LATHAM & WATKINS LLP

Acquiring a US Public Company

An Overview for the Non-US Acquirer

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I. Introduction

This guide summarizes certain considerations for a non-US acquirer considering an acquisition of a publicly traded US-based company in a negotiated (*i.e.*, friendly) transaction.

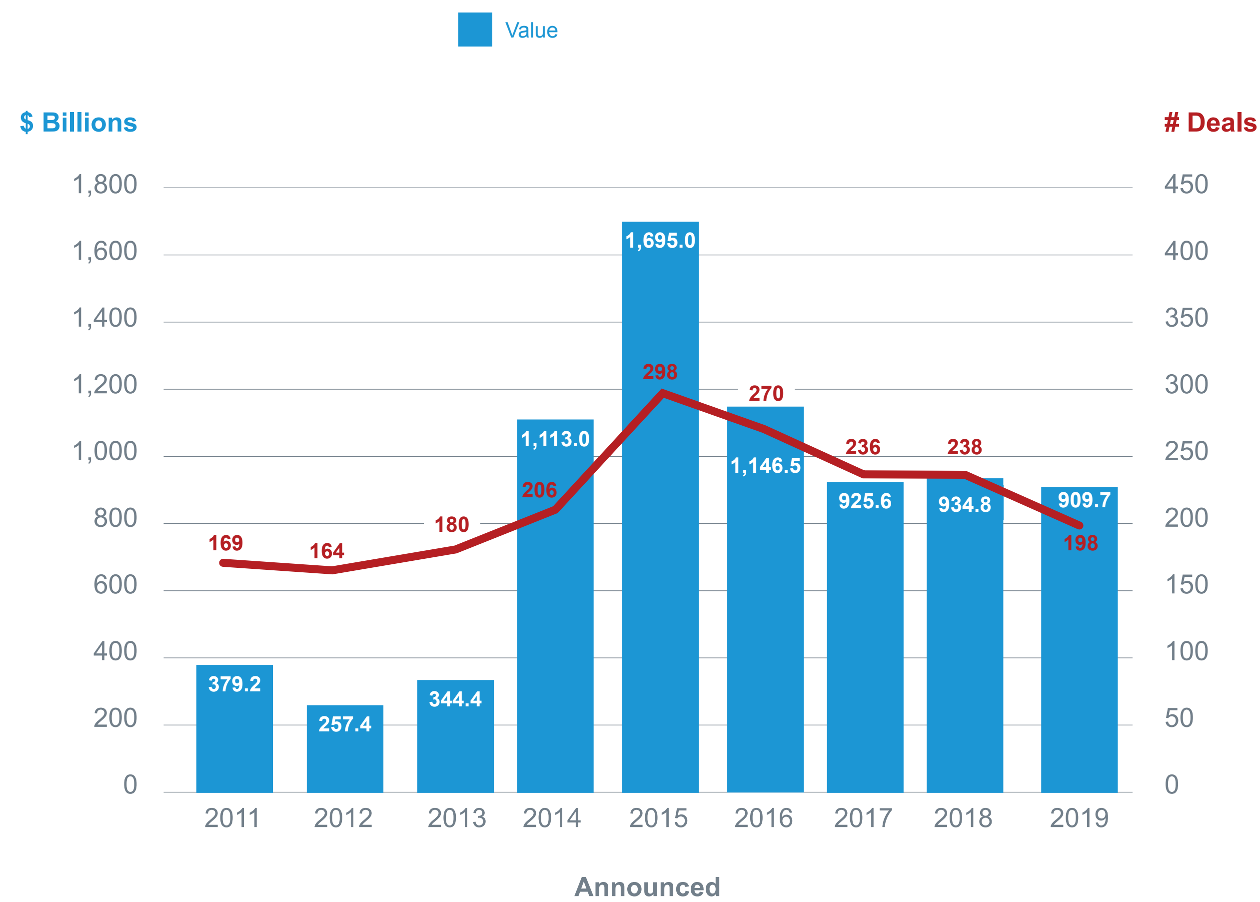
In addition to market dynamics and business and financial considerations, acquiring a US public company involves a number of legal considerations, including US federal securities, competition, and other laws, as well as the laws of the US state in which the target company is incorporated. As over 50% of public companies are incorporated in the state of Delaware (Source: Delaware Secretary of State), this guide focuses on several key Delaware law provisions relevant to acquisitions of US public companies incorporated in that state.

There is no standard transaction or formula for the acquisition of a US public company, and the legal considerations that arise require careful analysis on a case-by-case basis. In addition, applicable statutory and case law as well as other considerations are subject to change from time to time. Accordingly, this guide is not intended to be a comprehensive summary or analysis of all the legal and other considerations that may arise in the acquisition of a US public company, or a strict road map of the course of a transaction, and should not be construed as providing legal or other advice with respect to any particular situation or otherwise.

II. The US M&A Market

In 2019, the public mergers and acquisitions (M&A) market in the US continued at a strong level. A total of 198 M&A deals with equity values over US$100 million were announced with US public company targets in 2019, worth a combined total of more than US$909.7 billion (Source: US DealPointData). Non-US acquirers continued to represent a meaningful portion of US public company acquirers, accounting for approximately 25% of public company buyers since 2017 (Source: US DealPointData).

VALUE/COUNT OF US PUBLIC COMPANY M&A DEALS



WHAT IS A US PUBLIC COMPANY?

The term "US public company" as used in this guide refers to a US company (most often a corporation) that has equity securities publicly traded on a US securities exchange and is required to file financial reports and other information with the US Securities and Exchange Commission (the SEC) under the US Securities Exchange Act of 1934, as amended (the Exchange Act).

III. Stake-Building and Required Disclosures of 5%+ Stakes

A party planning to pursue an acquisition of a US public company may consider whether to acquire a stake in the target company's shares prior to commencing discussions with the target. Assuming the prospective acquirer will offer or will ultimately have to pay a per share premium to acquire all the target's outstanding shares, and the trading price of the shares will rise upon the announcement of the offer, building a pre-announcement stake may allow the acquirer to purchase some of the shares at a lower price than it will subsequently have to pay, and can represent a hedge (including a source of expense reimbursement) if the transaction is ultimately not consummated due to a superior offer or otherwise. In addition, acquiring a stake in the target's common shares may allow the acquirer to vote those shares in favor of a merger if the transaction is structured as a one-step transaction or tender them in a tender or exchange offer if the transaction is structured as a two-step transaction (see the discussion of one-step and two-step transactions below). Despite these potential benefits, most prospective acquirers do not acquire a stake in the target prior to commencing discussions, as doing so has a number of implications, including those discussed below.

The fact that a prospective acquirer knows of its intention to pursue an acquisition of the target company usually does not preclude it from purchasing shares in the target prior to commencing discussions about a possible transaction. In other words, in the view of most practitioners, such knowledge in and of itself does not constitute material, non-public information (MNPI) about the target that would result in a purchaser violating insider-trading laws by making such purchase. However, other factors, such as obtaining information about the target or learning the target's position or intentions regarding a possible transaction, could very well constitute MNPI that may restrict the acquirer's ability to trade in the target's securities. Accordingly, the potential applicability of insider-trading laws to any such purchase requires careful consideration and close coordination with knowledgeable counsel regarding the unique facts of the situation.

