Mergers & Acquisitions

Jurisdictional comparisons **First edition 2012**

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1. MARKET OVERVIEW

1.1 Please give a brief overview of the public M&A market in your jurisdiction

The market for public company transactions in the United States is quite broad, deep and diverse. In recent years, both the volume and number of transactions have been significant, and represent a substantial portion of global M&A. For the last five years, the US has been home to almost 40 per cent of global M&A by volume. While the 2008 financial crisis caused a sharp downturn in this activity, both sellers and buyers of public companies have returned to the marketplace, albeit with greater caution and often with more challenges, such as the volatility of financial markets.

The stimulus for this activity are manifold. In some cases, corporates seek to acquire competitors, or to further integrate their operations, via public company acquisitions. For example, Google's pending cash acquisition of Motorola Mobility is designed to allow Google to further expand its mobile technology products. 'Mergers of equals', typically all-stock transactions in which no or only a small premium is paid to stockholders of the 'target', which are motivated by the prospect of future increased valuation based on synergies of the combination, have been popular in industries undergoing consolidation. Industries such as banking and energy have seen large transactions of this type, such as Duke Energy's pending stock merger with Progress Energy. In other cases, financial sponsors identify undervalued companies capable of improved performance without the lens of public company reporting, or as a springboard for growth. Finally, stockholder activism and opportunistic stakebuilding by hedge funds and other short-term investors, can result in a company becoming 'for sale'.

The common theme in these examples is diversity. The reasons why a US listed company may be sold, and the means of doing so, are as varied as the situations that emerge. The consideration received by stockholders in a sale transaction may be cash, common or preferred shares of a US or foreign-domiciled company, debt securities of such a company, as well as derivative securities and rights, such as 'contingent value rights' or interests in a litigation trust or future revenue stream of a product under development, such as a drug or technology prospect.

1.2 What are the main laws and regulations which govern the conduct of public M&A activity in your jurisdiction?

1.2.1 What entities are covered?

Basic regulation of public company transactions in the US derives from three sources.

First, the federal securities laws, in particular the Securities Act of 1933, as amended, (15 U.S.C. § 77a et seq.) (the Securities Act) and the Securities Exchange Act of 1934, as amended, (15 U.S.C. § 78a et seq.) (the Exchange Act) and related rules and regulations govern the conduct of participants in our public markets. These rules generally address, among other topics:

(i) disclosure obligations of those engaging in transactions in the public markets;
(ii) disclosure obligations of targets of M&A transactions, including required financial and other information when seeking approval by stockholders of a transaction (where state law requires an approval);
(iii) procedures for commencing and consummating a tender offer for the shares of a public company (Exchange Act Regulation 14D and 14E), including disclosure obligations (Exchange Act Rule 14d-3), minimum time periods during which an offer may be open (Exchange Act Rule 14e-1), and the 'best price' rule (Exchange Act Rule 14d-10);
(iv) disclosure obligations for issuers of securities to US-based stockholders; and
(v) prohibitions on buying or selling securities in various circumstances, including when in possession of material non-public information. Exchange Act Rule 10b-5.

Second, state law generally governs the ability of a potential acquiror to purchase, or acquire by merger or other business combination, a US-domiciled company, the responsibilities of boards in these circumstances and the rights of stockholders of the target in such a transaction. More than 50 per cent of publicly-traded companies in the US, and 63 per cent of the Fortune 500 companies are incorporated in Delaware. Therefore, the Delaware General Corporation Law (DGCL), and the interpretation of those statutes and related common law by the Delaware Supreme Court and the Delaware Court of Chancery, have a dominant influence on the market for US public companies.

For example, Delaware law provides that the required vote to merge two companies is generally a majority of the outstanding shares of common stock. DGCL § 251. Further, the DGCL provides that in certain circumstances where the transaction is with a stockholder who previously acquired at least 15 per cent of the common stock without prior board or stockholder approval, the required vote is approval of holders of two-thirds of the stock not held by the 15 per cent holder. DGCL § 203. The DGCL also provides for the ability to squeeze out public stockholders in certain circumstances, typically where someone already owns at least 90 per cent of the common stock of a company. DGCL § 253.

An important caveat to all these rules is that the DGCL, and most US state corporate laws, are 'permissive' in nature, which generally means that, where state law does not expressly prohibit an action, companies incorporated in

the state are free to adopt additional limitations or rights in their certificate of incorporation. So, for example, a company incorporated in Delaware may have two classes of common stock, or may have preferred and common stock, each of which is entitled to vote as a separate class on a merger in addition to the statutory required vote. Or a company may increase the voting percentage to a number higher than a majority. These entitlements would be set forth in the company's certificate of incorporation (amendments to which require stockholder approval under DGCL § 242).

