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Market Trends: Tender and Exchange Offers

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Overview

This article provides an overview of the 2016-2017 market for tender and exchange offers as well as regulation and practical considerations relating to their use and conduct. Tender and exchange offers are used for a variety of purposes, including acquisitions of public companies, stock buybacks, liability management, and other transactions involving significant acquisitions of outstanding securities.

Tender offers are subject to extensive regulation, primarily consisting of federal legislation and Securities and Exchange Commission (SEC) rules, but also including state law fiduciary duty doctrines and statutory provisions. The enactment in 2013 of Section 251(h) of the Delaware General Corporation Law (DGCL), discussed in more detail below, has increased the attractiveness of tender offers as a means to acquire a Delaware company in certain cases by streamlining the process by which an acquirer eventually obtains any minority shares of the target company not tendered. For further information about tenders offers, see Commencing the Tender Offer and Anatomy of the Offer to Purchase.

Notable Transactions

Several recent large acquisitions were effected via a tender offer, including the following:

- Gilead Science's $11.9 billion acquisition of Kite Pharma, announced on August 28, 2017 and completed on October 3, 2017
- Takeda Pharmaceutical's $5.1 billion acquisition of ARIAD Pharmaceuticals, announced on January 9, 2017 and completed on February 16, 2017
- Pfizer's $13.5 billion acquisition of Medivation, announced on August 22, 2016 and completed on September 28, 2016
- Oracle's $8.9 billion acquisition of NetSuite, announced on July 28, 2016 and completed on November 7, 2016
- Pfizer's $5.5 billion acquisition of Anacor Pharmaceuticals, announced on May 16, 2016 and completed on June 24, 2016
- Mylan's $7.2 billion acquisition of Meda, announced on February 2, 2016 and completed on August 23, 2016

Note that the tender offer structure is most often used in transactions that are perceived to pose limited antitrust or regulatory risk. In industries with longer regulatory approval times, such as banking, the tender offer structure is seldom used for reasons discussed in "Considerations in the Current Legal and Regulatory Environment" below.

Deal Structure and Process

Federal Regulatory Regime

Federal regulation of tender offers derives primarily from the Williams Act of 1968, which added sections 14(d) and 14(e) (15 U.S.C.S. § 78n) to the Securities Exchange Act of 1934, as amended (the Exchange Act):

- Section 14(e) and Regulation 14E (17 C.F.R. §§ 240.14e-1 – 14f-1) promulgated by the SEC thereunder (collectively with Section 14(e), the 14E rules) apply to all tender offers.
- Section 14(d) and Regulation 14D (17 C.F.R. §§ 240.14d-1 - 14d-103) (collectively with Section 14(d), the 14D rules) apply only to tender offers that are made for equity securities registered under Section 12 (15 U.S.C.S. § 78l) of the Exchange Act (generally, equity securities that are listed on a stock exchange or sufficiently widely held).

In addition, Rule 13e-4 (17 C.F.R. § 240.13e-4) under the Exchange Act applies only to tender offers that meet both of the following conditions: (1) the tender offer is for equity securities of an issuer that (a) has a class of equity security registered under Section 12 of the Exchange Act, or (b) is required to file periodic reports under Section 15(d) of the Exchange Act (i.e., an issuer that has had a registration statement under the Securities Act of 1933, as amended (the Securities Act), declared effective) and (2) the tender offer is made by the issuer of such equity security or by an affiliate of such issuer.

Common situations in which these different sets of rules apply include:

- A tender offer used to acquire a U.S. public company, to which the 14D rules and the 14E rules will apply
- A tender offer used to acquire a foreign public company, to which the 14E rules and possibly the 14D rules will apply, subject to possible Tier I or Tier II exemptions as discussed below
- A tender offer for non-convertible debt securities, to which only the 14E rules will apply
- A self-tender offer by a public company for its own equity securities, to which Rule 13e-4 and the 14E rules will apply

Notably, the term tender offer is not defined in the Exchange Act or in any SEC rules. The term is typically defined by the eight-factor test developed in the Southern District of New York's decision in Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979): (i) whether there is an active and widespread solicitation of public securityholders; (ii) whether the solicitation is made for a substantial percentage of the issuer's securities; (iii) whether the offer is made at a premium over the prevailing market price; (iv) whether the terms of the offer are firm rather than negotiable; (v) whether the offer is contingent upon the tender of a fixed minimum and perhaps subject to the ceiling of a fixed maximum number of securities to be purchased; (vi) whether the offer is open for only a limited period of time; (vii) whether the offerees are subjected to pressure to sell; and (viii) whether the public announcements of a purchasing program precede or accompany a rapid accumulation of large amounts of the target company's securities. Not all of these factors need to be present in order for a tender offer to be found. For further information on the definition of a tender offer, see Distinctive Characteristics of Tender Offers.