Under Section 13(d) of the Exchange Act, a party or group that acquires beneficial ownership[1] of more than 5% of any class of equity securities (generally common shares) registered under the Exchange Act, including securities convertible into such securities, with a view toward pursuing an acquisition of the issuer of the shares, must, with 10 calendar days of crossing the 5% threshold, make a public filing with the SEC on a Schedule 13D. In the Schedule 13D, the acquiring party must disclose information relating to its identity, the source and amount of funds used to purchase the shares, the

US DEAL POINT: ACQUIRING ANY REMAINING MINORITY INTERESTS IN A US PUBLIC COMPANY

In the vast majority of cases, a party seeking to acquire a US public company can eliminate minority equity interests in the target company once it owns a majority of the common equity of the company. This generally affords an acquirer seeking to own the entire share capital of a business the ability to quickly and effectively eliminate minority interests, subject in certain cases to a post-closing judicial challenge to the price paid in the transaction by means of an appraisal proceeding (see "Shareholder Litigation"). Unlike many European jurisdictions, US federal and state laws and stock exchange rules generally do not impose "mandatory offer" or "minimum price" provisions, which require a party, once it acquires shares in excess of a certain threshold, to make an offer to acquire the remaining shares of the target.

purpose of the purchases, any plans or proposals involving the target company, and any agreements or arrangements it has with respect to the shares. A party that has filed a Schedule 13D is required to amend it promptly to disclose any material (*i.e.*, more than 1%) increase or decrease in the number of securities it beneficially owns or any change in its investment intent.[2]

US federal laws, the laws of the state in which the target company is incorporated, and certain provisions in the target's organizational documents may limit the number of shares a prospective acquirer can purchase in the target, or require certain approvals or clearances in connection with the share purchases. These laws and provisions include the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act), state anti-takeover statutes, and anti-takeover provisions in the target's certificate of incorporation, as well as some of the other laws and provisions described herein. In addition, a prospective acquirer should be aware that purchases of more than 10% of any class of equity securities (generally common shares) registered under the Exchange Act may be subject to Section 16 under the Exchange Act, and thus subject to liability for short-swing profits related to transactions in those securities.

A prospective acquirer should also be careful to ensure that any pre-announcement share purchases do not constitute a de facto or "creeping" tender offer that would be subject to the tender offer rules under the Exchange Act. A series of share purchases is more likely to be subject to the tender offer rules if there was active and widespread solicitation of the target's shareholders, the offer included a premium over the then-current trading price of the shares, and the terms of the offer were non-negotiable. Regular-way purchases of shares through a broker on a US securities exchange typically do not implicate tender offer rules.

Due to the complexity of US federal and state laws, as well as the provisions of a target's organizational documents which may be implicated by any purchase of a target's shares by a prospective acquirer, US counsel should be consulted in advance of any such pre-announcement share purchase.

IV. Friendly or Hostile? Deciding on the Approach to a Target

The acquisition of a US public company can be implemented on a negotiated (*i.e.*, friendly) basis pursuant to a definitive agreement that has been negotiated with the target and its board of directors, or potentially on an unsolicited or hostile basis, without the involvement or prior approval of the board of directors of the target. The vast majority of transactions are implemented on a negotiated basis, and hostile acquisitions can face a number of challenges, including the ability of a resistant target to use or implement various structural and procedural defenses, the inability to conduct due diligence on non-public information of the target, and the possibility that shareholders will ultimately reject the offer. In some instances, unsolicited approaches can help serve to bring a target to the bargaining table, with discussions thereafter proceeding on a negotiated basis (whether or not a transaction is ultimately consummated).

This does not mean a hostile transaction is never the appropriate or best strategy for the acquisition of a US public company. Our experience suggests, however, that a hostile transaction should be pursued only if the acquirer understands the complexity and risks involved, and then only if the acquirer has determined that a negotiated transaction is highly unlikely or if negotiations have proved futile. Although this guide does not cover the considerations and process involved in pursuing a hostile transaction, we would be happy to discuss and outline these considerations with a potential acquirer considering an unsolicited approach to a potential target.

V. The Basics: Transaction Structures

A negotiated acquisition of a US public company typically is structured in one of two ways: (1) a statutory merger governed by the law of the US state in which the target company is organized, or (2) a tender offer (or exchange offer) followed by a "back end" statutory merger. Transactions involving only a statutory merger are often referred to as "one step" transactions, and transactions involving a tender or exchange offer followed by a back-end merger as "two step" transactions. Regardless of whether an acquirer uses a one-step or two-step acquisition structure, the acquirer may pay in cash, the stock of the acquirer, or other forms of consideration, or a combination of the foregoing.[3] Moreover, in addition to some of the legal considerations described herein, other factors that are beyond the scope of this guide, such as tax considerations, can have a critical impact on — and in some cases dictate — the structure used in the transaction.

A. One-Step: Statutory Merger

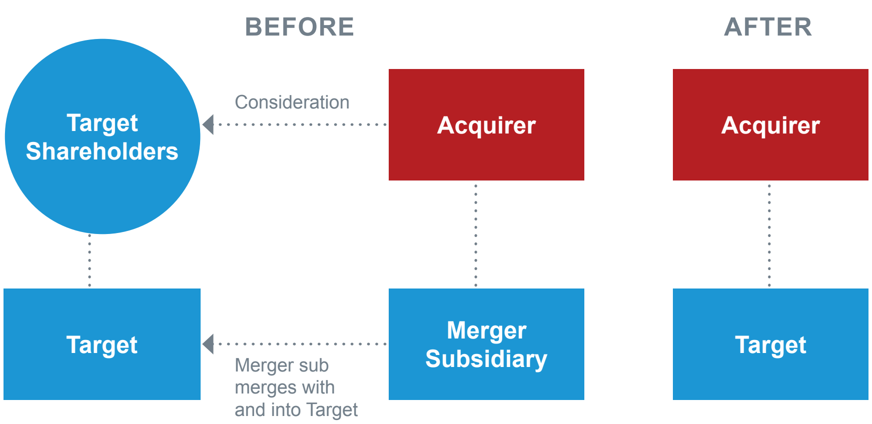
A one-step merger involves the negotiation of a definitive merger agreement between the acquirer and the target, the approval of that merger agreement by the target's board of directors, and the subsequent adoption of the merger agreement by the holders of the target's outstanding stock. In most cases (including under Delaware law), this shareholder vote requires approval of a majority of the target's outstanding shares — although an even greater vote may be required by the terms of a target's organizational documents or applicable state corporate law, or if the target company has multiple classes of stock outstanding. In acquisitions of US public companies, the one-step transaction structure most often takes the form of a "reverse triangular merger," which is illustrated below.

In 2019, approximately 79% of all merger agreements involving US public companies used the reverse triangular merger structure

(Source: US DealPointData)

A reverse triangular merger is performed as follows:

REVERSE TRIANGULAR MERGER



1. The acquirer forms a new wholly owned US subsidiary to act as an acquisition corporation.
2. At the effective time of the merger, the new acquisition corporation is merged with and into the target, with the target surviving the merger. The target's shareholders receive the approved per-share merger consideration upon consummation of the merger.
3. After consummation of the merger, the target is a wholly owned subsidiary of the acquirer.

WHAT IS IN A TYPICAL MERGER AGREEMENT?