Case law developed by the Delaware courts outlines the duties of boards of directors of target companies when considering an offer for the company, including the ability of the company to 'just say no' (see *Air Products & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (*Airgas*)), to choose to conduct a broad or limited 'auction' to sell the company, or to approve the sale of the company without an auction (see eg, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that once the board decides to sell the company (ie, a sale of control), it must seek to achieve the highest value reasonably available for shareholders); *In re The Topps Co. 12 S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007) (permitting a board to undertake a post-signing 'go shop' period rather than a full auction process)). Likewise, the cases address the role of the board of the target where management or a controlling stockholder seeks to acquire the company by taking out minority stockholders. See eg, *Kahn v. Lynch Communications Sys. Inc.*, 638 A.2d 1110 (Del. 1994); *In re Cox Communications, Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005); *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397 (Del. Ch. 2010).

Important Delaware cases also speak to the permissibility of takeover defences in the face of a hostile or unsolicited offer, or stakebuilding, including the ability to implement a shareholder rights plan (see *Airgas*, 16 A.3d at 122), and to include deal protection measures, such as break fees (see *Brazen v. Bell Atl. Corp.*, 695 A.2d 43 (Del. 1997)) in a recommended transaction.

Finally, the DGCL provides for appraisal, or dissenters' rights in mergers in which the consideration to stockholders does not consist solely of common stock of the surviving corporation or of a corporation either listed in the US or held by more than 2,000 persons. DGCL § 262.

The third source of regulation is the US securities exchanges. The New York Stock Exchange (the NYSE), the NYSE Amex (Amex) and The Nasdaq Stock Market (NASDAQ) all have listing rules that may be applicable in a merger transaction. For example, these rules generally provide that if a US-listed company will issue 20 per cent or more of its voting or equity interests, stockholder approval is required. NYSE Rule 312; Amex Rule 712; NASDAQ Rule 5635. Likewise, the exchange rules provide time-period requirements relating to the calling and holding of stockholder meetings. NYSE Rules § 4; Amex Rules Part 7; NASDAQ Rule 5620. More generally, these rules provide for certain disclosure requirements and set corporate governance standards that are not specifically implicated by an M&A transaction. NYSE Rule 303A; Amex Rules 801-809; NASDAQ Rule 5600.

1.2.2 Who is the regulator?

In the case of the SEC, the regulator generally is the Commission itself, comprised of five commissioners who serve staggered five-year terms. Each Commissioner must be nominated by the President and confirmed by the United States Senate. They retain the authority to establish rules and regulations under the relevant securities laws, and to grant waivers in certain circumstances. Decisions of the Commission may also be reviewed by US federal courts, although such review is rare in the context of an M&A transaction and is generally reserved for broader challenges to the Commission's rulemaking authority.

More typically, issuers will engage with the staff of the Commission, in particular legal and accounting staff of the Division of Corporation Finance, who have authority to interpret SEC rules and to provide guidance to issuers. Transaction-related required filings, such as registration statements for the issuance of securities, proxy statements to call a stockholder meeting, tender offer documents to launch a cash or stock offer for shares, and Rule 13e-3 filings (going-private transactions) are reviewed by the staff, who typically provide written comments that must be addressed before the parties may publicly launch the tender offer or the merger vote process.

In the case of the DGCL and Delaware case law, the usual and most important 'regulator' is the Delaware Chancery Court, which is the court of first instance for corporate law cases in Delaware. This court provides important decisions on directors' fiduciary duties when considering and recommending business combinations, as well as interpretations of the DGCL. Those decisions may be reviewed on appeal by the Delaware Supreme Court. The Delaware legislature retains the power to amend or revise the DGCL, although material changes in this regard are rare.

In the case of the US stock exchanges, each exchange has a staff which will provide interpretations of the listing rules and clear applications.

1.3 Other than in relation to anti-trust, are there other applicable regulations such as exchange and investment controls?

Key regulations other than the US competition rules are reflected in specific statutory requirements for certain commonly regulated industries, such as utilities (both state and federal regulations relating to production and fees), media and communications (primarily the Federal Communications Commission), banking (primarily the Office of the Comptroller of the Currency, the Federal Reserve System and the Federal Deposit Insurance Corporation) or gaming (primarily state regulation and licensing). Depending on the transaction, and generally regardless of whether the acquiror is US or foreign, substantial approvals for the transfer of ownership may be required, some of which can be time-consuming and may affect closing.

