies, including by telephone, electronic mail, letter, facsimile or in person. Be advised that all written soliciting materials, including any e-mails or scripts to be used in soliciting proxies over the telephone or any other medium, must be filed under the cover of Schedule 14A on the date of first use. Refer to Rule 14a-6(b) and (c). Please confirm your understanding."

Distributing Proxy Materials

- Generally, the SEC does not impose timing requirements for the delivery of proxy materials to shareholders, but the proxy materials must be delivered to shareholders before the shareholders' meeting is held. A company's charter documents and state corporate law set time limits for delivery of a notice of the meeting, which is included in the proxy statement. Typically, the notice period is at least ten days, but no more than 60 days, before the meeting date
- Merger proxy materials must be delivered by mail. The notice and access model of internet availability delivery method (a common delivery method for annual proxy statements) is not available for merger proxy statements (Rule 14a-16(m), Exchange Act).
- On March 13, 2020, the SEC's Division of Corporation Finance and Division of Investment Management issued guidance to assist companies, stockholders, and other participants to meet their obligations under federal proxy rules amid concerns over 2019 novel coronavirus disease (COVID-19). The SEC staff updated their guidance on April 7, 2020

Part 8- Mergers with Shares as Consideration

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Form S-4 and Form F-4 Registration Statements

- A US company undertaking a one step merger for Shares (or registered exchange offer) in the United States must prepare and file with the SEC a registration statement on Form S-4. A foreign private issuer would use Form F-4.
- Both forms consolidate the Exchange Act requirements of Schedule 14A (or Schedule TO in the case of an exchange offer) and the Securities Act requirements for the registration of securities and include the proxy/prospectus to be distributed to Target shareholders.
- The registration statement contains detailed information about the Buyer and the Target, the merger or exchange offer transaction, the securities being registered, the Buyer's plans with respect to the Target, the means and effects of the transaction, audited financial statements of both the Bidder and Target, and pro forma financial information showing the effects of the transaction.
- The preparation of a registration statement (and the proxy/prospectus contained within) can take several months and must be filed before dissemination to the shareholders.

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Form S-4 and Form F-4 Registration Statements

- If the SEC Staff decides to review the registration statement, it will so notify the Buyer and will provide comments on the registration statement to the Buyer.
- The Staff's comments may result in any material changes to the proxy/prospectus so it generally is not circulated until all comments are cleared.
- Before a Bidder may accept and settle any securities exchange, the SEC must have declared the registration statement effective.
- In the case of a Form S-4/Form F-4, the Buyer and its directors, officers, and controlling persons will be subject to liability under Section 11.

Questions?

Thank you

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