Whether a negotiated acquisition is structured as a one-step or two-step transaction, the parties typically will enter into a definitive agreement styled as a merger agreement. A typical merger agreement for the acquisition of a public company generally will contain the following provisions:

- **Purchase Price and Mechanics of Merger and Tender or Exchange Offer.** The merger agreement will set forth the consideration to be paid in the transaction, as well as the mechanics for the implementation of the transaction — *i.e.*, a merger (in a one-step transaction) or a tender offer or exchange offer followed by a back-end merger (in a two-step transaction). In an all-cash transaction, the purchase price typically is expressed as a fixed amount of cash per share of the target company. In a transaction in which all or part of the consideration consists of stock of the acquirer (or provides for an election of consideration that includes a stock alternative), the stock portion of the consideration typically is expressed as an exchange ratio between the acquirer's stock and the target's stock (*e.g.*, 0.123 shares of acquirer stock for each share of the target's stock) in a "fixed ratio" transaction or, less commonly, as the value of the consideration that is payable in acquirer shares (*e.g.*, US$10 worth of acquirer stock) in a "fixed price" transaction.
- **Representations and Warranties.** Both the acquirer and the target typically make representations regarding their due organization and ability and authority to enter into the merger agreement. In addition, the target generally will make additional representations regarding its business, financial condition, and other matters, including representations with respect to capitalization, no material adverse change, no undisclosed liabilities, litigation, compliance with laws, accuracy of public filings, financial statements, material contracts, employee benefits, and tax matters.[4]
- **Covenants.** The merger agreement typically includes covenants setting forth the actions required to be taken (or not taken) by the parties between signing and closing, including limitations on the activities of the target during this interim period, obligations of the parties to consummate the transaction (including to obtain required antitrust and other regulatory and third-party approvals), obligations with respect to the tender offer or shareholder vote, as applicable, financing efforts and cooperation in a leveraged transaction, and various other matters.
- **Conditions.** The merger agreement specifies the conditions to each party's obligation to consummate the merger and, in a two-step transaction, to close the tender or exchange offer. These usually include conditions relating to obtaining the requisite shareholder approval in a one-step transaction (or satisfying the minimum tender condition in a two-step transaction), receipt of required antitrust and other regulatory approvals, absence of injunctions or laws or orders prohibiting closing the transaction, the continued accuracy of representations and warranties, the performance of covenants, and the absence of a material adverse change regarding the target. Although very rare in practice, financing conditions are permissible for the acquisition of a US public company, as there are no statutory "funds certain" requirements.
- **Indemnification.** In the acquisition of a US public company, the merger agreement generally does not provide any post-closing recourse or indemnification. As a result, the principal consequence of a target's breach of a representation is — in the event the breach is sufficiently material — to afford the acquirer the right to terminate the agreement prior to closing (as opposed to closing over the breach and seeking indemnification).
- **Fiduciary Considerations and Deal Protection.** Generally, until a merger is approved by the target company's shareholders or a tender or exchange offer for at least a majority of the target company's shares is consummated, the board of directors of the target company has a fiduciary duty to the company's shareholders to consider competing offers. Accordingly, the merger agreement typically sets forth the circumstances in which the target board may consider competing offers (including engaging in discussions with, and providing due diligence information to, competing bidders), as well as the circumstances in which the target can terminate the merger agreement and accept a superior offer. However, an acquirer generally negotiates for certain "deal protection" provisions in the merger agreement that are intended to prevent or discourage the target's board from facilitating and accepting a competing offer, including an obligation of the target company to pay the original acquirer a "break-up" fee if it changes its recommendation to shareholders or terminates the merger agreement to accept a superior offer. Break-up fees typically range from 2% to 4% of the transaction's equity value, although this amount is heavily negotiated based on the unique facts and circumstances of the transaction. In addition, if a target has a controlling or significant shareholder, an acquirer will often seek additional deal protection by entering into an agreement with that shareholder to vote in favor of the merger or tender or exchange its shares in the offer.

Seeking Shareholder Approval: Filing a Proxy Statement with the SEC

Following the execution of a merger agreement, the target in a one-step merger typically is required to file with the SEC a proxy statement on Schedule 14A regarding the shareholder vote on the transaction. This is the principal disclosure document for shareholders in a one-step transaction.

If the consideration in the merger includes acquirer securities, those securities are generally required to be registered with the SEC, which means that the transaction will also be subject to the registration requirements of the US Securities Act of 1933, as amended (the Securities Act). In that case, the acquirer will file a registration statement on Form S-4 (if the acquirer is a US registrant) or Form F-4 (if the acquirer is a foreign private issuer) with respect to its issuance of acquirer securities in the transaction. In addition to the information otherwise required to be disclosed by the target in its proxy statement, this disclosure document addresses information about the acquirer and the acquirer securities, including certain financial information if deemed to be material to the transaction. The parties typically combine their respective disclosure documents into a single document referred to as a "proxy statement/prospectus," and this combined document is filed on Form S-4 or Form F-4, as applicable, in accordance with SEC rules. Further, if the transaction also requires the approval of the acquirer's shareholders, which is generally the case if the acquirer is listed on the New York Stock Exchange or traded on Nasdaq and will issue more than 20% of its outstanding shares as consideration in the transaction, the proxy statement will often be in the form of a joint proxy statement/prospectus by the parties so that it may be used by the acquirer for its shareholder vote as well.

WHAT IS IN A TYPICAL PROXY STATEMENT?

A merger proxy statement includes information about the target, the acquirer, and the merger. Among other disclosures, a proxy statement typically will contain the following information:

- **Background.** A narrative section describing the background of the merger, including negotiations and discussions between the acquirer and target and their representatives, as well as discussions the target may have had with other potential acquirers, in each case, during the two years prior to the transaction
- **Terms.** A summary of the principal terms of the merger agreement
- **Target Board Recommendation.** The recommendation of the target's board of directors regarding the proposed merger and the reasons for its recommendation
- **Fairness Opinion.** A summary of any opinion the target obtained from a financial adviser (typically an investment bank) with respect to the fairness of the transaction
- **Financial Information and Projections.** Financial statements of the target company, and — if the consideration includes securities of the acquirer, or a vote of the acquirer's shareholders is required — financial information of the acquirer. In addition, disclosure of summary financial projections is often required when financial projections are exchanged between the parties or provided to a financial adviser in connection with the delivery of a fairness opinion to the target
- **Meeting and Vote.** Information regarding the time and place of the shareholders meeting, the voting procedures (the vast majority of shareholders vote by proxy rather than attend the meeting), and the participants in the proxy solicitation
- **Directors, Officers and Major Shareholders.** Information regarding the directors, officers, and beneficial owners of 5% or more of the target's shares

Parties to a merger must wait to receive any comments the SEC may have on the proxy statement (or the proxy statement/prospectus, as applicable) and to resolve any such comments with the SEC prior to distributing definitive disclosure documents to the target's shareholders. Once the preliminary proxy statement on Schedule 14A (or proxy statement/prospectus on Form S-4 or Form F-4) is filed with the SEC, the SEC usually will notify the target within 10 calendar days if it intends to review the filing. If there is an SEC review of the filing, the SEC typically takes up to 30 calendar days from the original filing date to provide comments. The target and acquirer typically amend their filings in response to certain comments and work with the SEC to resolve any open issues. If the SEC has additional comments on the amended filings, there may be additional delay to allow for reviewing and responding to those comments (including making another amended filing if necessary). This process can take several weeks, and up to several months, depending on the nature and extent of the SEC comments and the changes required.