Although there is no precise definition of tender offer, in many cases it will be clear whether a tender offer is involved. For example, a publicly made offer to purchase any and all shares of common stock of a public company clearly is a tender offer. By contrast, a private negotiation with a single party to acquire securities from that party, with no discussion or contemplation of making any offer to acquire securities from any other holder, clearly is not a tender offer. In other cases, such as where a company wishes to purchase its own securities from multiple different parties, whether a tender offer is involved depends on the circumstances.

The 14E Rules – Basic Requirements

The 14E rules impose several basic requirements on all tender offers:

- **Minimum offer period**. Rule 14e-1(a) (17 C.F.R. § 240.14e-1) requires that the tender offer be held open for at least 20 business days from the date it is first published or sent to securityholders.
- **Mandatory extensions**. Rule 14e-1(b) requires that the tender offer be held open for at least 10 business days from the date that the offeror first publishes or sends or gives to securityholders a notice of an increase or decrease in any of the following:
    - The percentage of the class of securities being sought (other than increases of 2% or less)
    - The offered consideration
    - Any dealer's soliciting fee

    In addition, the SEC has stated that the mandatory extensions required by Rule 14d-4(d)(2) (17 C.F.R. § 240.14d-4) (discussed below) represent general guidelines that should be applied to all tender offers, including those subject only to Regulation 14E.

The SEC has taken the position that exchange offers with floating exchange ratios (whether third-party offers or issuer self-tender offers such as in a split-off, where an issuer purchases its own shares with the shares of a subsidiary) can comply with Rule 14e-1(b) without having to fix the amount of offer consideration 10 business days ahead of closing, provided that certain parameters are met, such as the mechanism for determining the final exchange ratio remaining constant throughout the offer, a specified dollar value of the consideration being disclosed, the issuer establishing a website and/or toll-free line where shareholders can receive daily updates on the exchange ratio, and the issuer publishing a press release and amendment to Schedule TO at a specified time.

- **Procedures for extending offer period**. To extend the offer period, the offeror must issue a public announcement notifying securityholders of the extension no later than 9:00 a.m. Eastern Time on the next business day after the scheduled expiration of the offer, which must disclose the approximate number of securities tendered to date.

- **Purchases outside of the offer.** From the time that a tender offer for equity securities commences until the tender offer expires, Rule 14e-5 (17 C.F.R. § 240.14e-5) prohibits purchases outside of the tender offer of certain securities by the bidder, its affiliates, and certain other covered persons, subject to certain exceptions.

- **Prompt payment.** Under Rule 14e-1(c), the bidder must pay the consideration offered or return the securities deposited promptly after the termination or withdrawal of a tender offer.

The 14E Rules - Antifraud Provisions

In addition to other antifraud provisions of the securities laws that apply more broadly (such as Exchange Act Section 10(b) (15 USCS § 78j) and Rule 10b-5 (17 C.F.R. § 240.10b-5) thereunder, which would apply to any purchase of a security, whether by tender offer or otherwise), there are several antifraud rules that apply specifically to tender offers. Section 14(e) of the Exchange Act provides that it is unlawful to make any untrue statement of a material fact (or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading) or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of securityholders in opposition to or in favor of any such offer, request, or invitation.

In addition, Regulation 14E includes several antifraud rules. Rule 14e-8 (17 C.F.R. § 240.14e-8) makes it unlawful to announce plans to make a tender offer (a) without the intention to commence the offer within a reasonable time and complete the offer, (b) with the intent to manipulate the market price of the stock of the bidder or target, or (c) without the reasonable belief that the bidder will have the means to purchase securities to complete the offer.

Rule 14e-3 (17 C.F.R. § 240.14e-3) provides that, subsequent to a bidder taking a substantial step toward commencing a tender offer, any person other than the bidder in possession of material, nonpublic information relating to such tender offer which has been acquired, directly or indirectly, from the bidder, the target, or certain other persons, may not purchase or sell securities that are the subject of the tender offer unless, within a reasonable time prior to any such purchase or sale, such information and its source are publicly disclosed by press release or otherwise, subject to certain exceptions. In addition, the bidder, the target, and certain other persons may not communicate material, nonpublic information relating to a tender offer to any other person where it is reasonably foreseeable that such communication is likely to result in a violation of Rule 14e-3, subject to certain exceptions.

The 14D Rules – Procedural and Disclosure Requirements

In addition to the basic requirements and antifraud provisions of the 14E rules, the 14D rules, which are applicable only to tender offers made for equity securities registered under Section 12 of the Exchange Act, include a number of additional procedural and disclosure requirements.