More generally, the Committee on Foreign Investment in the United States (CFIUS), created under federal statute (50 U.S.C. app § 2170), has the power to review transactions that result in foreign control of a US company or assets. Following an application by the parties or on its own initiative, CFIUS can recommend that the President disapprove such a transaction on the grounds

that it threatens to impair national security. The most prominent example of such a recommendation was the proposed acquisition of the US port assets of the Peninsular and Oriental Steam Navigation Company by Dubai Ports World in 2006, which failed following opposition by CFIUS. The CFIUS review process typically starts with a voluntary filing by the parties, although CFIUS can also initiate review on its own, after which CFIUS has 30 days to conclude whether the transaction 'threatens to impair the national security of the United States'. Areas of focus are typically defence-related industries, including production, but there is a constantly evolving view of what constitutes 'critical national infrastructure' – energy, communications and key commodities such as steel or aluminium are also areas that often draw heightened scrutiny. In addition to the industry affected, the nationality of the acquiror, as well as whether it is connected to or dominated by a foreign government, have a significant effect on the level of review and the scope of any relief required.

If an initial determination of risk is found by CFIUS, a further 45-day review period may ensue. Having received the recommendation of CFIUS, the President then has 15 days to determine whether to prohibit or suspend the transaction, on the basis that: (a) foreign control may impair national security, and (b) no other applicable law permits the President to protect national security in this regard. There is effectively no judicial appeal from the CFIUS process and parties to transactions that may implicate CFIUS matters are well-advised to consult with CFIUS as to filing requirements.

2. PREPARATION AND PRE-ANNOUNCEMENT

2.1 What are the main structural means of obtaining control of a public company? If there is more than one, what are the key advantages and disadvantages of each route? Is one route more commonly used than others?

The usual means to obtain control over a public company are either a merger transaction, in which the bidder and the target are either merged pursuant to state corporate law, or more commonly, the target is merged with a 'dummy' subsidiary of the acquiror, so that the acquiror, by force of law, becomes the 100 per cent parent at the effective time of merger. These common mergers are called 'reverse triangular mergers'. The legal effect of such a merger is that, at the effective time of the merger: (a) the combined entity automatically becomes responsible for the debts and obligations of, and will have the rights previously held by, the merged company (although change in control and transfer limitation provisions in contracts may nonetheless give a counterparty special rights); and (b) the former stockholders of the merged company lose all their rights as stockholders, which are replaced by their right to receive the merger consideration and, as noted above in some cases, appraisal rights.

The other common method to acquire control is a tender (cash) or exchange (shares) offer made to the stockholders of the target, in which the acquiror offers to acquire up to 100 per cent of the target shares, but no less than a specified percentage (typically at least enough to obtain control; often

high enough to permit a short-form squeeze out of the remaining public stockholders).

The merger approach is more common, although tender offers are also quite typical in the US market. Mergers provide the main benefit that, following receipt of the required stockholder approval, the acquiror upon the filing of the required certificate of merger in Delaware or other relevant state of incorporation, becomes the 100 per cent owner of the company. The former stockholders of the target only have the right to receive the merger consideration, and all their rights as stockholders in the target are extinguished (other than appraisal rights, if applicable). This structure therefore permits the acquiror, at the time of obtaining control, to fully incorporate the target, to extract synergies, pay dividends and otherwise control the capital structure without regard to minority holders. Unlike in many European jurisdictions that permit schemes of arrangement or amalgamations, no court proceedings are required to implement a merger in the US and creditors do not have the right to object unless specifically provided in the relevant debt agreements.

The key advantages of the tender offer are that it typically can be completed somewhat more quickly than a merger (in theory, 20 business days from launch, as opposed to 75-90 calendar days for a merger), and an offer can be an effective way of making a hostile bid because it does not require approval or agreement with the target. The bidder in a tender offer, however, may risk not acquiring sufficient shares to complete a squeeze out, in which case the process of eliminating minority investors may require the more lengthy merger process for the back-end of the transaction. This reality can raise complications for the bid, such as where the financing of the transactions includes security in the target's assets, or is otherwise being put on the target, and the ability to realise benefits from the initial acquisition prior to completion of the longer second step. Experience shows that uncontested tender offers typically result in the acquiror exceeding the squeeze-out threshold, if it exceeds the minimum condition.

2.2 What secrecy and disclosure obligations are placed on bidders and target companies ahead of any formal announcement of a bid?

Prior to a definitive agreement, neither the bidder nor the target generally has a disclosure obligation. Due diligence and negotiations are typically conducted pursuant to a non-disclosure agreement that requires the parties to retain the confidentiality of their discussions.

In the event of a market rumour, a target may simply maintain a 'no comment' position, and this is the usual course in US M&A processes. The stock exchanges do not tend to require announcements in these circumstances, unless it can be shown that the company itself is the source of the rumour. In some cases, a target will desire to confirm to the market that discussions are underway, while clarifying that no deal may be reached.