Target Shareholder Approval

Once all SEC comments are resolved, a date for the target shareholder meeting will be set and a definitive proxy statement will be sent to target shareholders, accompanied by a proxy card enabling shareholders to vote on the merger without having to attend the meeting. The SEC rules generally require target companies to solicit certain information from the brokers and other financial institutions through which shareholders hold their shares (commonly referred to as a "broker search") to ensure proper distribution of the proxy materials, which can take up to 20 business days. The target will also set a record date, which determines those shareholders who are eligible to vote at the shareholder meeting. The parties generally should provide sufficient time to ensure an active solicitation period and an informed shareholder vote, which is typically at least 20 to 30 business days; further, under Delaware law, a meeting of the target's shareholders to approve a merger may not be held prior to 20 calendar days after the notice of meeting included in the proxy statement is mailed. There may be additional requirements in a target's organizational documents or provisions negotiated in the merger agreement that govern the timing of and requirements for the shareholder meeting.

Consummation of the Merger

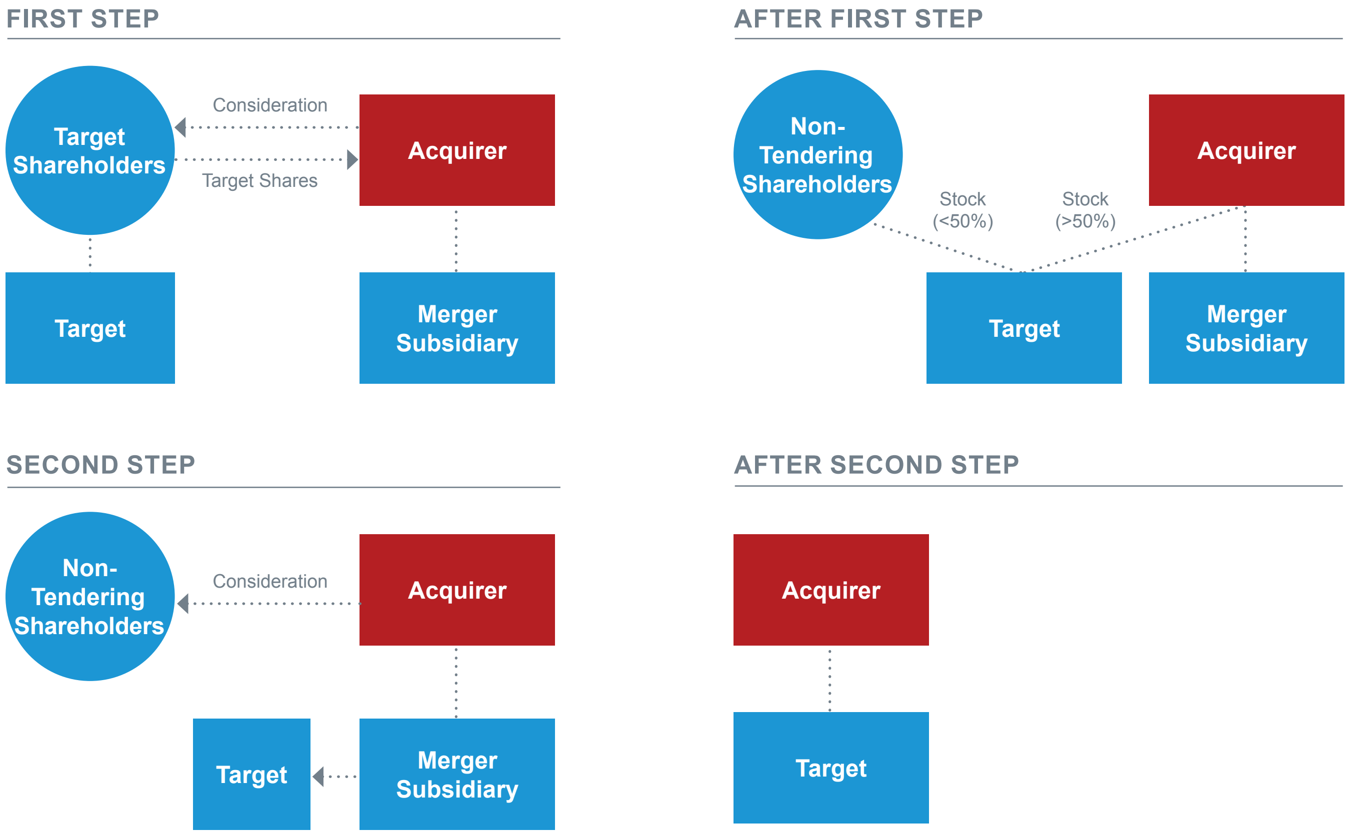
Assuming all regulatory and other conditions to the merger have been satisfied at the time of the shareholder vote, the parties typically complete the merger immediately following shareholder approval. The merger process typically takes two to three months to complete from the time of signing the merger agreement, and often much longer if the SEC review process is drawn out or other approvals (such as antitrust or other regulatory approvals) are required to be obtained (see Annex A for an illustrative timeline).

B. Two-Step: Tender Offer or Exchange Offer Followed by a "Back-End" Merger

A tender offer or an exchange offer, followed by a "back end" or "squeeze out" merger, is often referred to as a "two-step transaction." An all-cash offer for the target's shares is referred to as a tender offer, and an offer in which all or a portion of the consideration consists of acquirer securities is referred to as an exchange offer. In a two-step negotiated transaction, the parties typically still enter into a merger agreement. That agreement typically provides — as the "first step" in the transaction — for the acquirer to make a public offer directly to the target shareholders to acquire the shares of the target. Each shareholder then makes an independent decision whether to sell (or tender) their shares to the acquirer in exchange for the cash and/or acquirer securities offered. If a sufficient number of shares are tendered in this first-step tender offer or exchange offer, the acquirer typically will close the tender offer and, immediately thereafter, the target will merge with a wholly owned subsidiary of the acquirer in a statutory merger.

A typical two-step acquisition is structured as follows:

TWO-STEP ACQUISITION



1. The acquirer makes the “first step” tender offer directly to the target’s public shareholders.
2. A “second step” merger is required to acquire the remaining untendered shares.
3. After the consummation of the back-end merger, the target is a wholly owned subsidiary of the acquirer.

The Offer

An acquirer commences a tender offer typically by placing a summary advertisement, or “tombstone,” in a major national newspaper and distributing an “Offer to Purchase” (for a tender offer) or an “Exchange Offer/Prospectus” (for an exchange offer) to target shareholders. That document is attached as an exhibit to a Schedule TO that is filed with the SEC on the date of commencement of the offer. Unlike a proxy statement, a Schedule TO, and the Offer to Purchase or Exchange Offer/Prospectus included therein, does not need to be approved by the SEC before the offer is commenced and the materials are distributed to shareholders. However, the SEC has the ability to comment on such documents in much the same manner that it does with respect to a proxy statement in a one-step merger, and SEC comments will need to be resolved prior to completing the tender offer. The Offer to Purchase contains information about the terms and conditions of the offer, the procedures for tendering shares in the offer and for withdrawing shares, certain effects of the offer and the merger, information about the target and the acquirer, and a description of the factual background of the transaction similar to that contained in a merger proxy statement.[5]

An acquirer issuing securities as full or partial consideration in the offer must also register the offering of shares under the Securities Act by filing with the SEC a registration statement on a Form S-4 or Form F-4. The Form S-4 or Form F-4 primarily includes the Exchange Offer/Prospectus that is also filed as an exhibit to a Schedule TO.