- **Commencement of the tender offer.** Under Rule 14d-2 (17 C.F.R. § 240.14d-2), the offeror will commence the tender offer by publishing, sending, or giving to target securityholders the means to tender their securities. This may include distributing letters of transmittal for tenders or making a statement about how securityholders may obtain the transmittal form. On the date of commencement, the offeror must, among other things, file a Schedule TO with the SEC pursuant to Rule 14d-3 (17 C.F.R. § 240.14d-3), including copies of the offer to purchase (which contains most of the substantive disclosure relating to the tender offer) and the letter of transmittal. For further information on the letter of transmittal, see Drafting the Letter of Transmittal.

- **Content of the Schedule TO.** In the Schedule TO, the offeror must disclose, among other things:
  - A summary term sheet that briefly describes the most material terms of the tender offer
  - Past contacts, transactions, negotiations, and agreements between the offeror and the target
  - The purpose of the tender offer
  - Any plans to change the target's board or management, including any changes in the number of directors or changes to any material term of the employment contract of any executive officer
  - Any plans to make a material change in the target's corporate structure or business
  - If material, the offeror's financial statements
- **Response of the target.** Rule 14d-9 (17 C.F.R. § 240.14d-9) provides that, not later than the 10th business day after the tender offer is commenced, the target must file a Schedule 14D-9 containing, among other things, its recommendation (and the reasons therefor) as to whether target securityholders should tender their securities. Once the tender offer has commenced, the target and its directors, officers, and employees may not make any solicitations or recommendations to target securityholders regarding the exchange offer until the target files the Schedule 14D-9, other than a communication that identifies the tender offer, states that the tender offer is under consideration by the target's board and that the target will make a recommendation within ten business days, and requests target securityholders to defer making a determination on whether to tender their securities until the target has made such recommendation (a so-called stop-look-and-listen communication). The target's board will have four options in its Schedule 14D-9:
  - Affirmatively recommend acceptance of the tender offer
  - Affirmatively recommend rejection of the offer
  - State that it is expressing no opinion and is remaining neutral
  - State (if such is the case) that it is unable to take a position

  Note that Rule 14e-2 (17 C.F.R. § 240.14e-2) requires that the board of directors of the target publish or send or give to securityholders a similar recommendation.
- **Material changes.** Under Rule 14d-4(d), any material change in the information published or sent to securityholders must be promptly disclosed in additional tender offer materials. Rules 14e-2 and 14d-9 include similar obligations in respect of the information disclosed by the target pursuant to those rules.

The 14D Rules - Substantive Restrictions

There also are a number of substantive restrictions on tender offers subject to the 14D rules, including the following:

- **Withdrawal rights.** Under Rule 14d-7 (17 C.F.R. § 240.14d-7), tendering securityholders have the right to withdraw their tendered shares at any time during the offer period. In addition, Exchange Act Section 14(d)(5) provides that securities may be withdrawn any time after 60 days from the original tender offer.
- **All-holders best price rule.** Rule 14d-10 (17 C.F.R. § 240.14d-10) generally provides that the tender offer must be open to all security holders of the class of securities subject to the tender offer, and that the consideration paid to any securityholder for securities tendered in the tender offer must be the highest consideration paid to any other securityholder for securities tendered in the offer.
- **Extensions.** Rule 14d-4(d)(2) provides that, in exchange offers that are made pursuant to the early commencement procedure (discussed below), the offer must remain open from the date that material changes to the tender offer materials are disseminated to securityholders, as follows:
  - Five business days for a prospectus supplement containing a material change other than price or share levels
  - Ten business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change

  - Ten business days for a prospectus supplement included as part of a post-effective amendment
  - Twenty business days for a revised prospectus when the initial prospectus was materially deficient

  As noted above, the SEC has stated that these mandatory extensions should be applied to all tender offers, including those subject only to Regulation 14E.

- **Subsequent offering period.** Under Rule 14d-11 (17 C.F.R. § 240.14d-11), after the initial offering period has expired, the offeror may elect to provide a subsequent offering period of 3 to 20 business days for securityholders to make additional tenders. The offeror must announce the results of the initial offering period and immediately begin the subsequent offering period, and accept and promptly pay for all securities tendered during the initial offering period. Securityholders must be offered the same form and amount of consideration as they were offered in the initial offering period, but do not have withdrawal rights during the subsequent offering period.

For further information on regulation of tenders offers, see U.S. Securities Laws Applicable to Debt Exchange Offers and Cash Tender Offers Chart.

SEC Review

A tender offer can be commenced without any prior SEC review. While a tender offer is pending, the SEC may issue comments on the tender offer materials filed by the bidder and/or the target, which would be addressed through the amendment of offer materials. The SEC typically endeavors to provide comments in a timeframe that would not be expected to delay the expiration of the tender offer.