Where a target has previously commented on a possible transaction, the target may have a duty to update the market when the situation changes materially.

The other circumstances in which public announcement of pending discussions may be required occurs where the bidder already owns more than five per cent of the target's common stock, and has filed a Report on Schedule 13D, a required SEC filing upon an acquisition of shares that results in a person beneficially owning more than five per cent of a listed company's stock. In this case, it may be necessary to update the bidder's Schedule 13D to reflect a change in its plans or intentions regarding the target. As such announcements tend to result in sudden increases in the target's stock price, bidders and targets alike tend to work to avoid this requirement.

2.3 Are there any constraints over the ability of a bidder to carry out due diligence on the target?

Other than compliance with third-party confidentiality obligations and the limitations of antitrust law, there are no limitations on the scope of due diligence that may be provided to a bidder. Prudence and federal securities laws dictate that such information should be shared only pursuant to a non-disclosure agreement.

The antitrust laws prohibit the sharing of price-sensitive (meaning product pricing, not stock market price-sensitive) or certain other competitive information between direct competitors. For example, information about product-specific pricing and margins should not be shared with employees at an industry competitor. But this, as well as other sensitive competitive information, may be separated and placed in a 'clean room' review, access to which is limited to certain employees and outside advisors.

2.4 Is it possible for a target company to grant a bidder exclusivity and/or a break fee? Are there any other steps which can be taken to provide greater certainty to a bidder that its bid will be successful?

Prior to a definitive transaction agreement, it is possible for a public company to grant limited forms of exclusivity to a potential acquiror. For example, the company might agree not to seek other bids for a brief period while diligence or negotiations are completed, or it may agree to reimburse certain expenses of the bidder upon termination of negotiations.

More typically, deals are protected post-definitive agreement, by means of a reasonable break-up fee. Unlike many foreign jurisdictions, Delaware courts have not articulated a specified percentage for permitted break fees. The usual rule is that the fee must be reasonable and not so high as to unduly tax the stockholder vote. Parties typically agree that fees should not exceed three to four per cent of transaction value.

Transaction agreements typically also include provisions that forbid the target from seeking, or entertaining, other offers, unless their fiduciary duties require them to do so. Further, at least in Delaware, a bidder may obtain a 'force the vote' provision that requires the target to submit the deal to stockholders even if the target's board of directors changes its recommendation; this can result in a significant timing advantage for the first bidder. The precise mix of customary deal protections, of which the foregoing are just the most common, depends on the nature of the sale process,

whether the transaction is a cash or stock deal, and the relative bargaining power of the parties.

2.5 Are there any restrictions on a bidder obtaining commitments from a target company's shareholders ahead of the announcement of a bid?

It is common practice for bidders seeking targets that have large stockholders to require and obtain voting and support agreements, which essentially provide that the stockholder will vote in favour of the transaction (or tender its shares in the case of a tender offer), until such time as the company terminates the agreement (which it typically is entitled to do if a superior offer is received). Bidders need to be careful not to run foul of the proxy solicitation rules, which essentially means that they may only speak to a few stockholders and not to a large number (Exchange Act Rule 14a-2 provides a safe harbour for bidders to solicit not more than 10 target stockholders), prior to deal announcement and to comply with the SEC filing requirements relating to preliminary proxy materials. As a practical matter, and in part due to the desire to maintain confidentiality, bidders typically do not seek voting agreements where a stockholder holds less than 20 per cent of the voting power.

2.6 Are the directors of the target company under any particular obligations or duties in the period leading up to a bid?

There are no additional obligations on the target company board prior to receipt of a bid. The directors' basic fiduciary obligation to act in a manner they reasonably believe to be in the best interests of all stockholders applies. If they implement defensive measures in anticipation of a bid, their conduct may be subject to a higher standard of review by the Delaware courts (ie, was the response reasonable in relation to the threat posed, see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (*Unocal*)), but their basic fiduciary duties continue.

3. ANNOUNCEMENT OF A BID

3.1 At what stage does a bid have to be announced?

A bid must be announced either at the time there is a definitive agreement with the target company to seek to complete a merger or other business combination, such as a tender offer. In the case of hostile bids, announcement occurs at the time that the bidder chooses to make the proposal public, which may be by means of launching a tender offer, or a press release indicating that they have proposed a transaction to the company.

