SECOND EDITION

MERGERS & ACQUISITIONS

INTERNATIONAL SERIES

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UNITED STATES OF AMERICA

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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 broad, deep and diverse. US M&A activity continues to represent a substantial portion of global M&A. In 2015, US M&A comprised nearly 50% of global M&A by deal value. In the past two years, the domestic M&A market has seen a dramatic increase in high-value deal activity, with total deal value and average deal size reaching historic highs.

The stimuli for this activity are manifold. Deal pressures internal to a company may include the need to show top-line growth after years of post-recession cost-cutting, limited organic growth given the modest pace of the US economic recovery and the desire to redomicile for tax purposes. In such cases, corporations may seek to acquire strategic competitors or to further integrate their operations via acquisitions. One example is Charter Communications' pending acquisition of Time Warner Cable, which will expand its market presence in cable internet and television. Often a deal will address multiple objectives, such as with Pfizer's proposed merger with Allergan, which will provide both strategic and tax savings via an inversion deal with an Irish merger partner.

External stimuli for US M&A activity have included the low cost of capital in recent years, the rapid consolidation of certain industries and stockholder activism. With the low cost of capital, financial sponsors have sought to identify undervalued companies capable of improved performance without the lens of public company reporting, or as a springboard for growth – the 2013 take-private of Dell Inc. by founder Michael Dell and Silver Lake Partners is perhaps the most prominent recent instance. In the healthcare industry, 2015 saw the announcement of enormous deals such as Pfizer–Allergan ($160 billion), Anthem's acquisition of Cigna ($54 billion) and Aetna's acquisition of Humana ($37 billion). Finally, stockholder activism and opportunistic stakebuilding by hedge funds and other short-term investors can also result in a company becoming "for sale". Activist investor Starboard Value recently pushed office-supply companies Office Depot and Staples to merge, after acquiring stakes in both companies (a deal that has now been rejected twice by US antitrust authorities).

The nature and structure of US transactions are as diverse as their motives. The consideration received by stockholders may include cash, stock, debt securities, derivative securities and rights, such as "contingent value rights", interests in a litigation trust or even future revenue streams in specific products.

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

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

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

- Disclosure obligations of those engaging in transactions in the public markets.
- Disclosure obligations of parties to M&A transactions involving one or more listed companies, including with respect to soliciting stockholder votes at a stockholder meeting to approve a transaction.
- Procedures for conducting a tender offer for the shares of a public company.
- Disclosure obligations for issuers of securities to US-based stockholders.
- Prohibitions on trading securities in various circumstances, including when in possession of material non-public information.

While these provisions are largely disclosure-motivated, they can also affect the feasibility of a transaction, as disclosure obligations may delay the consummation of a deal (such as to provide required financial information) or may require a foreign company issuing equity in a deal for a US company to become a Securities and Exchange Commission (SEC) registrant.

Secondly, state law generally governs the ability of a potential acquiror to acquire a US-domiciled company, the responsibilities of target boards in these circumstances and the rights of stockholders of the target. More than 50% of publicly traded companies in the US and 64% 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 courts have a dominant influence on the market for US public companies.

Delaware law provides that the affirmative vote of a majority of the outstanding shares of common stock is generally required to merge with a Delaware company (*DGCL, § 251*). The DGCL also provides for the ability to squeeze out public stockholders in certain circumstances, typically where someone already owns at least 90% of the common stock of a company (*DGCL, § 253*) or in certain circumstances where an acquiror owns at least 50% of the common stock of a company following a friendly tender or exchange offer (*DGCL, § 251(h)*). Other US jurisdictions may have higher thresholds for shareholder approval of a merger: New York, for example, requires approval of a merger by two-thirds of the outstanding shares (*New York Business Corporation Law, § 903*).

An important caveat to these rules is that the DGCL and most US state corporate laws are "permissive" in nature; generally, where state law does not expressly prohibit an action, companies incorporated in the state are free to adopt additional limitations or rights in their certificates of incorporation. So, for example, a Delaware corporation may have two (or more) classes of common stock, or may have preferred and common stock, each entitled to vote as a separate class on a merger in addition to the statutory required vote. Likewise, a company may provide in its charter for a higher required voting threshold to approve a merger, or include a "fair price" provision requiring that any takeover bid be at a price not less than a defined fair market value.

Case law developed by Delaware courts outlines the duties of boards of directors of target companies when considering a takeover bid, 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 an "auction" to sell the company or to approve the sale of the company without an auction (*see, for example, Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.,* *506 A.2d 173 (Del. 1986)*). Situations involving a bid by management or a dominant stockholder generally involve a heightened standard of board conduct and judicial review (*see, for example, Kahn v Lynch Communications Sys. Inc., 638 A.2d 1110 (Del. 1994)*).