Note that, in addition to the specific rules discussed above, the SEC has also adopted a number of interpretations of the tender offer rules through the comment letter process. For example, although SEC staff have recently indicated that their views are evolving, the SEC has generally taken the position that the satisfaction of a financing condition is considered a material change that requires a five business day extension. In certain circumstances, the SEC may more broadly apply this principle and require an extension upon the satisfaction or waiver of other types of conditions, such as a condition that a related business combination be consummated. Further, the SEC will consider the waiver of a minimum tender condition to be a material change that requires an extension, even if the bidder has publicly disclosed its reservation of the right to waive such a condition.

Issuer Tender Offers

Self-tender offers for equity securities are subject to Rule 13e-4 (17 C.F.R. § 240.13e-4), which is broadly similar to the 14D rules. Rule 13e-4 requires the company to (1) keep the tender offer open for at least 20 business days from commencement (and possibly longer in certain circumstances); (2) permit shares tendered to be withdrawn so long as the tender offer remains open; (3) accept shares from participating shareholders on a pro rata basis if more shares are tendered than the company is seeking to purchase (subject to minor exceptions); (4) pay the same price to all shareholders; and (5) make the tender offer available to all shareholders. In addition, a company that undertakes a self-tender cannot purchase shares outside of the tender offer until at least 10 business days following the termination of the tender offer. For further information on issuer tender offers in the going private context, see Structuring and Planning Going Private Transactions.

Exchange Offers

Exchange offers are subject to all of the applicable tender offer rules described above, as well as the Securities Act, which generally requires that every offer or sale of a security must be registered, unless an exemption from registration applies. See U.S. Securities Laws: An Overview.

The issuance of securities in an exchange offer by a U.S. public company to acquire another U.S. public company generally will have to be registered under the Securities Act on a Form S-4. The Form S-4 would be in addition to the other disclosure documents required under the tender offer rules, although most of the substantive disclosure would be set forth in a prospectus/offer to exchange that would form the bulk of the Form S-4 and also be an exhibit to the Schedule TO. Form S-4 requires significant disclosure beyond what would be included in a cash tender offer, such as a description of the securities being offered, comparison of stockholder rights, historical and pro forma financial statements, and risk factors relating to the securities being offered and the combined company. In addition, depending on the amount of securities being issued, the offeror may need approval from its own shareholders under stock exchange listing rules to issue securities pursuant to the exchange offer.

A Form S-4 is subject to SEC review, and an exchange offer that requires a Form S-4 cannot be consummated until the Form S-4 is declared effective by the SEC. A bidder does not, however, need to have the Form S-4 declared effective before commencement of the exchange offer. Under Exchange Act Rule 14d-4, the exchange offer can commence if the bidder files a registration statement including a preliminary prospectus containing all information necessary for holders to make an informed investment decision, and disseminates the preliminary prospectus to all securityholders (so-called early commencement). Under Securities Act Rule 162 (17 C.F.R. § 230.162), in order to utilize early commencement, either the exchange offer must be subject to Rule 13e-4 or Regulation 14D, or the offeror must (among other requirements) provide withdrawal rights to the same extent as if Rule 13e-4 or Regulation 14D applied. One consequence of this rule is that an offeror must provide withdrawal rights if it utilizes early commencement for an exchange offer, even if the offeror would not otherwise have to provide withdrawal rights (e.g., in an exchange offer for securities of a foreign private issuer that is subject only to the 14E Rules and in which foreign law does not require withdrawal rights).

The benefit of early commencement is speed: it allows SEC review of the Form S-4 to proceed during the pendency of the tender offer, rather than having to wait to complete SEC review before commencing the offer. The SEC's adopting release for the early commencement rules stated that the SEC was committed to expediting staff review of exchange offers so that they may compete more effectively with cash tender offers. See SEC Release No. 33-7760, 34-42055 (January 24, 2000). For a discussion of exchange offers in another context, see Exchange Offers under Section 3(a)(9).

Foreign Private Issuers

The tender offer rules potentially apply to tender offers for securities of foreign companies as well, although there are certain exemptions for tender offers for securities of a foreign private issuer (i.e., a foreign company that meets certain requirements). If U.S. holders do not hold more than 10% of the subject securities, the so-called Tier I exemptions would exempt a tender offer for target shares from many of the tender offer rules. If U.S. ownership is above 10% but not more than 40%, the more limited set of Tier II exemptions, which are mainly intended to provide relief from certain U.S. tender offer rules that may conflict with foreign country practices, would apply. If U.S. ownership is above 40%, the full panoply of federal tender offer regulation would be applicable.

In addition, Securities Act Rule 802 (17 C.F.R. § 230.802) generally provides an exemption from Securities Act registration for an exchange offer that qualifies for Tier I exemptive relief from the tender offer rules. There is no Securities Act exemption analogous to Tier II exemptive relief, although there may be other means of avoiding Securities Act registration where Rule 802 is not available. For further information on foreign private issuers, see Foreign Private Issuer Practice Guide.

State Law

Although most tender offer regulation is at the federal level, tender offers also involve state law legal considerations, the most significant of which are summarized below.