Within 10 business days following the commencement of the offer, the target must file with the SEC a recommendation statement on a Schedule 14D-9. The Schedule 14D-9 sets forth the recommendation of the target's board of directors to the target's shareholders regarding the offer and the reasons for its recommendation, as well as a description of the factual background of the transaction similar to that contained in the Offer to Purchase. If the target's board received an opinion regarding the fairness of the offer from a financial adviser, the Schedule 14D-9 will also set forth the opinion and contain a summary of the financial adviser's analysis. In a negotiated transaction, the Schedule 14D-9 will generally be distributed to target shareholders contemporaneously with the acquirer's tender offer materials.

If enough shares are tendered in the tender or exchange offer to satisfy the minimum condition (discussed below), and all other conditions to the acquirer's obligation to close the tender or exchange offer have been satisfied, the acquirer will purchase those shares, and immediately thereafter typically will execute a back-end merger to "squeeze out" those shareholders who did not tender their shares in the offer by converting the shares into the right to receive the merger consideration, which is usually the same amount and form of consideration paid in the offer.

Conditions to the Offer

The acquirer's obligation to accept and pay for the target shares tendered is generally subject to a number of conditions, which are outlined in its Offer to Purchase. The most important condition is the so-called "minimum condition" to the offer. The minimum condition is the minimum number of target shares that must be tendered or exchanged in order for the acquirer to be obligated to consummate the offer and purchase the shares. The minimum condition is generally based on the number of shares the acquirer needs to ensure that it will have a sufficient number of votes (under applicable law and the target's organizational documents) to execute a back-end merger, as described above. In most US states, including Delaware, a merger requires the approval of a majority of the target's shares and, therefore, the minimum condition typically is expressed as a majority of the target's shares on a fully diluted basis. However, in some cases, a target's certificate of incorporation, or the law of the state of incorporation of the target, may impose a higher threshold (*e.g.*, two-thirds of the shares) for shareholder approval of a merger.

Timing of the Offer

A tender offer or exchange offer must remain open for at least 20 business days.[6] Target shareholders may tender or exchange their shares, and have the right to withdraw their shares, at any time prior to the date of expiration of the offer. The merger agreement for a two-step transaction generally provides that the offer period may (and, in some cases, must) be extended for certain time periods if the offer conditions have not been satisfied. The parties may also be required by law to extend the offer period if there has been a material change in the terms of the offer or a material condition has been waived.

Once the acquirer has commenced a tender offer, the SEC may review and comment on the Schedule TO. If the SEC's comments do not result in material revisions to the offer materials, typically the comments can be addressed by filing an amendment to the Schedule TO with the SEC, without the need to redistribute an amended Offer to Purchase to the target's shareholders. However, if the comments result in material revisions, the SEC may require the acquirer to mail a supplement to the Offer to Purchase to the target's shareholders and, depending on when the offer is scheduled to expire, may also require an extension of the offer period for up to 10 business days.

An exchange offer cannot close until after the SEC declares "effective" the acquirer's registration statement for the registration of the acquirer's shares that are offered as consideration in the exchange offer. While the SEC has committed publicly to provide comments in a timely manner to facilitate a 20-business-day offer period, SEC review of the acquirer's registration statement can sometimes result in extensive comments that often take several weeks to resolve, resulting in a need to extend the offer period.

Once an acquirer announces an intention to commence a tender or exchange offer, it cannot acquire shares outside the offer until the offer expires or is terminated.

Completion of the Transaction

Following the expiration of the tender offer or exchange offer, and assuming the minimum tender condition and other conditions are satisfied, the acquirer will purchase the tendered shares, and the acquirer and the target will work to complete a back-end statutory merger (usually via the reverse triangular merger structure described in the previous section).

The acquirer and target typically may consummate a back-end merger immediately following the acquirer's purchase of shares in the tender or exchange offer if either of these conditions are fulfilled:

- The acquirer owns shares sufficient to effect a short-form merger (which, in Delaware, is at least 90% of each class of the target's outstanding voting shares after the consummation of its offer).
- In the case of a Delaware-incorporated target, the requirements of Section 251(h) of the Delaware General Corporation Law (the DGCL) are satisfied, which include: (a) the acquirer owns a sufficient number of the target's outstanding shares to approve a long-form merger; (b) the merger agreement provides for use of the statute; (c) the tender or exchange offer is for all outstanding shares of the target; and (d) the acquirer is not an "interested stockholder" as defined in DGCL Section 203, Delaware's business combination statute, at the time the merger is approved by the target's board.

If a short-form merger is not initially available because the 90% threshold has not been satisfied, or the conditions for use of DGCL Section 251(h) cannot be met, the acquirer generally has two other options:

1. The acquirer can attempt to reach the 90% threshold necessary to effect a short-form merger by using a "subsequent offering period" or "top up" option.
    - The SEC allows an acquirer to close an initial tender offer and thereafter pursue a subsequent offering period on the same terms to acquire additional shares.
    - Delaware law also allows a target to grant an acquirer a top-up option (typically provided for in the merger agreement), in which the target issues to the acquirer the additional shares necessary to achieve the 90% threshold. The adoption of Section 251(h) has significantly reduced the need to resort to this option, and there are some legal and practical limitations on its utility in any case (including the need to ensure that the target has a sufficient number of authorized shares).
2. The acquirer can consummate the acquisition through a "long form" merger.
    - Requirements for a long-form merger are described above with respect to a one-step merger, including the filing with the SEC and dissemination to the target's shareholders of a proxy statement.
    - Note that, even though shareholder approval of the merger is assured because the acquirer will have purchased a sufficient number of shares in the offer to ensure such approval, the target likely will remain publicly traded and will be obligated to continue to file SEC reports during the pendency of the merger process described above.

C. One-Step or Two-Step? Deciding Which Structure to Use

Cash Consideration: Two-Step Generally More Expedient

In a negotiated cash transaction (a) that does not involve a lengthy regulatory approval process,[7] and (b) in which the parties can, following the tender offer, execute a short-form merger or a merger under DGCL 251(h), the parties usually prefer the tender offer/back-end merger transaction structure to the one-step merger structure because it potentially allows the transaction to be consummated more quickly. A tender offer can be completed in as little as 20 business days and a short-form merger or a merger under DGCL Section 251(h) can be executed immediately thereafter (often the first business following the expiration of the tender offer). In contrast, the one-step merger structure requires a potentially lengthy SEC review, proxy solicitation, and shareholder meeting process, which usually takes at least two to three months to complete. The shorter time to closing has a number of advantages, including:

- The acquirer is able to take control of and own the target earlier (and consolidate its financial results), which reduces the time period in which a topping bid can be made.

- The target's shareholders receive the merger consideration sooner than in a one-step transaction.
- The target is able to reduce the time during which a material adverse change regarding its business, assets, or financial condition (which may give the acquirer the right to terminate the transaction) might occur.

Stock Consideration: One-Step Structure Typical

If the consideration in a transaction consists entirely or partially of acquirer stock, the transaction will usually be structured as a one-step merger, rather than an exchange offer, because the offering of acquirer shares to target shareholders in the transaction must be registered with the SEC, which requires SEC review and usually reduces the timing advantage of the two-step process. While the SEC has attempted to balance the treatment of tender offers and exchange offers by affording expedited review of registration documentation filed in connection with an exchange offer, it often takes much longer than the 20 business day minimum tender period to complete its review process and for the acquirer to address the SEC's concerns. Accordingly, in this context, the two-step transaction structure often does not provide as meaningful a timing advantage over the one-step structure as one might expect.