Important Delaware cases also speak to the permissibility of takeover defences in the face of a hostile offer or stakebuilding, including the ability to implement a shareholder rights plan (*see Airgas, 16 A.3d at 122* (explaining the range of reasonable options available to a target board in response to a hostile offer)), and to include deal protection measures, such as break fees, in a recommended transaction.

The third source of regulation is the US securities exchanges. The New York Stock Exchange (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 company will issue 20% or more of its voting or equity interests, stockholder approval is required (*NYSE Rule 312; Amex Rule 712; NASDAQ Rule 5635*). 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*).

In the case of federal securities laws, the regulator generally is the SEC, comprising five commissioners who serve staggered five-year terms. They retain the authority to establish rules and regulations under the relevant securities laws, and to grant waivers in certain circumstances. Decisions of the SEC 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 SEC's rule-making authority.

More typically, issuers will engage with the staff of the SEC, in particular legal and accounting staff, of the Division of Corporation Finance, who interpret SEC rules and provide case-specific guidance to issuers. Transaction-related SEC filings, such as registration statements, proxy statements and tender offer documents, are reviewed by the staff, who typically provide written comments that must be addressed before the parties may complete the tender offer or commence 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 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 the DGCL, although material changes are rare.

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

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

Key regulations other than the US competition rules are reflected in statutory requirements for certain regulated industries, such as utilities (both state and federal regulations), media and communications (primarily the Federal Communications Commission, or FCC), and banking (primarily the Office of the Comptroller of the Currency, the Federal Reserve System and the Federal Deposit Insurance Corporation). There are many state-regulated industries as well, such as state gaming commissions. Industry regulators typically require pre-closing approval of transfers of control, and in some cases multiple states will independently review the transaction and may impose their own conditions. These approvals may be time-consuming; for example, the approval of BB&T's acquisition of National Penn Bancshares by the Federal Reserve Board in December 2015 – four months after announcement – was the fastest approval process for a large bank merger in the post-financial crisis period.

In the case of non-US acquirors, the Committee on Foreign Investment in the United States (CFIUS) has the power to review transactions that result in foreign control of a US company or assets. CFIUS can recommend that the President disapprove such a transaction on national security grounds. One of the prominent recent cases of CFIUS review was the rejection of Chinese-owned Ralls Corp.'s attempted purchase of four wind farms in Oregon near a US naval weapons facility, which resulted in a settlement after Ralls successfully sued CFIUS in US federal court on due process grounds. 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, but energy, communications and key commodities such as steel or aluminium are also areas that may draw heightened scrutiny. The nationality of the acquiror and its connections to, or domination 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. There is limited judicial appeal from the CFIUS process; parties to transactions that may implicate CFIUS matters are well advised to consult with CFIUS as to filing requirements.

It is also important to note that, even where CFIUS does not find an issue, US politicians may commence hearings regarding a transaction in the US Congress, and such activity may result in the parties revising the transaction to avoid adverse legislation.

1.4 Do the main laws and regulations governing the conduct of public M&A facilitate or hinder such activity in your jurisdiction?

Overall, US M&A laws create the framework for a healthy market for transactions. While the US securities law regime may have more detailed, and arguably more burdensome, disclosure obligations than most other jurisdictions, this does not seem to dampen M&A activity.

As noted, Delaware is the most popular state of incorporation for US public companies – in part because the well-developed corporate law in Delaware makes M&A activity more predictable by establishing clear rules for boards of directors and stockholders in connection with such transactions. Delaware courts provide a sophisticated and reasonably prompt forum for M&A-related disputes, which often are fully litigated in a few weeks.

While takeover defences are generally more widely available to US companies than in most foreign jurisdictions, many studies show that such defences do not deter otherwise value-creating transactions but, rather, require acquirors to increase their offer price. Board decisions whether to implement and maintain takeover defences are subject to judicial review in US courts. Determined acquirors typically have more than one means to reach a target's stockholders.

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 through either a merger transaction or a tender (or exchange) offer.

In a merger, the bidder and target are either merged directly or, more commonly, the target is merged with a "dummy" subsidiary of the acquiror, with the acquiror becoming the 100% 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: (i) the combined entity automatically assumes the rights and liabilities of the merged company; and (ii) the former stockholders of the merged company lose all their rights as stockholders, replaced by their right to receive the merger consideration and, in some cases, appraisal rights. From a technical perspective, mergers are simple to implement, generally involving the filing of a certificate with the relevant state authority after obtaining any requisite stockholder vote and regulatory approvals.