DGCL Section 251(h)

There are two principal methods for acquiring a public company incorporated in Delaware: a merger, which requires a vote of the target's shareholders, and a two-step transaction in which a tender offer is followed by a merger to acquire all shares not purchased in the tender offer. As discussed in more detail below, the key benefit of a two-step structure is that, in certain circumstances, it can result in a quicker completion of the acquisition—but only if the second step merger does not itself require a shareholder vote. Prior to the adoption in 2013 of Section 251(h) of the DGCL, this meant that the acquirer needed to reach the 90% threshold needed to effect a short-form merger without a vote under Section 253 of the DGCL. See Getting to 90 Percent Ownership in the Tender Offer.

There were a variety of imperfect mechanisms used to help reach this threshold in the event that less than 90% of the shares were acquired in the first step tender offer. One was to rely on a subsequent offering period. However, while additional shares were often tendered during the subsequent offering period, there was no assurance that the 90% threshold would be reached. Another method was to use a so-called top-up option. Such an option, exercisable after the close of the tender offer, permits the acquirer to purchase a number of newly issued shares directly from the target such that the acquirer may reach the short-form merger statute threshold, thereby avoiding a shareholder vote and enabling an almost immediate consummation of the transaction. However, a top-up option is limited by the amount of authorized but unissued stock of the target, which means that frequently the minimum acceptance condition needed to be set at a percentage higher than 50% in order to ensure that the acquirer could get to 90% through the top-up option, a result that targets sometimes resisted because it reduced deal certainty.

Yet another work-around was the dual-track tender offer structure popularized by a series of private equity buyouts from 2010 through 2012 (e.g., 3G Capital/Burger King, Bain Capital/Gymboree, and TPG/Immucor). This dual-track approach involves launching a two-step tender offer (including a top-up option) concurrently with filing a proxy statement for a one-step merger. The logic behind this approach is that, if the tender offer fails to reach the minimum acceptance condition, the parties would already be well along the

path to the shareholder meeting for a fallback one-step merger. It should be noted that under the dual-track structure, while the SEC will begin review of a preliminary proxy statement while a tender offer is pending, the SEC may view the filing of a definitive proxy statement during the pendency of a tender offer as a violation of the prohibition on purchases outside the tender offer under Rule 14e-5. While the dual-track structure can minimize the time to closing where the tender offer minimum acceptance condition needs to be set at more than 50% in order to assure being able to complete a short-form merger, it involves increased complexity and effort to simultaneously pursue two transaction structures.

Section 251(h) avoids the problems with these imperfect workarounds by permitting, in certain cases, a merger agreement to eliminate the need for a shareholder meeting to approve a second-step merger following a tender offer, so long as the acquirer owns sufficient stock following the tender offer to approve the merger (i.e., 50% of the outstanding shares, unless the target's charter requires a higher threshold or the vote of a separate series or class). Section 251(h) requires that (i) the tender offer extend to all outstanding voting stock of the target (subject to certain exceptions), (ii) all non-tendering shares receive the same amount and kind of consideration as those that tender, and (iii) the second-step merger be effected as soon as practicable following the consummation of the offer. The adoption of Section 251(h) has changed market practices, as discussed in more detail below. For further information, see Tender Offers Under Amendments to the Delaware General Corporation Law.

Fiduciary Principles

In a negotiated transaction, either a one-step merger or a two-step structure generally can be used, although each structure has benefits and drawbacks as discussed below, and the choice of structure generally does not have significant implications for the target directors' fiduciary duties. (This is particularly true following the Delaware courts' recent shift to applying a unified standard of review to transactions with controlling shareholders, regardless of whether they are to be implemented through a one-step merger or a two-step transaction involving a tender offer.)

In a hostile transaction, on the other hand, the tender offer is the only structure the bidder can use to acquire control without the approval of the target's board. Where a target board takes defensive action against a hostile bidder's tender offer, such as by adopting a shareholder rights plan (or so-called poison pill) that effectively prevents completion of the tender offer, a court will evaluate a challenge to the target directors' actions under the enhanced scrutiny standard established by Unocal Corp. v. Mesa Petroleum Co. and subsequent cases. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). Similarly, a board's decision not to grant a hostile bidder a waiver under DGCL Section 203, Delaware's antitakeover statute, would be subject to enhanced scrutiny. For further information on fiduciary duties, see Fiduciary Duties of the Board of Directors (Delaware).

Deal Terms and Tender Offers in Practice

An acquisition of a public company via a tender offer involves a complex set of coordinated agreements, filings, and communications, in addition to the parallel processes inherent in most public company acquisitions regardless of structure (such as making filings under the Hart-Scott-Rodino Act (HSR) or with foreign antitrust regulators, taking the steps necessary to obtain industry-specific regulatory approvals, and coordinating with the stock exchange to de-list the target company's shares following closing).