3.2 Briefly summarise the information which needs to be announced at this stage.

At the time a definitive transaction agreement is signed, the target company will announce, prior to the opening of trading on the next business day, the material terms of the agreement – essentially, the identity of the bidder, deal price, any material conditions (stockholder vote, regulatory approvals, minimum tender condition in the case of a tender offer) and, perhaps, the

nature of any break-up fee. Transaction announcements typically also note whether an investment bank provided a fairness opinion, and whether there is a 'go shop' period, or preliminary period in which the company is permitted to seek other bids on superior terms to the agreed deal. While not required, announcements also typically indicate expected timing for completion.

Within four business days, the company will be required to publicly file with the SEC on a Form 8-K the transaction agreement itself, and may at that time also provide a more detailed summary of the agreement. These filings are readily available online and also via the target's website.

4. BID TIMETABLE

4.1 Please provide a brief overview of the bid timetable, assuming that the bid is recommended by the board of directors of the target.

In the case of a recommended merger transaction, the typical timeline to completion is approximately three months. It will usually take the parties two weeks to prepare and file the proxy statement with the SEC, whose staff then typically provides comments 30 calendar days later. Those comments must be resolved prior to mailing the proxy statement to the target's stockholders, and one to four weeks of engagement with the SEC staff is the typical range. Thereafter, the company can mail the proxy statement and hold the stockholder meeting, which usually requires at least 20 business days' notice.

Unless the parties receive a second request under the US antitrust filing reviews, enter a Phase II or equivalent review in Europe, or are caught in another extended regulatory review (eg, CFIUS, FCC), such a timeline is achievable.

Tender offers can be launched promptly (within a few days) of reaching an agreement with the target. Unless competition approvals delay closing of the offer, these offers may be open for as few as 20 business days (or approximately 30 calendar days from agreement). Such a rapid timeline is rare in US transactions, due to other regulatory, financing and closing conditions that may exist, but this route remains attractive for well-funded bidders without regulatory issues.

4.2 Are there any material differences if the bid is hostile (ie, unsolicited) and/or if there are competing bidders?

As a legal matter, hostile bids do not necessarily require a longer timetable. If the bidder launches a tender offer, the same timeline is still possible. But it is likely that the target will put, or already have, in place takeover defences, such as a shareholder rights plan, that will preclude the bidder from acquiring the company absent an agreement with the board. Litigation also is likely to ensue.

A hostile bidder may also launch a proxy fight, to replace some or all of the target's directors, and amend the company's organisational documents in order to facilitate the bid.

In the case of competing bidders, once a definitive agreement is signed with one of the bidders, the usual timeline should apply. However, if overbidders emerge post-announcement, the target may require time to

assess the bids, which may delay calling the stockholder meeting and would certainly delay an early closing to a tender offer.

4.3 What are the key documents which the shareholders of a target company would typically receive on a bid?

In the case of a merger, the stockholders of the target company will receive a proxy statement, on behalf of the acquiror and the target, which contains financial information, a description of the transaction, the background to the transaction (negotiation history), the board's recommendation, as well as a description of any fairness opinion provided, together with a copy of the actual opinion and a copy of the definitive transaction agreement. Where the transaction involves the issuance of securities, the proxy materials will also include a registration statement with required disclosures regarding the bidder's financial and business history, as well as *pro forma* financial information for the combined company.

In the case of a tender offer, the stockholders will receive an offer document from the bidder, as well as a document containing the recommendation of the board. Taken together, these documents contain essentially the same information as in the case of a proxy statement.

5. FUNDING AND CONSIDERATION

5.1 At what stage does a bidder need to have funding in place? Are there any legal or regulatory requirements which the bidder must satisfy to show that its funding is sufficient?

Funding must be in place at the time the merger is effective, or the time of acceptance of tenders pursuant to a tender offer. The US M&A market does not have a 'certain funds' or similar requirement relating to bids and offers.

In the relevant disclosure document to the stockholders of the target, the bidder will need to generally describe what financing, if any, is required to complete the transaction, and may need to publicly file related documents, such as commitment letters, so that stockholders can assess the certainty of the financing for the transaction. While it is unusual in the current M&A market to have financing conditions in transactions, or a full walkaway right for the bidder, it is not unusual, in the case of financial sponsor acquirors, for the transaction agreement to have an express limitation on damages that can be claimed if the bidder fails to obtain financing, other than due to a breach by bidder. These so-called reverse break fees appear frequently in public company deals.

5.2 Can the consideration offered by a bidder take any form? Are there any special requirements the bidder must satisfy if the consideration is otherwise than in cash?

As noted above, the US M&A market is open to all forms of consideration and forms other than cash are not uncommon. In 2011, deals with some or all stock consideration represented 63 per cent of total US M&A volume. The percentage of stock consideration from year to year tends to vary with the relative performance of the equity markets (is bidder's stock currency cheap or

dear, in bidder's view), as well as the availability and cost of cash borrowing.