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% of the target shares, but no less than a specified percentage (typically at least enough to obtain control).

The merger approach is more common, although tender offers are also quite typical in the US market. Mergers provide the main benefit that, upon the filing of the certificate of merger, the acquiror becomes the 100% owner of the company. This structure therefore permits the acquiror to fully incorporate the target, extract synergies, pay dividends and control the capital structure without regard to minority holders. No court proceedings are required to implement a merger in the US and creditors do not generally have the right to object.

The key advantages of the tender offer are that it typically can be completed 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 the target's approval. Depending on the state domicile of the target, a bidder in a tender offer may risk not acquiring sufficient shares to complete a squeeze-out, in which case eliminating minority investors may require the lengthier merger process for the back end of the transaction. This reality may complicate the bid and may temporarily limit the ability to realise benefits from the initial acquisition until completion of the second step.

The means of acquiring a target (offer or merger) is typically negotiated between the parties, and is often driven by tax concerns as well as the likely timing of regulatory approvals.

2.2 Outline any secrecy and disclosure obligations 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 (NDA), which requires the parties to preserve confidentiality of 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. Stock exchanges and the SEC generally do not require a company to disclose takeover intentions, even in the face of very specific rumours, nor do they fix timelines such as the UK's "put up or shut up" rules, during which bids must either be announced or abandoned.

One reason companies do not comment on deal rumours is that, where a target has previously commented on a possible transaction, it may have a duty to update the market when the situation changes materially. This can lead to trading volatility and exacerbate litigation claims, especially if a deal does not emerge.

However, a public announcement of pending discussions may be required when the bidder already owns more than 5% of the target's 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 5% of a listed company's stock. It may be necessary to update the bidder's Schedule 13D prior to announcement of a definitive agreement to reflect a change in its plans or intentions regarding the target. As such announcements usually result in sudden increases in the target's stock price, both parties tend to work to avoid this requirement.

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

Other than compliance with third-party confidentiality obligations and 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. Due diligence is generally more extensive in US transactions than in European jurisdictions, for example.

Antitrust laws prohibit the sharing of certain competitive information, such as pricing and product-specific profitability, between direct competitors. Where such information is material to a bidder's terms, however, such information may be segregated for "clean room" review, access to which is limited to certain employees or outside advisors, who may then provide a summary overview to the bidder.

Generally, information shared in due diligence need not be disclosed to the target's stockholders. One common exception to this rule is disclosure of internal projections, which, if provided to the bidder or relied upon by a financial advisor to the target providing a fairness opinion, typically will be summarised in the proxy or tender offer documentation.

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, a company can grant limited forms of exclusivity to a potential acquiror. For example, the company may agree not to seek other bids 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 using a reasonable break fee. Unlike many foreign jurisdictions, Delaware courts have not articulated a specific 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. Target break fees typically do not exceed 4% of the transaction value, although this is not a required limit under Delaware law.

Transaction agreements typically also include provisions that forbid the target from seeking, or entertaining, other offers unless their fiduciary duties necessitate it; a bidder may obtain "matching rights" to have a last look at any overbid. Further, in Delaware, a bidder may obtain a "force the vote" provision, which requires the target to submit the deal to stockholders even if the target's board changes its recommendation; this can mean 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, the form of consideration, the relative bargaining power of the parties and the target board's perspective on process.

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 provide that the stockholder will vote in favour of the transaction (or tender its shares in the case of a tender offer). Bidders need to be careful not to run afoul of the proxy solicitation rules – they may speak to only a limited number of stockholders prior to the deal announcement (Exchange Act Rule 14a-2 provides a safe harbour for bidders to solicit not more than ten target stockholders) and to comply with SEC filing requirements relating to preliminary proxy materials. Bidders typically do not seek voting agreements with stockholders holding less than 20% 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 (that is, 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 to seek to complete a merger or other business combination, or when a hostile bid is launched publicly. The parties thus generally control the timing of announcement, and US securities regulators rarely require parties to make earlier announcements about a bid or offer.

3.2 Briefly summarise the information which needs to be announced

At the time a definitive transaction agreement is signed, the target company will announce material terms of the agreement: the identity of the bidder, the 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 fee. Transaction announcements typically also note whether an investment bank provided a fairness opinion and whether there is a "go shop" period, or initial period during which the company may solicit other bids on superior terms to the agreed deal. While not required, announcements also typically indicate the expected timing for completion.