Acquisition Transactions

In a negotiated two-step acquisition, the acquirer and the target enter into a merger agreement that governs the conduct of the tender offer and back-end merger. The merger agreement will set forth the specific economic terms of the tender offer and the conditions that must be satisfied or waived before the acquirer is required to accept the tendered shares and complete the offer. In substance, the conditions to a tender offer largely parallel those in a voted merger transaction, and typically cover matters such as accuracy of representations and warranties and compliance with covenants, absence of a material adverse effect, and required regulatory approvals. The key difference relative to a merger is that instead of a shareholder approval condition, there would be a condition as to the percentage of shares that have been tendered.

The merger agreement will also set forth the timing of the commencement of the offer and the circumstances under which the acquirer may (or must) extend the tender offer. In addition, the merger agreement will generally require that the target prepare, file, and mail a Schedule 14D-9 to its shareholders, which will include the target board's recommendation in favor of the tender offer. The target also will agree to supply certain information to be set forth in the Schedule TO and ancillary documents (and, if applicable, the Form S-4), as well as a mailing list of the target's shareholders that the acquirer will use to distribute the tender offer documents. The merger agreement will also detail the mechanics for the payment or exchange of the offer and merger consideration to target shareholders.

For further information on two-step acquisitions, see Transaction Structure — Two-Step Tender Offer, Two-Step Merger Timetable Checklist (Cash Merger with First-Step Tender Offer), Closing the Steps of a Two-Step Acquisition, and Benefits and Drawbacks of a Two-Step Acquisition. For a form of merger agreement in this context, see Agreement and Plan of Merger (Two Step Cash Tender Offer) (Pro-Buyer) (DE).

Various third parties are involved in the tender offer process. One is the information agent, which assists in the distribution of the printed tender offer materials and handles communications with certain shareholders. Another is the depositary and paying (or exchange) agent, which serves as bookkeeper for the offer, acting as the recipient for tenders and distributing offer consideration to selling shareholders upon completion of the offer. The target's transfer agent also will play a role, by certifying the total number of target shares outstanding. If the transaction is an exchange offer, the Form S-4 will need to include a legal opinion from the acquirer's counsel with respect to the valid issuance of the securities as offer consideration (which is the same opinion required in a merger where the merger consideration includes securities).

The vast majority of tender activity usually occurs in the last one or two days prior to the expiration of the offer. (By contrast, a greater proportion of proxies for a shareholder vote on a merger tend to come in earlier in the proxy solicitation process.) Following the expiration of the offer, the acquirer and its advisors will evaluate the tender results, and if necessary, extend the offer by issuing a press release announcing the extension in accordance with the requirements discussed above.

Following consummation of the offer, the acquirer will take the actions necessary to complete the second-step merger under state law. Where the merger can be completed immediately without a shareholder vote, the entire process, from definitive agreement to closing, potentially can be accomplished in less than five weeks. If shareholder approval for the merger is required, the acquirer may call a special meeting of shareholders or (if permitted) approve the merger by written consent (and bear the expense of disseminating a Schedule 14C information statement in accordance with the federal proxy rules).

Equity Self-Tenders

One method for a public company to repurchase its shares is a self-tender offer. As noted above, a tender offer by a company for its own equity securities is subject to Rule 13e-4 and the 14E rules. In a self-tender offer, the company may set a fixed offer price per share, or it may utilize a modified Dutch auction structure in which the company fixes in advance the quantity of its shares it is willing to purchase and sets a relatively narrow (10-15%) price range within which shareholder offers will be accepted. In a modified Dutch auction structure, shareholders may tender all or a portion of their shares at a price chosen by them within the price range set by the company. Based on the offers it receives, the company determines the lowest share price necessary to acquire the number of shares it initially specified and pays this same, market-clearing price for all of the shares that it purchases.

A company will typically retain an investment banker to act as dealer manager for the offer (in addition to an information agent and depositary and paying agent). The dealer manager typically advises the company with respect to the pricing of the offer and may also assist by soliciting tenders from institutional investors.

Debt Self-Tenders

Companies can also use tender offers as a means of reducing or refinancing their indebtedness. A tender offer for non-convertible debt is subject only to the 14E rules, which provides for greater flexibility in structuring such transactions than is available in tender offers that also are subject to the 14D rules or Rule 13e-4. For example, because the all-holders best price rule does not apply to 14E-only offers, debt tender offers sometimes provide for an early tender premium, in which securityholders who tender by a certain date (typically the 10th business day after commencement) receive greater consideration than those who tender afterwards. In addition, because withdrawal rights are not required for such tender offers, companies sometimes provide that no withdrawals are permitted after a certain date. The SEC also allows for abbreviated debt tender offers in certain circumstances, as discussed below. For further information on debt restructuring, see An Overview of Debt Securities Restructuring Options. For further information on debt tender offers generally, see Regulatory and Other Considerations in Structuring Debt Tender Offers, An Overview of Debt Tender Offers, and Preparing Other Key Documents for a Debt Tender Offer. For forms of agreements related to debt tender offers, see Dealer Manager Agreement (Debt Tender Offer), Legal Opinion (Debt Tender Offer) (Offeror's Counsel) (DE Corporation) and Dealer Manager and Solicitation Agent Agreement (Debt Tender Offer).