In the case of non-cash consideration, it will likely be necessary for the bidder to register such offering of equity or debt securities with the SEC, and to list such instrument on a national securities exchange, such as the NYSE or NASDAQ. This may have timing and disclosure implications for bidders not currently SEC registrants, who may be required either to become a domestic registrant or to register as a foreign private issuer.

6. CONDITIONS

6.1 Can a bid be made subject to the satisfaction of any pre-conditions? If so is there any restriction on the content of any such pre-conditions?

Transactions in the US market may be conditioned on any terms agreed between the bidder and the target. In the case of a hostile tender offer, the bidder likewise can attach any conditions it deems appropriate. Conditions can be based on the discretion or judgment of the bidder, or can be 'objective' and factual in nature.

The extent and nature of conditions are, of course, key terms of any bid to acquire a public company, and these conditions need to be fully and clearly disclosed to the target's stockholders so that they may assess the likelihood of completion.

6.2 What conditions are usually attached to a bid itself? Other than as a result of law and regulation specific to particular sectors and/or bidders are there any conditions which are mandatory?

Typical conditions in an agreed merger or recommended tender offer include: receipt of the necessary stockholder vote, or in the case of a tender offer, minimum tender; competition approvals; no material adverse change in the business or financial condition of the target (and of the bidder where a material amount of equity is being issued); no legal impediment or prohibition on closing; material accuracy of representations and warranties contained in the acquisition agreement, and a 'bring-down' of those representations to closing; material compliance with interim undertakings; and, in the case of tax-free transactions, receipt of the appropriate tax opinion from counsel.

Where material third-party consents are required for the bidder to realise the value it anticipates from the transaction, receipt of such consents, from a joint venture partner or key supplier or customer, may also be included. Parties may also agree that, in the event more than a specified percentage of stockholders elect appraisal rights, the bidder is not required to close.

Of these, the only required condition would be that relating to stockholder approval in the case of a merger. It is possible to complete a tender offer for less than a majority of the company's shares, but it is not possible to complete a merger without the requisite stockholder vote having been obtained.

While the 'no material adverse change' closing condition is nearly universal in US public company M&A, it should also be noted that courts have refused to recognise such claims by bidders, even in circumstances

where the business at issue has in fact materially declined. Delaware courts have typically described the existence of a 'material adverse change' in this context as requiring proof of an unanticipated, long-term and material decline in a key element of the target's business or financial condition. See *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008). On occasion, courts have suggested that where a bidder genuinely has a concern with a material adverse change, it would be best to specify such measures in quantitative rather than qualitative terms.

6.3 Is the bidder able to rely on the fact that a condition is not satisfied as a means of not proceeding with the bid?

As tender offers and mergers are subjects of contract, a bidder may rely on any basis agreed between the parties, including the failure to satisfy a closing condition, to refuse to close.

7. STAKEBUILDING

7.1 Is a bidder free to buy shares in the target in the period leading up to a bid and subsequently? If so, what are the disclosure requirements? Are there any material consequences for the bidder or target if stakebuilding does take place?

Under the US securities laws, a party in possession of material non-public information (MNPI) relating to an issuer may generally not transact in securities of that issuer until such time as either the information is no longer material, or it is publicly disclosed. While this rule is somewhat simple on its face, the interpretation of it by the courts can be complex, as prosecutors must generally show that the MNPI was obtained in violation of fiduciary duties to a company's stockholders or by fraud. See *Dirks v. SEC,* 463 U.S. 646 (1983) (securities analyst not liable for insider trading since MNPI was obtained from corporate insiders who were attempting to expose a corporate scandal, not violate their fiduciary duties); *SEC v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009) (computer hacker unaffiliated with an issuer could be guilty of insider trading because he obtained the material MNPI by 'deception').

Once the bidder has signed a non-disclosure agreement with the target, it is likely inappropriate for the bidder to engage in transactions in the target's stock. Most NDAs would specifically prohibit this, and contain an appropriate standstill provision. Further, the negotiations between the bidder and target are confidential, and likely material, and the bidder is likely to receive MNPI from the target in the course of due diligence.

Further, once the transaction is announced, it is likely that the definitive agreement (or the continuing effect of the initial confidentiality agreement until closing) will prohibit the bidder from transacting in the target's shares. This is important to the target so that the stockholder vote is not tilted by the bidder's ownership of target shares. MNPI concerns for the bidder also likely exist at least until the proxy statement or tender offer documents are disseminated to stockholders.