Within four business days, the company will be required to file with the SEC, on a Form 8-K, the transaction agreement itself, and may also provide a more detailed summary of the agreement. These filings are readily accessible by market participants via the SEC website and the company's own website.

3.3 Are statements made in the announcement binding?

No. Statements made in the announcement reflect the material terms of the agreement as signed, but the parties are free to condition, modify or terminate the agreement at a later date. Certain changes cannot occur following the stockholder vote (such as a change in the consideration), unless shareholder approval is resolicited. Modifications to the agreement or a failure to consummate the transaction will also generally be publicly announced. The parties are not required to complete the transaction at all, and deal announcements usually note that completion of the transaction is subject to regulatory approvals, shareholder approval and other customary closing conditions.

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)

US M&A deals typically close within three to four months following the deal announcement. 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 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 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 (for example, CFIUS, FCC, financial services transactions), such a timeline is achievable. Stockholder litigation may also delay closing.

Tender offers can be launched promptly (within a few days) after reaching an agreement with the target. Unless competition approvals delay the closing of the offer, these offers may be open for as few as 20 business days (or approximately 30 calendar days from the agreement). Such a rapid timeline is rare, due to other regulatory, financing and closing conditions that may exist, but this route remains attractive for well-funded bidders in transactions not involving heightened regulatory review. For example, Expedia, Inc. closed its $3.9 billion cash and stock tender offer for HomeAway, Inc. 41 days after the deal announcement.

4.2 Are there any material differences if the bid is hostile (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 (though a hostile bidder could not complete a squeeze-out after acquiring only

50% ownership in the same way a friendly bidder may be able to under DGCL, § 251(h), and may have to go through the more formal process of holding a stockholder meeting, the outcome of which it controls). 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 board approval. Litigation is also likely to ensue.

A hostile bidder may also launch a proxy fight to replace the target's directors and seek to amend the company's organisational documents to facilitate the bid. This is a more lengthy process, and the practical reality is that a hostile bid will typically take several months longer to complete than a friendly offer. Indeed, some hostile bid processes have continued for more than a year, with no agreed deal. For example, Air Products and Chemicals' attempted hostile takeover of Airgas in 2010–11 lasted for over a year until the bid was withdrawn after litigation failed to force Airgas to redeem its poison pill.

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, and the initial bidder may have the right to match or top any competing bid. This post-signing auction process can add time to the interim period, though typically only a few weeks.

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

In mergers, 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 and a description of any fairness opinion provided by an investment bank to the target board, together with a copy of the actual opinion and a copy of the transaction agreement. The disclosure document must also disclose interests of the board and executive officers of the target in the transaction, whether due to stock ownership or equity compensation payments, or pursuant to employment and noncompetition agreements. 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.

The disclosure obligations for the proxy statement are fairly detailed and prescribed by SEC rules (*Exchange Act Schedule 14A*). A typical proxy statement is several hundred pages long. The document is closely reviewed by SEC staff, who provide written comments that must be resolved prior to mailing the document to shareholders.

In tender offers, the stockholders will receive an offer document from the bidder, as well as a document containing the recommendation of the target board. Taken together, these documents contain essentially the same information as in proxy statements, and are also subject to SEC staff review and comment.

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 either at the time the merger is effective or at 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, and parties to an M&A transaction may agree to condition the closing upon receipt of financing (relatively rare since 2005), to a "reverse break fee" as a penalty paid by the bidder for failure to obtain financing (common in private equity deals) or to a strict obligation to close not dependent upon financing.

In the relevant disclosure document to the stockholders of the target, the bidder will need to generally describe what financing is required to complete the transaction, and may need to publicly file related documents, such as bank commitment letters, so that stockholders can assess the certainty of the financing. While it is unusual in the current M&A market to have financing conditions in transactions, or a full walkaway right for the bidder if financing does not materialise, it is also common, in the case of financial sponsor acquirors, for the transaction agreement to limit damages due from the sponsor bidder to a fixed "reverse break fee" amount. These fees frequently appear in public company deals, and, unlike target break fees relating to receipt of stockholder approval, are not necessarily capped by case law. It is not uncommon for a reverse break fee to be 5–8% of the transaction value.

While no regulatory requirement to have committed financing at deal signing exists, US targets generally require bidders without sufficient liquidity on hand to obtain bank financing commitments at the time of the announcement.

5.2 What are the main sources of funding usually obtained by bidders (for example, capital markets/banks/alternative lenders)?