Industry Insights

Generally, the tender offer structure can serve as a useful alternative to a voted merger structure regardless of the parties' industry.

Industry-specific factors rarely drive the choice of whether to use a tender offer or voted merger structure, except insofar as the time necessary to obtain industry-specific regulatory approvals is likely to prevent a tender offer from closing more quickly than a merger. See "Considerations in the Current Legal and Regulatory Environment" for additional discussion of such industry-specific regulatory considerations.

Disclosure Trends

Disclosure trends specific to tender offers have been generally consistent, with limited exceptions in recent years. Of note, in November 2016, the SEC issued new guidance stating that a target must include a summary of the material terms of the compensation of its financial advisor on Schedule 14D-9. See SEC Division of Corporate Finance, Compliance and Disclosure Interpretations: Tender Offers and Schedules, last updated November 18, 2016, which is available at https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm (Tender Offer CD&Is). The SEC further stated that generic disclosure such as "customary compensation" would not be sufficient, and specified the disclosures that the target should generally include, such as (a) the types of fees payable to financial advisors (e.g., independence fees, sale transaction or success fees, periodic advisory fees, or discretionary fees); (b) sufficiently-detailed narrative disclosure (if there is no quantitative disclosure) that would allow securityholders to identify the types of fees that provide the primary financial incentives to financial advisors; (c) contingencies, milestones, or triggers relating to the payment of financial advisors' compensation; and (d) other information that would be material to securityholders' assessment of financial advisors' analyses or conclusions, including any material incentives or conflicts.

Legal and Regulatory Trends

SEC Guidance and the Federal Regulatory Regime

Tender offers have historically been an area of substantial focus for the SEC. The 1999 adoption and 2008 revisions to the rules governing cross-border tender offers were particularly notable. See SEC Release No. 33-7759, 34-42054 (October 22, 1999) and SEC Release No. 33-8957, 34-5859 (December 8, 2008). Similarly, the SEC guidance adopted in 2000 regarding early commencement of exchange offers greatly increased the use of exchange offers as an alternative to voted mergers involving stock consideration. See SEC Release No. 33-7760, 34-42055 (January 24, 2000). For further information on cross-border tender offers, see Exemptions under the Federal Securities Laws for Cross-Border Tender Offers and Other Business Combinations.

Another important development in the regulation of tender offers was the SEC's 2006 amendment of the "best price rule" (Rule 14d-10(a)(2), and the related Rule 13e-4(f)(8)(ii) that applies to issuer tender offers) to clarify that the rule does not apply to employment compensation, severance, or other employee benefit arrangements with respect to target security holders, if certain requirements are met. See SEC Release No. 34-54684 (December 8, 2006). Prior to these amendments, certain court decisions had treated such arrangements as violations of the best price rule, which had discouraged the use of tender offers.

Recent developments, while important, are likely to be less consequential. With respect to debt tender offers, the SEC in January 2015 issued a no-action letter, later supplemented by additional guidance in November 2016, which revised prior SEC guidance as to the ability to conduct abbreviated issuer debt tender or exchange offers. See No-Action Letter re: Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities (January 23, 2015), which is available at https://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf, and Tender Offer CD&Is. Under the updated guidance, such offers can be held open for only five business days so long as certain conditions are satisfied, including that the offer be only for non-convertible debt securities, that the offer be for any and all of such debt securities, that the consideration offered consist only of cash or so-called qualified debt securities or a combination thereof, and that the tender offer not be made in connection with a consent solicitation. This updated guidance also eliminated an earlier distinction that allowed abbreviated offers only for investment grade debt securities.

State Law

The most significant recent developments in state law have related to Delaware's adoption and subsequent amendments of Section 251(h), and the adoption by other states of similar statutes. The 2014 amendments to Section 251(h) expanded the scope of transactions that could be effected under the statute, most notably by eliminating the provision preventing an acquirer that is an interested stockholder under DGCL Section 203 from using 251(h). An interested stockholder is an acquirer that owns 15% or more of the outstanding voting stock of the target or is an affiliate or associate of the target and at any time in the previous three years owned 15% or more of the outstanding voting stock, subject to certain exceptions. Additional amendments to Section 251(h) were adopted in 2016.

Other states, including Maryland, Texas, and Virginia, have adopted similar provisions to Section 251(h) to streamline the second-step merger process. See Maryland General Corporation Law, Section 3-106.1, Texas Corporations Law Section 21.459(c), and Virginia Stock Corporation Act, Section 13.718.G.