Therefore, in general, the only time that a bidder may engage in stakebuilding is in the period leading up to negotiations with the target. However, under US

disclosure rules, ownership of more than five per cent of a listed security requires that the holder file a Report on Schedule 13D with the SEC, and one required disclosure in this report is specification of the purchaser's plans or intentions, if any, with respect to the target, including extraordinary business combinations. Exchange Act Rule 13d-1; Item 4 of Schedule 13D. Thus, practically speaking, a potential acquiror will not wish to cross this threshold.

A further limitation exists in the US antitrust rules. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (15 U.S.C. § 18a) (the HSR Act), and the relevant rules, the acquisition of more than $66.0 million (increasing to $68.2 million after 27 February, 2012) in value of equity securities usually require prior approval under the HSR Act. Such approval in turn would require notice to the target of the intention to exceed this amount, and effectively preview to the target the bidder's intention. While such filings may be confidential, it is possible that the bidder's interest would leak at least to competitors, who may be contacted as part of the review by the Federal Trade Commission or Department of Justice.

Thus, in summary, a bidder might consider acquiring up to the lesser of five per cent of the target's equity, or $65.9 million (soon to be $68.1 million).

Such a level of ownership does not cause material consequences for the transaction, and likewise may have limited benefits. Some bidders prefer to be a stockholder of the target especially in the case of a hostile bid, so that they can bring legal action in their capacity as a stockholder of target in the event the target declines to approve their bid.

8. RECOMMENDED BIDS

8.1 Where a bid is recommended, does the target board require a 'fiduciary out' (ie, the ability to withdraw its recommendation). If so what, typically, is the scope of this right and what are the consequences for the bid?

Under Delaware law, the right of the board to withdraw or modify its recommendation on the basis of fiduciary obligations is required and not waivable. The general standard is that the board may change its recommendation where its fiduciary duties make it necessary to do so, or where the failure to make such a change would result in a breach of fiduciary duties.

Under the DGCL, a merger transaction may still proceed to a stockholder vote even if the board has changed its recommendation. DGCL § 146. Such 'force the vote' provisions may be agreed by the parties. Likewise, a tender offer can still proceed where the board has changed its recommendation as to whether stockholders should tender (the effective equivalent of a force the vote provision in a merger agreement). Some target boards are uncomfortable with these provisions, which, although lawful, may put the board in the awkward position of holding a vote on a matter that the board believes is adverse to the best interests of stockholders. Others will accept these provisions on the basis that, so long as stockholders have full information regarding the risks and benefits of the transaction, they are willing to have stockholders make the final decision on the deal.

An adverse change in board recommendation typically gives the bidder the

right to terminate the agreement and receive a break-up fee. In addition, most agreements provide for various consultation and 'matching' rights for bidders, so that, prior to changing its recommendation, the board must consult with the bidder and permit the bidder to propose alternative terms that would result in the board maintaining its recommendation based on the revised bid.

9. HOSTILE BIDS

9.1 How can a target company defend a hostile bid?

Under Delaware law, a target of a hostile bid has a wide range of tools to protect itself from a hostile offer. First, the company may already have, or can usually quickly adopt, a stockholder rights plan, which effectively makes the acquisition by a bidder of more than 15 per cent or 20 per cent of the target's equity prohibitively dilutive and expensive to the bidder. The rights plan can be subsequently waived or withdrawn by the board for a friendly deal. The legality of rights plans is well-settled in Delaware and other states as well. See, eg, *Airgas* (Delaware); Business Corporation Law § 505 (New York); Virginia Stock Corporation Act § 13.1-646.

Second, the target may seek to sell a large amount of stock to a friendly holder. Under NYSE and other stock exchange rules, this amount may be limited to 19.9 per cent of the target's equity or voting power, but can be a substantial protection against a hostile bidder.

Third, the target may seek to engage in a recapitalisation or extraordinary dividend, to provide some immediate benefit to stockholders and potentially derail any momentum the hostile bidder has.

Fourth, the company may consider an alternative corporate transaction, such as a stock-for-stock merger that does not involve a sale of control, or the sale of a division for cash or assets of a third party, or a spin-off or other corporate transaction. Each of these may be of material benefit to the company's stockholders and reduce the appeal of the company as a target.

There are other measures that may be taken as well, some of which would require stockholder approval and therefore substantial time to complete, as well as inherent risk in attempting to do so.

Under Delaware law, responses by a target of an unsolicited bid are measured under the *Unocal* standard, which requires that the target show it had 'reasonable grounds for believing that a danger to corporate policy and effectiveness existed' and that its defensive measures were 'reasonable in relation to the threat posed'. *Unocal*, 493 A.2d at 955. Before taking any of these defensive actions, it is critical for the board to consider and identify the threats to the company and its stockholders from the hostile bid, and the potential risks and benefits of the defensive measure.