Extended Regulatory Review: One-Step Structure Preferred

In many transactions the antitrust or other regulatory approval process may be lengthy, thereby potentially eliminating the timing advantage of the two-step structure. As a tender offer or exchange offer cannot close until all material regulatory review processes have been completed, and target shareholders have the right to withdraw their shares at any time prior to the expiration of the offer, an acquirer remains at risk of a topping bid or a shift in shareholder sentiment against the deal during the extended offer period. In a one-step merger, however, a shareholder vote to approve a merger can be taken even if regulatory approvals are still pending and — if shareholder approval is obtained — the right of the target board to terminate the initial merger agreement and accept a higher offer ceases. For these and other reasons, in transactions in which the regulatory review process is expected to take longer than the shareholder approval process, parties usually prefer a one-step merger structure.

Leveraged Acquisitions: One-Step Structure More Prevalent

Although the two-step transaction structure can be used for leveraged acquisitions of US public companies, various timing considerations and other aspects of the acquisition financing can present issues and challenges. For example, coordinating the timing of the marketing and funding of a bond offering or leveraged loan (particularly one involving a syndicate of banks, including non-US banks) with the expiration of a tender or exchange offer requires careful consideration. In addition, although parties to a two-step merger usually wish to close the tender or exchange offer immediately after the satisfaction of all the closing conditions, the SEC has taken the view that the satisfaction of a financing or funding condition generally constitutes a material change to the terms of the tender offer, which requires that the tender offer be held open for at least five business days after disclosure of the satisfaction of the condition. Furthermore, if a short-form merger or a merger under DGCL Section 251(h) is not possible, and the parties must pursue a long-form merger, the target's assets generally cannot be used to secure the loan, and the US federal margin rules limit the acquirer's ability to use the target company's stock purchased in the tender or exchange offer as collateral. Accordingly, most leveraged acquisitions are structured as one-step transactions.

VI. Financing Considerations

Unlike many non-US jurisdictions, such as the United Kingdom, which imposes on acquirers of UK public companies a "funds certain" requirement to demonstrate they have sufficient funds to fulfill the cash portion of a takeover offer, the US does not impose any such legal obligations on acquirers. However, as a matter of practice, in the vast majority of acquisitions of US public companies — whether they are structured as one-step or two-step transactions — the acquirer either (a) has sufficient cash and available financing under existing credit facilities to complete the acquisition, or (b) will enter into commitment papers with one or more banks or other financial institutions pursuant to which they agree, subject to certain limited conditions, to provide the financing necessary to complete the transaction. Due to the uncertainty it creates regarding the acquirer's ability to consummate the transaction, US public targets typically will not enter into a merger agreement and announce a merger unless the acquirer has demonstrated that it has sufficient cash and/or financing to complete the acquisition. For similar reasons, acquisitions of US public companies are typically not subject to an express financing condition, although that is legally permissible. However, merger agreements involving leveraged acquisitions by private equity firms and other financial buyers typically contain specific provisions that take into account the need for financing by the acquirer, often providing, among other things, that the acquirer will be obligated to pay the target a termination fee if the merger agreement is terminated in certain circumstances related to the acquirer's failure to consummate the transaction when required to do so.

VII. Shareholder Litigation

The vast majority of acquisitions of US public companies involve one of two forms of shareholder litigation: so-called merger "strike suits," which have been the more common of the two forms of suits, and appraisal actions. In a strike suit, a group of law firms that specializes in these types of lawsuits usually seeks to identify one or more shareholders of the target to serve as the named plaintiff and file a lawsuit, often on behalf of a class of allegedly aggrieved shareholders. The lawsuits often allege flaws in the sale process and/or the disclosure regarding the transaction contained in the principal SEC disclosure document (*i.e.*, the proxy statement in a one-step transaction or the offer to purchase and Schedule 14D-9 in a two-step transaction). Plaintiffs frequently name as defendants the board of directors of the target company and, based on an "aiding and abetting" theory, the acquirer and sometimes even the financial adviser. These complaints generally seek, among other relief, an injunction preventing or delaying the close of the transaction, and damages for the alleged harm caused to the shareholders. Typically, these cases can be resolved prior to the shareholder vote on the transaction, often when the target voluntarily agrees to make additional, or supplemental, disclosures to the shareholders.

In appraisal actions, plaintiffs (usually represented by one of a group of law firms that specialize in these claims) take advantage of statutes in many states (including Delaware) that generally permit target shareholders to demand a judicial determination of the "fair value" of their shares in lieu of the consideration paid in the merger. In Delaware, appraisal rights are generally available in a merger in which all or a portion of the consideration consists of cash or unlisted securities, subject to certain exceptions.[8] To exercise appraisal rights in Delaware, a shareholder generally (a) must vote against (or abstain from voting on) a merger in which all or a portion of the consideration consists of cash or unlisted securities, and (b) must comply with various notice and other statutory conditions to exercise appraisal rights. In a two-step transaction, shareholders who do not tender their shares in the tender offer can exercise their appraisal rights in connection with the subsequent back-end merger. Fair value in appraisal actions is determined by the applicable state court and may be more than, equal to, or less than the merger consideration. Shareholders exercising appraisal rights only retain the right to payment, in cash, of the fair value of their shares.

In response to what the Delaware courts viewed as an excessive number of merger strike suits (and settlements of these suits based on immaterial supplemental disclosures), as well as misuse of the state's appraisal statute as a means of so-called "appraisal arbitrage," beginning in 2015 the courts rendered a series of decisions holding that:

- Settlements in shareholder strike suits are not likely to be approved if the only concessions made by the defendants (usually the target's board of directors) are additional or improved disclosures (so-called "disclosure only" settlements), *unless* the supplemental disclosures cure "plainly material" misrepresentations or omissions, and the scope of the release granted to the defendants is narrowly tailored to the circumstances.
- Shareholder approval of a transaction based on an uncoerced, fully informed vote of disinterested shareholders should be subject to the deferential business judgment standard of review, rather than the more stringent standards imposed by *Revlon* (which impose on the board a duty to obtain the best price reasonably available) or the "entire fairness" review (in which both the price and process must be "fair" to shareholders).
- In appraisal actions, courts should usually give significant deference to the deal price, as opposed to other means of determining the fair value of the target's shares.

In addition, in 2016 the Delaware legislature adopted amendments to its appraisal statute intended to limit the use of the statute for appraisal arbitrage cases in which plaintiffs' firms pursue appraisal claims as an independent investment opportunity, leveraging the possibility of an appraisal award that exceeds the price paid in the merger and the ability to receive statutory interest for the duration of the appraisal process at a rate in excess of market interest rates. Specifically, these amendments (a) impose minimum ownership thresholds on shareholders seeking to pursue appraisal claims (1% of the total shares or US$1 million in value), and (b) allow companies to make a payment to claimants early in the litigation to terminate the accrual of interest on that amount.

The Delaware judicial decisions regarding disclosure-only settlements, informed approval of mergers and valuation in appraisal actions, and the amendments to Delaware's appraisal statute to limit appraisal arbitrage have reduced somewhat the amount of shareholder litigation in public company acquisitions involving Delaware targets. Prior to 2015, approximately 90% of all mergers involving public companies as targets resulted in shareholder litigation. By 2018, approximately 82% of public target mergers were litigated. The vast majority of this litigation was shareholder strike suits. Although the number of merger appraisal petitions filed in Delaware nearly quadrupled from 2012 to 2016, it has been declining since then.[9]

One result of Delaware's more stringent approach to shareholder litigation has been an increase in actions brought in federal court alleging violations of the federal securities laws' disclosure requirements in connection with the proxy statement and tender offer filings made in connection with public company mergers. In the period from 2015 to 2018, federal securities laws claims in connection with mergers involving public companies increased from approximately 26% to approximately 91%.[10]

Accordingly, even though Delaware state court litigation arising from acquisitions of Delaware public companies has declined somewhat in recent years, it is still a feature of most transactions, and federal securities laws claims have become increasingly common.