Considerations in the Current Legal and Regulatory Environment

The adoption of Section 251(h) has increased the attractiveness of a two-step tender offer structure as compared to a one-step shareholder-approved merger. Despite these user-friendly changes, there are several issues that parties should consider in light of their particular circumstances when making the key structural choice between tender offer and merger, including:

- **Speed and Certainty.** As discussed above, a tender offer followed by a back-end merger can potentially be completed in less than five weeks after entering into a definitive transaction agreement. In contrast, it typically takes at least two to three months to receive shareholder approval of a voted merger under similar circumstances. In a situation where the parties expect regulatory approval or the satisfaction of other conditions in a short timeframe, a tender offer therefore can significantly shorten the period between signing and closing. On the other hand, some transactions entail a long regulatory approval process (whether HSR, foreign antitrust approvals, or industry-specific approvals such as those in the banking, media, or telecom industries). If the regulatory process is expected to take a substantial amount of time, a tender offer would need to remain open until regulatory approval has been received. In a one-step merger structure, however, the parties could obtain shareholder approval during the pendency of the regulatory process and then close the transaction promptly following receipt of regulatory approval. In this circumstance, acquirers often prefer the one-step merger structure because a target's ability to accept an alternative proposal (or change its recommendation to shareholders) in a merger agreement typically terminates upon shareholder approval, while a tender offer remains subject to interloper risk as long as it remains open.

- **Proxy advisor recommendations.** Institutional Shareholder Services and other proxy advisors only occasionally make recommendations with respect to tender offers because, unlike a merger subject to shareholder approval, there is no specific voting or proxy decision. As a result, in a tender offer, shareholders are more likely to tender based on their economic interests rather than on proxy advisors' views (that may reflect non-price factors), which may help minimize risk to closing certainty. For additional information on proxy advisors, see Understanding the Role of Proxy Advisory Firms and Preparing for ISS Proxy Voting Recommendations Checklist.

- **Prominence of index funds in the target's shareholder base.** Most index funds have implemented policies to automatically vote shares at any shareholder meeting to approve a merger, unless the circumstances provide a specific reason to override such policy. However, several major index funds do not have equivalent policies with respect to tendering into a tender offer. Without proactive encouragement, these funds often will wait for the second-step merger rather than tendering their shares into the offer, making it more difficult for the acquirer to reach the minimum number of tenders to close the offer. As a result, in a tender offer, additional attention and outreach to index funds by the parties or an information agent are often required to ensure that these index funds actually tender their shares. In transactions in which the target has a significant percentage of index fund shareholders, parties may be less inclined to use a tender offer structure because of this additional effort and uncertainty.

Market Trends and the Effect of Recent Developments

As discussed above, the adoption of Section 251(h) and similar statutes has streamlined the process to effect a second-step merger following a tender offer. Section 251(h) and its equivalent in other states are increasingly being used not just in cash tender offers, but in exchange offers as well.

Prior to the adoption of Section 251(h), the possible delay between completion of a tender offer and consummation of the second-step merger was particularly problematic in transactions involving private equity acquirers, who needed to close on the first and second steps of the transaction concurrently in order to gain access to the target's balance sheet to facilitate acquisition financing. The adoption of Section 251(h) and similar statutes in other states has therefore facilitated the use of tender offers by private equity buyers. For additional information on private equity buyers, see Private Equity Industry Practice Guide.

The use of top-up options, as well as the dual-track tender offer structure, have decreased since the advent of Section 251(h). However, dual-track structures continue to be potentially useful in some circumstances. Some strategic transactions (e.g., Alexion/Synageva, Verizon/Terremark, and Georgia Pacific/Buckeye Technologies) have employed a dual-track approach where there was

uncertainty at the outset as to whether regulatory hurdles would involve a lengthy process that could subject the acquirer in a tender offer to prolonged interloper risk. For example, there can be uncertainty as to how quickly HSR approval will be received. If regulatory approval is promptly received, the acquisition can close pursuant to the tender offer route (and the second-step merger can be effected pursuant to Section 251(h), if available, or Section 253, if the 90% threshold is reached); if not, the shareholder vote can be taken on the long-form merger route, thereby cutting off interloper risk.

Market Outlook

Several years after Section 251(h) was adopted, and after multiple amendments to work out some of the minor issues with its operation, the tender offer market has developed to take advantage of this streamlined process. With Section 251(h) becoming the market standard and being used not just for cash tender offers but for exchange offers as well, it is expected that more state legislatures will aim to follow Delaware's lead and implement a user-friendly regime similar to Section 251(h). The SEC also can be expected to continue its traditional focus on tender offers. And market participants can be expected to continue to use tender offers where they provide a timing advantage over one-step mergers in light of regulatory and other considerations.