The sources of funding in the US M&A market are as diverse as the types of bidders. Bidders can use cash reserves, issue new stock, sell assets, pledge assets of the target, issue new debt or debt vehicles, obtain loans from banks, private equity firms or other types of lenders, or any combination of the above. For example, in Dell's pending acquisition of EMC, Dell will finance the deal with a combination of loans, high-yield bonds, institutional shareholders, a revolving credit facility through banks, and will issue equity in the form of tracking stock in a subsidiary of the target.

As a general trend, however, US companies have increased their cash reserves in the last two years, and available cash remains the primary source of acquisition funding for bidders. For debt financing, banks and other traditional lenders remain strong options for investment grade bidders, but in highly leveraged acquisitions non-bank lenders such as private equity funds have become increasingly popular. This trend is the result in part of leveraged lending guidelines, issued by regulators, which restrict the ability of regulated banks to provide financing in high-leveraged situations. See *Section 15.1*.

5.3 Are there any limits on the ability to use assets of the target company to secure a bidder's funding?

Unlike in some European and Asian countries, leveraged buyouts (LBOs) are legal in the United States – acquirors may use the assets of a target company to secure transaction financing and/or pay down transaction-related debt. The US M&A market has experienced two large waves of LBOs: the first, in the 1980s, financed primarily through the junk bond market; and the second, in the mid-2000s, financed by private equity firms backed by large institutional investors.

Since the financial crisis, US regulators have focused on limiting the supply side of financing highly leveraged deals. US bank regulators issued leveraged lending guidelines in 2013, asking banks to generally avoid financing deals where the target would incur debt more than six times earnings before interest, taxes, depreciation and amortisation, or EBITDA. One of the effects of such limits has been the rise of non-bank lenders in highly leveraged deals. See *Section 15.1*.

5.4 Can the consideration offered by a bidder take any form? Are there any special requirements the bidder must satisfy if the consideration is not in cash? Is a foreign bidder able to offer its shares as consideration for the bid?

As noted above, the US M&A market is open to all forms of consideration, and forms other than cash are not uncommon. In 2015, deals with some type of consideration other than cash represented 43% of total US M&A transactions by value.

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. This may have timing and disclosure implications for bidders that are not currently SEC registrants, as they may be required either to become a domestic registrant or to register as a foreign private issuer.

5.5 Can the bidder offer different consideration to different shareholders?

It is generally possible to offer different consideration to different shareholders, although such transactions tend to involve increased litigation risk. In tender offers, the "best price" rule (*Exchange Act Rule 14d-10*) requires that the consideration paid to any shareholder for securities tendered in the offer is the highest consideration paid to any other shareholder for such securities. This rule has not been interpreted, however, as applying to customary employment and non-competition agreements with senior executives in their capacity as such.

In merger agreements, governed mostly by state corporate law, generally all shares of the same class must be converted into the same consideration in the transaction, except for the bidder's own shares. A bidder may agree to exchange some of its own shares with some but not all of the shareholders of the target company prior to the consummation of the transaction, or the target may be recapitalised in a manner to provide differential consideration to a large shareholder – in effect providing those shareholders with different consideration in the transaction. For example, in BC Partners' acquisition of PetSmart, Inc., BC Partners allowed Longview, a 9% holder in PetSmart, to exchange some of Longview's shares for shares in BC Partners' acquisition vehicle that was used to purchase PetSmart, thus providing Longview with equity in the resulting company while public shareholders received cash instead. Finally, where a company has multiple classes of common stock, each class may receive different consideration unless the company's certificate of incorporation provides otherwise.

Bidders may also enter into voting or support agreements with certain large shareholders of the target, in which large shareholders agree to vote their shares in favour of the transaction in exchange for a post-merger benefit (for example, board representation). See *Section 2.5*.

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. Such conditions may include receipt of financing, receipt of regulatory approvals without conditions and there not having occurred a material adverse effect in the target's business. Conditions can be based on the discretion of the bidder or can be "objective" and factual in nature.

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

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 equity is being issued); no legal impediment to closing; material accuracy of representations and warranties contained in the agreement, and a "bring-down" of those representations to closing; material compliance with interim undertakings; receipt of material third-party consents; and, in the case of tax-free transactions, receipt of the appropriate tax opinion from counsel.

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.

6.3 If a condition is not satisfied, can the bidder choose not to proceed with the bid?

As tender offers and mergers are subjects of contract between the bidder and target, 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?

Under the US securities laws, a party in possession of material non-public information (MNPI) relating to an issuer generally may 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 simple on its face, courts' interpretation of it can be complex, as prosecutors must generally show that the MNPI was obtained in violation of fiduciary duties 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) and *SEC v Dorozhko, 574 F.3d 42 (2d Cir. 2009)* (computer hacker unaffiliated with an issuer could be guilty of insider trading because MNPI was obtained by "deception").