VIII. Regulatory Approvals and Other Considerations

A non-US acquirer should be aware of several other important US legal considerations faced by the parties to a US public company acquisition, including the specific filing and disclosure requirements of the federal securities laws; limitations on trading in the target's (and in some cases the acquirer's) securities while in the possession of material, non-public information; rules regarding the disgorgement of short swing trading profits; and in leveraged transactions US federal banking regulations regarding margin stock.

In addition, an acquisition of a US company — whether public or privately held — may require US regulatory review and approval under various statutes and regulations, including, for example, clearance under the HSR Act and review under the Exon Florio Amendment to the Defense Production Act of 1950 (a so called "CFIUS Review"). Other approvals required will depend on the size of the target and the target's and the acquirer's industries.

The HSR Act and Its Requirements

The HSR Act generally requires that an acquisition that results in the acquirer owning more than a certain amount of the target's assets or voting securities (in 2019 the amount was US$90 million; this amount is indexed annually for inflation) cannot be completed until a statutory waiting period has expired or terminated.

To commence this waiting period, the merging parties must file a pre-merger notification form (HSR Form) with the US Federal Trade Commission (FTC) and Department of Justice (DOJ). The information included in this form permits the FTC or DOJ to review the potential competitive implications of the transaction. Parties to a transaction generally seek to file such notification as promptly as practicable to start the clock on this waiting period.

The requisite waiting period under the HSR Act is 30 calendar days for all transactions other than tender offers, and 15 calendar days for tender offers. The parties to the transaction may request early termination of the HSR waiting period if they believe there are no material issues requiring the FTC and/or DOJ's attention. If the government grants early termination, that grant is publicly disclosed on the FTC's website and published in the Federal Register.

If the government does not grant early termination, one of three outcomes will typically occur at the end of the HSR waiting period: (1) the waiting period will expire with no action (in which case the parties are free to close); (2) the government may suggest — and the parties may decide to — "pull and refile" the HSR filing, thereby restarting the 30-day clock; or (3) the government may issue a Request for Additional Information (a so-called "Second Request"). The issuance of a Second Request may substantially lengthen the HSR waiting period.

In attempting to resolve any antitrust issues that arise as a result of the Second Request, the FTC or DOJ may demand concessions or divestitures from the parties to the transaction or seek to block the acquisition altogether. Typically, but not always, if the parties are required to make concessions, they should assume that the government will expect (1) a divestiture as a likely remedy to address its concerns, and (2) in the case of a divestiture remedy, a fully negotiated sale agreement with an upfront buyer, with the government approving both the buyer and the agreement. Because the FTC and DOJ conduct a rigorous review of divestiture buyers, acquirers should expand the overall transaction timeline to allow for this process if there is a risk that the government will demand remedies as a condition of granting HSR clearance. Moreover, parties should be mindful of limitations on integration and other activities prior to receipt of HSR clearance, as the failure to comply with such requirements can result in significant adverse consequences.

CFIUS

When a non-US investor seeks to acquire a US target that operates in certain sensitive sectors or presents other national security risks, the parties may be required to file a notification of the transaction with the Committee on Foreign Investment in the United States (CFIUS), or they may choose to file voluntarily to preclude a future review of the transaction by the Committee. CFIUS filings are mandatory for certain investments involving so-called "critical technology" and, if a foreign government has a substantial interest in the transaction, for certain investments involving "critical infrastructure" or sensitive personal data. CFIUS filings may also be prudent for other transactions with national security implications, such as investments in targets with business with the US government or locations near sensitive US government facilities. There are some exemptions from CFIUS's jurisdiction, however, so parties need not always make filings for transactions with national security implications.

When the parties to a transaction make a CFIUS filing, they generally do so jointly, and the submission includes information about all parties and the transaction itself. The CFIUS review process can take anywhere from 30 days to four months or longer, largely depending on the extent of the national security risks associated with the transaction. At the conclusion of the process, CFIUS can clear the transaction, impose conditions on the transaction, or recommend that the US President block or unwind the transaction. If the parties make a short-form filing, CFIUS can also finish its review without granting clearance unless the parties then make a long-form filing.

Absent clearance of a transaction within CFIUS's jurisdiction, the Committee retains the ability to review a transaction indefinitely — even after signing or closing.

Other Possible US Regulatory Regimes

A number of other US regulatory regimes and agencies may be implicated by the acquisition of a US company by a non-US acquirer. These include the following federal regulatory regimes and agencies:

- The Foreign Corrupt Practices Act (FCPA) and Office of Foreign Assets Control (OFAC), particularly for companies with overseas operations
- The Federal Energy Regulatory Commission (FERC) for target companies operating in the energy or power space
- The Federal Communications Commission (FCC) for target companies operating in the communications space

In addition to these and other federal regulatory regimes and agencies, the acquisition of a US public company may implicate various state regulatory regimes and agencies. Before considering the acquisition of any US company, including a public company, a non-US acquirer should consult with M&A counsel who can advise the acquirer on all applicable regulatory regimes and agencies, or at least be able to identify which regimes and agencies may be implicated by the proposed transaction.

IX. Conclusion

The acquisition of a US public company by a non-US acquirer is a transformational transaction for the target and likely a significant transaction for the acquirer. Given the significance and potential complexity of such an acquisition, and the numerous strategic, legal, and practical issues, non-US parties considering such a transaction should engage experienced legal counsel to help guide them through the process, remembering that every such acquisition should be carefully analyzed on a case-by-case basis.

Please do not hesitate to contact us if you have any questions.

Endnotes

[1] A person is deemed to have "beneficial ownership" of shares it if has the power, directly or indirectly, to vote or dispose of the shares.

[2] Certain investors, including institutional investors, that have a passive investment intent and hold less than certain specified thresholds of the class of shares in question may be able to file a Schedule 13G rather than a Schedule 13D. Schedule 13G requires the disclosure of less information than Schedule 13D and in some cases can be filed 45 days after the end of the calendar year in which the shares were acquired. However, a party that intends to pursue an acquisition of the issuer of the shares will typically be required to file a Schedule 13D.

[3] Unlike most European takeover regimes, there are no liquid securities requirements under US law. Accordingly, the consideration in a US public company acquisition can include non-listed securities, debt instruments, options, warrants, or other contract rights, such as contingent value rights (CVRs).

[4] In a transaction in which the consideration consists in whole or in part of acquirer securities, the acquirer typically also makes representations in the merger agreement regarding its business and financial condition. In a transaction of this nature, the more the acquirer and the target are equal in size, the more typical it is for the parties' representations and warranties to mirror each other.

[5] Tender offers are governed by Section 14(d) of the Exchange Act and Regulations 14D and 14E promulgated thereunder. Exchange offers are further regulated by the stock issuance rules under the Securities Act. The detailed requirements of the disclosure required in an Offer to Purchase and Exchange Offer/Prospectus are set forth in the instructions and items of Schedule TO, the requirements and disclosure required for a non-US acquirer to register its shares for exchange are set forth in the instructions to Form F-4, and the requirements and disclosure required for a US acquirer to register its shares for exchange are set forth in the instructions to Form S-4. During the period after the public announcement and prior to the commencement of the offer, all written communications regarding the offer must be separately filed on Schedule TO on the date first used.