10. COMPULSORY ACQUISITION OF SHARES

10.1 Briefly describe any compulsory acquisition or "squeeze-out" provisions a bidder may be able to take advantage of in order to acquire the shares of non-accepting shareholders

Most states have squeeze-out provisions that permit a large stockholder to acquire the shares of the remaining minority investors. In the case of

a Delaware corporation, where a parent owns 90 per cent or more of the subsidiary's stock, it can complete a short-form merger by making a simple filing with the Delaware secretary of state. DGCL § 253. The minority will be entitled either to the merger consideration set out in the relevant agreement, or to exercise their appraisal rights and receive fair value in cash for their shares as determined by the Delaware courts.

In the context of a friendly tender offer, the target will typically require that, if the bidder acquires less than 100 per cent of the target shares in the offer, it must promptly complete a squeeze-out merger and provide the non-tendering investors with the same consideration as paid in the offer. Where the bidder has crossed the squeeze-out threshold, this is quickly achieved. Where the bidder owns less than this amount, it may have to call a stockholder meeting and vote its shares in favour of the merger.

11. DE-LISTING

11.1 What are the requirements for de-listing a target company's shares following a successful bid?

A listed company that has fewer than 300 record holders (or fewer than 500 record holders and less than $10 million in assets) can be delisted. The process of delisting generally requires requesting that the relevant stock exchange file a form with the SEC on the date the bid closes, followed by the target (or, if the target no longer exists, the surviving entity) filing an additional form with the SEC 10 days later, which results in the termination of all public reporting requirements of the target.

12. TRANSFER TAXES

12.1 Are there any transfer taxes which are payable on a bid for a target company incorporated in your jurisdiction, under the various routes described above?

There are no transfer taxes with respect to the transfer of shares in a public entity in the United States. In some cases, a transaction that results in a change in control of a company may trigger state or local taxes, such as real estate transfer taxes, although this is not usually the case. In addition, the sale of shares for cash can trigger capital gains taxes.

13. EMPLOYEE ISSUES

13.1 Are there any employee notification or consultation requirements on a bid?

There are no required pre-notification or consultation provisions under US or state law relating to employees. Some collective bargaining agreements (CBA) may contain provisions that provide union employees with certain benefits, or the right to re-negotiate, their CBA in the event of a change in control. These matters are contract-specific, however, and not required as a matter of law.

14. CURRENT TOPICAL ISSUES AND TRENDS

14.1 Please summarise any current issues or trends relating to public M&A activity in your jurisdiction

The current M&A market in the US reflects the broader volatility in the domestic and global economy. As deal financing has become increasingly more difficult to obtain, strategic acquirors, with listed securities or perhaps available cash, have been more active than financial sponsors. Financing challenges have even led to some strategic transactions including minimum ratings conditions for the acquiror, even for large corporates, such as a provision that the acquiror may terminate the deal on payment of a reverse break fee in the event that its credit rating is reduced below investment grade. For example, Pfizer's 2009 agreement to acquire Wyeth permitted Pfizer to terminate the agreement upon a payment of a $4.5 billion reverse break fee (approximately 6.6 per cent of the total transaction value) in the event Pfizer failed to obtain financing 'primarily' because its credit ratings were downgraded.

In terms of deal catalysts, stockholder activists, such as short-term hedge fund investors and well-known corporate raiders such as Carl Icahn, have pressed many companies to seek a sale or change their corporate strategy, often with no results. See, eg, Lions Gate Entertainment (Mr. Icahn agreed in 2011 to sell most of his shares after owning a significant stake of Lions Gate for almost three years and waging a series of unsuccessful tender offers, an unsuccessful proxy fight, and an unsuccessful effort to merge Lions Gate with Metro-Goldwyn-Mayer), or Clorox (activist proposal to nominate a slate of directors was withdrawn after it was evident that activist plan to sell the company was not supported by Clorox stockholders). Stockholder activism remains a significant deal pressure in the US market and is expected to continue to do so.

Finally, Delaware courts have focused of late on the conduct of management in the course of private equity buyout transactions. In some cases, courts have expressed concern (or worse) that management has failed to adequately inform the board of its activities in this regard, or has criticised the board for failing to actively manage a sale process or deal negotiation where management may be conflicted. While Delaware courts will grant directors broad leeway in determining whether, and how, to sell a company, they place close scrutiny on failures to exercise control over that process, or to engage in true arm's-length negotiations in the context of a sale of control. For example, in *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014 (Del. Ch. 2011), the Delaware Chancery Court delayed the stockholder vote to approve the acquisition of Del Monte Foods by a private equity consortium and voided certain deal protection provisions, in part because the court concluded that the Del Monte board failed to actively supervise the sale process.