For tender offers, once the potential bidder has taken a "substantial step" towards making the offer, no one who has MNPI about the bid may trade on such information unless they are part of the offering group. However, what counts as a "substantial step" or who counts as part of the offering group can be complex fact-bound determinations. See *Allergan v Valeant Pharmaceuticals Int'l, 2014 WL 5604539 (C. D. Cal. Nov. 4, 2014)* (shareholder may have violated securities laws by consulting with hostile tender offeror pre-bid, purchasing shares, then subsequently becoming a co-bidder when the offer was made).

Once the bidder has signed a non-disclosure agreement with the target, it is likely impermissible for the bidder to engage in transactions in the target's stock. Most NDAs would specifically prohibit this, through a customary 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.

Likewise, the definitive transaction agreement typically prohibits the bidder from transacting in the target's shares. This is important to the target as it ensures that the stockholder vote is not tilted by the bidder's ownership of target shares.

Prior to NDA-governed negotiations with the target, a bidder may accumulate shares in the target. However, under US disclosure rules, ownership of more than 5% 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 with respect to the target, including extraordinary business combinations (*Exchange Act Rule 13d-1; Item 4 of Schedule 13D*). In most situations a potential acquiror will not wish to cross this threshold. Nevertheless, because a Schedule 13D is only required to be filed within ten days of exceeding the 5% threshold, a hostile acquiror may use this ten-day window to buy a significantly larger position in the target company before the required disclosure is due.

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) (HSR Act) and the relevant rules, the acquisition of more than $78.2 million in value of equity securities usually requires prior approval. Such approval, in turn, would require notice to be given to the target of the intention to exceed this amount, effectively previewing to the target the bidder's intention. While such filings may be confidential as to third parties, the target will be on notice of potential activity.

7.2 Are there any material consequences for the bidder or target if stakebuilding does take place?

The level of ownership specified above (the lesser of 5% of the target's equity or $78.2 million) does not cause material consequences for the transaction, and 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 as a stockholder in the event the target declines to negotiate or approve their bid.

7.3 Are there any circumstances in which a bidder could become bound to make a mandatory bid?

Generally no. The United States does not have an equivalent of the mandatory bid provisions of the European Directive on Takeover Bids. Three US states (Maine, Pennsylvania and South Dakota) have "control share cash-out" provisions, under which, if a bidder obtains more than a certain threshold of voting power in a company, the other shareholders of the company can demand that the bidder also buy their shares at a "fair price". In all other states, unless a company's certificate of incorporation provides otherwise, an acquiror may purchase any percentage of the target's shares without an obligation to purchase or offer to purchase the remaining shares.

8. RECOMMENDED BIDS

8.1 Where a bid is recommended, does the target board require a "fiduciary out" (the ability to withdraw its recommendation)? If so, what 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 based on 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.

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 unwilling to accept 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 the stockholders.

An adverse change in board recommendation typically gives the bidder the right to terminate the agreement and receive a break fee. In addition, most agreements provide for various consultation and "matching" rights for bidders, so that, prior to changing its recommendation, the target board must negotiate in good faith with the bidder and permit the bidder to propose alternative terms that would result in a favourable recommendation.

9. HOSTILE BIDS

9.1 How can a target company defend against a hostile bid?

Under Delaware law, a target of a hostile bid has a 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 or 20% of the target's equity prohibitively dilutive and expensive to the bidder. The rights plan can be waived or withdrawn by the board for a friendly deal. The legality of rights plans is well settled in Delaware and other states. See, for example, *Airgas* (Delaware); Business Corporation Law, § 505 (New York); Virginia Stock Corporation Act, § 13.1-646.

Secondly, 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% of the target's equity or voting power, but can be a substantial protection against a hostile bidder.

Thirdly, 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.

Fourthly, the company may consider an alternative corporate transaction, such as a stock-for-stock merger that does not involve a sale of control, the sale of a division to a third party or a spin-off. 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, some of which would require stockholder approval and therefore substantial time to complete. For example, the target may seek a "white knight" transaction with a friendly bidder. This was the case in Allergan's merger with "white knight" acquiror Actavis PLC in 2015, through which Allergan fended off a hostile bid by Valeant Pharmaceuticals and activist investor Bill Ackman.

Under Delaware law, responses by a target of an unsolicited bid are measured under the *Unocal* standard, which requires that the target has "reasonable grounds for believing that a danger to corporate policy and effectiveness exist[s]" and that its defensive measures are "reasonable in relation to the threat posed" (*Unocal, 493 A.2d at 955*).