[6] This time period is dictated by Regulation 14E under the Exchange Act.

[7] Specifically, if the regulatory approval process for a transaction takes longer than the time required to commence and close a tender offer and execute a short-form merger or a merger under DGCL Section 251(h), the timing advantage of the two-step structure is reduced or eliminated (see "Extended Regulatory Review: One-Step Structure Preferred").

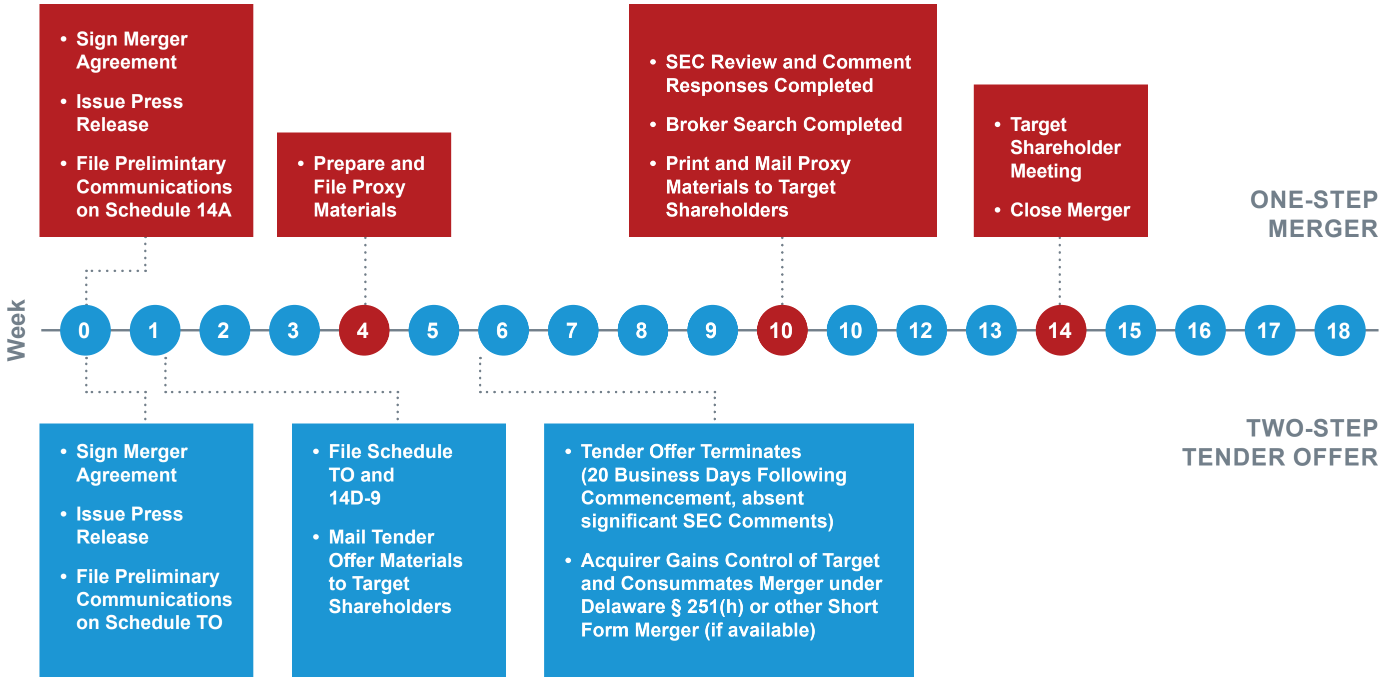
[8] One common exception to appraisal rights in many states, including Delaware, provides that shareholders of a publicly traded target corporation with stock held of record by more than 2,000 shareholders will not be entitled to appraisal rights in transactions in which the consideration to be received by those target shareholders consists solely of the securities of the acquirer. This exception only applies when the acquirer is also a large, publicly traded corporation with stock held of record by more than 2,000 shareholders.

[9] Source: Cornerstone Research

[10] Source: Cornerstone Research

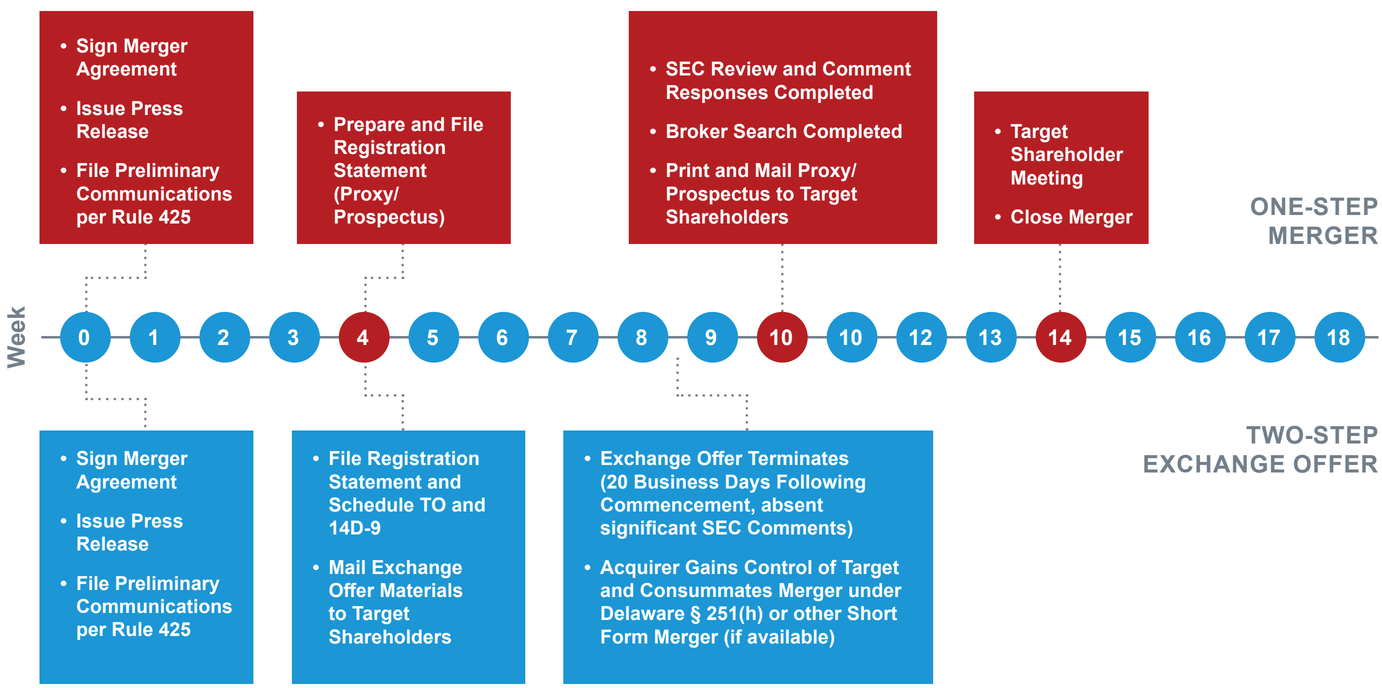
ANNEX A

ILLUSTRATIVE TIMELINE – CASH TRANSACTIONS



Note: Assumes no antitrust or other regulatory delay.

ILLUSTRATIVE TIMELINE – STOCK-FOR-STOCK TRANSACTIONS



Note: Assumes no antitrust or other regulatory delay, and no acquirer shareholder approval required.

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