10. CONTROL REQUIREMENTS, TREATMENT OF DISSENTING SHAREHOLDERS AND COMPULSORY ACQUISITION OF SHARES

10.1 What are the minimum acceptance thresholds required to obtain control of a target company?

Legal control of a US-listed company typically requires ownership of a majority of the outstanding shares. While companies may have limited "super majority" vote requirements, most matters submitted to shareholders require a majority vote. For this reason, tender offerors typically set minimum thresholds as conditions of the offer of at least 50% (in order to gain general control of the target and effect a back-end merger or squeeze out the remaining shareholders). See *Section 10.3*.

10.2 What protections (if any) do non-accepting shareholders have against a bid becoming successful and/or its terms?

Under US law, dissenting shareholders do not have the ability to block a bid from being successful, if approved by the majority of shareholders (or any higher relevant standard applicable). The rights of dissenting shareholders extend only to the right (if applicable) to forego the merger consideration and seek judicial appraisal for the value of their shares under the relevant state statute. Under Delaware law, stockholders have appraisal rights in mergers where 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*). In the appraisal process, a court determines the fair value of the dissenters' shares and awards that value, plus statutory interest, in lieu of the merger consideration. It has become increasingly popular recently for some hedge funds to engage in "appraisal arbitrage" by buying shares of a target company after the announcement of a transaction and then seeking appraisal for the value of their shares. See *Section 15.1*. Valuations in appraisal proceedings may be higher than the deal price, though some recent Delaware cases have found the fair value equal to, or very near, that price. The dissenting stockholder will also be responsible for its own legal and valuation expert fees.

Bidders sometimes seek to include a dissenting-shareholders condition in a merger agreement that gives the bidder the right to not complete the transaction if too many dissenting shareholders exercise appraisal rights. Importantly, the exercise of appraisal rights by dissenting shareholders does not preclude the bidder from obtaining full ownership of the target; these claims are monetary only, and do not limit the bidder's ability to close the deal and wholly acquire the target.

10.3 Briefly describe any compulsory acquisition or "squeeze-out" provisions a bidder may be able to take advantage of 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% 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 stockholders will be entitled either to the merger consideration or to exercise their appraisal rights and receive fair value in cash as determined by the Delaware courts.

In friendly tender offers, the target will typically require that, if the bidder acquires less than 100% 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 owns less than the squeeze-out threshold, it may have to call a stockholder meeting and vote its shares in favour of the merger.

Delaware has recently amended its state law to avoid this often time-consuming formality. DGCL, § 251(h) allows friendly tender offerors, under certain circumstances and as long as the target company agrees, to effect an immediate squeeze-out as soon as it acquires more than 50% of the target.

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 ten 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 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. The sale of shares for cash can also 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 law relating to employees. Some collective bargaining agreements (CBA) may contain provisions that provide union employees with certain benefits, or the right to renegotiate their CBA, in the event of a change in control. These matters are contract-specific, however, and not legally required. Nor do they provide a consent right on a bid.

14. FOREIGN BIDS

14.1 Describe your jurisdiction's level of cross-border M&A activity (including whether particular countries or regions are more active counterparties than others)

The United States leads the world in cross-border M&A activity. In 2015, 28% of cross-border M&A transactions worldwide involved a US company, and cross-border transactions comprised about 30% of all US M&A transactions. 2015 also saw the highest number of cross-border M&A deals involving US companies since 2008, including the third-largest transaction in M&A history (Pfizer–Allergan).

Because of their status as tax-friendly jurisdictions, Ireland and the Netherlands have been common locations for US cross-border deals, particularly those motivated in part by the desire of US companies to redomicile (or "invert") overseas to reduce their US tax burden. While recent Treasury Department revisions to tax rules have limited the ability of US companies to implement inversion deals, the tax benefits of such transactions remain attractive for many non-US acquirors and US targets. See *Section 15.1*.

EU countries collectively represent the most common counterparties for cross-border deals involving US targets or acquirors. EU countries were the counterparties in roughly half of all cross-border US M&A transactions in 2015.

14.2 Are there any laws or regulations or local practice that may raise particular challenges or impediments for foreign bidders?

In general, foreign bidders face essentially the same sets of laws and regulations as domestic bidders. SEC registration and ongoing disclosure requirements may make it unattractive for foreign bidders to offer shares to US shareholders, but cash deals do not face these impediments.

The only law in the M&A context that imposes a unique hurdle for foreign, as opposed to domestic, bidders is the Exon-Florio Amendment to the Defense Production Act of 1950, which established CFIUS. See *Section 1.3*.

14.3 Are there any particular legal, regulatory or other requirements applied to foreign bidders that are not generally applied to local bidders?

Other than CFIUS review, there are no particular legal impediments to foreign bidders wishing to acquire US companies, and the disclosure and regulatory environments are essentially the same.

15. CURRENT TOPICAL ISSUES AND TRENDS

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

The current M&A market in the United States is robust and reflects the US economy's overall recovery following the 2008–09 recession. In the last two years, both deal volume and average deal size in the US have reached unprecedented levels. Acquisition finance has experienced correspondingly strong overall growth, but the sources of financing have depended on the type of transaction. For highly leveraged transactions, in part due to more stringent bank regulations on financing such deals (*see Section 5.3*), there has been a rise in financing commitments from non-bank sources, such as private equity, hedge funds and mutual funds. These alternative lenders have deep pools of capital and have proven highly competitive lenders. The investment grade market also saw record financings, such as a $60 billion loan made by JPMorgan and Morgan Stanley in connection with Verizon's $130 billion buyout of Vodafone's stake in Verizon Wireless.

At the same time, there has been a relative decline in private equity deals as a percentage of deal volume in US M&A. This is in part due to the increased difficulty of private equity firms to compete with strategic acquirors in a market where strategic acquirors have ample financing and are able to justify higher valuations due to synergies or tax savings. In the US, private equity deals as a percentage of total deal volume have fallen from 33% in 2007 to 14% in 2015.

Stockholder activists, such as short-term hedge fund investors and corporate raiders, have pressed many US companies to seek a sale or change their corporate strategy, with mixed results. Noteworthy successes include the activist-motivated deals at Kraft (merger with Heinz) and the DuPont–Dow Chemical transaction. Activist efforts that have failed include Carl Icahn's repeated attempts at Lions Gate Entertainment, and Pershing Square's backing of Valeant's failed bid for Allergan. Delaware courts have upheld the use of shareholders' rights plans to defend against takeover attempts by activists during proxy contests. See *Third Point LLC v Ruprecht, et al., C.A. No. 9469-VCP (Del. Ch. May 2, 2014)*. Nonetheless, US companies must expect that activist investors will continue to exert pressure, from both within and outside the boardroom, for short-term results, including M&A opportunities.

Another motivation for US M&A in recent years has been the desire for US companies to redomicile in foreign jurisdictions for strategic and tax savings purposes. The US currently has the highest corporate income tax rate among industrialised countries, at 35%; it is also the only developed country to tax worldwide income. By merging with a foreign corporation and reincorporating in a foreign jurisdiction, US companies are able to realise significant tax savings. In the pending Pfizer–Allergan merger, for example, Pfizer's effective tax rate is expected to drop from about 25% to 17–18%. The US Treasury Department issued new rules in November 2015 to limit some types of practices relating to these inversion deals.

These new rules in part are the result of political pressure and public opinion regarding high-profile M&A deals. Some politicians have labelled as "unpatriotic" or "disloyal" CEOs of US companies who have supported inversion transactions. Deal announcements have sometimes provoked congressional hearings. Even in deals not involving an inversion, US politicians may engage in public debate about the consumer impact of a merger, as is evidenced by recent hearings relating to the pending acquisition of SABMiller by Anheuser-Busch InBev (in which neither company is domiciled in the US). M&A parties must be well prepared for these potential political reactions.

In the deal process itself, there has been an increase in "appraisal arbitrage" in US transactions, in which investment firms purchase shares in a target company after the announcement of a transaction, dissent from the merger and then seek appraisal rights for the value of their shares. Appraisal arbitrage can create significant risks for buyers, especially in leveraged transactions where margins are slim; buyers may end up paying much more than the original merger consideration. The Delaware State Bar Association has proposed pending amendments to the DGCL which may limit, but do not purport to eliminate, appraisal arbitrage.

Finally, it has become increasingly common practice for public companies to adopt forum-selection clauses in their governing documents in order to consolidate all transaction-related litigation in the courts of one state, usually Delaware. For public M&A transactions in the United States valued at over $100 million, shareholders file lawsuits over 90% of the time, with an average of over five lawsuits per deal; in 2013, 62% of such litigation was filed in multiple state courts. Exclusive forum clauses allow companies to reduce deal-related litigation expenses through consolidation and to defend against lawsuits in a jurisdiction with relatively familiar and well-developed corporate law. In August 2015, the DGCL was amended to expressly permit certain forum-selection clauses.